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Latest Court of Appeal judgment on English Courts' jurisdiction to grant anti-suit injunctions in support of foreign arbitrations - UniCredit Bank GmbH v RusChemAlliance LLC [2024] EWCA Civ 64

In a judgment handed down last month in the *Unicredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64 case, the most recent one arising from proceedings involving RusChemAlliance LLC ("**RCA**"), the Court of Appeal held that it had jurisdiction to grant an anti-suit injunction ("**ASI**") to restrain foreign proceedings commenced in contravention of an arbitration clause which provided for ICC arbitration in Paris, as it found that the underlying arbitration clause was governed by English law and the English Courts were the proper place where to bring the claim.

Facts

RCA, a Russian company, entered into two EPC contracts for the construction of LNG and GPP facilities in Russia with two German contractors. Under the contracts, RCA was to pay the contractors €10bn in stages, with approximately €2bn having been paid by way of advance payments.

The contracts required the contractors to provide on demand bonds guaranteeing the performance of their obligations and some of these bonds were provided by UniCredit Bank GmbH ("**UniCredit**"), a German bank. Further bonds were provided by Deutsche Bank and Commerzbank.¹

UniCredit had issued a total of seven bonds, four to guarantee performance of contractors' obligations

and three to secure the repayment of the advance payments. All of the bonds provided for disputes to be resolved by ICC arbitration seated in Paris and contained the following applicable law clause:

"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."

Following Russia's invasion of Ukraine in February 2022, the contractors halted performance of the contracts on the basis of EU sanctions. RCA terminated, or purported to terminate, the contracts and requested return of the advance payments and compensation caused by the breach. RCA then demanded payment under the bonds from UniCredit, which refused to pay on the basis that such payment was prohibited by EU sanctions. RCA disputes that the sanctions afford a valid ground for UniCredit to refuse to make payment. Contractually, this was a dispute that should be determined in accordance with the contractual dispute resolution mechanism agreed between the parties, i.e. ICC arbitration in Paris.

Russian proceedings

However, instead of commencing arbitration proceedings, RCA issued proceedings against UniCredit before the Arbitrazh Court of St Petersburg and the Leningrad Region, claiming payment of just under €444m, the total value of the bonds, together with interest. In the Russian proceedings RCA alleged that the EU sanctions invoked by UniCredit

¹ These bonds have also given rise to litigation in Russia and before the English Courts. See Issue 47 of CIF weekly (link [here](#)) commenting on Commercial Court decision in the case brought by Deutsche Bank, which has since then been reversed by Court of

Appeal which granted an interim anti-suit injunction in an appeal heard without notice to RCA. Commerzbank has also obtained an ex parte interim ASI against RCA.

violated Russian public policy, did not provide a ground for non-payment and that the Arbitrazh Court was competent to determine the dispute because the arbitration clause contained in the bonds was unenforceable as a matter of Russian law. The Arbitrazh Court accepted RCA's claim on 14 August 2023 and fixed a hearing for 27 September 2023. That hearing never took place and the new hearing was fixed for after the appeal by the Court of Appeal could be heard.

Commercial Court decision

On 24 August 2023 UniCredit obtained an urgent *ex parte* interim ASI restraining the pursuit of the Russian proceedings, which was served on RCA and return date fixed for 22 September 2023 for determination of the final relief. RCA acknowledged service and indicated that it was going to challenge jurisdiction.

On the return date, Mr Tear J concluded that the English Court did not have jurisdiction over UniCredit's claim for an anti-suit injunction because (a) the arbitration agreement was governed by French law as the law of the seat of arbitration, and (b) the English Court was not the appropriate forum on the grounds that UniCredit could obtain substantial justice in an arbitration in France. However, the Judge left the interim ASI in place pending UniCredit's permission to appeal. The Court of Appeal granted permission and ordered that the interim ASI should remain in place until determination of the appeal.

Neither party has commenced arbitration proceedings – RCA because it wishes for the matter to be determined in the Russian Arbitrazh Court, maintaining that the agreement to arbitrate is unenforceable, and UniCredit because it is of the view that if RCA wishes to make a claim against it, it must do so by arbitration in Paris.

Court of Appeal Decision

The Court of Appeal allowed UniCredit's appeal and granted a final injunction restraining RCA from prosecuting its claims in the Russian proceedings and ordering it to discontinue the Russian proceedings.

In order for UniCredit to be able to show that the English Courts did have jurisdiction, because RCA is not domiciled nor has presence in the jurisdiction, it had to satisfy the Court that:

- (1) There was a serious issue to be tried on the merits (which there was no difficulties with);
- (2) There is a good arguable case that the claim falls within one of the gateways pursuant to which service can be effected out of the jurisdiction, which here was that the claim is in

respect of an arbitration agreement governed by English law; and

- (3) England and Wales was "the proper place in which to bring the claim".

UniCredit argued that the general rule, that the law applicable to the main contract also applies to the arbitration agreement should be followed, whereas RCA took the position that it was the law applicable to the seat of arbitration, French law, that applied to the arbitration agreement.

In determining (2) the Court of Appeal relied on the principles established by the Supreme Court in *Enka*, which sets out a "roadmap" for determining the law applicable to arbitration agreement. The Court of Appeal held that the law applicable to the arbitration agreement was English law. Whilst the contracts did not expressly set out the law applicable to the arbitration agreements, the Court found that the general principle that the arbitration agreement is governed by the law governing the main contract and the choice of a different country as the seat of the arbitration was, without more, sufficient to negate that was applicable here. The Court did not consider that there were any additional factors, for example there being anything in French law that indicated that where the seat of arbitration was France, the arbitration agreement would also be considered governed by French law or that the seat was chosen as a "neutral forum" that would negate the general rule.

The Court of Appeal also noted that there was no scope in this instance to determine the governing law by reference to the "closest connection test", which is applicable in the absence of *any* choice of law clause, which is only relevant where the main contract does not include a choice of law clause.

In relation to the third criteria, the Court of Appeal concluded that England was the proper forum for this claim. This was because the Court considered it highly unlikely that an arbitration in Paris would be allowed to proceed – without the protection of an ASI, which French courts could not grant procedurally, there would be nothing to stop RCA from obtaining an injunction from the Russian court preventing UniCredit from pursuing the arbitration. Even if an arbitration could proceed and UniCredit could obtain an order equivalent to an ASI from the Tribunal, it was clear that such an award would have been unenforceable in Russia, where RCA has assets.

Comment

This is the latest in a series of judgments where the English Courts have had to consider whether they would be able to grant an anti-suit injunction to restrain proceedings commenced in contravention of arbitration clauses providing for foreign arbitration proceedings and is a good illustration of how the principles applied to determining the governing law of the arbitration clause work in practice. Whilst the Court in this instance decided that it had jurisdiction to grant an ASI, given separability of arbitration agreements, it is also a useful reminder of some of the issues which parties could face where the governing law and the jurisdiction clauses are not directly aligned.

Please click [here](#) for a copy of the full judgment.

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