Neutral Citation Number: [2020] EWHC 769 (Comm)

Case No: CL-2016-000547

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2020

Before :

Mr Justice Butcher

- -

Between :

Carpatsky Petroleum Corporation	**Claimant**
- and -	
PJSC Ukrnafta	**Defendant**

- -
- -

Huw Davies QC and **Felix Wardle** (instructed by **Bird & Bird LLP**) for the **Claimant**
Alistair Schaff QC and **Philip Riches** (instructed by **PCB Litigation LLP**) for the **Defendant**

Hearing dates: 3-6, 12-13 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BUTCHER

Mr Justice Butcher:

1. The Defendant ('Ukrnafta') has applied to set aside orders made by Robin Knowles J granting the Claimant permission to enforce a Stockholm Chamber of Commerce ('SCC') award made on 24 September 2010 ('the Final Award') whereby the tribunal consisting of Sigvard Jarvin, Per Runeland and Wolfgang Peter ('the tribunal') awarded US$145.7 million in favour of the Claimant against Ukrnafta.

2. The Final Award is a New York Convention award, within the meaning of s. 100 Arbitration Act 1996 ('the 1996 Act'). Enforcement is resisted on the basis, as I will set out in more detail, that one or more of the exceptions specified in s. 103 of the 1996 Act is applicable.

3. Although other points have been taken at an earlier stage, Ukrnafta's case was confined at the hearing to three points. First, Ukrnafta contends that there was never an arbitration agreement, and no arbitration agreement in writing, between itself and the Claimant. I will call this the 'No Arbitration Agreement point'. Secondly, it contends that there was a serious procedural irregularity in that, it says, the tribunal dealt with an issue concerning a limitation of liability clause (Article 20.1) on a basis which had not been pleaded, was not properly evidenced, and which Ukrnafta had no proper opportunity to deal with. I will call this the 'Article 20.1 point.' Thirdly, it contends that the tribunal took a procedurally irregular approach to the agreed methodology for assessing damages, with the result that a serious mathematical error has occurred in the calculation exercise. I will call this the 'Damages Model point'. I will return to consider these points in turn. First, however, it is necessary to introduce the parties, to say something about what is now a long and involved history of this case, and as to the nature of the present hearing.

The Parties

4. The Claimant is an oil and gas company which was incorporated and registered in Delaware on 18 July 1996. Before 1996 there was another company called 'Carpatsky Petroleum Corporation', which had been incorporated under the laws of Texas on 17 November 1992. (Where it is necessary to distinguish between them, I will call the Claimant 'Carpatsky Delaware' and the Texas company 'Carpatsky Texas'. Where in context it is not essential to distinguish, I will refer to whichever of the two was extant at the relevant time as 'Carpatsky'). On 18 June 1996, one minute after the incorporation of Carpatsky Delaware, there was filed a Certificate of Merger of Carpatsky Texas into Carpatsky Delaware, which named Carpatsky Delaware as the 'surviving corporation' of the merger. Articles of merger were filed in Texas four days later, on 22 June 1996. The result of this process was that Carpatsky Texas ceased to exist. Carpatsky Delaware, as the 'surviving corporation' assumed all the rights and liabilities of Carpatsky Texas, and succeeded as a universal successor to Carpatsky Texas as a matter of Delaware law.

5. Ukrnafta is a large Ukrainian oil and gas company. At least by the time of the arbitration it was owned 50% plus one share by PJSC National Joint-Stock Company Naftogaz of Ukraine, which is owned by the Ukrainian state.

The JAA and subsequent agreements

6. On 14 September 1995, Carpatsky Texas and SE Poltavanaftogaz ('PNG'), a subsidiary of Ukrnafta entered into a joint activity agreement ('the JAA') to develop and exploit the Rudivsko-Chervonozavodskiy gas field (the 'RC field') in Ukraine. The initial investment of Carpatsky Texas was to consist of cash and technology, whilst PNG was to make a contribution in kind by way of certain wells to be explored. At the outset it was intended that the parties should invest on a 50:50 basis.

