UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30.

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UniCredit: a more refined approach to determining the law which governs an arbitration agreement?

Where two parties to a contract, governed by English law, have agreed that all disputes arising out of that contract shall be decided by way of arbitration in Paris, is an English court entitled to grant an anti-suit injunction to restrain one party from continuing (or indeed commencing) court proceedings? The Supreme Court, in *UniCredit Bank GmbH v RusChemAlliance LLC,*[1] in agreement with the Court of Appeal,[2] determined that the answer to the question was "yes". The purpose of this note is to look at the Court's reasoning and to consider what lessons commercial parties may learn from the judgment as a whole.

Background

The facts can be taken quickly. RusChem is a Russian company, which entered into contracts with German companies for the construction of liquefied natural gas and gas processing plants in Russia. Importantly, performance of the German companies' obligations was guaranteed by bonds payable on demand and seven such bonds were issued by UniCredit, a German bank. Insofar as is relevant, the contracts contained in the bonds provided:

a) "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" (Clause 11); and

b) "... All disputes arising out of or in connection with the bond ... shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce ... The place of the arbitration shall be Paris..." (Clause 12).

After Russia's invasion of Ukraine in February 2022, a dispute arose and in October 2022 and again in April 2023, RusChem made demands on UniCredit for payment under the bonds, which demands UniCredit refused. On 5 August 2023, RusChem commenced proceedings in Russia and, on 22 August 2023, UniCredit applied to the Commercial Court in London for injunctive relief. Disagreeing with the High Court, the Court of Appeal granted UniCredit the injunction sought. RusChem then appealed to the Supreme Court.

What the Supreme Court had to decide and how it decided

As Lord Leggatt, who delivered the only judgment, made clear, the issue on the appeal was whether "the English court has jurisdiction over UniCredit's claim".[3] That, however, resolved itself into two

1 [2024] UKSC 30 (hereafter, "*UniCredit*").

2 [2024] EWCA Civ 64; [2024] 1 Lloyd's Rep 350.

3 *UniCredit,* [16].

further issues: a) whether the arbitration agreements in the bonds were governed by English law; and b) whether England and Wales was the proper place to bring the claim.[4]

Whether the arbitration agreements were governed by English law

The answer to this question lay in the Supreme Court's decision in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb.*[5] In *Enka*, and insofar as material for present purposes, the Supreme Court had held that where the parties had made a choice of law to govern their contract, that choice of law should generally be construed as applying to an arbitration agreement set out in a clause of the contract.[6] However, this "inference" could be negated, such that the arbitration agreement was governed instead by the law of the seat, *inter alia*, where "any provision of the law of the seat ... indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country's law".[7] The facts in *UniCredit*, so argued RusChem, fell within this exception: French law, so the argument ran, provides that arbitration agreements like those in the bonds are governed by French law, thus justifying the inference that the arbitration agreements in the bonds themselves were to be governed by French law.[8]

The Supreme Court rejected this argument. It was prepared to assume that by choosing Paris as the seat of the arbitration, the parties must be taken to know that French law would regard the arbitration agreements in the bonds as being governed by the French substantive rules of international arbitration. However, it did not accept the further proposition that the parties must thus be taken to have intended that, if French law were to govern the arbitration agreements when the matter was looked at in France, it should govern the arbitration agreements wherever the matter was considered. In consequence, the choice of English law in the bonds was properly to be construed as applying to all the provisions of the bonds including the arbitration agreements. The "fact that the courts of the seat would take a different view and regard their own law as the law governing the arbitration agreement is not a good reason to reach a different conclusion".[9]

What lessons can commercial parties and their advisors take from the Supreme Court's reasoning and conclusion on this issue? Primarily, the rejection, in *UniCredit*, of part of the reasoning in *Enka*: now, even where a provision of the law of the seat indicates that the arbitration agreement will be governed by that country's law, no inference can properly be drawn from the parties' choice of seat in the circumstances. In short, therefore, the circumstances in which the inference that the parties' choice of law for the contract extends also to the arbitration agreement contained in that contract may be rebutted have narrowed. Now, in order to rebut the inference, it would seem necessary for a party to make the case for "the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective".[10] Of course, other novel arguments may be available to litigants but, if they are, they

4 *Ibid.*

5 [2020] UKSC 38; [2020] 1 WLR 4117 (hereafter, "*Enka*").

