DREW & NAPIER

# Court of Appeal Provides Guidance on When Non-Contractual Disputes are Caught by an Arbitration Agreement

***COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others and another matter* [2024] SGCA 50**

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LEGAL UPDATE

# In this Update

In *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others and anor matter* [2024] SGCA 50, the claimant shipowner had entered into contracts of carriage with the defendant, who was not only the sub-charterer of the vessel but also the owner and operator of a port facility in Indonesia.

Although the defendant commenced Indonesian proceedings claiming for tortious damage and loss when the claimant's vessel allided with part of the defendant's port facility, the Court held that this dispute was one "*arising out of or in connection with*" the arbitration agreement between the claimant *qua* carrier and the defendant *qua* sub-charterer.

## INTRODUCTION

When an arbitration agreement states that it only applies to disputes "*arising out of or in connection with*" the main contract, are non-contractual claims covered and, if so, what types? While the courts are generally in agreement that this phrase can cover disputes beyond the terms of the contract, it is less clear how the courts should delineate the scope of disputes covered.

The Court of Appeal in the recent decision of *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others and another matter* [2024] SGCA 50 has clarified the approach to be taken by courts in determining when a non-contractual dispute can be said to be "*arising out of or in connection with*" the contract between the parties. We discuss the Court of Appeal's guidance and practical considerations for commercial parties to take into account if they wish to draft a dispute resolution clause which covers certain disputes, but not others.

## RELEVANT BACKGROUND

*a. The dispute between the parties*

The Claimant was in the business of operating and managing vessels.[1] The 1st Defendant owned and operated a port facility in Indonesia (the "**Terminal**"), which comprised, *inter alia*, a jetty ("**Jetty**") and a trestle bridge ("**Trestle Bridge**") connecting the Jetty to the mainland.[2]

The Claimant (as shipowner) chartered a vessel ("**Vessel**") to the 2nd Defendant (as head charterer). The 1st Defendant was the sub-charterer in this arrangement.[3] The dispute between the parties arose from contracts of carriage entered into between the Claimant and the 1st Defendant, which were contained in bills of lading. The bills of lading had each incorporated an arbitration agreement which provided that "*any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore*".[4]

On 31 May 2022, the Vessel departed from the Jetty carrying cargo ("**Cargo**"). The Vessel subsequently allided with the Trestle Bridge, causing a section of the Trestle Bridge to collapse ("**Incident**").[5]

On 4 August 2022, the Claimant commenced proceedings in Singapore seeking to limit its liability arising out of the Incident.

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[1] ***COSCO CA*** at [10]
[2] ***COSCO CA*** at [12]
[3] ***COSCO CA*** at [13]
[4] ***COSCO CA*** at [6]
[5] ***COSCO CA*** at [15]

On 26 October 2022, the 1st Defendant commenced proceedings against the Claimant in the Indonesian courts ("**Indonesian Proceedings**") for losses arising out of the Incident.[6]

In response, the Claimant applied for an anti-suit injunction in the Singapore courts to enjoin the 1st Defendant from pursuing the Indonesian Proceedings[7] on the grounds that the Indonesian Proceedings had been commenced by the 1st Defendant in breach of the arbitration agreement.[8]

*b. The Lower Court's decision*

At first instance, the Judge of the General Division of the High Court ("**Judge**") dismissed the Claimant's application for an anti-suit injunction and issued the full grounds of his decision in *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others* [2024] SGHC 92.[9]

In resisting the Claimant's application, the 1st Defendant argued that its claim in the Indonesian Proceedings for losses suffered because of the damage caused to the Trestle Bridge was a pure tort claim which could not be said to have arisen "*out of or in connection with*" the contracts of carriage.[10]

The Judge agreed with the 1st Defendant that its claim in the Indonesian Proceedings was a pure tort claim[11]and affirmed the observations of the English court in *Eastern Pacific Chartering Inc v Pola Maritime Ltd* [2021] 1 WLR 5475 ("***The Pola Devora***") that a tort claim may be said to arise "*in connection with*" the charter "*where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom*".[12] The Judge termed this the "*Causative Connection Test*".[13]

The Judge also observed that English courts had used two alternative tests to determine if a non-contractual claim fell within the scope of an arbitration agreement:

1. the "*Parallel Claims Test*", which posits that a tort claim may be said to arise "*in connection with*" the charter where there are parallel claims in tort and contract (for instance, in a breach of a duty of care);[14] and

2. the "*Closely Knitted Test*", which considers whether the contractual and non-contractual claims arise out of, or are "*closely knitted*

