Neutral Citation Number: [2024] EWCA Civ 64

Case No: CA-2023-001933

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Sir Nigel Teare (sitting as a High Court Judge)
[2023] EWHC 2365 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2024

Before:

LORD JUSTICE BEAN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

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Between:

UNICREDIT BANK GmbH (a company incorporated under the laws of Germany)	**Appellant/ Claimant**
- and -	
RUSCHEMALLIANCE LLC (a company incorporated under the laws of the Russian Federation)	**Respondent /Defendant**

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Stephen Houseman KC & Stuart Cribb (instructed by **Latham & Watkins (London) LLP**) for the **Appellant**
Sa'ad Hossain KC & Alexander Brown (instructed by **Enyo Law LLP**) for the **Respondent**

Hearing date: 25 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2nd February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. The issue in this appeal is whether the English court has jurisdiction to grant an anti-suit injunction to restrain the pursuit of proceedings in Russia when the parties' contract is governed by English law but provides for arbitration in Paris in accordance with the rules of the International Chamber of Commerce; and if so, whether such an injunction should be granted. That issue arises because the respondent, RusChemAlliance LLC ('RCA'), is pursuing a claim for payment before the Arbitrazh Court of St Petersburg and the Leningrad Region under certain on demand bonds issued by the appellant bank, notwithstanding that each of the bonds contains an arbitration clause. It does so contending that the agreement to arbitrate is unenforceable under Russian law, although it has never contended that the arbitration agreement is governed by Russian law.

2. Sir Nigel Teare, sitting as a judge of the Commercial Court, held that the English court does not have jurisdiction, for two reasons: first, because the arbitration agreement is not governed by English law as the governing law of the contract, but by French law as the law of the seat of arbitration; and second, because the English court is not the appropriate forum on the ground that the claimant bank could obtain substantial justice in an arbitration in France, notwithstanding that any order by an arbitral tribunal would not be reinforced by the coercive powers of the English court. The bank appeals on both issues.

3. The judge's decision on jurisdiction meant that he did not have to consider whether, if there had been jurisdiction, a final injunction should be granted. As to that, the bank submits that it should, while the defendant company submits that the issue should be remitted to the Commercial Court to decide.

4. At the conclusion of the hearing on 25th January 2024 we announced that the appeal would be allowed and that a mandatory final injunction would be granted (in short) to restrain the respondent from prosecuting its claims in the Russian proceedings and to order it to bring those proceedings to an immediate end. After giving the parties an opportunity to make submissions on the form of the order, we made such an order on 29th January 2024. We refused an application by RCA that the order should be stayed until after any further appeal to the Supreme Court. This judgment sets out my reasons for joining in those decisions.

Background

5. RCA is a company incorporated under the laws of the Russian Federation. In July and September 2021 it entered into two Engineering Procurement and Construction contracts for the construction of LNG (liquefied natural gas) and GPP (gas processing plant) facilities in Russia. Its contractual counterparties were German companies, Linde GmbH and Renaissance Heavy Industries LLC, together described as 'the Contractor'.

6. Under the EPC contracts RCA was obliged to pay, in stages, a total of approximately €10 billion. The Contractor was entitled to advance payments of approximately 20% of that sum, i.e. €2 billion. Those advance payments have been made.

7. The contracts also provided for the Contractor to provide on demand bonds guaranteeing the performance of its obligations. It arranged for some of those bonds to be provided by the claimant, UniCredit Bank GmbH, then known as UniCredit Bank

AG, a German bank. Further bonds were provided by other banks, including Deutsche Bank and Commerzbank.

8. UniCredit issued seven bonds. Four of them were to guarantee the performance of the Contractor's obligations under the contract. Three of them were to secure the repayment of the advance payments.

9. Each of the bonds provided for English law and ICC arbitration in Paris, as follows:

> '11. 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.
>
> 12. In case of dispute arising between the parties about the validity, interpretation or performance of the Bond, the parties shall cooperate with diligence and in good faith, to attempt to find an amicable solution. All disputes arising out of or in connection with the bond which cannot be resolved amicably, shall be finally settled under the rules of arbitration of the International Chamber of Commerce, the ICC, by one or more arbitrators appointed, in accordance with the said ICC's rules. The place of arbitration shall be Paris and the language to be used in the arbitral proceedings shall be English.'

10. Following Russia's invasion of Ukraine in February 2022, the European Union extended its existing sanctions and imposed new sanctions on Russia, and on specified Russian legal entities and persons, although these did not include RCA. This led the Contractor to seek clarification from the German Federal Office for Economic Affairs and Export Control whether it could continue to perform the EPC contracts. It was instructed that it could not. As a result, the Contractor halted performance of the contracts, citing EU sanctions as its reason for doing so.

11. On 23rd September 2022 RCA terminated or purported to terminate the first contract on the ground that the Contractor had materially breached its obligations. On 7th April 2023 it terminated or purported to terminate the second contract on the same basis. It requested the Contractor to return the advance payments which it had made and sought compensation for damage caused by the breach.

12. Following the termination of the contracts, RCA made demands on UniCredit for payment under the on demand bonds. Initially UniCredit declined to pay on the ground that the demands did not comply with formalities required by the terms of the bonds. However, RCA submitted revised demands which appear to have cured any formal defects. The position now is that demands for payment have been made under all seven bonds, which UniCredit has rejected on the grounds that such payment was prohibited by EU sanctions, specifically Articles 3b(2)(b) and 11(1) of Regulation (EU) 833/2014. UniCredit has not advanced any other ground for its refusal to pay.

13. RCA disputes that these sanctions afford a valid ground for UniCredit's refusal to make payment under the bonds. Accordingly that is an issue which ought to be decided, and which the parties have agreed should be decided, by ICC arbitration in Paris, by one or more arbitrators applying English law.

