Wilberforce Arbitration Insight

English anti-suit injunctions in aid of arbitration agreements with a foreign seat

Article by Stuart Isaacs KC and Daniel Petrides, 22nd February 2024

The recent Court of Appeal decision in *Unicredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64 ("***Unicredit***") is the latest in a trilogy of cases[1] involving successful applications to the English courts for the grant of anti-suit injunctions to restrain RusChemAlliance LLC ("**RCA**"), a Russian company, from continuing Russian proceedings brought in breach of arbitration agreements governed by English law. The distinguishing feature in each of these cases is that although the arbitration agreements were governed by English law, the chosen seat of the arbitration was Paris, France, and hence the supervisory court was not the English court but the French court.

The cases are significant and of interest not only because they demonstrate the English courts' growing willingness to grant both interim and final injunctive relief in support of foreign-seated arbitrations, but also because of their consideration of the principles laid down by the UK Supreme Court in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 ("***Enka***") which underpinned the applications that an arbitration agreement in a contract governed by English law and providing for arbitration under the ICC Rules in Paris was itself generally subject to English law.

[1] The other cases being *Commerzbank AG v RusChemAlliance LLC* [2023] EWHC 2510 (Comm) ("*Commerzbank*") and *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144 ("*Deutsche Bank*").

In *Unicredit*, RCA had obtained performance and repayment bonds from Unicredit Bank GmbH (the "**Bank**") in respect of its obligations under contracts with two German contractors for the engineering, procurement and construction of LNG and GPP plants in Russia. (The underlying facts in the *Commerzbank* and *Deutsche Bank* were materially identical). The bonds were governed by English law and provided for the resolution of disputes by ICC arbitration in Paris. Following the imposition of EU sanctions on Russia, the contractors ceased work, resulting in RCA amongst other things demanding payment under the bonds, which the Bank refused. RCA started proceedings in the Arbitrazh Court of St Petersburg contending that the EU sanctions regime was contrary to Russian public policy and that the arbitration agreement was not enforceable as a matter of Russian law. The Bank applied to the English court for an anti-suit injunction which was granted on an interim basis by Robin Knowles J. However, Sir Nigel Teare refused to grant a final injunction on the basis that the English courts lacked jurisdiction. The Bank's appeal to the Court of Appeal succeeded.

As is well-known, English courts will only grant an anti-suit injunction in support of an arbitration agreement if satisfied that there is an arbitration clause which is highly likely to cover the dispute in question, and there are no exceptional circumstances which militate against the granting of relief: *The Angelic Grace* [1995] 1 LI Rep 87. In cases involving persons not domiciled in England and Wales, it is also necessary to establish the English courts' jurisdiction over the respondent. In *Unicredit*, there was no dispute that the case raised a serious issue to be tried on the merits. Accordingly, the principal issues for the Court of Appeal (on which Sir Nigel Teare had ruled against the Bank at first instance) were whether (i) the arbitration agreements were governed by English law and (ii) England was the appropriate forum.

Governing law

In *Enka*, Lord Hamblen and Lord Leggatt (for the majority) laid down at [170] the applicable principles which (so far as is relevant to the facts of *Unicredit*), can be summarised as follows:

> (1) The law applicable to an arbitration agreement "*will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected*" ([170(ii)]);

(2) Whether the parties have chosen a law to govern the arbitration agreement will be question of construction applying orthodox principles of contractual interpretation ([170(iii)]);

(3) Where the law applicable to the arbitration agreement is not specified, the choice of governing law for the contract will generally apply ([170(iv)]);

(4) This general rule will not be negated by the mere fact that the seat of the arbitration is in a different country to the governing law of the contract ([170(v)]), but it may be negated by *"…(a) 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; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.*" ([170(vi)]); and

(5) In cases where there is no choice of law, the most closely connected system of law will generally be the law of the seat ([170(viii)]).

Given that the governing law of the bonds was expressly provided to be English law, the key question in *Unicredit* was whether the general rule in [170(iv)] was negated by one of the factors identified in [170(vi)]. The Court of Appeal, differing from Sir Nigel Teare, held that it was not negated. The principle of French law relied on by RCA simply amounted to a rule that "*the law governing the arbitration agreement depends on the parties' common intention*" which did not amount to a clear rule of the law of the seat capable of negating the general rule. It followed that "*the parties' common intention must necessarily be ascertained from what they have said in their contract. There is no other source available. As a matter of English law…which is the system of law which the parties have chosen to govern their contract, a choice of English law to govern the main contract carries with it a choice of English law to govern the arbitration agreement. It is not the point that a French court, applying its own conflict rules, might reach a different conclusion*" ([65]).