[6] ***COSCO CA*** at [21]
[7] ***COSCO CA*** at [30]
[8] ***COSCO HC*** at [36]
[9] ***COSCO CA*** at [36]
[10] ***COSCO HC*** at [40]
[11] ***COSCO HC*** at [42]-[43]
[12] ***COSCO HC*** at [61]
[13] ***COSCO CA*** at [42]; ***COSCO HC*** at [61]-[63]
[14] ***COSCO CA*** at [75]; ***COSCO HC*** at [66]

*together*", on the same facts such that the agreement to arbitrate on one can be construed as covering the other.[15]

The Judge, however, deemed that the Parallel Claims Test and the Closely Knitted Test were not applicable on the facts of the present case.[16]

Applying the Causative Connection Test, the Judge held that the 1st Defendant's tort claim also could not be said to be "*causatively connected*" to any legal relationship established under the bills of lading between the Claimant *qua* carrier and the 1st Defendant *qua* shipper.

The Judge therefore found that there was no breach of the arbitration agreement by the 1st Defendant, and declined to grant the anti-suit injunction sought by the Claimant.

## COURT OF APPEAL'S DECISION

The Court of Appeal allowed the appeal and found that the commencement of the Indonesian Proceedings was in breach of the arbitration agreement. In so doing, the Court of Appeal also laid down useful guidance on the application of the various 'tests' referred to by the Judge in determining whether a non-contractual dispute "*arises out of or in connection with*" the underlying contract between parties.

The Court of Appeal agreed with the Judge below that the analysis for whether court proceedings have been brought in breach of an arbitration agreement proceeds in two stages:

1. First, the court must determine what are the matter(s) or dispute(s) which the parties have raised or foreseeably will raise in the foreign court proceedings (the "**Identification Issue**");

2. Second, the court must then ascertain whether such matter(s) or dispute(s) fall within the scope and ambit of the arbitration clause (the "**Scope Issue**").[17]

The Court of Appeal clarified that while this two-stage approach was previously laid down in in the context of a stay application under section 6 of the International Arbitration Act ("**IAA**"), this approach is not confined to stay applications under the IAA.[18] Accordingly, the two-stage approach applies equally in the context of an application for an anti-suit injunction which is predicated on a breach of an arbitration agreement.[19]

[15] ***COSCO CA*** at [76]; ***COSCO HC*** at [67]
[16] ***COSCO HC*** at [72]
[17] ***COSCO CA*** at [68]
[18] ***COSCO CA*** at [73]
[19] ***COSCO CA*** at [73]

*a. Stage 1: The Identification Issue*

The Court of Appeal noted that in approaching the Identification Issue, the court must ascertain the substance of the dispute(s) between the parties.

This involves looking at the claimant's pleadings while not being overly respectful to the formulations in those pleadings.[20] This is to prevent a claimant from circumventing an arbitration agreement by formulating proceedings in terms which artificially avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded.[21]

The exercise also involves a consideration of all reasonably foreseeable defences to the claim or part of the claim,[22] as well as cross-claims relating to the same matter, where appropriate.[23]

To this end, the Court of Appeal clarified that the ***merits*** of an identified or reasonably foreseeable defence and/or cross-claim are generally irrelevant to the inquiry. This principle is, however, subject to the appropriate control mechanisms, such as where it can be shown that the party seeking an anti-suit injunction has acted in abuse of process by raising defence(s) and/or competing claim(s) that are entirely hopeless or doomed to fail. The threshold for finding abusive conduct on the part of the applicant is a high one.[24]

*b. Stage 2: The Scope Issue*

The Court of Appeal, like the Judge below, noted that there are various other approaches aside from the Causative Connection Test which have been used to determine if a non-contractual claim falls within the scope of an arbitration clause.[25]However, there can be ***no universal test*** that applies to all such disputes as the ascertainment of the relevant "*connection*" between the non-contractual claim and the contract is invariably a highly fact-specific inquiry. Further, the existing approaches articulated by the courts in previous cases are not exhaustive.[26]

Nonetheless, the different approaches articulated by the courts remain helpful to the extent that they show how courts generally deal with the "*connection*" inquiry, that is, the arbitration agreement should be construed with common sense and in a manner consistent with rational businessmen.[27]

*c. Application of the two-stage approach*

Under the first stage, in identifying the "*matter*" raised by the parties in the Indonesian Proceedings, the Court of Appeal considered the defences

