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UNICREDIT V RUSCHEMALLIANCE

UK SUPREME COURT CONFIRMS POWER TO GRANT ANTI-SUIT INJUNCTIONS IN SUPPORT OF FOREIGN-SEATED ARBITRATION WHERE ARBITRATION AGREEMENT IS GOVERNED BY ENGLISH LAW

The UK Supreme Court in *UniCredit Bank v RusChemAlliance* has issued its reasons for its unanimous decision in April to uphold an anti-suit injunction granted by the Court of Appeal requiring a party to cease Russian court proceedings brought in breach of an arbitration agreement. The Supreme Court's judgment confirms that the English courts can issue an anti-suit injunction to stop a party from pursuing foreign court proceedings brought in breach of a non-English seated arbitration agreement where the arbitration agreement is governed by English law. The Supreme Court's decision has put to bed a string of conflicting decisions by lower courts on the issue and provides guidance on the English court's approach to the Enka test for determining the governing law of an arbitration agreement.

Background

RusChemAlliance (RCA), a Russian company, entered contracts for the construction of gas facilities in Russia with a German contractor. Following Russia's invasion of Ukraine, the German contractor halted its performance of the contracts and refused to return advance payments made by RCA, citing EU sanctions against Russia. RCA made demands under performance bonds issued by UniCredit guaranteeing the contractor's performance. The bonds were governed by English law and provided for ICC arbitration seated in Paris, but there was no express provision on the law governing the arbitration agreement.

UniCredit refused to make payment under the bonds because of EU sanctions. RCA brought proceedings against UniCredit in the Russian courts seeking payment under the bonds. UniCredit applied to the English courts for an anti-suit injunction to stop RCA from pursuing the Russian court proceedings on the basis that the parties had agreed to resolve all disputes arising out of the bonds by arbitration.

After initially granting UniCredit an interim injunction on a without notice basis, the High Court refused to grant a final injunction holding that the English courts did not have jurisdiction to hear UniCredit's claim. The Court of Appeal disagreed and itself issued a final mandatory injunction against RCA (rather than remitting the decision back to the High Court). In reaching its decision, the Court of Appeal found the English courts had jurisdiction over the claim because: (a) the arbitration agreements in the bonds were, on their proper construction, governed by English law and (b) England and Wales was the proper place in which to bring the claim. See our April edition of Disputes Briefcase for a summary of the Court of Appeal's findings.

RCA was granted permission to appeal the Court of Appeal's jurisdiction decision to the Supreme Court. In April, less than one week after the hearing, the Supreme Court delivered its decision dismissing RCA's appeal and upholding the Court of Appeal's decision to grant a final mandatory injunction. The Supreme Court has now delivered its reasoned judgment for that decision.

Governing law

To establish the English court's jurisdiction over RCA, UniCredit had to show that its claim was made in respect of a contract governed by English law (being one of the gateways for service of proceedings outside the jurisdiction under PD6B.3.1). For these purposes, the relevant contracts were the arbitration agreements (i.e. the arbitration clauses) contained within the bond contracts.

The general rule according to the Supreme Court's test in *Enka v Chubb* is that, where parties have not chosen a governing law for the arbitration agreement, the parties' choice of governing law for the main contract shall extend to the arbitration agreement. However, RCA argued that this case fell within an exception to the general rule in *Enka*. That exception stated that "any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law" "may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat". Relying on this exception, RCA argued that the arbitration agreements were governed by French law because French law (as the law of the seat) provided that the arbitration agreements should be governed by the law of the seat.

The Supreme Court rejected RCA's reading of *Enka* as it focussed on dissecting permissive (not prescriptive) and obiter phrasing in the judgment, without taking account of the underlying reasoning. *Enka* did not address when such an inference should be drawn and the wording in a court judgment should not be treated as if it had "textual authority" akin with an Act of Parliament. All that was decided in *Enka* was that a choice of an English seat does not support an inference that the parties had chosen English law to govern the arbitration agreement. In the Supreme Court's view, the key question was whether, on a proper interpretation of the contracts, the parties intended that the law of the seat should determine the law governing the arbitration agreement. The Supreme Court considered there was no valid basis for imputing an intention that, if the arbitration

agreement would be treated as governed by French law by the French courts, those rules should govern the arbitration agreement wherever the matter is looked at. RCA's approach would also introduce "significant complication" as it would be necessary to determine how the foreign law would determine the governing law of an arbitration agreement (using expert evidence) whenever parties choose a foreign seat.

