Neutral Citation Number: [2023] EWCA Civ 1144

Case No: CA-2023-001697

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr Justice Bright
[2023] EWHC 2145 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 October 2023

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between :

DEUTSCHE BANK AG	**Claimant/ Appellant**
- and -	
RUSCHEMALLIANCE LLC	**Defendant/ Respondent**

- -
- -

Paul Key KC (instructed by **Baker & McKenzie LLP**) for the **Appellant**

Hearing date: 7 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. A guarantee issued by a German bank in favour of a Russian company is governed by English law and provides for arbitration in Paris. When a dispute arises, the Russian company issues proceedings in Russia in apparent breach of the arbitration agreement. Should the English court grant an anti-suit injunction (**"ASI"**) to restrain those proceedings in circumstances where no such injunction could be obtained in France? That is the question raised by this appeal.

2. The guarantee was issued by Deutsche Bank AG (**"DB"**) in favour of RusChemAlliance LLC (**"RCA"**). DB applied to the Commercial Court without notice for an ASI against RCA which had started proceedings in Russia. The application was heard by Bright J on 17 and 18 August 2023. On 21 August 2023 he handed down judgment (under the name *SQD v QYP* [2023] EHWC 2145 (Comm)) dismissing the application on the basis that England was not the proper forum and that the English court should not grant the injunctive relief that DB sought.

3. DB appealed to this Court (again without notice). We heard the appeal on an expedited basis on 7 September 2023. We allowed the appeal and granted an ASI, giving very brief reasons. I now give fuller reasons for agreeing to this course.

Facts

4. The facts as they appear from the material before the Court at this stage are as follows.

5. RCA is a Russian company. On 9 September 2021 it entered into a contract with a German construction company, Linde GmbH, Linde Engineering (**"Linde"**) for the engineering, procurement and construction of an LNG plant in Ust-Luga in the Leningrad Region of the Russian Federation. The contract provided for advance payments to be made to Linde, and for an advance payment guarantee to be provided to RCA in respect of each such advance payment.

6. On 24 September 2021 DB issued one such advance payment guarantee to RCA (**"the Guarantee"**). By clause 1 DB undertook to pay RCA the amount demanded by RCA up to a maximum of €238,126,196.10. By clause 11 the Guarantee was to be construed under and governed by English law. By clause 12 in case of disputes the parties were to co-operate and attempt to find an amicable solution, failing which such disputes were to be settled by arbitration in Paris under the Rules of Arbitration of the International Chamber of Commerce (**"the ICC"** and **"the ICC Rules"**).

7. Following the Russian invasion of Ukraine and the adoption of sanctions by the EU (among others), Linde suspended work under the contract on 27 May 2022. On 7 April 2023 RCA gave Linde notice terminating the contract and claimed back the advance payments it had made in a total sum of over €738m. Linde did not pay and on 2 May 2023 RCA made a demand on DB under the Guarantee for the full amount of €238,126,196.10 guaranteed. DB declined to pay on the grounds that it was prohibited by sanctions from doing so. On 31 May 2023 DB received a dispute notice from RCA triggering the dispute resolution mechanism in clause 12 of the Guarantee.

8. On 27 June 2023 RCA commenced proceedings against DB in the Arbitrazh Court of Saint Petersburg and Leningrad Region (**"the Russian proceedings"**). It claimed the full sum due under the Guarantee together with interest. It also claimed execution of any judgment on DB's shares in two wholly-owned Russian subsidiaries, Deutsche Bank LLC and Deutsche Bank Technology Centre LLC. In its statement of claim, it referred to the arbitration clause contained in the Guarantee but asserted that it was unenforceable for a number of reasons.

9. DB received notification of the Russian proceedings on 20 July 2023. On 14 August 2023 it commenced arbitration in Paris under the ICC Rules by filing a request for arbitration. At the date of the hearings before Bright J and this Court the arbitral tribunal had not yet been established. In its request for arbitration DB claimed among other things a final order specifically enforcing the arbitration agreement by requiring RCA not to pursue, and to take steps to discontinue, the Russian proceedings.

