HENDERSON CHAMBERS

Alerter

Commercial

26 November 2024

Supreme Court reaffirms pro-arbitration stance in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30

Weishi Yang

Weishi Yang examines the recent Supreme Court judgment in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 following the Court's decision in April to grant an anti-suit injunction in support of a foreign-seated arbitration.

INTRODUCTION

1. In April, the Supreme Court upheld a final anti-suit injunction preventing RusChemAlliance LLC ("**RusChemAlliance**") from breaching its arbitration agreement with UniCredit Bank GmbH ("**UniCredit**"). Given the urgent nature of the appeal, the Supreme Court gave its short oral decision a mere five days after the appeal was heard. The full written judgment of the Supreme Court was handed down in September.

2. The decision turned on whether the English courts had jurisdiction to grant the anti-suit injunction in a foreign-seated arbitration. The Supreme Court, in finding that it did have jurisdiction, clarified the law in two key respects:

a. The exception in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 ("***Enka***") at [107(vi)(a)] is not to be applied in future. The general rule remains that the arbitration agreement is governed by the law that, on the proper interpretation of the contract, was reasonably understood to be agreed by the parties. Where there is no agreement, it is the law to which the arbitration agreement is the most closely connected.

b. England and Wales is presumed to be the proper place to bring a claim for an anti-suit injunction to prevent breach of an arbitration agreement unless the fact that the arbitration has a foreign seat makes it inappropriate to do so. CPR 6.37(3) in these cases is to be read to follow the approach of Section 2(3) of the Arbitration Act 1996.

BACKGROUND

3. In 2021, RusChemAlliance, a Russian company, entered into contracts with a German contractor. Performance of the German contractor's obligations were guaranteed by bonds payable on demand. Seven of these bonds were issued by UniCredit, a German bank.

4. Each of the bond agreements provided (emphasis added):

> *"11. This Bond and all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law.*
>
> *"12. In case of dispute arising between the parties about the validity, interpretation or performance of the Bond, the parties shall cooperate with diligence and in good faith, to attempt to find an amicable solution. All disputes arising out of or in connection with the bond (which cannot be resolved amicably) shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by one or more arbitrators appointed, in accordance with the said ICC's Rules. The place of arbitration*

shall be Paris and the language to be used in the arbitral proceedings shall be in English." (*UniCredit v RusChemAlliance*, [3])

5. Following Russia's invasion of Ukraine in 2022, the EU imposed sanctions on Russia and on designated Russian legal entities and individuals. As a result, the German contractor announced that it could not continue to perform the contracts, nor would it be able to return RusChemAlliance's advance payments under said contracts. RusChemAlliance therefore sought payment from UniCredit under the bonds. UniCredit refused on grounds that payment would be prohibited by the EU sanctions.

RUSSIAN PROCEEDINGS

6. On 5 August 2023, RusChemAlliance issued proceedings against UniCredit in the Arbitrazh Court of the St Petersburg and Leningrad Region in Russia, claiming for payment under the bonds. RusChemAlliance relied upon article 248 of the Russian Arbitrazh Procedural Code to claim that the Arbitrazh Court had exclusive jurisdiction over the matter, despite the arbitration agreement in the bonds.

7. Article 248 of the Arbitrazh Procedural Code is a wide-reaching provision. Amongst other things, it provides that:

    a. Where there is a dispute based on foreign sanctions involving Russian and non-Russian parties, the Russian Arbitrazh Courts have exclusive jurisdiction over that dispute;

    b. Any dispute resolution clause that confers jurisdiction to any other institution is treated as unenforceable; and

    c. The Russian courts may issue an anti-suit injunction prohibiting proceedings taking place in a foreign jurisdiction. Contravention of that

injunction could lead to serious penalties including the payment of substantial damages.

8. UniCredit applied to the Arbitrazh Court to dismiss the claim on the basis that the arbitration agreement in the bonds provided for the dispute to be settled in arbitration in Paris under the ICC Rules. The Arbitrazh Court dismissed UniCredit's application. SS Saltykova held that, applying article 248 of the Arbitrazh Procedural Code, the Arbitrazh Courts had exclusive jurisdiction over the matter and the arbitration agreement was therefore unenforceable.

