

# Insight: Arbitration

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## Supreme Court confirms English courts can grant injunctions to protect arbitration agreements, even absent a current or prospective arbitration.

The Supreme Court yesterday confirmed that, even where no arbitration is contemplated or afoot, English courts can grant an anti-suit injunction protecting an English law agreement to arbitrate (*AES Ust-Kamenogorsk LLP v. Ust-Kamenogorsk JSC* [2013] UKSC 35). Entering an arbitration agreement entails not only a positive right to refer disputes to arbitration, but also a negative obligation on contracting parties not to bring proceedings in any other forum. The Supreme Court found this negative obligation could be enforced using courts' general discretion under the Senior Courts Act 1981 (the "**1981 Act**"), even absent a current or prospective arbitration.

The decision enhances the attraction of choosing an English 'seat' for international arbitration. The choice of seat in an arbitration agreement determines the supervisory framework which underpins the arbitral proceedings. It has a significant impact on the extent to which courts can intervene in and support the arbitral process. The Supreme Court's judgment confirms that the English courts have a wide range of powers to support arbitrations seated in England, and are prepared to use these powers to uphold agreements to arbitrate.

The decision also forms part of a recent trend of English courts relying on section 37(1) of the 1981 Act to support the arbitral process. Using the same provision, *Cruz City 1 Mauritius Holdings* ("**Cruz City**") (represented by White & Case) recently obtained an order requiring the losing parties in an arbitration to disclose their assets worldwide, to assist Cruz City in enforcing against these parties arbitral awards of US\$298 million (see our previous Client Alert by clicking [here](#)).

### Background: the English courts' powers to enforce arbitration agreements

It is well recognised that English courts have wide powers under the Arbitration Act 1996 to enforce arbitration agreements where arbitral proceedings are afoot or contemplated. These include powers to order interim anti-suit injunctions in urgent situations or with the Tribunal's permission / the parties' agreement (although such injunctions cannot be used to restrain proceedings in other EU member states, Switzerland, Norway and Iceland following the European Court of Justice's decision in



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*West Tankers*). But to what extent can the court enforce arbitration agreements where none of the parties has commenced or intends to commence arbitration? This was the question in the present dispute.

## The dispute

The dispute arose between the owner and operator of a hydroelectric plant in Kazakhstan. The concession to operate the plant was governed by Kazakh law, but contained an English law arbitration agreement providing for disputes (with limited exceptions) to be resolved by arbitration in London. The owner applied to the Kazakh courts, in breach of the arbitration agreement, for further information about the value of the concession assets. The owner later agreed to withdraw these Kazakh proceedings, but refused to undertake not to reinstitute them.

The operator brought proceedings in England for (1) a declaration of the arbitration agreement's validity; and (2) an anti-suit injunction preventing the owner from pursuing Kazakh court proceedings. The High Court accepted such orders could not be made under the Arbitration Act where, as was the case here, arbitral proceedings were not afoot or contemplated. But it found it had the power to make these orders instead using its general discretion to grant interim or final injunctions where just and convenient to do so (under section 37(1) of the 1981 Act). When this decision was upheld by the Court of Appeal, the owner appealed to the Supreme Court.

## The Supreme Court's decision

The owner argued before the Supreme Court that the Arbitration Act alone allowed courts jurisdiction to grant injunctions supporting arbitration. Thus, absent current or prospective arbitral proceedings, the courts could not grant an injunction. The owner contended the Arbitration Act was designed as a complete set of rules to determine jurisdictional issues and, therefore, the courts' more general discretion under the 1981 Act could not be used to 'get around' its limitations.

This approach fitted, it argued, with the general principle of limiting court intervention underlying the Arbitration Act.

The Supreme Court rejected these arguments. Its starting point was that the 1981 Act granted English courts an inherent power to give an injunction in favour of a party who can show either (1) an invasion or threatened invasion of a right in the court's jurisdiction, or (2) unconscionable behaviour by another party. On this basis, English courts could grant anti-suit injunctions protecting the right of a party to an arbitration agreement not to have disputes resolved in another forum.

The Arbitration Act did not remove the courts' powers under the 1981 Act. The Court found "[i]t would be astonishing if Parliament should, silently and without warning, have ... precluded the use by the English court of its previous well-established jurisdiction under section 37." Express parliamentary provision would have been required to remove these powers. The Arbitration Act contained no such provision.

The Supreme Court found the powers under the 1981 Act co-exist with, and complement, those available under the Arbitration Act.

First, the Arbitration Act expressly preserved previously existing rules of English arbitration law and made no claim to be a comprehensive code.

Second, the general principle of limited court intervention underlying the Arbitration Act did not impliedly oust the courts' jurisdiction under the 1981 Act: the principle did not preclude intervention in foreign litigation (as in the present case), but rather cautioned against intervening in an existing or prospective arbitration (of which here there was none).

Third, the principle that an arbitral tribunal may rule on its own jurisdiction did not stop a court ruling when no arbitration was intended. A party seeking to prevent proceedings in breach of an arbitration agreement should not have to commence

arbitration just to obtain a ruling on that agreement's validity.

## Implications of the decision

The Supreme Court's decision enhances London's attraction as a seat for parties wishing their disputes to be resolved by arbitration. The Court has confirmed that the English courts have a discretion – and are willing to exercise that discretion – to grant anti-suit injunctions and uphold parties' bargains to arbitrate.

It remains an open question whether the 1981 Act can be used to overcome other limitations of the Arbitration Act. For example, absent the Tribunal's consent or both parties' agreement, the Arbitration Act only allows the courts to make orders in support of arbitration in cases of "urgency". Section 37 of the 1981 Act has a broader scope. The threshold for obtaining an injunction under the 1981 Act (i.e., invasion / threatened invasion of a right or unconscionable behaviour) is arguably lower than that of "urgency" under the Arbitration Act. In the present case, the operator showed a threatened invasion of its right to have its disputes determined by arbitration, by virtue of the owner's refusal to undertake not to bring further Kazakh proceedings. Yet, with no such proceedings immediately in prospect, the threshold for "urgency" under the Arbitration Act may have been harder to meet.

Also left unclear is the precise relationship between the 1981 Act and the Arbitration Act. Rix LJ (in the Court of Appeal's leading judgment) suggested each act influenced the application of the other, and that the 1981 Act should in principle not be used to get round the limitations of the Arbitration Act. By contrast, the Supreme Court recognised a freestanding discretion under the 1981 Act. Though it concluded that the discretion should "*be exercised sensitively and ... with due regard for the scheme and terms of the [Arbitration Act] when any arbitration is on foot or proposed*", the Court stopped short of further clarification on the relationship between these two important statutes. This question still needs to be resolved by the English courts.