SIArb Case Digest 2025

Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd & Others [2024] 2 SLR 279

Nature of Matter	Abuse of process through re-litigation in court proceedings to set aside an arbitral award & the grant of anti-suit injunctions to restrain foreign proceedings.
Case Summary	1. The appellant, Asiana Airlines Inc ("**Asiana**"), was a Korean company controlled by Mr Park Sam-Koo ("**Chairman Park**"). 2. Asiana had a joint venture agreement ("**JVA**") with Gate Gourmet Switzerland GmbH ("**GGS**"). A joint venture company called Gate Gourmet Korea Co Ltd ("**GGK**") was formed with Asiana and GGS holding 40% and 60% of its shares respectively. Mr Christoph Schmidt ("**Schmidt**") and Mr Xavier Espel ("**Espel**") were the current and former chief executive officers of the Gate Gourmet Group of companies. A catering agreement was also made between GGK and Asiana ("**CA"**) for GGK to provide catering and airline services to Asiana 3. The JVA and CA contained arbitration agreements. In 2019, a dispute between GGK and Asiana over the interpretation of the CA led to an arbitration award made in GGK's favor in 2021. Asiana's attempt to set aside the award was dismissed in May 2022. Its subsequent appeal was also unsuccessful in November 2022. 4. Chairman Park was indicted in 2021 and convicted in 2022 in Korea for offences of embezzlement, breach of trust, and violation of the Monopoly Regulation and Fair Trade Act. 5. Asiana started two civil suits in Korea ("**Korean Proceedings**") against CGC, GGK, Schmidt and Espel (collectively, "**Gate Gourmet**") in 2022. One suit filed in January 2022 against GGK sought a declaration that the CA was null and void ("**1st Suit**"). In another suit filed in October 2022, GGS, Schmidt and Espel were sued for alleged involvement in Chairman Park's unlawful conduct and to hold GGS vicariously liable for the conduct of Schmidt and Espel ("**2nd Suit**"). In 2021, GGK applied to enforce the 2019 award against Asiana. The Korean court allowed enforcement of the award in 2024. 6. Gate Gourmet applied for anti-suit injunctions ("**ASIs**") in Singapore against both Korean Proceedings in June 2023. At first instance, the Singapore International Commercial Court ("**SICC**") granted both ASIs on the basis that continuing the 1st and 2nd Suits would breach the JVA and CA arbitration agreements. Even though Schmidt and Espel were not parties to the JVA, the SICC held that the JVA arbitral agreement was wide enough to cover tortious claims against non-parties to the agreement, including both directors. 7. Asiana appealed against the SICC decision. Asiana argued that the CA and JVA arbitral agreements were null and void. It argued that public policy considerations weighed against the ASIs being granted, contending that the disputes in both the 1st and 2nd Suits were non-arbitrable and that the Korean courts were better suited to decide matters which affected the Korean public. Asiana also claimed that the 2nd Suit fell outside the scope of the JVA arbitration agreement.
Ruling	8. The Court of Appeal denied Asiana's argument that the arbitration agreements were null and void. The Court of Appeal held that such an

argument, on the facts, was an abuse of process under the rule in *Henderson v Henderson* (1843) 3 Hare 100. Under that rule, a litigant may not litigate points not raised by it before when it could and ought properly to have raised such a point previously. The Court of Appeal held that Asiana had at least three opportunities to make this argument before the appeal but did not do so viz., during the 2019 ICC arbitration, at the setting aside proceedings at the SICC and on appeal, in 2022 and at the SICC below. The Court of Appeal also treated the issue of whether the arbitral agreements were null and void as new arguments on appeal for which no application was made for permission to make them.

9. The Court of Appeal also rejected Asiana's public policy arguments. The court held that proceedings involving corporations of a significant size would inevitably have some impact on the countries they operate in. However, the court held that Asiana had mounted the public policy argument in broad strokes with no specificity as to how Korean public policy might be undermined, where its argument was bereft of the support of any expert evidence.

