IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 23

Originating Application No 14 of 2023

Between

(1) Gate Gourmet Korea Co. Ltd.
(2) Gate Gourmet Switzerland GMBH
(3) Christoph Schmitz
(4) Xavier Rossinyol Espel

… *Applicants*

And

(1) Asiana Airlines, Inc.

… *Respondent*

JUDGMENT

[Arbitration — Restraint of proceedings — Foreign judicial]
[Arbitration — Agreement — Scope]
[Arbitration — Arbitrability and public policy]

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Gate Gourmet Korea Co, Ltd and others
v
Asiana Airlines, Inc

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15 September 2023, 10 November 2023

1 December 2023 Judgment reserved.

Simon Thorley IJ:

Introduction

1 This is the latest round in the long running dispute between the parties surrounding four agreements relating to the provision of catering facilities to Asiana Airlines, Inc ("Asiana"), the respondent to these applications.

Background

The Parties

2 Asiana is a Korean company engaged in the business of air travel and is part of the Kumho Asiana group of companies (the "Kumho Asiana Group").

3 There are four applicants (the "Applicants"): the 1st Applicant, Gate Gourmet Korea Co Ltd ("GGK"), is a Korean company engaged in the business of providing catering and other services to the airline industry. It is a joint venture between the 2nd Applicant, Gate Gourmet Switzerland GMBH ("GGS") and Asiana. GGK's main customer is Asiana.[1] GGS is a Swiss company which provides in-flight catering and other airline handling services.[2] GGS and GGK are part of the Gate Gourmet group of companies of which the 3rd and 4th Applicants, Mr Christoph Schmitz ("Mr Schmitz") and Mr Xavier Rossinyol Espel ("Mr Rossinyol"), are, respectively, the current and former Chief Executive Officers.

4 There are two applications before the court, the first, initially commenced in the General Division of the High Court (the "GDHC"), HC/OA 656/2023 ("OA 656"), on 28 June 2023 and subsequently transferred to this court as SIC/OA 14/2023 ("SIC 14"), seeks declaratory and anti-suit relief in relation to two civil suits commenced in the Courts of South Korea by Asiana against one or more of the Applicants. The second was a summons filed by the Applicants again in the GDHC (HC/SUM 1931/2023) seeking interim anti-suit relief pending judgment in OA 656, which has also been transferred to the SICC. The parties have however come to an agreement as to how to hold the ring pending delivery of this judgment and I need therefore say no more about this summons.

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1 Agreed Bundle of Documents ("ABOD") Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at para 6.

2 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at para 5.

5 The first of the Korean cases is Case No. 2022 Gahap 51122 brought before the Incheon District Court ("Korean CA Proceedings") against GGK[3] and the second is Case No. 2022 Gahap 109880 brought before the Seoul Southern District Court ("Korean Compensation Proceedings") against GGS, Mr Schmitz and Mr Rossinyol (collectively, the "Directors").[4]

The Four Agreements

6 The four agreements governing the relationship between the parties as referred to above were entered into to replace agreements in existence between Asiana and its previous catering supplier. The four agreements are:

(a) a Joint Venture Agreement dated 30 December 2016 (the "JVA") between GGS (signed by Mr Schmitz and Mr Rossinyol on its behalf) and Asiana;

(b) a Catering Agreement dated 30 December 2016 between GGK and Asiana (the "CA");

(c) a Bonds with Warrants Subscription Agreement dated 10 March 2017 (the "BWA") between Gategroup Financial Services SarL ("GGFS") and Kumho & Company Inc ("Kumho & Co") (GGS's and Asiana's respective affiliate companies); and

(d) a Management Services Agreement dated 10 March 2017 between GGS and GGK.

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3 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at para 62 and pp 956 to 965.

4 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at para 80 and pp 1084 to 1106.

7 There is also (apparently) a side letter dated 30 December 2016 linking the JVA and CA to the BWA on the basis that if the BWA was terminated prior to a given date, Asiana, GGS and/or GGK would be entitled to terminate the JVA and the CA.[5]

8 All of these agreements were governed by Korean law and contained arbitration agreements in substantially the same form. In the CA and the JVA the clauses were in the following forms:

(a) Clause 28 of the CA:[6] (the "CA Arbitration Agreement")

> This Agreement including its Annexes shall be governed by and construed in accordance with the laws of Korea.
>
> Any disputes shall be escalated according to Annex 1 prior to taking any legal action; however, preliminary injunctions or similar instruments remain reserved.
>
> All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in force on the date on which the Notice of Arbitration is submitted. The number of arbitrators shall be three. The seat of the arbitration shall be Singapore.
>
> [emphasis added]

(b) Clause 34.2 of the JVA:[7] (the "JVA Arbitration Agreement")

> All disputes, controversies or claims arising out of or in connection with this Agreement shall be referred to and finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in

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5 See Respondent's Written Submissions at para 26. No copy of this side letter was exhibited but it is not in dispute that such a letter exists: see Respondent's solicitors letter to court dated 20 October 2023.

6 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at pp 112-113.

7 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at p 88.

> accordance with those Rules. The seat of the arbitration shall be Singapore. The language of the arbitration shall be English.
>
> [emphasis added]

9 There is no need for the purposes of this application to enter into the precise details of the four agreements and the interrelationship between them. It is sufficient to record that under the JVA, GGS owned 60% of the share capital of GGK with Asiana holding the remaining 40%. For these shares, GGS would contribute KRW 80 billion by way of capital and Asiana KRW 53.33 billion.[8] Under the CA, GGK was to provide airline catering and handling services to Asiana for a period of 30 years on an exclusive basis commencing on 1 July 2018. In return for the exclusivity, GGK agreed to pay Asiana the same sum, KRW 53.33 billion, as Asiana was due to pay for its share in GGK. In this respect therefore there was a set-off.[9]

10 By the BWA, Kumho & Co and GGFS agreed that GGFS would invest in zero interest bonds with warrants issued by Kumho & Co in the aggregate principal amount of KRW 160 billion with a maturity date of up to 20 years.[10]

11 The agreements were negotiated on behalf of the Kumho Asiana Group by, amongst others, Mr Park Sam-Koo ("Chairman Park") who was at the time Chairman of the Kumho Asiana Group and co-CEO of Asiana. He also held key positions in other companies of the group and was a significant shareholder in the Kumho Asiana Group. On behalf of the Gate Gourmet group, Mr Schmitz and Mr Rossinyol were amongst the negotiators. The precise involvement of

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8 Respondent's Written Submissions at para 25(a); Applicants' Written Submissions at para 13

9 Respondent's Written Submissions at para 25(b).

10 Respondent's Written Submissions at para 25(c).

those three individuals in the negotiations is in dispute but it is not disputed that each played a part.

Procedural History

The Initial Dispute

12 The pricing mechanism for the catering services that GGK was to provide pursuant to the CA was set out in Annex 1.4. The parties were unable to agree on the correct interpretation of that Annex and the matter was referred to arbitration on 17 June 2019 under Clause 28 by GGK seeking an order that Asiana pay all outstanding invoices and for a declaration that the pricing mechanism was binding and did not require any further agreement.

13 Asiana counterclaimed for a declaration that that GGK was bound to negotiate and agree with Asiana on an adjusted price mechanism and for an order that GGK repay excess payments based on that adjusted price mechanism.

14 By its award dated 18 February 2021 (the "Final Award") the arbitral tribunal (the "Tribunal") upheld GGK's claims and dismissed Asiana's counterclaim. On 11 June 2021, Asiana commenced SIC/OS 11/2021 ("OS 11") in the Singapore International Commercial Court ("SICC") to set aside the Final Award. OS 11 was dismissed by a Judgment dated 27 May 2022 (*Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2022] SGHC(I) 8) ("the SICC Judgment") and the subsequent appeal from OS 11 to the Court of Appeal (CA/CAS 5/2022) was dismissed on 14 November 2022.

15 For present purposes it is important to note that during the course of the arbitration:

(a) Asiana did not challenge the jurisdiction of the Tribunal.

(b) Asiana did not contend that the CA was invalid. Indeed, their counterclaim was based on the assertion that the CA was valid.

(c) More specifically, Asiana did not contend that the CA Arbitration Agreement in clause 28 was invalid. Again, this would have been inconsistent with their filing a counterclaim in the arbitration.[11]

(d) Asiana asserted that the CA was a self-standing agreement and was not, as GGK had contended, part of a package with the BWA.[12]

(e) Asiana denied that Chairman Park was materially involved in the negotiation of the joint venture.[13]

16 On the application to set aside before the SICC Asiana contended that the Tribunal had acted in breach of natural justice in that it had failed to consider its argument that if the CA and the BWA were part of a "package deal" as GGK had asserted,[14] the CA might be null and void pursuant to Article 107 and also possibly Article 103 of the Korean Civil Code on the basis of the "abuse of power representation".[15]

17 This argument was considered and rejected by the SICC for the reasons given in [94] to [100] of its judgment.

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11 SICC Judgment at [40] and [97] to [99].

12 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) p 333 at [5.3.7]; SICC Judgment at [97].

13 Asiana's Statement of Defence and Counterclaim at para 32 and Statement of Rejoinder at paras 76(a) and 78, ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at pp 422, 541 and 542.

14 SICC Judgment at [61].

15 SICC Judgment at [17(a)], [39] and [63] to [68].

The Enforcement Proceedings

18 Following the Tribunal's Award, on 20 May 2021 GGK commenced proceedings in the Seoul Southern District Court (Case No. 2021 Kagi 1285) seeking leave to enforce the Final Award in Korea ("The Enforcement Proceedings"). These proceedings were suspended pending the final outcome of the challenges to the Final Award in the Singapore courts. No date has been fixed for a further hearing.

Chairman Park

19 On 26 May 2021 Chairman Park was indicted by the Korean Public Prosecutor for, *inter alia*, violating the Act on the Aggravated Punishment of Specific Economic Crimes in relation to alleged crimes of embezzlement and breach of trust.[16]

20 The Respondent drew my attention to part of that indictment which reads as follows:[17]

> "Defendant Park Sam-Koo, the Representative Director of Asiana Airlines, and Defendant Kim Ho-Gyun, the financial officer of Asiana Airlines, had to discharge the fiduciary duty of care in managing the company's material assets by taking into consideration the interests of the corporation, shareholders, and creditors; and, with respect to transacting material assets such as the exclusive catering business license of Asiana Airlines, the value of the relevant asset must be adequately assessed and traded at a fair price in accordance with the actual value. In particular, with respect to a transaction that implicates conflict-of-interest, like the transfer of the assets of Asiana Airlines on the condition of procuring funds for the company controlled by Defendant Park Sam-Koo, the value of

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16 ABOD Vol VII Tab 11 (1st Affidavit of Kim Gyuel dated 1 September 2023) Tab 5B at pp 174 to 195.

17 ABOD Vol VII Tab 11 (1st Affidavit of Kim Gyuel dated 1 September 2023) Tab 5B at pp 188 to 190; Respondent's Written Submissions at para 34.

the relevant assets should be objectively assessed through competitive bidding process or other various assessment methods, and then determine the fair transaction price and terms based thereon without prejudicing the interests of shareholders and creditors, and there exists an occupational duty to ensure that the proceeds and funds from such transaction are properly used for the benefit of Asiana Airlines.

Nonetheless, from early January 2016, Defendant Park Sam-Koo instructed Defendant Park Hong-Seok, etc. to commence negotiations as to the Package Deal with the Gate Group. Accordingly, from around January 12, 2016, Defendant Park Hong-Seok met with employees-in-charge of the Gate Group in Singapore to undergo the Package Deal negotiations; in late January of 2016, Defendants Park Hong-Seok and Kim Ho-Gyun went to London and Madrid, etc. to undergo more detailed discussions with the relevant employees of the Gate Group; and in early February 2016, Defendants Park Hong-Seok and Kim Ho-Gyun met with the employees from the Gate Group who visited Seoul and specified the details of the Business Plan (including the agreement on minimum net profit) related to recovering the funds invested in the form of bonds with warrant (hereinafter "BW") in Kumho Corporation pursuant to the Package Deal via the catering business of Asiana Airlines. Meanwhile, for the purpose of reaching an agreement on the drafted Business Plan, the CEO of Gate Group Xavier Rossinyol visited Seoul around February 15, 2016 and, on the next day (February 16, 2015), Defendant Park Sam-Koo directly met with CEO Rossinyol at the Asiana Town Building located at Osoe-dong, Seoul and the foregoing Business Plan was approved.

Thereafter, around August 19, 2016, Defendants Park Sam-Koo and Park Hong-Seok executed the "Agreement regarding Bond with Warrant Subscription" according to which the 30-year exclusive catering business license would be granted to the Gate Group in exchange for its investment in Kumho Corporation. The value of the catering business license was arbitrarily determined at roughly KRW 133.3 billion to match KRW 80 billion that the Gate Group set as domestic facility investment cost (based on the joint venture ratio of 60:40, KRW 80 billion : KRW 53.3 billion, total: KRW 133.3 billion); and, around December 30, 2016, the Defendants transferred the exclusive catering business license at a price considerably lower than the actual value via a private contract to the Gate Group that agreed to fund KRW 160 billion (20 years, 0% interest rate) to Kumho Corporation in the form of acquiring BWs, whereas contractual terms unfavorable to Asiana Airlines were determined such as the agreement that guaranteed minimum net profit for the Gate Group.