[20] ***COSCO CA*** at [71]
[21] ***COSCO CA*** at [71], citing *Lombard North Central plc v GATX Corporation* [2012] 1 Lloyd's Rep 662 at [14]
[22] ***COSCO CA*** at [71]
[23] ***COSCO CA*** at [72]
[24] ***COSCO CA*** at [93]
[25] ***COSCO CA*** at [75]
[26] ***COSCO CA*** at [79]
[27] ***COSCO CA*** at [85]

raised or likely to be raised by the Claimant.[28] The Court found that the 1st Defendant's tortious claim, the contractual defence of negligent navigation and the cross-claim for breach of the Safe Port Warranty shared a common connection – namely, the question of what was the cause of the allision.[29] Accordingly, this was the "*matter*" deemed to have been raised by the parties in the Indonesian Proceedings.

Under the second stage, the Court of Appeal noted that in applying the Causative Connection Test, the court would have to examine the nature of the tortious claim in tandem with the contractual defence, and not the contracting capacities of the parties. In this respect, while the 1st Defendant's tortious claim was not causatively connected to any legal relationship constituted under the bills of lading, the allision had occurred in the performance of the contract of carriage which also provided for the contractual defence of "*errors of navigation*".[30]

The Court of Appeal held that the parties must have contemplated that a pure tort claim for damage to the Trestle Bridge, caused during the performance of the contracts of carriage between the parties and where the foreseeable lines of defence included recourse to the provisions of those contracts, should be subject to the arbitration agreement.[31] This was because the loading of the Vessel at the Jetty with the Trestle Bridge, as well as the allocation of risk for loss caused by negligent navigation, were contractually provided for.[32]

In this sense, therefore, the parties' dispute arose out of or were in connection with the contracts of carriage in line with the "*causative connection*" or "*closely knitted*" tests: the 1st Defendant's tortious claim, the Claimant's contractual defence of "*errors of navigation*" and the Claimant's counterclaim for breach of the Safe Port Warranty all related to the cause of the allision.[33] The Judge had erred in treating the contractual counterclaim and defence as discrete rather than connected matters from the claim in tort.

Accordingly, as the Court had found that the matters which parties had raised in the Indonesian proceedings fell within the scope of the arbitration agreement, it held that the Indonesian Proceedings were commenced in breach of the arbitration agreement and granted the anti-suit injunction sought by the Claimant.[34]

[28] ***COSCO CA*** at [94]
[29] ***COSCO CA*** at [99]
[30] ***COSCO CA*** at [100]
[31] ***COSCO CA*** at [102]
[32] ***COSCO CA*** at [102]-[103]
[33] ***COSCO CA*** at [103]
[34] ***COSCO CA*** at [113]

## COMMENTARY

There are many types of non-contractual disputes which could arise between two contracting parties and it is important to understand when a non-contractual dispute can be said to have arisen "*out of or in connection with*" the contract between the parties.

The Court of Appeal has helpfully clarified that this inquiry proceeds in two stages – the court will first determine the matter(s) which they have raised or foreseeably will raise in the foreign proceedings, and will then ascertain if such matter(s) fall within the scope of the arbitration agreement.

The Court has also explained that a party bringing a claim in the foreign courts and against whom the anti-suit injunction is sought cannot shield itself from anti-suit relief by artificially drafting its claim to avoid any express reference to a matter that may fall within the scope of the arbitration agreement. Our courts will also consider the defences raised, all reasonably foreseeable defences, and cross-claims relating to the same matter to discern the matter which is said to fall within the scope of the arbitration agreement. To this end, applicants of anti-suit injunctions (who are likely the defendants in the foreign proceedings sought to be injuncted) should make clear in their defences and/or their counterclaim in the foreign proceedings the matter in dispute.

While parties may contractually stipulate the various matters which they intend to fall outside the scope of the arbitration agreement, they can rest assured that the courts, regardless of which approach they take towards determining if a non-contractual claim falls within the scope of an arbitration clause, will take a common-sense approach consistent with rational businessmen.

Parties should, however, be cautious of relying on a single test or approach to prove that a dispute does or does not arise "*out of or in connection with*" the contract. As the Court of Appeal and the High Court observed, whether there is a connection between the non-contractual dispute and the contract is a highly fact-specific inquiry; the tests which the Court of Appeal had cited, such as the Causative Connection Test, the Parallel Claims Test and the Closely Knitted Test, were formulated in the context of the unique facts of previous cases. Given the Court's observations that the tests previously formulated are not exhaustive, there is no need to force-fit one's situation into one of these tests to succeed in an argument that a non-contractual dispute falls within the ambit of an arbitration agreement.

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