

## Not waiting until the 18<sup>th</sup> hole: Resisting forum shopping effectively with the anti-suit injunction

The Singapore High Court has on a number of occasions considered the issue of when an anti-suit injunction in aid of an arbitration may be issued. The Singapore High Court in *BC Andaman Co Ltd and others v Xie Ning Yun and another* [2017] SGHC 64 re-examines the boundaries of issuing permanent anti-suit injunctions in aid of Singapore-seated arbitration.

### Background

This was a case where two individuals (named "the Sias" in the judgment) were restrained from commencing or pursuing proceedings outside Singapore against their former companies. The facts were rather complicated due to the complex shareholding structure of the entities.

In 1998, the Sias invested in Murex, a Thai company that owned the Blue Canyon Country Club and various hotels and golf courses in Phuket, Thailand. The Sias were appointed directors of Murex. In 2002, the Sias and Deutsche Bank, through their corporate vehicles Legacy and RREEF respectively, entered into a joint venture with to redevelop the Phuket properties (the "JV"). Deutsche Bank had the majority stake in the JV. The JV in turn held a 96% stake in Murex. The remaining shares in Murex were held by two subsidiaries of the JV, Andaman and Legacy Thailand.

In 2005, as the JV ran into financial difficulties, it took out a loan from Deutsche Bank, which was secured by charges over the Sias' stake in Legacy, and through that, the JV. In 2006, the Sias, Deutsche Bank, the JV and the related entities entered into a shareholders' agreement, which contained an arbitration agreement providing for

arbitration under the rules of the Singapore International Arbitration Centre ("SIAC") in Singapore (the "Arbitration Agreement"). Murex was not a party to the shareholders' agreement.

The dispute arose out of an alleged corporate coup in February of 2014 to remove the Sias as directors of Murex. The Sias were unable to repay the 2005 loan upon demand and the charge over the Sias' stake which resulted in the Sias being removed as directors of their corporate vehicle and the JV. The Sias' employment in Murex was terminated as well.

In April 2014, the Sias commenced proceedings in the courts of the British Virgin Islands (the "BVI Proceedings") against 19 entities, including Deutsche Bank, and the companies that the Sias were booted from. The Sias alleged, among other things, that its creditors had enforced the charge in bad faith and conspired to injure the Sias. A consent order was recorded between the Sias and some of the defendants in the BVI Proceedings to the effect that all claims, including claims for costs in the BVI Proceedings, were to be referred to arbitration under the rules of the SIAC ("BVI Consent Order"). Murex was not a party to the consent order.

The Sias subsequently commenced proceedings before the Thai courts in July 2014 against, among others, Murex and various directors that had been appointed by Deutsche Bank to the board of Murex (the "**First Thai Proceedings**"). The Sias alleged that these entities and individuals dishonestly and illegally removed the Sias from Murex. The parties to the BVI Consent Order were not named as defendants in the First Thai Proceedings.

In May 2015, the Sias commenced SIAC arbitration against the other parties to the BVI Consent Order, advancing substantially identical claims as in the BVI Proceedings (the "**SIAC Arbitration**"). Murex was not a party to the SIAC Arbitration.

The Respondents in the SIAC Arbitration applied to the arbitral tribunal for security for costs and for payment of the costs of the BVI Proceedings. The Tribunal did not order security for costs but ordered the Sias to pay the costs of the BVI Proceedings. Dissatisfied with the ruling, the Sias sought to terminate the SIAC Arbitration, asserting that they had "lost all confidence in the fairness of the proceedings". The parties consented to terminate the arbitration by way of a final award issued in July 2016, which dismissed the Sias' claims with prejudice.

On or around 21 June 2016, after the SIAC arbitration proceedings were declared closed, the Sias commenced a second set of proceedings before the Thai courts against, among others, the Respondents in the SIAC Arbitration (the "**Second Thai Proceedings**").

In response, five plaintiffs, comprising:

- (a) Murex;
- (b) the JV and Legacy (both of which participated in the SIAC Arbitration); and
- (c) Legacy Thailand and Andaman (both of which were parties to the Arbitration Agreement),

initiated the present proceedings before the High Court in Singapore to seek a permanent anti-suit injunction to restrain the Sias from pursuing the First and Second Thai

Proceedings, and any other proceedings in breach of the Arbitration Agreement.

## Court's findings

An anti-suit injunction is an order by the Singapore High Court to prevent a party from commencing or continuing proceedings in a foreign jurisdiction. The law does not explicitly grant the court this power but it is inferred from the court's broad powers under section 4(10) of the Civil Law Act to grant an injunction in cases which it appears to be just or convenient.

