IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA(I) 8

Court of Appeal / Civil Appeal from the Singapore International Commercial Court No 12 of 2023

Between

Asiana Airlines, Inc

… *Appellant*

And

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

… *Respondents*

In the matter of Singapore International Commercial Court / 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

Asiana Airlines, Inc

… *Respondent*

JUDGMENT

[Arbitration — Restraint of proceedings — Foreign judicial]
[Arbitration — Agreement — Scope]

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

[2024] SGCA(I) 8

Court of Appeal — Civil Appeal from the Singapore International Commercial Court No 12 of 2023
Sundaresh Menon CJ, Steven Chong JCA, and Jonathan Hugh Mance IJ
23 July 2024

29 October 2024 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of a judge sitting in the Singapore International Commercial Court (the "Judge" and the "SICC", respectively) in *Gate Gourmet Korea Co, Ltd and others v Asiana Airlines, Inc* [2024] 3 SLR 199 (the "Judgment"). The Judge granted two anti-suit injunctions ("ASIs") restraining the appellant from continuing court proceedings in South Korea against the respondents. Both ASIs were granted on the basis that arbitration agreements between some of the relevant parties would be breached by the continuation of court proceedings against all of them, including the third and fourth respondents who were not parties to these agreements.

2 Although it is well-established that an ASI will generally be granted to

restrain court proceedings that are in breach of an arbitration agreement (or an exclusive jurisdiction clause), it is less clear whether this can – or should – be the case when the parties to the court proceedings, that are the subject of an ASI, are not also parties to the arbitration agreement. Put differently, can the breach of an arbitration agreement be relied upon to obtain an ASI preventing court proceedings against a non-party to that arbitration agreement? This is one of the questions raised in this appeal.

3 In this judgment, we consider this issue which, in our view, may become increasingly commonplace given the prevalence of transnational disputes.

Background facts

4 The background facts have been set out by the Judge (see the Judgment at [2]–[28]). For the present purposes, it suffices for us to focus on the parties' relationships, the contracts they entered into, and the proceedings that were commenced as a result of their dispute.

The parties

5 The appellant is Asiana Airlines, Inc ("Asiana"), a Korean company in the business of air travel. It owns subsidiaries in the Kumho Asiana Group. At the material time, one Mr Park Sam-Koo ("Chairman Park") was the chairman of the Kumho Asiana Group and the chief executive officer of Asiana.

6 There are four respondents (collectively, "Gate Gourmet"). The first respondent, Gate Gourmet Korea Co, Ltd ("GGK"), is a Korean company providing catering and other services to the airline industry. It was formed by a joint venture between Asiana and the second respondent, Gate Gourmet Switzerland GmbH ("GGS"), a Swiss company providing in-flight catering and

other airline handling services. GGS and GGK are part of the Gate Gourmet group of companies (the "Gate Gourmet Group"). The third and fourth respondents, Mr Christoph Schmitz ("Mr Schmitz") and Mr Xavier Rossinyol Espel ("Mr Rossinyol"), are, respectively, the current and former chief executive officers of the Gate Gourmet Group (collectively, the "directors").

7 Between 2016 and 2017, the parties entered into several contracts. There are two contracts, both of which were entered into on 30 December 2016, that are material to the present appeal.

(a) First, pursuant to a joint venture agreement to create GGK (the "JVA"), GGS and Asiana agreed, among other things, that they would respectively own 60% and 40% of GGK and would each make capital contributions.

(b) Second, GGK and Asiana entered into a catering agreement (the "CA"). Under the CA, Asiana agreed to appoint GGK as the exclusive caterer at Incheon Airport, and GGK agreed to provide catering and airline handling services to Asiana for a 30-year term from 1 July 2018 to 30 June 2048. In return, GGK agreed to pay an exclusivity fee of KRW53.33bn which was to be set off against Asiana's capital contribution towards the establishment of GGK.

8 Both the CA and the JVA contain arbitration agreements (the "CA Arbitration Agreement" and the "JVA Arbitration Agreement", respectively). It was subsequently revealed that the CA and the JVA were part of what was known as the "Package Deal", whereby Chairman Park planned to raise funds for his own benefit by selling Asiana's catering license to the Gate Gourmet Group in return for an investment of KRW200bn in Kumho Corporation Co

Ltd. It is Asiana's position that it did not know about the Package Deal during the negotiations of the CA and the JVA, as well as during the subsequent arbitral proceedings (see [9] below), and that it discovered the arrangement only when Chairman Park was subsequently indicted on 26 May 2021 (see [13] below). The Seoul Central District Prosecutor's Office acknowledged on 27 May 2021 that the Package Deal had been actively concealed from Asiana.

The arbitral proceedings

9 Shortly after entering into the CA, there was a disagreement between GGK and Asiana as to the interpretation of the pricing mechanism for the catering services that GGK was to provide, as set out in Annex 1.4 of the CA. As a result, on 17 June 2019, GGK commenced ICC Arbitration No 24544/HTG against Asiana (the "2019 ICC Arbitration") to resolve that dispute. GGK claimed that the pricing mechanism was binding, and Asiana was obliged to pay all outstanding invoices in the amount of approximately KRW35.8bn. In response, Asiana counterclaimed requiring GGK to negotiate an adjusted price mechanism, and to repay all sums that would be treated as excess payments having regard to that adjusted price. On 18 February 2021, the arbitral tribunal (the "Tribunal") issued its final award (the "Award"), in which it allowed GGK's claims and dismissed Asiana's counterclaims. This was supplemented by an addendum dated 2 April 2021.

10 Asiana commenced SIC/OS 11/2021 ("OS 11") in the SICC on 11 June 2021 to set aside the Award. For context, in the 2019 ICC Arbitration, GGK had contended that the CA had been entered into pursuant to the Package Deal. Asiana disagreed that there was a Package Deal: it had maintained that if this was the case, then Asiana had received inadequate value for the overall arrangement. Asiana had further contended that on this basis, Chairman Park

had caused Asiana to enter into a transaction that was beneficial to him and prejudicial to Asiana. In OS 11, Asiana contended that the Tribunal had acted in breach of natural justice, in that it failed to consider Asiana's argument that *if* there had been a Package Deal, as the Tribunal found, the consequence of this would be that the CA as a whole might be null and void pursuant to Arts 103 and 107 of the Korean Civil Code 2013 (Act No 11728 of 2013) (the "Korean Civil Code"). Asiana argued on this basis that the Tribunal should not have found that there was a Package Deal as GGK contended. The court dismissed OS 11 on 27 May 2022, but also observed that Asiana did not in the 2019 ICC Arbitration contend that GGK's interpretation would render the CA null and void, and to the contrary, Asiana's case was premised on the validity of the CA (see *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2022] 4 SLR 158 at [97]).

11 On 22 June 2022, Asiana appealed against that decision by way of CA/CAS 5/2022 ("CAS 5"). This was dismissed on 14 November 2022, without any reasons being provided by the court.

The indictment of Chairman Park

12 In the meantime, from some time in 2018, Asiana had been under investigation by the Korean Fair Trade Commission (the "KFTC") for matters relating to the Package Deal. On 27 August 2020, a fine of KRW32bn was imposed on Kumho Asiana Group by the KFTC, which then also referred the matter for further investigation to the Korean Prosecution Office (the "KPO").

13 Chairman Park was subsequently indicted by the KPO on 26 May 2021 for the offences of embezzlement, breach of trust, and violation of the Monopoly Regulation and Fair Trade Act. On 17 August 2022, Chairman Park

was convicted by the Seoul Central District Court in Case No 2021 Gohap 482 of the offences of embezzlement and breach of trust under the Act on the Aggravated Punishment of Specific Economic Crimes 2017 (Act No 15256 of 2017) (Korea) as well as violation of the Monopoly Regulation and Fair Trade Act and he was sentenced to ten years' imprisonment (the "Conviction Judgment"). His appeal is pending.

The court proceedings in Korea

14 In the meantime, two civil suits were commenced by Asiana against Gate Gourmet in Korea. These suits are the subject of the respondents' application for the ASIs.

15 Asiana first commenced Case No 2022 Gahap 51122 in the Incheon District Court (the "Korean CA Proceedings") on 24 January 2022 against GGK. This was to seek, among other reliefs, a declaration that the CA is null and void pursuant to Art 103 of the Korean Civil Code.

16 More specifically, Asiana contended that the Package Deal was a breach of trust by Chairman Park, which GGK participated in by entering into the CA. Asiana also argued that if the CA was null and void pursuant to Art 103 of the Korean Civil Code, the CA Arbitration Agreement would similarly be null and void. In response, GGK argued that the Korean CA Proceedings should be dismissed because it was initiated in breach of the CA Arbitration Agreement. Further, the 2019 ICC Arbitration had been conducted pursuant to the CA Arbitration Agreement, and in the course of the arbitration, Asiana did not dispute the validity of the CA Arbitration Agreement.

17 Subsequently, on 13 October 2022, Asiana commenced Case No 2022 Gahap 109880 in the Seoul Southern District Court (the "Korean Compensation

Proceedings") against GGS, Mr Schmitz, and Mr Rossinyol. Asiana argued that Mr Schmitz and Mr Rossinyol, as employees of GGS, were actively involved in the unlawful conduct of Chairman Park's Package Deal and were liable for tortious acts under Arts 750 and 760 of the Korean Civil Code. Asiana also argued that GGS was vicariously liable for the alleged acts of its directors, pursuant to Arts 35(1) and 756 of the Korean Civil Code.

