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Thomas Heintzman specializes in arbitration, mediation and litigation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions, construction and environmental law.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as numerous appearances in the Supreme Court of Canada.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

Playing Offence, Not Defence, In International Arbitrations

What is the best way to protect the authority of international commercial arbitrations? Is a party obliged to "play defence" and not ask the courts of the seat of the arbitration to interfere until after arbitration proceedings are commenced? Or can a party "play offense" and ask those courts to take jurisdiction before any arbitration proceedings begin? That is the issue which the UK Court of Appeal addressed in ***AES-Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC*.**

The Background

The dispute related to a 20 year concession agreement between the owner and operator of a hydro-electric facility in Kazakhstan. The original owner was the Republic of Kazakhstan. Both the original owner and the original operator had assigned their interests to companies to which each of them was related and those companies were the parties to this English proceeding. The companies were both Kazakhstan companies and the concession agreement was governed by Kazakhstan law.

The concession agreement contained an arbitration clause which was governed by English law. It provided that all disputes were to be settled by ICC arbitration to be conducted in London, England.

The owner had brought previous litigation in the Kazakhstan court. In that litigation, the Kazakhstan Supreme Court held that the arbitration clause was unenforceable under Kazakhstan law. The operator appeared in the Kazakhstan court to contest the jurisdiction of that court. When that court held that it had jurisdiction, the operator made submissions on the merits but at all times it contested the jurisdiction of the Kazakhstan courts.

The operator brought an application in the UK courts for a declaration that any claim arising out of the concession agreement (except tariff matters) had to be determined in accordance with the arbitration clause of that agreement. It also sought an injunction restraining the owner from bringing any such proceedings in the Kazakhstan courts. At the time of the application, there was no court of arbitration proceeding in existence or contemplated under the concession agreement. The UK court of first instance granted the declaration but not the injunction and the owner appealed.

The "Just and Equitable" Principle

The UK Court of Appeal upheld the jurisdiction of the UK courts to hear the application and grant the declaration. It did not do so based upon the general UK arbitration statute, the ***Arbitration Act, 1996*** (the "1996 Act"). It held that section 44 of the 1996 Act only allowed the court to grant interim injunctions in the case of urgency, or with the tribunal's or the parties' agreement. None of those circumstances existed in the present case. Indeed, the operator conceded that it could not rely on section 44 in the present circumstances.

Instead, the operator relied upon the general declaratory jurisdiction of English courts found in section 37 of the ***Senior Courts Act***. That section authorized the court to grant an injunction if it is "just and equitable" to do so. This authority is also found in section 101 of the **Ontario *Courts of Justice Act*** and in the judicature or procedural statutes of most common law jurisdictions. Accordingly, the decision in ***Kamenogorsk*** is of general application in Canada and elsewhere.

One would have thought that the legislature's policy and intention regarding anti-suit injunctions or declarations to enforce arbitration clauses would be found in the arbitration home statute, in this case the 1996 Act. That statute did not authorize the English court to take

jurisdiction to grant an anti-suit injunction or declaration in these circumstances. If that is so, why should the court reach out to the general authority of the court to grant the declaration?

Two Reasons for "Playing Offence"

The UK Court of Appeal gave two reasons for taking jurisdiction:

First, the UK courts would, **sooner or later**, have to deal with the jurisdictional issue. Accordingly, it should do so in the absence of an existing or threatened arbitral proceeding, and notwithstanding the "competence-competence" principle which appears to direct a contrary conclusion.

Second, the profound policy of UK law is to **uphold arbitration proceedings**. None of the surrounding circumstances displaced the application of that policy.

