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Insights

LESSONS FROM UNICREDIT V RUSCHEMALLIANCE: WHAT LAW GOVERNS YOUR ARBITRATION CLAUSE?

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The UK Supreme Court decision in UniCredit Bank v RusChemAlliance has confirmed that the English court has jurisdiction to grant an anti-suit injunction (ASI) to restrain foreign court proceedings brought in breach of a Paris seated ICC arbitration agreement.

The decision is the final word in a series of cases in which the English courts have grappled with the scope of English court's jurisdiction to grant ASIs in circumstances where the seat of the arbitration is not within the jurisdiction. The debate centred around whether it was appropriate for the English court to grant an injunction in circumstances where the French courts, as the courts of the seat, had supervisory jurisdiction over the arbitration. A position complicated by the fact that the French courts do not have the power to grant ASIs.

After a series of conflicting decisions at first instance and in the Court of Appeal, the unanimous Supreme Court judgment, delivered by Lord Leggatt, been welcomed as a pragmatic decision demonstrating the willingness of the English courts to exercise their coercive powers to uphold international arbitration agreements.

In reaching its decision, the Supreme Court had to determine 2 issues: (1) whether the arbitration agreements were governed by English law; and (2) whether the English court is the proper place in which to bring the claim (a principle often referred to as "forum non conveniens").

This insight focuses on the first of those issues and highlights some practical considerations for parties drafting and negotiating governing law and arbitration clauses in the future.

GOVERNING LAW ISSUE

In order to establish the jurisdiction of the English courts, a claim form had to be served on the defendant out of the jurisdiction. Rule 6.36 of the English Civil Procedure Rules (CPR) set out the grounds (commonly known as "gateways") on which this may be done. The sole gateway relied on was that the claim was made in respect of a contract which is governed by English law. This meant that the court had to decide whether the arbitration agreement was governed by English law.

The arbitration agreement was contained in a bond contract. The bond contract was expressly governed by English law. The arbitration agreement provided for ICC arbitration seated in Paris. UniCredit argued that the arbitration agreement was governed by English law because the choice of English law to govern the bond contract applied to the arbitration clause as well as all the other clauses of the contract. RusChem argued that the arbitration agreement was governed by French law, being the law of the seat of arbitration as chosen by the parties.

THE ENKA PRINCIPLES

The English common law principles for determining what system of law governs an arbitration agreement are set out in paragraph 170 of the judgment of Lord Hamlen and Lord Leggatt in the Supreme Court decision in Enka v Chubb.

The general rule is that, where the law applicable to the arbitration agreement is not specified, a choice of governing law for the main contract will apply to an arbitration agreement contained in the main contract even when a different country has been chosen for the seat of arbitration (paras 170 (iv) and (v)).

Paragraph 170(vi) then sets out additional factors which may negate this inference and may imply that the parties intended the arbitration agreement to be governed by the law of the seat. The additional factors include "(a) 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".

Relying on para 170(vi)(a), RusChem argued that by choosing Paris as the seat of arbitration the parties must be taken to have known that, under French law, the arbitration agreements would be regarded by the French court (and the courts of any other jurisdiction) as governed by French law. Therefore, the parties impliedly chose French law to govern the arbitration agreements.

Lord Leggatt rejected this argument and clarified the proper approach to be taken to para 170(vi)(a). In doing so he made it clear that the language used in the Enka judgment was permissive rather than prescriptive and that no attempt was made to suggest when, if at all, such an inference ought to be drawn. The key question was what the parties to the arbitration agreements intended when choosing Paris as the place of arbitration and he found no valid basis for imputing to the parties an intention that the arbitration agreement should be governed by French law. He concluded that in future what was said in para 170(vi)(a) should be disregarded.

FUTURE LEGISLATIVE CHANGE

It has been suggested (perhaps not unreasonably) the Enka principles are unduly complex, unpredictable and difficult to apply in practice. In response to this, the Law Commission in its review of the Arbitration Act 1996 recommended that the Arbitration Act be amended. However, significantly, the proposed amendment departs from the current position under common law.

Clause 6A of the Arbitration Bill introduces a new default rule providing that an arbitration agreement is governed by the law of the seat of arbitration unless the parties expressly agree otherwise, and that an agreement on the governing law of the main contract does not constitute express agreement that that law also applies to the arbitration agreement.

The Arbitration Bill is currently before Parliament and the amended Arbitration Act is likely to come into force sometime in 2025.

WHAT ARE THE PRACTICAL IMPLICATIONS OF THE DECISION?

The short answer is that it is important to understand the impact that a choice of governing law and (in the future) the choice of a seat of arbitration may have on the governing law of an arbitration agreement.

The governing law of an arbitration agreement is important. It determines what law will be applied to determine (amongst other things) the existence, validity and scope of an arbitration agreement and, as illustrated in UniCredit v RusChem, the extent to which injunctive relief may be available to enforce an arbitration agreement.

Parties can specify what law governs an arbitration agreement. However, as noted by the Supreme Court, it is very rare for the governing law of an arbitration agreement to be separately specified in an arbitration clause. Most of the major arbitral institutions have model arbitration clauses but, of these, only the Hong Kong International Arbitration Centre's model clause includes a provision prompting parties to specify the law of the arbitration clause.

It is far more common for parties to specify the law which is to govern a contract. In some jurisdictions (including England, the Netherlands, Japan, India and Australia) the choice of governing law for the contract as a whole will be interpreted as applying to an arbitration clause that forms part of the contract (the "main contract" approach) irrespective of the fact that the chosen seat of arbitration is in another jurisdiction. However, there is no international consensus on this. In some jurisdictions (including France) the law of the seat is treated as the law governing the arbitration agreement (the "seat" approach).

Significantly, as a result of the Law Commission recommendations, the approach adopted in England and Wales is about to change. As explained above, to date, the English courts have adopted a "main contract" approach – meaning that the law governing the main contract will be interpreted as applying to an arbitration clause forming part of the contract. However, the amended Arbitration Act (likely to come into force in 2025) will adopt a "seat" approach. The new Act will contain a default rule providing that (unless the parties specifically agree otherwise) an arbitration agreement is governed by the law of the seat and that an agreement on the governing law of the main contract does not constitute express agreement that that law also applies to the arbitration agreement.

Governing law and arbitration clauses are often dubbed “midnight clauses” because they are drafted at the last minute when parties are in a rush to close a transaction. However, choices made after midnight can have significant (and often unforeseen) consequences if disputes arise - as the judgment in UniCredit v RusChemAlliance clearly demonstrates. This is something that can be avoided by seeking advice well before the transaction closes. When advising on arbitration clauses, we generally recommend that the choice of governing law and choice of seat are aligned. However, in cases where parties wish to depart from this approach it is important that they understand the broader implications of that decision.

RELATED PRACTICE AREAS

- International Arbitration

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