18 We also mention Case No 2021 Kagi 1285 before the Seoul Southern District Court (the "Korean Enforcement Proceedings"), which GGK commenced on 20 May 2021 to enforce the Award in Korea. On 16 February 2024, the court issued its judgment (the "Korean Enforcement Judgment"), in which it allowed the enforcement of the Award.

Decision below

19 Gate Gourmet commenced the present proceedings in SIC/OA 14/2023 ("OA 14") before the Judge on 28 June 2023. The following grounds were relied upon by Gate Gourmet:

(a) as against GGK, the Korean CA Proceedings were *prima facie* in breach of the CA Arbitration Agreement; and were vexatious and oppressive, being an improper collateral attack on the 2019 ICC Arbitration;

(b) as against GGS, the Korean Compensation Proceedings were *prima facie* in breach of the JVA Arbitration Agreement; and

(c) as against the directors, the Korean Compensation Proceedings were vexatious and oppressive for being an improper attempt to circumvent the JVA Arbitration Agreement.

20 The Judge granted ASIs in respect of both sets of proceedings and in respect of all the defendants in those proceedings. The basis for both ASIs was the same: the proceedings were *prima facie* in breach of the respective arbitration agreements. The Judge did not rely on the submission that the Korean Compensation Proceedings were vexatious and oppressive to the extent those proceedings were being pursued against the directors. We briefly summarise the Judge's reasons.

21 With respect to the Korean CA Proceedings, the Judge rejected Asiana's arguments regarding non-arbitrability, invalidity of the CA Arbitration Agreement, and Art 9 of the Korean Arbitration Act 2016 (Act No 14176 of 2016) (the "KAA"). To provide some context on the final point, Art 9(1) obliges the court in Korea to dismiss an action whose subject matter falls within an arbitration agreement, unless the arbitration agreement is null and void, inoperative, or incapable of being performed. Art 9(3) in turn provides that where court proceedings referred to in Art 9(1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made while the issue is pending before the court in Korea. Asiana contended on this basis that it was open to Asiana to maintain the Korean CA Proceedings to show that the CA Arbitration Agreement was null and void. The dispute between the parties was whether Art 9 enabled Asiana to contest the validity of the CA Arbitration Agreement before the Incheon District Court in the Korean CA Proceedings without being in breach of the CA Arbitration Agreement, in circumstances where the Korean CA Proceedings had been commenced *after* the conclusion of the 2019 ICC Arbitration. We now outline the Judge's reasons for each of Asiana's three arguments.

(a) On the issue of non-arbitrability, under Korean law, which was the proper law of the CA Arbitration Agreement, the subject matter of

the proceedings was arbitrable. This was because the subject matter did not fall within any of the accepted categories of non-arbitrability in Korea; nor was there any statutory provision or precedent in Korea suggesting that the proceedings were not arbitrable (see the Judgment at [62]–[64] and [92]).

(b) Even if the CA was null and void pursuant to Art 103 of the Korean Civil Code, the doctrine of separability applied to preserve the validity of the CA Arbitration Agreement (see the Judgment at [98]–[101]).

(c) Finally, notwithstanding Art 9(1) of the KAA, Asiana was *prima facie* in breach of the CA Arbitration Agreement when it brought the Korean CA Proceedings. Art 9 contemplates the commencement of proceedings in the Korean courts *before* or in the course of concurrent arbitral proceedings; it does not apply where court proceedings are commenced after the conclusion of arbitral proceedings (see the Judgment at [112]–[114]).

22 Turning to the Korean Compensation Proceedings, the Judge addressed two main questions: (a) whether these fell within the scope of the JVA Arbitration Agreement; and (b) if so, whether an ASI could also be granted with respect to the claims against GGS and the directors (see the Judgment at [61]). The Judge answered both questions in the affirmative.

23 The Judge determined that the JVA Arbitration Agreement, which contained the words "[a]ll disputes, controversies or claims arising out of or in connection with this Agreement", was wide enough to include tortious disputes between the parties (see the Judgment at [8] and [171]–[173]).

24 The Judge also found that the JVA Arbitration Agreement was wide enough to cover claims not only against GGS but also against Mr Schmitz and Mr Rossinyol even though they were not parties to the JVA or the JVA Arbitration Agreement. This was because the substance of the Korean Compensation Proceedings had been to redress the damages suffered by Asiana owing to the directors' involvement in the entering into of the JVA (see the Judgment at [161]–[170]). He therefore considered that the ASI in favour of GGS to prevent the breach of the JVA Arbitration Agreement, should extend also to cover the claims against the directors. On this basis, it was not necessary for the Judge to decide whether the directors *themselves* were entitled to an ASI, but the Judge held that there was a strong analogy with *Clearlake Shipping Pte Ltd and Gunvor Singapore Pte Ltd v Xiang Da Marine Pte Ltd* [2020] 1 All ER (Comm) 61 ("*Clearlake*"), where it was noted that the objective interpretation of an exclusive forum clause would tend to include a tort claim against a non-party where that was necessary to prevent forum fragmentation (see the Judgment at [179]–[180]).

The parties' arguments on appeal

25 On appeal, Asiana raises several discrete arguments. These may be summarised as follows.

(a) The CA Arbitration Agreement and the JVA Arbitration Agreement are null and void.

(b) Public policy considerations weigh against any grant of the ASIs because: (i) the disputes in the Korean CA Proceedings and the Korean Compensation Proceedings are not arbitrable; and (ii) the Korean courts are in a better position to rule on matters that would have a significant impact on the Korean public.

(c) Art 9 of the KAA applies to the Korean CA Proceedings, and as a result Asiana had not breached the CA Arbitration Agreement when it commenced those proceedings.

(d) The Korean Compensation Proceedings do not fall within the scope of the JVA Arbitration Agreement, because the proceedings were brought against the directors on account of their own *active participation* in Chairman Park's unlawful scheme, with GGS being vicariously liable for the acts of its employees. The proceedings are therefore not closely related to the formation or performance of the JVA within the meaning of the JVA Arbitration Agreement.

(e) The JVA Arbitration Agreement does not extend to the Korean Compensation Proceedings against the directors. The ASI in respect of the Korean Compensation Proceedings could not, on any reasonable basis, extend to the claims against the directors.

26 We observe that Asiana's first argument, at least with respect to the JVA Arbitration Agreement, was raised for the first time in this appeal, while its argument in relation to the CA Arbitration Agreement was raised for the first time before the Judge. The significance of this cannot be understated, as we elaborate below (see [34]–[42]).

27 Gate Gourmet's arguments traverse each of Asiana's. It contends that: (a) the CA Arbitration Agreement and the JVA Arbitration Agreement are *prima facie* valid; (b) there are no public policy reasons to warrant the refusal of the ASIs; (c) the Korean Compensation Proceedings *prima facie* fall within the scope of the JVA Arbitration Agreement; (d) the ASI granted to GGS for the Korean Compensation Proceedings may extend to the claims against the

directors; and (e) the ASI for the claims against the directors in the Korean Compensation Proceedings should be upheld because they are in any case vexatious or oppressive.

Procedural history

28 Prior to the hearing of this appeal, the parties each applied to adduce further evidence on appeal.

29 Asiana's application, CA/SUM 14/2024 ("SUM 14"), was made on 15 March 2024 for permission to adduce further evidence in support of its submission that the CA Arbitration Agreement and the JVA Arbitration Agreement are null and void. This took the form of expert evidence from one Professor Hongki Kim.

30 Gate Gourmet, on the other hand, applied by way of CA/SUM 17/2024 ("SUM 17") on 18 April 2024 for permission to adduce the Korean Enforcement Judgment.

31 We considered SUM 14 and SUM 17 collectively and on 4 July 2024, we dismissed SUM 14 with costs to Gate Gourmet and made no order on SUM 17. As to the latter, we considered that the parties were free to refer to the Korean Enforcement Judgment for whatever value they thought it might have without the need for an order permitting them to do so. As for the former, we dismissed SUM 14 because in our judgment, it was an abuse of process under the principles set out in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*"). The rule there is that in the absence of special circumstances, a litigant may not litigate points that were not previously raised before and hence not determined by a court or tribunal, even though they could and ought properly to have been so raised and argued then (see *The Royal Bank of Scotland*

NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal [2015] 5 SLR 1104 at [101]). As we observed at [5]–[6] of our reasons in the minute sheet:

> 5. Asiana did not, in the arbitral proceedings, challenge the validity of the arbitration agreements. It argued only that the [T]ribunal ought to have considered that [GGK's] interpretation of the Catering Agreement would render the Catering Agreement null and void under the Korean law doctrine of abuse of power of representation. In [OS 11] and [CAS 5], Asiana also did not challenge the validity of the arbitration agreements. On the contrary, it proceeded on the basis that the arbitration agreements were valid. For instance, in its written submissions for OS 11 dated 7 February 2022 at paragraph 95, it argued only that the [T]ribunal failed to consider that GGK's interpretation of the Catering Agreement would render it null and void, without challenging the same for the CA Arbitration Agreement.
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> 6. During the arbitral proceedings and the setting aside proceedings, it was open to Asiana to raise the *alternative* argument that the CA Arbitration Agreement and the JVA Arbitration Agreement are null and void. But it did not do so. It was only in [OA 14] that Asiana first challenged the validity of the CA Arbitration Agreement. As for the argument that the JVA Arbitration Agreement is null and void, this was first raised in CAS 12. We find this to be an abuse of process.
>
> [emphasis in original]

32 We should reiterate that in the 2019 ICC Arbitration, Asiana had submitted that because GGK's interpretation of the CA as being part of a Package Deal could render it null and void, the Tribunal should have rejected this interpretation, so as to uphold the validity of the CA (see [10] above and [37] below).