Procedural history

14. Instead of commencing such an arbitration, however, on 5th August 2023 RCA issued proceedings against UniCredit before the Arbitrazh Court of St Petersburg and the Leningrad Region, claiming payment of €443,767,755.29, the total value of the bonds, together with interest. Its pleaded case in the Russian proceedings is that the EU sanctions invoked by UniCredit violate Russian public policy and therefore do not provide a ground for non-payment, and that the Arbitrazh Court is competent to determine the dispute because the arbitration clause contained in the bonds is unenforceable as a matter of Russian law.

15. On 14th August 2023 the Arbitrazh Court formally accepted RCA's claim and fixed 27th September 2023 for a hearing to consider not only preliminary matters, but also the substantive trial of the claim.

16. On 22nd August 2023 UniCredit issued a claim in the English court, together with an application for an interim anti-suit injunction to restrain the pursuit of the Russian proceedings. That application was heard urgently and without notice to RCA by Mr Justice Robin Knowles on 24th August 2023 and an interim injunction was granted. RCA was served with the proceedings and the order on the following day. Mr Justice Robin Knowles also gave directions fixing the hearing of the claim for final relief for 22nd September 2023.

17. On 1st September 2023 RCA acknowledged service and indicated its intention to challenge jurisdiction.

18. The trial of the claim for final anti-suit relief and the challenge by RCA to the jurisdiction of the English court were heard together by Sir Nigel Teare on 22nd September 2023. In view of the urgency, with a hearing in Russia which was potentially the substantive trial of RCA's claim fixed for 27th September 2023, the judge gave an *extempore* judgment.

19. In the event the substantive trial of the claim in the Russian proceedings did not take place on 27th September 2023. Instead, on 1st November 2023, Judge Saltykova dismissed UniCredit's challenge to the jurisdiction of the Russian court, holding (in translation) that:

> 'Therefore, by virtue of the provisions of paragraph 2 of part 1 of article 248.1 of the APC RF [the Arbitration Procedural Code of the Russian Federation], this dispute belongs to the exclusive competence of arbitration courts in the Russian Federation, therefore the arbitration agreement cannot be performed.'

20. In addition, Judge Saltykova, who was aware of the proceedings here, including the pending appeal to this court, suspended the proceedings on the merits of RCA's claim until this court had considered UniCredit's appeal from the refusal of Sir Nigel Teare to grant a final anti-suit injunction. I should record my gratitude to her for taking this course, enabling this appeal to be dealt with in an orderly way. The current position in the Russian proceedings is that there is to be a hearing on 14th February 2024, to consider the further progress in those proceedings. I infer that this date was fixed on the basis that the decision of this court on the appeal would be known by then.

Article 248 of the Russian Arbitration Procedural Code

21. Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been described as 'the single most important pillar on which the edifice of international arbitration rests' and as 'perhaps … the most effective instance of international legislation in the entire history of commercial law' (see the citation by Lord Hamblen and Lord Leggatt in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2021] 1 WLR 4117 ('*Enka*') at [126]). However, in 2020, pursuant to Federal Law No. 171-FZ, the Russian legislature amended the Arbitration Procedural Code of the Russian Federation to grant exclusive jurisdiction to Russian courts over disputes arising from foreign sanctions or involving sanctioned persons. It did so by introducing a new Article 248.1 and 248.2 into the Code.

22. The effect of Article 248.1, in summary and among other things, was to confer exclusive jurisdiction on Russian Arbitrazh Courts over disputes between Russian and foreign persons arising from foreign sanctions; to enable Russian persons affected by foreign sanctions to apply to a Russian Arbitrazh Court for an anti-suit injunction prohibiting the other party from initiating or continuing proceedings before a foreign court or international arbitration tribunal located outside the territory of the Russian Federation; to treat an agreement providing for arbitration outside the territory of the Russian Federation as inoperable; and to enable a Russian Arbitrazh Court to punish a breach of an anti-suit injunction granted to prohibit proceedings before a foreign court or international arbitration tribunal. UniCredit's evidence, which RCA has not challenged, is that Article 248.1 has been applied broadly by the Russian courts, and that there have been a significant number of cases in which Russian courts have assumed jurisdiction and issued anti-suit injunctions prohibiting foreign court or arbitration proceedings.

23. It was pursuant to this Article that Judge Saltykova determined that the Russian Court has exclusive jurisdiction over RCA's claims on the bonds and that the arbitration agreements which they contain cannot be performed.

No arbitration has been commenced

24. It should be noted that neither party has commenced an arbitration. RCA has not done so because it wishes to bring its claim on the bonds in the Russian Arbitrazh Court, maintaining that the agreement to arbitrate is unenforceable. The bank has not done so either and has explained that it has no present intention of doing so. Its position is that if RCA wishes to make a claim against it, it must do so by arbitration in Paris.

The judgment

Governing law of the arbitration agreement

25. The judge set out the guidance given by the majority of the Supreme Court (Lord Hamblen and Lord Leggatt, with whom Lord Kerr agreed) in *Enka* at [170]:

> '170. It may be useful to summarise the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:

i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (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; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the

> seat, even if this differs from the law applicable to the parties' substantive contractual obligations.
>
> ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.'

26. It is clear that this guidance was intended to provide a road map for courts and tribunals called on to determine the governing law of an arbitration agreement.

27. The judge took as his starting point that when, as here, the law applicable to the arbitration agreement is not specified, the choice of English law as the governing law of the contract (sometimes called the 'matrix' contract: I shall use the term 'main contract') will generally apply also to the arbitration agreement. However, he considered that this general rule was negated because there was here a provision of the law of the seat, i.e. French law, indicating that where an arbitration is subject to that law, the arbitration agreement would also be treated as governed by that country's law. The provision of French law which the judge identified was not a statutory provision, and in his view did not have to be, but a principle developed in case law. He described it as 'a substantive rule of international law of arbitration whereby the existence and effectiveness of the arbitration agreement is to be determined in accordance with the parties' common intention', which formed part of French law.

