Anti-Suit Injunctions and Dispute Resolution Clauses

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1. Introduction

In two decisions decided within a fortnight of each other, the Singapore Court of Appeal considered anti-suit injunctions pursued to restrain proceedings allegedly brought in breach of arbitration agreements. The first case, *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* ('*Asiana Airlines*')[1] dealt with whether A could rely on an arbitration agreement between A and B to restrain B's proceedings against C, a third party. The second case, *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* ('*COSCO Shipping*')[2] considered whether an arbitration agreement covered a tortious claim. To put it in another way, *Asiana Airlines* mainly concerned the 'party scope' of an arbitration agreement while *COSCO Shipping* concerned the 'subject matter' scope of an arbitration agreement.[3] Where the anti-suit application is to restrain foreign proceedings brought in breach of an arbitration or choice of court agreement, ordinarily it would be granted unless 'strong cause' is shown by the respondent.[4] This provides an easier path for the anti-suit claimant compared to the alternative requirement of establishing that the foreign proceedings are vexatious or oppressive in nature.

In both judgments, the Court emphasised that forum fragmentation was sometimes inevitable and that the crux was to ascertain parties' intentions as to the ambit of the arbitration agreement. While both decisions canvassed other private international law issues, the primary focus of this comment is the Court's approach to construing the scope of dispute resolution clauses. Although both decisions involved arbitration agreements, the same reasoning applies to choice of court agreements.[5] Further, the principles apply equally whether the application concerns a stay of proceedings or an anti-suit injunction.[6]

2. *Asiana Airlines*

Asiana Airlines (a Korean company) entered into a joint venture agreement with Gate Gourmet Switzerland GmbH (GGS). This joint venture resulted in the

establishment of Gate Gourmet Korea (GGK). Asiana entered into a catering agreement with GGK. Both the joint venture and catering agreements contained arbitration agreements. It transpired that the chairman of Asiana had arranged for the two agreements to benefit his own personal interests, in breach of his obligations to Asiana. The chairman was later convicted in Korean proceedings.

Asiana commenced proceedings in Korea against GGK for a declaration that the catering agreement was null and void under Korean law due to its chairman's breach of trust, and consequently, the arbitration agreement was similarly null and void. It also advanced an argument that the dispute was non-arbitrable due to Korean public policy; all relevant stakeholders were members of the Korean public and the outcome of the proceedings would have an impact in Korea. Subsequently, Asiana also pursued actions against GGS and the directors of the Gate Gourmet Group. It alleged that the directors were actively involved in the chairman's unlawful conduct and therefore liable in tort under Korean law, and GGS was vicariously liable for their actions. The same points on nullity and public policy were raised.

Gate Gourmet applied for anti-suit injunctions in Singapore to restrain the Korean proceedings. Central to the anti-suit applications was the arbitration agreements in the joint venture and catering agreements. The Court of Appeal, hearing the appeal from a decision of the Singapore International Commercial Court (SICC), held that it was an abuse of process for Asiana to argue that the arbitration agreements were null and void given that it had not pursued previous opportunities to raise this point. Not surprisingly, Asiana's public policy argument received short shrift; it was too broadly framed as it was inevitable that proceedings involving big companies would have an impact on their home countries. Thus, the Court held that the Korean proceedings against GGK was in breach of the arbitration agreement in the catering agreement and the anti-suit injunction restraining the Korean proceedings against GGK was upheld.

More interesting was the anti-suit injunction restraining the Korean proceedings against the directors. Asiana argued that the directors were non-parties to the joint venture agreement and the arbitration agreement contained therein and as GGS were sued on the basis of vicarious liability, the proceedings were not related to the agreement. The Court applied Korean law, the proper law of the agreement, to construe the arbitration agreement. It observed that under Korean law, arbitration agreements could cover non-contractual claims and that the

tortious claims pursued were closely connected with the joint venture agreement. The anti-suit injunction restraining the Korean proceedings against GGS was affirmed. The question which then arose was whether the anti-suit injunction restraining the proceedings against the directors could be maintained on the same basis of breach of the arbitration agreement or could only be maintained if the Korean proceedings against the directors were shown to be vexatious or oppressive in nature. As the Court observed, an anti-suit injunction based on the first ground meant that 'GGS as the anti-suit claimant would have to show that if Asiana pursued the claim against the [directors], it would breach *GGS's* rights under the JVA Arbitration Agreement.'[7]