Issues to be determined on appeal

33 The parties' cases on appeal span a wide variety of issues. However, in our judgment, this appeal turns on two issues:

(a) whether it is even open to Asiana to contend that the arbitration agreements are null and void; and

(b) whether an ASI may be granted for the claims against the directors.

Whether it is even open to Asiana to contend that the arbitration agreements are null and void

34 We begin with the issue of whether it is even open to Asiana to contend that the two arbitration agreements are null and void. This is a new argument that Asiana raised for the first time before the Judge (in the case of the CA Arbitration Agreement) and before us (in the case of the JVA Arbitration Agreement). It relies on two alternative grounds to support its argument.

(a) First, Asiana submits that the confidentiality of the arbitration agreements allowed Gate Gourmet to shield the Package Deal from public scrutiny. This was contrary to Art 103 of the Korean Civil Code, which sought to safeguard against illegality.

(b) Second, and in the alternative, Asiana submits that the arbitration agreements were entered into without authority and/or as a result of Chairman Park's abuse of his authority. It was said that the agreements were entered into without authority because Asiana's board of directors was not informed of the Package Deal, which was a self-dealing transaction requiring approval of the board pursuant to Art 398 of the Korean Commercial Act 2010 (Act No 10366 of 2010).

35 There is, however, an anterior question which must be addressed before we even consider Asiana's substantive arguments, and that is whether it is open to Asiana to take this point at this stage.

36 As noted above, we dismissed SUM 14 on the grounds that it was an abuse of process for Asiana to try to mount evidence in support of its attempt to contend that the arbitration agreements are null and void when it had multiple opportunities to challenge their validity and did not take any of these until the proceedings below and before us. Indeed, we specifically asked counsel for Asiana, Mr Benedict Teo ("Mr Teo"), whether he could even take this point given our decision in respect of SUM 14, the material part of which we have set out at [31] above. There were at least three such instances in which Asiana could have taken this point prior to this appeal, the first of which arose in 2019.

37 We begin with the 2019 ICC Arbitration. In those proceedings, Asiana did not challenge the validity of the CA and the CA Arbitration Agreement. Asiana's case was that the Package Deal did not exist, and that GGK's interpretation of the CA (as being part of a Package Deal) *could* render it null and void, and for that reason, Asiana's interpretation which would be consistent with the principle of effective interpretation under Korean law, should instead be preferred. In short, Asiana's position was that its interpretation should be preferred because that would uphold the validity of the CA and with it, the CA Arbitration Agreement. In line with this, Asiana advanced its counterclaim which plainly was predicated on the validity of the CA and of the CA Arbitration Agreement, and it undertook on multiple occasions to comply with its obligations under the CA if so ordered by the Tribunal. For instance, in a letter dated 14 August 2019, then-counsel for Asiana stated that once the "Tribunal makes a final determination [on the applicable pricing terms under the CA], GGK and Asiana will be obligated to pay or reimburse the unpaid balance to the other party". In its Statement of Defence and Counterclaim dated 25 March 2020, Asiana accepted that it would "settle the balance, if any, based on the ruling of this Tribunal as to the price that was duly payable by Asiana to GGK

under the Catering Agreement". This position was also maintained in its written submissions dated 25 September 2020.

38 Second, when Asiana applied to set aside the Award by its application and appeal in OS 11 and CAS 5 respectively (the "Setting Aside Proceedings"), it proceeded on the basis that the CA Arbitration Agreement was valid. In its written submissions for OS 11 dated 7 February 2022 at paragraph 95, it argued only that the Tribunal had failed to consider that GGK's interpretation of the CA would render it null and void, but at no time mounted the argument, whether on this basis or any other, that the CA Arbitration Agreement *was* invalid. Subsequently, in the Appellant's Case for CAS 5 dated 31 August 2022 at paragraph 54, Asiana maintained its challenge to the CA. It further contended that Chairman Park's conviction on 17 August 2022 would have had the effect of invalidating the CA, but again did not suggest that the CA Arbitration Agreement would similarly be invalidated.

39 Third, and most recently, before the Judge, Asiana challenged the validity of the CA Arbitration Agreement for the first time. It adduced an expert report by one Professor Lee Kitaik ("Professor Lee"), where he discussed at paragraph 49 a theory in Korean law that, where the contract is null and void under Art 103 of the Korean Civil Code, the arbitration agreement will similarly be null and void. Later at paragraph 56, he stated that "Asiana claims nullity of not only the CA but also the arbitration agreement in the CA". Asiana affirmed this in its written submissions for OA 14 dated 8 September 2023 at paragraph 63. In oral submissions before the Judge, former counsel for Asiana also stated on two occasions that the CA Arbitration Agreement was null and void under Art 103 of the Korean Civil Code. Yet, despite Asiana's challenge to the validity of the CA Arbitration Agreement, it did not challenge the validity

of the JVA Arbitration Agreement on precisely the same basis until the present appeal.

40 In our judgment, given that Asiana had the opportunity in the 2019 ICC Arbitration and the Setting Aside Proceedings to raise the argument that the CA Arbitration Agreement is null and void, and given that it *did not* take that point on either occasion, it is not open to Asiana to take the point and, indeed, it is an abuse of process for Asiana to attempt to raise this argument belatedly before us. We also consider it to be an abuse of process for Asiana to challenge the validity of the JVA Arbitration Agreement before us, when it could have done so before the Judge, which was an option it must have known was open to it given that it had challenged the validity of the CA Arbitration Agreement. Procedurally, this is also a new argument raised by Asiana on appeal, for which it did not apply for permission to raise on appeal, and for which we did not grant permission (see *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2024] 1 SLR 1 at [34]–[35]).

41 Mr Teo nonetheless submits that we should allow Asiana to pursue these points, even if belatedly, because, according to him, Asiana did not have the opportunity to challenge the validity of the arbitration agreements earlier. In particular, he submits that Asiana had been controlled by Chairman Park at the time of the 2019 ICC Arbitration and the Setting Aside Proceedings. We do not accept this. Asiana knew of Chairman Park's indictment on 26 May 2021 and his conviction on 17 August 2022, and, despite this, it did not challenge the validity of the arbitration agreements until considerably later. Indeed, the setting aside proceedings in OS 11 was commenced on 11 June 2021, and the appeal in CAS 5 was commenced on 22 June 2022, both of which were after Chairman Park's indictment.

42 Mr Teo also submits that Asiana was unsuccessful in its effort in CA/SUM 17/2022 to adduce other evidence, including the Conviction Judgment, in CAS 5. This seems to us to be an argument to the effect that because that application was dismissed, Asiana had no opportunity to alert the court to take into account Chairman Park's conviction and assess its impact on the validity of the CA Arbitration Agreement. We reject this submission. In our judgment, it is important to consider the purpose for which Asiana sought to adduce the Conviction Judgment. It is evident from Asiana's written submissions for CA/SUM 17/2022 dated 28 September 2022 at paragraph 18(d) that the Conviction Judgment was thought to be potentially material in CAS 5 because it showed that the Tribunal ought to have applied the "Doctrine of Effective Interpretation" to the CA, which would have led it to reject GGK's position, because that position would have resulted in the CA being rendered null and void. In its minute sheet dated 6 October 2022, the court noted that it dismissed CA/SUM 17/2022 because the Conviction Judgment concerned Chairman Park's criminal liability under Korean *criminal* law, and did not concern the effect the conviction could have on the validity or interpretation of the CA under Korean *civil* law. Further, even at this point, Asiana was not contending that the CA Arbitration Agreement, or for that matter the JVA Arbitration Agreement, was void.

43 For these reasons, we hold that Asiana cannot now argue that the arbitration agreements are null and void.

Whether the ASI against the Korean CA Proceedings should be granted

44 It follows that in respect of the ASI against the Korean CA Proceedings, which is premised on a *prima facie* breach of the CA Arbitration Agreement, unless we find that the Korean CA Proceedings are not arbitrable or do not

breach the CA Arbitration Agreement, the Judge's decision on this will be upheld.

45 In our judgment, Asiana has not discharged its burden of establishing that the dispute in the Korean CA Proceedings is non-arbitrable. Asiana contends that the dispute is contrary to Korean public policy, because the outcome of those proceedings will have an impact on Korea and, in particular, "its creditors and the individual shareholders who are members of the Korean public". It draws support for this, in part from the Seoul Central District Court's findings in the Conviction Judgment that Chairman Park had harmed the legitimate interests of various stakeholders in the Korean capital market and plunged the Kumho Asiana Group into a crisis. We reject this argument. It must first be stressed that the Korean court's finding in the Conviction Judgment as regards Chairman Park's conduct is not directly relevant to the dispute in the Korean CA Proceedings: while the former concerned Chairman Park's criminal liability, the latter deals with the validity of the CA and the CA Arbitration Agreement under civil law. Indeed, this was the reason relied upon by the court in CA/SUM 17/2022 to reject Asiana's attempt to rely on the Conviction Judgment (see [42] above). Other than the Conviction Judgment, Asiana has not adduced *any* expert evidence establishing the position under Korean law. More troubling, in our judgment, is how it has framed its argument on public policy in broad strokes. Proceedings involving corporations of a significant size will inevitably have *some* impact on the countries they operate in. It cannot be open to litigants to rely on this, without more, to assert that it is against public policy to arbitrate these disputes. Had Asiana forwarded its argument with greater specificity as to how Korean public policy might be undermined, and supported this with expert evidence, it would have had a better chance of persuading us. It has not done so, and we accordingly dismiss this argument.