> The Defendants conspired in the above order and breached their duty to have Asiana Airlines transfer the 30-year exclusive catering business license valued at roughly KRW 505 billion (if not reflecting the agreement on guaranteeing net profit, a minimum of KRW 266.9 billion) to the Gate Group for roughly KRW 133.3 billion, whilst Asiana Airlines would have to pay additional profit for 30 years to the Gate Group pursuant to the "agreement on preservation of minimum net profit" and, in exchange, Kumho Corporation that Defendant Park Sam-Koo controls would reap pecuniary gain corresponding to receiving funds from the Gate Group worth KRW 160 billion at zero (0%) interest rate for 20 years. In so doing, Asiana Airlines incurred pecuniary damages equivalent to the difference between the fair transfer price of the exclusive catering business license and the foregoing transfer price of KRW 133.3 billion."
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> [emphasis added]

21 Chairman Park was tried before the Seoul Central District Court which resulted in a conviction. In its decision in 2021*Gohap*482 (the "Criminal Decision") on 17 August 2022 Chairman Park was sentenced to 10 years of imprisonment.[18]

22 Asiana drew my attention to various passages in reasoning of the Court in giving its sentencing decision: (the "Sentencing Reasons")

> 3. Sentencing Decision
>
> A. Common Reasons for Sentencing
>
> Large-scale business groups play a pivotal role in the Korean economy due to their significant influence and proportion within the overall economy. As such, safeguarding their autonomy in business operations is paramount, and the collective interests of these business groups should be acknowledged in alignment with their shared objectives. At the same time, there exists an expectation from the public, who have coexisted with these conglomerates for many years, that these entities, as economic actors, uphold the rule of law and fulfill their social responsibilities through transparent corporate governance. In this regard, the use of affiliated companies by large business groups for the benefit of a single individual, their

[18] ABOD Vol VII Tab 13 (1st Affidavit of Park Sung Hyun dated 4 September 2023) at pp 279 to302; Respondent's Written Submissions at para 38.

> family, or personal entities not only undermines corporate transparency and a healthy work ethos, but also harms the legitimate interests of various stakeholders in the capital market, including minority shareholders and creditors. Moreover, it could have far-reaching effects when liquidity crises or insolvency, caused by self-centered pursuits being transferred to other affiliated companies, ultimately result in irreversible adverse effects on the entire national economy. In light of these considerations, strict control over such practices becomes imperative.
>
> The crime in this case was committed when Defendant Park Sam-Koo, in an attempt to regain control of the Kumho Group, which he had lost in the 2010 workout, developed a so-called "Group Reconstruction Plan (Governance Plan)" with Defendants Yoon Byeong-Chul, Park Hong-Seok, and Kim Ho-Gyun, and others who were or are executives of the strategic management office under the direct control of Defendant Park Sam-Koo, and then conspired with Defendant Yoon Byeong-Chul to embezzle an aggregate of KRW 330 billion in funds from Kumho Group affiliates in the name of Kumho Corporation, which was under Defendant Park Sam-Koo's control […] on the appeal on the set-aside application
>
> Furthermore, the loss of control over Asiana Airlines and its subsidiaries by Defendant Park Sam-Koo led to a continuous deterioration of Asiana Airlines' business situation and a severe tarnishing of its corporate image due to these crimes. To this day, the diminished corporate value has not been fully restored.
>
> The nature of the case, the gravity and seriousness of the offenses, and the adverse effects on the Kumho Group's affiliated companies and the national economy are all factors that weigh unfavorably to the Defendants."

23 Chairman Park has appealed against the conviction and the appeal is currently pending.[19]

24 No charges have been brought against GGS, GGK or any of their employees nor have any of them been notified as suspects.

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19 ABOD Vol VI Tab 9 (1st Affidavit of Professor Lee Kitaik dated 28 August 2023). An English translation of Professor Lee's Expert Report is exhibited in ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 53 para 9(10).

25 Asiana applied to the Court of Appeal on the appeal from the SICC Judgment to introduce evidence relating to the trial and conviction of Chairman Park but this was refused.[20]

The 2022 Korean Proceedings

26 As a result of the investigations into the conduct of Chairman Park, Asiana commenced the two sets of proceedings in the Korean Courts referred to above. On 24 January 2022 Asiana brought the Korean CA Proceedings (see above at [5]) against GGK before the Incheon District Court seeking a declaration that the CA is invalid due to the doctrine of "abuse of power representation" under Article 103 of the Korean Civil Code[21] ("Article 103") on the basis that the coupling of the BWA with the CA was a breach of trust by Chairman Park and that GGK actively participated in that breach by entering the CA.[22]

27 On 13 October 2022 Asiana commenced the Korean Compensation Proceedings (see above at [5]) against GGS and the Directors before the Seoul Southern District Court (Case No, 2022 Gahap 109880) seeking damages on the basis that:[23]

> (a) Chairman Park induced Asiana to enter into a "package deal" with gategroup as a consequence of which: (i) GGK became Asiana's exclusive airline catering service provider; (ii) Kumho

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20 ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at paras 54 to 56.

21 Statement of claim filed by Asiana Airlines Inc in Case No. 2022*Gahap*51122 dated 14 March 2022 at Section III.1, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) p 76.

22 Statement of claim filed by Asiana Airlines Inc in Case No. 2022*Gahap*51122 dated 14 March 2022 at Section III.2, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) at p 77.

23 Applicants' Written Submissions at para 51.

> Buslines received at least KWR 160 billion; and (iii) Asiana received inadequate consideration as a result;
>
> (b) each of the contracts comprising the joint venture, i.e. the JVA, Catering Agreement, BWA and Management Services Agreement, constituted part of the "package deal"
>
> (c) Chairman Park's action were a breach of trust against Asiana;
>
> (d) GGS, Mr Schmitz and Mr Rossinyol actively participated in Chairman Park's breach of trust by entering into and/or concluding the JVA, for which they are jointly and severally liable pursuant to Arts 35, 756 and 760 of the Korean Civil Code.

28 It is these two proceedings that are the subject of this application for anti-suit injunctions.

The Applicable Legal Principles

Anti-Suit Injunctions

29 The fundamental principles governing the grant of anti-suit injunctions are not in dispute. Asiana directed my attention to the recent decision of the Court of Appeal in *VEW v VEV* [2022] 2 SLR 380 ("*VEW v VEV*") at [42]–[43], where Andrew Phang Boon Leong JCA (as he then was) said this:

> 42 An ASI is an order of the court compelling the party subject to the order to refrain from instituting or continuing with proceedings abroad (see the High Court decision of *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd and others* [2015] 5 SLR 873 ("*PT Sandipala*") at [71]). The general principles governing the issuance of ASIs are well established in Singapore. First, the jurisdiction is to be exercised when the "ends of justice" require it; second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed; third, an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court; fourth, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution (see the decision of this court in *Sun Travels & Tours Pvt Ltd v Hilton*

> *International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [65]).
>
> 43 This court has also identified five factors (as stated in *Lakshmi* ([18] *supra*) at [50]) that have to be considered when deciding whether to grant an ASI (see the decisions of this court in *VKC v VJZ and another* [2021] 2 SLR 753 ("*VKC*") at [16]–[20]) and *Sun Travels* at [66]):
>
> (a) whether the defendant is amenable to the jurisdiction of the Singapore court;
>
> (b) whether Singapore is the natural forum for resolution of the dispute between the parties;
>
> (c) whether the foreign proceedings would be vexatious or oppressive to the plaintiff if allowed to continue;
>
> (d) whether the ASI would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and
>
> (e) whether the institution of foreign proceedings was or would be in breach of any agreement between the parties.
>
> Although these factors are to be considered in the round, a breach of an agreement has been regarded as a separate basis on which an ASI may be granted; one that is distinct from vexatious or oppressive conduct (see *Sun Travels* at [67]).

30 For their part, the Applicants accurately summarised the principles in their written submissions:[24]

> 54 The Court has the power to grant interim and permanent anti-suit injunctions pursuant to s 4(10) of the Civil Law Act 1909 78 and s 18(2) (read with paragraph 14 of the First Schedule) of the Supreme Court of Judicature Act 1969 respectively: *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 ("*Hilton*") at [42]-[43].
>
> 55 An anti-suit injunction is directed not against the foreign court but against the party so proceeding or threatening to proceed: *Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd* [2022] 3 SLR 103 ("Baker') at [45(c)].

[24] Applicants' Written Submissions at paras 54 to 57.

> 56 As noted by the Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("Sun Travels") at [67] there are two grounds for the grant of an anti-suit injunction:
>
> > (a) where the institution of foreign proceedings is in breach of any agreement between the parties; and
> >
> > (b) where the foreign proceedings would be vexatious or oppressive to the applicant if allowed to continue.
>
> 57 The former category includes cases involving the breach of an arbitration or an exclusive jurisdiction clause: *Maldives Airports Co Ltd v GMR Male International Airport Pte Ltd* [2013] 2 SLR 449 at [42].

31 In the circumstances of this case, it is appropriate to have in mind the following observations of Steven Chong JA in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [67]–[68]:

> 67 Although the factors are to be considered in the round, a breach of an agreement has been regarded as a separate basis on which an anti-suit injunction may be granted; one that is distinct from vexatious or oppressive conduct: *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 ("*Telesto Investments*") at [111]; *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 ("*BC Andaman*") at [53]; *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [15]; *Fentiman* at para 16.39. This was also the view that the Judge took at [58] of her Judgment ([41] *supra*).
>
> 68 In cases involving an arbitration agreement or an exclusive jurisdiction clause, it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to: *Donohue v Armco Inc* [2002] 1 All ER 749 ("*Donohue*"), *per* Lord Bingham at [24]; *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 ("*Morgan Stanley*") at [29]. There will be no need to adduce additional evidence of unconscionable conduct in such cases. Crucially, however, this approach is subject to an important caveat: there is no requirement for the court to feel any diffidence in granting an anti-suit injunction, "*provided that it is sought promptly and before the foreign proceedings are too far advanced*" [emphasis added]: *Aggeliki Charis Compania Maritima SA v Pagnan SpA*

> *(The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 ("*The Angelic Grace*") at 96. In the same vein, Lord Bingham in *Donohue* at [24] had also held that "a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct". The issue of delay and how it relates to comity are key to the determination of this appeal and we turn now to.
>
> [emphasis in italics in original; emphasis in underlining added]

32 Relying upon the reasoning of Quentin Loh J (as he then was) in [28]–[34] of *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 ("*Hai Jiang*"),[25] the Applicants asserted that that the court's power to grant an anti-suit injunction was the flip side of the coin of the court's power to stay domestic proceedings under s 6 of the Arbitration Act 2001 (2020 Rev Ed) and that, accordingly, the court should apply a *prima facie* test in order to determine whether there is a valid and binding arbitration agreement which has been breached.

33 Counsel for Asiana questioned whether this reasoning was supportable and invited me to consider the question afresh. I decline to do so for two reasons. First, I would not lightly depart from the reasoning of a fellow judge without full argument and I have not had this in this case. Secondly, with respect, on the basis of the arguments I have heard, I agree with Loh J's reasoning.

The Effect of Delay

34 The parties also addressed me on the question of delay and the circumstances in which an otherwise appropriate application for an anti-suit injunction should be refused on the basis of delay. *Sun Travels* was such a case but with fairly extreme facts as the proceedings in the Maldives had not only

[25] Applicants' Bundle of Authorities at Tab 15.

been commenced but had resulted in a substantive judgment before the application for an anti-suit injunction had been made.

35 However the court in *Sun Travels* considered the relationship between delay and comity generally in [69]–[80] and concluded in [81]–[84]:

> 81 In our judgment, comity considerations are relevant when there is delay in bringing an application for anti-suit relief, and this is true even if the proceedings involve an exclusive jurisdiction clause or an arbitration agreement (as was the case in *Ecobank* and *Sea Powerful*). We set out two other propositions that are relevant to this appeal.
>
> 82 First, the longer the delay and the more advanced the foreign court proceedings become, the stronger the considerations of comity would be. It was observed in *Ecobank* that "the longer an action continues without any attempt to restrain it, the less likely a court is to grant an injunction and considerations of comity have greater force", as more time, effort and expense will be wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about (at [133]). This court in *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [24] had also observed that "considerations of comity grow in importance the longer the foreign suit in question has continued, and the more the parties and the foreign court have engaged in its conduct and management".
>
> 83 While the length of delay is relevant, what is of greater importance is the extent to which the delay has allowed foreign proceedings to have progressed: *Niagara Maritime SA v Tianjin Iron & Steel Group Company Limited* [2011] EWHC 3035 (Comm) at [22], citing Thomas Raphael, *The Anti-Suit Injunction* (Oxford University Press, 2008) ("*Raphael*") at para 8.11. Where a foreign judgment has already been delivered as a result of delay, a host of different considerations come into play, and for reasons expounded on below (see [97] and [98]), we are of the view that exceptional circumstances must be shown *in addition* to the usual requirements for anti-suit relief.
>
> 84 The second proposition is that delay cannot be justified on the basis that jurisdictional objections are being raised in the foreign court. In *The Angelic Grace* ([68] *supra*), it was contended that the proper approach would have been to defer any application for an injunction until "something ha[d] gone wrong", such as when the foreign court accepted jurisdiction (at 95). Leggatt LJ rejected this approach, and found that this could be patronising and would achieve the "reverse of comity":

> "I can think of nothing more patronising than for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would be not only invidious but the reverse of comity".
>
> [emphasis added]

36 Cases where proceedings in the foreign jurisdiction have been the subject of a substantive judgment are therefore an extreme case. In cases where proceedings in a foreign jurisdiction have been commenced and have proceeded some way down the road to resolution, whether any delay in seeking anti-suit relief will serve to prevent the granting of such an injunction is a multi-faceted question underlying the exercise of the court's discretion to grant the injunction sought. Each case will turn on its own facts. In the case of an alleged breach of an arbitration agreement, the exercise of the discretion involves drawing a balance between the *prima facie* right of a party to an arbitration agreement to insist on its right to enforce that agreement and on the duty on such an applicant to act with due diligence to enforce that right. Not every delay will be fatal—the answer lies in assessing the degree of the delay, what has happened during the period of the delay, the state of the foreign proceedings as a result of the delay and the underlying effect on comity in order to reach a conclusion as to whether the applicant has forfeited its right to compel litigation in the arbitral forum.

Non-Contractual Anti-Suit Injunctions - Vexation and Oppression

37 In the case where the parties to the foreign proceedings are also parties to the arbitration agreement and it is shown that the bringing of the foreign proceedings constitutes a breach of the agreement, then, subject to delay, *prima facie* an anti-suit injunction will be granted.

38 Where the sole defendant in the foreign proceedings is not a party to the arbitration agreement, the question of whether it would be vexatious or oppressive to the defendant if those proceedings were permitted to continue arises. The first four of the factors in [43] of the judgment in *VEW v VEV* (see above at [29]) will have to be addressed.

