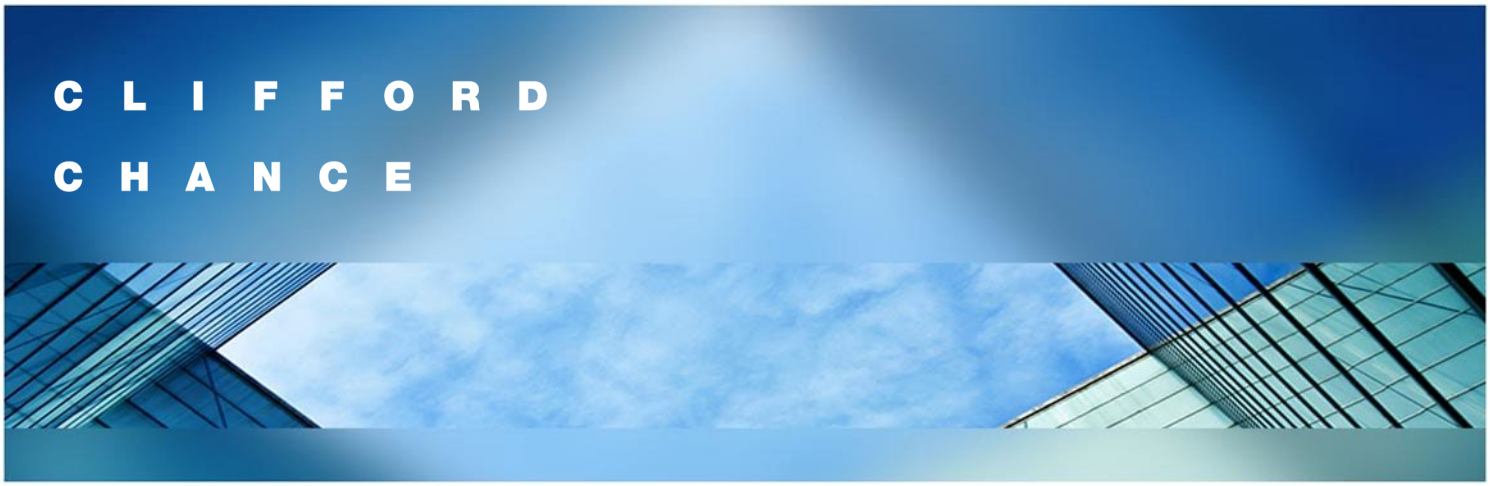

SUPREME COURT PROVIDES GUIDANCE ON ENGLISH COURT'S JURISDICTION TO ISSUE ANTI-SUIT INJUNCTIONS IN SUPPORT OF FOREIGN SEATED ARBITRATIONS

INTRODUCTION

On 18 September 2024, the Supreme Court handed down a judgment in *UniCredit Bank GmbH v. RusChemAlliance LLC*[1]. The judgment sets out the reasons for a decision it made in April 2024 to grant final injunctive relief to restrain proceedings commenced in Russia, where the contract in issue is governed by English law and provides for ICC arbitration seated in Paris.

BACKGROUND

Facts

In 2021, RusChemAlliance LLC ("**RCA**") entered into two contracts with German counterparts (together the "**Contractor**") for the construction of natural gas and gas processing facilities in Russia. UniCredit Bank GmbH ("**UniCredit**") issued several bonds to guarantee the Contractor's obligations and secure repayment of advance payments made to the Contractors.

These bonds were governed by English law and provided for ICC arbitration in Paris.

Following the imposition of sanctions against Russia by the EU in 2022, the Contractor ceased performance, citing sanctions as the reason for doing so. RCA terminated both contracts and sought to call on the bonds issued by UniCredit. UniCredit rejected these demands on the basis that payment was prohibited by EU sanctions.

Notwithstanding the arbitration clauses in the bonds, RCA commenced proceedings against UniCredit in the Russian courts (the Arbitrazh Court of St Petersburg and the Leningrad Region). RCA claimed the total value of the bonds (and interest) on the basis that EU sanctions contravene Russian public policy. RCA asserted that the Arbitrazh Court has jurisdiction as the arbitration clause was unenforceable pursuant to Article 248 of the Russian Arbitration Procedural Code. The Arbitrazh court accepted jurisdiction. In response, UniCredit applied in the English courts for an anti-suit injunction ("**ASI**") restraining the Russian proceedings.

On 24 August 2023, the High Court granted an interim ASI on an *ex parte* basis.