The "sooner or later" principle was stated by Lord Justice Rix as follows:

> "This analysis, in my respectful opinion, usefully underscores the wider picture about the autonomy of the parties and the jurisdiction of arbitrators with power to investigate their own jurisdiction: namely that, sooner or later, the question of substantive jurisdiction is likely to come before the court. Where parties differ as to a matter as fundamental as whether they have agreed any contract, or any contract containing an arbitration clause, it is most unlikely that one or other of them will rest content with the decision of arbitrators as to either their jurisdiction or as to the parties' rights. For one or other party is saying that there is simply no agreement that arbitrators can resolve their disputes. In such circumstances, the issue of jurisdiction is likely to come before the courts sooner or later, and when it does, it will have to be decided by the court from first principles and in the light of facts which, whatever the investigation by the arbitrators, are yet to be determined on the evidence by the court." (underlining added)

This reasoning is based on the profound and dynamic relationship between an arbitral tribunal and the courts of the seat of the arbitration. The "competence-competence" principle usually means that the arbitral tribunal should be the first to exercise its jurisdiction. Yet, ironically, it is not wrong for the court of the seat of the arbitration to first assume jurisdiction and issue such a declaration because the court's exercise of that power is in aid of the arbitral tribunal exercising its authority and because, one way or another, the jurisdictional issue must come back to the court of the seat of the arbitration if one party objects to that jurisdiction.

Accordingly, Lord Justice Rix said:

> I do not with respect agree …that it is in all circumstances necessary for a party who wishes to raise with the court an issue of the effectiveness of an arbitration clause first to commence an arbitration…. In my judgment, at any rate in a case where no arbitration has been commenced and none is intended to be commenced, but a party

> goes to court to ask it to protect its interest in a right to have its disputes settled in accordance with its arbitration agreement, it is open to the court to consider whether, and how best, if at all, to protect such a right to arbitrate. Whether it will assist a claimant at all, and if so, how, is a matter for its discretion: but it would to my mind be an error of principle and good sense for the court to rule that as a matter of jurisdiction, or even as a matter of the principled exercise of its discretion, it has no possible role in the protection and support of arbitration agreements in such a context.

The second principle is that the UK courts will uphold the arbitral regime against virtually all other incursions into that regime. It is on this basis that the Court of Appeal ended its analysis:

> In those circumstances, it is hard, in my judgment, to see any reason why, as a matter of jurisdiction, there should be any difficulty about the English court providing a remedy to preserve and support the right of the operator to arbitrate.. …The demand that the operator commence an arbitration solely in order to put before an arbitral tribunal an issue of substantive jurisdiction which it is to be presumed the owner would repudiate, very probably by standing aloof from the arbitration, and which, in all practical terms, could only be definitively settled by the court, seems to me to be far-fetched and unrealistic, to be creative of unnecessary expense and delay, and to put the operator under unnecessary risk that further proceedings in the Kazakhstan courts would be to its prejudice, as well as to the prejudice of the agreed process of arbitration. None of that promotes any of the principles upon which the [***Aribration Act***] ***1996*** is founded, as set out in its section 1. It would seem to me to be the antithesis of the principles of that Act for this court, in such circumstances, to refuse, as a matter of jurisdiction or principle, a request for assistance in the form of an anti-suit injunction.

Pro-Actively Protecting the Arbitral Regime

This judgment is a ringing endorsement of the entitlement of the courts of the seat of the arbitration to take matters into their own hands to preserve and protect the arbitral regime. Perhaps the fact that London is the seat of many international arbitrations is a strong motive for the UK courts to adopt such a policy. But the 1996 English Act is based on the principles of the UNCITRAL Model Law. So the policy should be equally applicable to other common law jurisdictions.

Clearly, if the courts of countries which are not the seat of the arbitration "play offence" and issue conflicting declarations and injunctions, it would play havoc with the arbitration regime. There must be one and only one court system which exercises this supervisory "<u>sooner or later</u>" jurisdiction, and that is the court system of the seat of the arbitration. For those who need the pro-active intervention of that court system to protect an arbitral regime, the ***Kamenogorsk*** decision is a powerful pronouncement.

Arbitration - International Commercial Arbitration - Declaratory Relief - Jurisdiction of the Court

AES-Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC
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