28. As a result, in the judge's view:

> '24. In choosing France as the seat of the arbitration, the parties can fairly be taken as being aware of that aspect of French law and having it in mind and to have intended that the arbitration would be governed by those principles. For that reason I consider that the inference relied upon by claimants cannot be drawn in the present case. It is negatived in the way that the Supreme Court has suggested is possible in an appropriate case.
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> 25. It follows that English law is not the governing law the arbitration agreement. Instead the governing law of the arbitration is the French substantive rules applicable to international arbitration. It is true that they are not French domestic law, but they are nevertheless provisions of French law which apply to international arbitration.'

Appropriate forum

29. In case he was wrong in that conclusion, the judge considered whether England was the appropriate forum (i.e. 'where the case may be tried suitably for the interests of all the parties and the ends of justice': *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 480G) on the assumption that the arbitration agreement was governed by English law. He pointed out that the only connection with England was that the bonds and, on this assumption, the arbitration agreements which they contain, were governed

by English law and that there was a clear connecting factor with France, the seat of the arbitration. It was the French and not the English court which would have supervisory jurisdiction over any arbitration, if an arbitration were to be commenced.

30. The judge appears to have accepted that an anti-suit injunction would not be a remedy available from the French court, and that such a remedy was only available in England, but concluded that if there were to be an arbitration in France, in which the bank sought remedies for breach of the arbitration agreement, the remedy of damages would be available. On this basis, he considered that substantial justice could be done in the arbitration in France, even though the remedy of an anti-suit injunction would not be available and an award of damages might be difficult to enforce in Russia. For that reason the judge concluded that the English court was not the appropriate forum for the claim.

31. The judge concluded, therefore, that the English court did not have jurisdiction over UniCredit's claim for an anti-suit injunction. However, he left the interim injunction granted by Mr Justice Robin Knowles in place pending an application for permission to appeal. On 19th October 2023 I granted permission and ordered that the interim injunction should remain until determination of the appeal.

The *Deutsche Bank* case

32. As I have mentioned, on demand bonds were also provided to RCA by Deutsche Bank. Those bonds have also given rise to litigation both in Russia and here, although it appears that Deutsche Bank, unlike UniCredit, has commenced an ICC arbitration in Paris. In *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144, [2023] Bus LR 1660, on facts almost identical to those of the present case, this court (reversing Mr Justice Bright in the Commercial Court) granted an interim anti-suit injunction in an appeal heard without notice to the defendant, RCA. Sir Nigel Teare said in the present case that he derived very little assistance from the decision of this court in *Deutsche Bank*, although (in fairness) when he gave judgment urgently on 22nd September 2023 this court's full judgment was not available to him. The appeal in *Deutsche Bank* had been allowed on 7th September 2023, when very brief reasons were given, but these were supplemented by a fuller judgment given on 11th October 2023.

33. It appears to have been assumed without argument in *Deutsche Bank* that there was at least a good arguable case that the governing law of the arbitration agreement was English law, although Lord Justice Nugee did say at [35] that he was satisfied that there was a good arguable case to this effect. On this basis, and on the basis of French law evidence that an anti-suit injunction could not be granted by a French court, but that the French court would recognise an anti-suit injunction granted by the English court, and would not regard such an injunction as an undesirable interference in the dispute, this court held that England was the proper forum in which to bring the claim. Lord Justice Nugee (with whom Lord Justice Snowden and Lady Justice Falk agreed) said:

> '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.'

34. Having concluded that the English court had and should exercise jurisdiction, the court regarded the application for an interim anti-suit injunction, extending also to restrain enforcement of any judgment entered in the Russian court, as "quite straightforward".

35. I would make five comments about the *Deutsche Bank* case. First, RCA was not present as the application was made without notice. Second, the claim was for an interim and not a final injunction. Third, it appears to have been assumed without submission that the arbitration agreement was governed by English law. At any rate, there is nothing in the judgment to suggest that the argument now advanced by RCA, based on the exception in [170(vi)] of the Supreme Court's judgment in *Enka*, was even considered. Fourth, in any event Lord Justice Nugee went no further than to say that there was a good arguable case that the arbitration agreement was governed by English law. Fifth, the issue of appropriate forum appears to have been confined to whether the English court or the French court was the appropriate forum. There was no consideration whether the possibility of obtaining a suitable remedy in an arbitration in France meant that the English court was not the proper forum for the claim, which is the ground on which Sir Nigel Teare decided the issue of appropriate forum in this case.

36. For these reasons, we must consider the issues arising in the present case for ourselves. Indeed, despite its factual similarity to the present case, it has rightly not been submitted on behalf of UniCredit that it binds us to decide any of the issues in the present appeal in its favour. Nevertheless, to the extent that it does decide those issues, it is of persuasive value and its reasoning is compelling.

The *Commerzbank* case

37. *Commerzbank AG v RusChemalliance LLC* [2023] EWHC 2510 (Comm) was a third case on materially the same facts. On a without notice application Mr Justice Bryan was satisfied that the English court had jurisdiction and granted an interim anti-suit injunction to restrain the pursuit of proceedings in Russia.

Jurisdiction

38. RCA is not domiciled in England or Wales and has no presence here. Accordingly the jurisdiction of this court depends on whether service can be effected on it out of the jurisdiction. The bank must satisfy three requirements, namely that: (1) there is a serious issue to be tried on the merits; (2) there is a good arguable case that the claim falls within one of the relevant gateways; and (3) England and Wales is 'the proper place in which to bring the claim' (*Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [71]).