This question involved the situation where A and B are parties to the dispute resolution clause and B commences proceedings against C in a different forum from that named in the clause. Can A pursue an anti-suit injunction restraining B's action against C on the ground that that action is in breach of the clause?[8] Another variant of this situation is where C applies for an anti-suit injunction restraining B's action against C as being in breach of the jurisdiction clause. In a prior decision *VKC v VJZ*,[9] the Court of Appeal held that section 2(1)(b) of the Contracts (Rights of Third Parties) Act 2001 did not cover exclusive jurisdiction clauses.[10] In contrast, the New South Wales Court of Appeal in *Global Partners Fund v Babcock & Brown*[11] took the view that C could rely on the benefit of the jurisdiction clause under the common law provided C was a 'non-party' who was intimately involved in the transaction between A and B.[12]

The UK House of Lords in *Donohue v Armco Inc*[13] held that where an exclusive English choice of court agreement bound some, but not all, of the parties in the foreign proceedings, the avoidance of forum fragmentation amounted to strong reasons not to uphold the choice of court agreement. The requested anti-suit injunction in *Donohue*, however, involved those who were parties to it: A sought an anti-suit injunction restraining B's action against A. Nevertheless, Lord Scott of Foscote had commented in *obiter* that A could in certain circumstances obtain an anti-suit injunction restraining not only proceedings against itself but also proceedings against C if there was a possibility that A and C would be jointly and severally liable. This is provided the wording of the clause was sufficiently wide to cover the proceedings against C and A had a sufficient interest in obtaining the anti-suit injunction, namely, to avoid incurring liability as a joint tortfeasor. The Singapore Court of Appeal rejected Lord Scott's comments, as it thought that it

would be overinclusive and prohibit legitimate claims against third parties.[14] Instead it cited with approval the decision in *Team Y&R Holdings Hong Kong v Ghoussoub; Cavendish Square Holding BV v Ghossoub*[15] to the effect that the *Fiona Trust*[16] principle that the intentions of rational businessmen would be to have a 'one-stop shop' for litigation cannot apply with the same force when considering claims involving third parties. Clear language is required before an exclusive jurisdiction clause covers claims brought by or against third parties.[17] The risk of forum fragmentation, which underscored Lord Scott's suggestion in *Donohue*, should not be 'overstated'.[18]

This more narrow construction of the party scope of dispute resolution clauses raises the risk of B manipulating the situation and evading the dispute resolution clause by pursuing claims against C. However, as the Court pointed out, it would be open for A to apply for an anti-suit injunction on the basis that B's proceedings against C rendered the proceedings between A and B vexatious or oppressive. Additionally, C could also independently seek an anti-suit injunction restraining the proceedings against it on the vexation or oppression ground.[19]

On the facts, the Court held that while the directors had signed the joint venture agreement, they had done so in their capacity as representatives of GGS. There was nothing in the wording of the arbitration agreement to indicate that Asiana and GGS intended the clause to apply to claims against the directors. The anti-suit injunction restraining the action against the directors could not succeed on the basis of breach of the arbitration agreement; it could only succeed on the vexation or oppression ground. However, Gate Gourmet failed to show any bad faith on Asiana's part in suing the directors. Therefore, the anti-suit injunction was upheld in relation to the action against GGS as being in breach of the arbitration agreement while the anti-suit injunction restraining the action against the directors was discharged.

3. *COSCO Shipping*

PT OKI (an Indonesian company) had sub-chartered a vessel which belonged to COSCO Shipping (a Chinese company). The head charter and sub-charter contracts each contained a law and arbitration clause for English law and arbitration in Singapore. Further to that, contracts of carriage were entered into between the two companies. These contracts, which were evidenced by or contained in bills of lading, incorporated the law and arbitration clause in the

charter contracts. While loading PT OKI's cargo at the port of Palembang, Indonesia, COSCO Shipping's vessel allided with the trestle bridge of the jetty, causing damage which allegedly amounted to US$269m. The bridge and port were owned and operated by PT OKI. Various proceedings were pursued by both parties, the most relevant of which were: PT OKI commenced proceedings against COSCO in Indonesia in tort for the damage to the trestle bridge; COSCO applied for an anti-suit injunction in Singapore to restrain PT OKI from continuing with the Indonesian action; and COSCO commenced arbitration against PT OKI before the Singapore International Arbitration Centre (SIAC) in Singapore seeking declarations of non-liability and various reliefs arising out of the allision. COSCO alleged that PT OKI had breached the safe port warranty under the head charter agreement as incorporated into the bills of lading and raised contractual defences also found in the head charter agreement and incorporated into the bills of lading.