39 The courts have however had to consider cases where the defendants to the foreign proceedings include parties, some of whom are parties to the arbitration agreement and some who are not, as well as cases where a non-party is a defendant in the foreign proceedings and arbitration proceedings are brought against a person who is a party to the arbitration agreement where the same issues arise.

40 Whilst each case must turn on its own facts, guidance can be obtained from the reasoning in earlier cases. As Quentin Loh J (as he then was) put it in *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] SGHC 64 at [104] ("*Andaman*"):[26]

> 104 Since an anti-suit injunction is granted to meet the ends of justice, the interests of both parties must be considered. Even if the bringing of the foreign proceedings is *prima facie* vexatious or oppressive, an anti-suit injunction will not be granted if it would nevertheless be unjust to enjoin the respondent from pursuing the foreign proceedings. This involves balancing the injustice to the applicant of denying the anti-suit injunction against the injustice to the respondent of granting the anti-suit injunction. All relevant factors must be considered, including but not limited to the natural and proper forum for the dispute to be heard: *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [19].

[26] Applicants' Bundle of Authorities at Tab 26.

41 The question of the approach where both parties and non-parties were involved was considered by Lord Scott in the House of Lords in England in *Donohue v Armco Inc* [2001] UKHL 64 ("*Donohue*") and cited at length in *Clearlake Shipping Pte Ltd and Gunvor Singapore Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 284 (Comm) ("*Clearlake*") at [21].[27]

42 Lord Scott was considering the possibility of an anti-suit injunction being granted against a non-party to the arbitration agreement but who was alleged in the foreign proceedings to be liable as a joint tortfeasor with a person who was a party. The arbitration clause in that case was of similar scope to that in the CA Arbitration Agreement and the JVA Arbitration Agreement (see [8] above). At [60]–[62] of *Donohue* Lord Scott said this:

> 60. There is a point of construction of the exclusive jurisdiction clause that it is convenient to deal with at this point. It is accepted that the clause is not restricted to contractual claims. A claim for damages for, for example, fraudulent misrepresentation inducing an agreement containing an exclusive jurisdiction clause in the same form as that with which this case is concerned would, as a matter of ordinary language, be a claim in tort that arose "out of or in connection with" the agreement. If the alleged fraudulent misrepresentation had been made by two individuals jointly, of whom one was and the other was not a party to the agreement, the claim would still be of the same character, although only the party to the agreement would be entitled to the benefit of the exclusive jurisdiction clause. The commencement of the claim against the two alleged tortfeasors elsewhere than in England would represent a breach of the clause. The defendant tortfeasor who was a party to the agreement would, absent strong reasons to the contrary, be entitled to an injunction restraining the continuance of the foreign proceedings. He would be entitled to an injunction restraining the continuance of the proceedings not only against himself but also against his co-defendant. The exclusive jurisdiction clause is expressed to cover "*any dispute* which may arise out of or in connection with" the agreement. It is not limited to "any claim against" the party to the agreement. To give the clause that limited construction

[27] Applicants' Bundle of Authorities at Tab 24.

would very substantially reduce the protection afforded by the clause to the party to the agreement. The non-party, if he remained alone as a defendant in the foreign proceedings, would be entitled to claim from his co-tortfeasor a contribution to any damages awarded. He could join the co-tortfeasor, the party entitled to the protection of the exclusive jurisdiction clause, in third party proceedings for that purpose. The position would be no different if the claim were to be commenced in the foreign court with only the tortfeasor who was not a party to the exclusive jurisdiction clause as a defendant. He would be able, and well advised, to commence third party proceedings against his co-tortfeasor, the party to the exclusive jurisdiction clause.

61. In my opinion, an exclusive jurisdiction clause in the wide terms of that with which this case is concerned is broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as defendant to the proceedings. An injunction restraining the continuance of the proceedings would not, of course, be granted unless the party seeking the injunction, being someone entitled to the benefit of the clause, had a sufficient interest in obtaining the injunction. It would, I think, be necessary for him to show that the claim being prosecuted in the foreign jurisdiction was one which, if it succeeded, would involve him in some consequential liability. It would certainly, in my opinion, suffice to show that if the claim succeeded he would incur a liability as a joint tortfeasor to contribute to the damages awarded by the foreign court.

62. This point is of direct relevance in the present case. In the New York proceedings, which I must analyse more fully in a moment, several claims are made but most of them are based upon the allegation that Mr Donohue, Mr Atkins, Mr Rossi and Mr Stinson conspired together fraudulently to extract in various ways substantial sums of money from the Armco group of companies. If the allegations can be made good, the liability of the conspirators would be a joint and several liability. There are substantial issues as to which of the claims fall within the language of the exclusive jurisdiction clause but I think it is clear that some of them do. Of the four alleged conspirators only Mr Donohue and Mr Atkins are contractually entitled to the benefit of the exclusive jurisdiction clause. Mr Atkins has settled with Armco, so it was Mr Donohue alone who commenced an action in this country for an injunction enforcing the clause. If Mr Donohue is entitled to an injunction enforcing the clause he is entitled, in my opinion, to an injunction that bars the continuance of the claims in question not only against himself but also against Mr Rossi and Mr Stinson with whom he is jointly and severally liable. If claims against Mr Donohue are within the clause, then so too are the

> corresponding claims against Mr Rossi and Mr Stinson. Mr Rossi and Mr Stinson are not contractually entitled to enforce the clause, but Mr Donohue is, in my opinion, entitled to ask the court to enforce it by restraining the prosecution in New York of all claims within its scope in respect of which Mr Donohue would be jointly and severally liable.
>
> [emphasis added]

43 The logic of Lord Scott's reasoning is, with respect, persuasive. If a party to an arbitration agreement which is wide enough to cover a tort that arose "out of or in connection with" the agreement and was not limited to a claim made solely against a party to the agreement, then, provided the subject matter of the foreign proceedings does arise out of or in connection with the agreement and the party has a sufficient interest in those proceedings, such as joint liability for damages, the ends of justice are, *prima facie*, best served by confining the litigation to one forum; the forum the parties to the arbitration agreement have chosen as the place to resolve their disputes.

44 *Clearlake* was a case brought before the High Court in England seeking an anti-suit injunction to restrain proceedings in Singapore which raised various tortious misrepresentation claims against two parties, Clearlake and Gunvor. The former was a party to a charterparty containing an arbitration clause but the latter was not. Following the grant of an *ex parte* anti-suit injunction the claimant sought to separate the claims so that a claim in contract was brought only against Clearlake with the claim in tort being brought only against Gunvor (see *Clearlake* at [16]).

45 Having reviewed the authorities, including *Donohue*, the Judge, Andrew Burrows *QC*, concluded in [23] as follows:

> 23. In principle, and consistently with what Lord Scott and Laurence Rabinowitz QC[28] have said and with the other authorities listed in paragraph 20 above, I would express the correct approach to this question (of whether the contracting party (B) can enforce against the other contracting party (A) an exclusive jurisdiction clause, by an anti-suit injunction, so as to prevent tort proceedings by the other contracting party (A) against a third party (C)) in the following way:
>
> > (i) It is a matter for the interpretation of the jurisdiction clause whether the clause extends to cover the tort proceedings against the third party […]
> >
> > (ii) *If, as a matter of interpretation, the jurisdiction clause does extend to cover the tort proceedings against the third party, the contractual basis for an anti-suit injunction applies so that, as regards an application by the contracting party (B), the injunction will be granted unless there are strong reasons not to do so.*
> >
> > (iii) Applying privity of contract, only the contracting party (B) and not the third party (C) can enforce the jurisdiction clause (against A) by an anti-suit injunction on the contractual basis (unless an exception to privity of contract applies). But the jurisdiction clause may be a relevant factor in granting the third party (C) an anti-suit injunction on the alternative basis that the foreign proceedings are vexatious or oppressive. (It is also presumably possible in certain circumstances that the jurisdiction clause, even though not contractually enforceable by the contracting party (B) in favour of the third party (C), may be a relevant factor in granting the contracting party (B) an anti-suit injunction against the other contracting party (A) on the basis that the foreign proceedings are vexatious or oppressive.)
>
> [emphasis added]

46 In [24] of *Clearlake* the Judge continued:

> 24. In expressing the correct approach in the way I have just done, I accept that Laurence Rabinowitz QC in the *Ghossoub* case was correct that, absent express words as to the jurisdiction clause extending to claims against non-parties, the starting point in interpreting a jurisdiction clause (covering, let us say, 'all disputes arising out of the contract') will be that only the parties to the contract are covered. But I also agree

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[28] See *Cavendish Square Holding BV v Joseph Ghossoub* [2017] EWHC 2401 (Comm)

> with Lord Scott in the Donohue case that, where one has an alleged joint tort committed in relation to a contract by a contracting party and a non-contracting party, the objective interpretation of the jurisdiction clause (covering all disputes 'arising out of the contract') will tend to include a tort claim against the non-party because this will help to prevent forum-fragmentation on essentially the same issues. Such fragmentation is contrary to what the parties are likely to have objectively intended. Ultimately there may be no real conflict between the speech of Lord Scott and the judgment of Laurence Rabinowitz QC because the resolution of the issue turns on the interpretation of the particular contract in the light of the particular facts.
>
> [emphasis added]

47 I agree that avoidance of forum fragmentation is a relevant consideration underlying Lord Scott's reasoning.

48 In *Hai Jiang* at [81], Quentin Loh J said this about *Clearlake*:

> The English Court in *Clearlake Shipping* ([64] *supra*) pushed the envelope further by taking into consideration what the court viewed as deliberate and unacceptable forum fragmentation in bringing separate claims in contract and tort in different jurisdictions. I do not need to decide on this point but I will say that it echoes the bold approach of our Court of Appeal in *Tomolugen* ([30] supra) and can be well justified in some circumstances under the rubric as being required by the ends of justice.

49 Finally, in *Andaman* at [75] Loh J said this:

> Where substantially the same claims are pursued against related defendants, the ends of justice are, as a general rule, best served by a single composite trial within which all the claims can be determined: see, eg, *Donohue v Armco Inc & Others* [2002] 1 All ER 749; Halsbury's at para 75.135; Fentiman at para 16.46.

50 For my part, I find the reasoning in these citations compelling. In so far as an anti-suit injunction is sought by a party to an arbitration agreement to

restrain foreign tort proceedings not only against itself but also against other parties to those proceedings, the position is as follows:

(a) The relevant arbitration clause must be interpreted to determine:

(i) whether it extends to cover tort disputes as well as contractual disputes; and

(ii) whether it extends to tort claims against non-parties.

(b) If it does, the court must decide whether bringing the tort claim against the party is a breach of the arbitration clause.

(c) If it is, *prima facie* the party is entitled to an anti-suit injunction in its favour.

(d) If the party has a sufficient interest in the tort claim such as a liability for damages, it is also *prima facie* entitled to an anti-suit injunction in its favour to restrain the continuation of the claim as against the non-party.

(e) If it does not, then it is open to the non-party to seek a non-contractual anti-suit injunction on the basis that the foreign proceedings are vexatious or oppressive.

The Proper Law of the Arbitration Agreement

51 It was common ground that the doctrines of separability and kompetenz-kompetenz apply both under Singapore and Korean law. Hence the agreement to arbitrate in the various agreements is separate from the main agreement in which it is contained. As a result, the proper law of the arbitration agreement has to be determined separately from that of the main agreement and the

arbitration agreement can survive the termination or invalidity of the main agreement. Equally, it is within the power of the arbitral tribunal to determine whether it has jurisdiction to adjudicate over the dispute.

52 Both parties invited me to apply Singapore law to determine the law that governs the arbitration clauses in this case. There is a three-stage test which was set out in [62] of the judgment of Judith Prakash JCA in the Court of Appeal in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 ("*Anupam Mittal*"):[29]

> 62 The three-stage test to determine the proper law of an arbitration agreement was laid down in *BCY v BCZ* [2017] 3 SLR 357 ("*BCY*") and involves considering at:
>
> (a) Stage 1: Whether parties expressly chose the proper law of the arbitration agreement.
>
> (b) Stage 2: In the absence of an express choice, whether parties made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice of law being the law of the contract.
>
> (c) Stage 3: If neither an express choice nor an implied choice can be discerned, which is the system of law with which the arbitration agreement has its closest and most real connection.

53 So far as concerns the second stage, in [67] of *Anupam Mittal*, the Court noted that the general rule was that the choice of law to govern the main arbitration will lead to a conclusion that the same law was intended to govern the arbitration agreement (applying *Sulamérica Cia National de Seguros SA and Others v Enesa Engelharia SA and others* [2013] 1 WLR 102) ("*Sulamérica*").

54 However, this rule can be displaced by the facts of the case particularly by considering how the effectiveness of the arbitration agreement will be affected by that choice of law (*Anupam Mittal* at [68]). In *Sulamérica*, the main

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[29] Respondent's Bundle of Authorities at Tab 9.

agreement was governed by Brazilian law but the arbitration agreement provided for arbitration in London. Under Brazilian law there were fundamental difficulties in enforcing any award which led the Court to conclude that it could not have been the intention of the parties to have Brazilian law govern the arbitration agreement. In *BCY v BCZ* [2017] 3 SLR 357 the Court emphasised that the governing law of the main contract "should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes" (see also *Anupam Mittal* at [69]).

Public Policy and Arbitrability

55 The Court of Appeal in *Anupam Mittal* considered the effect of public policy on the ability to arbitrate, drawing, in [46], upon one of its previous decisions:

> 46 The relationship between arbitrability and public policy was extensively considered by this court in *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2016] 1 SLR 373 ("*Tomolugen*") with emphasis on s 11 of the IAA. We can do no better than quote the following passages from *Tomolugen*:
>
> > **The concept of arbitrability**
> >
> > 71. We turn now to the question of arbitrability. The absence of arbitrability has come to be associated with that class of disputes which are thought to be incapable of settlement by arbitration. The concept of arbitrability has a reasonably solid core. It covers matters which 'so pervasively involve "public" rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve… disputes [over such matters] by "private" arbitration should not be given effect': Gary Born ([33] *supra*) at p 945. However, the outer limits of its sphere of application are less clear. Lord Mustill and Stewart Boyd QC, for instance, suggest that '[i]t would be wrong… to draw … any general rule that criminal,

admiralty, family or company matters cannot be referred to arbitration': Michael J Mustill & Stewart C Boyd, The Law and Practice of Commercial Arbitration in England (Butterworths, 2nd Ed, 1999) at pp 149–150.