Application to Bright J

10. On 16 August 2023 DB applied to the Commercial Court for an interim ASI restraining RCA from pursuing the Russian proceedings, and an anti-enforcement injunction (**"AEI"**) restraining RCA from enforcing any judgment obtained in the Russian proceedings together with permission to serve RCA out of the jurisdiction. The application was made without notice to RCA and was therefore in the first instance for injunctive relief pending a return date on which there could be an on notice hearing, but as was made clear by DB, the relief then sought would also be interim pending the ability of the arbitral tribunal to grant relief.

11. The application came before Bright J on 17 August 2023. At the outset of the hearing he was able to give a number of indications, as set out in his Judgment at [17(i)-(vii)]. These were as follows:

    (1) He was satisfied to a high degree of probability that the Guarantee existed and contained clauses providing that it was to be governed by English law and was subject to ICC arbitration in Paris.

    (2) He was satisfied that so far as the English court is concerned the arbitration agreement itself was subject to English law: see *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38, [2020] 1 WLR 4117 (***"Enka"***) at [170(iv)]) per Lord Hamblen and Lord Leggatt JJSC. See also *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 where it was held, applying the principles laid down in *Enka*, that an arbitration agreement in a contract governed by English law and providing for arbitration under the ICC Rules in Paris was itself subject to English law.

    (3) He was satisfied to a high degree of probability that the Russian proceedings were in breach of the arbitration agreement.

    (4) In principle agreements should be honoured; if the Court has jurisdiction it will generally give support to a party wising to ensure that an agreement is honoured by its counterparty. This includes arbitration agreements.

    (5) He was satisfied that DB had acted promptly and that delay was not a factor.

(6) He was not persuaded that RCA would not have access to justice in the context of the arbitration in Paris.

(7) In principle if the case had involved an arbitration with its seat within the jurisdiction, he would be very likely to grant an ASI and probably an AEI (after some discussion of its terms).

12. Mr Paul Key KC, who appeared on the appeal for DB (but did not appear below) unsurprisingly did not take issue with any of these, and we did not require any submissions on them. Nevertheless I have considered them for myself and I am satisfied that the conclusions stated by Bright J were all justified by the evidence before him, or by the relevant legal principles. I do not think it necessary to go into more detail.

13. The point that concerned Bright J, however, was whether it was appropriate to grant an injunction given that the seat of the arbitration was in Paris. Rather to his surprise, it would appear, the evidence did not explain why the application was being made in England rather than in France. In particular DB had not furnished the Court with any evidence of French law. In those circumstances he adjourned the hearing to the next day.

14. When the hearing resumed on 18 August 2023, DB had obtained evidence of French law. I will have to look at this evidence in more detail below, but for present purposes it is sufficient to note that it explained that it would not be possible to obtain an ASI in France.

Judgment of Bright J

15. Bright J reserved judgment and handed down a clear, thorough and commendably quick judgment dismissing the application on 21 August 2023. Having set out the background and having identified the critical point as being what the effect was of the fact that the seat of the arbitration was not within the jurisdiction, he first dealt with an issue on the source of the Court's jurisdiction to grant an ASI.

16. Counsel then appearing for DB focussed primarily on s. 44 of the Arbitration Act 1996 (**"AA 1996"**) which by s. 44(1) and (2)(e) confers on the Court "for the purposes of and in relation to arbitral proceedings" the same power of granting interim injunctions as it has for the purposes of and in relation to legal proceedings. But Bright J did not accept that s. 44 was the source of the power to grant an ASI, holding that the relevant power arises solely under s. 37(1) of the Senior Courts Act 1981 (**"SCA 1981"**) and not under s. 44 AA 1996 (at [23] and again at [34]). That was on the basis of what Lord Mance JSC said in *Ust-Kamengorsk Hydropower Plant JSC v AES Ust-Kamengorsk Hydropower Plant LLP* [2013] UKSC 35 (***"Ust-Kamengorsk"***) at [48] as follows:

> "The better view, in my opinion, is that the reference in section 44(2)(e) to the granting of an interim injunction was not intended either to exclude the Court's general power to act under section 37 of the 1981 Act in circumstances outside the scope of section 44 of the 1996 Act or to duplicate part of the general power contained in section 37 of the 1981 Act. Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement – whether on an interim or a final

> basis and whether at a time when arbitral proceedings are or are not on foot or proposed – the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

17. When Bright J was asked for permission to appeal his judgment, one of the grounds of appeal (Ground 4) sought to challenge this aspect of his judgment. He granted permission on all four grounds. But in the event this ground has not been pursued. Instead Mr Key embraced the point and himself relied on the fact that the source of the power to grant an ASI is s. 37 SCA 1981. We did not therefore hear any argument against Bright J's conclusion to this effect. But I see no reason to doubt that he was right, in the light of what Lord Mance said in *Ust-Kamengorsk*.

18. Bright J then drew attention to some of the consequences of the fact that the application for an ASI was made under s. 37 SCA 1981 rather than s. 44 AA 1996, including (at [27]) the fact that for the purposes of service out of the jurisdiction, reliance could not be placed on CPR r 62.5(1)(b) (as it can where an application is made under s. 44 AA 1996), nor, in the case of an arbitration with a foreign seat, on CPR r 62.5(c) (as it can where an application is made for an ASI where the seat of the arbitration is in England and Wales). Instead the claimant would have to rely on CPR r 6.36, and this would require it to show that England and Wales is the proper forum in which to bring the claim: CPR r 6.37(3).

19. He then referred to the general principles under which the English court will grant an ASI, as articulated by Millett LJ in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Ll Rep 87. The effect is that an ASI will readily be granted if the claimant can demonstrate with a high degree of probability the existence of an arbitration clause to which the defendant is a party and which covers the dispute and there are no exceptional circumstances which militate against the grant of relief (at [31]-[32]). But the many cases where an ASI had been granted in the context of arbitration were all, as far as he was aware, cases where the seat was or would be in the jurisdiction, and he did not regard it as axiomatic that the Court should feel no diffidence in granting an ASI where the seat was outside the jurisdiction (at [35]-[36]).

20. He then considered (at [38]-[41]) the decision of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, in which the parties had agreed on ICC arbitration in Brussels. Lord Mustill said that it was possible in principle to claim an interim injunction in support of a foreign arbitration but the Court should approach the making of such an order "with the utmost caution" (at 367F). Bright J also referred (at [44]-[45]) to the Supplemental Departmental Advisory Report which preceded the Arbitration Act 1986 which included statements that the English court should not use its powers where their exercise would produce a conflict or a clash with another more appropriate forum.

21. Having referred to a number of authorities (none of which was suggested to be determinative of the question), Bright J then considered the approach to ASIs in France (at [77ff]). He did this on the basis of the evidence that DB had obtained overnight in

response to his request. This consisted of two brief letters, one from Professor Claude Brenner, Professor of Civil Law and Civil Procedure at the University of Paris Panthéon-Assas, and one from a French practitioner. Both confirmed in clear terms that it would not be possible to obtain an ASI in France. The latter can be ignored for present purposes as Bright J found Professor Brenner's letter more instructive.

22. Professor Brenner said that it would be legally impossible for a French judge to issue an ASI for two reasons. The first was that the procedural tool enabling such an injunction to be granted was absent from the toolkit available for the national judge. He expressed the second as follows (in translation):

> "on the other hand, in France, such an injunction would contradict the fundamental principle of freedom of legal action, as well as the constitutionally recognised limitation on the general powers of the judge, who is not entitled to diminish the legal capacity of other judges – a fortiori if they are foreign – to assess their own competence. Any contravention of this legal impossibility would constitute an excess of power on the judge's part, which would have to be sanctioned on appeal if a French judge were to contravene it."