ENGLISH PROCEEDINGS

9. On 22 August 2023, UniCredit claimed for injunctive and declaratory relief in the courts of England and Wales on the basis that the Russian proceedings were in breach of the arbitration agreement. RusChemAlliance issued an application disputing the English court's jurisdiction to hear UniCredit's claim.

10. In order to obtain permission to serve the claim form on RusChemAlliance out of the jurisdiction, UniCredit were required to show that:

    a. The claim had a reasonable prospect of success (CPR 6.37(1)(b)). This was undisputed.

    b. The claim fell into one of the gateways in CPR Practice Direction 6B, paragraph 3.1 (CPR 6.36). UniCredit relied upon paragraph 3.1(6)(c): *"A claim was made in respect of a contract where the contract* [...] *is governed by English law."* UniCredit argued that the arbitration agreement was governed by English law. RusChemAlliance argued that French law, as the law of the seat of the arbitration, governed the arbitration agreement.

c. England and Wales was the proper place to hear the claim (CPR 6.37(3)). RusChemAlliance argued that the proper place to bring this claim was in the French courts, or alternatively, in arbitration.

11. The English High Court held that it did not have jurisdiction to grant the anti-suit injunction and dismissed the claim. The Court of Appeal overturned that decision, holding that the English courts did have jurisdiction, and ordered a final anti-suit injunction requiring RusChemAlliance to terminate the Russian proceedings. RusChemAlliance appealed the decision to the Supreme Court.

12. Thus, there were two issues for the Supreme Court to consider:

a. Were the arbitration agreements in the bonds governed by English law?

b. Was England and Wales the proper place in which to bring the claim?

SUPREME COURT

13. Lord Leggatt (with whom Lords Reed, Sales, Burrows, and Lady Rose agreed) gave the unanimous judgment of the Supreme Court. In summary, Lord Leggatt held that the English courts did have jurisdiction to grant the anti-suit injunction, as:

a. on the proper interpretation of the bond agreements, the arbitration agreement was governed by English law; and

b. England and Wales was the proper place to bring the claim.

14. The Supreme Court therefore upheld the final anti-suit injunction ordering RusChemAlliance to terminate the Russian proceedings.

Issue 1: did English Law govern the arbitration agreement?

15. The general rule is that the choice of governing law for the contract governs the arbitration agreement. This rule applies even if the arbitration is seated

in a different jurisdiction. This was summarised by the Supreme Court recently in *Enka*, in which Lords Leggatt and Hamblen gave the majority judgment. As their Lordships held at [170(iv)-(v)]:

> *"(iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*
>
> *(v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement."*

16. However, it is possible for an arbitration agreement to be governed by a different system of law from the rest of the contract. RusChemAlliance argued that the exception in *Enka* at [170(vi)(a)] applied, namely:

> *"(vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (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..."* (emphasis added)

17. Lord Leggatt rejected RusChemAlliance's argument and held that the exception in *Enka* at [170(vi)(a)] should not be applied. His reasoning was as follows.

18. First, as the Supreme Court had held in *Enka*, the law governing the arbitration agreement is simply determined by "*what, on the proper interpretation of the contract, the parties would reasonably be understood to have agreed*" (*UniCredit v RusChemAlliance*, [26]). Where there is no agreement, it is *"the system of law with which the arbitration agreement is most closely connected"* (*UniCredit v RusChemAlliance*, [21]). Whether the parties have

agreed to a choice of law is *"ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum"* (*UniCredit v RusChemAlliance*, [21]).

19. Second, the exception in *Enka* at [170(vi)(a)] was (i) permissive, worded as *"may"*, not *"must"* (*UniCredit v RusChemAlliance*, [37]), and (ii) it was an *obiter* comment which remained unexplored in the judgment, with no explanation as to when such an inference could properly be drawn (*UniCredit v RusChemAlliance*, [50]).

20. Third, while it would be ideal for the question *'what law governs the arbitration agreement?'* to be answered in the same way regardless of which jurisdiction this question was asked in, this was not the case at present. In particular, a general rule which treated the arbitration agreement to be governed by the law which the courts of the seat would consider it to be governed by would in practice be significantly complicated to apply (*UniCredit v RusChemAlliance*, [53]-[56]).