…

75. The concept of arbitrability finds legislative expression in s 11 of the IAA, which reads as follows:

> **Public policy and arbitrability**
>
> 11.—(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

…

It is evident from this that the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration. Beyond this, the scope and extent of the concept of arbitrability has been left undefined, as a consequence of which, it falls to the courts to trace its proper contours (see the 1993 Report on Review of Arbitration Laws ([65] *supra*) at paras 26–28; *Larsen Oil v Petroprod* at [24]).

76. In our judgment, the effect of s 11 of the IAA is that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of an arbitration clause. This presumption may be rebutted by showing that (*Larsen Oil v Petroprod* at [44]):

(a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question); or

(b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

[emphasis added in underline]

56 The Court of Appeal went on to emphasise that the essential criterion of non-arbitrability was "whether the subject matter of the dispute is of such a nature as to make it *contrary to public policy* for that dispute to be resolved by arbitration" (see *Anupam Mittal* at [47]) [emphasis in original].

57 Finally, in [55] of *Anupam Mittal* the Court of Appeal expressed its view that consideration must be given to the question of whether the subject matter of the dispute was non-arbitrable either under the law of Singapore or of the foreign state in question.

58 There are a number of types of disputes which are generally recognised as being non-arbitrable: criminal, admiralty, family or company matters are examples given in the quotation in *Anupam Mittal* (see above at [55]). But what has to be emphasised is that it is first necessary to identify the subject matter of the dispute and then to consider whether or not that subject matter is of a nature that is non-arbitrable, rather than considering the impact which aspects of public policy (of any State) may have on the outcome of a properly founded arbitration dispute. There is a necessary and proper distinction between the subject matter of a dispute and the grounds relied upon for resolving that dispute.

The Issues

59 With that background I can turn to the issues that arise for determination in this application.

The Korean CA Proceedings

60 As regarding the Korean CA Proceedings, four issues arise for determination:

(a) What is the proper law of the CA Arbitration Agreement? ("Issue 1")

(b) Is the subject matter of the Korean CA Proceedings non-arbitrable as being contrary to public policy under Korean law? ("Issue 2")

(c) If it is arbitrable, what is the effect of Article 9(1) of the Korean Arbitration Act ("KAA")? ("Issue 3")

(d) Finally, if the Court has a discretion to grant the anti-suit injunction, how should it exercise that discretion? ("Issue 4")

The Korean Compensation Proceedings

61 Concerning the Korean Compensation Proceedings, seven issues arise:

(a) What is the nature of the Korean Compensation Proceedings? ("Issue 5")

(b) In what circumstances and on what basis does the law of Korea permit tort claims to be determined in arbitration proceedings? ("Issue 6")

(c) The *Mozambique* judgment ("Issue 7")

(d) What are "the matter or matters" in respect of which the Korean Compensation Proceedings are brought? ("Issue 8")

(e) Does that matter or do those matters fall within the scope of the arbitration agreement on its true construction such that there is a *prima*

facie breach of the JVA warranting an anti-suit injunction in favour of GGS? ("Issue 9")

(f) Is GGS entitled to an anti-suit injunction to prevent the continuation of the tort claim against the Directors? ("Issue 10")

(g) Are the Directors themselves entitled to an anti-suit injunction? ("Issue 11")

The Korean CA Proceedings

Issue 1: What is the proper law of the CA Arbitration Agreement?

62 Applying the three-stage test in *Anupam Mittal*, the parties are agreed that there is no express choice of proper law of the CA Arbitration Agreement in the main agreement of the CA (the "CA Main Agreement"). The fact that Korean law is expressly chosen as the proper law of the CA Main Agreement is not of itself an express choice for the purposes of the first stage. It is however a strong pointer of an implied choice for the second phase.

63 Subject to one point, the parties were agreed that there was nothing to displace this starting point. GGK however contended that if the effect of Korean law was that the subject matter of the Korean CA Proceedings was non-arbitrable, this would negate the CA Arbitration Agreement even though the parties themselves had shown a clear intention to be bound to arbitrate their disputes (see *Anupam Mittal* at [69]).

64 This is a complex question as is illustrated in the discussion at [71]–[74] of *Anupam Mittal* of the distinction between the facts of that case and those in *BNA v BNB and another* [2020] 1 SLR 456. Should it be necessary I shall address this point after resolving Issue 2.

Issue 2: Is the subject matter of the Korean CA Proceedings non-arbitrable as being contrary to public policy under Korean law?

65 Asiana's contention that the subject matter of the Korean CA Proceedings is non-arbitrable as being contrary to Korean Law has its foundation in the prosecution and conviction of Chairman Park. By the Criminal Decision issued on 17 August 2022 Chairman Park was sentenced to 10 years' imprisonment for embezzlement and breach of trust under the Korean Act on the Aggravated Punishment of Specific Economic Crimes (the "SEC Act"). [30]

66 The Sentencing Reasons (see above at [22]) emphasised the pivotal role that large scale businesses play in the Korean economy and the need for strict controls over ethical business practices and to the fact that the damage caused by the defendants had been translated into damage to the nation as a whole.[31] This, in particular, had led to a tarnishing of Asiana's corporate image which had an adverse effect on the national economy.[32]

67 It was as a result of the investigation into Chairman Park's conduct and his indictment that the Korean CA Proceedings were commenced on 24 January 2022 seeking a declaration that the CA was null and void.[33] Reliance was placed upon the indictment of Chairman Park for his breach of trust in coupling Asiana's catering business in the CA with the BWA in violation of the SEC Act.

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30 ABOD Vol VII Tab 13 (1st Affidavit of Park Sung Hyun dated 4 September 2023) at p 172.

31 ABOD Vol VII Tab 13 (1st Affidavit of Park Sung Hyun dated 4 September 2023) at p 297.

32 ABOD Vol VII Tab 13 (1st Affidavit of Park Sung Hyun dated 4 September 2023) at p 299.

33 Statement of claim filed by Asiana Airlines Inc in Case No. 2022*Gahap*51122 dated 14 March 2022, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) at p 71.

As a result, it was asserted that the CA was a contract contrary to good morals and other social order which was null and void pursuant to Article 103 of the Korean Civil Act,[34] which provides that:

> "A juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void."

68 *Prima facie*, a dispute as to whether an agreement, such as the CA, is void in circumstances where there is an arbitration agreement is a matter to be decided by the Tribunal in a properly constituted arbitration. It is not a matter which falls to be decided, save with the consent of the parties, in a national court and hence it would be a breach of the arbitration proceedings to bring proceedings in a national court. Asiana did not dispute this as a matter of principle but contended that a dispute based on Article 103 constituted an exception on the basis that the dispute in the Korean CA Proceedings was non-arbitrable under Korean law. Hence, since the dispute was non-arbitrable, there was no breach of the CA Arbitration Agreement in commencing proceedings in Korea.[35]

69 It was not suggested that the dispute based on Article 103 fell into one of the recognised categories of non-arbitrable matters (see [55] above) nor was it suggested that there was any statutory provision under Korean law which expressly made disputes under Article 103 non-arbitrable. I was referred to no case where a court in Korea had been asked to address the question.

70 It was pointed out by counsel for the Applicants that at the hearing of the setting aside proceedings, OS 11 (see above at [15]), Asiana contended that

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34 Respondent Bundle of Authorities (Vol 1) at Tab 3.

35 Respondent's Written Submissions at paras 50 to 54 and 59.

the CA was valid but, additionally, that if the interpretation placed on the CA by GGK was correct, this would result in the agreement being void under either Articles 103 or 107 of the Korean Civil Code (see above at [16] and [17]). It was not there suggested by Asiana that the Tribunal would have been unable to resolve a dispute under Article 103.

71 At the hearing, I drew the attention of the parties to a recent decision of this Court in *CNA v CNB and another and other matters* [2023] SGHC(I) 6 at [170] where an issue arose as to whether an agreement was void under Article 103 or 107 of the Korean Civil Code. In that case the Court had the assistance of two experts in Korean law, neither of whom suggested that a dispute under Article 103 was non-arbitrable.

72 This of course is not conclusive. The point which has been directly raised by Asiana in these proceedings may nonetheless be a good one which has escaped the notice of practitioners and some experts over the years.

73 Asiana relies on the expert report of Professor Lee Kitaik[36] ("Professor Lee") in support of its assertion of non-arbitrability under Korean law. Professor Lee is an eminent jurist who graduated from the Seoul National University College of Law in February 1982 and completed his studies at the Judicial Research and Training Institute, Supreme Court of Korea. He then became a Judge in Korea culminating in being appointed as a Supreme Court Justice in 2015. He retired from the Supreme Court in 2021 and in 2022 became an Endowed-Chair Professor at the Soang University School of Law. Over the

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[36] ABOD Vol VI Tab 9 (1st Affidavit of Professor Lee Kitaik dated 28 August 2023) at p 495. An English translation of Professor Lee's expert report is exhibited in ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023).

years he has authored a number of academic papers covering various different subject matters.[37]

74 In his expert report Professor Lee states his conclusion on the question of arbitrability:[38]

> 12. The purpose behind Article 103 of the Korean Civil Code is to prevent the legal order from becoming an accomplice to illegal acts by absolutely denying the validity of legal acts contrary to good morals and other social order. If the main contract, the CA, is absolutely null and void *ab initio* for violation of Article 103 of the Korean Civil Code, an exception to the doctrine of separability applies, and the arbitration clause in the CA should also be viewed as null and void *ab initio*.

75 In his report, Professor Lee further identifies the subject matter of the Korean CA Proceedings as being "confirmation of the CA's nullity".[39] He draws attention to Articles 2(1) and 5(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded on 10th June 1958 (the "New York Convention") (which is binding in Korea) which states that recognition and enforcement of an arbitral award that is not capable of settlement by arbitration under the law of the country may be refused.[40] He then continues to consider the Arbitration Act of Korea before turning to Article 103 where he states in paragraph 26:[41]

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37 Expert Report of Professor Lee Kitaik at paras 1 to 5 and Appendix, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 48 to 51 and 86 to 88.

38 Expert Report of Professor Lee Kitaik at para 12, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 56.

39 Expert Report of Professor Lee Kitaik at para 17, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 58.

40 Expert Report of Professor Lee Kitaik at para 20, ABOD ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 59.

41 Expert Report of Professor Lee Kitaik at para 26, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 61.

> 26. Article 103 of the Korean Civil Code states that "a juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void." The term "good morals in Article 103 refers to the society's general and sound moral sense; and the term "social order" in Article 103 refers to the nation's or the society's public order or general interest. Article 103 of the Korean Civil Code is regarded as an overarching principle in the sphere of Korean civil law and order.
>
> [footnotes omitted]

76 He goes on to give a number of reasons why the authority to make the decision as to whether a juristic act has gone beyond the bounds of the principle of private autonomy should be deemed to rest with the Korean court.[42] In particular, at paragraph 32, he says this:

> 32. Arbitrators are not judges but private persons. Arbitral proceedings proceed in accordance with agreement between parties and arbitrators or among arbitrators. There is a great deal of difference between litigation and arbitration. In arbitral proceedings, there is no guarantee that an arbitral tribunal would reach the same conclusion about what constitutes Korea's good morals and other social order as a judge would in judicial court. For example, inconsistencies may arise if an arbitral tribunal upholds validity of a juristic act under Article 103 of the Korean Civil Code that would otherwise be, in an objective view, nullified by the same provision. The arbitral tribunal's inconsistent decision then causes a juristic act that is contrary to good morals and other social order to be valid and effective.

77 In paragraphs 36 to 45 he considers the effect a finding under Korean law on the "Arbitrability of a Juristic Act [the CA] Executed through a Breach of trust under the Korean Criminal Code"[43] and opines that "Korean law has

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42 Expert Report of Professor Lee Kitaik at paras 29 to 35, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 61 to 64.

43 Expert Report of Professor Lee Kitaik at para 36, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 64.

consistently recognized an act of breach of trust toward a company as a grave and serious act contrary to good morals and other social order".[44]

78 He concludes in paragraphs 44 and 45:[45]

> 44. As explained above, an arbitrable "private-law dispute" should not simply be construed as an opposite concept of "public-law dispute." Rather, an arbitrable "private-law dispute" is "a dispute whose nature permits parties to agree to resolve it through arbitration under the principle of private autonomy." If a dispute over validity of a contract executed as a by-product of a serious crime like an act of breach of trust is referred to arbitration, an arbitral tribunal consisting of private persons would have to decide the preceding issue of whether there is in fact a crime. Thus, such dispute may not be considered as a typical private-law dispute where parties may freely agree to resolution by arbitration under the principle of private autonomy.
>
> 45. In light of the above, one may not reach a dispositive conclusion that the dispute in the Korean CA Proceedings is arbitrable under Korean law. At a minimum, given absence of clear case law on this issue, Asiana's right to trial in Korean courts can easily be discerned.

79 Professor Lee then turns to address the question of whether the arbitration clause in the CA is itself null and void notwithstanding the doctrine of separability. He accepts that the doctrine of separability exists under Korean law but contends that it does not apply indiscriminately and draws attention to what he refers to as a "theory" in paragraph 49:[46]

> 49. There exists a theory in Korean jurisprudence that when a main contract is null and void because it contravenes good morals and other social order under Article 103 of the Korean Civil Code, validity of an arbitration agreement within the main

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44 Expert Report of Professor Lee Kitaik at para 40, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 66.