Applying the *Enka* test, the Supreme Court held that the arbitration clauses were governed by English law. The choice of a Paris seat did not justify a departure from the general rule and therefore the English court had jurisdiction to determine the claim.

Proper place

The Supreme Court then considered whether England was the "proper place" for UniCredit to bring its claim against RCA (in accordance with CPR 6.37(3)). The Supreme Court rejected RCA's contention that the proper place for the claim was the French courts (as the courts of the seat with supervisory responsibility over any arbitration) or Paris-seated arbitration brought pursuant to the arbitration agreements in the bonds.

First, the Supreme Court held that it was not necessary to show that the English courts are a more appropriate forum to grant relief as the longstanding *Spiliada* jurisdiction test was intended for situations where no contractual forum had been agreed. Here, the parties had contractually agreed to arbitration. The appropriate starting point was therefore that, in principle "[i]t is desirable that parties should be held to their contractual bargain by any court before whom they have been or can properly be brought" (per the Court of Appeal in *Enka*).

Secondly, although it is generally accepted that the courts of the seat of arbitration have sole responsibility for supervising the arbitration and the primary responsibility for supporting the arbitration process, the Supreme Court considered that preventing a party from breaking its contract is not a supervisory function. Further, the English court's power to grant anti-suit relief is not part of its supervisory or supporting jurisdiction under the Arbitration Act 1996 and instead derives from its equitable jurisdiction under section 37 of the Senior Courts Act 1981 (*AES Ust-Kamenogorsk*).

Thirdly, noting the tests for interim relief under section 44 of the Arbitration Act 1996 and the jurisdictional gateways for service of proceedings outside the jurisdiction (PD6B.3.1), the Supreme Court considered that service out of the jurisdiction should in principle be permitted unless the court considered that the fact the arbitration has a foreign seat makes it inappropriate to exercise the court's jurisdiction. The Supreme Court found this was consistent with CPR 6.37(3), which in this situation could be read as a presumption that treats the English courts as the proper place to bring an anti-suit injunction unless the existence of a foreign seat makes it inappropriate to do so.

In this case, the expert evidence demonstrated that the French courts would not have jurisdiction to hear UniCredit's claim to enforce the arbitration agreements and, even if they did, the French courts have no power to grant anti-suit injunctions. Further, Paris-seated arbitration would not deliver substantial justice as an arbitrator's award or order creates only a contractual obligation and has no coercive force. It is not backed by the powers available to a court to enforce performance of its orders (e.g. sanctions for contempt of court). Further, the French courts would have no power to enforce such an order by an arbitral tribunal and the order would not be enforceable in Russia.

The Supreme Court did not consider it necessary to decide whether the Court of Appeal was right to characterise RCA's arguments as abusive, but noted that that it was "unattractive" for RCA to be contending in the Russian proceedings that the arbitration agreements are invalid and unenforceable whilst in the English proceedings arguing that the proper place for UniCredit to bring its claim was pursuant to the parties' arbitration agreements. The Supreme Court also observed that it could be drawn from RCA's conduct that for UniCredit to seek relief in arbitration would be "wholly ineffectual" to prevent RCA from breaking its agreement to arbitrate.

What this means for commercial parties

The Supreme Court's decision in *UniCredit* is the third set of proceedings brought by different banks against Russian company RusChemAlliance (RCA) since last summer, all of which are based on almost identical facts but yielded different decisions from different courts. The case is also part of a wider series of decisions in which the English courts have thwarted attempts by Russian parties to bring Russian court proceedings in breach of dispute resolution clauses (see, for example, our July edition of Disputes Briefcase).

Consistent with the English court's pro-arbitration approach, the Supreme Court's decision provides welcome reassurance for commercial parties who choose English law to govern their arbitration agreements that the English courts are prepared to step-in to uphold parties' contractual bargains to arbitrate, even where they have chosen a foreign seat.

However, the planned overhaul of the *Enka* governing law test in the Arbitration Bill, which is currently progressing through the House of Lords, looks set to change how the English courts approach the question of governing law. The Bill includes a new default rule that, unless the parties expressly agree otherwise, the law which governs the arbitration agreement is the law of the seat of the arbitration. An agreement that a particular law governs the agreement of which the arbitration agreement forms part is not sufficient for this purpose. If/when the new rule enters into force, parties seeking anti-suit relief from the English courts in support of a foreign-seated arbitration agreement would need to show that the parties expressly agreed that the

arbitration agreement is governed by English law, or demonstrate their claim falls within one of the other gateways enabling the English courts to take jurisdiction. For certainty, parties who intend for English law to govern their arbitration agreements should make express provision to this effect.

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