By Dr. Jan Kraayvanger, Frankfurt am Main and Kwadwo Sarkodie, London[1]

AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC: Englischer Supreme Court stärkt den internationalen Schiedsort London

Der Europäische Gerichtshof erklärte in seiner West Tankers-Entscheidung anti-suit injunctions als mit der EuGVO unvereinbar, soweit hierdurch die Einleitung oder Fortführung eines Verfahrens vor den Gerichten eines anderen Mitgliedsstaates mit der Begründung verboten wird, dass ein solches Verfahren gegen eine Schiedsvereinbarung verstoße. Zudem legte der EuGH nahe, dass nach seiner Auffassung anti-suit injunctions auch gegen das New Yorker Übereinkommen verstießen. Demgegenüber hat der englische Supreme Court nunmehr klargestellt, dass zur Durchsetzung von Schiedsvereinbarungen mit einem englischen Schiedsort anti-suit injunctions weiterhin zulässig sind, soweit hierdurch Gerichtsverfahren außerhalb des räumlichen Geltungsbereichs der EuGVO bzw. des Luganer Übereinkommens unterbunden werden sollen. Dies gilt selbst dann, wenn der Antragsteller kein Schiedsverfahren in England eingeleitet hat und dies auch nicht beabsichtigt.

The European Court of Justice ruled in its West Tankers decision that anti-suit injunctions were incompatible with the Brussels Regulation if they were made to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement. In addition, the ECJ suggested that in its opinion anti-suit injunctions also infringed the New York Convention. In contrast, the English Supreme Court has now clarified that in order to uphold an arbitration agreement with an English seat of arbitration, anti-suit injunctions continue to be permissible and may be granted in respect of litigation outside the jurisdictions of the Brussels Regulation or the Lugano Convention. This is true even if the applicant has not commenced arbitration in England and does not intend to do so.

I. Introduction

When the parties to a cross-border agreement select a jurisdiction as the seat of arbitration, a key consideration will very often be the support to arbitration which can be provided by the courts of that jurisdiction. Whilst support for the arbitral proceedings themselves is obviously key, of no less importance is the upholding of the arbitration agreement and protecting it from being undermined or circumvented by state

1) Dr. Jan Kraayvanger is a partner in the Litigation and Arbitration Group of Mayer Brown LLP in Frankfurt am Main; Kwadwo Sarkodie is a partner in the Construction and Engineering Group of Mayer Brown International LLP in London.

court litigation. This is likely to be especially relevant for parties contracting with entities (or in relation to goods and assets) located in jurisdictions where the courts may be thought not to meet the standards associated with the courts of western democracies. Indeed, it is very often the desire to avoid litigation before such courts which drives the adoption of arbitration in the first place.

As such, it may not be sufficient that the courts of the seat of arbitration honour the arbitration agreement and decline jurisdiction in relation to disputes under the arbitration agreement. The risk may remain that the courts of another jurisdiction would take a different view, accepting jurisdiction notwithstanding the arbitration agreement and leaving a contracting party with no choice but to participate in the very litigation which it entered into the arbitration agreement to avoid. This is particularly so where assets are held in the jurisdiction where the court proceedings are pursued, raising the prospect of the resulting judgment being enforced locally, even if it were not enforceable in other jurisdictions.

It is in relation to these risks that the English courts offer a remedy which is not to be found in most other European jurisdictions – the anti-suit injunction. Where a valid arbitration agreement is in place and England is the seat of arbitration, the courts have shown themselves to be prepared to grant such measures to prevent the commencement or continuance of proceedings before an overseas court. Anti-suit injunctions, which have been granted by the English courts for many years, direct a party to take no further steps in proceedings started in breach of an agreement to arbitrate. They are enforceable by the courts' contempt jurisdiction, meaning that the sanctions of fines or imprisonment are available in the event of breach. As such they are a powerful tool for deterring or preventing proceedings commenced in breach of an arbitration agreement.