The injunction can only be issued when the court has personal jurisdiction over the party that is being restrained as the injunction is directed against the party pursuing the foreign proceedings, and not against the foreign court. As the injunction indirectly affects foreign proceedings, as a matter of international comity, the court must have subject-matter jurisdiction before granting such relief. **Subject-matter jurisdiction exists when the court is asked to protect the interests of parties in arbitral proceedings seated in Singapore or to enforce an arbitration agreement providing for arbitration seated in Singapore.**

In exercising its discretion to grant such an injunction, the court will weigh the following factors:

1. Whether the defendant is amenable to the jurisdiction of the court,
2. Whether Singapore is the natural forum for resolving the dispute between the parties,
3. Whether the foreign proceedings are vexatious or oppressive to the plaintiff if they are allowed to continue,
4. Whether an anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings, and
5. Whether the commencement of the foreign proceedings is in breach of any agreement between the parties.

Having regard to the factors, the court found that:

1. It has personal jurisdiction over the Sias as they are nationals of and resident in Singapore.
2. In regards to **the JV and Legacy**, the **court granted the permanent anti-suit injunctions** sought. The court had subject-matter jurisdiction and found that the conduct of the Sias was clearly vexatious and oppressive. The JV and Legacy had been sued in the BVI, consented to a stay of the BVI proceedings in favour of arbitration, participated in the SIAC Arbitration which the Sias discontinued on spurious grounds and then commenced the Second Thai Proceedings against them.
3. In regards to **Legacy Thailand and Andaman**, the **court also granted the permanent anti-suit injunctions** to protect their substantive contractual rights under the Arbitration Agreement to have their disputes with the Sias referred to SIAC arbitration in Singapore. They were sued in the BVI Proceedings but were not parties to the BVI Consent Order or the SIAC Arbitration. Nevertheless, the court found that they would still suffer prejudice having to defend their actions in the Second Thai Proceedings.
4. As for Murex, the court **refused to grant an anti-suit injunction**. Murex was not a party to the Arbitration Agreement, the BVI Consent Order or the SIAC Arbitration. It also did not enjoy sufficient privity of interest with Andaman, Legacy, Ace and Legacy Thailand in the SIAC Arbitration to entitle it to invoke the final award to resist a claim against it by the Sias. Further, the facts pointed to Thailand being the natural forum to hear the disputes between the Sias and Murex.

## Key Takeaways

Singapore courts will issue a permanent anti-suit injunction restraining a party from advancing a foreign proceeding in breach of a Singapore-seated arbitration agreement. This extends not only to potential and pending arbitration proceedings but also to arbitration that has been discontinued, as was the case for the JV and Legacy.

Parties to arbitration agreements providing for a Singapore-seated arbitration should take comfort that other than running to the foreign court where litigation has been commenced to seek a stay of the foreign court proceedings, they have the option of seeking an anti-suit injunction from the Singapore court where the arbitration is seated. The anti-suit injunction could cut the Gordian knot especially where the breaching party has pursued proceedings in multiple jurisdictions. It could also be tactically advantageous as the foreign court may not always be the most efficient or receptive to issuing a stay of court proceedings.

Compared to some other jurisdictions, an anti-suit injunction is more obtainable in Singapore. For instance, the **courts in European Union ("EU")** countries, including the English courts, are **prohibited from issuing anti-suit injunctions** to restrain proceedings in other EU jurisdictions, as a result of the European Court of Justice decision in *Allianz SpA v West Tankers Inc* (C-185/07, 2009). **US courts** would only grant an anti-suit injunction where there is **irreparable harm**.

Nevertheless, parties who are not parties to the arbitration agreement, even if they come with a related dispute, may find considerable difficulty in seeking an anti-suit injunction from the Singapore courts, since they have not consented to having their dispute heard before an arbitral tribunal.

# Authors



**June (Junghye) Yeum**  
Partner, Singapore  
T: +65 9646 4980  
E: [june.yeum@clydeco.com](mailto:june.yeum@clydeco.com)



**Danna Er**  
Associate, Singapore  
T: +65 6240 6147  
E: [danna.er@clydeco.com](mailto:danna.er@clydeco.com)



**Gerald Leong**  
Associate, Clasis LLC, Singapore  
T: +65 6544 6549  
E: [gerald.leong@clasisllc.com](mailto:gerald.leong@clasisllc.com)



**James Song**  
Foreign Qualified Lawyer, Singapore  
T: +65 6544 6509  
E: [james.song@clydeco.com](mailto:james.song@clydeco.com)