Kluwer Arbitration Blog

Giving Arbitration Teeth: The Supreme Court's Judgment in UniCredit Bank GmbH v RusChemAlliance

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The release of the judgment in *UniCredit Bank GmbH v RusChemAlliance* [2024] UKSC 30, on 18 September 2024, concluded the most recent in a handful of applications for anti-suit injunctions brought by banks against RusChemAlliance ("RusChem").

The decision demonstrates the willingness of the English courts to support international arbitration proceedings, even if the seat of the arbitration is elsewhere. It is also, of course, helpful guidance in the context of continuing Russia-related disputes. Not least in the light of Russia's newly enacted legislation empowering the Russian courts to seize jurisdiction where the dispute involves a foreign party and the matter of sanctions.

Background

In 2021, RusChem entered into agreements with German contractors for the construction of liquefied natural gas and gas processing plants in Russia. Performance was guaranteed by UniCredit, and USD 2 billion was paid by RusChem to the contractors in advance. The UniCredit bonds were English law governed, and subject to an arbitration clause specifying a seat in Paris and application of the ICC Rules.

Following the Russian invasion of Ukraine in 2022, the contractors declined to continue to perform the contracts. They cited the EU sanctions regime as reason for their non-performance. RusChem terminated the contracts and demanded repayment. The contractors again declined, citing EU sanctions.

RuscChem then looked to UniCredit which, similarly, declined to pay under the bonds citing the EU sanctions regime as preventing it from doing so (and specifically, Article 11 of Council Regulation (EU) No 833/2014 of 31 July 2014).

RusChem's Russian Claim

On 5 August 2023, RusChem brought a claim in the Russian court against UniCredit for payment under the bonds.

Since the bonds were subject to an arbitration clause, UniCredit sought to dismiss that claim on grounds that the Russian court lacked jurisdiction. The Russian court ruled that by virtue of Article 248.1 of the Arbitrazh Procedural Code, the dispute fell within the exclusive competence of the Arbitrazh Courts of the Russian Federation. It did, though, stay the proceedings pending the outcome of proceedings on foot in England and Wales.

Journey Through the English Courts

First, on 22 August 2023, UniCredit applied to the English Commercial Court for injunctive relief restraining RusChem from pursuing the Russian proceedings. While the English Commercial Court held that it did not have jurisdiction to hear the claim, it continued an interim anti-suit injunction until the appellate court could decide the matter.

The Court of Appeal subsequently found that it should grant a final anti-suit injunction. It decided, in essence, that because the bonds were governed by English law, England and Wales was the proper place for UniCredit to have brought its claim.

RusChem sought to appeal the decision in the Supreme Court, which was asked to decide, whether: (i) it had been right to decide that the arbitration agreements in the bonds are governed by English law ("Governing Law Issue"); and (ii) England and Wales was the proper place to bring the claim ("Proper Place Issue").

Key Issues

Governing Law Issue

UniCredit relied squarely on the principle set down in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38–*i.e.*, that the governing law of the contract will also be taken to have been the parties' choice for the law which governs the arbitration clause. RusChem, on the other hand, argued that the law of the seat (*i.e.*, Paris) should govern the arbitration clause.

In deciding this issue, the Supreme Court drew together *Enka* and *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 in holding that, where the parties do not specify what system of law shall govern the arbitration agreement, they will be taken to have agreed that the law of the contract will do so, even if the seat of the arbitration is to be elsewhere.

The Court went on to note that some have referred to this as a principle of "implied choice". The Court rejected this definition: an arbitration clause should be interpreted no differently to any other contractual provision. It is not necessary to infer that the parties meant to include the arbitration clause within the ambit of their agreement on governing law–it can be taken as read.

Arbitration practitioners in England and Wales will regard this all as relatively trite. But they will also be aware of the which has, after the change of government, made its way back onto the legislative agenda; and which proposes to modify the law such that the law of the seat will be the law of the arbitration agreement.

RusChem sought to make use of the Bill's existence (in its previous iteration) to suggest the Court may wish to revisit *Enka*. The Court rejected the argument on the ground that the Bill is not (yet) the law.

RusChem's second line of attack was to rely on a paragraph in *Enka* which suggested (at [170]) that "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" might be enough to demonstrate that the parties did *not* intend for the governing law of the contract to apply to the arbitration agreement.

The Supreme Court rejected this too. It would require the parties to be imputed with unrealistically involved knowledge about the legal systems concerned with their contract, and how those legal systems treat arbitration clauses.

The correct approach was the fundamental principle laid down in *Enka*. If the parties select a law to govern their contract, that is the law which governs the contract. Every clause of it–including the arbitration one.

Proper Place Issue

In order for UniCredit succeed, it also had to convince the Court that England and Wales was the proper place to bring its claim (*i.e.*, under the Civil Procedure Rules, Rule 6.37(3)). Again, the Court found in favour of UniCredit.

First, on *forum conveniens*, the Court pointed out that both parties here had wrongly assumed that it was for UniCredit (*i.e.*, the claimant) to demonstrate that England and Wales was clearly the appropriate forum for the trial of the underlying dispute. But neither party could suggest that. The parties had agreed to arbitration in Paris–so the question for the English court was only whether or not it should enforce the parties' agreement with an anti-suit injunction. The Supreme Court found that it should; and indeed, that the English courts would not necessarily be the *only* courts for whom this was the answer.

Second, the Supreme Court disagreed that the French court's curial jurisdiction meant that they had sole responsibility for supervising the arbitration and, therefore, was the proper forum for the granting of an anti-suit injunction.

The Supreme Court drew a distinction between the curial or supervisorial law–*i.e.*, the law of the seat–and powers which might be exercised by courts to enforce a party's agreement to arbitrate. The English court did not tread on the French court's toes in granting an anti-suit injunction since that only enforced the parties' agreement. There was no comity issue in circumstances where the English courts were merely enforcing an English law-governed agreement (*i.e.*, to arbitrate).

Lastly on this point, the Supreme Court noted (from the evidence before it) that the French courts cannot grant anti-suit injunctions and could not hear any claim brought by UniCredit. It found that there was "no possibility" that the French courts could be seized of this matter. This did not help RusChem, though the Supreme Court also decided that even if the French courts could have granted relief to UniCredit, that would not make it inappropriate for the English courts to do so as well.

RusChem's third and final argument on the proper place issue was that UniCredit ought to have sought relief in an arbitration commenced under the agreement in the bonds.

The Supreme Court rejected this as well, principally for the reason that "any award or order made by an arbitrator has no coercive force". Since an arbitral award only creates a contractual obligation, and since the issue to be decided by the Court had arisen only because RusChem had already commenced litigation in *breach* of such an obligation, there was no reason to assume that yet another contractual obligation would have any greater effect.

RusChem's appeal was therefore dismissed. UniCredit was granted a mandatory injunction requiring RusChem to discontinue its Russian proceedings.

Impact of This Decision

This case gives comfort to parties that English courts can and will issue anti-suit injunctions where there is a valid arbitration agreement governed by English law. The English courts' pro-arbitration stance remains steadfast.

The decision also serves as a reminder that arbitration can only be as effective as the outcome it produces. Ultimately arbitral awards are contractual obligations only. Unless state courts are prepared robustly to support those obligations, the system cannot function. By granting the anti-suit injunction in this case, the Supreme Court affirmed the English courts' appetite for giving the system of international arbitration the teeth that it needs to continue to run.

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This entry was posted on Thursday, December 26th, 2024 at 8:12 am and is filed under Anti-suit injunction, English Arbitration Act, forum non conveniens, Governing Law
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