The anti-suit injunction has attracted extensive attention in the international arbitration community in connection with the well-known case of *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurta SpA) (The Front Comor)*[2]. In that case the European Court of Justice held that such an injunction would be incompatible with the Brussels Regulation[3], as it was contrary to the general principle that every court seised itself determines whether it has jurisdiction to resolve the dispute before it.

The *West Tankers* decision has been perceived as a blow against the attractiveness of London as a place of arbitration. It should be noted, however, that this decision does not prevent the English courts from granting an anti-suit injunction with regard to proceedings in jurisdictions which are not subject to the Brussels Regulation and the Lugano Convention. This has been established by a series of cases which followed *West Tankers*, including *Shashoua v Sharma* [2009] EWHC 957 and *Midgulf International Limited v Groupe Chimique Tunisien* [2010] EWCA Civ 66. In the Midgulf

2) ECJ, decision of 10 February 2009, case C-185/07.

3) COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

case, the English Court of Appeal (reflecting the conclusions of the Commercial Court in *Shashoua*) rejected an argument, based on paragraph 33 of the ECJ's decision in *West Tankers*, that an anti-suit injunction is contrary to the principles of Article II(3) of the New York Convention[4]. That article provides that it is the court seised of an action in a matter in respect of which the parties have made an arbitration agreement that will refer the parties to arbitration (unless it finds that the said agreement is null and void, inoperative or incapable of being performed). Having considered this, it was held at paragraph 68 of the leading judgment in *Midgulf* that "*English Courts have long taken the view that the grant of an anti-suit injunction is not incompatible with the New York Convention and I do not see that* [West Tankers] *provides a good reason for taking a different view*".

Support for anti-suit injunctions has been further underlined by the judgment handed down on 12 June 2013 by the English Supreme Court in the case of *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35. The grant of an anti-suit injunction to restrain proceedings in the courts of Kazakhstan was upheld and, importantly, the Court confirmed that it was willing and able to do so even where neither side was actually seeking arbitration. This is discussed in further detail below.

II. Background of the Supreme Court's decision

The *Ust-Kamenogorsk* case arose out of an agreement granting a 25-year concession for the generation of hydroelectric power in Kazakhstan. The concession agreement was originally entered into by the Republic of Kazakhstan, whose rights as owner were then assumed by the defendant company, Ust-Kamenogorsk Hydropower Plant JSC ("**JSC**"). The claimant in the proceedings was the operator under the concession agreement, AES Ust-Kamenogorsk Hydropower Plant LLP ("**AES**"). Whilst the concession agreement itself was subject to the laws of Kazakhstan, it contained an arbitration clause governed by English law.

Various disputes arose, leading to court proceedings in Kazakhstan. In one set of proceedings, JSC sought an order directing AES to provide information, requested under the concession agreement, as to the value of various concession assets. The Kazakh court rejected AES's contentions that these court proceedings should be stayed to arbitration, relying on an earlier finding of the Kazakh Supreme Court that the arbitration clause in the concession agreement was void. Whilst JSC subsequently agreed that it would suspend the proceedings seeking the disclosure of information, it was unwilling to undertake not to resume them.

AES therefore commenced proceedings in the English Commercial Court, seeking (i) a declaration that the arbitration agreement was valid, and (ii) an anti-suit injunction restraining JSC from resuming proceedings before the Kazakh courts. AES did not commence arbitration proceedings, however, and had no

4) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

intention of doing so – it merely wished to terminate and/or prevent court proceedings in Kazakhstan.

Arbitration in England is governed by the Arbitration Act 1996 (the "**Arbitration Act**"), which sets out, at clause 44, various powers which the Court may exercise "*for the purposes of and in relation to arbitral proceedings*". One such power is the granting of an interim injunction (clause 44(2)(e)), thus permitting the Court to uphold a valid arbitration agreement by temporarily restraining proceedings in another court pending the ruling by the arbitral tribunal as to its own jurisdiction.

