

The factual outcome of the case is logically supportable and consistent with the decision in *United Wire* and various hypotheticals explored in the judgments, though it is difficult to predict how effectively the approach will transpose to more complex claims and fact scenarios where there is more substantial interaction between different parts of patented products such that there is no clear distinction between subsidiary and main parts.

The Supreme Court decision in *Schütz* is particularly notable for its endorsement of an inventive concept approach, albeit embedded in a multifactorial analysis. Lord Neuberger recognised that a focus on the inventive concept was not mandated by *United Wire*, but nor was it inconsistent with that decision. This endorsement provides considerable overlap with the approach taken in the German authorities as well as the decision at first instance. However, it departs from those decisions in various respects and there is a degree of ambiguity in all approaches. Lord Neuberger expressed a surprising degree of confidence in the ability of courts to identify (or divine) the inventive concept in patent cases (particularly at [69]), though nowhere does he or Floyd J. clearly identify what is meant by the inventive concept, except to state summarily that it resides in the cage rather than the bottle. Lord Neuberger seems to view the inventive concept as a stable entity, despite case law that has interpreted it in different ways in different contexts, such as entitlement, inventive step, patentable subject matter and amendment. Presumably he equated the inventive concept with the claimed inventiveness set out in characterising portion of the claim, which emphasised features of the cage welding. Both Lord Neuberger and Floyd J. distanced themselves from the strict language of the claim, invoking some notion of the substance of the invention beyond the claim. Neither, however, seems to use inventive concept expressly in the sense it is used in German law or in the harmonised provisions on unity of invention, as reflecting the technical advantages, effects or features of the invention. It remains to be seen how the ill-defined notion of inventive concept, which occupies an increasingly central role across various areas of patent law, will continue to develop and apply.

JULIA POWLES

#### ANTISUIT INJUNCTIONS AND ARBITRATION AGREEMENTS

IF one party to a dispute ignores a London arbitration agreement by suing in a foreign court can an English court grant the other party an antisuit injunction although neither intends to arbitrate? The UK

Supreme Court gave an affirmative answer to this important question in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35. As Lord Mance said, giving the court's judgment, the immunity from suit conferred by such agreements is "a right enforceable independently of the existence or imminence of any arbitral proceedings" (at [28]).

AES had leased a concession to operate a hydroelectric plant in Kazakhstan from JSC. Both were Kazakh corporations but the contract, although governed by Kazakh law, provided for arbitration in London under ICC rules. When JSC sued AES in Kazakhstan AES failed to obtain a stay of the proceedings on the basis of the arbitration agreement because the court declared the agreement invalid as being contrary to Kazakh public policy. Burton J. subsequently granted AES an antisuit injunction restraining JSC from pursuing any claim under the concession agreement "otherwise than by commencing arbitration proceedings in the International Chamber of Commerce in London". This was upheld (unequivocally) first by the Court of Appeal, then by the Supreme Court.

The Supreme Court's approach rested on four important assumptions.

First, AES maintained that any dispute should be submitted to arbitration in London, but did not intend to initiate arbitral proceedings itself. So arbitration in London was neither pending nor contemplated by either party.

Secondly, although Kazakh law governed the concession agreement, it was common ground that the arbitration clause, being severable from its host contract, was subject to English law, reflecting the principle that agreements to London arbitration are normally subject to English law (*Sulamerica Cia Nacional de Seguros SA v Enesa SA* [2012] EWCA Civ 638).

Thirdly, it was irrelevant that the Kazakh court had declared the arbitration agreement invalid. Section 32 of the Civil Jurisdiction and Judgments Act 1982, helpfully analysed by the Court of Appeal ([2011] EWCA Civ 647), provides that English courts shall not recognise foreign judgments obtained in breach of jurisdiction or arbitration agreements, and are not bound by decisions of foreign courts concerning the validity of such agreements.

Fourthly, AES had not submitted to the jurisdiction of the Kazakh courts, a matter determined by the Court of Appeal after an important discussion of the law on submission. There was therefore no basis for arguing, pursuant to section 32(1)(c) of the 1982 Act, that AES was after all bound by the finding that the arbitration agreement was invalid. Although AES had defended JSC's claim on the merits in Kazakhstan, it did so only to preserve its right under Kazakh law to

appeal on jurisdiction, it objected throughout to the court's jurisdiction, and it withdrew once jurisdiction was established.

Superficially, the conclusion that AES was entitled to relief, reached consistently by the English courts at each stage of the proceedings, may seem unsurprising, notwithstanding JSC's strenuous (and costly) efforts to argue otherwise. Few would have contemplated a different result before the dispute arose. Indeed, Lord Mance considered any other outcome "inconceivable" (at [60]), and "astonishing" (at [57]).

