English Courts Split Over Anti-Suit Injunctions in Foreign-Seated Arbitrations

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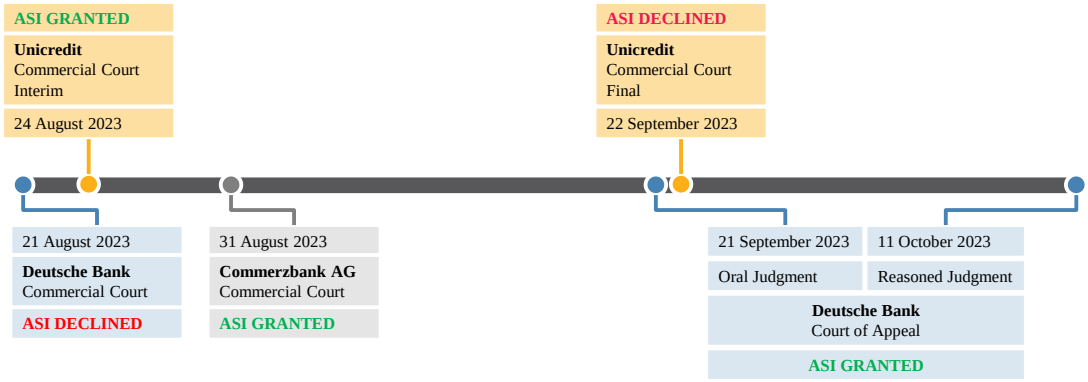
A party might initiate court proceedings despite a prior agreement to arbitrate. In such cases, the other party may seek an "anti-suit injunction" or "ASI" to compel performance of the contractual agreement to arbitrate the dispute. ASIs are based on the claimant's entitlement, under English law, not to be sued in a foreign court in light of the parties' agreement to arbitrate. English courts have long possessed the discretionary power to grant ASIs under section 37(1) of the Senior Courts Act 1981 (the "Senior Courts Act"). This practice has been recognised and confirmed in a number of court decisions. In the leading decision of *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, Millett LJ clarified that, as long as the application is made promptly and there are no exceptional circumstances, an ASI would be granted as a matter of course.

Factual Background

The English courts' power to grant ASIs has recently been tested in the context of arbitrations seated in foreign jurisdictions. The Commercial Court and the Court of Appeal have issued five decisions in three related cases. Recent Russian countersanctions legislation gives Russian courts exclusive jurisdiction over cases involving parties affected by sanctions. RusChemAlliance ("RusChem"), the defendant in all three cases, took advantage of this legislation.

All three cases relate to a LNG plant in Ust-Luga, Russia. RusChem, a Russian company, entered into an EPC contract with Linde relating to the LNG plant. Linde suspended work after the EU imposed sanctions on Russia following the Russian invasion of Ukraine. RusChem consequently terminated the EPC contract and pursued the banks—Deutsche Bank, Unicredit and Commerzbank—who had issued on demand bonds and guarantees. The banks contended that they could not pay RusChem because of sanctions. In each case, despite arbitration agreements providing for ICC arbitration seated in Paris, RusChem commenced proceedings in Russia.

As the underlying contracts were governed by English law, the claimant banks sought ASIs from the English courts. The graphic below demonstrates the timing and outcome of each of the proceedings.



We examine these judgments below.

Deutsche Bank AG v. RusChemAlliance LLC[1]

In response to RusChem's proceedings in Russian courts, Deutsche Bank initiated a Paris-seated ICC arbitration seeking: (i) a declaration that the arbitration agreement was valid and enforceable; and (ii) an order for RusChem to cease the Russian proceedings and to refrain from enforcing any decision made by the Russian court. Deutsche Bank also applied to the English Commercial Court without notice to RusChem seeking an interim ASI to maintain *status quo* until the arbitral tribunal was constituted.

Bright J acknowledged that RusChem's commencement of Russian proceedings was in breach of an otherwise valid arbitration agreement. He stated that if this case involved an arbitration with its seat in England, he would likely grant an ASI. However, Bright J was unsure if it was appropriate to grant an injunction here given the Paris seat.

