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Anti-Suit Injunctions in Support of Foreign-Seated Arbitrations: The Final Word by the English Courts?

Rina See (Bankside Chambers) · Monday, January 27th, 2025

In *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 (*UniCredit*), the UK Supreme Court unanimously confirmed that anti-suit injunctions (ASIs) could be issued by English courts in support of foreign-seated arbitrations, where the arbitration agreement is governed by English law. The Supreme Court's decision brought welcome finality to a series of decisions with divergent outcomes in this area.

The background facts and the Supreme Court's reasoning have been recently summarised here. While the Court re-affirmed the test in *Enka v Chubb* in what it labelled "the governing law issue," the impact of that aspect of *UniCredit* is limited given the forthcoming reform of the English Arbitration Act 1996 (AA96), which proposes to reverse the *Enka* test.

Rather, this post contends that *UniCredit*'s significance lies in the Supreme Court's analysis on "the proper place issue," which arises uniquely in the context of ASIs sought in support of foreign-seated arbitrations. The following sections outline the background to the *UniCredit* decision and the Supreme Court's analysis in this respect, before considering the implications of *UniCredit* for the future.

Background to the *UniCredit* Decision

UniCredit was one of several cases involving RusChemAlliance LLC (RusChem), arising out of the non-payment of bonds that were governed by English law and provided for ICC arbitration in Paris. When RusChem initiated proceedings against UniCredit, Deutsche Bank, and Commerzbank in Russia in breach of the arbitration agreement, the banks sought ASIs in English courts.

Because the seat of arbitration was not in England and no arbitral proceedings were on foot, CPR 62.5 in respect of arbitration claims did not apply to permit service out of the jurisdiction. The banks thus needed to establish that permission should be granted to serve proceedings out of the jurisdiction under CPR 6.36. To do so, they had to establish that: (a) the arbitration agreement was governed by English law, to meet the jurisdictional "gateway" under para 3.1(6)(c) of Practice Direction 6B; and (b) England and Wales was the "proper place" to bring the claim under CPR 6.37(3).

Despite effectively identical facts, English courts came to divergent conclusions on the banks' applications for ASIs:

1. Deutsche Bank successfully appealed against an initial refusal to grant an interim ASI (*see SQD v QYP* [2023] EWHC 2145 (Comm) and *Deutsche Bank AG v. RusChemAlliance LLC* [2023] EWCA Civ 1144 (*Deutsche Bank*)). In contrast to the High Court's concern about ASIs giving rise to a conflict with French public policy ([95]-[96]), the Court of Appeal allowed the appeal based on fresh evidence on French public policy, and the fact that a claim for ASIs could not be given effect to in France ([30]-[33], [41]-[42]).
2. Commerzbank was successful at first instance (*Commerzbank AG v RusChemAlliance LLC* [2023] EWHC 2510 (Comm)). The High Court found that England and Wales was the proper forum to grant relief under English law that was not available in France or Russia ([28]-[35]).
3. UniCredit was initially successful in obtaining an interim ASI, but its application for a final ASI failed when the High Court held that England was not the proper forum because the parties had chosen a French seat and substantial justice could be done in France (*G v. R* [2023] EWHC 2365 (Comm)). This was reversed on appeal when the Court of Appeal held that England was the appropriate forum: the evidence on French law was to the same effect as in its decision in *Deutsche Bank*, and the suggestion that UniCredit could obtain substantial justice in France was an illusion (*UniCredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64, [74]-[78]).

As previously discussed here, the division in opinion may reflect differing emphases placed on the related principles of public policy, comity, access to justice, and party autonomy in considering whether England and Wales was the proper place to bring the claim. More fundamentally, the courts had generally proceeded on the basis that the test in *Spiliada Maritime Corp v Cansulex Ltd* applied: that is, whether England and Wales was the appropriate forum, having regard to "where the case may be tried suitably for the interests of all the parties and the ends of justice."

The Supreme Court's Analysis of the "Proper Place" Test

The Supreme Court confirmed that the *Spiliada* test had no application where the parties have agreed on a forum for resolving their dispute ([66], [73]-[75]). An English court would readily exercise the discretion to grant an ASI where the parties had agreed to arbitration in England, and the relevant question is whether the fact of a foreign seat makes any difference to this analysis ([72]).