39. There is no difficulty about the first requirement. The issues concern the second and third requirements.

40. The gateway on which the bank relies is that set out in paragraph 3.1(6)(c) of Practice Direction 6B, that the claim is in respect of a contract governed by English law. Because of the principle of separability (see e.g. section 7 of the Arbitration Act 1996), the contracts on which the bank relies are not the bonds, which are expressly governed by English law, but the arbitration agreements contained within them. The issue, therefore, is as to the governing law of those arbitration agreements.

41. For jurisdictional purposes, the bank is only required to satisfy the test of good arguable case, which requires the court to take a view on the material available at a preliminary stage. However, the hearing before the judge was not only concerned with jurisdiction, but was also the trial of the claim for a final injunction, so that the parties can fairly be taken to have adduced all of the evidence on which they wished to rely. It would therefore be unsatisfactory to limit our decision to deciding whether there is a good arguable case that the arbitration agreements are governed by English law. If, despite a good arguable case to that effect, the arbitration agreements are actually governed by French law, that would be a relevant consideration in deciding whether as a matter of discretion to grant a final injunction. As we have all the relevant evidence, I propose to decide the issue on a final basis.

The governing law of the arbitration agreement

The nature of the issue

42. The principles for determining the governing law of the arbitration agreement are the English common law conflicts of laws principles set out by the majority of the Supreme

Court in *Enka* at [170]. Thus the law applicable to the arbitration agreement will be either (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

43. Accordingly the first question is whether the parties have agreed on a choice of law to govern the arbitration agreement. This must be ascertained by construing the arbitration agreement and the contract containing it as a whole, applying the rules of contractual interpretation of English law as the law of the forum (*Enka* at [31] to [34]). Such a choice of law may be express or implied.

44. The Supreme Court's fourth and fifth principles were as follows:

> 'iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.
>
> v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.'

45. The fourth principle appears to describe an express choice of the governing law of an arbitration agreement. That is to say, an express choice of the governing law for the main contract will generally be understood as including an express choice of the law applicable to an arbitration agreement which forms part of that contract. However, the language of the fifth and succeeding principles, which refer to negating or justifying an inference as to the applicable law of the arbitration agreement, suggests that the Supreme Court regarded an express choice of the law of the main contract as, in general, an implied choice of the same law to govern the arbitration agreement. But, as explained at [35], the distinction between an express and an implied choice in this context is not a sharp one.

46. In any event it is clear that the general rule, in a case such as the present where the main contract is expressly governed by English law, and the arbitration agreement contained within that contract provides for arbitration with a foreign seat but does not say anything specific about the governing law of the arbitration agreement, is that the parties are taken to have made a choice of English law as the law applicable to the arbitration agreement. This general rule is said to be based on important principles such as certainty, consistency, the avoidance of complexity and artificiality, and legal coherence (*Enka* at [53] and [54]), although I note that the Law Commission has suggested that the law in *Enka* is 'complex and unpredictable' (*Review of the Arbitration Act 1996, Final Report*, paras 12.20 and 12.74) and has recommended a default rule that an arbitration agreement will be governed by the law of the seat (para 12.77). Be that as it may, the current law is that the general rule is as stated by the Supreme Court in *Enka*. The judge was therefore right to take the general rule as his starting point. As certainty, consistency, the avoidance of complexity and artificiality, and legal coherence are important foundations of English commercial law, this general rule should not lightly be displaced.

47. The judge concluded that the general rule was displaced, applying the Supreme Court's sixth principle, which I set out again with added emphasis:

> 'vi) Additional factors which *may*, however, negate such an inference and *may in some cases imply* that the arbitration agreement was intended to be governed by the law of the seat are: (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; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor *may* be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.'

48. RCA relies on the first of these additional factors, contending that French law contains a provision that where an arbitration is subject to French law, the arbitration agreement will also be treated as governed by French law. Here, the arbitration itself is governed by French law as the curial law, and the French court is the court exercising supervisory jurisdiction over the arbitration. The questions arise, therefore, whether French law does contain such a provision and, if so, whether that provision negates a conclusion that the arbitration agreement is governed by English law.

The parties' submissions in outline

49. On behalf of UniCredit, Mr Stephen Houseman KC advanced three main reasons why the general rule and not the exception to that rule should apply in this case. First, he relied on the wide language of the choice of law clause in the bonds ('This Bond and all non-contractual or other obligations arising out of or in connection with it'), submitting that the negative obligation not to litigate a dispute falling within the arbitration clause (*AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 at [21] to [23]) is an 'other obligation arising out of or in connection with' the bond. Second, he submitted that the exception to the general rule to which the Supreme Court referred is confined to situations where the law of the seat contains a *legislative* provision that the arbitration agreement is governed by that law. Third, he submitted that the exception applies only where the law of the seat provides directly that (in the absence of express agreement) an agreement to arbitrate will be governed by the law of the seat, and that French law contains no such provision.

50. On behalf of RCA, Mr Sa'ad Hossain KC supported the judge's reasoning. He submitted that the exception to the general rule is founded on the recognition by the majority of the Supreme Court that parties may fairly be taken to be aware of the relevant curial law when choosing the seat of the arbitration, so that it is sufficient for the exception to apply that the law of the seat would apply that law to the arbitration agreement; in such a case the parties' choice of seat shows that they intended that law to apply to the arbitration agreement; and there is no principled basis on which to confine this exception to statutory provisions.

51. Mr Hossain submitted in addition, by way of a Respondent's Notice, that this reasoning was reinforced by the fact that the French seat was chosen as a neutral forum; and in

the alternative, that the choice of a French seat at least precluded any conclusion that the parties had chosen English law to govern the arbitration agreement, so that the parties had made no choice of law to govern the arbitration agreement at all. In this latter case, the Supreme Court's eighth principle would apply, with the result that the arbitration agreement is governed by French law:

> 'viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.'

