

# High Court rejects challenge to enforcement where defences were already raised before foreign court

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### Introduction

In *Carpatsky Petroleum Corporation v PJSC Ukrnafta*, (1) the High Court dismissed a challenge to a previous decision to grant permission to enforce a Stockholm Chamber of Commerce (SCC) award on the basis that:

- contrary to the defendant's contention, there was a valid arbitration agreement between the parties; and
- the defendant's arguments as to procedural irregularity had previously been raised in Swedish court proceedings, thereby giving rise to an issue estoppel.

### Legal background

Section 101 of the Arbitration Act 1996 provides for the recognition and enforcement of arbitral awards made in the territory of another state (other than the United Kingdom) which is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The SCC award that was the subject of the proceedings discussed below was a New York Convention award within the meaning of Section 100 of the act.

Section 103 of the act sets out narrow grounds on which recognition and enforcement of an arbitral award may be refused. Of relevance to this case is the ground set out at Section 103(2)(b) of the act – namely, that "the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made".

Grounds dealing with procedural elements of the arbitration, including Section 103(2)(c) of the act (ie, that a party was otherwise unable to plead its case) and Section 103(2)(e) of the act (ie, that the arbitration procedure was not in accordance with the parties' agreement) were also pleaded in this case.

### Facts

The dispute arose under a joint activity agreement (JAA) to develop a Ukrainian gas field, which was governed by Ukrainian law.

The JAA was entered into by a company incorporated in Texas, Carpathy Petroleum Corporation, and a subsidiary of the defendant.

The claimant was an oil and gas company incorporated in Delaware. Shortly following its incorporation, also under the name Carpathy Petroleum Corporation, it merged with the Texan company. The claimant was designated as the "surviving corporation" following the merger and it consequently assumed the rights and liabilities of the Texan company.

The JAA was subsequently amended and restated and supplemented by an addendum. That addendum substituted the defendant's subsidiary with the defendant (PJSC Ukrnafta) and provided for any unresolved disputes to be referred to SCC arbitration.

In 2007 the claimant commenced an arbitration under the SCC rules. The defendant initially made no jurisdictional objection and explained in its answer to the request for arbitration that the parties

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had agreed to proceed with arbitration and the application of the SCC rules. However, following the submission of its statement of defence and counterclaim and the receipt of the claimant's reply and answer, the defendant challenged the tribunal's jurisdiction, arguing that there was no valid arbitration agreement as:

- the various agreements under which the dispute had arisen had been made by the Texan company; and
- it (the Delaware company) had not been made aware of the merger at the time.

The tribunal rejected this challenge on two grounds. First, by initially engaging in the arbitration actively without objection to the tribunal's jurisdiction, the defendant had entered into an arbitration agreement. Second, the defendant's challenge was out of time pursuant to the SCC rules. In its final award dated 24 September 2010, the tribunal held that the defendant had breached the JAA and awarded the claimant \$145.7 million in damages (the final award).

During the arbitration, the deputy public prosecutor of Ukraine successfully applied to the Kyiv Commercial Court for a declaration that the JAA was invalid. The claimant's appeal of this decision was denied.

Following the issuance of the arbitral tribunal's final award, multiple proceedings were initiated to enforce or challenge it in various jurisdictions. However, even before the final award was handed down, the defendant brought proceedings in the Swedish courts contesting the tribunal's jurisdiction; following a stay, those proceedings were resumed upon conclusion of the arbitration. On 13 December 2011 the Stockholm District Court rejected the defendant's complaint on the basis that:

- a valid arbitration agreement had been entered into in an addendum to the JAA;
- the defendant had acceded to the arbitration agreement by means of its conduct following the execution of the addendum; and
- the defendant's challenge was out of time by reference to the SCC rules.

The defendant's appeal was denied, as was a separate claim by the defendant in Sweden seeking to set aside the arbitration award on the basis that the tribunal had "exceeded its mandate and had made errors which affected the outcome".

In parallel to the Swedish proceedings, the claimant's enforcement proceedings in Ukraine were unsuccessful. However, the claimant was subsequently successful in obtaining permission to enforce the final award in France, the Netherlands, Texas and England.

The defendant applied to set aside the English order granting permission to enforce on the basis that:

- the ground of refusal in Section 103(2)(b) of the act applied, as there allegedly was no valid arbitration agreement and no arbitration agreement in writing as required by Section 101 of the act;
- there was a procedural irregularity in the tribunal's approach to a limitation of liability clause; and
- the tribunal had allegedly taken "a procedurally irregular approach" to the agreed methodology for assessing damages.

## **Decision**

### ***Was there a valid arbitration agreement?***

Mr Justice Butcher held that there was a valid arbitration agreement between the parties. In reaching this conclusion, he found that the applicable law in determining whether an arbitration agreement existed was Swedish law, being the law governing the arbitration agreement. He made the related finding that the defendant was estopped from now arguing that the arbitration agreement was governed by Ukrainian law by virtue of its active participation in the arbitration and the Swedish court proceedings.

The judge also considered the question of the law applicable to the arbitration agreement by reference to English common law conflict rules. While there was no evidence of an express choice of law, the judge found that an implied choice of Swedish law had been made by the parties on the basis that in the addendum to the JAA, they had chosen the SCC as the arbitral institution and Sweden as the seat of arbitration. Further and in any event, the law with which the arbitration agreement had the closest and most real connection was the law of Sweden.

The judge took note of Swedish law expert evidence and, in applying the relevant principles of Swedish law, found that:

- an arbitration agreement existed between the defendant and claimant;

- the defendant had been aware of the merger of the Texan and Delaware companies; and
- the parties had objectively and subjectively intended to enter into the addendum to the JAA.

The judge stated that even if these findings had not been made, the defendant's participation in the arbitration and the service of its defence had in any event resulted in an arbitration agreement being entered into between the parties.

### ***Alleged procedural irregularity***

The judge agreed with the claimant's argument that the defendant was estopped from raising an alleged procedural irregularity in respect of the tribunal's treatment of a limitation of liability clause in the JAA, as the same arguments had already been raised unsuccessfully in the Swedish and US proceedings. In reaching this conclusion, the judge stated that "there is a public interest to be accorded to sustaining the finality of decisions of the supervisory courts on properly referred procedural issues arising from the arbitration". The judge advised against taking an "overly narrow approach" in determining whether the same issues had already been decided by the supervisory court.

Note was also taken of *Henderson v Henderson*,<sup>(2)</sup> an English judgment which held that where a party could or should have raised relevant arguments in curial court proceedings, it could amount to an abuse of the court's process if these issues were raised only in subsequent challenges to enforcement.

Further, the judge found that an issue estoppel arose in respect of an alleged procedural irregularity in calculating and assessing the damages payable to the claimant, as the defendant had raised the same arguments in the Swedish proceedings.

### **Comment**

This case demonstrates the High Court's deference, expressed through findings of issue estoppel, to relevant findings made by foreign courts as to whether grounds to deny recognition and enforcement of a foreign arbitral award have been fulfilled. It also shows its expectation that objections to an arbitral tribunal's jurisdiction or procedure should be raised at the earliest available opportunity; otherwise, they might be deemed to be an abuse of process at the enforcement stage.

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### **Endnotes**

(1) *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm).

(2) *Henderson v Henderson* [1843] 3 Hare 100.

Sophie Romain, trainee solicitor, assisted in the preparation of this article.

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