46 Asiana has also failed to discharge its burden of demonstrating that Art 9 of the KAA allows it to contest the validity of the CA Arbitration Agreement before a Korean court without being in breach of the CA Arbitration Agreement. As mentioned (see [21] above), Art 9(1) obliges the court to dismiss an action whose subject matter falls within an arbitration agreement, unless the arbitration agreement is null and void, inoperative, or incapable of being performed. Our decision on the applicability of Art 9 requires an analysis of two points: (a) the relevance of Korean law to the question of whether mounting the Korean CA Proceedings entailed a breach of the CA Arbitration Agreement; and (b) whether Art 9 applies where court proceedings are commenced after the conclusion of arbitral proceedings. As to the latter point, this arises because of the factual context before us in this appeal: the Award was issued on 18 February 2021 (with an addendum on 2 April 2021); the Korean CA Proceedings were subsequently commenced on 24 January 2022. We address each point in turn.

47 The first point concerns the relevance of Korean law, which the Judge has found to be the governing law of the CA Arbitration Agreement (see the Judgment at [62]–[64]), and which the parties have not disputed on appeal. Counsel have made submissions on the interpretation of Art 9 of the KAA, without considering the anterior question of *why* the KAA is relevant in determining whether the CA Arbitration Agreement has been breached. In our judgment, the applicable law for determining whether an arbitration agreement has been breached is the governing law of that agreement. We draw support for this from *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117 ("*Enka*"). Despite the disagreement between the majority and the minority as to the governing law of the arbitration agreement, it was undisputed that, had the governing law been Russian law, the English court

would have to apply Russian law to interpret the arbitration agreement to determine whether the commencement of Russian proceedings was a breach of the agreement to arbitrate in England (see *Enka* at [185], *per* Lord Hamblen and Lord Leggatt, as part of the majority with Lord Kerr, and [261], *per* Lord Burrows, as part of the minority with Lord Sales). In a similar vein, we observed in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [76] that the governing law of the arbitration agreement is relevant in determining whether there was a breach of the arbitration agreement. Therefore, the interpretation of Art 9 of the KAA, as a matter of Korean law, is of relevance in so far as the CA Arbitration Agreement is governed by Korean law.

48 The second point requires an interpretation of Art 9 of the KAA, with the assistance of expert evidence. While both parties adduced expert evidence before the Judge, their experts address only a situation where both court and arbitral proceedings are pending. For instance, Asiana's expert, Professor Lee, suggested that "*even in the midst of 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" [emphasis added]. On the other hand, Gate Gourmet's expert, Professor Hi-Taek Shin ("Professor Shin"), stated that "even if the counterparty were to commence an arbitration to adjudicate the existence or validity of the arbitration agreements *while the litigation is pending*, the KAA does not require the courts to stay the litigation" [emphasis added]. He also referred to a 2018 Supreme Court of Korea decision that provides that "*while an arbitration proceeding is pending*, the party arguing the non-existence or invalidity of an arbitration agreement may file litigation on the subject matter of the arbitration agreement, and the court may also determine the non-existence or invalidity of an arbitration agreement" [emphasis added].

Neither of these expert reports provide us with any assistance on the factual context that is presented before us, where the arbitration has already been completed pursuant to the arbitration agreement, and even more so, where, as here, an application to set aside the award has failed.

49 It is for Asiana to persuade us that its interpretation of Art 9 of the KAA is correct, if it is to succeed in establishing that its commencement of the Korean CA Proceedings was not in breach of the CA Arbitration Agreement. It has failed to do this. On the contrary, the natural reading of Arts 9(1) and 9(3) is, in our view, that they concern situations where an arbitration has not been commenced or not been concluded. Once an arbitration has been concluded by an award, the remedy open to a disaffected party is either to apply to it set aside in the court of the seat or to resist enforcement, as the case may be. Accordingly, we uphold the Judge's grant of the ASI against the Korean CA Proceedings.

Whether the ASI against the Korean Compensation Proceedings should be granted

50 We turn to the ASI against the Korean Compensation Proceedings, where, besides the argument that the JVA Arbitration Agreement is null and void (which we have dismissed), Asiana also contends that the proceedings are not arbitrable; that the proceedings do not fall within the scope of the JVA Arbitration Agreement; and that the ASI should not extend to the claims against the directors.

51 Asiana's first argument that the Korean Compensation Proceedings are not arbitrable is premised on the same reasons that it argues the Korean CA Proceedings are not arbitrable. Given that we have dismissed this with respect to the Korean CA Proceedings due to the lack of evidence adduced by Asiana,

we similarly dismiss this argument with respect to the Korean Compensation Proceedings and repeat our comments at [45] above.

52 As regards Asiana's second argument regarding the scope of the JVA Arbitration Agreement, it contends that because the Korean Compensation Proceedings were primarily brought against the directors for their active participation in Chairman Park's unlawful scheme, with GGS being only vicariously liable, the proceedings are not closely related to the formation or performance of the JVA within the meaning of the JVA Arbitration Agreement. We do not agree with Asiana's reading of the JVA Arbitration Agreement, which is located in cl 34.2 of the JVA, and provides as follows:

> 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.

53 Under Korean law, arbitration agreements are generally broad enough to encompass disputes over non-contractual claims. This is provided for in Art 3(ii) of the KAA, which 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*" [emphasis added]. This is drafted in similar terms to Art II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (more commonly known as the New York Convention), which defines an arbitration agreement as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, *whether contractual or*

not, concerning a subject matter capable of settlement by arbitration" [emphasis added]. We agree with Professor Shin, who stated that the words "whether contractual or not" in the KAA were intended 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".

54 In the present circumstances, the JVA Arbitration Agreement is drafted broadly, as it provides for "[a]ll disputes, controversies or claims arising out of or in connection" with the JVA to be resolved by arbitration. As stated by Professor Shin, the Supreme Court of Korea has observed that this includes "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". A dispute regarding tortious liability may be closely related to the performance of the relevant contract. Indeed, this was not disputed by Professor Lee, who agreed that an arbitration agreement covers a dispute closely connected to the contract's execution, performance, and validity. We are therefore of the view that the Korean Compensation Proceedings, which involves claims against both the directors and GGS, fall within the scope of the JVA Arbitration Agreement.

55 Having addressed the first two of the three arguments raised by Asiana, this suffices for us to uphold the Judge's grant of the ASI in respect of the claim against GGS in the Korean Compensation Proceedings.

56 We finally turn to the claims against the directors in the Korean Compensation Proceedings. As to this it is necessary for us to determine whether the ASI may extend to them, either: (a) on the contractual basis of the JVA Arbitration Agreement; or (b) on the non-contractual basis that the proceedings are vexatious or oppressive. We turn to address this issue.

Whether an ASI may be granted for the claims against the directors

57 Gate Gourmet relies upon two grounds to obtain an ASI in respect of the claims against the directors: (a) first, that GGS should be granted an ASI that *extends* to the claims against the directors on the basis that the institution of foreign proceedings is in breach of an agreement between the parties; and (b) second, that the directors should be granted an ASI on the basis that the foreign proceedings would be vexatious and oppressive to the directors if allowed to continue.

58 In the context of this appeal, the unusual feature is that GGS seeks an ASI that extends to the action being pursued against the third and fourth respondents who are not party to the JVA or the JVA Arbitration Agreement. This raises a potential difficulty in so far as the application rests on the first ground, namely, that the pursuit of the foreign action would be in breach of an agreement between the parties. GGS as the ASI claimant would have to show that if Asiana pursued the claim against the third and fourth respondents, it would breach *GGS's* rights under the JVA Arbitration Agreement.

59 On the other hand, the directors also contend that the ASI should be granted on the basis that the Korean Compensation Proceedings are vexatious or oppressive to them. This is independent of any question of the action being pursued in breach of an arbitration agreement. But it also faces a high threshold.