The anti-suit application was based on PT OKI's alleged breach of the arbitration agreement. The Court of Appeal considered the meaning of the phrase 'arising out of or in connection with this contract', used in the arbitration agreement and which is standard language in dispute resolution clauses. At first instance, the judge had referred to various tests-such as the 'parallel claims test',[20] 'causative connection test' and the 'closely knitted test'[21] to ascertain if the tort claim fell within the scope of the arbitration agreement. The Court of Appeal emphasised that the various tests were 'simply labels and tools developed to assist the courts'[22] and pushed back against any presumption that parties must always have intended for all their claims to be decided in the same forum. The crux was the parties' intentions as encapsulated by the wording of the agreement; thus '[i]f upon examining the text of the agreement and the nature of the competing claims, a claim is not within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome …'[23]

The Court adopted a two-stage test when ascertaining the scope of an agreement: first, the court should identify the matter or dispute which parties have raised or foreseeably will raise in the foreign proceedings; and secondly, the court must then ascertain whether such matter or dispute falls within the scope and ambit of the agreement. At the first stage, the court is trying to identify the substance of the dispute between the parties. It should not consider only the claimant's pleaded cause of action but should also take into account defences or reasonably foreseeable defences and cross-claims that may arise. The Court held that it was

not necessary for the claims or defences to be connected to the contractual relationship. This is significant because the tort action in Indonesia was not based on the contract between the parties.[24] It concluded that the tort action fell within the scope of the arbitration agreement. The parties must have contemplated that a pure tort claim for damage to the trestle bridge caused during the performance of the contracts of carriage between the parties and where it was foreseeable that defences based on the contract would be raised would fall within the scope of the arbitration agreement. Thus, the anti-suit injunction could properly be founded on breach of the arbitration agreement. There was no consideration if 'strong cause' was shown by PT OKI to justify the breach of the arbitration agreement; it did not appear that arguments had been made on this point.

4. Conclusion

The decisions in *Asiana Airlines* and *COSCO Shipping* should not be read as the Singapore courts resiling from the *Fiona Trust* principle, which has been cited and applied in a number of other decisions.[25] The core idea that one should adopt a common-sense approach when construing dispute resolution clauses, bearing in mind that the parties are rational businessmen, still underlines the two judgments. The clarification added by the Court of Appeal was the starting point must always be the wording of the dispute resolution clause and the context in which it was entered into.[26] This is in contrast with the prior approach where sometimes the court tended to start with the presumption that parties intended for 'one-stop shopping' and to apply the presumption in the absence of any contrary evidence.[27] There is now an important shift in focus. The court should not go to great lengths to achieve a construction which supports 'one-stop shopping' where this is not borne out by the wording of the clause and the circumstances of the case. If this means that there would be parallel litigation across a few jurisdictions, the courts should not shy away from that conclusion.[28] In particular, where third parties are concerned, clear language must be used to bring third parties within the scope of a dispute resolution clause. Ultimately, *Asiana Airlines* and *COSCO Shipping* underscore the importance of clear and precise drafting of dispute resolution clauses.

[1] [2024] SGCA(I) 8; [2024] 2 SLR 279.

[2] [2024] SGCA 50; [2024] 2 SLR 516.

[3] The phrases ‘party scope’ and ‘subject-matter scope’ was coined by the New South Wales Court of Appeal in *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* [2010] NSWCA 196.

[4] *Sun Travels v Hilton* [2019] 1 SLR 732 (Singapore CA) [68], [78], [81]-[87].

[5] *Asiana* [80]-[83].

[6] *COSCO* [73].

[7] *Asiana* [58].

[8] See Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019) para 7.31.

[9] [2021] 2 SLR 753.

[10] This provision allows C to enforce a term of the contract if the term purports to confer a benefit on C.

[11] [2010] NSWCA 196 (noted A Chong, ‘The “Party Scope” of Exclusive Jurisdiction Clauses’ [2011] LMCLQ 470).

[12] Cf *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61 [90] (President Bell) (in the context of a stay application).

[13] [2002] 1 All ER 749 (HL).

[14] *Asiana* [85]-[88].

[15] [2017] All ER(D) 81 (Nov) [82].

[16] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd’s Rep 254 (UKHL).

[17] *Asiana* [72]-[73].

[18] *Asiana* [88].

[19] *Asiana* [84].

[20] *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 ("*The Pola Devora*") [37].

[21] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (English CA) 89. The Court disagreed with the judge that the 'closely knitted test' applies only where the non-contractual claim may be recast as a contractual claim: *COSCO* [78]-[79].

[22] *COSCO* [3]

[23] *COSCO* [5].

[24] The court below had been troubled by the fact that the tort claim could not be recast as a contractual claim. It did not grant the anti-suit injunction: [2024] SGHC 92.

[25] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[26] See also *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 [34].

[27] Eg, *Vinmar Overseas* [79].

[28] See to similar effect, *Australian Health* [90].

[29] Eg, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (Singapore CA), *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 (Singapore HC(A)).

[30] Eg, *Vinmar Overseas* [79].

[31] See to similar effect, *Australian Health* [90].