III. The decisions of the Commercial Court and the Court of Appeal

The Commercial Court found the arbitration agreement to be valid, but accepted that clause 44(2)(e) of the Arbitration Act did not give it the power to grant an anti-suit injunction. Such power was only exercisable in relation to arbitral proceedings, and in the present circumstances no arbitration proceedings were either underway or in contemplation. However, the Court went on to hold that the power to grant an anti-suit injunction did exist pursuant to the wider and more general discretion to grant injunctions conferred by section 37(1) of the Senior Courts Act 1981 (the "**Senior Courts Act**"). The Commercial Court therefore granted a final anti-suit injunction in the terms sought by AES.

JSC appealed to the Court of Appeal, claiming that the Commercial Court had been wrong to hold that it had the power to grant an anti-suit injunction under section 37 of the Senior Courts Act, when there was no power to do so under section 44 of the Arbitration Act. The Court of Appeal dismissed the appeal, although the leading judgment did comment with approval on the proposition that while section 37(1) of the Senior Courts Act gave an independent right of relief, the exercise of a discretion under this clause was not necessarily entirely free-standing. That is to say, it could be influenced by matters arising under section 44 of the Arbitration Act (and vice versa).

IV. Decision of the Supreme Court

JSC then appealed to the Supreme Court, arguing that the right to restrain court proceedings in support of an arbitration agreement could only arise under the provisions of the Arbitration Act. Being a complete set of rules in relation to arbitration, the exercise of other more general rights (such as those under section 37 of the Senior Courts Act) was to be treated as constrained by the terms of the Arbitration Act when applied in relation to arbitration. This was in accordance with the principle of non-intervention set out at section 1(c) of the Arbitration Act. Since the Arbitration Act only permitted an injunction to be granted in circumstances where arbitration proceedings were either underway or proposed, no injunction could be granted to AES whether under the Arbitration Act or the Senior Courts Act.

The above arguments were rejected. The Supreme Court observed that inherent in an arbitration agreement were both positive and negative obligations. That

is to say, the positive obligation to seek relief in relation to the agreement only by way of arbitral proceedings in the stated forum, and the negative obligation to refrain from seeking relief in any alternative forum. JSC contended that the negative obligation was restricted to current or intended arbitral proceedings. This was rejected – it was held that "*the negative aspect is as fundamental as the positive*".

The contention that the Arbitration Act restricted the court's existing powers under the Senior Courts Act was also rejected. The Supreme Court commented that if any such restriction was intended, the United Kingdom Parliament would have been expected to have made this very clear, given that it would amount to a "*radical diminution of the protection afforded by English law to parties to … an arbitration agreement*". Going further than the Court of Appeal, the Supreme Court recognised a power under section 37(1) of the Senior Courts Act which was wholly unaffected by matters under section 44 of the Arbitration Act (although regard to the scheme and terms of the Arbitration Act was necessary in cases where arbitral proceedings *were* on foot or proposed).

As to the principle of non-intervention set out at section 1(c) of the Arbitration Act, this was found to be directed at intervention in an arbitration (and therefore not applicable where, as in this case, an arbitration was not anticipated or ongoing). It did not have a bearing on foreign court proceedings.

The Supreme Court further observed that the power of the arbitral tribunal to rule as to its own jurisdiction pursuant to the principle of *Kompetenz-Kompetenz* did not limit the court's ability to determine issues of jurisdiction where there was no arbitral tribunal, because no arbitration had been commenced.

V. Effect of the decision

The approach taken by all three of the English courts which considered the Ust-Kamenogorsk case serves to affirm the support which will be given to agreements to arbitrate.

Subject to the acknowledgment of the restrictions imposed by West Tankers, the Supreme Court in Ust-Kamenogorsk confirmed the discretion of the courts to grant injunctions against foreign proceedings in support of an agreement to arbitrate, as well as the willingness to exercise such powers whether or not an arbitration was actually underway or imminent.

Outside of the Brussels Regulation and Lugano Convention jurisdictions, there are of course many jurisdictions where real concerns will arise as to the efficacy and impartiality of national courts. Parties wishing to contract with entities based or domiciled in such jurisdictions should certainly have regard to the availability of anti-suit injunctions, as one of the relevant factors to be kept in mind when considering which seat of arbitration is to be stated in the arbitration agreement.