Analysis

52. The principles for ascertaining the governing law of an arbitration agreement have now been authoritatively established by the decision of the majority of the Supreme Court in *Enka*. It is therefore unnecessary to travel again through the previous case law on this topic.

53. As the Supreme Court has explained, the search for the governing law of an arbitration agreement requires the court to construe the parties' contract, including the arbitration clause, to see whether they have made a choice of the governing law, either expressly or by implication. The principles set out by the Supreme Court at [170], both the general rule and the exceptions to it, are the result of that process of construction. They represent, therefore, what the parties can be taken to have intended to achieve when they choose a governing law for the main contract which is different from the law of the seat of arbitration. It is notable also that when the Supreme Court returned to this topic in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 911, [2021] Bus LR 1717 (*Kabab-Ji*), Lord Hamblen and Lord Leggatt at [28] treated [170] of their judgment in *Enka* as a sufficient summary of the conclusions of the court.

54. Logically the first question for consideration is whether the particular terms of the choice of law clause, clause 11, amount to an express agreement as to the governing law of the arbitration agreement. It will be recalled that this clause provided:

> '11. 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.'

55. The issue is whether the negative obligation, inherent in an arbitration clause, not to commence court proceedings on the merits of an arbitrable dispute is an "other obligation" within the meaning of this clause. I accept Mr Hossain's submission that it is not. The phrase 'non-contractual or other obligations' expands the choice of English law beyond the parties' contractual obligations, but nonetheless refers to obligations relating to the parties' substantive performance of the bonds. It makes clear that the parties intend obligations arising (for example) in tort or in restitution also to be governed by English law, but in my judgment does not have anything to say about the governing law of the arbitration agreement. The reference to 'other obligations' ensures that obligations not already captured by the preceding words of clause 11 will be governed by English law. But the negative obligation inherent in an arbitration clause

is a contractual obligation. The reasoning of the Supreme Court in *Enka* is that the arbitration agreement is a contractual term which is part of the bond, just like any other contractual term, so that a clause providing for the contract terms to be governed by English law includes the arbitration clause. Accordingly the governing law of the arbitration agreement is dealt with by the opening words of clause 11 ('This Bond … shall be construed under and governed by English law'), and not by the later sweep-up reference to 'other obligations'.

56. Accordingly the terms of clause 11 do not enable the bank to avoid engaging with the exception to the general rule set out by the Supreme Court in *Enka* at [170(vi)].

57. That exception to the general rule, whereby the governing law of the arbitration agreement will be the law of the seat when the law of the seat so provides, is itself a conclusion as to what the parties can be taken to have intended. The words which I have emphasised from the Supreme Court's formulation of the exception (see at [47] above) suggest that this is not an inflexible rule, and that its application depends on all the circumstances, including what the parties can fairly be taken to have known about the content of the law of the seat. The Supreme Court made this clear at [69] and [94]:

> "69. Whether a choice of the curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement -- and, if so, the strength of such implication -- must depend on the content of the relevant curial law."
>
> '94. … While a choice of seat and curial law is capable in some cases (based on the content of the relevant curial law) of supporting an inference that the parties were choosing the law of that place to govern the arbitration agreement, the content of the Arbitration Act 1996 does not support such a general inference where the arbitration has its seat in England and Wales.'

58. It is apparent that in formulating that exception, the Supreme Court had principally in mind legislative provisions such as exist in Sweden and Scotland. The majority gave these as examples, contrasting them with the position in England and Wales under the Arbitration Act 1996:

> '70. In *Carpatsky Petroleum Corpn v PJSC Ukrnafta* [2020] EWHC 769 (Comm); [2020] Bus LR 1284, the claimant applied to enforce in England and Wales an arbitration award made in Sweden. Enforcement was resisted on the ground (among others) that there was no valid arbitration agreement in the contract between the parties. This argument depended on the assumption that the validity of the arbitration agreement was governed by the law of Ukraine. The contract provided for the "law of substance of Ukraine" to apply "on examination of disputes". Butcher J held (at paras 67-71) that this was not a choice of Ukrainian law to govern the arbitration agreement and that, in the circumstances, the choice of Stockholm as the seat for any arbitration demonstrated an implied choice that the validity and interpretation of the arbitration agreement should be governed

> by Swedish law. His reasons were that: (1) it was reasonable to infer that the parties had deliberately chosen a neutral forum to resolve their disputes and hence "intended the law of that jurisdiction to determine issues as to the validity and ambit of that choice"; and (2) by choosing Sweden as the seat for the arbitration, the parties agreed to the application of the Swedish Arbitration Act, including section 48 which provides that, in the absence of agreement on a choice of law to govern an arbitration agreement with an international connection, the arbitration agreement shall be governed by the law of the country in which, by virtue of that agreement, the arbitration proceedings have taken place or will take place. It follows that, by providing for a Swedish seat, the parties were impliedly agreeing that Swedish law should govern the arbitration agreement.
>
> 71. A similar inference could also be drawn where a contract contains an agreement for arbitration in Scotland. Section 6 of the Arbitration (Scotland) Act 2010 provides:
>
> > "Where - (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law."
>
> 72. There is, however, no similar provision in the Arbitration Act 1996. …'

59. However, I do not think that the exception to the general rule identified by the Supreme Court at [170(vi)] is necessarily confined to statutory or other legislative provisions, albeit that these were the only examples given by the Supreme Court of when the exception might apply and it is relatively easy to conclude that parties can fairly be taken to have been aware of the content of legislation specifically concerned with law of arbitration in their chosen seat. In principle, however, it seems to me that a sufficiently clear rule of the law of the seat established by case law is capable of satisfying the exception. Whether it does so in any given case must depend on the content of the relevant rule and on whether it is a rule of which the parties can fairly be taken to have been aware, such as to negate the general rule that the arbitration agreement is intended to be governed by the law applicable to the main contract. In considering that question, it is necessary to keep in mind the Supreme Court's fifth principle, that where there is a choice of law as the governing law of the main contract, the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