6 As paraphrased in *UniCredit* at [22]. Obviously, this has no application where the parties have expressly chosen the law to govern the arbitration agreement but such occurrence is rare.

7 *Enka,* [170(vi)(a)].

8 *UniCredit*, [34].

9 *Ibid*, [62].

10 Enka, [170(vi)(b)).

are still to be found.

Whether England and Wales is the proper place to bring the claim

With respect to this issue, the Supreme Court effectively began by highlighting, on the strength of the decision in *Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace),*[11] that had the parties chosen England as the seat of the arbitration, the "English court would not hesitate to enforce the parties' bargain by issuing [an anti-suit] injunction".[12] Yet, what made *UniCredit* different was the parties' agreement on the seat of the arbitration being Paris.

In the eyes of the Supreme Court, this difference was a very significant one. Contrary to how the parties had argued the case, in Lord Leggatt's view it meant that the ordinary forum non conveniens test, as elaborated by the House of Lords in *Spiliada Maritime Corpn v Cansulex Ltd*,[13] was inapposite. Instead, the appropriate starting point is that it is desirable for parties to be held to their contractual bargain by any court before whom they have been or can properly be brought.[14]

Applying this principle, the Supreme Court determined that it was entirely appropriate for an English court to grant the remedy which UniCredit sought. In the first place, there was a substantial connection with England and Wales given the fact that the contractual rights which UniCredit relied on were governed by English law.[15] Second, the fact that the French courts had supervisory jurisdiction over the arbitration did not preclude an English court from upholding the parties' bargain: the purpose of the injunction was to enforce the negative promise contained in the arbitration agreement not to bring court proceedings.[16] Third, requiring UniCredit to obtain the relief it sought from a French court or indeed the arbitral tribunal would be inappropriate: in neither of those fora could UniCredit obtain any, or any effective remedy of the breach of the arbitration agreements.[17]

In future cases, prospective litigants asking an English court to do a similar thing as was done in *UniCredit* will likely have to keep in mind the rather unique circumstances of the case itself. It may not, for instance, always amount to a sufficient connection with England and Wales to justify intervention by the English court to restrain breach of an agreement to arbitrate that an English court has personal jurisdiction over the defendant. It is likely, therefore, that argument may centre, in due course, on whether that connection – or any other connection – *is* sufficient to justify interference. Similarly, had arbitration proceedings been commenced in which an issue had been raised about whether the arbitral tribunal had jurisdiction to decide whether UniCredit were liable to pay the sums claimed under the bonds, it might have been said that for the English court to decide that issue would have been to encroach on the role of the courts of the seat. Last, of course, the Supreme Court's endorsement of the decision in *The Angelic Grace* demonstrates that there is no move towards an unprincipled enlargement of the English's court role as a global actor. England and Wales must really be the proper place to bring the claim.

11 [1995] 1 Lloyd's Rep 87.

12 *UniCredit*, [71].

13 [1987] 1 AC 460.

14 *UniCredit*, [75].

15 *Ibid,* [83].

16 *Ibid*, [100].

17 *Ibid,* [112].

Conclusion

The Supreme Court's decision in *UniCredit,* while refining the principles set out in *Enka and in Kabab-Ji SAL v Kout Food Group,*[18] demonstrates that the principles which the common law applies in order to determine the law that governs an arbitration agreement are not to be overthrown by the impending reform of the Arbitration Act 1996. If reform is to come, it will, as the Supreme Court made clear, have to come from Parliament. What impact that reform has, if it comes, on commercial parties remains a matter of conjecture. For now, though, the decision in *UniCredit*, and the guidance it contains, is what commercial parties, and their legal advisors, must adhere to when considering the law which governs an arbitration agreement and the consequences of such governance.

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18 [2021] UKSC 48.

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