45 Expert Report of Professor Lee Kitaik at paras 44 and 45, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 67.

46 Expert Report of Professor Lee Kitaik at para 49, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 68.

> contract cannot be recognized. According to the theory, that holds true even if the arbitration agreement itself does not present grounds for nullification—a reason being that a valid legal obligation cannot be created from illegality. In my opinion, the theory is sound and persuasive because the purpose of Article 103 of the Korean Civil Code is to preclude the legal order from becoming complicit in illegality by flatly denying and countermanding validity of any juristic act that is contrary to good morals and other social order, and because according such tortious act even partial validity would abolish the entire purpose of Article 103 of the Korean Civil Code.
>
> [footnote omitted]

80 The paper referred to in support of this theory is an article by Professor Su-mi Kang ("Professor Kang"), Professor of Law at the College of Law of Yonsei University, published in the Journal of Law, entitled "The Validity of Arbitration Agreement in cases where the Validity of the Main Contract is Contested – with particular focus on the Doctrine of Separability".[47]

81 This is a long, detailed paper but the essence of the reasoning relevant for present purposes is in the following section:[48]

> D. With respect to the reasons for which the validity of the main contract is contested
>
> The separability of an arbitration agreement becomes an issue in a dispute over validity of the main contract containing an arbitration clause when there is a reason for invalidation or cancellation of the main contract, e.g., where it is asserted that a contract containing an arbitration clause was executed upon fraud or coercion, or where there is an issue of error or incapacity.
>
> However, when the validity of a contract containing an arbitration clause is contested, determination of the validity of the arbitration agreement is subject to certain restrictions. <u>If a contract that includes an arbitration clause constitutes a</u>

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47 ABOD Vol VI at Tab 11 (1st Affidavit of Kim Gyuel dated 1 September 2023) at pp 91 to 116.

48 ABOD Vol VI at Tab 11 (1st Affidavit of Kim Gyuel dated 1 September 2023) at pp 106 to 107.

> juristic act contrary to good morals or other social order or an unfair juristic act, the arbitration agreement should also be deemed invalid. In such cases, although there is no ground for invalidation of such arbitration agreement, the validity of the arbitration agreement cannot be accepted because arbitration cannot create a valid legal obligation based on an illegal juristic act. However, this issue is more likely to be discussed in the perspective of arbitrability or public policies rather than separability.
>
> In the event that one party claims invalidity of a main contract and such claim is not contested by an opposing party, or in the event that one party claims that there are grounds for termination of a main contract and such claim is not contested by an opposing party, or in the event that both parties agree to terminate a main contract, these scenarios could realistically undermine the subject matter of an arbitral award. In that case, an arbitrator can simply acknowledge his or her lack of jurisdiction over the claim.
>
> However, if there is a dispute between the parties regarding the validity of a main contract, an arbitrator's jurisdiction to rule on that of validity could be deemed as a jurisdictional issue. If parties had agreed at the time of entering into an arbitration agreement that an arbitrator would have the power to decide on this issue, then the arbitrator should have the power to decide on validity of the main contract on the basis of this agreement. In the absence of such agreement, the issue must be resolved by contract interpretation. Since the arbitration agreement by its nature has an independent purpose and content separate from the main contract, it is reasonable to assume that disputes over the validity of the main contract also fall within the subject matter of arbitration. To the extent the validity of the main contract is contested, it can be presumed that the arbitration agreement is still valid under the main contract.
>
> [footnotes omitted; emphasis added]

82 Professor Lee states that there is no Korean case law either from the Supreme Court or from the lower courts which address this question and expresses his own conclusion in paragraph 52:[49]

> 52. In this case, Asiana claims that the CA was executed through Park Sam-Koo et al.'s act of breach of trust and active

[49] Expert Report of Professor Lee Kitaik at para 52, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 69-70.

> participation in the tortious act by the Gate Group, and thus that the CA is null and void under Article 103 of the Korean Civil Code. Against such backdrop, I find it difficult to construe that the arbitration clause in the CA was intended to be applicable even in these circumstances. Likewise, it is my view that the doctrine of separability would not cover the arbitration clause of the CA.

83 The Applicants have retained Professor Hi-Taek Shin ("Professor Shin") as an expert in Korean law to assist the court. Professor Shin is also an eminent Jurist. He has an LL.B and an LL.M degree from Seoul National University and a J.S.D. from Yale Law School. He also trained at the Judicial Research and Training Institute, Supreme Court of Korea. He practiced at a leading Korean law firm for 27 years until 2007 when he became a Professor of Law at Seoul National University School of Law as well as being the director of its Centre for International Economic and Business Law. He is currently a full-time arbitrator. He was a member of the taskforce which proposed amendments to the Korean Arbitration Act in 2016 and wrote the chapter on Korean arbitration law in *The UNICITRAL Model Law and Asian Arbitration Laws*, G. Bell (ed.) (Cambridge University Press 2018).[50]

84 Professor Shin reaches the opposite conclusion to that expressed by Professor Lee and expresses this in paragraph 24:[51]

> 24. Asiana's claim and the dispute in the Korean CA Proceedings come within the scope of the arbitration agreement in the CA. Under Korean law which embraces the principle of separability of an arbitration agreement, the arbitration agreement contained in the CA is not affected by the alleged invalidity of the CA. Thus, Asiana's claim and the dispute in the Korean CA Proceedings which arose out of or in connection with

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50 Expert Report of Professor Hi-Taek Shin at paras 2 to 7 and Appendix A, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 6 to 7 and 39 to 43.

51 Expert Report of Professor Hi-Taek Shin at para 24, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 9 to 10.

> the CA must be resolved by arbitration in accordance with the arbitration agreement in the CA unless the court finds the arbitration agreement itself null and void, inoperative or incapable of being performed. I am of the opinion that there exists no such ground to view the arbitration agreement in the CA null and void, inoperative or incapable of being performed. Furthermore, the dispute between Asiana and GGK concerns the private law consequence of the CA, a commercial agreement, entered into by Asiana allegedly in breach of trust by its representatives with the alleged involvement of GGK. As such, the dispute squarely falls under the category of typical arbitrable disputes in private law under the Korean Arbitration Act and is capable of being resolved by arbitration in accordance with the arbitration agreement in the CA.

85 Having confirmed that the principles of separability and kompetenz-kompetenz apply in Korea,[52] Professor Shin draws attention to Clause 23 of the CA which expressly provides that if any provision of the agreement is invalid or unenforceable the other provisions shall remain in force as serving to emphasise the intention of the parties with regard to separability.[53]

86 He then expresses his opinion with regard to the effect of the doctrine of separability in this case in paragraph 63:[54]

> 63. As discussed above, under the separability doctrine embedded in the KAA and accepted by Korean court precedents, the validity of an arbitration clause cannot be denied on the grounds of a challenge to the validity of the main contract. That is unless there are special circumstances to find that the arbitration clause is invalid in itself, the validity of the arbitration clause cannot be denied just because the validity of the main contract is being challenged. Asiana simply asserts that the CA is invalid under Article 103 of the Civil Code, and accordingly the arbitration agreement is also invalid. However, Asiana has not presented a rational argument how an

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52 Expert Report of Professor Hi-Taek Shin at para 57, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 19.

53 Expert Report of Professor Hi-Taek Shin at para 62, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 21.

54 Expert Report of Professor Hi-Taek Shin at para 63, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 21.

> agreement between the parties to resolve disputes by arbitration could be contrary to "good morals and other social order" under Article 103 of the Civil Code. As quoted in the paragraph 54 above, Article 103 of the Civil Code provides that legal acts "*which has for its object such matters as are contrary to good morals and other social order shall be null and void.*" Article 1 of the KAA provides that the purpose of this law is "to ensure the appropriate, fair and prompt settlement of disputes in private law by arbitration". Accordingly, an arbitration agreement whose objective is to resolve the disputes between the parties by arbitration is a means to fulfil such public policy of fair and prompt settlement of disputes in private law expressed in the KAA. Unless there is a special circumstance such as fraudulent inducement to agree to an arbitration or an arbitration clause that is extremely unfair to one party, it is improbable that an arbitration agreement itself would be determined invalid on the ground of Article 103 of Civil Code. I do not find any such circumstance making the arbitration agreement in the CA invalid. Designating Singapore as the place of arbitration is not extremely unfair to Asiana to be viewed as "*contrary to good morals and other social order*" of Korea. Korean parties commonly agree to arbitrate their disputes in Singapore under the rules of the ICC or SIAC.
>
> [emphasis in original]

87 The question that falls to be answered in his opinion is thus whether the agreement to arbitrate was separate from the question of whether the CA Main Agreement was reached in circumstances that render it contrary to Article 103.

88 Professor Shin considers the opinion of Professor Kang,[55] and the kernel of his reasoning in rebuttal is found in the following extract from paragraph 76:

> The flaw in the reasoning of Su Mi Kang is the statement that "*it cannot create a valid legal obligation through arbitration from an unlawful act*". The principle of separability establishes the obligation to arbitrate is not created from the main contract but exists independently. As stated earlier, the principle of separability recognizes that an arbitration agreement, by its nature and function, exists on the premise that disputes may arise over the validity of the main contract containing an arbitration clause. Accepting the opposite argument would

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55 Expert Report of Professor Hi-Taek Shin at paras 74 to 79, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 25 to 27.

> invalidate the arbitration agreement whenever the main contract is alleged to be invalid (not just on the grounds of illegality or public policy). Su Mi Kang's opinion is also against the explicit text of Article 17(1) of the KAA, which provides that "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other clauses of the contract*". This provision does not distinguish according to the basis for alleged invalidity. The conclusion is that the principle of separability applies regardless of the basis for pleading invalidity: only if the basis goes to the arbitration agreement specifically will the arbitration agreement be determined invalid.
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> [emphasis in original]

89 Drawing all this together, the experts are agreed that the principles of separability and kompetenz-kompetenz apply. They are agreed that the invalidity of all or part of the CA Main Agreement will not of itself serve to invalidate the CA Arbitration agreement. They are agreed that a defence based, for example, on fraud/duress (Article 110 of the Korean Civil Code), would not serve to invalidate the CA Arbitration Agreement.[56]

90 It is not in dispute that the subject matter of the Korean CA Proceedings is whether and to what extent the CA is void. Professor Lee expressed it as being "confirmation of the CA's nullity".[57] This is subject matter which is *prima facie* suitable for determination by way of arbitration under the agreement. More specifically, it is not in dispute that the question of whether the CA Main Agreement is void would be susceptible to resolution by way of arbitration if the CA Arbitration Agreement was valid.

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[56] See Expert Report of Professor Hi-Taek Shin at para 77, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 26; Expert Report of Professor Lee Kitaik at para 50, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 69-70.

[57] Expert Report of Professor Lee Kitaik at para 17, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 58.

91 The sole question therefore is whether, in the circumstances of this case, the dispute is non-arbitrable so that the CA Arbitration Agreement cannot be invoked.

92 It is accepted that the subject matter does not fall within any of the accepted categories of non-arbitrable agreements and that there is no express provision in Korean law which creates an exception to arbitrability when Article 103 is invoked. Further there is no case law which suggests that there is or even might be such an exception when it is accepted that there is no such exception in the case of fraud.

93 The subject matter of the Korean CA Proceedings is, as indicated above, the validity of the CA Main Agreement. The grounds on which it is alleged to be void is that it was entered into in circumstances which are contrary to Article 103 because of the actions of Chairman Park.

94 However, the parties entered into the CA Arbitration Agreement because they wished relevant disputes between them to be resolved by arbitration, not in the courts. The subject matter of the Korean CA Proceedings is a relevant dispute yet it is suggested that a subsequent event, the indictment and conviction of Chairman Park, can, of itself, serve to negate that wish.

95 In my judgment that cannot be the right way to approach the answer to the question. The actions of Chairman Park have been held to constitute a criminal offence. The Applicants played no part in that trial and, in any subsequent civil proceedings, whether in the Korean Courts or in an arbitration, Asiana would have to prove their case – that the CA was entered into in breach of Article 103.

96 But the scope of Asiana's objection cannot be limited to a case where the history subsequent to the making of the agreement presents a potentially strong case that Article 103 might have been breached. If there is a principle that disputes over validity based upon Article 103 are non-arbitrable, it must apply to all cases where Article 103 is invoked. Hence the Tribunal would not have the authority to decide whether it was reasonable to invoke Article 103, far less to decide whether that Article was breached.

97 I consider that Professor Shin was correct when he said in paragraph 63 of his report that Asiana has not presented a rational argument as to how an agreement between the parties to resolve disputes by arbitration could be contrary to Article 103. There is no suggestion that the agreement to arbitrate was induced by any conduct that was contrary to "good morals and other social order". There were rational reasons for agreeing to arbitrate which are not said to be tainted by Chairman Park's conduct.

98 In my judgment it is necessary to draw a clear distinction between the grounds on which it is said that the subject matter of the CA Main Agreement is void and the grounds on which it is said that the CA Arbitration Agreement is void. It does not follow from the fact that Article 103 is being invoked to invalidate the CA Main Agreement, that the CA Arbitration Agreement is also rendered invalid. In any given case there might be grounds for saying that the CA Arbitration Agreement itself was tainted but that is a far cry from the submission made to me that there was a principle of Korean law that the doctrine of separability does not apply when a main contract is allegedly null and void because it contravenes Article 103.[58]

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[58] Expert Report of Professor Hi-Taek Shin at para 49, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 68.

99 As I see matters, were there to be a contention that a particular arbitration clause had been entered into in a manner that renders it void, this would be a matter for a properly constituted tribunal to decide, it would not serve to oust their jurisdiction.

100 For all these reasons I regret that I am unpersuaded by the reasoning of Professor Lee, based upon Professor Kang's paper. I cannot help but feel that had Professor Kang's views had any traction, they would have been the subject of subsequent academic papers or raised by way of argument in litigation in the intervening 15 years since it was published. I consider, with respect, that Professor Lee in paragraph 52 of his report was focussing too heavily on the very serious crimes of which Chairman Park was convicted and not sufficiently upon the generality of the effect that his reasoning would have had on an agreement to arbitrate.

101 In circumstances where there is no statutory provision that disputes under Article 103 are non-arbitrable under Korean law, the better view is that the principle of separability and kompetenz-kompetenz apply even in cases where Article 103 is raised. GGK have therefore raised the necessary *prima facie* case in this regard.

102 In these circumstances it is unnecessary to consider the alternative argument raised by GGK that if the Article 103 argument was a good one, then Singapore law became the proper law of the CA Arbitration Agreement so as to give effect to the parties' clear desire to arbitrate their disputes (see [64] above).

Issue 3: What is the effect of Article 9(1) of the Korean Arbitration Act 2016 ("KAA")?

103 Asiana contends that even if the dispute raised in the Korean CA Proceedings is arbitrable, nonetheless the bringing of those proceedings does not constitute a breach of the CA Arbitration Agreement because Korean law allows them to be brought pursuant to Article 9(1) of the KAA.