60. The relevant French law as found by the judge was summarised by him as follows:

> '15. In this case, the defendant has responded to the suggestion that the court has jurisdiction by reason of English being the proper law of the arbitration agreement by saying that in the present case such inferences negated by the law of the seat,

> which is French, and which provides that the French courts would regard the arbitration agreement as being subject to what its expert describes as French substantive rules applicable to international arbitration. This, indeed, appears to be common ground.
>
> 16. Counsel for the claimant has summarised the matter in this way at paragraph 39(b) of the claimant's skeleton argument. "The experts agree that the French court would follow the approach in *Municipalité de Khoms El Mergeb v Société Dalico* and apply 'a substantive rule of international law of arbitration', whereby the existence and effectiveness of the arbitration agreement is to be determined in accordance with the parties' common intention."
>
> 17. It is also common ground that there is no statutory provision to this effect in French law, rather, the relevant principles have been worked out via courts. …'

61. This summary accords with RCA's own expert evidence:

> 'The French *Cour de cassation* (the highest French Court for civil, commercial and criminal matters) provided guidance on how to determine the law applicable to the arbitration agreement in the *Dalico* ruling in 1993. In that case, the *Cour de cassation* ruled that: "*Pursuant to a substantive rule of international arbitration law, the arbitration agreement is legally independent directly or by reference and … its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and or the international public policy, based on the common intent of the parties, without any reference to State law*". Although the exact wording has varied over the years, this guidance has remained untouched for the last 30 years.'

62. I would add that this is identical to what was found to be the content of French law on this issue in the *Kabab-Ji* case: see the Supreme Court judgment in *Kabab-Ji* at [88].

63. Thus the principle of French law is not that a choice of Paris as the seat of arbitration means *ipso facto* that French law is to govern the arbitration agreement, but that the law governing the arbitration agreement depends on the parties' common intention. This falls considerably short of what the Supreme Court contemplated would be sufficient for the exception to apply. I would therefore conclude that French law does not contain a provision 'which indicates that, where arbitration is subject to that law, the arbitration will also be treated as governed by that country's law'. It contains only a provision that the law governing an arbitration agreement is to be determined in accordance with the parties' common intention, but that, ultimately, is no different from the principle which applies in English law. Accordingly the exception to the general rule does not apply.

64. I am reinforced in this conclusion by the fact that, even though the principal issue in *Kabab-Ji* concerned the governing law of the arbitration agreement, it does not appear to have occurred to the Supreme Court that the arbitration agreement in that case was

governed by French law pursuant to the exception to the general rule in *Enka* at [170(vi)]. In *Kabab-Ji*, as in the present case, the main contract was expressly governed by English law, with arbitration in Paris under the rules of the ICC. Strictly the issue of the law of the arbitration agreement arose under the New York Convention rather than at common law, but it was accepted 'that the general principles summarised in *Enka*, at para [170], are applicable where an English court is applying s 103(2)(b) of the 1996 Act to ascertain whether the parties have chosen the law which is to govern their arbitration agreement and, if so, what law they have chosen' (see *Kabab-Ji* at [36]). As I have already noted, the Supreme Court was aware of the relevant French law, but held nevertheless that the arbitration agreement was governed by English law. This was, therefore, a striking case of the dog which did not bark.

65. In any event the parties' common intention must necessarily be ascertained from what they have said in their contract. There is no other source available. As a matter of English law, however, which is the system of law which the parties have chosen to govern their contract, a choice of English law to govern the main contract carries with it a choice of English law to govern the arbitration agreement. It is not to the point that a French court, applying its own conflict rules, might reach a different conclusion.

66. In these circumstances it is unnecessary to say much about the Respondent's Notice. Mr Hossain's first point here was that France was chosen as a neutral forum. He relied on the final sentence of *Enka* at [170(vi)]:

> 'Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.'

67. I confess to some difficulty in understanding when this reinforcement will apply. Almost all major centres of international arbitration are chosen by the parties because they provide a neutral forum. But that cannot be enough to displace the general rule that a choice of law for the main contract carries with it a choice of law for the arbitration agreement, and that the choice of a different country as the seat of arbitration is not, without more, sufficient to negate that choice of law. Otherwise the exception would swallow the general rule. It is apparent, therefore, that the choice of a neutral forum will only come into play to reinforce a provisional conclusion that the law of the seat should apply as a result of one of the factors set out at [170(vi)]. As I have concluded that those factors are not present in this case, it is unnecessary to consider this point further. I would note, however, that although Mr Hossain referred to evidence from the parties' negotiations which he said showed that Paris was chosen as a neutral seat, he withdrew reliance on that evidence when asked how it could be reconciled with the principle that pre-contract negotiations are not admissible in order to construe a contract (*Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896: 'The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent').

68. Mr Hossain's second Respondent's Notice point involved reliance on the Supreme Court's eighth principle in *Enka* (emphasis added):

> '(viii) *In the absence of any choice of law to govern the arbitration agreement*, the arbitration agreement is governed by the law with which it is most closely connected. Where the

> parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.'

69. This was the decisive principle in *Enka* itself, where the main contract contained no choice of law. Accordingly the governing law of the arbitration agreement had to be ascertained by applying the closest connection test, resulting in a conclusion that English law as the law of the seat applied (see at [171]). But where, as in the present case, the main contract does contain an express choice of law, the general rule at [170(iv)] will apply, and represents a choice of law for the arbitration agreement, unless that choice is negated by one of the factors identified at [170(vi)] pointing to a choice of the law of the seat. Thus, when there is such an express choice of the law governing the main contract, there will be no scope for a principle which depends on 'the absence of any choice of law to govern the arbitration agreement'.