60 We consider the applicable law in this connection.

61 The question whether an ASI may be sought by or in favour of a non-party to an arbitration agreement is not straightforward. In *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 ("*Hai Jiang*"), Quentin Loh J (as he then was) in the High Court surveyed the relevant

authorities from a number of jurisdictions and set out certain principles, while also acknowledging at [82]–[83] that this area of law was still developing and some of the judicial underpinnings remained in need of clarification. On the facts before him, Loh J concluded (at [45]) that the ASI claimant had established, even if barely, a *prima facie* case that it had by assignment acquired the rights under the arbitration agreement in a contract, so that it could obtain the ASI to restrain the foreign proceedings that appeared to have been brought contrary to the ASI respondent's obligation to arbitrate. He then went on to consider an alternative argument that, in any case, the obligation to arbitrate may extend to, and be enforced by an ASI in, circumstances where foreign court proceedings are brought under or with reference to an exclusive forum clause by which the respondent in the foreign proceedings is not necessarily bound. Loh J analysed the position as follows:

> (a) Citing *Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 ("*The Angelic Grace*"), an ASI would be granted to enforce exclusive forum clauses unless there are strong reasons to the contrary. The paradigm situation is one where the clause appears to be valid, the foreign proceedings are in breach of such a clause, the claim in the foreign jurisdiction falls within the terms of the exclusive forum clause, and the ASI respondent appears to be in breach of it (see *Hai Jiang* at [54]).
>
> (b) This will also extend to any party who becomes bound by the clause, such as an insurer who becomes subrogated to the rights of its insured, or an assignee (see *Hai Jiang* at [55]).
>
> (c) A party that wishes to take the benefit of the contract will be treated as bound by the burden of an exclusive forum clause (see *Sea*

> *Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] EWHC 540 (Admlty)). Thus, a party who claims not to be a party to a contract, in respect of which proceedings have been brought contrary to the terms of an exclusive forum clause in that contract, is nonetheless entitled to seek an ASI. The operative principle is that if the ASI respondent wishes to pursue its claims against the ASI claimant despite the latter's denial that it is party to or otherwise bound by the contract, then the ASI respondent can be compelled to abide by the exclusive forum clause governing a claim founded upon the contract in question (see *Hai Jiang* at [57] and [81]). It has been suggested in at least some of the authorities (see *Dell Emerging Markets (EMEA) Ltd and another v IB Maroc.com SA (a body corporate)* [2017] EWHC 2397 (Comm) at [34]) that this is so because it would be "inequitable or oppressive and vexatious for a party to a contract … to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract" (see *Hai Jiang* at [63(b)]).

We note in passing that some of these points have been more recently considered: see, for instance, *Times Trading Corporation v National Bank of Fujairah (Dubai Branch) (The Archagelos Gabriel)* [2020] EWHC 1078 (Comm) and *QBE Europe SA/NV anor v Generali España de Seguros y Reaseguros* [2022] EWHC 2062 (Comm).

62 These are situations where the ASI sought is based directly, or indirectly, on an exclusive forum clause; or on the premise that a party suing on an agreement that contains an exclusive forum clause cannot ignore that clause, even if the party being sued claims not to be bound by that agreement. However, Loh J also referred at [71]–[77] to a pair of ASIs that had been granted in

Clearlake in respect of proceedings in Singapore. The grant of the ASIs in that matter were significantly impacted by the consideration that unacceptable "forum fragmentation" should be avoided.

63 This is a distinct principle from one that is rooted directly or indirectly in the notion that a party should be held to an exclusive forum clause. The latter is essentially rooted in the notion of consistency: a party cannot pick and choose the parts of the contract it will apply or enforce while rejecting others. The former, on the other hand, is reflective of the pragmatic concern for sensible case management. While this will often be a weighty consideration, in our judgment, it cannot extend beyond the limits of principle. This is particularly so where there are overlapping but distinct disputes between different sets of parties, bound by different contracts or subject to different duties. In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*"), we sought to contain the issues and potential difficulties through sensible case management and the imposition of a case management stay in respect of certain aspects of the proceedings. This was done by inviting all the parties before us to arbitrate their dispute, despite some of them not being originally subject to the arbitration agreement (see *Tomolugen* at [190]). We stress that in *Tomolugen*, parties were invited to participate in arbitral proceedings to prevent forum fragmentation; they were not compelled and in any event the court does not have the power to compel. Importantly, what the court does as part of its case management powers should not and cannot be taken to be the default rule applicable in all circumstances, to the effect that non-parties to an exclusive forum clause can be made to comply with an exclusive forum clause that they have not agreed to.

64 We turn to consider how far applications for an ASI against a party that is not privy to an exclusive forum clause have been taken or conversely, how

the interests of those not party to an exclusive forum clause have been affected by the position of a party to such a clause.

65 We begin with *Donohue v Armco Inc and others* [2002] 1 All ER 749 ("*Donohue*"). This was an appeal to the House of Lords against the grant of an ASI against New York proceedings on the basis that it violated exclusive jurisdiction clauses in favour of the English courts, which were located in three agreements (see *Donohue* at [7]). The New York proceedings were commenced by a group of companies that included Armco Inc and its subsidiaries ("Armco" and the "Armco Group", respectively), against a number of Armco executives and their companies. This dispute arose out of Armco's sale of its shares in the British National Insurance Group ("BNIG") (see *Donohue* at [3]–[6]). Of the defendants in the New York proceedings, only Mr Donohue and two Jersey companies, Wingfield Ltd and CISHL, were parties to the three agreements (see *Donohue* at [7]). Mr Donohue applied for the ASI to restrain the commencement or continuation of the New York proceedings against the defendants (*including non-parties to the agreements*) in any court other than those of England and Wales regarding any dispute arising out of the disposal of the BNIG. Mr Donohue was successful before the Court of Appeal and all the proceedings in New York were restrained as a result, including those involving non-parties to the exclusive jurisdiction clauses (see *Donohue* at [10] and [15]).

66 *Donohue* is noteworthy because, not only was it the case that some of the defendants in the New York proceedings were not party to the relevant agreements with the exclusive jurisdiction clause, but in addition, some of the claims against the defendants in the New York proceedings could only be pursued in New York and not England. If the ASI was maintained by the House of Lords against the New York proceedings, then the New York plaintiffs would not be able to obtain relief in respect of some of the reliefs at all. On the other

hand, if the ASI was not granted, and the New York proceedings continued, it would potentially expose some of the New York defendants to damages that they would not be liable for if the proceedings were to take place in England. The injustice in this would be heightened by the fact that some of those defendants had the benefit of a contractual right not to be sued in any jurisdiction other than England. On the other hand, if the proceedings were split between New York and England based on the diverse contractual arrangements as to choice of jurisdiction, it would lead to forum fragmentation.

67 The House of Lords reversed the decision of the Court of Appeal (see *Donohue* at [39]–[42] and [76]). The majority declined to grant the ASI, but pragmatically procured an undertaking from Armco and the Armco Group that they would not enforce against Mr Donohue, Wingfield Ltd, and CISHL any damages awarded in the New York proceedings that would not otherwise be awarded in English proceedings (see *Donohue* at [39]). Lord Bingham of Cornhill in the majority noted that although Mr Donohue was a party to the agreements containing the exclusive jurisdiction clauses, some of the New York plaintiffs and the New York defendants were not, and considerable weight was placed on the need to avoid fragmentating the litigation between New York and England (see *Donohue* at [29]–[34]). In short, the interest in avoiding forum fragmentation was invoked as a basis for *not* granting the ASI, so long as safeguards were in place to avoid prejudice to those who lost the benefit of the exclusive forum clause.

68 In his concurring judgment at [60]–[62], Lord Scott of Foscote suggested a somewhat different approach in *obiter*. Lord Scott thought that a party to an agreement that contained an exclusive forum clause could in certain circumstances get an ASI not only in respect of proceedings against himself but also in respect of proceedings commenced against a co-defendant who was not

the beneficiary of the exclusive forum clause if there was a prospect of joint and several liability arising. Lord Scott reasoned that this would be defensible where: (a) the exclusive forum clause was wide and covered "any dispute", instead of being limited to "any claim against" a contractual party; and (b) the ASI claimant has a sufficient interest in obtaining the ASI to avoid incurring liability as a joint tortfeasor. Lord Scott framed the sufficiency of the interest of the ASI claimant in these terms at [61]:

> [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.

Lord Scott was of the view that in the circumstances of the appeal, the exclusive jurisdiction clauses applied not only to the benefit of Mr Donohue, but also to the other defendants in the New York proceedings, despite some of them being non-parties to the agreements (see *Donohue* at [76]). When considering Lord Scott's speech, it should be noted that Lord Scott was, in this respect, taking a view of the scope of the relevant exclusive forum clause different from that taken by all his colleagues (see the majority judgment of Lord Bingham at [15] and [30], and Lord Scott's own final paragraph at [76]).

69 Despite Lord Scott's observations in *Donohue* at [60]–[62], it appears that his Lordship was ultimately persuaded to decline to grant the ASI because some of the claims against the defendants in the New York proceedings could

only be pursued in New York and not England. The "overriding factor", in Lord Scott's judgment, was "the evident absurdity of requiring some claims … to be litigated in England notwithstanding that the rest will be litigated in New York" (see *Donohue* at [75]).

70 Lord Scott's observations in *Donohue* have evoked a range of views and reactions. Some have noted that it is impermissible to grant such relief without a contractual basis, a point noted in Lord Bingham's judgment at [15].

71 Others have suggested that it might be defensible only in very specific and limited facts, where a party to the foreign proceedings (A) has no direct contractual entitlement to have the matter tried in a particular jurisdiction, but is held jointly and severally liable with another party (B); Lord Scott's comments in *Donohue* may apply in respect of a tort claim brought by a claimant (C) against A, and where B and C are both subject to the exclusive forum clause (see Thomas Raphael QC, *The Anti-Suit Injunction* (Oxford University Press, 2nd Ed, 2019) ("*The Anti-Suit Injunction*") at paragraph 7.3.1).