1 [2024] UKSC 30

High Court's Decision

RCA then issued an application disputing the English court's jurisdiction. Sir Nigel Teare, sitting as a judge of the High Court, concluded on 22 September 2023 that the English courts did not have jurisdiction to restrain the Russian proceedings by way of a final ASI, based on the following grounds:

1. Following the guidance in *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb*[2], the arbitration agreements were not governed by English law, but rather by the French substantive rules applicable to international arbitration; and
2. England was not the appropriate forum. The only connection with England was that the bonds were governed by English law. French courts would have supervisory jurisdiction over any arbitration. In particular, the judge considered that substantial justice could still be done by arbitration in France, notwithstanding that ASIs are not an available remedy and any award of damages would be difficult to enforce in Russia.

However, he continued the interim ASI pending the resolution of any appeal from his order.

Court of Appeal's Decision

On 2 February 2024, the Court of Appeal issued its ruling overturning the High Court's decision. The Court of Appeal granted a final ASI in favour of UniCredit.

Given that RCA is not domiciled in England and Wales and has no presence in the jurisdiction, the court's jurisdiction therefore depended on whether service could be effected out of the jurisdiction. This required UniCredit to show that:

1. There is a serious issue to be tried on the merits;
2. There is a good arguable case that the claim falls within one of the relevant gateways; and
3. England and Wales is the proper place in which to bring the claim.

Relevant gateway: contract governed by English law

UniCredit relied on the gateway set out in paragraph 3.1(6)(c) of Practice Direction 6B regarding claims in respect of a contract governed by English law, the contract in question being the arbitration agreements themselves.

The Court of Appeal applied the principles in *Enka*, starting with the "general rule" that where the main contract is expressly governed by English law, and the arbitration agreement provides for a foreign seat but is silent about the governing law of the arbitration agreement, the parties are generally taken to have chosen English law as governing the arbitration agreement. As to whether the present clause fell into an exception to this rule where there was a "*sufficiently clear rule of the law of the seat*", it found that the principle of French law in question i.e. that the law governing the arbitration agreement depends on the parties' common intention, fell "*considerably short*" of engaging the exception as contemplated by *Enka*.

As such, the arbitration agreements were governed by English law.

England and Wales is the proper place

The appropriate forum is where the case can "*suitably be tried for the interests of all parties and for the ends of justice*". This involved two factors: considering the "*natural forum*" for the claim, and whether there is a "*real risk that justice will be unobtainable in that forum*".

The Court of Appeal found that the "*suggestion that substantial justice could be obtained by UniCredit in France…is an illusion*". In particular, the Court noted that:

1. ICC arbitrators have the power to order a party to refrain from or terminate court proceedings commenced in breach of arbitration provisions, akin to an ASI.
2. However, such a process would be slow and in any event neither an award nor an order made by an emergency arbitrator would be enforceable in Russia.

2 [2020] UKSC 38

3. It was unlikely that arbitration in Paris would be allowed to proceed, as RCA could apply to the Russian courts for an injunction to restrain UniCredit from commencing arbitral proceedings. Such injunctions were readily granted in Russia and since UniCredit had assets in Russia, it would be compelled to comply.
4. It was highly likely that without an ASI, the Russian court would give judgment in favour of RCA shortly, which would be readily enforced in Russia.

The Court also accepted UniCredit's argument that it was "*abusive*" for RCA to rely on the availability of substantial justice in France while pursuing proceedings in Russia on the basis that the arbitration clause was unenforceable.

England was therefore the proper forum for the claim.

Whether a final ASI should be granted

Having established that the English court had and should exercise its jurisdiction over the claim, the Court considered whether a final ASI should be granted.

The Court held that there was "*no reason in principle*" why the English court should not grant an ASI in support of an arbitration agreement providing for a foreign seat, where it had jurisdiction pursuant to an English law governed contract.

RCA then appealed to the Supreme Court.

Supreme Court's Decision

In a judgment given by Lord Leggatt, with whom the rest of the Court agreed, the Supreme Court unanimously dismissed the appeal against the Court of Appeal's decision. It considered whether the English court had jurisdiction over UniCredit's claim, comprising two issues:

1. Whether the arbitration agreements are governed by English law; and
2. Whether England and Wales is the proper place in which to bring the claim.

Governing Law

The Supreme Court considered the principles identified in *Enka*. Applying these principles, the Court held that that there was nothing in the language of the governing law clauses to exempt the arbitration agreements from the choice of English law. In particular, the reference in each governing law clause to "*this Bond*" was reasonably understood to refer to the whole bond, including the arbitration clause.

English law therefore governed the arbitration agreements, and UniCredit's claims fell within the gateway for service out of jurisdiction.

