In praise of independent arbitration proceedings

Colin Gibson welcomes the Supreme Court decision providing clear support for arbitration clauses choosing England as the dispute resolution centre

There will always be a place for litigation. It is the court process that gets a litigator up in the morning and occasionally keeps him or her awake at night. The popularity of arbitration, on the other hand, ebbs and flows. Currently it, like Azaelia Banks, full beards and New Zealand sauvignon blanc, is all the rage. The reason probably lies in globalisation and the importance of the ability to enforce internationally where bi or multi-lateral treaties are non-existent.

London is a major arbitration centre. Both the legislature and the courts have a significant role in ensuring London's effectiveness and, therefore, reputations are maintained. Civil procedure in London can affect proceedings worldwide. In May the Supreme Court reaffirmed for a generation the jurisdiction of the English court to prohibit overseas proceedings in breach of a binding contractual clause providing for arbitration in England. The decision, which on one view merely tells us what we thought we knew, is a significant reinforcement of the English court's powers to ensure fair play and to give arbitrations the space to work.

Some of the issues discussed in the judgment in *Ust-Kamenogorsk Hydropower Plant JSC (Appellant) (JSC) v AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent) (AESUK)* [2013] UKSC 35 are well-known and uncontroversial. Certain powers exercisable by the High Court on an application under CPR Part 62 and ss 42 et seq of the Arbitration Act 1996 to enforce peremptory orders of the tribunal and support the process are clearly drawn. Another given is that since 2007 the English court has been unable to issue an anti-suit injunction prohibiting proceedings in the Brussels/Lugano region. That is on the basis of an assumed mutual trust between courts of EU member states to "do the right thing" (Case C-185/07, *West Tankers*). That did not, however, affect the jurisdiction to restrain proceedings outside that region.

However, enough uncertainty apparently lay in the scope of the power to restrain overseas proceedings for the Supreme Court to be interested. JSC had commenced proceedings in Kazakhstan, on the face of it in breach of an arbitration clause providing for arbitration in England. The Kazakh court had made decisions in relation to the arbitration clause which might be described as eccentric but at all events were "unsustainable under English law which is accepted to govern the arbitration agreement". AESUK sought and obtained an anti-suit injunction in England but without commencing any arbitration proceedings to which the injunction could be described as ancillary. AESUK had no intention of commencing arbitration proceedings in England – it merely pointed out that if any proceedings were to be commenced this must be the jurisdiction and arbitration must be the process. JSC argued that in the absence of actual or proposed arbitration proceedings the English court did not have such a power. In this respect JSC submitted that the Act had implicitly curtailed the jurisdiction of the English court under section 37 of the Senior Courts Act 1981 to grant an injunction in all cases in which it appears just and convenient to do so. In other words AESUK could seek relief under the sections 42, 44, 48 and 66 of the Act or not at all.

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This is a tricky area of conflicts of laws where careless pronouncements would be unwelcome. At the same time a very significant power of the English court was at stake. The Supreme Court's judgment is economical and well-written. The Supreme Court found emphatically that the jurisdiction under section 37 of the Senior Courts Act 1981 to restrain foreign proceedings remains intact (subject to the rather large Brussels/Lugano region exception). It thereby preserved the jurisdiction to protect the arbitration process.

Uneven recognition

Not all signatories to the New York Convention recognise and enforce arbitration agreements and awards as astutely as they should. If the foreign court is happy to ignore the arbitration clause and the New York Convention it will probably be happy to ignore an extra-territorial injunction of the English court. However, that does not completely neutralise the anti-suit injunction. To the extent that there are assets in England or the EU now or in the future, the English court's judgment will be recognised and the mischief of the non-EU judgment in that sense cured. It also clears the way for any future arbitration award to be recognised and enforced without complication in any New York Convention signatory state.

From an English civil procedure standpoint this is an important decision. A major talking point concerning start-up arbitration centres outside the USA and EU is the extent to which arbitration in those jurisdictions comes free of unwarranted interference by local governments and courts. The Supreme Court's decision, ironically, demonstrates a firm commitment to the independence and sanctity of the arbitration process – by interfering instead with the court process of another jurisdiction. The message is simple: a party choosing England as its seat of arbitration can expect the English courts to support, but not usurp, the arbitral process.

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