Supreme Court Upholds Anti-Suit Injunction in Support of Foreign-Seated Arbitration: *UniCredit v RusChem* [2024] UKSC 30

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Introduction

There has been much uncertainty as to whether English courts will grant anti-suit injunctions ("ASIs") in support of arbitral proceedings, when the seat of arbitration is located outside of England & Wales.

The Supreme Court in UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30 ("*UniCredit v RusChem*") has provided welcome clarity in this area, and has affirmed that English courts will generally uphold ASIs in support of foreign-seated arbitrations, barring exceptional circumstances. This decision provides comfort to parties involved in international arbitration, including those who wish to rely on the English courts to restrain Russian court proceedings in the context of Russia-related arbitral disputes.

Facts and Issues

The Supreme Court in *UniCredit v RusChem* upheld the Court of Appeal's decision to grant an ASI with respect to proceedings brought by RusChemAlliance LLC ("RusChem") against UniCredit Bank GmbH ("UniCredit") before the Russian courts for payment under certain bond guarantees (the "bond contracts"). The bond contracts were governed by English law and provided that all disputes were to be resolved by arbitration seated in Paris under the rules of the International Chamber of Commerce ("ICC").

In determining whether to grant UniCredit the ASI, the Supreme Court had to address whether the English court had jurisdiction over UniCredit's claim. There were two issues in this context: (i) whether the arbitration agreements in the bonds were governed by English law (the "Governing Law Issue"); and (ii) whether England & Wales was the proper place to bring the claim (the "Proper Place Issue"). The Supreme

Court answered these questions in the affirmative, in UniCredit's favour, and consequently upheld the ASI granted by the Court of Appeal.

Governing Law Issue

On the Governing Law Issue, UniCredit argued that the arbitration agreements were governed by English law because the parties' choice of English law as the governing law of the bond contracts extended to the arbitration agreements within those contracts. RusChem argued that the arbitration agreements should be governed by French law because the parties had chosen Paris as the seat of arbitration. The Court preferred UniCredit's argument.

In reaching its conclusion, the Court examined its previous decision in Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors [2020] UKSC 38 ("*Enka*"). In *Enka*, the Supreme Court considered which system of national law governed the validity and scope of an arbitration agreement in circumstances where (i) the parties had not made an express choice of law governing the arbitration agreement, and (ii) the governing law of the underlying contract was different from the law of the seat of the arbitration. The Court had sought in *Enka* to bring some order to an unsettled area of English law and ultimately held that, where the parties had not expressly or impliedly chosen the law governing the arbitration agreement, but designated a governing law for the underlying contract, the governing law of the contract would generally apply to the arbitration agreement.

RusChem argued that, on a proper reading, *Enka* established an exception to the general rule that the governing law of the contract should also govern the arbitration agreement. This exception, it said, applied where the law of the seat of arbitration specifies that the arbitration agreement is governed by that country's law. On the facts, RusChem therefore argued that French law should govern the arbitration agreements because French law (being the law of the seat) provided that arbitration agreements should be governed by the law of the seat (i.e., French law).

The Court rejected RusChem's analysis of *Enka*, noting that it (i) placed too much emphasis on *obiter* statement in *Enka* regarding possible exceptions; and (ii) failed to consider the underlying reasoning in *Enka*, a case in which it was ultimately decided that the choice of seat for an arbitration in England & Wales did not support an inference that the parties also chose the law of England & Wales to govern the arbitration agreement.

The Court stressed that the only question of legal relevance is whether, on the proper interpretation of the contractual documents, the parties had an intention that the law of the seat of the arbitration should determine the law of the arbitration agreement. It noted RusChem's argument would require parties to have intended that an extremely complex exercise be undertaken to determine what the law of the seat said about the governing law of the arbitration agreement, which would not have been reasonable or realistic. Accordingly, the general rule applied in this case, which meant that English law, which governed the main contract, also governed the arbitration agreement.

Proper Place Issue

Having dealt with the Governing Law Issue, the Court then considered whether England & Wales was the proper place for UniCredit to bring the claim for the ASI. RusChem argued that the proper forum was the French courts, or arbitration, for reasons discussed below, but this was rejected by the Court.

First, the Court rejected the underlying assumption that, to satisfy the proper place requirement, it must be shown that the English court is a more appropriate forum than any other to grant an ASI. The Court explained that the test only applies where no forum has been contractually agreed and, in addition to England & Wales, there is another available forum where the claim can suitably be tried. In this case, where the parties have contractually agreed on a forum (i.e. arbitration) strong reason would need to be shown as to why the court ought not to exercise its jurisdiction to grant an ASI to restrain foreign proceedings.

Second, the Court rejected RusChem's argument that French courts (being the courts of the seat of the arbitration) had the responsibility for supervising an arbitration commenced pursuant to the arbitration agreements and were accordingly the proper forum for UniCredit to seek an ASI. The Court distinguished the supervisory responsibility of the court of the seat from the powers exercisable by courts generally to prevent a party from breaking its contract to arbitrate. The English court would only be exercising the latter power by determining the Proper Place Issue. Moreover, expert evidence showed that the French courts would not have jurisdiction to determine a claim of any kind brought by UniCredit against RusChem and that in any case, it did not have the power to grant ASIs. Accordingly, it was not inappropriate for an English court to grant an ASI to restrain the breach of the arbitration agreements.

Finally, the Court affirmed the Court of Appeal's rejection of RusChem's argument that the proper place for UniCredit to bring the claim was in arbitration commenced under the arbitration agreements. This was because UniCredit was unlikely to obtain

substantial justice through arbitration proceedings: (i) an order by the arbitrator would have no coercive force (or be enforceable in Russia) as arbitrators lack the powers available to a court to enforce its orders, including sanctions for contempt of court; and (ii) without an ASI from the English courts, RusChem would likely seek an injunction from the Russian courts to prevent UniCredit from commencing or pursuing arbitration.

For the reasons above, the Court concluded that England & Wales was the proper place for UniCredit to bring the claim for the ASI. Thus, the English court had jurisdiction over UniCredit's claim, and the court below was right to grant the ASI.

Key Takeaways

- The decision provides welcome clarity on the circumstances in which parties will be able to seek an ASI from the English courts to prevent a breach of an arbitration agreement, where parties have selected a foreign seat. More generally, it demonstrates the willingness of the English courts to grant an ASI to uphold agreements to arbitrate.

- The Court has also provided further guidance on the decision in *Enka* regarding the law governing arbitration agreements, reinforcing the weight given to the rule that the law governing the main contract generally applies to the arbitration agreement. Only particular circumstances (for e.g. where the governing law clause of a contract expressly excludes the arbitration agreement) would give rise to the inference that the parties intended that the law of the seat would govern the arbitration agreement. It should be noted, however, that this position looks set to change—the draft Arbitration Bill in Parliament includes a default statutory rule that an arbitration agreement should be governed by the law of the seat unless parties agree otherwise.

- To avoid uncertainty in litigation, parties should consider including contractual provisions which expressly specify the law governing their arbitration agreements, given the shifting position regarding the determination of the governing law of arbitration agreements.

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