104 Article 9(1) of the KAA is the provision which implements in Korea Article II(3) of the New York Convention and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). It provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall dismiss the action when the defendant raises as a defense the existence of an arbitration agreement: provided that this shall not apply in cases where it finds that such arbitration agreement is null and void, inoperative or incapable of being performed.

105 And Article 9(3) of the KAA goes on to provide:

> Where an action referred to in paragraph (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made while the issue is pending before the court.

106 This was not a point that was canvassed directly in the parties' written submissions. It is referred to in Asiana's written submissions in relation to delay[59] and potential injustice to Asiana.[60] The legal position was however covered in both experts' reports and the argument was raised as a self-standing point by counsel for Asiana in his oral submissions and was responded to by counsel for the Applicants in his reply.

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59 Applicants' Written Submissions at para 114.

60 Applicants' Written Submissions at para 151.

107 Professor Lee considers the effect of these provisions in paragraphs 54 to 56 of his report, wherein he relies on a decision of the Supreme Court of Korea (the "Supreme Court Decision"):[61]

> 54 Collectively, the above provisions of the KAA imply that when one contracting party files an action claiming nullity of an arbitration agreement and the other contracting party raises a defense of the existence of an arbitration agreement, Korean courts would first deliberate whether the arbitration agreement is null and void, rather than dismissing the action immediately. Case law from the Korean Supreme Court also holds to the same effect: that even in the midst of the arbitral proceedings, a contracting party that claims non-existence or nullity of the arbitration agreement can file an action in court regarding an arbitrable dispute.
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> "We proceed on the premise that while arbitral proceedings are ongoing, a party that claims non-existence or nullity of an arbitration agreement can still file an action related to subject matters that fall within the scope of the arbitration agreement in court. That said, it also means that an arbitral tribunal may independently commence or continue the arbitral proceedings notwithstanding the legal proceedings at the court."
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> "Article 6 of the Arbitration Act limits cases and ways in which the court may intervene in the arbitral proceedings to those explicitly listed in the Arbitration Act. Also, a party that claims non-existence or nullity of an arbitration agreement can still file an action in court even if the arbitral proceedings are ongoing. An arbitral tribunal may commence or continue arbitral proceedings, or render an award, while the legal proceedings in court are ongoing. (Article 9 of the Arbitration Act)" (The Seoul Central District Court Decision 2017KaHap80375) (original first-instance decision of the above Supreme Court Decision)
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> 55. In other words, the fact that the arbitrability of a dispute is recognized under Korean law does not necessarily exclude the possibility of resolving the dispute by litigation. According to Korean arbitration law, where there is a dispute regarding the nullity or nonexistence of an arbitration agreement, the party claiming the nullity or non-existence of an arbitration

[61] Expert Report of Professor Lee Kitaik at para 50, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 70 and 71.

> agreement may file a separate lawsuit regardless of the arbitration proceeding even if a party initiates arbitration and the arbitration proceeding is ongoing. The Korean law specifically provides for the court to render judgement on the validity of such arbitration agreement.
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> 56. In sum, as long as Asiana claims nullity of not only the CA but also the arbitration agreement in the CA, Korean courts would need to deliberate and render a final decision on the merits, regarding the issue of whether the arbitration clause of the CA is null and void, rather than dismissing the Korean CA Proceedings.
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> [emphasis in original; footnotes omitted]

108 Professor Shin gives similar evidence in paragraphs 32 to 42 of his report. In paragraph 38 he refers to the same passage in the Supreme Court Decision cited by Professor Lee. It is to be noted that this passage is based on the premise "while arbitral proceedings are pending".[62]

109 He goes on to conclude in paragraph 39 that even if the counterparty were to commence an arbitration whilst the litigation is pending, the KAA does not require the courts to stay the litigation and accepts that this could lead to inconsistent conclusions. He goes on to draw attention to the fact that in the unusual facts of this case the fact that GCK has initiated the Enforcement Proceedings, in which the alleged non-arbitrability of the CA Arbitration Agreement owing to the effect of Article 103 is also raised, the possibility of two inconsistent decisions in the Korean courts also arises.[63]

110 In his oral submissions counsel for Asiana drew upon the Supreme Court Decision cited by Professor Shin to submit that since under Korean law a party

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62 Expert Report of Professor Hi-Taek Shin at paras 32 to 42, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 12 to 15.

63 Expert Report of Professor Hi-Taek Shin at paras 39, 41 and 42, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 14 and 15.

claiming nullity of the arbitration agreement may initiate proceedings concurrently with the same issue being raised in an arbitration, it could not be a breach of the CA Arbitration Agreement to do so. The argument made by counsel was as follows:[64]

> But my point is this. This is something the Korean Courts deal with and allow parties to do. And if I'm doing something which a Korean Court---or if my clients are doing something the Korean Court allows us to do under the law, it cannot be a breach of an arbitration agreement, or at the very least, that would be a strong reason to deny an anti-suit injunction, because we're just exercising rights and expectations that we have under Korean law in the exact manner that Korean law expects these issues to be decided.

111 Counsel for the Applicants responded by acknowledging that Korean law permitted a party to seek relief in the Korean Courts but contended that this did not mean that Asiana were not in breach of the CA Arbitration Agreement by so doing.

112 Having regard to the way in which the point was developed, rather than dealing with this as a matter of generality I prefer to restrict my observations to the facts of this case. The pertinent facts are that the Korean CA Proceedings were commenced on 24 January 2022 after the Final Award had been made and the application to set it aside had been commenced in the Singapore Court. It was also made after the Enforcement Proceedings were commenced in the Korean Courts on 20 May 2021.

113 Article 9 of the KAA contemplates the commencement of proceedings in the Korean Courts either before or in the course of concurrent arbitration proceedings. This is clear from the wording of Article 9(3) and from the

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64 Certified Transcript of 15 September 2023 at p 102 lines 1 to 9.

approach of the Korean Supreme Court (see [107] above). It does not apply to the facts of this case where the proceedings were commenced after the arbitration proceedings had been concluded and the Final Award had been made.

114 The purpose underlying Article 9 is to enable a party alleging that an arbitration agreement is void to have that issue determined by the National Court instead of, or as well as, by the Tribunal. It is not to enable a party who did not make that allegation in the arbitration nor seek to raise it before or during the course of the arbitration to do so in the National Court subsequent to the rendering of the Final Award. In these circumstances, I am satisfied that the Applicants are correct in their submission that Article 9 does not absolve Asiana from the possibility of being in breach of the CA Arbitration Agreement in starting the Korean CA Proceedings.

Issue 4: If the Court has a discretion to grant the anti-suit injunction, how should it exercise that discretion?

115 On the basis that the commencement of the Korean CA Proceedings was *prima facie* a contractual breach of the CA Arbitration Agreement, the correct approach to considering the exercise of discretion is as set out by Steven Chong JA in *Sun Travels* (see above at [31]). In the case of a contractual breach anti-suit relief will ordinarily be granted unless there are strong reasons not to do so and there is thus no need to adduce additional evidence of unconscionable conduct. But relief must be sought without undue delay and without unconscionable conduct on the applicant's part.

116 Here, Asiana assert that the delays that have occurred in the Korean CA Proceedings coupled with the GGK's manner of conducting those proceedings is such that GGK has lost the right to seek anti-suit relief. GGK seeks to

counterbalance the effect of any delay by raising the issue of the alleged unconscionable conduct of Asiana in contesting the arbitration proceedings on the basis that the CA was valid and then, having failed, seeking a determination from a different tribunal that the agreement was void. I do not accept this. The conduct of the party in breach cannot serve to justify delay by the complaining party in seeking anti-suit relief. Indeed, where there is alleged unconscionable behaviour of this nature, this would seem to be a spur to seeking relief promptly; it cannot justify delay.

117 This is therefore a straight question of deciding whether any delay as has occurred in this case is such that the court should refuse to exercise its discretion to grant the injunction sought (see [36] above).

118 The procedural timetable for the Korean CA Proceedings is set out in paragraph 42 of Asiana's written submissions:[65]

Date	**Event**
24.01.2022	Asiana's filing of its Complaint
14.03.2022	GGK's filing of its Reply
29.12.2022	Asiana's filing of its Brief
16.06.2023	GGK's filing of its Reply Brief
20.06.2023	1st hearing
18.08.2023	Asiana's filing of its 2nd Brief
22.08.2023	2nd hearing
24.10.2023	Intended 3rd hearing date

119 In the Complaint filed on 24 January 2022, Asiana contested the validity of the CA Main Agreement on the basis that it was contrary to Article 103. It

65 Respondent's Written Submissions at para 42.

did not raise the issue surrounding the potential invalidity of the CA Arbitration Agreement until the filing of its Brief on 29 December 2022. In its first Reply on 14 March 2022 GGK contended that the proceedings were improper because they were brought in breach of clause 28 of the CA and sought that the proceedings should be terminated under Article 9 of the KAA.

120 On 22 May 2023, GGK requested Asiana to withdraw the proceedings on the basis that they were in breach of the CA Arbitration Agreement. This request was refused on 31 May 2023 and Asiana also refused to attend a meeting of the Joint Steering Committee which is the committee set up under the CA to try to resolve disputes.[66]

121 In its second Reply Brief of 16 June 2023 GGK reiterated its contention that the claim should be dismissed and sought an order that the jurisdictional issue should be decided as a preliminary issue. There followed the first court hearing on 20 June 2023 at which the court acknowledged GGK's position on jurisdiction but allowed Asiana to file a brief on the merits.

122 This application, SIC 14, was then commenced on 28 June 2023.

123 Although there is a delay from January 2022 until June 2023, it can be seen that this was taken up with the exchange of two rounds of Briefs during which Asiana expanded its case as indicated and GGK repeated its objection to the continuation of the proceedings and sought to engage with Asiana to agree their withdrawal. There was only one court hearing during which directions were given.

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66 See Annex 1.3 to the CA, ABOD Vol II Tab 3 (1st Affidavit of Angela Petzold Theiler dated 28 June 2023) at p 120.

124 Although there was a second hearing on 22 August 2023 and a third was scheduled for 23 October 2023, the parties were unable to give me any indication as to when the Korean court might reach a decision on the issues.

125 Professor Lee considers the Korean CA Proceedings in paragraphs 67 to 73 of his report.[67] In paragraph 68 he describes the first pleading date (*ie*, the first hearing) as being the occasion on which the court "directs the parties to state the major points of the complaint and the answer, sets out the contested issues and hears the parties' opinions about matters to be proven".[68] The court may then designate additional pleading dates for the parties' submission of evidence and examination of evidence. Eventually when the court is satisfied that sufficient pleading has been done it closes the pleading stage and designates a date for pronouncement of the judgment.

126 In paragraph 70 he refers to the second hearing on 22 August 2023 as being the time when Asiana submitted a detailed brief and when GGK announced that it would present detailed arguments to refute Asiana's claims. He concludes "in other words, it can be said that the court is already reviewing the case" and he concludes in paragraph 73 that "the Korean CA Proceedings, in terms of duration and procedure have already progressed to a significant extent."[69]

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67 Expert Report of Professor Lee Kitaik at paras 67 to 73, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 75 and 77.

68 Expert Report of Professor Lee Kitaik at paras 68 to 73, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 75.

69 Expert Report of Professor Lee Kitaik at para 79, ABOD Vol VI at Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 75 and 77.

127 However, Professor Lee lays particular emphasis on the steps that were taken between the first and second hearings and which were thereafter to be taken as a result of the second hearing. What I have to consider is the state of the proceedings and the delays up to the filing of this application which was immediately after the first hearing in June, whereas the second hearing was in late August.

128 Since the commencement of the proceedings in January 2022 up until the end of June 2023, there have been two rounds of pleadings, the second of which raised the additional claim of invalidity of the CA Arbitration Agreement. and one procedural court hearing which on the evidence equates to a Case Management Conference. There had been no substantive consideration of the issues by the court.

129 During that period Asiana were well aware that GGK were taking the point that the proceedings were in breach of the CA Arbitration Agreement and GGK acted reasonably and properly in inviting Asiana voluntarily to withdraw the proceedings or to take part in an agreed dispute resolution procedure.

130 As was pointed out in *Sun Travels* (at [83]) the focus of the inquiry is not delay *simpliciter*. What is of more importance is the extent to which the delay has allowed the foreign proceedings to progress. As can be seen from the above that by the end of June 2023 few judicial resources had been expended and the timetable for service of briefs had been generous. Moreover, no judgment on the merits has been handed down in any form.

131 Taking all these matters into account, I do not consider that the conduct of GGK during the relevant period was such as to disentitle it, in the exercise of the court's discretion, to the relief it seeks to restrain Asiana's breach of the CA

Arbitration Agreement. GGK is therefore entitled to the anti-suit injunction which it seeks.

The Korean Compensation Proceedings

Issue 5: The nature of the Korean Compensation Proceedings

132 The Korean Compensation Proceedings were commenced on 13 October 2022 although service on the three defendants was not completed until June 2023. The Statement of Claim dated 13 October 2022[70] deals at some length with the part played in the negotiations by Chairman Park leading up to the conclusion of the four agreements and the illegality of his actions. The case raised against GGS and the Directors can be seen from the following extracts:

> **B. Defendant GGS**
>
> The Defendant GATE GOURMET SWITZERLAND GMBH (hereinafter referred to as "**Defendant GGS**") is a company in charge of the airline catering business at GATEGROUP and it is a Swiss company incorporated on 29 November 2002 {see Certificate A No. 7 on the Decision of the Fair Trade Commission of 6 November 2020 (hereinafter referred to as the "**Decision in this case**"), page 18).
>
> As will be discussed below, Defendant GGS is a party to the Joint Venture Agreement that was signed with Plaintiff. In addition, said Defendant signed the Management Services Agreement in this case with GATE GOURMET KOREA Co, Ltd, a Korean company which is jointly operated with the Plaintiff pursuant to the Joint Venture Agreement in this case (see Certificate A No. 2 for the entire record of GATE GOURMET KOREA, hereinafter referred to as "**GGK**").
>
> **C. Defendants XAVIER ROSSINYOL and CHRISTOPH SCHMITZ**
>
> Defendant XAVIER ROSSINYOL (XAVIER ROSSINYOL, hereinafter referred to as "**Defendant ROSSINYOL**") was the former CEO of the Defendant GGS and Defendant CHRISTOPH

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70 Statement of claim filed by Asiana Airlines Inc in Case No 22*Gahap* 109880 dated 13 October 2022, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) at p 165 to 187.

