

SAMPLE REPORT

The Republic of Kazakhstan v. Istil Group Inc.

27th NOVEMBER 2007

**Description of the Case:** Injunction – Arbitration – London Court of International Arbitration Rules – Paris Commercial Court – Contredit – Jurisdiction – French Proceedings – Effect of an Earlier Award – Res Judicata

**Case Name:** *The Republic of Kazakhstan v Istil Group Inc*

**Date of Judgment:** 21<sup>st</sup> November 2007

**Court:** Queen’s Bench Division (Commercial Court)

**Judge:** The Honourable Mr Justice Tomlinson

**Citation:** [2007] EWHC 2729 (Comm)

**Background:** The Claimant in this case was the Republic of Kazakhstan (“ROK”). The Defendant, Istil Group Inc (“Istil”) was a Delaware corporation. This was an application for an injunction restraining Istil from pursuing any further proceedings in respect of claims advanced by it against ROK in an arbitration conducted under London Court of International Arbitration (“LCIA”) Rules. It raised a question as to the proper ambit of judicial restraint in relation to the conduct of international arbitration.

Istil first litigated in Paris and established that there was no applicable arbitration agreement, but lost its action because it was held that ROK enjoyed sovereign immunity. The French Court directed Istil to litigate in Kazakhstan. Istil then arbitrated in London in defiance of the French Court ruling. This time Istil won but it was deprived of the “*fruits of victory*” following a four-day trial on jurisdiction before the Commercial Court (“Justice David Steel’s Judgement”). The Commercial Court had concluded that the

arbitrators had no jurisdiction, ROK not being party to any agreement to arbitrate. Therefore, the Final Arbitration Award was set aside on grounds of lack of substantive jurisdiction.

Istil argued that Justice David Steel’s Judgement did not prevent it from returning to the arbitrators and inviting them to proceed to a further award on the merits of the dispute. Istil contended that by reason of Sections 58 (1)<sup>1</sup> and 73(2)<sup>2</sup> of the Arbitration Act the award on jurisdiction became final and binding and ROK had lost the right to object to the tribunal’s substantive jurisdiction.

**Issue:** The issue which the Commercial Court had to decide was whether, if it formed the view that the arbitrators had no jurisdiction so to proceed, it should nonetheless leave it to them to consider the effect of Justice David Steel’s Judgement.

<sup>1</sup> Section 58 (1) of the Arbitration Act – “*Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them*”

<sup>2</sup> Section 73 (2) of the Arbitration Act – “*Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling— (a) by any available arbitral process of appeal or review, or (b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal’s substantive jurisdiction on any ground which was the subject of that ruling*”.

**Held:** The Commercial Court referred to *Fiona Trust and Holding Corporation v Privalov*<sup>3</sup> in which it had been pointed out that the scheme of the Arbitration Act is that it will in general be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. The Court stated that there has been full respect for that general principle in that the arbitral tribunal has indeed, vis a vis the English supervisory court, been the first tribunal to consider the question of jurisdiction.

The Court found that in the present case there had been a full re-hearing of the question, not just a review of the arbitrators' decision, on the basis of evidence not all of which was before the arbitrators. The Court took the view that Istil had the opportunity to appeal against the direction that there be such a hearing but they did not avail themselves of it.

According to the Court, the question was whether the optimum procedure was that the court should now enjoin further pursuance of the claim in arbitration or whether the court should leave it to the arbitrators to dismiss the duplicative proceedings. The Court found that it was implicit in Istil's submissions that the further arbitration proceedings would not be duplicative because the arbitrators would simply give effect to that by which the parties were already bound, the first award on jurisdiction. However, the Commercial Court held that the parties are not so bound. Therefore, according to the Court, no question arose of the court failing to comply with obligations undertaken pursuant to the New York Convention.

The Court held that it would be undesirable to leave it to the arbitrators to decide whether they should give preference to their own earlier decision over that of the supervisory court on precisely the same subject matter. The supervisory court had held in proceedings between Istil and ROK that there was no basis upon which the arbitrators had been invested with jurisdiction to determine the dispute

between those parties. According to the Court, that should be the final decision.

Therefore, the Court granted an injunction and restrained Istil from further pursuit of their claim against ROK in LCIA.

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<sup>3</sup> *Fiona Trust and Holding Corporation v Privalov* [2007] Bus LR 686