

## **UK SUPREME COURT CONSIDERS ANTI-SUIT INJUNCTIONS**

*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*  
[2013] UKSC 35

### **Introduction**

In a decision in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, handed down on 12 June 2013, the Supreme Court considered whether the English courts had jurisdiction to injunct the continuation or commencement of foreign proceedings brought in breach of an arbitration agreement, even in the absence of an actual, proposed or intended arbitration.

### **Background**

AES Ust-Kamenogorsk Hydropower Plant LLP (“AESUK”) was the grantee and lessee of a 25 year concession granted by agreement dated 23 July 1997 entered into with Ust - Kamenogorsk Hydropower Plant JSC (“JSC”) entitling it to operate an energy producing hydroelectric plant in Kazakhstan. The concession agreement included an arbitration clause providing for arbitration in London in the event of any disputes.

In 2009, following disputes between the parties, JSC brought proceedings against AESUK in the Kazakhstan courts. AESUK subsequently issued proceedings before the English Commercial Court claiming a declaration that the arbitration clause was valid and enforceable and a without notice interim anti-suit injunction restraining JSC from pursuit of the proceedings before the Kazakhstan courts.

AESUK had not commenced, and had no intention or wish to commence, any arbitration proceedings. Its position was that JSC should not pursue or be free to pursue court proceedings against it – should it bring arbitration proceedings, AESUK would defend those proceedings.

By order dated 16 April 2010, Burton J, sitting in the High Court, granted AESUK such a declaration together with an injunction in relation to the bringing of proceedings against it by JSC (<http://www.bailii.org/ew/cases/EWHC/Comm/2010/772.html>). By order dated 1 July 2011, the Court of Appeal dismissed JSC's appeal against Burton J's order (<http://www.bailii.org/ew/cases/EWCA/Civ/2011/647.html>).

JSC appealed.

## Judgment

The Supreme Court unanimously dismissed the appeal.

The Supreme Court held that the English courts had a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration was in existence or contemplation, provided that the foreign proceedings were not within the scope of the Brussels/Lugano Conventions following the decision in *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurta SpA) (The Front Comor)* (Case 185/07) [2009] 1 AC 1138. There was nothing in the Arbitration Act 1996 which removed this power from the courts.

In giving the decision of the Supreme Court, Lord Mance said:

- An arbitration agreement gives rise to a ‘negative obligation’ whereby both parties expressly or impliedly promise to refrain from commencing proceedings in any forum other than the forum specified in the arbitration agreement. This negative promise not to commence proceedings in another forum is as important as the positive agreement on forum.
- The provisions of the Arbitration Act 1996 relating to the determination of jurisdictional questions were not comprehensive, and only applied where arbitral proceedings were on foot or in contemplation.
- Accordingly, the Arbitration Act 1996 had no bearing on whether the court may order injunctive relief under section 37 of the Senior Courts Act 1981 where no arbitration is on foot or in contemplation.
- The general power provided by section 37 of the Senior Courts Act 1981 must be exercised sensitively and, in particular, with due regards for the scheme and terms of the Arbitration Act 1996 when any arbitration was on foot or proposed.
- It was also open to a court under section 37 of the Senior Courts Act, if it thinks fit, to grant any injunction on an interim basis, pending the outcome of current or proposed arbitration proceedings, rather than a final basis.

25<sup>th</sup> June 2013