23. He then gave a historical explanation of the difference in approach between the French and English legal systems, noting that in France since the revolutionary period judges have been responsible for putting the law into practice, not for creating the law on their own authority, and that the rules of civil procedure were conceived in a spirit of mistrust against judicial arbitrariness and hence written down and traditionally conceived in a very objective way. He concluded as follows:

> "European Union law, which takes precedence over national law in France, only reinforces this difference in approach, the Court of Justice of the European Union ruled in its famous *West Tankers* judgment of 10 February 2009 (case C-185/07) that the use of injunctions by the courts of a State infringes the legitimate trust between courts within the European judicial area when it prevents each court from assessing its own jurisdiction. So much so, that a recent ruling by the Paris Court of Appeal gave the interim relief judge the power to neutralise such an injunction, in the name of international public policy, even outside the application of European law, when its effect is to interfere with French jurisdictional competence (CA Paris, Pôle 5, 16ème ch., March 3, 2020, n° 19/21426, Lexbase: A90183G4). It is only when the purpose of an injunction duly issued abroad is to ensure the performance of a lawful agreement that its effectiveness can and must be recognised in France, insofar as the parties have then been able to freely dispose of the disputed right, and because it then finds its basis in the applicable procedural law."

24. On the basis of this evidence, Bright J drew the following conclusions. ASIs are simply not available in France (at [81]). The reason why is not because the grant of ASIs is an emerging doctrine under French law, but because French law has a philosophical objection to the grant of ASIs (at [82]). He reached this conclusion on the basis of Professor Brenner's second reason: ASIs are not in the French legal toolkit, but this is not a mere omission; it is a deliberate choice. French law considers ASIs to contradict

the fundamental principle of freedom of legal action; ASIs are a tool that French law does not like (at [83]). He continued as follows:

> "84. Counsel for SQD suggested that French law objects to French judges granting ASIs but has no objection to foreign judges doing so. This is not how I understand the evidence submitted to me by SQD. On the contrary, the final paragraph that I have set out indicates that, while the French courts will not issue an ASI, they will issue an anti-ASI: i.e., an injunction that seeks to strike down or restrain an ASI granted by a non-French court. It is difficult to think of a clearer way of demonstrating an objection to ASIs granted by foreign judges.
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> 85. I further understand that the only situation in which French law will accept an ASI granted by a non-French court is if it has been "duly issued abroad" in the sense that it "finds its basis in the applicable procedural law". Thus, if a non-French court has substantive jurisdiction and the procedural law applicable to the matter is the procedural law of that non-French court, under which an ASI can properly be granted, the ASI will be recognised in France.
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> 86. The facts of this case do not fall within that paradigm. The seat of the arbitration being Paris, the procedural law that the parties have agreed upon is French law. I therefore understand this to be a case where the French court would not enforce an interim ASI granted by this court, were I to grant one. On the contrary, if requested to do so in its capacity of court of the seat of the arbitration, the French court might well grant an anti-ASI."

25. Bright J then considered a submission on ICC Rule 29.7, which he concluded did not advance matters either way, and finally gave his conclusion. This was that in the light of the evidence that he had received in relation to French law, England was not the proper forum and the Court should not grant the ASI and AEI that DB sought (at [94]). He gave two complementary reasons for reaching this view. The first was that to grant an ASI would be inconsistent with the approach of the courts of the seat (and hence the curial law) (at [95]); the second was that the Court should have deference to the intention of the parties (at [96]). The parties chose Paris as the seat of the arbitration. They must be taken to have done so knowing that the French courts would not grant ASIs. Contracting parties are free to arbitrate where they like. If they choose to arbitrate in a country such as France where "the policy is that ASI[s] will not be granted and will not generally be enforced" the English court should acknowledge the significance of that (at [97]). It is not the job of the English courts to support arbitration in France by granting ASIs given the fundamentally inconsistent approach in France on whether such support is appropriate or desirable. "Indeed, it seems that the support of this court would be unwelcome."

26. He therefore dismissed the application.

Grounds of appeal

27. Bright J granted permission to appeal on four grounds. The fourth was that the Court

should have held that s. 44 AA 1996 was available, and, as already referred to, this was not pursued on appeal. The other three were as follows:

(1) The Court should have held that England was the proper place to claim the injunctions, regardless of where the seat was, or whether an ASI or AEI was available from the French court as the court of the seat.

