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International Arbitration Practice
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Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower

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Last week the Supreme Court of the United Kingdom put an end to the long-running attempt by the owner of the Ust-Kamenogorsk Hydropower Plant in the Republic of Kazakhstan (the "Republic") to circumvent a London arbitration agreement contained in its 25-year concession agreement with the operator. In doing so the Court upheld the 2010 and 2011 decisions of the Commercial Court and Court of Appeal, respectively, that the operator is entitled to halt court proceedings in Kazakhstan that were filed in 2009 by the owner in breach of the London arbitration clause contained within the concession.

The Dispute and Court's Holding

Ust-Kamenogorsk Hydropower Plant JSC ("JSC") is the present owner and grantor of the concession, having succeeded the Republic in that capacity. AES Ust-Kamenogorsk Hydropower Plant LLP ("AES"), a company headquartered in the United States, is the current grantee of the concession, having succeeded in that capacity its affiliate company Tau Power B.V. (Netherlands).

Whilst the underlying proceedings were filed in 2009 the historic background to the dispute is relevant to the decision by the Court, which largely depended on the facts of the case.

Background Dispute

In 2001 the Republic claimed the existence of an outstanding debt under the concession agreement and at the same time AES challenged its listing in a register of monopolies within the Kazakhstan energy market.

In 2002 the Republic sought a declaration that the concession agreement was invalid. The Kazakh Supreme Court ("KSC") initially dismissed the Republic's claim on the basis that the concession contained a London arbitration clause under the rules of the "International London Chamber of Commerce (sic)", but left the door open to challenge the concession if the government considered that it had been deceived about the nature of the arbitration or the transaction itself.

A key aspect of the underlying litigation is that the arbitration clause refers to clause 17 in the concession agreement, which makes provision for the determination of disputes concerning tariffs by an independent expert.

In 2003 the Republic issued court proceedings in Kazakhstan claiming the annulment of the arbitration clause in the concession agreement and, in 2004, at appeal level, the KSC held that the clause was invalid on two grounds: (1) that it includes disputes concerning tariffs and, AES being a monopoly, any decision by the arbitrators would place such disputes beyond the public policy of the Republic; and, (2) that the literal meaning of the clause did not refer to the International Chamber of Commerce ("ICC").

Underlying Proceedings

The 2004 ruling allowed JSC to issue proceedings in 2009 against AES, before a specialist Economic Court in Kazakhstan (the "EC"), claiming that AES had failed to comply with a repeated Request for Information by JSC about the value of the concession assets. The EC dismissed AES' motion to reject the claim on the basis of the 2004 decision by the KSC.

AES applied to the English Commercial Court for declarations that the arbitration clause is valid and enforceable and that the underlying dispute falls within it; and, an injunction restraining and/or prohibiting JSC from commencing and/or pursuing legal proceedings in Kazakhstan or elsewhere in respect of disputes that the parties agreed to arbitrate and in particular those issued in 2009. JSC in turn made an application to challenge the jurisdiction of the English Commercial Court.

Interim injunctions were granted whilst the jurisdiction application was heard by the English Commercial Court and in April 2010 it granted to AES a declaration that JSC cannot bring the underlying claim or any other matter in

relation to the provisions of the concession agreement otherwise than by commencing arbitration proceedings in the ICC in London "and that the injunction should be similarly directed to enjoining the present proceedings and the bringing of any other claims, as above described, otherwise than in ICC Arbitration".

JSC appealed the order before the English Court of Appeal and subsequently before the Supreme Court. The only aspect that was not appealed is the Court of Appeals' finding that it was not bound by the KSC's conclusions in relation to the nature of the arbitration agreement, being subject to English law, and that neither of its findings was sustainable: the tariff disputes are in fact outside the arbitration agreement and the reference to the ICC is plainly sufficient to mean that any arbitration was to be by the ICC.

The legal issues before the Supreme Court were the following: (1) whether in connection with an arbitration agreement an injunction is available to parties independently of the existence or imminence of any arbitral proceedings and whether an interpretation of the Arbitration Act 1996 ("the Arbitration Act") requires a different conclusion; and, (2) whether the Arbitration Act qualifies the use of the courts' general power under section 37 of the Senior Courts Act 1981 (the "1981 Act") to grant injunctions.

The Supreme Court dismissed JSC's appeal and held that the Arbitration Act is not a complete code of arbitration law; that its section 1(c) is a deliberate departure from the more prescriptive article 5 of the UNCITRAL Model Law; that sections 30, 32, 44 and 72 of the Arbitration Act relied upon by JSC are not applicable in circumstances where no arbitration proceedings exist and that JSC wrongly sought to benefit by AES's reliance on an arbitration agreement while itself denying its existence; and, that section 44(2)(e) of the Arbitration Act (concerning powers of the courts in arbitration proceedings, including interim injunctions) was not intended by Parliament to exclude the courts' general power under section 37 of the 1981 Act.

The Supreme Court considered that the source of the power to restrain foreign proceedings in breach of an arbitration agreement -whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed- is to be found not in section 44 of the Arbitration Act but in section 37 of the 1981 Act. The Court placed emphasis on the words of Lord Mustill in the Channel Tunnel case: "[u]nder section 37(1)…. the arbitration clause is not the source of the power to grant an injunction but is merely a part of the facts in the light of which the court decides whether or not to exercise a power which exists independently of it".

Finally, the Supreme Court considered that despite that leave to serve in Kazakhstan the claim containing the injunction was obtained by AES under Civil Procedure Rules ("CPR") PD 6B, paragraph 3.1(2), that is, an injunction ordering the defendant to do or refrain from doing an act within the United Kingdom, English courts also appear to have jurisdiction to give leave for service out of the jurisdiction under CPR PD 6B(6)(c) on the ground that, treating arbitration agreements as contracts a claim can be "made in respect of a contract …(c) is governed by English law".

Commentary

The decision of the Supreme Court makes clear that, under English law, there is no reason why a party to an arbitration agreement should be free to engage its counterpart in proceedings at a different forum (particularly outside the European Union) merely because neither party wishes to bring proceedings in the agreed arbitration forum. This reinforces the pre-eminence of London as a global dispute resolution centre. In this case AES did not intend to commence arbitration proceedings and was prepared to defend any claim by JSC concerning the concession only in arbitration.

The Supreme Court nevertheless warned that the general power to grant injunctions provided by section 37 of the 1981 Act must be exercised sensitively having due regard to the scheme established by the Arbitration Act when any arbitration is in fact current or proposed, and that injunctions may be granted on an interim basis pending the outcome of such arbitration proceedings, rather than a final basis.

The only caveat to the general rule mentioned by the Court is the European regime on jurisdiction, in view of a 2009 decision by the European Court of Justice that the grant of anti-suit injunctions restraining a party from commencing or continuing with proceedings in the court of a Brussels Regulation member state, where those proceedings are in breach of an arbitration agreement, is incompatible with the Regulation.

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