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An anti-suit injunction to protect a non-existent arbitration

Andrew Cannon (Herbert Smith Freehills LLP) · Thursday, June 30th, 2011 · Herbert Smith Freehills

The Court of Appeal of England and Wales ruled last month that where parties have entered into an arbitration agreement, one party can obtain an anti-suit injunction to prevent the other party from initiating proceedings in a foreign court, even where no arbitration is underway or indeed even contemplated.

In *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, the claimant was a Kazakh subsidiary of a US energy company and operator under a concession agreement with the Kazakh owner, a company deriving its rights from the State. In an earlier dispute, the Kazakh Supreme Court had ruled that the arbitration clause (providing for a seat in London) contained in the concession was invalid, and the owner sought to rely on this in subsequent proceedings which it brought before the Kazakh courts seeking information as to the value of the concession assets. The operator then sought and obtained from the English High Court an anti-suit injunction to prevent the owner from bringing proceedings covered by the arbitration agreement in the Kazakh courts.

There were four issues on appeal before the Court of Appeal. Of these, the first and most comprehensively examined was what was called the “jurisdictional issue”, i.e. whether the court had jurisdiction to grant the anti-suit injunction in a situation where no arbitral proceedings were afoot. At its heart was the inter-relationship between the UK’s Arbitration Act of 1996, and the broad, general powers of the courts to issue injunctive relief under the Supreme Court Act 1981. The Court described the issue as having been “floating around, recognised or unrecognised, for some time”.

The Arbitration Act (under its section 44) gives the courts powers to issue injunctive relief, such as anti-suit injunctions, “for the purposes of and in relation to arbitral proceedings”. The lower courts rejected the operator’s argument that this included a power to issue anti-suit injunctions where no actual or intended arbitration was underway, and by the time of the appeal it was common ground between the parties that the Arbitration Act contained no such power.

Instead, the parties’ disagreement centred around whether the Arbitration Act was the sole basis by which the court might award anti-suit injunctions to uphold the arbitration agreement, or whether the courts’ broader powers under the Supreme Court Act might provide a basis for the injunction.

The opening section of the Arbitration Act sets down a provision that encapsulates one of the main principles of the Act, namely that the court should not intervene except as provided in the relevant part of the Act. The owner argued accordingly that the court’s general powers were inapplicable.

As often happens when courts are asked to limit the extent of their jurisdiction, the Court of Appeal, however, was unconvinced. It conceded that in situations where section 44 did apply, use of powers under the Supreme Court Act would be "wrong as a matter of principle". But, as the parties had agreed, section 44 did not apply where no arbitral proceedings were ongoing or even in prospect. If the Arbitration Act provided that the court should not intervene except as provided in the Act, one could ask – "intervene in what?". Since there were no arbitral proceedings to intervene in, the Court had little difficulty in finding that its own broader powers allowed it to issue the injunction.

In reaching its decision, the Court was clearly influenced by practical considerations of time and cost. In a previous decision, *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] EWHC 205 (Comm), the High Court had held that declaratory relief was a matter within the arbitral tribunal's substantive jurisdiction and it would be proper for the tribunal to form and determine the application for relief itself, in accordance with the provision in the Arbitration Act that it is primarily for a tribunal to rule on its own substantive jurisdiction. According to the Court of Appeal however, since the Supreme Court Act gave the court jurisdiction to grant the injunction anyway, requiring the operator to commence arbitration merely to put to the tribunal a question of its own substantive jurisdiction would be "far-fetched and unrealistic" – especially so when a tribunal is not obliged to rule on its own jurisdiction.

So is the decision pro-, or anti-arbitration? There's a case for both. On the one hand, it could be argued that the courts have seen fit to limit the principle behind section 1 of the Arbitration Act, that they should not intervene in matters governed by the Act. But, on the other hand, they did so to uphold an arbitration agreement in circumstances to which it was considered (by both parties) that the Act did not in fact extend. The Supreme Court judgment in *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 is cited in the judgment, and relied upon to underscore the Court of Appeal's view that disputes on jurisdiction are likely to come before the court at some point in any event, so why put the parties to the trouble and expense of initiating arbitral proceedings simply for the purpose of determining jurisdiction. The agreement was between two Kazakh entities, for performance in Kazakhstan, but the arbitration clause provided for a seat in London. The English courts were prepared to uphold and enforce an English arbitration agreement, even if the parties themselves were not prepared to bring an arbitration to do so.

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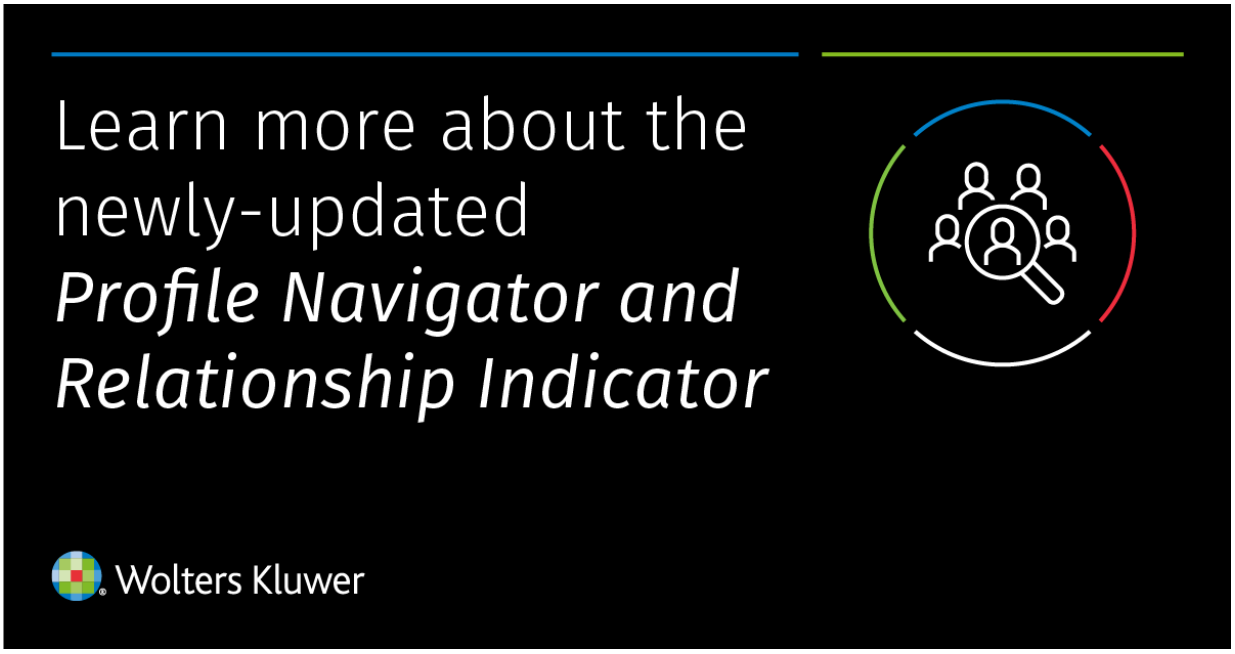

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