SCHMITZ (CHRISTOPH SCHMITZ, hereinafter referred to as "**Defendant SCHMITZ**") is the current CEO of the Defendant GGS. The two defendants were directly involved in the Package Deal, including the Joint Venture Agreement and the Airline Catering Agreement.[71]

[…]

B. Liability for damages of the defendant

If the representative of the corporation acts unlawfully in the performance of his duties, the corporation is liable for damages under Article 35(1) of the Civil Code. If an employee of the corporation acts unlawfully in the performance of his or her duties, the corporation is liable for damages under Article 756(1) (see Supreme Court of Korea, 26 November 2009, 2009-Da-57033). If several persons act together unlawfully and thereby cause damage to another person, they are jointly and severally liable for compensation for such damage under Art. 760(1) of the Civil Code.

As noted above, it is an act of breach of trust against the Plaintiff and therefore an unlawful act for SAM-KOO PARK, inter alia, for the purpose of restoring and strengthening SAM-KOO PARK's dominant influence over KUMHO GROUP with Defendant GGS and GGK and GGFS, inter alia, to implement the package deal in this case and thereby prevent the Plaintiff from obtaining a fair price for the In-Flight Catering Business Rights in this case.

It is clear from the background and structure of the package deal offer in this case alone that it is an act of disloyalty towards the plaintiff and therefore an unlawful act. Although the Defendants were well aware that the package deal in this case was an act of disloyalty to the Plaintiff and thus an unlawful act, they actively participated in the unlawful acts through SAM-KOO PARK, inter alia, in order to obtain the profits from the "exclusive license for airline catering over a period of 30 years".[72]

[emphasis added]

[…]

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71 Statement of claim filed by Asiana Airlines Inc in Case No 22*Gahap* 109880 dated 13 October 2022, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) at p 168.

72 Statement of claim filed by Asiana Airlines Inc in Case No 22*Gahap* 109880 dated 13 October 2022, ABOD Vol 5 Tab 6 (1st Affidavit of Kim Se Joong dated 14 July 2023) at p 179 to 180 .

A. Method for calculating the amount of damage suffered by the claimant[73]

The amount of damages to be borne by the plaintiff as a result of the package deal in this case is calculated by subtracting the plaintiff's current pecuniary status, which has arisen as a result of the unlawful act, i.e. the Package Deal, from the plaintiff's pecuniary status, which would have arisen in the absence of the unlawful act, namely the Package Deal (difference theory). The corresponding formula can be presented as follows:

Plaintiff's loss = GGK business profit X 60% + MSA Outflow amount – Investment amount KRW 80 billion GGK Business Profit + MSA Outflow amount - Investment amount KRW 80 billion = Value of the Airline Catering License in this case

① **GGK business profit X 60%**

Here, "GGK's business profit" refers to the profit made by GGK from the exclusive supply of the in-flight meals to the Claimant and its subsidiaries over a period of 30 years and the receipt of consideration therefor under the In-Flight Catering Agreement, among other things. GGK's business profit can be determined by calculating the profit calculated in accordance with the Initial Business Plan (IBP) set out in Schedule 1 to the Airline Catering Agreement in this case (in view of GGK's corporate tax charge, the profit after tax is calculated for this purpose) at present value.

If the plaintiff held all the shares in the In-Flight Catering Business, the profit from the airline catering business would have been fully attributed to it. However, due to the package deal in this case, the In-Flight Catering Business was set up as a joint venture and only 40 per cent of GGK's business profit was attributed to the plaintiff. In other words: It lost 60 per cent of GGK's business profit. Therefore, the "business profit of GGK x 60 %" refers to the plaintiff's loss.

[emphasis added]

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73 Statement of claim filed by Asiana Airlines Inc in Case No 22*Gahap* 109880 dated 13 October 2022, ABOD Vol 5 Tab 6 1st Affidavit of Kim Se Joong dated 14 July 2023) at p 180 to 181.

133 The relevant parts of the Korean Civil Code are:[74]

> **Article 35(1) (Capacity of Juristic Person to Assume Responsibility for Unlawful Act)**
>
> A juristic person shall be liable for any damages done to other persons by its directors or other representatives in the performance of their duties. This liability of a juristic person shall not relieve the directors or other representatives of their own liabilities for damages sustained thereby.
>
> **Article 750 (Definition of Torts)**
>
> Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom.
>
> **Article 760 (Liability of Joint Tort-feasors)**
>
> (1) If two or more persons have by their joint unlawful acts caused damages to another, they shall be jointly and severally liable to make compensation for such damages.
>
> (2) The provisions of paragraph (1) shall also apply if it is impossible to ascertain which of the participants, albeit not joint, has caused the damages.
>
> (3) Instigators and accessories shall be deemed to act jointly.
>
> **Article 756 (Employer's Liability for Compensation)**
>
> (1) A person who employs another to perform a specific affair is liable for compensating for any loss inflicted on a third person by the employee in the course of performing the specific affair: Provided, That this shall not apply where the employer has exercised due care in appointing the employee, and in supervising the performance of the specific affair, or where the loss has been inflicted even if the employer has exercised due care.
>
> (2) A person who supervises the performance of a specific affair on behalf of the employer shall also assume the same liability as prescribed in paragraph (1).
>
> (3) In cases falling under paragraphs (1) and (2), the employer or the supervisor may claim for reimbursement from the employee.

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74 Respondent's Bundle of Authorities Tab 4; Respondent's Written Submissions at para 44.

134 From this, it is plain that in the Korean Compensation Proceedings, Asiana are not contending that the JVA (or any of the other four agreements) are invalid. They are raising a claim based upon Chairman Park's alleged breach of trust and building upon this by making the assertion that because the Directors, and through them GGS, were well aware that Chairman Park's conduct "was an act of disloyalty" all three have incurred joint and several liability to Asiana under the Korean Civil Code.

135 As is apparent from the sections of the Korean Civil Code, although expressed as being a breach of trust, Chairman Park's conduct constitutes a tort. Professor Lee expresses the position under Korean law as follows at paragraph 62 of his expert report:[75]

> 62. To my understanding, Asiana, at the outset, argues that Rossinyol and Schmitz as [*sic*] co-tortfeasors of Park Sam-Koo's tortious act in the Korean Compensation Proceedings. Then against GGS, Asiana seems to claim GGS's vicarious liability for tortious act of Rossinyol and Schmitz related to their official responsibilities and discharge of those responsibilities as a CEO under Articles 35(1) and 756 of the Korean Civil Code.

136 In oral submissions counsel for Asiana equated the case to an allegation of conspiracy in a common law jurisdiction and emphasised that the claim was not a contractual breach of the substantive clauses of the JVA.[76] Counsel for the Applicants did not contend that the making of the claim was a breach of the main JVA but asserted that nonetheless it was, so far as GGS was concerned, a tort dispute which fell within the terms of the JVA Arbitration Agreement. Hence Asiana were in breach of the JVA Arbitration Agreement

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75 Expert Report of Professor Lee Kitaik at para 62, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at p 73. See also Expert Report of Professor Hi-Taek Shin at paras 101 to 104, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 32 to 33.

76 Certified Transcript of 15 September 2023 at p 129 lines 11 to 19.

notwithstanding the fact that the claim was a tort claim and that the Directors were not parties to the JVA.

137 For convenience I shall repeat Clause 34.2 of the JVA, being the JVA Arbitration Agreement:

> All disputes, controversies or claims arising out of or in connection with this Agreement shall be referred to and finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with those Rules. The seat of the arbitration shall be Singapore. The language of the arbitration shall be English.
>
> [emphasis added]

138 I have already concluded that the CA Arbitration Agreement contained in Clause 28 of the CA is governed by Korean Law. The parties did not suggest that any different conclusion should be reached on the JVA but it is not suggested that this arbitration clause is invalid.

Issue 6. In what circumstances and on what basis does the law of Korea permit tort claims to be determined in arbitration proceedings?

139 On this question I have received assistance from both Professors.

140 Professor Shin considers the matter in paragraphs 108, 110 and 112-115:[77]

> 108. First, the fact that a claim is framed as a tort claim does not necessarily bring it outside the scope of an arbitration agreement, nor does it mean the claim is incapable of resolution by arbitration. Article 3(ii) of KAA defines an arbitration agreement as "*an agreement between the parties to settle by arbitration all or some disputes which have already arisen or might arise in the future in respect of defined legal relationships, whether contractual or not*."

[77] Expert Report of Professor Hi-Taek Shin at paras 108, 110, 112 to 115, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at pp 34 and 35.

> 110. Commentators agree that the insertion of the phrase "*whether contractual or not*" in defining the arbitration agreement in the KAA was to include damages claims based on tort within the scope of an arbitration agreement, as long as the claim is closely related to the relevant contract. Therefore, as long as there exists a valid arbitration agreement, a tort claim arising in connection with the subject contract must be settled by arbitration. (See Exhibit 23, Mok Young Jun & Choi Seung Jae, at p.94).
>
> 112. The scope of the arbitration agreement in the JVA is not confined to contractual disputes. Rather, it refers in broad terms to"*[a]ll disputes, controversies or claims arising out of or in connection with this Agreement.*"
>
> 113. As mentioned earlier, in paragraphs 49 through 53, the Korean Supreme Court has consistently interpreted the scope of an arbitration agreement broadly.
>
> 114. The Supreme Court decision rendered in 1992, discussed in paragraph 50 (See Exhibit 8) is the leading decision of the Supreme Court recognizing the scope of an arbitration agreement broadly, holding that if an arbitration clause in a business transfer contract provides that "*legal disputes in connection with the terms of this agreement that cannot be resolved between the parties' are subject to arbitration,* [in such case] *legal disputes in connection with the terms of this agreement shall be construed to include not only a dispute concerning the interpretation of the terms of the agreement but also a dispute directly or closely relating to the formation, performance, and validity of the agreement*." The Supreme Court has also ruled that if the seller's warranty liability and tort liability rely on the same set of facts, "a dispute regarding whether any tort liability exists is closely related to the performance of the contract, and *therefore it is reasonable to conclude that the tort claim fills within the scope of the arbitration clause.*"
>
> [emphasis in original]

141 Professor Lee agrees that a tort dispute which is closely connected to the contract's execution, performance and validity can fall within the scope of an arbitration proceeding but contends that existing case law demonstrates a

common thread, that this close connection is only present where the tort claim also concerns a breach of contract claim.[78]

142 Professor Lee goes on to contend that since the tortious act in issue is the Directors' active participation in the tortious acts of Chairman Park and that none of them were parties to the JVA, any claim against them was non-arbitrable.

143 Whilst it may be that a case where there is not only a tort claim but also a related claim in contract is a prime example of a case which is closely connected for the purposes of arbitrability, I do not understand the Korean Supreme Court in its reasoning set out in paragraph 114 of Professor Shin's Report to be limiting itself to cases where there was also a contract dispute. It cannot be that by avoiding raising a contract dispute where one was open to the complainant this could avoid the arbitration clause. The language of the Korean Supreme Court echoes that of Article 3(ii) of the KAA which expressly says "whether contractual or not". The Korean Supreme Court uses the language "but also a dispute directly or closely relating to the formation, performance and validity of the agreement".

144 Furthermore, I am unpersuaded that the fact that a claim in tort is made against individuals who are not parties to the agreement necessarily leads to the conclusion that there can have been no breach of the arbitration agreement. Where a claim in tort is made against both parties and non-parties to the agreement, regard must be had to the substance of the claim and not merely the form. As Lord Scott observed in paragraph 61 of his speech in *Donohue* (see

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78 Expert Report of Professor Lee Kitaik at para 57 to 61, ABOD Vol VI Tab 10 (1st Affidavit of Kim Minji dated 28 August 2023) at pp 72-73.

[42] above) the party to the agreement seeking the injunction must show a sufficient interest that an adverse result in the foreign proceedings would materially affect him, such as having a liability in damages.

145 As a result, I am satisfied that on its true construction under Korean law the language of the JVA Arbitration Agreement, "[*a*]*ll disputes, controversies or claims arising out of or in connection with this Agreement*" [emphasis added] is wide enough to include tort disputes between the parties.

Issue 7. The Mozambique judgment

146 This does not however mean that all tort disputes involving the parties to an arbitration agreement will fall to be decided by way of arbitration. It is necessary to identify the nature or substance of the tort dispute and then to consider its relationship to the agreement in question.

147 The starting point lies in Article 9(1) of the KAA, cited in [104] above. The relevant passage for present purposes is the underlined words:

> A court before which an action is brought <u>in a matter which is the subject of an arbitration agreement</u> shall dismiss the action when the defendant raises as a defense the existence of an arbitration agreement.
>
> [emphasis added]

148 How should one go about determining whether any given "matter" is the subject of an arbitration agreement? Beyond directing my attention to the Korean Supreme Court Decision referred to in paragraphs 54 to 56 of Professor Shin's report to the effect that the dispute in question must relate directly or closely to the formation, performance and validity of the agreement, the experts

did not identify any Korean decision or academic paper illustrating how this task was to be addressed under Korean Law.[79]

149 In paragraph 30 of his expert report, Professor Shin states that in circumstances where there is no direct authority in Korea, the courts will look to case law and commentary from other jurisdictions, particularly from jurisdictions which have implemented the Model Law such as the United States, United Kingdom, France, Germany and Singapore.

150 Subsequent to the oral hearing in this case, the Supreme Court of the United Kingdom ("UK") delivered its Judgment in *Republic of Mozambique (acting through its Attorney General) (Appellant) v Privinvest Shipbuilding SAL (Holding) and others (Respondents)* [2023] UKSC 32 ("*Mozambique*").