The Court of Appeal also went on to reject a further argument by RCA that the deliberate selection of France as a "neutral forum" further indicated that the parties' intention was for French law to apply. Males LJ emphasised at [67] that "*almost all major centres of*

international arbitration are chose by the parties because they provide a neutral forum" and that "*the choice of a neutral forum will only come into play to reinforce a provisional conclusion that the law of seat should apply as a result of one of the factors set out at [170(vi)].*"

Finally, RCA sought to rely on [170(viii)] of *Enka* to reinforce the argument that the governing law was the law of the seat. The Court of Appeal held at [69] that this principle has no role to play where there is an express choice of law in the main contract.

Accordingly, the case fell within the governing law gateway for establishing the English courts' jurisdiction under paragraph 3.1(6)(c) of Practice Direction 6B.[2]

Appropriate forum

In *The Spiliada* [1987] AC 460, the House of Lords stated that "*The task of the court is to identify the forum in which the case can be suitably tried for the interest of all the parties and for the ends of justice*". Also, as Lord Briggs explained in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20; [2020] AC 1045 at [88], "*Even if the court concludes (as I would have in the present case) that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction*".

In *Deutsche Bank*, the Court of Appeal had held that the interests of justice were best served by ensuring that parties to contracts adhere to them. As Nugee LJ observed at [38], if an "*English court, faced with an English law governed contract containing a promise by a party not to do something and a threat by a party to do the very thing he has promised not to do, will readily and usually enforce that promise*". Nugee LJ also suggested that the policy of holding parties to their contracts applies "*in particular* [to] *the parties to an arbitration agreement*".

The Court of Appeal in *Unicredit* quoted those remarks with approval. It also emphasised that, on the expert evidence before the court, it appeared that a French court would not itself grant an anti-suit injunction due to a "*philosophical objection*" to such relief. Furthermore, whilst it was conceptually possible that an ICC arbitrator could order RCA to

[2] "*A claim is made in respect of a contract where the contract – … (c) is governed by the law of England and Wales*".

refrain from or terminate the Russian proceedings, such an order might take months to obtain and would be unenforceable in Russia given the finding made by the Arbitrazh Court that the parties' arbitration agreement was itself unenforceable. Instead, Males LJ noted at [77], the more likely course was that RCA would apply for an injunction in the Russian courts to prevent the Bank from ever pursuing an arbitration in Paris, thereby stifling the arbitration agreement. These factors made it appropriate for relief to be granted in England and Wales.

The trilogy of decisions (which now effectively speak with one voice) are salutary reminders of the power of anti-suit injunctions in the arbitration context and the English courts' determination to uphold and enforce agreements to arbitrate, even where the seat of the arbitration lies in another jurisdiction. *Unicredit* goes further than previous decisions in that the relief granted was final relief and suggests that English courts may become increasingly willing to intervene where the *lex fori* may be less well-equipped to protect the integrity of the arbitration process.

The guidance on the test in *Enka* test is also welcome, in particular the clarification that the reference to "*neutral venues*" in [170(vi)] does not form an additional category of exception; and that [170(viii)] only applies to cases where there is no choice of law in the underlying contract. The gloss on the circumstances in which [170(vi)(a)] will be engaged (and in particular the decision that this threshold is unlikely to be crossed in cases involving the popular choice of Paris as a forum) is also helpful.

However, certain questions inevitably remain. For instance, a decision is still awaited which illustrates when the "*general rule*" in [170(iv)] might be negated because it would render the arbitration agreement "*ineffective*". Uncertainties also remain over the approach which an English court might adopt to the law of different seats.

Those interested in these and other questions may, however, be disappointed by the potential enactment of section 6A of the Arbitration Bill which is presently passing through second reading in the House of Lords and which will consign *Enka* to history. Section 6A(1) envisages that the law applicable to an arbitration agreement is either "*(a) the law that the parties expressly agree applies to the arbitration agreement, or (b) where no such agreement is made, the law of the seat of the arbitration in question*"; and that "*(2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute*

express agreement that that law also applies to the arbitration agreement." This simplified test would avoid the complex questions of construction which can arise in the absence of express terms (as illustrated by the 3-2 division in the Supreme Court on the facts of *Enka*. It would also align the approach to the law governing disputes post-award (which are subject to the *lex fori*) with those prior to the commencement of arbitration, an anomaly also remarked upon by the Supreme Court in *Enka* at [136]. However, in *Unicredit* itself, it would also have left the Bank unable to invoke the assistance of the English courts in upholding the arbitration agreement. As such, parties – both now and following the passage of the Bill – would be best advised to ensure that their contracts contain clear provisions specifying the law governing arbitration agreements.

For more information:

- Our International Arbitration expertise.

If you are viewing this document on LinkedIn, you can download it by clicking on the  *icon in the top-right-hand corner when in full screen view.*