Kluwer Arbitration Blog

Extending Anti-Suit Injunctions to Non-Parties to an Arbitration Agreement: A View From Singapore

Neo Yu Fan · Friday, January 24th, 2025

Say that Party B sues Parties A and C in a court in Jurisdiction X, notwithstanding an arbitration agreement between Parties A and B that covers "all disputes, controversies or claims arising out of or in connection" with their contract. Parties A and C then turn to Jurisdiction Y, the seat of arbitration, for an anti-suit injunction to restrain Party B from pursuing the proceedings commenced in Jurisdiction X.

Should the court in Jurisdiction Y grant an anti-suit injunction to restrain the claims against Party C, a non-party to the arbitration agreement? According to the Singapore Court of Appeal ("SGCA") in *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2024] SGCA(I) 8 ("*Asiana Airlines*"), Singapore courts may grant such injunctions—but only exceptionally.

Background

Asiana Airlines, Inc ("Asiana") entered into a joint venture agreement ("JVA") with Gate Gourmet Switzerland GmbH ("GGS") to create Gate Gourmet Korea Co, Ltd ("GGK"), a Korean company providing catering and related services to the airline industry. Subsequently, Asiana entered into a Catering Agreement ("CA") with GGK. Both the JVA and CA contained arbitration agreements seated in Singapore.

The JVA and CA were later subject to investigations by the Korean Fair Trade Commission and the Korean Prosecution Office. These investigations revealed the agreements to be part of a "package deal" procured by Asiana's CEO, Mr Park Sam-Koo, to raise funds for his own benefit. For matters relating to the "package deal", Mr Park was convicted of the offences of embezzlement, breach of trust and violation of the Monopoly Regulation and Fair Trade Act.

As a result, Asiana commenced court proceedings in Korea against GGK, seeking a declaration that the CA is null and void on the basis that GGK actively participated in the breach of trust by Mr Park by entering into the CA. Asiana also commenced court proceedings in Korea against GGS and its directors. Asiana sought damages on the basis that the directors were also active participants in the breach of trust and were liable for tortious acts. It also argued that GGS was vicariously liable for the actions of its directors.

The defendants in both proceedings applied to the Singapore International Commercial Court

("SICC") for anti-suit injunctions in respect of the aforementioned proceedings. The basis for the injunctions was that the proceedings were in breach of the arbitration agreements contained in the JVA and CA. The SICC allowed the application at first instance. On appeal, one of the key issues was whether an anti-suit injunction should be granted for the claims against the directors, who were themselves not party to the JVA between Asiana and GGS.

Two Bases for Granting Anti-Suit Injunctions for Claims Against Non-Parties

The SGCA set out two bases for a court to grant an anti-suit injunction for foreign proceedings against a non-party to an arbitration agreement:

1. *Contractual basis*: Party A can obtain such an injunction by showing that Party B agreed under an arbitration agreement between them that Party B would sue Party C, if at all, only in arbitration (notwithstanding that Party C is a non-party to the arbitration agreement).
2. *Non-contractual basis*: Party A can also obtain such an injunction by showing that the real purpose for suing Party C is to bypass the arbitration agreement in a manner making the foreign proceedings vexatious and oppressive to Party A. Party C can also, in its own right, obtain such an injunction by showing that the continuation of the foreign proceedings would be vexatious and oppressive to it. The SGCA clarified that the threshold for identifying vexatious or oppressive conduct is a high one.

Outside of the aforementioned situations, the court will not grant an anti-suit injunction to restrain foreign proceedings against a non-party to an arbitration agreement. Importantly, the SGCA also observed that the same analysis would apply in relation to exclusive jurisdiction clauses.

On the facts, the SGCA decided that there was no basis to grant an anti-suit injunction for the claims against the directors in the Korean proceedings. There was nothing in the JVA to suggest that Asiana and GGS agreed that Asiana was to sue the directors only in arbitration. Nor was there any evidence of vexation or oppression in the commencement of the Korean proceedings. To grant an injunction simply on the basis that Asiana entered into an arbitration agreement with GGS would prejudice Asiana because, in the event that Korea is the natural forum, there may not be any other jurisdiction where the directors can be held personally liable.

Commentary

Asiana Airlines is a welcome clarification in a time when transnational disputes are becoming increasingly prevalent. It confirms that Singapore courts will only grant anti-suit injunctions in respect of claims against non-parties to an arbitration agreement in limited circumstances.

Significantly, the SGCA declined to adopt the "sufficient interest" test, as suggested by Lord Scott in *obiter* in the House of Lords decision of *Donohue v Armco Inc and others* [2002] 1 All ER 749. The "sufficient interest" test promises the grant of anti-suit injunctions in respect of proceedings against non-parties if the exclusive forum clause is wide, and the party to that clause demonstrates a sufficient interest in obtaining the injunction. The SGCA's decision is undoubtedly correct, because a less restrictive approach would upset the contracting parties' expectations with respect to their rights to commence legal proceedings against a non-party outside of arbitration. Arbitration

clauses are often described as “midnight clauses” because, in practice, they may be included following minimal negotiations (as discussed here). It would be unlikely for contracting parties to have considered that such clauses would affect their ability to commence litigation against any party apart from those subject to the contract. The problem is compounded if the plaintiff would only be able to obtain relief against the non-party in a specific forum outside of arbitration. As the SGCA observed, the appropriate starting position should therefore be that absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-parties.

Readers will thus appreciate that the language of the arbitration clause will play an important role in determining whether claims against non-parties can be folded into arbitration. This is relevant especially when a contracting party’s liability may arise indirectly as a result of the actions of non-parties, as was the case in *Asiana Airlines*. Even if the contracting party’s liability must ultimately be determined in arbitration, there are a few reasons why it would want claims involving non-parties to also be heard in arbitration. First, the contracting party would prefer for the dispute to remain confidential, which would not be the case if the claim was heard in a domestic court. Second, conflicting decisions might arise if the arbitration involves questions already dealt with by a domestic court. The facts of *Asiana Airlines* help to illustrate this. Even if an arbitrator finds that the directors are liable for tortious acts against Asiana (for the purposes of determining GGS’ vicarious liability), the Korean court may arrive at a different conclusion. This may create problems at the enforcement stage.

In this connection, a key takeaway from *Asiana Airlines* is that broad language is insufficient to establish a contractual basis for the anti-suit injunction for claims against non-parties. After all, the JVA in *Asiana Airlines* provided for “all disputes, controversies or claims arising out of or in connection with this Agreement” to be arbitrated, yet GGS was unable to obtain an anti-suit injunction for the proceedings against the directors. To eliminate any possible doubt, it is advisable for contracting parties to specify that claims against related non-parties to the transaction must also be arbitrated.

However, it remains to be seen whether this alone would be sufficient to warrant a stay. After all, the non-party is not bound by the arbitration agreement and cannot be forced to arbitrate just because the contracting parties agreed to it. It is therefore suggested that something *more* is necessary—there must be a sufficient basis or evidence to find that the non-party in question is agreeable to arbitration. Otherwise, the party against which a stay is obtained would be left stranded without any forum to resolve their claim against the non-party.

This post does not reflect the views of the author’s employer, the Supreme Court of Singapore. It is written in the author’s personal capacity, and the opinions expressed are entirely the author’s own.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Friday, January 24th, 2025 at 8:41 am and is filed under Anti-suit injunction, Arbitration, Courts, Korea, Singapore, Singapore Court of Appeal, Singapore International Commercial Court
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.