The power to restrain a claimant in foreign proceedings is well-established. Section 37 of the Senior Courts Act 1981 confers a general power to grant injunctions by providing that "the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so". This clearly includes relief preventing the breach of contractual arbitration agreements, as prominently in *The Angelic Grace* [1994] 1 Lloyd's Rep. 168, just as it permits injunctions enforcing agreements to a court's exclusive jurisdiction. But in *Ust-Kamenogorsk* the situation was complicated by section 44 of the Arbitration Act 1996, which provides that the court's general injunctive power is exercisable ancillary to arbitration "for the purposes of and in relation to arbitral proceedings". Does this confine the power to grant remedies ancillary to arbitration to cases involving active arbitral proceedings? Must such proceedings be commenced, or at least contemplated, before a court can enforce an arbitration agreement by injunction?

The Supreme Court accepted that such relief could not be regarded as connected with arbitral proceedings, and so was not within section 37, unless proceedings are active or imminent. But, as Lord Mance concluded, it did not have to be. The 1996 Act does not exclusively regulate remedies ancillary to arbitration. The power to restrain foreign proceedings in breach of an arbitration agreement does not derive from section 44 of the 1996 Act, but is an instance of the general injunctive power originating in section 37 of the 1981 Act which exists independently of the powers contemplated by the 1996 Act. The only question therefore was whether section 44 qualified that general power. It did not. Only by express words could section 44 have curtailed the scope of so fundamental a remedy. Courts therefore remain free to enforce contractual arbitration agreements by injunction, just as they can restrain breach of any contractual term.

This does not mean, however, that the context supplied by the 1996 Act is irrelevant. As Lord Mustill had previously said in *Channel Tunnel Group v Balfour Beatty* [1993] A.C. 334, and as Lord Mance accepted, the Act is "part of the facts in the light of which the court decides whether or not to exercise a power which exists independently of it" (at [56]). A court must therefore respect the statutory scheme

established by the 1996 Act, if only when arbitration is pending or proposed. For example, as Lord Mance indicated, when arbitral proceedings are active or contemplated any injunction should be interim not final, pending the outcome of those proceedings.

The decision in *Ust-Kamenogorsk* is important for parrying what many would perceive as an unwarranted threat to the effectiveness of arbitration agreements. It rejects an argument superficially justified by statutory words which principle and common sense suggest were never intended by Parliament to curb a court's power to grant injunctive relief.

But the decision has wider significance. First, it highlights the substantive rather than procedural character of injunctions to restrain the breach of dispute-resolution agreements. As Lord Mance's analysis implies, such relief is concerned with the vindication of contractual rights, not (directly) with the allocation of jurisdiction.

Secondly, it illuminates the conceptual structure of arbitration agreements. As Lord Mance said (at [1]), such agreements have both a positive and a negative aspect, and so resemble exclusive jurisdiction agreements. Positively, claims subject to such agreements must be arbitrated according to their terms. Negatively, such claims must not be pursued in any other forum. Importantly, moreover, it is now clear that the obligation to refrain from non-arbitral proceedings is not extinguished by the fact that neither party intends to initiate proceedings under the agreement.

Thirdly, the decision contributes to the continuing discussion about how comity affects a court's discretion to grant antisuit injunctions, a discussion prompted by the decision in *Star Reefers v JFC Group* [2012] EWCA Civ 14 (noted, [2012] C.L.J. 273). A matter of particular importance concerns the extent to which a court should refuse relief when the foreign court could decline jurisdiction on the same grounds, or has already refused to do so. The issue arose squarely in *Ust-Kamenogorsk*, where the Kazakh court had previously declined to stay proceedings, having ruled that the arbitration agreement was invalid. Lord Mance accepted that cases may exist where the decision whether to enforce such agreements (and exclusive jurisdiction agreements) should be left to the foreign court. But this was not such a case. Not only did section 32 of the Civil Jurisdiction Act 1982 prevent an English court from recognising the Kazakh court's decision on the issue, but an English court was bound to apply English law not Kazakh law to determine the agreement's effect (at [61]).

Fourthly, by championing the contractual rights of those who submit to arbitration *Ust-Kamenogorsk* is a reminder of how the enforcement of those rights is diminished in cases subject to the EU jurisdiction regime embodied in Regulation 44/2001. Had JSC sued not

in Kazakhstan, but in an EU state, the English courts would have been powerless to restrain its breach of contract, a result notoriously ordained by the decision of the CJEU in C-185/07 *Allianz SpA v West Tankers Inc.* [2009] ECR I-663.

The decision in *Ust-Kamenogorsk* will be widely welcomed, save only perhaps by JSC and its advisers. It avoids needless costs and potential absurdity. It means that a party seeking to enforce its contractual rights is not forced to initiate fictitious arbitral proceedings as a vehicle for doing so. And it avoids condemning arbitration agreements to the status of second-class contract terms. It ensures that a breach of contract is no less of a breach, and no less entitled to enforcement by injunction, where the term infringed is an English arbitration clause.

RICHARD FENTIMAN