Interestingly, before Bright J, Deutsche Bank relied primarily on section 44 of the Arbitration Act 1996 (the "Arbitration Act"), which empowers the court to issue various interim orders. Bright J disagreed that section 44 of the Arbitration Act is the correct provision and reiterated the clear line of authorities that explain the power to grant ASIs comes from section 37(1) of the Senior Courts Act. Notwithstanding this, Bright J's decision drew parallels between the court's powers under section 44 of the Arbitration Act and the court's power to grant ASIs. For example, Bright J noted the reservation in section 2(3) of the Arbitration Act, which would apply to section 44 of the Arbitration

[1] *Deutsche Bank v. RusChemAlliance* (formerly known as *SQD v. QYP* [2023] EWHC 2145 (Comm) (21 August 2023)); *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144 (11 October 2023).

Act, that the court may refuse to exercise its power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales makes it inappropriate to do so.

Bright J did not initially have French law evidence before him. He asked for it overnight. In the French law evidence obtained in short order, the experts noted that it would not be possible to obtain an ASI in France. Bright J's understanding of the French law evidence was that French law had a philosophical objection to ASIs, and ASIs were considered under French law to "*contradict the fundamental principle of freedom of legal action*".[2] Based on that evidence, he considered that a French court would not likely enforce an interim ASI granted by an English court. Bright J emphasised the differences in approaches to ASIs under English and French law and stated that it is not the role of the English courts to support arbitration in France by granting ASIs.

As a result, he rejected Deutsche Bank's application for an ASI.

Deutsche Bank pursued its appeal of Bright J's judgment on several grounds, of which the following two were the most pertinent:

- the court should have determined that England was the appropriate jurisdiction to seek the injunctions, regardless of the location of the seat or the availability of an ASI from the French court as the court of the seat; and

- the court should not have determined that the application was against any French public policy.[3]

Deutsche Bank accepted that the source of the power to grant ASI was found in section 37(1) of the Senior Courts Act.

On 7 September 2023, the Court of Appeal overturned the decision of the Commercial Court and granted the ASI. The Court of Appeal issued a reasoned judgment on 11 October 2023.

On the first ground of appeal, based on previous caselaw, the Court of Appeal noted that its task was to "*identify the forum in which the case can be suitably tried for the interest of all parties and for the ends of justice*".[4] Given that the claim for interim injunctive relief

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2 *SQD v. QYP* [2023] EWHC 2145 (Comm) (21 August 2023), ¶ 80.

3 *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144 (11 October 2023), ¶ 27.

4 *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144 (11 October 2023), ¶ 37.

could only be obtained in England and could not be given effect to in France, the Court of Appeal found that the English court was proper forum in this instance.

The Court of Appeal determined that the second ground of appeal was made out based on the fuller French law evidence before it. The Court of Appeal noted that Bright J was "*hampered*" by the limited evidence before him. The evidence before the Court of Appeal was that although a French court did not have the ability to grant an ASI, it would recognise the grant of an ASI by another court. There was therefore no perceived conflict.

The Court of Appeal therefore reversed the Commercial Court's decision and granted an ASI.

Commerzbank AG v. RusChemAlliance[5]

In the second of the three applications, Commerzbank sought an *ex parte* urgent ASI under section 37(1) of the Senior Courts Act in relation to RusChem's commencement of Russian court proceedings.

In a decision dated 31 August 2023, Bryan J granted an ASI.

Bryan J was satisfied that the requirements for an ASI were fulfilled, noting that this was an "*archetypal*" case for granting ASIs.[6] He considered, however, the additional factor that the seat was in Paris, not in London, and whether that amounted to exceptional circumstances that meant an ASI should not be granted.

Bryan J was satisfied that English courts had jurisdiction and that England was the proper place to bring the claim for an ASI because:

- both the arbitration agreement and the underlying financial instrument were governed by English law;
- English law provided a juridical advantage in the form of an ASI, which the French courts did not have available; and
- neither Russia nor France were the proper places to obtain the type of relief sought.

Bryan J distinguished Bright J's *Deutsche Bank* decision on the basis that he had more extensive French law advice before him. Bryan J noted that if Bright J had access to the French law advice presented by Commerzbank and had accepted it, it would have had a

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5 *Commerzbank AG v. RusChemAlliance LLC* [2023] EWHC 2510 (Comm) (31 August 2023).

6 *Commerzbank AG v. RusChemAlliance LLC* [2023] EWHC 2510 (Comm) (31 August 2023), ¶ 23.

substantial impact on various parts of his judgment's reasoning. Bryan J considered the evidence on French law and concluded that there was no clash or conflict with the law of the seat that could justify refusing the injunction. He went on to opine that the seat of arbitration is of "*very limited relevance*" in the granting of an ASI under section 37 of the Senior Courts Act.[7]

Unicredit v. RusChemAlliance[8]

Similar to Deutsche Bank and Commerzbank, Unicredit sought an *ex parte* interim ASI under section 37 of the Senior Courts Act until the *inter partes* final ASI hearing.