(2) The Court should have held that rule 29.7 of the ICC Rules made England a proper place to bring the claim even if (contrary to Ground 1) it otherwise would not be.

(3) The Court should not have held that the application was contrary to any French public policy.

Fresh evidence

28. In support of Ground 3, DB applied to admit various items of fresh evidence. We allowed this application in part, permitting DB to admit two items of fresh evidence of French law, for reasons given at the hearing.

29. The fresh evidence consisted of a further short letter from Professor Brenner, and a rather longer advice from Professor Louis d'Avout, another professor at the University of Paris Panthéon-Assas, who is a specialist in the conflict of laws. Neither complied with the requirements of CPR r 35.10(2) and Practice Direction 35 para 3.3, but we asked for, and were given, an undertaking that statements in accordance with those requirements would be given, and these have subsequently been duly filed. It is important that those who seek to adduce expert evidence ensure that the requirements of CPR Part 35 are complied with even in interlocutory applications, to which they apply as much as at trial.

30. Professor d'Avout's opinion is to the following effect:

(1) An ASI granted to sanction a breach of an arbitration agreement that is apparently valid and applicable to the case would be recognised in France on the grounds (i) that it is not contrary to international public policy and (ii) that it is issued by a foreign court that has sufficient links to the case, and has been acquired without fraud by the claimant. (It is apparent from the context that "sanction" here is used in the sense of "impose a sanction" or "punish" rather than in the sense of "allow" or "permit".)

(2) Since the UK ceased to be a member state of the EU, the *West Tankers* decision (which concerns the mutual trust relationships between courts of different member states) would no longer apply, and the French court would apply the ordinary law forged by the case law of the Cour de Cassation when considering whether to recognise an ASI.

(3) Under the law laid down by the Cour de Cassation in *Cornelissen* (20 February 2007), there are three conditions for such recognition: the indirect jurisdiction of the foreign court based on the connection of the dispute to the court, compliance with international public policy in terms of substance and procedure, and the absence of fraud against the law.

(4) These principles have been consistently applied since then, and in *In Zone Brands International Inc* (14 October 2009) the Cour de Cassation applied them to an ASI granted by a foreign court where a party to a contract was sued in France in breach of a contractual provision stipulating jurisdiction in Georgia (USA), and obtained an ASI from a US court. The Cour de Cassation held that the foreign judgment was neither contrary to international public policy, nor obtained in fraud of the French procedure.

(5) Professor d'Avout considered that this precedent would be applicable to the present case and that France would be disposed to recognise the ASI sought by DB from the English court. The ASI would not be contrary to international public policy, and, given the links between the English court and the dispute, would not be a fraud on the French court. The latter doctrine was limited to a case where proceedings were taken in order to defeat a decision or proceedings taken in France; it did not include a case where the claimant applied to the English court to obtain an injunction that it could not have obtained in France.

(6) Professor d'Avout also explained that he did not understand Professor Brenner's first letter to have been intended to suggest the contrary. The decision of the Paris Court of Appeal of 3 March 2020 which Professor Brenner had referred to in his final paragraph (see paragraph 23 above) was given with knowledge of the *In Zone Brands* case, but in a different context where a US court had granted an ASI injunction to prevent proceedings being continued in France but there was no pre-existing contractual obligation to refer to the US courts in preference to the French courts. And Professor d'Avout also said that he understood the reference in Professor Brenner's final sentence to "the applicable procedural law" (see paragraph 23 above) not to be intended as a reference, as Bright J understood it to be, to the curial law of the arbitration, but to the procedural law in force in the country which considers itself competent to issue the injunction, in this case England.