72 In thinking about the grant of an ASI in circumstances where some of the parties to the foreign proceedings have the benefit of an exclusive forum clause while others do not, we think it also helpful to have regard to the following observations of the court in *Team Y&R Holdings Hong Kong and others v Ghossoub; Cavendish Square Holding BV and another v Ghossoub* [2017] All ER (D) 81 (Nov) ("*Team Y&R*") at [82]:

> (1) Whether an exclusive jurisdiction clause should be understood to oblige a contractual party to bring claims relating to the contract in the chosen forum even if the claim is one against a non-contracting party, requires a consideration of the contract as a whole including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended.

(2) The principle that rational businessmen are likely to have intended that all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court cannot apply with the same force when considering claims brought by or against non-contracting third parties. More particularly, whilst it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties.

(3) Where it is clear from the express terms that the contracting parties have turned their minds to the position of third parties and more particularly whether such third parties are to benefit or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the exclusive jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties.

(4) Where the exclusive jurisdiction clause is silent on the question, the fact that any provision in the contract dealing with third parties indicates an intention that third parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the clause was not intended either to benefit or prejudice such third parties.

(5) Where a particular interpretation of the exclusive jurisdiction clause produces a material contractual imbalance because for example it results in one party to a dispute relating to the contract being subjected to an obligation to bring proceedings in the chosen jurisdiction in circumstances where the other party to the dispute is not similarly obliged, or where that interpretation would require a claim against a non-contracting third party to be brought in the agreed jurisdiction even where the chosen forum may not actually have jurisdiction over such a claim against that party, this too may be an indication that the clause was not intended to so apply because such a result is unlikely to be what the contracting parties as rational businessmen would have agreed.

(6) The fact that there is nothing in the contract that might indicate a rational limit in terms of the identity of non-contracting third parties whose rights and interests might be affected by the application of an exclusive jurisdiction clause might provide a further indication that the clause was only

> intended to affect the rights and interests of the contracting parties.
>
> (7) It follows that where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured.

73 In our judgment, the principles set out in *Team Y&R* correctly reflect the position. The starting position is that it is a matter of interpreting the contract to ascertain whether the parties contemplated that the exclusive forum clause would also avail in respect of claims against third parties. In keeping with the requirement of privity, this would usually mean that such clauses will not avail in relation to non-parties absent a quite clear indication otherwise. This is in line with our observations in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 ("*Rals International*") at [55] that allowing a non-party to an arbitration agreement to avail itself of the right to arbitration under that agreement would, on its face, conflict with the doctrine of privity.

74 We turn to briefly consider applications for an ASI on the basis that the continuance of the foreign proceedings would be vexatious or oppressive. This was touched on in *Clearlake* where the court reasoned at [34(ii)] that it was vexatious and oppressive for Xiang Da Marine Pte Ltd ("Xiang Da") to seek to avoid being bound by the exclusive jurisdiction clause in the charter. For context, Xiang Da had chartered a vessel to Clearlake Shipping Pte Ltd ("Clearlake Shipping"), who in turn sub-chartered it to Gunvor Singapore Pte Ltd ("Gunvor"). As a result of certain alleged misrepresentations made by Xiang Da to a Chinese company, Xiang Da commenced third-party proceedings in Singapore, where it pursued a contractual claim against Clearlake and a

tortious claim against Gunvor. The defendants to the Singapore proceedings each sought an ASI: Clearlake Shipping relied on the exclusive jurisdiction clause, while Gunvor contended that it would be vexatious and oppressive for Xiang Da to continue the Singapore proceedings. The court observed as follows at [34(ii)]:

> Xiang Da has manipulated its third party claims to try to avoid being caught by the exclusive jurisdiction clause in the Clearlake charter. It was Clearlake (through China Grace), not Gunvor, that directly dealt with Xiang Da. The email of 1 April 2016, containing the alleged misrepresentation 'due to receiver's request', was directly provided to Xiang Da (through China Grace) by Clearlake not Gunvor. In other words, despite the criminal case mentioned in paragraph 11 above, the most obvious tortious misrepresentation claim, open to Xiang Da, would be against Clearlake not Gunvor; and it appears that the claim against Gunvor rests on the misrepresentations being passed on by Clearlake to Xiang Da. If Gunvor were to be held liable to Xiang Da for tortious misrepresentation, it is hard to see why Clearlake would not also be so liable; and certainly one would normally expect Clearlake to be sued for tortious misrepresentation if Xiang Da were suing Gunvor for such misrepresentations. Yet such a claim against Clearlake would have fallen within the exclusive jurisdiction clause in the Clearlake charter; and, had the misrepresentation claim been brought against Clearlake in England (as required by the exclusive jurisdiction clause in the Clearlake charter) it would plainly have constituted unacceptable forum fragmentation on the same issues for the misrepresentation claim against Gunvor to have been heard in Singapore. Although I reject the submissions, forcibly put on behalf of Gunvor (and Clearlake), that the tort claim against Gunvor is hopeless (so that I do not think that this case is equivalent to *Shell International Petroleum Co v Coral Oil Co Ltd (No 2)* [1999] 2 Lloyd's Rep 606), I consider that the bringing of the tortious misrepresentation claim solely against Gunvor and not against Clearlake is a procedural manoeuvre designed to evade the exclusive jurisdiction clause. It may well be that this precise type of procedural manoeuvre has not previously triggered an antisuit injunction on the ground of being vexatious or oppressive; but, as we have seen at paragraph 18(ii) above, the categories of what counts as vexation or oppression should not be regarded as closed.

75 The point was also considered in Hong Kong in *Giorgio Armani SpA and others v Elan Clothes Co Ltd f/k/a Dalian Les Copious Clothes Co Ltd* [2020] 1 HKLRD 354 ("*Giorgio Armani*"). The dispute there arose out of a contract between Armani SpA and Elan, pursuant to which Elan was to purchase Armani products from Armani HK and Armani Shanghai. The contract contained an arbitration agreement (see *Giorgio Armani* at [2]). Elan commenced court proceedings in China against Armani SpA, Armani HK, Armani Shanghai, and Mr Giorgio Armani (the chairman of Armani SpA, ("GA")) (see *Giorgio Armani* at [5]). The defendants applied for an ASI in respect of the Chinese proceedings. The court granted this on the basis that the contract extended to the latter three defendants. However, the court held that even if "there was no arbitration agreement between Elan, [Armani] Shanghai, [Armani] HK and GA", it would have been prepared to grant the ASI on the basis that it would be unconscionable to allow Elan to pursue the Chinese proceedings (see *Giorgio Armani* at [29]). The court held that: (a) the claims – including the tortious claims – related to and arose out of the commercial relationship in the contract and should be pursued in arbitration; and (b) importantly, Elan was attempting to bypass the arbitration agreement and to subject the defendants to duplicative costs and inconvenience in parallel proceedings on the same issues (see *Giorgio Armani* at [30]–[33]).

76 We highlight these observations at [33]:

> 33. In my view, the steps taken by Elan on the Mainland by instituting the Shangdong Proceedings against [Armani] SpA and extending the claims to [Armani] Shanghai, [Armani] HK and GA all of which are closely associated, are vexatious attempts to bypass the arbitration agreement, and to subject the plaintiffs to duplicative costs and inconvenience in parallel proceedings on the same issues. It would be unconscionable for this Court to allow Elan to pursue its claims against [Armani] SpA and its associates on the Mainland, when such claims fall within the scope of the arbitration clause in the [Master

> Agreement] (*BNP Paribas SA v Open Joint Stock Co Russian Machines* [2011] EWHC 308 (Comm)). It is no less unconscionable of Elan to make a claim against [Armani] Shanghai, [Armani] HK and GA otherwise than through arbitration, than it would be for Elan to make a claim against [Armani] SpA, when the true substance of its claim arises under and derived from the supply and sale of the Products bearing the Armani Marks under the [Master Agreement], and the relationship created under the [Master Agreement].

77 In our judgment, where an ASI is sought against a party that is not subject to an exclusive forum clause, as we have foreshadowed at [73] above, the starting point is that this will not normally be granted unless the court finds that the clause was intended to also apply to the non-party. However, an ASI may also be granted where the court finds that the foreign action has been brought against the non-party for ulterior reasons, namely to bypass or avoid the constraints of the exclusive forum clause. In the latter category, among the key considerations is whether in pursuing the foreign proceedings, the ASI respondent is, in truth, seeking to evade its obligations under the exclusive forum clause or is in some way acting in bad faith. In such a situation, if the court grants the ASI, it will have been satisfied that the action against the non-party was not being pursued for a legitimate purpose.

The applicable law in Singapore

78 We turn then to consider and summarise the position in Singapore.

Distinction between an arbitration agreement and an exclusive jurisdiction clause

79 Before we turn to this, we dispose of a preliminary issue. This is whether, for the purposes of the present analysis, a distinction should be drawn between an arbitration agreement and an exclusive jurisdiction clause. This was the subject of dispute between parties, with Asiana contending that there was

such a distinction, given that while a court's jurisdiction is provided for at law, an arbitral tribunal's jurisdiction is founded upon consent. As a result, an arbitral tribunal would not have jurisdiction over a dispute involving a non-party to the arbitration agreement. Gate Gourmet on the other hand, submits that the same principles apply without distinction.