Knowles J acknowledged that the necessary elements for granting such relief were present. While he considered the approach of French courts with respect to ASIs as a "*factor in the exercise*" of its discretion, he found that it could not "*deprive the court of all jurisdiction*".[9] Addressing Bright J's decision in *Deutsche Bank*, Knowles J further noted that granting the interim injunctive relief served the agreement between the parties to arbitrate the dispute. He also highlighted the comity between the English and French courts and their shared objective of making the parties' agreement work.

Knowles J, therefore, decided to grant the interim ASI.

The Commercial Court held the *inter partes* final hearing approximately a month later. In a decision dated 22 September 2023, Teare J declined to issue the final ASI, deciding that he had no jurisdiction to hear the claim on two bases. Teare J found that:

- based on French law evidence before him, French substantive rules on international arbitration governed the dispute, and, therefore there was no English law governed contract. The English courts did not, consequently, have jurisdiction.

- on the question of proper forum, the parties had not chosen English courts to have supervisory jurisdiction over the arbitration. He did not accept the proposition that substantial justice could not be done in France because ASI relief was not available there. He also noted that the availability of ASIs in English courts, but not in French courts, was not a sufficient reason to intervene.

Teare J referred to the decision of the Court of Appeal in *Deutsche Bank*, where an interim ASI was granted. However, Teare J noted that the *Deutsche Bank* decision was given on an *ex parte* basis, without the defendant's presence or submissions. In contrast,

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7 *Commerzbank AG v. RusChemAlliance LLC* [2023] EWHC 2510 (Comm) (31 August 2023), ¶ 66.

8 *Unicredit v. RusChemAlliance* (formerly known as *G v. R* [2023] EWHC 2365 (Comm) (24 August 2023); *G v. R* (In an Arbitration Claim) [2023] EWHC 2365 (Comm) (22 September 2023)).

9 *G v. R* [2023] EWHC 2365 (Comm) (24 August 2023), ¶ 7.

in the current case, Teare J had the benefit of submissions made on behalf of the defendant. Therefore, he considered that only limited assistance could be derived from the Court of Appeal's decision in *Deutsche Bank*.

Teare J's decision in *Unicredit* is currently on appeal. It will be heard by the Court of Appeal on 25 January 2024.

Comment

The differences in the approach of the English courts in the decisions discussed above turned on two key points:

- **Law applicable to the arbitration agreement**: In *Deutsche Bank* and *CommerzBank*, the courts followed the UK Supreme Court's decision in *Enka v. Chubb* and held that English law—as the governing law of the underlying contract—governed the arbitration agreement. In *Unicredit*, Teare J held (on the basis of French law evidence) that French law governed the arbitration agreement. He squared this with the decision in *Enka v. Chubb* because *Enka v. Chubb* recognised that the inference regarding the governing law of the arbitration agreement could be negated by the law of the seat.

  If the Law Commission's recommendation in its latest consultation paper is followed, English law as laid down in *Enka v. Chubb* would change. Instead, English law would provide that the law of the seat would be the governing law of the arbitration agreement. In a foreign-seated arbitration, therefore, the foreign law would govern the arbitration agreement, potentially severing the connection with English law and courts for jurisdictional purposes.

- **Foreign law evidence**: The key issue before the English courts was whether England is the proper place for the claim given the foreign seat. In deciding this issue, they considered why France—the seat of the arbitration—was not the proper place for the relief sought. The courts relied heavily on the French law evidence before them, using the experts' opinions to distinguish what other judges had decided. In this context, it was significant that in all cases other than before Teare J in *Unicredit*, RusChem was unrepresented, and there was therefore no foreign law evidence before the court supporting its position.

Consistent jurisprudence has not yet emerged on whether English courts are likely to grant ASIs when the seat of arbitration is located outside England & Wales. While the Court of Appeal decision in Deutsche Bank granted the ASI, Teare J in *Unicredit*

considered that decision to be of limited assistance in light of its *ex parte* nature. The *Unicredit* appeal to be heard later this month will be keenly watched and will hopefully provide clarity on the English courts' approach.

In the meanwhile, if parties want to ensure they can obtain ASIs, they should consider seating their arbitration in London to avoid any uncertainty.

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