151 This was a case concerning the interpretation of Section 9 of the UK Arbitration Act 1996 (c 23) (the "UK Arbitration Act") which mirrors Article 9(1) of the KAA in that it provides:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> [emphasis added]

152 There were agreements between the claimants ("Mozambique") and the respondents ("Privinvest") governed by Swiss law relating to borrowings to purchase equipment which were secured by guarantees from Mozambique. These agreements contained conventional arbitration clauses. Mozambique

[79] Applicants' Written Submissions at para 114.

subsequently brought legal proceedings in England alleging that there was a conspiracy involving Privinvest to pay bribes to corrupt officials of Mozambique and others which had resulted in Mozambique being exposed to losses under the guarantees.

153 Privinvest applied to the UK court for a stay under section 9 of the UK Arbitration Act on the basis that the conspiracy claims fell within the arbitration agreements.

154 The trial Judge dismissed the section 9 applications but this judgment was reversed on appeal to the Court of Appeal in England. Mozambique then appealed to the Supreme Court which had to decide what the correct approach was to determine whether the "legal proceedings are […] in respect of a matter which under the agreement is to be referred to arbitration" within the meaning of Section 9. In *Mozambique*, Lord Hodge, with whom the other Judges agreed, reviewed the applicable law in many common law jurisdictions, before concluding what the correct approach was.

155 It will thus be seen that there is a similarity between the issue raised in *Mozambique* and that which falls to be decided in this case. Accordingly, once this court became aware of the decision in *Mozambique*, it gave both parties the opportunity to provide further written submissions on the issues raised in *Mozambique*.

156 In Section 4(a) of his judgment Lord Hodge addressed the question of "the meaning and ascertainment of a 'matter'" in section 9 of the UK Arbitration Act. The learned Judge identified (at [48]) that section 9 involved a two-stage process:

> 48 Section 9 involves a two-stage process. First, the court must identify the matter or matters in respect of which the legal proceedings are brought. Secondly, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement on its true construction.

157 Lord Hodge went on to consider the fact that section 9 gives effect to Article II(3) of the New York Convention (as does Article 9(1) of the KAA) and then considered the jurisprudence developed in relation to legislation in other jurisdictions giving effect to Article II(3) of the New York Convention including the Cayman Islands (*Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21. *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn* [2023] UKPC 33), Hong Kong (*Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd and another* [2014] 4 HKLRD 759), Singapore (*Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2016] 1 SLR 373 ("*Tomolugen*")), and Australia (*WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164).

158 At [61] he cited with approval from the judgment of Sundaresh Menon CJ in *Tomolugen*:

> 61. Between paras 108 and 122 of the court's judgment Sundaresh Menon CJ addressed the question whether a "matter" should be interpreted broadly by identifying the essential dispute or the main issue, as Silica urged, or more granularly, as Lionsgate submitted. He stated (para 108) that establishing whether the dispute pertained to a matter that is subject to the arbitration agreement involves the two stages which I have stated in para 48 above: first, the court must identify the matter or matters in respect of which the legal proceedings are brought and then, secondly, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement on its true construction. At the first stage, the court proceedings which are sought to be stayed may involve more than a single matter. In addressing the differing submissions of the parties, Sundaresh Menon CJ stated (para 113) that the starting point of the analysis was the language of

> section 6 of the IAA. Section 6 of the IAA mandates a stay only "so far as" the court proceedings relate to the matter or matters which are the subject of the arbitration agreement. This, he stated, militates against taking "an excessively broad view of what constitutes a 'matter' or treating it as a synonym for the court proceedings as a whole". He continued (para 113):
>
> "In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common-sense enquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule." [emphasis in original]

159 Following this review, Lord Hodge expressed his conclusions in [71]–[78]:

> 71. In my view there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration. I summarise my understanding of that consensus in the following paragraphs.
>
> 72. First, as I have stated (para 48 above) the court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement.
>
> 73. In carrying out this exercise the court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means. The exercise involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim.
>
> 74. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is

silent as to the stay of the court proceedings, legislation implementing this provision of the New York Convention has generally made express provision for a stay pro tanto. Section 9 of the 1996 Act has done so expressly. The "matter" therefore need not encompass the whole of the dispute between the parties.

75. Thirdly, a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence to that claim, it is not a matter in respect of which the legal proceedings are brought. I agree with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* that a "matter" requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. I agree with Foster J's third proposition in *WDR Delaware* that a "matter" is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.

76. A focus on the substantial nature and relevance of a referred matter to the legal proceedings is consistent with international jurisprudence, including *Lombard North Central*, *Quiksilver*, *Tomolugen* and *Ting Chuan*. It is also consistent with the Australian jurisprudence in *Tanning* and *WDR Delaware*.

77. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a question of judgment and the application of common sense rather than a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay whether in whole or in part. In so far as the summary of the law in *Sodzawiczny*, if read by itself, may suggest otherwise, it is in error.

78. The existing jurisprudence also supports a fifth point. There may not yet be a consensus on this matter, but common sense lends further support. When turning to the second stage of the analysis (para 48 above), namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.

160 As indicated in [149] above, the courts in Korea look to case law and commentary from other jurisdictions, particularly from jurisdictions which have implemented the Model Law in concluding the correct approach to interpreting statutory provisions such as Article 9(1) of the Korean Civil Code in circumstances where there is no specific guidance from decisions or academic commentary in Korea. Lord Hodge's analysis is detailed and far reaching and I therefore propose to approach the two questions posed by him in the manner suggested in his reasoning.

Issue 8. What are "the matter or matters" in respect of which the Korean Compensation Proceedings are brought?

161 This is the first of Lord Hodge's questions and I therefore turn to consider the facts and circumstances underlying the claim in the Korean Compensation Proceedings. First, Asiana submits that the main claim is a claim against the Directors, that this is a legitimate claim because they were the ones involved in the alleged illegal acts and that GGS's vicarious liability is subsidiary to this.[80] Accordingly the claim is about the part played by the Directors in negotiating all the agreements and that the position of GGS as a party to the JVA is immaterial to this question.

162 Counsel for the Applicants submits that although the claim is formulated as being a claim against the Directors with GGS being vicariously liable for their acts, in substance this is a claim primarily against GGS. It is not suggested that either Mr Schmitz or Mr Rossinyol is a man of such substance that he could pay the sums claimed. Their presence as defendants is necessitated by the way in which Korean law is enacted. The objective underlying the claim is to obtain

[80] Certified Transcript of 15 September 2023 at p 125 lines 15 to 23.

damages from GGS as being vicariously liable for the Directors' acts. There will be joint and several liability for those acts.

163 I consider that the approach of the Applicants constitutes the practical common-sense approach advocated by Lord Hodge. The claim is a claim for damages primarily directed against GGS based on its liability for the alleged tortious acts of the Directors. As indicated in [136] above counsel for Asiana equated these alleged tortious acts to a claim based on conspiracy in Common Law. I find this a helpful analogy.

164 The foundation of the claim lies in the assertion that the way in which the four agreements were structured (the Package Deal) was a conspiracy designed to prevent Asiana obtaining a fair price for the in-flight catering rights and that the Directors were well aware of this (see [132] above). The dispute thus relates directly to the formation of the Package Deal, particularly the interrelationship between the CA and the BWA, but Asiana contends that this is as far as it goes and that it is nothing to do with the JVA itself.[81]

165 Counsel for the Applicants submits that this is too narrow a view. Counsel relies upon the fact that the CA was signed on the same day as the JVA by GGK and it was the JVA that established GGK as being the joint venture vehicle, owned 60% by GGS and 40% by Asiana. GGK then entered into the CA.[82] The kernel of the dispute is whether in the circumstances this division of ownership represented a fair distribution of the profits. In support of this, they draw attention to the "[m]ethod for calculating the amount of damage suffered

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81 Certified Transcript of 15 September 2023 at p 126 line 26 to p 129 line 27, and p 153 line 10 to p 154 line 12.

82 Certified Transcript of 15 September 2023 at p 154 line 24 to p 156 line 23.

by the claimant" in the statement of claim (see [132] above). The principal sum sought from GGS is 60% of the business profit generated by GGK which would in substance equate to the profit which would have been made by GGK over the period of 30 years under the CA.

166 In the light of this the Applicants submit that the substance of Asiana's claim is to seek to vary the economic benefits which the parties had agreed under the JVA so that Asiana obtains all the profits generated by GGK under the JVA rather than its 40% share subject to a deduction of the investment amount of KRW 80 billion.

167 Whilst the tort proceedings are framed in the pleadings as being a breach of trust akin to a conspiracy, regard must be had to the substance of those proceedings. They are proceedings which seek to address the alleged imbalance of the percentage ownership of GGK as between Asiana and GGS on the basis that the breach of trust was instrumental in creating that imbalance.

168 It is to be noted that Asiana has not sought to contend that the JVA is void or voidable because of the breach of trust. Article 103 is not relied upon. On the pleadings, if Asiana was wholly successful, it would receive damages to compensate it for the imbalance which on its contention would equate to a significant dilution of the sums that GGS would receive by way of profits in respect of its 60% shareholding.

169 GGS's primary defence to the claim is that the Directors did not actively participate in Chairman Park's illegal acts (see [132] above) but if this were to fail, there is further defence as to quantum. If there was an imbalance in the shareholding because of the illegal actions, what would have been the fair balance?

170 Taking all these matters into account, I have concluded that the Korean Compensation proceedings have been brought "to redress by way of damages the loss that Asiana have suffered owing to the alleged imbalance of the shareholdings in GGK due to the Directors' involvement in the illegal acts of Chairman Park". There are thus two "matters" which fall to be decided. First, was there a "conspiracy" between the Directors and Chairman Park to create this imbalance? Secondly, if there was, what award of damages would properly serve to redress that imbalance?

Issue 9: Do either of those matters fall within the scope of the JVA Arbitration Agreement on its true construction such that there is a prima facie breach of the JVA warranting an anti-suit injunction in favour of GGS?

171 This is a question of Korean law as to the correct interpretation of the JVA Arbitration Agreement (Clause 34.2). The question to be answered is whether the claim, not being a claim concerning the interpretation of the terms of the agreement, *relates to a dispute directly or closely relating to the formation, performance or validity of the agreement* (see above at [137]).

172 The JVA Arbitration Agreement is in conventional terms. It is recognised as being wide in its effect and "the Korean Supreme Court has consistently interpreted the scope of an arbitration agreement broadly".[83]

173 The matters falling for decision in the Korean Compensation Proceedings together constitute a dispute which seeks to undermine the way in

[83] Expert Report of Professor Hi-Taek Shin at para 49, ABOD Vol IV (1st Affidavit of Professor Hi-Taek Shin dated 14 July 2023) at p 16.

which the JVA was negotiated and concluded and for this reason constitute, in my judgment, a dispute which *is closely related to the formation or performance of the JVA within the meaning of Clause 34.2*. It is not, as Asiana contended in its supplementary written submissions, a dispute which is only peripherally or tangentially connected to the formation of the JVA.[84] It goes to the heart of that agreement.

174 Although *Donohue* is a decision under English law, the reasoning of Lord Scott at [60] is (see above at [42]), I believe, equally applicable to the interpretation of the JVA Arbitration Agreement under Korean law. The JVA Arbitration Agreement is not restricted to contractual claims. Lord Scott postulated a tort claim for fraudulent misrepresentation inducing the agreement containing the arbitration clause as being the sort of claim in tort which would be held to be a clause that arose "out of or in connection with" the agreement.

175 Here, the material wording of the JVA Arbitration Agreement is the same as was in the clause considered by Lord Scott and his postulated tort is of the same underlying nature as that alleged against the Directors and hence, GGS. Furthermore, GGS has more than sufficient interest in the outcome of the tort proceedings as it will be liable for any damages awarded.

176 I consider that the analogy with the facts and reasoning in *Donohue* is closer to the factual matrix in this case than are the facts and reasoning in *Mozambique*. In *Donohue* and in this case the allegation was that the illegal acts had induced the parties to enter the agreements on the terms which they did. In [106]–[109] of *Mozambique*, Lord Hodge explained that the matter identified

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84 Respondent's Supplementary Written Submissions dated 9 November 2023 at para 40.

as arising on the facts of that case was a factual dispute as to quantification which was held to be an insufficient connection.

177 Accordingly, I have concluded that the bringing of the Korean Compensation Proceedings was *prima facie* a breach of the JVA Arbitration Agreement.

178 Counsel for Asiana accepted that his clients were not taking a point on delay in relation to the current status of the Korean Compensation Proceedings, such that this would be an inappropriate case for the grant of an anti-suit injunction in favour of GGS to restrain the continuance of the proceedings as against it.

Issue 10: Is GGS entitled to an Anti-Suit Injunction to prevent the continuation of the tort claim against the Directors?

179 I refer back to the factors set out at [50] above. I have found that the JVA Arbitration Agreement on its true interpretation covers the tort claims against GGS. The next question is whether it is wide enough to cover tort claims not only against GGS but also its co-defendants. By parity of reasoning with that of Lord Scott in [60] and [61] in *Donohue* (see above [42]) I am satisfied that it does. To reach any other conclusion would be likely to lead to undesirable forum fragmentation. In all the circumstances, this is a clear case whereby the anti-suit injunction granted to GGS to prevent a breach of the JVA Arbitration Agreement should extend to cover the case against the Directors.

Issue 11: Are the Directors themselves entitled to an anti-suit injunction?

180 In the circumstances, it is not necessary that I should address this question. Had the tort action been brought only against the Directors, the analogy with the position of Gunvor in *Clearlake* (see above at [44]) would have been a strong one.

The Directors' Undertaking

181 I should record that counsel for the Applicants offered an undertaking from the Directors to participate in and be bound by any arbitration between Asiana and GGS commenced in consequence of this anti-suit injunction. It is appropriate that an undertaking of this nature should be given.

Conclusion

182 For the reasons given, GGK is entitled to an anti-suit injunction to restrain Asiana from proceeding further with the Korean CA Proceedings and GGS is entitled to a similar injunction restraining Asiana from proceeding further with the Korean Compensation Proceedings both against it and against the Directors.

183 The parties should seek to agree:

(a) The wording of the injunction;

(b) The wording of the Directors' undertaking; and

(c) The question of costs.

184 In so far as this cannot be done, the parties should within 21 days of this judgment file written submissions on the matters in dispute (limited to 5 pages)

and indicate whether they are prepared to dispense with an oral hearing on those matters.

Simon Thorley KC
International Judge

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