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ENGLISH courts regularly grant antisuit injunctions to restrain foreign proceedings brought in breach of agreements to arbitrate in England. In *UniCredit Bank GmbH v RusChemAlliance L.L.C.* [2024] UKSC 30, [2024] 3 W.L.R. 659, the Supreme Court went further and granted relief to prevent Russian proceedings commenced contrary to agreements to arbitrate in France. UniCredit, incorporated in Germany, had issued bonds guaranteeing a third party's payment obligations to RusChem, a Russian company. The bonds were expressly governed by English law but provided for arbitration in Paris. When RusChem sued UniCredit in Russia under the bonds UniCredit sought an injunction in England to enforce the arbitration agreements by preventing those proceedings. Like the Court of Appeal, the Supreme Court granted the injunction.

The defendants were clearly in breach of their agreement to arbitrate in France, justifying the injunction on the merits. The more difficult question was whether jurisdiction existed to grant relief when the injunction claim's sole connection with England was that English law governed the bonds. The Supreme Court concluded that it did. English law governed not only the bonds but the arbitration agreements, which in English law are treated as severable contracts (*Enka AS v Chubb* [2020] UKSC 38). This supplied one ingredient of jurisdiction by establishing a ground for service of the claim on the defendant in Russia. The injunction claim concerned contracts, the arbitration agreements, governed by English law (CPR PD 6B 3.1(6)(c)). The other requirement of jurisdiction, that the English court was the proper forum to hear the claim (required by CPR 6.37(3)), was satisfied in the strong sense that only in England could the agreements be enforced, given that no equivalent remedy was available in a French court or in any arbitration in France (at [112]).

The reasoning in *UniCredit* is both controversial and surprising. The Supreme Court accepted jurisdiction despite the apparent absence of any meaningful connection between the claim and England. It adopted a novel perspective, viewing the claim essentially as one for breach of contract in which the contractual goal of enforcing an arbitration agreement displaced the private international law principles of comity and territorial connection.

This is evident in the court's treatment of the proper forum requirement. Lord Leggatt, giving the court's judgment, proceeded on the basis that the familiar test in *The Spiliada* [1987] A.C. 460 did not apply. Where the parties agree to arbitration the court is not concerned with whether England is the *forum conveniens*, "but only with whether to enforce the parties' agreement" (at [74]). This novel analysis, which neither party had adopted, is arresting, by prizing the substantive, contractual issue

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whether relief should be granted over the prior, procedural question whether jurisdiction exists to grant such relief. It is not traceable in earlier cases and departs from the English courts' usual approach. It has long been accepted in injunction cases that the English court must be the most appropriate forum to grant relief (*The Jag Pooja* [2018] EWHC 389 (Admlty), [2018] 2 Lloyd's Rep 243). Nor is the court's analysis assisted by the analogy drawn in the judgment with cases involving contractual jurisdiction agreements. Certainly, it is presumed that such agreements will be enforced but this depends nonetheless on whether another court is the more appropriate forum, as recently illustrated by *Zephyrus Ltd. v Fidelis Underwriting Ltd.* [2024] EWHC 734 (Comm), [2024] 4 W.L.R. 47.

Again, no reference was made to the decision in *Four Seasons Holdings v Brownlie* [2017] UKSC 80, [2018] 1 W.L.R. 192. There the Supreme Court saw the proper forum requirement as a safeguard against any exercise of exorbitant jurisdiction on the basis of a broad ground for service abroad. Principle suggests that this should be achieved by the exercise of a court's residual discretion in matters of jurisdiction not through the *forum conveniens* test. But, however implemented, this control mechanism is especially important in cases such as *UniCredit*, where the defendant was unconnected with England and the only link with England was that English law governed the arbitration agreements. No difficult issues of English law arose, however, which might have given substance to that technical, legal connection. Nor is there is any sense in which *RusChem* had impliedly submitted to English law and jurisdiction, a possible justification for service abroad on the basis of an English governing law. The law governing the arbitration agreements was never expressly agreed and it was uncertain that English law governed – uncertainty that was evident in the arguments advanced by RusChem to the contrary.