7. The JAA provided that 'Carpatsky Petroleum Corporation' had contracted with PNG and was 'a Party'. Article 1.10 of the JAA provided that 'the Parties in their joint activity shall be governed by Ukrainian law and this Agreement.'

8. An additional and amended JAA was entered into on 15 October 1996 ('the Restated JAA'). The Restated JAA provided at the outset that PNG and 'Carpatsky Petroleum Corporation, USA' had made the agreement. It further defined 'the Company' as 'Carpatsky Petroleum Corporation, registered in Texas, USA, a participant to this Agreement'. By Article 17.3 it was provided that 'If any of the Participants terminates as a result of liquidation or reorganization, its rights and obligations hereunder shall pass to the official legal successor subject to legal backing of the rights of the latter'. By Article 20.1 it was provided that 'Each of the Participants shall bear material liability for failure to perform, or improper performance of, the terms and conditions of this Agreement and annexes hereto, and in the event of breach of such terms and conditions shall indemnify the other Participants for the direct losses suffered through its fault.' By Article 20.4 the parties agreed, in the event of disputes which could not be resolved by negotiations, that there should be reference to the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Ukraine.

9. Nearly two years after that, on 26 August 1998, an addendum to the JAA was executed ('the 1998 Addendum'), which, amongst other things, replaced PNG with Ukrnafta, and also made a change in relation to the provision for arbitration in the JAA, such that it now provided for disputes to be referred to the Arbitration Institute of the SCC for arbitration to be conducted under UNCITRAL rules.

10. The 1998 Addendum also amended the definition of 'Parties' for the purposes of the JAA and the Restated JAA, so that it now read that the term meant 'participants who initially concluded this Agreement, or their legal successors and any other legal entities or individuals who will join this Agreement in the future.'

11. A number of other agreements supplemental to the JAA were entered into subsequently.

12. It is of significance to note that each of the original JAA, the Restated JAA and the 1998 Addendum was signed by Mr Leslie Texas as 'President' of 'Carpatsky Petroleum Corporation'. Each of the documents was stamped with the seal of Carpatsky Texas, which bore a Texas lone star, and Carpatsky Texas's corporate number. Apparently until 2000, other supplemental agreements were also stamped with the seal of Carpatsky Texas. From 2000 a Carpatsky Delaware seal was in use for official documents, including some which were transmitted to Ukrnafta.

13. It appears that, during the early years of the project, Carpatsky had difficulties raising the funding necessary to sustain a 50% interest in the project. As a result, during the

years 1997-2003, Carpatsky's actual share was reduced to 14.9%. From 2004, however, Carpatsky was seeking to restore its stake in the project to 50% by providing further investment. Ukrnafta refused to allow Carpatsky to participate in the project on an equal basis, but instead undertook the development of the RC field on its own. This effectively led to the arbitration.

The Commencement of Arbitration

14. Carpatsky filed a request for arbitration with the SCC on 28 September 2007. The front page of the Request stated that the claimant was 'CARPATSKY PETROLEUM CORPORATION (Delaware, United States)'. Paragraph 10 of the Request set out that the arbitration had been commenced pursuant to the arbitration agreement contained in the 1998 Addendum. Ukrnafta submitted its Answer on 28 November 2007. It was served without a reservation as to jurisdiction, and explained that the parties, 'through negotiations between counsels' had 'agreed to proceed with the arbitration' on various terms, including the application of SCC Rules rather than UNCITRAL rules.

15. A tribunal was constituted comprising Messrs Peter, as Chairman, Jarvin and Runeland, and a procedural timetable was agreed. Carpatsky submitted its Statement of Claim dated 13 May 2008, followed by Ukrnafta's Statement of Defence and Counterclaim dated 23 June 2008. On 25 November 2008, Carpatsky submitted its Reply to the Statement of Defence and Answer to the Counterclaim.