31. Professor Brenner's second letter explained that he had only intended to answer the question he was asked, which was whether French domestic law has a procedure equivalent to an ASI. He did not intend to take a position on the different question of how the French court might, in the present case, treat an ASI granted by the English court, much less to suggest that it might legitimately be regarded as an undesirable interference by the English court in the dispute. On his final sentence, he confirmed Professor d'Avout's understanding and explained the position as follows:

> "In concluding his remarks by stating that *"it is only when the purpose of an injunction duly issued abroad is to ensure the performance of a lawful agreement that its effectiveness can and must be recognised in France, insofar as the parties have then been able to dispose freely of the right at issue and because it is then based on the applicable procedural law,"* he simply wanted to point out that the position of French law with regard to anti-suit injunctions is not such that it necessarily condemns their effectiveness. In accordance with the principles on which the French court is prohibited from issuing them, there is no a priori reason to condemn them [anti-suit injunctions] where they have been duly issued abroad in a system that, in principle, generally recognises the court's power to do so and where they in no

way infringe on the litigant's freedom to bring legal proceedings or the court's freedom to assess its own jurisdictional competence, but on the contrary give effect to the parties' agreement to reserve the hearing of their case to an arbitral tribunal. This is, in fact, as the undersigned understands it, the state of positive French law, but as the question is one of private international law and not of domestic civil procedure, he did not consider himself qualified to express it further in a legal opinion, nor does he intend to do so today."

32. On the basis of this evidence, I think Ground 3 of the appeal is made out. Bright J was hampered by having limited evidence of French law whose import was far from clear, and it is not perhaps surprising that he read that evidence as suggesting that French law had a philosophical objection to the use of ASIs, even to the extent of countenancing an anti-ASI injunction. But the evidence before us, as can be seen, is to a different effect. It is that although a French court does not have the ability to grant an ASI as part of its domestic toolkit, it will recognise the grant of an ASI by a court which does have that as part of its own toolkit, provided that in doing so it does not cut across international public policy.

33. It was the perceived conflict or clash between the grant of an ASI and what he understood to be the stance of the French courts that led Bright J to dismiss the application: see his judgment at [84]-[86] (paragraph 24 above). In those circumstances I think we are obliged to reconsider the question for ourselves.

Is England the proper place in which to bring the claim?

34. The starting point is whether this is an appropriate case for service out of the jurisdiction. The applicable principles are well established. The claimant must show (i) a serious issue to be tried on the merits; (ii) a good arguable case that the claim falls within one of the relevant gateways; and (iii) that England and Wales is "the proper place in which to bring the claim" (CPR r 6.37(3)): see eg *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [99]-[100].

35. There is in the present case no difficulty over the first two requirements. I am satisfied that on the material before us, DB has demonstrated that there is a serious issue to be tried on the merits, and that there is a good arguable case that the claim falls within the gateway in Practice Direction 6A para 3.1(6)(c), namely a claim in respect of a contract governed by English law.

36. So far as the third requirement is concerned, this requires more consideration. It is natural to regard the grant of an ASI to restrain proceedings brought in breach of an arbitration agreement as intimately connected with the arbitration (whether already on foot or proposed), and one can point to statements of high authority to the effect that where the seat of the arbitration is in England, the practice of the English court in readily granting ASIs is part of the "supervisory" or "supporting" jurisdiction of the English court: see, for example, *West Tankers Inc v Ras Riunione Adriatica di Sicurtá SpA (The Front Comor)* [2007] 1 Ll Rep 391 (***"West Tankers (HL)"***) at [21] per Lord Hoffmann; and *Enka* at [174] and [179] per Lords Hamblen and Leggatt. At first blush it might be thought to follow that the natural (and hence "proper") place in which to bring any claim for an ASI would be the courts of the seat of the arbitration, and hence that where the seat is not in England, England is not the proper place for such a claim.

37. But I do not think that necessarily follows. In *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] AC 1045 (***"Vedanta"***), the Supreme Court explained that the requirement in CPR r 6.37(3) that the Court be satisfied that England and Wales is "the proper place in which to bring the claim" was not intended to change the meaning of what was a long-standing concept: see per Lord Briggs JSC at [66]. He there identified the concept as that fleshed out by Lord Goff in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 475-484, summarised as being that the task of the Court is to "identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".