10. The Court upheld the SICC's decision to grant ASIs to GGK against the 1st Suit and to CGS, against the 2nd Suit, on the basis that there would be a *prima facie* breaches of the CA and JVA arbitration agreements if Asiana was to be allowed to continue these Korean Proceedings. However, the Court set aside the ASI granted in respect of claims against Schmidt and Espel in the 2nd Suit on the basis that Gate Gourmet had failed to show that the JVA arbitration agreement was intended by the parties to apply to both officers.

11. The Court of Appeal reaffirmed the *prima facie* test set out in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 that a party relying on an arbitration agreement to seek an ASI only needs to prove that the agreement is *prima facie* valid. It made no difference whether the ASI sought was an interim or final injunction. The court held that at its core, an ASI is very much like an application for a stay application under s 6 International Arbitration Act 1994, to safeguard the parties' agreement to arbitrate their disputes.

12. The Court of Appeal also held that there should be no difference between an arbitration agreement and an exclusive jurisdiction clause in the context of granting an ASI. Both represented the agreed conferral of jurisdiction on a specific dispute resolution forum, in circumstances where none might otherwise exist.

13. A party to a contract with an exclusive forum clause, including an arbitration agreement, A, could apply for an ASI to stop another party, B, from suing a non-party, C. This was provided A could prove that the clause was intended to also cover C or that the real purpose for B's lawsuit against C was to bypass the exclusive forum clause in a manner making the foreign proceedings vexatious and oppressive between A and B. C can also apply for an ASI against B if C is able to show that that it would be vexatious and oppressive to C to allow the foreign proceedings to continue against C.

	14. The Court found that the JVA arbitration agreement was *prima facie* valid as Asiana was unable to show that the JVA arbitration agreement was null and void. However, Gate Gourmet failed to show that the JVA Arbitration Agreement was intended by Asiana and GGS to apply to Schmidt and Espel. Gate Gourmet also could not show that the 2nd Suit against Schmidt and Espel had the effect or purpose of frustrating or subverting the JVA arbitration agreement. 15. Granting an ASI preventing Asiana from commencing claims against the Schmidt and Espel was held to have the effect of prejudicing Asiana in at least two situations: (a) if Korea were the natural forum, and there was no other jurisdiction where Schmidt and Espel could be held personally liable, an ASI would effectively insulate them from liability; or (b) if vicarious liability could not be imposed on GGS under Korean law, and the ASI prevented Asiana from suing Schmidt and Espel, Asiana would be left with no recourse. 16. While Schmidt and Espel had previously provided an undertaking to court that they would participate in and be bound by arbitral proceedings, until and unless Asiana consented to this arrangement, it remained open to Asiana to proceed with its claims against Schmidt and Espel in the 2nd Suit. The Court of Appeal held that it was not for the court to compel the participation of non-parties in arbitral proceedings or to prevent disputes with them being pursued in other fora in the interest of preventing forum fragmentation. 17. The Court of Appeal remarked that the risk of forum fragmentation should not be overstated. It accepted that in disputes concerning one or some of the parties having arbitration agreements, such disputes are inherently prone to forum fragmentation. The court characterised arbitration agreements to be agreements to remove disputes from their natural forum, which it recognised to be the national courts. The Court of Appeal therefore specifically declined to follow a point made in *obiter dicta* by Lord Scott in *Donohue v Armco Inc and others* [2002] 1 All ER 749 that it might be possible for an ASI to be granted not only against proceedings against a party to an arbitration agreement, but also a co-defendant who is not subject to such an agreement, because of a prospect of joint and several liability arising, provided the scope of the arbitral agreement was sufficiently wide to cover “any dispute” and not limited to “any claim against” a contractual party. 18. The Court of Appeal also recognised that an ASI may also be granted to prevent vexatious and oppressive conduct against non-parties to an arbitral agreement. However, the court held that such applications would face a high threshold. Relief could be granted in such cases if the party sought to be enjoined is proved to be “unconscionable”. This could be shown if the real purpose and effect of a suit against non-parties by the ASI respondent was to frustrate or subvert an existing obligation under an exclusive forum clause.

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