16. On 19 December 2008, Ukrnafta served Objections to the Jurisdiction. These Objections raised a new issue, namely that it was said that there was no valid arbitration agreement because the relevant contracts had been made between Ukrnafta and Carpatsky Texas, which had ceased to exist. It was contended by Ukrnafta that it had not been informed about the merger between Carpatsky Texas and Carpatsky Delaware. In this context, Ukrnafta contended that the validity of the arbitration agreement was governed by Swedish law, while the issue of authorisation to enter into an arbitration agreement was to be determined by the law of the place where the company was domiciled, which was said to be Texas.

17. On 12 January 2009 Carpatsky submitted its response to the jurisdictional challenge. It contended that Carpatsky Delaware had assumed all Carpatsky Texas's rights and liabilities pursuant to the merger, and had therefore become party to the JAA and to the arbitration agreement contained in the 1998 Addendum. It contended further that both parties had treated Carpatsky Delaware as a party to the JAA, that Ukrnafta had been aware of the merger, and also that the complaint was not timely as Ukrnafta had participated in the arbitration without making this complaint.

18. Ukrnafta submitted a rejoinder on this issue on 19 January 2009 reiterating that the 1998 Addendum, and therefore the agreement for SCC Arbitration, was 'null and void ab initio'. Ukrnafta withdrew its counterclaims. Carpatsky responded to this on 23 January 2009.

19. Ukrnafta submitted a further document on 18 February 2009, and this time attached witness statements from Ms Svitlana Vasylets, who was Head of the Protocol Division – Deputy Head of the External Affairs and Corporate Relations Department of Ukrnafta from 2001 to 2008, and from Mr Texas. Ms Vasylets stated that it was

only in the course of the arbitration, 'somewhere in November 2008', that she had learned that Carpatsky Texas had 'ceased to exist upon its merger into the company with the same name, having its place of incorporation in the State of Delaware'. Mr Texas stated that the merger 'was done for tax reasons and generally because Delaware law was more favourable than Texas law'.

20. On 24 February 2009 Ukrnafta urged the tribunal to postpone the jurisdiction hearing. The tribunal did not accede to that request. Ukrnafta then declined to attend the hearing, which went ahead and resulted in a decision of the tribunal on jurisdiction of 22 April 2009. The tribunal rejected Ukrnafta's case that it was only when the arbitration was underway that it first discovered that the claimant was Carpatsky Delaware. The tribunal determined that it had jurisdiction because Ukrnafta had entered into an arbitration agreement with Carpatsky Delaware by engaging in the arbitration without reservation, and that that agreement was concluded at the latest by the time of the service of Ukrnafta's Statement of Defence; and also that Ukrnafta's jurisdictional objection was out of time by reference to Article 24 of the SCC Rules. The arbitration then proceeded on the merits.

21. In the meantime, on 23 February 2009, Ukrnafta had sued Carpatsky Delaware in the US District Court for the Southern District of Texas (Houston Division) asserting a number of causes of action, including negligent misrepresentation, fraud and misappropriation of trade secrets, and contending that all amendments to the JAA after the date of the merger were 'void *ab initio*'. On 7 April 2009 the US District Court stayed these proceedings on the basis that there was an agreement to arbitrate and that the claims were arbitrable.

The Arbitration and other proceedings after the tribunal's decision on jurisdiction

22. While the arbitration was progressing, apparently in early 2009, the Deputy Public Prosecutor of Ukraine 'acting in the interests of the state and on behalf of the Ministry of Protection of Environment of Ukraine' applied to the Kyiv Commercial Court seeking a declaration that the JAA was invalid. Carpatsky Delaware was joined to these proceedings 'on initiative of the court' by order of 19 March 2009 'in the capacity of a third party which does not lodge own claims in respect of the subject-matter of the dispute'. On 27 May 2009 the Commercial Court of Kyiv terminated the proceedings. The basis on which it did so, as appears from the judgment, was as follows:

    (1) It concluded that the relevant agreements 'were executed on behalf of [Carpatsky Texas] which had demised as of the dates of execution of such agreements and, subsequently, terminated its status of a legal entity'.