38. There is no difficulty in identifying what English law regards as required by "the ends of justice" in a case such as the present. It is the policy of English law that parties to contracts should adhere to them, and in particular that parties to an arbitration agreement, who have thereby impliedly agreed not to litigate elsewhere, should not do so. The English court, faced with an English law governed contract containing a promise by a party not to do something and a threat by that party to do the very thing he has promised not to do, will readily and usually enforce that promise by injunction. If authority were needed for such basic propositions, it can be found in *Ust-Kamengorsk* at [21] per Lord Mance ("the negative aspect of an arbitration agreement is … as fundamental as the positive"), and at [46] ("[ASIs] enforce the negative right not to be vexed by foreign proceedings"); *West Tankers (HL)* at [21] per Lord Hoffmann ("an important and valuable weapon") and [31] per Lord Mance ("[ASIs] … represent a carefully developed – and, I would emphasise, carefully applied – tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements."); and *Enka* at [177] per Lords Hamblen and Leggatt ("In granting an [ASI] the English courts are seeking to uphold and enforce the parties' contractual bargain as set out in the arbitration agreement.")

39. Hence the Court will usually grant an ASI to enforce an arbitration agreement unless there is good reason not to: see *The Angelic Grace* at 96 col 2 per Millett LJ, 97 col 1 per Neill LJ. This is no more than a particular application of the general principle that an injunction will be granted to restrain breaches of negative contracts almost as of right, which is a well-established principle of English law: see eg *Snell's Equity* (34th edn, 2020) §18-035, *Doherty v Allman* (1878) 3 App Cas 709.

40. The only claim in the present case is a claim for interim injunctive relief based on these well-established principles of English law. Such relief, regarded by English law as a valuable tool to uphold and enforce the arbitration agreement, can only in practice be obtained in England and not in France. Bright J, as explained above, thought, on the basis of the evidence before him, that that was because French law had a philosophical objection to the grant of ASIs. The evidence before us is to a different effect and strongly suggests that while French law does not have the ability to grant an ASI as part of its procedural toolkit, it has no objection in principle to (and will recognise) the grant of an ASI by a court which can by its own procedural rules grant one, at any rate where the basis for the ASI is the parties' contractual agreement to submit disputes to a particular forum.

41. In those circumstances it seems to me that the forum in which the claim for an interim ASI can be suitably tried for the interests of all the parties and for the ends of justice is the English court, on the simple basis that such a claim cannot be given effect to in France. I do not think it necessary to consider what the position would have been had

Bright J's understanding been correct – that is, if the French court would regard the grant of an ASI by the English court as inappropriate and unwelcome – which raises questions of some difficulty and on which we have heard very little argument. On the position as it appears to us, the choice is between the English court where an ASI can be granted and a French court where it cannot, not because of any hostility to the concept, but because of a lack of domestic procedural rules permitting them. Since it is not to be supposed that DB would take the futile step of applying to a French court for an ASI which it has been repeatedly and clearly advised the French court cannot grant, the real choice is not between two competing forums, but between the English court entertaining the claim and the claim not being brought at all. Seen in this light, I would hold that the English court is indeed the proper place to bring the claim. I would therefore grant DB permission to serve the claim out of the jurisdiction.

Should the injunctions be granted?

42. Once this position has been reached, I regard the application for an interim ASI as quite straightforward. It is of course the case that injunctions are always discretionary but, as explained above, an ASI will usually be granted unless there is good reason not to. Bright J found such good reason in his understanding of the hostility with which the French Courts would view an ASI, even to the extent of issuing what he termed an "anti-ASI". But as I have said the evidence before us is to a different effect. Once this is put to one side, there seems to me no good reason why an ASI should not issue. As Lord Cairns said in *Doherty v Allman* at 720:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

43. In the present case DB also sought an AEI. I would grant this as well in the particular circumstances of the present case. The evidence before us is to the effect that even if RCA filed a motion in the Russian proceedings to discontinue, the approval of the court is required, and approval might not be granted so that judgment may be entered regardless. In those circumstances it seems to me that it is only appropriate for RCA to be restrained from executing any such judgment in addition to being restrained from prosecuting the proceedings itself.

44. Those are the reasons why I agreed to the appeal being allowed and to the grant of permission to serve out, the grant of an ASI and the grant of an AEI.

Lord Justice Snowden:

45. I agree.

Lady Justice Falk:

I also agree.