70. For all these reasons I conclude that the arbitration agreement in the bonds was governed by English law.

Appropriate forum

71. The next question is whether, in the terms of CPR 6.37(3), England and Wales is 'the proper place in which to bring the claim'. Giving the only judgment of the Supreme Court in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [2020] AC 1045, Lord Briggs explained that this may involve two distinct factors, one being concerned with the natural forum for the claim and the other with whether there is a real risk that justice will be unobtainable in that forum:

> '66. … CPR 6.37(3) provides that: "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales *is the proper place in which to bring the claim*" (my emphasis). The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. … The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case, summarised much more recently by Lord Collins in the *Altimo* case at para 88 as follows: "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; …" That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred. …
>
> …

> 88. Even if the court concludes (as I would have in the present case) that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction. The same test was, prior to *Owusu v Jackson* [2005] QB 801, applicable in the context of an application for a stay of English proceedings against a defendant served within the jurisdiction. The question whether there is a real risk that substantial justice will be unobtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to proper place, but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice.'

The parties' submissions in outline

72. On behalf of UniCredit, Mr Houseman submitted that it is abusive for RCA, having established exclusive jurisdiction of the Russian court on the basis that the arbitration agreement is unenforceable and inoperable, to assert that substantial justice can be obtained in an arbitration in Paris. But in any case, he submitted that there is at least a real risk that such justice could not be obtained there. An award of damages would not be a sufficient remedy; an award would not be enforceable in Russia; and with no injunction from the English court in place, there would be a real risk that RCA would obtain an anti-suit injunction from the Russian court which would prevent it from pursuing an arbitration anyway.

73. On behalf of RCA, Mr Hossain submitted that France is the natural forum for this claim, and is an available forum where UniCredit can obtain substantial justice. The fact that an anti-suit injunction is not available from the French courts does not mean that substantial justice cannot be obtained there. Suitable relief could be obtained in an arbitration and there is no evidence that RCA would take steps to frustrate the pursuit of such an arbitration.

Analysis

74. As I have explained, the issue of appropriate forum is where the case 'can be suitably tried for the interests of all parties and for the ends of justice'. In *Deutsche Bank*, this court had no difficulty in identifying the 'ends of justice' in a case such as the present:

> '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 the 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 a party to do the very thing he has promised not to do, will readily and usually enforce that promise by injunction. …'

75. On the basis of French law evidence that although the French court would not itself grant an anti-suit injunction, and would not regard such an injunction as an interference with its own jurisdiction, this court concluded that the English and not the French court was the appropriate forum for the claim, for the reasons set out at [40] and [41] of the judgment in *Deutsche Bank*, which I have cited at [32] above. This was 'on the simple basis that such a claim cannot be given effect to in France'. The French law evidence in the present case is to the same effect.

76. I respectfully agree with this reasoning. However, the judge's essential comparison was not between the English court and the French court, but between the English court and a French-seated arbitration, where an award of damages could be obtained for breach of the arbitration clause. In my judgment this is an unrealistic comparison. I would accept that ICC arbitrators have power, not merely to award damages, but to make an award ordering a party to refrain from or to terminate court proceedings brought in breach of the arbitration clause. In theory, therefore, UniCredit could obtain in an arbitration an award containing an order equivalent to an anti-suit injunction. But that would take many months and it is clear that such an award would not be enforceable in Russia. The ICC Rules also contain provision for the appointment of an emergency arbitrator where urgent interim or conservatory measures cannot await the constitution of an arbitral tribunal. But an order made by an emergency arbitrator would likewise be unenforceable in Russia, where it has already been held that the parties' arbitration agreement is unenforceable.

77. More fundamentally, it seems highly unlikely that an arbitration in Paris would be allowed to proceed. As Mr Houseman pointed out, without the protection of an anti-suit injunction from the English court, which is the only court available and able to grant such an injunction, there would be nothing to stop RCA from applying to the Russian court for an injunction to prevent UniCredit from pursuing any arbitration. The evidence is that Russian courts readily grant such injunctions. Mr Hossain was not in a position to offer any undertaking that RCA would not seek such an injunction if free to do so. As UniCredit has assets in Russia, it would then have no choice but to comply. Moreover, the Russian court now has all the material which it will need in order to determine RCA's claim on the bonds and, without an injunction in place, it must be highly likely that judgment in favour of RCA, applying Russian law, would be given in short order, and such a judgment could be readily enforced in Russia. The suggestion that substantial justice could be obtained by UniCredit in France, whether in court or in arbitration, is an illusion.

78. Accordingly I have no hesitation in concluding that England is the proper forum for this claim. For essentially the same reasons, I accept Mr Houseman's submission that it is abusive for RCA to rely on the availability of substantial justice in France as the seat of arbitration while simultaneously seeking to pursue proceedings in Russia on the basis that the arbitration clause is unenforceable.

Should a final injunction be granted?

79. My conclusions so far mean that the English court has and should exercise jurisdiction over this claim. The next question is whether a final injunction should now be granted or whether, as Mr Hossain submitted, that question should be remitted to the Commercial Court. He suggested that a day's hearing would be required to decide it.

80. The hearing before Sir Nigel Teare was the trial of the claim, at which it was incumbent on the parties to put forward their whole case as to whether a final injunction should be granted. I see no reason, therefore, why this court should not now decide whether such an injunction should have been granted.

81. I summarised the broad principles applicable to the grant of anti-suit injunctions in *Nori Holding Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), [2018] 2 All ER (Comm) 1009:

> '28. The legal framework within which this application has to be determined is well established. Where court proceedings are brought (otherwise than in the courts of an EU or Lupugano Convention state) in breach of an agreement to arbitrate, the court will generally grant an anti-suit injunction to prevent any further breach unless there are strong reasons not to do so: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87, *per* Millett LJ at 96, cited with approval by the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889. The court's power to grant such an injunction is derived from section 37 of the Senior Courts Act. It does not depend on whether an arbitration has been or is about to be commenced. When such an injunction is sought, it is for the court to determine whether there is a binding arbitration agreement and whether the pursuit of the foreign proceedings constitutes a breach of the agreement. Moreover, an arbitration agreement is distinct from the contract of which it forms part and will be binding notwithstanding the invalidity of the main contract unless the ground for invalidating the main contract applies equally to the arbitration agreement: see section 7 of the Arbitration Act 1996 and *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254.'