    (2) The result was that 'due to lack of legal status of a legal entity for [Carpatsky Texas] and, respectively lack of right to be a party to a contract after July 22, 1996 … the disputable agreements are non-executed, since material terms and conditions cannot be deemed as consented due to absence of a party to such agreement'. Accordingly, 'it must be deemed that after July 22, 1996, actions of persons directed to execution of agreements on behalf of [Carpatsky Texas] did not result in execution of agreements.'

(3) Because only executed agreements could be declared as invalid, and because the JAA had not been executed, the proceedings should be terminated for want of subject matter, in accordance with clause 80 of the Commercial Procedural Code of Ukraine.

23. In the SCC arbitration, on 24 June 2009, Ukrnafta submitted a Rejoinder, and shortly thereafter a quantum expert report from Mr Ellison of KPMG. On 7 August 2009 Carpatsky submitted a Response to Rejoinder, with a supplemental quantum report from its expert Mr Kaczmarek. There was a four-day hearing before the tribunal in September 2009. Some 15 fact and expert witnesses gave evidence. There were then two rounds of written post hearing briefs. Carpatsky and Ukrnafta submitted their first post hearing memorials on 30 October 2009. The parties then exchanged their second post hearing memorials on 30 November 2009.

24. While the arbitration was continuing in this way, on 14 October 2009 the High Civil and Criminal Court of Ukraine rejected Carpatsky Delaware's appeal from the decision of the Kyiv Commercial Court of 27 May 2009. It appears that Carpatsky Delaware was not informed that the hearing of the appeal would occur, and was not aware that it had been scheduled. It is shown as 'no show' in the record of the Decision.

The Final Award

25. The tribunal issued the Final Award in the arbitration on 24 September 2010. It found Ukrnafta liable for breaching the JAA, and awarded Carpatsky US$145.7 million, plus interest and costs.

26. While the tribunal had already rejected Ukrnafta's jurisdiction challenge it had nevertheless, as part of the evidentiary hearing on the merits in September 2009, heard oral evidence going to the issue of the change from Carpatsky Texas to Carpatsky Delaware, because it was relevant to Ukrnafta's defence that there was no valid contract under Ukrainian law. In the Final Award the tribunal:

(1) Held that Carpatsky Delaware was 'a proper party to the JAA';

(2) Noted that it was 'not disputed that under Delaware law, [Carpatsky Delaware] automatically succeeded to [Carpatsky Texas's] rights and obligations'; and held that '[Carpatsky Delaware] was the successor of [Carpatsky Texas] and with the merger acquired all of the latter's rights and obligations';

(3) Found that Carpatsky Delaware was Ukrnafta's counterparty to the 1998 Addendum. In coming to this conclusion, the tribunal rejected Ukrnafta's case that the use of Carpatsky Texas's seal meant that Carpatsky Texas was the party to the contract;

(4) Found that because Mr Texas was the President of Carpatsky Delaware when he signed the agreements, they were 'valid and legally binding';

(5) Rejected Ukrnafta's case that the 1998 Addendum was invalid because Carpatsky Delaware had not notified Ukrnafta about the merger, including because Ukrnafta 'knew, and in any event could have known, about the change of [Carpatsky's]

place of registration, and there is no evidence of intentional misleading by [Carpatsky]', and because Ukrnafta had 'not alleged that any particular harm could arise from the merger'.

27. Ukrnafta requested that the tribunal should correct and supplement the Final Award, on 22 October 2010. This request was declined by the tribunal on 15 November 2010.