The Supreme Court reasoned as follows. ***First***, it is well-established that an English court would ordinarily exercise its discretion to secure compliance with a contractually agreed forum, and strong reasons are required to displace this *prima facie* entitlement. The policy of securing compliance applies even more forcefully to arbitration because courts are required to apply section 9 of AA96, which gives effect to Article II(3) of the New York Convention ([67]-[69]).

Second, English courts have issued ASIs to restrain foreign proceedings in favour of a third forum where the intervention of the English court is consistent with comity, which requires the English forum to have a sufficient connection with the subject matter of the case ([77]). When enforcing arbitration agreements, however, comity has little to no role ([78]-[80]). Instead, the Supreme Court left open whether having personal jurisdiction over the defendant would always amount to a sufficient connection, but suggested that presence in England and Wales or meeting the "contract"

jurisdictional gateway would suffice ([83]).

Third, section 2(3) of the AA96 expressly provides that English courts can exercise powers in support of arbitral proceedings with a foreign seat, unless the fact of the foreign seat makes it inappropriate to do so. The principle in section 2(3) should apply equally to courts enforcing an arbitration agreement seated outside England and Wales.

Consequently, the Court held that, where the parties have agreed on a foreign-seated arbitration, there is a presumption that English courts are the "proper place" to bring a claim for ASIs, unless the fact that the arbitration has a foreign seat makes it "inappropriate" to do so. A "strong reason" needs to be shown as to why the court ought not to exercise this jurisdiction ([92]-[93]).

The Implications of *UniCredit*

The Supreme Court's reasoning is undoubtedly sound. As explained here, it rests on distinguishing the supervisory jurisdiction of the courts of the seat from the power (and duty) of all courts to enforce parties' contractual obligations to arbitrate and to support the arbitral process ([96]-[98]). This is consistent with provisions in the UNCITRAL Model Law providing for any court to issue interim measures in support of arbitral proceedings, as well as the fact that it will not ordinarily be a breach of an arbitration agreement to commence proceedings in a non-contractual forum if the proceedings are initiated only to obtain interim relief.

The Court also resolved any tension between the principles of comity, public policy, and party autonomy by finding that they all pointed in favour of granting relief to enforce arbitration agreements. In finding that the foreign seat was not a reason making it inappropriate for an English court to exercise jurisdiction, the Court was fortified by its findings that UniCredit would otherwise have been denied access to justice, as neither French courts nor arbitration proceedings were available fora for obtaining an effective remedy ([104], [112]).

What impact, then, is *UniCredit* likely to have? Three aspects are of note.

First, the circumstances in *UniCredit* are unusual. It is telling that the most analogous case the Supreme Court referred to was a 2007 decision of the Court of Appeal for Bermuda, which concerned an ASI to prevent a Bermudan company from pursuing Russian proceedings in breach of agreements to arbitrate claims in Switzerland and Sweden ([81]). An English court will only be faced with the same scenario where (a) ASIs cannot be granted under the law of the foreign seat (or courts of the seat are unavailable to act); and (b) there are no arbitration proceedings proposed or on foot. It may be that this combination of features is rare. It may also be that, in such cases, seeking ASIs from an English court has not been within the parties' contemplation, and the decision in *UniCredit* may encourage its consideration.

Second, the Court left open what would constitute a "sufficient connection" with England and Wales. It is not limited to where the proper law of the arbitration agreement is English law; satisfaction of other jurisdictional gateways in para 3.1(6)(c) of Practice Direction 6B might also suffice. Thus, even if the result of legislative reform is that the law of the seat and the law governing the arbitration agreement are more likely to converge, the principles set out in *UniCredit* remain relevant and invite consideration of what a "sufficient connection" entails.

Third, the Court's adoption of the test in section 2(3) of the AA96 as also applicable to the "proper place" test provides a helpful framework for the analysis, and confirms that authorities on section 2(3) are instructive. Nevertheless, it is likely that the same arguments that the lower courts considered under the *Spiliada* analysis would simply be repurposed as "strong reasons" why it is "inappropriate" for English courts to assume jurisdiction. It remains to be seen how this test will be applied in practice.

This entry was posted on Monday, January 27th, 2025 at 8:19 am and is filed under Anti-suit injunction, England, English Arbitration Act, English courts, English Law
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