21. Lord Leggatt therefore held at [59] that: "*[w]hat was said in para 170(vi)(a) [of Enka] should therefore in future be disregarded.*"

22. Applying this reasoning to the bond agreements, Lord Leggatt held that the governing law clause was *"particularly wide"*, covering not only the bond itself, but also *"all non-contractual or other obligations arising out of or in connection with it"*. There was nothing in the wording which excepted the arbitration agreement from the choice of English law. Thus, properly construed, the arbitration agreement was governed by English law (*UniCredit v RusChemAlliance*, [31] and [62]-[63]).

Issue 2: Was England and Wales the proper place to bring the claim?

23. Both parties approached this issue by reference to the test in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] 1 AC 460, 476 ("***Spiliada***"). This test provides that the English court should not exercise jurisdiction if there is *"some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all parties and the ends of justice"* (*UniCredit v RusChemAlliance,* [65]-[73]).

24. However, Lord Leggatt held that the *Spiliada* test should not be applied to the present case. *Spiliada* was concerned with trial of the substantive dispute where no forum had been contractually agreed by the parties. The Court in the present case was not concerned with trying the substantive dispute (i.e. whether RusChemAlliance was entitled to payment under the bonds), and neither party had suggested that England and Wales was the appropriate forum for the trial of this issue. Instead, the Court was concerned with whether it should enforce the parties' agreement to arbitrate. Exercise of such a jurisdiction was not, in Lord Leggatt's judgment, limited to a single court (*UniCredit v RusChemAlliance,* [75]).

25. Thus, the correct test was not whether the English courts were the most suitable tribunal to prevent the breach of the arbitration agreement. Instead, the proper starting point was Lord Justice Popplewell's statement in the Court of Appeal in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574 at [75]:

> *"it is desirable that parties should be held to their contractual bargain by any court before whom they have been or can properly be brought."* (*UniCredit v RusChemAlliance,* [75])

26. Lord Leggatt reasoned that this was consistent with the test applied by the English courts when considering whether to grant an anti-suit injunction. The relevant question was not whether the English court was the most suitable forum for the case, but rather whether intervention by the English court was consistent with comity (*UniCredit v RusChemAlliance*, [77]). Lord Leggatt noted that, in this case, both the Russian Federation and France were parties to the New York Convention, and therefore could not object to the English court taking steps to enforce the arbitration agreement (*UniCredit v RusChemAlliance*, [78]-[80]).

27. This approach was also compatible with the arbitration agreement. As the seat was not in England, there was no implied agreement by the parties that proceedings to uphold that agreement may be brought in the English courts. However, the agreement also should not be interpreted to impliedly prohibit the English proceedings, as to do so would be contrary to commercial sense and undermine the efficacy of the agreement (*UniCredit v RusChemAlliance*, [84]-[85]).

28. Nor was the English court encroaching on the supervisory jurisdiction of the French courts. The power to grant anti-suit injunctions derived from the English courts' general equitable jurisdiction under section 37 of the Senior Courts Act 1981, and not from any supervisory jurisdiction (*UniCredit v RusChemAlliance*, [95]-[100]). In any event, there could be no encroachment on these facts, as there was no possibility of the French courts being seized in the matter, as the French courts did not have the power to grant anti-suit injunctions, nor did they have jurisdiction to determine any claim brought by UniCredit regarding RusChemAlliance's breach of the arbitration agreement (*UniCredit v RusChemAlliance*, [101]-[104]).

29. Lord Leggatt therefore held that the correct test to apply for 'proper place' in this particular context was section 2(3) of the Arbitration Act 1996. As Lord Leggatt summarised at [92]:

> *"Service out of the jurisdiction should in principle be permitted unless, in the opinion of the court, the fact that the seat of the arbitration is or is likely to be outside England and Wales makes it inappropriate on the facts of the case to exercise the court's jurisdiction to grant relief aimed at enforcing the arbitration agreement or supporting the arbitral process. This test should be applied consistently with the principle discussed above: that a strong reason needs to be shown as to why in the particular circumstances the court ought not to exercise its jurisdiction to restrain a breach of the parties' contractual bargain."*

30. Lord Leggatt considered it an "*anomaly*" that section 2(3) did not apply to claims for anti-suit injunctions (*UniCredit v RusChemAlliance*, [92]). Thus, while CPR 6.37(3) formally remains the test, Lord Leggatt considered that the courts should take a principled approach and read the wording of CPR 6.37(3), in a case of this kind, as *"against the background of a presumption which treats the courts of England and Wales as the proper place in which to bring the claim for an anti-suit injunction unless the fact that the arbitration has a foreign seat makes it inappropriate to do so"* (*UniCredit v RusChemAlliance*, [93]).

