
litigation lawflash

15 August 2013

UK Supreme Court Clarifies Power to Restrain Foreign Proceedings

Court holds that English courts may grant an anti-suit injunction when foreign proceedings are brought in violation of an English law arbitration agreement, even where no arbitration is contemplated or underway.

On 12 June, the UK Supreme Court gave its judgment in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, holding that a party to an agreement to arbitrate disputes in London was entitled to an anti-suit injunction restraining the other party from commencing court proceedings in a foreign jurisdiction outside Europe, namely, outside the Brussels/Lugano Convention countries.¹ In so holding, the Court upheld the judgments of the Court of Appeal² and the High Court.³

Background

In 1997, AES Ust-Kamenogorsk Hydropower Plant LLP (the Operator) became the grantee and lessee of a 25-year concession agreement with Ust-Kamenogorsk Hydropower Plant JSC (the Owner), which entitled the Operator to run a hydroelectric plant in Kazakhstan. The concession agreement was governed by Kazakh law, but it contained an arbitration clause governed by English law that provided for arbitration in London.

In 2009, the Owner brought proceedings against the Operator in Kazakhstan. The Operator applied to stay the proceedings under the arbitration clause but was unsuccessful as the Kazakh court held the arbitration clause to be invalid. The Operator subsequently issued proceedings before the English courts, requesting a declaration that the arbitration clause was valid and enforceable and an anti-suit injunction restraining the Owner from continuing its proceedings in Kazakhstan. The High Court granted the order, which the Owner then unsuccessfully appealed in the Court of Appeal.

Supreme Court Judgment

In giving the judgment of the Supreme Court, Lord Mance noted that an agreement to arbitrate disputes has positive and negative aspects and that a party to an agreement who seeks relief under the arbitration agreement undertakes to do so in the prescribed forum. He noted that an often silent concomitant to this is that neither party will seek such relief in any other forum and, accordingly, the courts have the power to restrain a party from commencing foreign proceedings outside Europe when those proceedings are brought in violation of an arbitration agreement. Lord Mance further noted that an unusual feature of the dispute between the Owner and the Operator was that the Operator had not commenced, and had no intention or wish to commence, any arbitration proceedings.

The primary issues before the Court were the scope and effect of the provisions governing jurisdiction and court powers under the Arbitration Act 1996 and section 37 of the Senior Courts Act 1981. The Operator submitted that

1. *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, [2013] UKSC 35, available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0172_Judgment.pdf.

2. [2011] EWCA (Civ) 647.

3. [2010] EWHC (Comm) 772.

Morgan Lewis

the court had a general inherent power to declare rights under section 37, which allowed the High Court to “grant an injunction . . . in all cases where it appears to the court to be just and convenient to do so”.

The Owner opposed the use of such powers and submitted that any negative obligation inherent in an arbitration agreement is a mere ancillary to current or intended arbitral proceedings and that the courts could not provide relief to enforce the negative aspect of an arbitration agreement until arbitration had been started or proposed.

The Court found that the case law on these issues contained no support for the Owner’s argument that the negative aspect of an arbitration agreement is enforceable only when an arbitration has been started or proposed. Although in most of the cases an arbitration was underway, none of the statements of principle identified this as being relevant or critical.

The Owner further submitted that the Arbitration Act 1996 limited the scope of or qualified the general power provided by section 37 so that it was no longer permissible to use section 37 to injunct a claimant from commencing foreign proceedings brought or threatened in breach of an arbitration agreement. The Court held that the section 37 power was a general one and there was no basis on which to treat the Arbitration Act 1996 as having effectively abrogated the protection under it in respect of a party’s negative rights under an English law arbitration agreement.

Implications

The *Ust-Kamenogorsk Hydropower Plant* decision has clarified and confirmed the position that an English court may restrain a claimant from bringing foreign proceedings outside Europe where they are brought in breach of an arbitration agreement in English law, even where an arbitration under that agreement is not contemplated or underway. Within Europe, however, it remains the case that an anti-suit injunction will not be granted where parallel proceedings are underway in an European Union member state in breach of an arbitration agreement.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

Nick Greenwood	+44 (0)20 3201 5570	ngreenwood@morganlewis.com
Peter Sharp	+44 (0)20 3201 5580	psharp@morganlewis.com
David Waldron	+44 (0)20 3201 5590	dwaldron@morganlewis.com

About Morgan, Lewis & Bockius

With 24 offices across Europe, the United States, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius. All Rights Reserved.