82. The cases there referred to were all cases where the seat of arbitration was in England. Where the seat is abroad, the English court will need to be more cautious, as the court in the country of the seat has primary responsibility for supervising any arbitration. It may be, therefore, that in such a case it would not be appropriate to grant an anti-suit injunction if, for example, the court of the seat would regard that as an unwarranted interference with its own jurisdiction. That could itself be regarded as a strong reason why an injunction should not be granted by the English court. However, as I have explained, that is not the position here.

83. There is no reason in principle why the English court, having jurisdiction over a defendant pursuant to an English law contract, should not grant an anti-suit injunction in support of an arbitration agreement providing for arbitration in a foreign seat. Indeed, section 44 of the Arbitration Act 1996, which empowers the court to grant an interim

injunction in support of arbitration proceedings, is a section of the Act which applies regardless of the location of the seat: see section 2(3). Although not directly applicable because the power to grant an anti-suit injunction is derived from section 37 of the Senior Courts Act 1981, this suggests that Parliament saw no intrinsic objection to an exercise of jurisdiction by the English court in support of arbitral proceedings – or, I would add, in support of the English public policy that those who agree to arbitrate should abide by their agreement to do so. I note that the Court of Appeal for Bermuda, applying law to essentially the same effect as English law, took the same view in *IPOC International Growth Fund Ltd v OAO CT-Mobile LV Finance Group* [2007] CA (Bda) 2 Civ, [2007] Bda LR 43:

> '35. … It does not follow that, if the personal jurisdiction arises from the presence of the defendant, that only the courts of the seat of the arbitration can issue the anti-suit injunction. The role of the courts of the seat of arbitration is to supervise the arbitration itself. They are not the only courts that can prevent a party breaking his contract to arbitrate.'

84. RCA relied on three matters as constituting strong reasons why a final injunction should not be granted in this case. The first was that the French courts would not recognise or enforce an English order. However, this is irrelevant in circumstances where it is most unlikely that UniCredit would ever seek recognition or enforcement of an English anti-suit injunction in France. What matters, as in *Deutsche Bank*, is that a French court would not regard an English anti-suit injunction as an interference with its own jurisdiction, which is a different point. The second reason was that as a matter of English law, Article 11 of EU Regulation 833/2014 imposing sanctions on Russian entities provides UniCredit with no defence to RCA's claim on the bonds. But whether that is so is a matter which the parties have agreed should be decided by arbitration in Paris applying English law. Even if RCA is right, as to which I say nothing, it does not amount to a reason justifying RCA's breach of its agreement to arbitrate. The third reason was that the English court has no sufficient interest in or connection with the matter to justify the indirect interference with a foreign court which an anti-suit injunction entails. I do not accept this. The fact that the contract, including the agreement to arbitrate, is governed by English law, together with the policy of English law that those who agree to arbitrate should adhere to their bargain, provides a sufficient interest or connection in this case.

85. For these reasons I conclude that the 'strong reasons' on which RCA relied carry no weight at all. On the contrary, there can be no doubt (and RCA has not denied in these proceedings) that by commencing and pursuing its Russian proceedings, RCA is in breach of its agreement to arbitrate. In my judgment a final injunction requiring RCA to terminate those proceedings is necessary.

Refusal of a stay

86. RCA submitted that it should not be required actually to terminate its Russian proceedings until after any appeal or application for permission to appeal to the Supreme Court had been concluded. It maintains that, if it terminates those proceedings, it would not be permitted to commence fresh proceedings if an appeal to the Supreme Court were to succeed.

87. I was not prepared to grant such a stay. The present position in Russia is that there is to be a hearing on 14th February 2024 to consider the further progress of the Russian proceedings. If those proceedings remain in being, in continuing breach of RCA's agreement to arbitrate, the Russian court would be in a position, if it saw fit, to decide that they should continue to judgment. If it did so decide, it would be in a position to enter judgment against UniCredit either at the 14th February hearing or shortly thereafter, but in any event long before any appeal to the Supreme Court had been concluded. Such a judgment could be readily enforced against UniCredit's assets in Russia. Moreover, now that its jurisdiction challenge has been dismissed by the Russian court, UniCredit would be hamstrung in resisting that course, as it would run a real risk that it would be taken to have submitted to the jurisdiction of the Russian court (cf. *The Atlantic Emperor (No. 2)* [1992] 2 Lloyd's Rep 624). I find it hard to accept that, if an appeal to the Supreme Court were to succeed, RCA would indeed be shut out from fresh proceedings in Russia, but even if this is so, the prejudice to UniCredit from allowing the Russian proceedings to remain in being far outweighs the prejudice to RCA – not least as there is no doubt that the Russian proceedings have been brought in breach of the arbitration agreement regardless of whether that agreement is governed by English law (as UniCredit contends and as I have held) or by French law (as RCA contends) and it is always open to RCA to bring its claim in arbitration.

Conclusion

88. For these reasons I joined in the decision to allow the appeal, to declare that the English court has jurisdiction, and to grant an anti-suit injunction ordering RCA to terminate the Russian proceedings.

Lord Justice Lewis:

89. I agree with the reasons given by Lord Justice Males for allowing the appeal, declaring that the English court has jurisdiction and granting the anti-suit injunction sought.

Lord Justice Bean:

90. I also agree that the appeal should be allowed for the reasons given by Lord Justice Males.