The judgment also noted that there was "*no legal significance*" as to the distinction between an "*implied*" or "*express*" choice of law. Rather, the only question of legal relevance is whether on the proper interpretation of the contractual documents the parties have agreed on the law governing the arbitration agreement.

RCA argued that paragraph 170(vi)(a) of *Enka* established an exception, stating that if the law of the seat treats the arbitration agreement as governed by that law, it can be inferred that the parties intended for the arbitration agreement to be governed by the law of the seat. On that basis, the arbitration clauses in the bonds were governed by French law.

The Supreme Court dismissed this argument, clarifying that the exemption contemplated at paragraph 170(vi)(a) of *Enka* should be disregarded. No inference could therefore be drawn from the choice of seat even where the law of the seat contained a provision treating the arbitration clause as being governed by the law of the seat.

England and Wales as the proper place

The Supreme Court rejected the use of the *Spiliada* test of forum non conveniens as the applicable test for determining this issue. The correct starting point was instead the principle that it was desirable for parties to be held to their contractual bargain by any court before whom they have been, or properly can be, brought. Lord Leggatt drew support from the decision of the Court of Appeal for Bermuda in *IPOC International Growth Fund Ltd v OAO CT-Mobile LV Finance Group*[3], in which the Bermudian court granted an ASI to restrain a defendant incorporated in Bermuda from continuing Russian proceedings

3 [2007] CA (Bda) 2 Civ

brought in breach of agreements to arbitrate in Switzerland and Sweden, on the basis of its personal jurisdiction over the defendant alone.

In doing so, he endorsed the dicta of Sir Murry Stuart-Smith JA in *IPOC*, that the courts of the seat of arbitration were not the only courts that could prevent a party breaking its contract to arbitrate, as being rightly said. Service out of jurisdiction for interim relief in relation to an arbitration with a foreign seat should in principle be permitted unless it would be inappropriate to do so (as per the principle expressed in Section 2(3) of the Arbitration Act). This would require showing that there is a strong reason why the court should refrain from exercising its jurisdiction.

The Supreme Court rejected RCA's argument that England was not the proper place because the parties had chosen the supervisory jurisdiction of the French courts:

1. The power to grant injunctive relief to prevent a breach of an arbitration agreement is not an aspect of the supervisory or supportive jurisdiction of an English, but rather, its general equitable jurisdiction under Section 37 of the Senior Courts Act 1981.
2. In the present case, no issue of comity arises as the French courts would not have jurisdiction to determine such a claim and the evidence of French law before the court was that the French courts would not object to the grant of an ASI by an English court.
3. The choice of a French seat does not amount to a reason which would make it inappropriate for an English court to order injunctive relief.

The Supreme Court also rejected RCA's argument that the proper place for UniCredit's claims is instead arbitration commenced in France, and agreed with the Court of Appeal's determination that UniCredit would not be able to obtain substantial justice in arbitration proceedings.

In light of the above, the Supreme Court found that England and Wales is the proper place to bring the claim, whether by the principle set out in Section 2(3) or, in the alternative, even by applying the *Spiliada* test.

The Supreme Court also observed that:

1. Where parties have chosen England as the seat, English courts will readily enforce this bargain.
2. It is not incompatible with the agreement to arbitration that litigation proceedings were commenced for injunctive relief or otherwise to support the arbitral process.

Comment

The Supreme Court's decision is a further illustration of the English courts' pro arbitration stance. The courts remain committed to protecting and enforcing arbitration agreements (even for those arbitrations seated abroad), including by issuing ASIs to protect the parties' agreement, where not inappropriate to do so. Through its endorsement of the Bermuda Court of Appeal's judgment in *IPOC*, the Supreme Court has also recognised the possibility of a claimant obtaining an ASI against an English defendant on the basis of the defendant's domicile alone, even where the arbitration agreement in question provides for a foreign seat and foreign governing law.

The forthcoming Arbitration Bill 2024, presently before the UK Parliament, proposes an amendment to the Arbitration Act 1996 to the effect that the default law of an arbitration agreement in a contract is the law of the seat, unless explicitly stated otherwise. This change follows a recommendation by the Law Commission, which found that the law set out in *Enka* was "*complex and unpredictable*". For an overview of the proposals by the Law Commission, see our briefing.

In its judgment, the Supreme Court declined RCA's invitation to revisit the principles established in *Enka* in light of the fact that the Arbitration Bill put the issue squarely before Parliament. Until the Bill is enacted, *Enka* (together with the clarifications provided by the Supreme Court in this case) remains good law. Parties should seek to minimise the risk of disputes by explicitly specifying the governing law of their arbitration agreements.

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