80 In our judgment, there are some differences but also important similarities between an arbitration agreement and an exclusive jurisdiction clause. Both represent the agreed conferral of jurisdiction upon a particular dispute resolution forum, in circumstances where none might otherwise exist. For instance, one of the implied negative obligations arising from an arbitration agreement is the obligation not to pursue claims in relation to disputes falling within the arbitration agreement in any other forum (see *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [53], citing *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889 at [1]). In a similar fashion, exclusive jurisdiction clauses represent the parties' agreement to bring all disputes within the scope of that agreement to an agreed forum. To safeguard party autonomy, ASIs are granted to restrain proceedings commenced in breach of exclusive jurisdiction clauses (see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [114]–[115]), just as they are granted to prevent a party from proceeding with a claim in breach of an arbitration agreement.

81 As noted by the English Court of Appeal in *The Angelic Grace* at 96, "[t]he justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy". More recently, the English High Court has observed that while there may well be some differences of

principle, in broad terms, "the principles appear to apply with equal force where an [ASI] is sought by reference to either an exclusive jurisdiction clause or an arbitration agreement" (see *Cupreus Sarl v Whiteshell Group Ltd* [2023] All ER (D) 125 (Dec) at [14]).

82 Asiana seeks to distinguish the two by focusing on party consent. It is trite that an arbitral tribunal derives its jurisdiction on party consent (see *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 at [78]). Relying on this, Asiana suggests that the practical effect of an ASI would differ depending on whether there is an arbitration agreement or an exclusive jurisdiction clause. In the former case, a non-party cannot be forced to arbitrate absent an arbitration agreement. But in at least some cases, the same may be said of national courts, save where the national courts happen to be the natural forum, or there is an exclusive jurisdiction clause in place.

83 For most practical purposes, and certainly for the purposes of this appeal, we see no basis for drawing a distinction between the two situations. For clarity, we will hereafter refer to both types of clauses collectively as "exclusive forum clauses".

The applicable test for the grant of an ASI

84 We turn to consider the position under Singapore law. In our judgment, a party to a contract with an exclusive forum clause (A) may apply for an ASI to prevent proceedings commenced by another party (B) against a non-party (C), where it can show either

(a) that the clause was intended to also cover the non-party in the sense that, upon its true construction, B agreed under it with A that B

would sue C, if at all, only in the exclusive forum agreed as between A and B; or

(b) that the real purpose for suing the non-party is to bypass the exclusive forum clause in a manner making the foreign proceedings vexatious and oppressive between A and B (as noted at [74]–[77] above).

And, to the extent C was able to show it would be vexatious and oppressive to C to allow the foreign proceedings to continue against it, it too would be able, in its own right, to seek an ASI against B.

85 However, we respectfully do not accept the suggestion of Lord Scott in *Donohue*, that would predicate the grant of the ASI on whether the ASI claimant has a *sufficient interest* in obtaining the ASI. One example of such sufficient interest given by Lord Scott is where the proceedings commenced by B might entail the consequential liability of A, the ASI claimant (see *Donohue* at [61]).

86 In our judgment, this would result in a threshold that could be overinclusive, in the sense of preventing legitimate claims being pursued in a foreign jurisdiction against non-parties by means of an ASI. Using the facts of *Donohue* as an example, it is not clear why the claim against the non-party would necessarily be abusive unless it were suggested, implausibly in our view, that *any* claim potentially involving joint liability should be restrained.

87 We also do not see why B should be prevented from exercising its right to bring proceedings against C in a forum of its choice, assuming that forum has jurisdiction over C, and provided there is no contractually stipulated forum as between B and C. In such a case, B has a *prima facie* right to pursue its claim against C. We do not think that an exclusive forum clause between A and B can

be so elastic, that it is capable of preventing B from suing non-parties who may not be bound by that agreement. To suggest otherwise seems contrary to the basic principles of privity (see *Rals International* at [55]). While the court will take a generous approach towards the construction of arbitration agreements (see *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [19]–[20]), the starting position where a non-party is concerned is that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties (see *Team Y&R* at [82]).

88 One of the main reasons advanced in support of Lord Scott's approach in *Donohue* was the risk of forum fragmentation (see *Hai Jiang* at [81]). We think this risk should not be overstated, especially in the context of arbitration agreements, because such disputes are *inherently* prone to forum fragmentation. When parties agree to arbitrate their disputes, they remove such disputes from their natural forum, which are the national courts, and which typically have the ability to bring involving parties with related interests or liabilities into consolidated proceedings. And unfortunately, related disputes that do not fall within the arbitration agreement cannot be decided by the same arbitral tribunal because this has not been agreed by parties. The risk of forum fragmentation can neither prevent parties from agreeing to arbitrate their disputes, nor prevent a party from pursuing a claim by any means available to it in the absence of an arbitration agreement.

89 As for when an ASI may be granted to prevent vexatious or oppressive conduct, in our judgment, this will typically face a high threshold, but it can arise in a number of situations, and the list of such situations is not closed. In

VEW v VEV [2022] 2 SLR 380 at [44], it was noted that vexation or oppression had been found in the following instances:

(a) Where foreign proceedings were instituted in bad faith or for no good reason, or were bound to fail, or would cause extreme inconvenience (see *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [47]).

(b) Where foreign proceedings amounted to an unlawful attack on the plaintiff's legal rights, such as where the ASI respondent challenges the ASI claimant's right to claim limitation in a forum of their choice, and thereby frustrates or subverts the latter's legal rights conferred by the limitation decree and limitation fund in the context of a collision claim (see *Evergreen International SA v Volkswagen Group Singapore Pte Ltd and others* [2004] 2 SLR(R) 457 at [46]–[64]).

(c) Where foreign proceedings are duplicative of Singapore proceedings (see *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd and others* [2015] 5 SLR 873 ("*PT Sandipala*") at [112]–[119]). Because there is no presumption that a multiplicity of proceedings is inherently vexatious or oppressive, something additional will be required, such as the positive and voluntary involvement of the ASI respondent in the local proceedings, or a consideration of the extent to which the local proceedings had already progressed before the commencement of parallel foreign proceedings (see *PT Sandipala* at [137]; *The Anti-Suit Injunction* at paragraphs 19.43–19.44).

90 In our judgment, these are examples of the broader underlying principle which is that the foreign proceedings will be said to be vexatious or oppressive if the conduct of the ASI respondent in suing the non-party to the exclusive

forum clause is unconscionable, such as where the real purpose and effect of suing the non-party is to frustrate or subvert an existing obligation under an exclusive forum clause.

91 In our judgment, this is also consistent with the reasoning in *Clearlake* and in *Giorgio Armani*. In *Clearlake*, the court noted that "Xiang Da has *manipulated its third party claims* to try to avoid being caught by the exclusive jurisdiction clause in the Clearlake charter" [emphasis added] (see *Clearlake* at [34(ii)]). It would have been the obvious course for Xiang Da to pursue a tortious claim against Clearlake Shipping (instead of Gunvor, against whom Xiang Da chose to pursue the claim of tortious misrepresentation). Further, the claim of tortious misrepresentation against Gunvor rested on misrepresentations conveyed by Clearlake to Xiang Da (see *Clearlake* at [34(ii)]). Similarly, in *Giorgio Armani*, the court noted that "[t]here is no good explanation to justify the need to commence and pursue the Shandong Proceedings, after the Arbitration was commenced, and after Elan had participated in the Arbitration" (see *Giorgio Armani* at [30]).

The applicable test for assessing the validity of an arbitration agreement when considering the grant of an ASI

92 Finally, given that Asiana challenges the validity of the arbitration agreements, albeit very belatedly (see [34]–[42] above), we briefly consider the approach the court should take to determine this question before it grants an ASI. In our judgment, it suffices to establish this to a *prima facie* standard. As was noted in *Hai Jiang* at [34]:

> Thus, in line with *Tomolugen* ([30] *supra*), the *prima facie* test should be adopted to determine whether "there is a valid arbitration agreement between the parties to the court proceedings" in the context of an application for an ASI in

> favour of arbitration. Since the issue of assignment is directly relevant to whether there is an arbitration agreement between the Plaintiff and the Defendant, the *prima facie* test should also be applied to the question of whether the arbitration agreement had been assigned to the Plaintiff or whether the Plaintiff can otherwise avail itself of the arbitration agreement.

93 Asiana seeks to distinguish *Hai Jiang*, on the basis that the court's comments were made in the context of an application for an *interim* ASI under s 12A of the then-applicable International Arbitration Act 1994 (Cap 143A, 2002 Rev Ed) (the "IAA"), where the court sought to align the standard of review under s 12A of the IAA with that of a stay application under s 6 of the IAA.

94 In our judgment, the *prima facie* standard applies equally, regardless of whether the application is for an interim ASI or a permanent ASI. At its core, an ASI, much like a stay under s 6 of the International Arbitration Act 1994 (2020 Rev Ed), is an effort to safeguard the parties' agreement to arbitrate their disputes.

95 We recognise that a permanent ASI may have the effect of depriving the claimant of his right to sue a defendant in the forum of his choice, and the order has a palpable effect on foreign proceedings (see *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] 4 SLR 1232 at [103]). But at least in the context of a case concerning an arbitration agreement, these considerations should not overshadow the fact that requiring anything more than a *prima facie* standard would be to require the court to undertake a full determination of an arbitral tribunal's jurisdiction, which would not be consistent with the *kompetenz-kompetenz* principle. In *Tomolugen* at [65]–[70] we explained why the *prima facie* standard ought to apply in the context of a s 6 stay application. In our judgment, the same reasoning applies in the context of an ASI.

