

UK Supreme Court Rules on Anti Suit Injunctions

Yesterday, the Supreme Court of the United Kingdom ruled in *Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent)* that English courts have jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

The Court issued the following Press Summary.

Background

The appellant is the owner of a hydroelectric power plant in Kazakhstan. The respondent is the current operator of that plant. The concession agreement between the parties contains a clause providing that any disputes arising out of, or connected with, the concession agreement are to be arbitrated in London under International Chamber of Commerce Rules. For the purposes of this appeal the parties are agreed that the arbitration clause is governed by English law. The rest of the concession agreement is governed by Kazakh law.

Relations between the owners and holders of the concession have often been strained. In 2004 the Republic of Kazakhstan, as the previous owner and grantor of the concession, obtained a ruling from the Kazakh Supreme Court that the arbitration clause was invalid. In 2009 the appellant, as the current owner and grantor of the concession, brought court proceedings against the respondent in Kazakhstan seeking information concerning concession assets. The respondent's application to stay those proceedings under the contractual arbitration clause was dismissed on the basis that the Kazakh Supreme Court had annulled the arbitration clause by its 2004 decision.

Shortly thereafter the respondent issued proceedings in England seeking (a) a declaration that the arbitration clause was valid and enforceable and (b) an anti-suit injunction restraining the appellant from continuing with the Kazakh proceedings. An interim injunction was granted by the English Commercial Court and the appellant subsequently withdrew the request for information which was

the subject of the Kazakh proceedings. However, the respondent remained concerned that the appellant would seek to bring further court proceedings in Kazakhstan in breach of the contractual agreement that such disputes should be subject to arbitration in London. As a result the respondent continued with the proceedings. The English Commercial Court found that they were not bound to follow the Kazakh court's conclusions in relation to an arbitration clause governed by English law and refused to do so. The Commercial Court duly granted both the declaratory and final injunctive relief sought.

The appellant appealed to the Supreme Court of the United Kingdom on the grounds that English courts have no jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

Judgment

The Supreme Court unanimously dismisses the appeal. The English courts have a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration is on foot or in contemplation. Nothing in the Arbitration Act 1996 ("the 1996 Act") has removed this power from the courts. The judgment of the court is given by Lord Mance.

Reasons

- An arbitration agreement gives rise to a 'negative obligation' whereby both parties expressly or impliedly promise to refrain from commencing proceedings in any forum other than the forum specified in the arbitration agreement. This negative promise not to commence proceedings in another forum is as important as the positive agreement on forum [21-26].
- Independently of the 1996 Act the English courts have a general inherent power to declare rights and a well-recognised power to enforce the negative aspect of an arbitration agreement by injuncting foreign proceedings brought in breach of an arbitration agreement even where arbitral proceedings are not on foot or in contemplation [19-23].
- There is nothing in the 1996 Act which removes this power from the courts; where no arbitral proceedings are on foot or in prospect the 1996

Act neither limits the scope nor qualifies the use of the general power contained in section 37 of the Senior Courts Act 1981 (“the 1981 Act”) to injunct foreign proceedings begun or threatened in breach of an arbitration agreement [55]. To preclude the power of the courts to order such relief would have required express parliamentary provision to this effect [56].

- The 1996 Act does not set out a comprehensive set of rules for the determination of all jurisdictional questions. Sections 30, 32, 44 and 72 of the 1996 Act only apply in circumstances where the arbitral proceedings are on foot or in contemplation; accordingly they have no bearing on whether the court may order injunctive relief under section 37 of the 1981 Act where no arbitration is on foot or in contemplation [40].
- The grant of injunctive relief under section 37 of the 1981 Act in such circumstances does not constitute an “intervention” as defined in section 1(c) of the 1996 Act; section 1(c) is only concerned with court intervention in the arbitral process [41].
- The reference in section 44(2)(e) of the 1996 Act to the power of the court to grant an interim injunction “for the purposes of and in relation to arbitral proceedings” was not intended to exclude or duplicate the court’s general power to grant injunctive relief under section 37 of the 1981 Act [48].
- Service out of the jurisdiction may be affected under Civil Procedure Rule 62.2 which provides for service out where an arbitration claim affects arbitration proceedings or an arbitration agreement; this provision is wide enough to embrace a claim under section 37 to restrain foreign proceedings brought or continued in breach of the negative aspect of an arbitration agreement [49].

H/T: Dominic Pellew