Proceedings to enforce and challenge the Final Award

28. Ukrnafta had, in March 2009, brought proceedings before the Swedish courts contending that the tribunal lacked jurisdiction. Those proceedings had been stayed by the Swedish courts pending the arbitration. After the Final Award, these proceedings resumed. Ukrnafta filed submissions on 3 March 2011. There was a hearing, at which oral evidence was given, and there was extensive written evidence. On 13 December 2011 the Stockholm District Court (Division 5) gave judgment, in which it rejected Ukrnafta's case that the tribunal had lacked jurisdiction. The Stockholm District Court gave three reasons for its decision.

(1) First, that the 1998 Addendum included a valid and binding arbitration agreement between Ukrnafta and Carpatsky Delaware. The court considered that Ukrnafta's case 'may be best described as *error in motivis*'. It considered the evidence as to whether the identity of the contracting party had or was deemed to have had significance to Ukrnafta's willingness to enter into the 1998 Addendum. The court concluded that it did not, saying:

'… the information regarding the merger between [Carpatsky Texas] and [Carpatsky Delaware] cannot be deemed to have had such significance for Ukrnafta's willingness to enter into a contract that the company's alleged mistake regarding the circumstances prevented a binding arbitration agreement between Ukrnafta and [Carpatsky Delaware] from coming about through the execution of the contractual documents. The authority of the representatives who executed [the 1998 Addendum] on behalf of the parties has not been called into question. Accordingly, a valid arbitration agreement came about through the execution of [the 1998 Addendum], and the arbitrators have, on this basis, had jurisdiction.'

(2) Secondly, that Ukrnafta must be deemed to have acceded to the arbitration agreement by means of material acts. What was intended by this was that Ukrnafta had acceded to the arbitration agreement in the 1998 Addendum by its actions after that Addendum was signed. The court considered that the evidence established that Ukrnafta had known of the merger, at latest by the end of 2002, but had performed the 1998 Addendum and the JAA more generally after it had learned of the merger, thereby agreeing to the arbitration provision in the 1998 Addendum.

(3) Thirdly, that Ukrnafta had lost its right to object to the tribunal's jurisdiction by not making a jurisdictional objection within the period specified by Article 24(2)(ii) of the SCC Rules, namely by the time of the submission of Ukrnafta's Statement of Defence to the tribunal.

29. Ukrnafta appealed the decision of the Stockholm District Court to the Svea Court of Appeal. On 30 November 2012 the Svea Court of Appeal affirmed the judgment of the District Court. In reaching this decision, the Svea Court of Appeal:

(1) Was 'of opinion that it was not established that Ukrnafta, as a consequence of the request of arbitration, learned of [Carpatsky Delaware's] identity';

(2) Found that Ukrnafta should have known of the merger before, at least, June 2008 when the Statement of Defence was served;

(3) Concluded that the failure to take the point by the time of the Statement of Defence amounted to a waiver of the point under Swedish law, and that 'the fact that Ukrnafta lost the right to bring the claim in this respect means that the [tribunal] also had jurisdiction';

(4) Having reached this result, said that it did not need to examine the other grounds which had been argued.

30. Separately from these proceedings, Ukrnafta brought proceedings in Sweden, which I will call the 'Swedish challenge proceedings', seeking the setting aside of the Final Award on the basis that the tribunal had exceeded its mandate and had made errors which affected the outcome.

31. While the Swedish challenge proceedings were pending, Carpatsky commenced enforcement proceedings in Ukraine. On 13 November 2013, the Shevchenkivsky District Court of the City of Kyiv dismissed the application on the grounds that Carpatsky had failed to attach a certified translation of the arbitration award, 'and there is no written arbitration agreement under which the parties agree to submit to arbitration all differences arising between them'. The District Court then continued:

> 'Additionally, according to the data contained in the automated system for collecting, storing, protection, registration, search and provision of electronic copies of court judgments … a contract which contains an arbitration clause based on which [Carpatsky Delaware] files the application seeking to obtain recognition and enforcement of a foreign arbitral award, was held null and void (not concluded) in its entirety'.