96 Furthermore, the grant of a permanent ASI on the basis that the arbitration agreement is *prima facie* valid is not an irreversible order. Should the arbitration agreement subsequently be found to be invalid, it remains open to parties to return to the court to apply to set aside the ASI.

Application to the facts

97 We now consider whether, applying the applicable tests we have set out, an ASI may be granted for the claims against the directors in the Korean Compensation Proceedings.

98 Asiana brought the Korean Compensation Proceedings against GGS and the directors to claim damages of KRW1bn. It advances separate claims against GGS and the directors. As against the directors, Asiana contends that they are to be held personally liable for their involvement in the Package Deal, because they were aware that the arrangement was unlawful, but they nevertheless actively collaborated with Chairman Park to carry out the Package Deal. In particular, Mr Schmitz and Mr Rossinyol had signed the JVA as authorised representatives on behalf of GGS. Asiana also highlights that the Seoul Central District Court in the Conviction Judgment held that Mr Rossinyol was complicit in Chairman Park's breach of trust through the inclusion of the minimum net profit guarantee clause in the CA and the execution of the Package Deal. The legal basis for Asiana's claim in this regard is Arts 750 and 760 of the Korean Civil Code. The former provides that "[a]ny 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". The latter deals with the liability of joint tortfeasors. In particular, Art 760(1) states that "[i]f 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". Separately, Asiana contends that GGS is to be held vicariously liable for the directors' acts under Arts 35(1) and 756 of the Korean Civil Code. While Art 35(1) provides that 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, Art 756 states that an employer is liable for compensating any loss inflicted on a third person by the employee in the course of employment.

99 There would be little room for dispute that Asiana's commencement and continuance of the Korean Compensation Proceedings would be in breach of the JVA Arbitration Agreement if *both* GGS and the directors were party to that agreement. However, although the directors had signed the JVA, they did so in their capacity as representatives of GGS. They are not parties to the JVA. The only parties to the JVA are Asiana and GGS. It follows that the only parties to the JVA Arbitration Agreement, and who are bound to arbitrate disputes arising out of or in connection with the JVA, are Asiana and GGS.

100 The substantive issues that fall to be determined are whether the JVA Arbitration Agreement was intended to include the directors, and whether the real purpose behind Asiana suing the directors is to bypass its obligation to arbitrate with GGS as contained in the JVA Arbitration Agreement. Gate Gourmet contends that there is no legitimate reason for Asiana to include the directors in the Korean Compensation Proceedings, because they did not execute the JVA in their personal capacities, and because the claims against them are based on identical factual and legal grounds as against GGS. Thus, it suffices for Asiana to proceed only against GGS. When asked for evidence of such bad faith, counsel for Gate Gourmet, Mr Colin Liew ("Mr Liew"), pointed to the pre-action correspondence to argue that Asiana never had a legitimate case against the directors. In his words, Asiana never intimated to the directors

that they fraudulently conspired with Chairman Park to sign the agreements. Beyond this, the only other point Mr Liew emphasises is that Asiana could have commenced arbitral proceedings against GGS directly, whether by pursuing a tortious claim or a contractual claim for the breach of the JVA, and that it is not necessary to include the directors as defendants to the Korean Compensation Proceedings.

101 In our judgment, there is no basis for us to grant an ASI for the claims against the directors in the Korean Compensation Proceedings, whether on the contractual basis that the JVA Arbitration Agreement has been breached, or on the non-contractual basis that the proceedings are vexatious and oppressive to the directors. At the outset, we observe that based on the applicable test we have set out (see [84] above), it would be open to GGS and the directors to each apply for an ASI. In the present appeal, GGS relies on the contractual basis, while the directors rely on the noncontractual basis. We turn to consider these arguments.

102 On the contractual basis, the threshold issue for us to consider is whether the JVA Arbitration Agreement is *prima facie* valid. We find in the affirmative. Indeed, this conclusion is supported by Asiana's failure to adduce expert evidence demonstrating that the arbitration agreement is null and void, because we dismissed SUM 14, as we have set out in detail above (see [34]–[43] and [50]). The substantive issue in this regard concerns the scope of the JVA Arbitration Agreement. There is nothing in the JVA Arbitration Agreement (in cl 34.2 of the JVA) to suggest that it was intended by Asiana and GGS to apply to the directors and Gate Gourmet has not shown otherwise. Asiana was accordingly not in *prima facie* breach of the JVA Arbitration Agreement by commencing or continuing the Korean Compensation Proceedings against the directors. The remaining issue is the purpose behind Asiana suing the directors

in the Korean Compensation Proceedings and whether that can be said to render those proceedings vexatious or oppressive.

103 In our judgment, Gate Gourmet has not demonstrated that Asiana's suit against the directors in the Korean Compensation Proceedings has the effect or even the purpose of frustrating or subverting the operation of the JVA Arbitration Agreement. As regards Mr Liew's point that Asiana never indicated in the pre-action correspondence that they intended to sue the directors, we do not think that this suffices to establish bad faith. It cannot be the case that Asiana is bound by correspondence before the commencement of the Korean Compensation Proceedings, to the extent that its failure to definitively state its plan to sue the directors suggests any bad faith on its part. It should be open to Asiana – as with any other litigant – to bring a suit in a forum of its choice, against whomever it wants, subject to the limits imposed by exclusive forum clauses as agreed upon between contracting parties.

104 Mr Liew's other contention is that Asiana should have sued GGS directly without involving the directors in the Korean Compensation Proceedings. However, as we had indicated to Mr Liew, it was open to Asiana to sue the directors in Korea, since there could be a possibility that the directors could be found to be personally liable but yet GGS might not be vicariously liable. Although the JVA might provide Asiana with at least one cause of action against GGS, there is no basis for depriving Asiana of the option of suing other parties to safeguard against a situation where it fails to obtain relief against GGS. We highlight that this point was not stated in these precise terms in the affidavit filed by representatives of Asiana; that only goes so far as to state that the Korean Compensation Proceedings were structured in this manner to hold the directors jointly and severally liable for Chairman Park's breach of trust, and to hold GGS liable for the acts of the directors. Despite this, we accept

Mr Teo's submissions that it is incumbent on Gate Gourmet to demonstrate that the Korean Compensation Proceedings were not pursued in good faith. Indeed, unless there is evidence to infer bad faith in Asiana's choice in proceeding against the directors in Korea, this Court should not lightly interfere with its choice.

105 Since Gate Gourmet has not established bad faith on Asiana's part, it is not open to this court to grant an ASI preventing it from commencing claims against the directors. To do so will unduly prejudice Asiana, based simply on the fact that it entered into an arbitration agreement with GGS. In our view, there are at least two situations in which prejudice to Asiana may arise. First, in the event that Korea is the natural forum, and there is no other jurisdiction where the directors can be held personally liable, the grant of the ASI would insulate them from liability. This is despite the fact that Asiana never agreed to enter into an arbitration agreement with the directors, and consequently, Asiana never agreed to preclude litigation before the Korean courts against the directors. Second, as Mr Teo suggested during the hearing, there is currently no expert evidence before us regarding the extent to which vicarious liability may be imposed on GGS under Korean law. It is conceivable that vicarious liability cannot be imposed on GGS. In those circumstances, if there were an ASI preventing claims against the directors, Asiana would be left without recourse.

106 The practical effect of the foregoing analysis is that neither GGS nor the directors have been able to demonstrate that Asiana's continuance of the Korean Compensation Proceedings would be vexatious or oppressive to each of them respectively. It follows that Asiana can pursue its claims against the directors in the Korean Compensation Proceedings. However, its claims against GGS must be arbitrated, as it has agreed to do when Asiana and GGS entered into the JVA Arbitration Agreement. While it may be argued that having all of Asiana's

claims heard in a single forum promotes consistency, and indeed the risk of forum fragmentation is a relevant consideration as we have outlined above, this would require the directors to consent to and participate in arbitral proceedings between Asiana and GGS. And although the directors have previously provided an undertaking to the Judge that they will participate in and be bound by such proceedings (see the Judgment at [181]), it must not be forgotten that Asiana has not consented to this arrangement. It is not incumbent on Asiana to consent. Until and unless Asiana consents, it remains open to Asiana to proceed with its claims against the directors in the Korean Compensation Proceedings.

107 In the final analysis, while parties are free to enter into arbitration agreements, it is not for the court to compel the participation of non-parties in arbitral proceedings or to prevent disputes with them being pursued in other fora in the interest of preventing forum fragmentation.

Conclusion

108 For the foregoing reasons, we allow the appeal in part. We set aside the ASI granted in respect of the claims against the directors in the Korean Compensation Proceedings. And we uphold the Judge's decision regarding the ASIs granted for the Korean CA Proceedings and for the claims against GGS in the Korean Compensation Proceedings, as we find that those proceedings are in breach of the CA Arbitration Agreement and the JVA Arbitration Agreement respectively.

109 We had earlier granted costs of $8,000 (all-in) to Gate Gourmet in respect of SUM 14. Given that each party has succeeded in part, unless the parties come to an agreement on costs we will hear them on costs; submissions limited to eight pages are to be filed and exchanged within ten days of the date of this judgment.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Jonathan Hugh Mance
International Judge

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