

There's Life In The Anti-Suit Yet

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Having had their wings clipped by the European Court of Justice in *West Tankers*, the English courts have recently confirmed that there is life in the anti-suit injunction yet. In *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2010] EWHC 772 (Comm), Burton J granted anti-suit relief to restrain litigation in Kazakhstan even in the absence of any actual or intended arbitral proceedings.

Various disputes arising in connection with a twenty year concession agreement led, despite the existence of an arbitration agreement, to several sets of proceedings in the courts of Kazakhstan. One suit involved allegations by UST-Kamenogorsk Hydropower Plant JSC ("JSC") that AES UST-Kamenogorsk Hydropower Plant LLP ("AES") had failed to comply with certain requests for information regarding the concession's assets. AES objected to the court's jurisdiction on the basis of the arbitration clause. Its challenge was rejected, however, because in proceedings to which AES was not a party the Supreme Court of Kazakhstan had already found the arbitration agreement to be in conflict with Kazakh public policy.

AES then sought anti-suit relief from the English courts. It did so directly under the Arbitration Act (by section 44, the court has the same powers to grant injunctive relief in relation to arbitral proceedings as it does in connection with legal proceedings) and in the context of the court's inherent jurisdiction to award injunctive relief where it is "just and convenient to do so" (section 37 of the Senior Courts Act 1981).

No “gateway” to the Arbitration Act in the absence of actual or contemplated arbitral proceedings: AES did not intend to commence its own arbitral proceedings, it merely wished to resist and prevent the continuation of the Kazakh proceedings. The court confirmed that no relief is available under the Arbitration Act in those circumstances: an application under s44 of the Arbitration Act can only be made by “a party or proposed party to the arbitral proceedings”.

Inherent jurisdiction of English courts to award anti-suit relief: The court was nevertheless prepared to protect AES’ contractual right to insist on arbitration. Burton J was “entirely satisfied” that the Court had jurisdiction to entertain a claim for a declaration and an anti-suit injunction because, as Lord Hobhouse had put it in *Turner v Grovit* [2002] 1 WLR 107 HL, the applicant was “relying upon a contractual right not to be sued in the foreign country . . . because of . . . an arbitration clause [and thus] he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract”.

No usurpation of tribunal’s jurisdiction: In this case, the applicant had also sought a declaration that the arbitration clause itself was valid and binding. The court drew a distinction between parties seeking to enforce an arbitration clause who subsequently intend to make a claim within it and those who simply seek to enforce their contractual right not to be sued other than in arbitration. In respect of the former, the court will respect the principle of non-intervention enshrined in section 1(c) of the Arbitration Act 1996, leaving the issue of the validity of the clause to the tribunal, unless and until a subsequent application under section 32 is made, while in the case of the latter, the intervention of the court to determine validity may be entirely appropriate.

In order to avoid any usurpation or ouster of the very arbitral jurisdiction invoked by AES, however, Burton J granted only a limited declaration; that JSC could not bring the claim, the subject matter of the Kazakh proceedings, or any other claim arising out of or in connection with the concession agreement, otherwise than by commencing arbitral proceedings.

In sum, the case comes as a welcome reminder in the post-West Tankers environment that the English courts will still act to protect a contractual right to arbitrate and that they are willing to do so even where the applicant does not itself wish to initiate arbitral proceedings.

Post authored by Sophie Lamb and Ruth Stackpool-Moore