



# Anti-Suit Injunctions in Favour of Non-Parties to Arbitration Agreement?

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## LEGAL UPDATE

# In this Update

We discuss the recent decision of *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd and others* [2024] SGCA(I) 8, in which the Court of Appeal made a significant ruling regarding the limited circumstances in which an anti-suit injunction may be granted in favour of a non-party to an arbitration agreement.

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## INTRODUCTION

In early 2024, a judge sitting in the Singapore International Commercial Court granted two anti-suit injunctions (“**ASIs**”) against Asiana Airlines (“**Asiana**”). The ASIs restrained Asiana from continuing court proceedings in South Korea against two companies from the Gate Gourmet catering group (“**Gate Group**”), as well as two of Gate Group’s current and former directors (“**Directors**”). Both ASIs were granted on the basis that arbitration agreements between Asiana and Gate Group would be breached by the continuation of court proceedings against Gate Group and/or the Directors, notwithstanding the fact that the Directors were not party to the arbitration agreements.

We acted for Asiana in its appeal against the judge’s decision. On 29 October 2024, the Singapore Court of Appeal partially allowed the appeal, setting aside the ASIs insofar as they prevented litigation against the Directors.

## THE TEST FOR GRANTING AN ANTI-SUIT INJUNCTION FOR NON-PARTIES

The Court of Appeal held that a party to a contract (A) with an exclusive forum clause (such as an arbitration clause) may apply for an ASI to prevent proceedings commenced by another party to the contract (B) against a non-party to the contract (C) where it can show either:

- (a) that the exclusive forum clause was intended to cover C. In other words, on the true construction of the clause, B had agreed with A that, if B sued C, it would sue C only in a particular forum; or
- (b) that the real purpose of B suing C is to bypass the exclusive forum clause, such that the proceedings against C are vexatious and oppressive to A.

Insofar as C is able to show that it would be vexatious and oppressive to C to allow the foreign proceedings to continue against it, C would also be able, in its own right, to seek an ASI against B.

However, the Court made clear that a party seeking an ASI on the basis that the foreign proceedings were “*vexatious and oppressive*” would face a high threshold. Such circumstances may include, but are not limited to, where the foreign proceedings were instituted in bad faith, were bound to fail, or would cause extreme inconvenience.

## ANALYSIS / COMMENTARY

## KEYPOINT

*Anti-suit injunctions should not be used to prevent legitimate claims from being pursued in a foreign jurisdiction against non-parties to exclusive forum clauses.*

The Court of Appeal's judgment marks a significant departure from the UK House of Lords decision in *Donohue v Armco Inc and others* [2002] 1 All ER 749 ("**Donohue**").

In *Donohue*, Lord Scott had suggested that the grant of an ASI should be predicated on whether the applicant had a "*sufficient interest*" in obtaining the ASI. For example, party A may apply for an ASI if the proceedings commenced by party B against non-party C might result in consequential liability for A.

The Singapore Court of Appeal ruled that this test would be over-inclusive, and held that anti-suit injunctions should not be used to prevent legitimate claims from being pursued in a foreign jurisdiction against non-parties to exclusive forum clauses.

While the Court of Appeal noted that forum fragmentation was one of the concerns underpinning Lord Scott's approach in *Donohue*, the Court held that this risk should not be overstated. Parties who agree to arbitrate their disputes remove such disputes from their natural forum, the national courts, and such disputes are therefore inherently prone to forum fragmentation.

The Court of Appeal's judgment brings welcome clarity to Singapore law on when an ASI may be sought against non-parties to an exclusive forum clause. Insofar as parties entering into agreements with exclusive forum clauses intend for the clause to cover related parties such as directors and/or officers of the company, this should be made clear in the agreement.

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