The Supreme Court's determinedly contractual perspective is revealed again in its treatment of the long-standing requirement that antisuit relief can only be granted if, in addition to having personal jurisdiction over the defendant, the English court has a sufficient interest in or connection with the injunction claim. This derives from *Airbus Industrie GIE v Patel* [1998] UKHL 12, [1999] 1 A.C. 119, the leading case on jurisdiction to grant antisuit injunctions. The *Airbus* test had no place, however, in *UniCredit*. This was because in Lord Leggatt's view the test is intended to ensure respect for the principle of comity and comity has no role in cases where relief is sought to enforce an arbitration (or jurisdiction) agreement.

Many will disagree with this conclusion for two reasons. First, although Lord Goff in *Airbus* saw the connection requirement as ensuring compliance with comity, it has a wider role in safeguarding due process by ensuring that defendants are not subject to the exercise of exorbitant jurisdiction, a matter of special importance when their conduct abroad is in question. This is of

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particular importance in *UniCredit* where the fact that English law governed the arbitration agreements provided such a weak connection on the facts.

Second, it has always looked doubtful that a court is absolved from respect for comity when an injunction is sought to enforce a contractual term. That robustly contractarian view was famously expressed by Millett L.J. in *The Angelic Grace* [1995] 1 Lloyd's Rep 87, which Lord Leggatt cites. But it has since been superseded by a more calibrated approach in which comity remains important, even if its importance is reduced and depends on the facts, a view endorsed in *Ecobank Inc. v Tanoh* [2015] EWCA Civ 1309, [2016] W.L.R. 2231, which is not referred to in *UniCredit*.

Despite initially marginalising the *Airbus* test, Lord Leggatt nonetheless appears to accord it a role in *UniCredit*, perhaps because the injunction claim's connection with England was unavoidably the crux of the case. Unusually, however, if consistently with the Supreme Court's approach, this is viewed in a contractual light. A "substantial connection" with England existed because "the contractual rights which UniCredit is asking the court to enforce are rights governed by English law" (at [83]). It is unclear, however, that this supposed connection is material. First, claims under English law can be litigated anywhere, and the fact that English law governs does not by itself make an English forum the most appropriate. Second, no difficult issues of English law arose in *UniCredit* to reinforce the connection, given that RusChem's breach was obvious. Third, the court's finding that English law governed did not depend on any express contractual agreement which might have strengthened the link by indicating the parties' intention to be subject to English law. Finally, in stark contrast, the parties had expressly agreed to arbitration not in England but in France.

Arguably, England was the proper forum in *UniCredit* even on orthodox *Spiliada* principles because the claimants had no remedy elsewhere, as the Court of Appeal had held. But this begs the fundamental question whether this is relevant under those principles without some existing justification for suing in England, such as the defendant's presence there or the fact that the English court is an appropriate forum. More importantly, however, even if UniCredit had no remedy in France, it is doubtful even if the *Spiliada* test applies that the hurdles in *Brownlie* and *Airbus* could be surmounted.

It is hard to see that the English courts in *UniCredit* had any "interest in or connection with" granting relief or that merely because the arbitration agreements were governed by English law there was a robust basis for exercising jurisdiction. Certainly, the injunction in *UniCredit* was justified given RusChem's manifest breach of those agreements. And none could doubt the importance of holding parties to their bargain, identified by Lord Leggatt as the starting point of the enquiry (at [75]). But the need for a remedy does not establish jurisdiction.

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The consequence of the Supreme Court's approach, perhaps unintended, is that *UniCredit* effectively introduces into English law a form of jurisdiction by necessity, a doctrine known to other legal systems but hitherto not to English law, whereby jurisdiction is asserted in the absence of any relevant connection with the forum if justice so requires. More precisely, it does so where an arbitration agreement is governed by English law and intervention is sought to prevent its breach, an objective which after *UniCredit* displaces a more traditional approach to jurisdiction.

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