31. For completeness, Lord Leggatt held that neither the French courts nor the agreed arbitration proceedings were appropriate alternative forums. On the former, there was evidence before the court that the French courts would not have jurisdiction over this matter, as the case did not have sufficient links to France. On the latter, any award or order made by an arbitrator would have no coercive force, and given that RusChemAlliance had already breached their contractual obligation to not bring proceedings in Russian courts, there was no reason to think that adding a further contractual

obligation would have any greater effect (*UniCredit v RusChemAlliance*, [101]-[110]).

SIGNIFICANCE

32. The Supreme Court's decision in *UniCredit v RusChemAlliance* is a landmark decision on the jurisdictional test in claims for anti-suit injunctions. It reaffirms English law's strong preference to prevent breach of arbitration agreements and to support the arbitral process, and clarifies the principled approach which English courts should take to the interpretation of arbitration agreements.

33. These developments in the law are especially significant in the light of the recent amendments to the Russian Arbitrazh Procedural Code, which have granted the Russian Arbitrazh Courts wide-ranging powers to act contrary to parties' arbitration agreements. In fact, the Supreme Court's decision was one of several recent decisions by the English courts to grant anti-suit injunctions against RusChemAlliance ordering them to terminate proceedings brought in Russia (see *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144, *Commerzbank AG v RusChemAlliance LLC* [2023] EWHC 2510 (Comm), and *Bayerische Landesbank and Landesbank Baden-Wurttemberg v RusChemAlliance LLC* [2024] EWHC 1822 (Comm)).

34. It should however be noted that the future effect of the Supreme Court's decision will vary depending on the progress of Arbitration Bill, formulated by the Law Commission and currently in the House of Lords. The Arbitration Bill in its current form proposes the following amendment to the Arbitration Act 1996:

> *"**6A Law application to the arbitration agreement***
>
> *(1) The law applicable to an arbitration agreement is –*

(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.

(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 constitute express agreement that that law also applies to the arbitration agreement."

35. If the above amendment is implemented, a case with similar facts to *UniCredit v RusChemAlliance* would likely find that French law applied to the arbitration agreement, and thus the English courts would not have jurisdiction to grant an anti-suit injunction. However, this is not a foregone conclusion, for at least two reasons.

36. First, Lord Leggatt held the bond agreements, in expressly choosing English law to govern *"all non-contractual or other obligations arising out of or in connection with it",* included obligations created by the arbitration agreement, and therefore the parties had expressly agreed that English law would govern the arbitration agreement (*UniCredit v RusChemAlliance*, [26]-[27] and [31]). The Law Commission Report, Law Com No 413 'Review of the Arbitration Act 1996: Final report and Bill' makes clear that Section 6A is intended to operate as a 'default rule' that the law of the seat governs the arbitration agreement. While a catch-all provision like that in the bond agreements may not be sufficiently clear to displace such a default rule, the question as to what level of specificity is required remains open for potential future disputes.

37. Second, Lord Leggatt noted in his judgment that UniCredit had made a late-stage argument that, for the purposes of meeting the gateway in CPR Practice

Direction 6B, paragraph 3.1(6)(c), it was not necessary for the arbitration agreement to be governed by English law. Instead, it was sufficient that the rest of the contract was governed by English law. This argument was not relied upon at the hearing, and Lord Leggatt did not address it (*UniCredit v RusChemAlliance*, [19]). However, this argument remains a potential route by which parties may attempt to meet the requirements of paragraph 3.1(6)(c) in the future.

38. The full judgment can be found here.

Weishi Yang

26 November 2024