The reference to the arbitration clause having been found to be null and void was explained as a reference to the decision of the Commercial Court of Kyiv of 27 May 2009, which had been upheld on appeal.

32. Carpatsky sought to appeal this decision, but its appeals were dismissed by the Kyiv City Court of Appeal on 12 December 2013 and the Higher Specialized Court of Ukraine on 12 March 2014 and 11 August 2014. In the first of these (in the Kyiv City Court of Appeal) the court had, in part, reasoned that the ruling of 27 May 2009 became effective as of 26 August 2009 and that as from that date no addendum containing an arbitration clause had existed. The Kyiv City Court of Appeal said that the ruling of 27 May 2009 had been 'a judicial judgment, therefore facts established both by a judgment and by a ruling of a court have prejudicial effect due to which the arguments of the appeal that the rulings are not judicial judgments in the meaning of civil procedure law shall be dismissed.' Similarly, in the latter two decisions, the

Higher Specialized Court of Ukraine said that 'the courts correctly took into consideration prejudicial nature of the facts established by the ruling of the Commercial Court of the City of Kyiv dated 27 May 2009'.

33. On 26 March 2015, the Svea Court of Appeal gave judgment in the Swedish challenge proceedings. The Svea Court of Appeal rejected all Ukrnafta's challenges to the Final Award, including (insofar as potentially relevant to the points which have been maintained by Ukrnafta on this application) the following:

(1) A complaint that the tribunal had exceeded its mandate or committed a procedural error in relation to its approach to Article 20.1 of the Restated JAA; and

(2) Certain complaints about the way in which the tribunal had calculated damages.

The Swedish Supreme Court denied permission to appeal from this decision of the Svea Court of Appeal on 9 December 2016.

34. On 7 April 2015, permission was granted to enforce the Final Award in France.

35. On 28 April 2015, an application was made by Carpatsky to the Dutch Court for permission to enforce the Final Award. A hearing took place on 25 September 2015. On 21 October 2015, the District Court in The Hague granted leave to enforce the Final Award in the Netherlands.

36. Once the Swedish challenge proceedings were over, the stay imposed by the United States District Court for the Southern District of Texas was lifted. Ukrnafta resisted enforcement of the Final Award. On 2 October 2017 the US District Court granted Carpatsky Delaware's motion to confirm the Final Award. The District Court dealt with a range of arguments which had been raised by Ukrnafta as to why the Final Award should not be enforced. These may be summarised as (i) that the arbitration agreement was invalid; (ii) that Ukrnafta did not have an opportunity to present its case; (iii) that the award was beyond the scope of the purported agreement to arbitrate; (iv) that the arbitration was not in accordance with the agreement of the parties; and (v) that enforcement of the Final Award would be contrary to public policy. All were rejected as reasons for refusing enforcement of the Final Award.

37. The Swiss and Russian courts have refused recognition and enforcement of the Final Award on the grounds that Ukrnafta does not have assets in those jurisdictions.

The legal framework and the nature of the hearing

38. Sweden is a party to the New York Convention. The Final Award is therefore, as I have already said, a New York Convention award within s. 100 of the 1996 Act. Sections 100-103 of the 1996 Act give domestic effect to the New York Convention.

39. In relevant respects, the New York Convention comprises an 'overall scheme' for the facilitation of the enforcement of awards, and the scheme reflects a 'pro-enforcement bias' which is recognised in England. (Diag Human SE v Czech Republic [2014] EWHC 1639 (Comm), [10-11]).

40. The grounds for refusing enforcement of an award are restricted and construed narrowly. Enforcement may be refused only if one of the listed grounds in the 1996

Act, which are exhaustive, applies. Save in those cases, enforcement is mandatory. The burden is firmly on the party resisting enforcement to show that the award should not be enforced. In effect, the party which has obtained the award enjoys a presumption of the validity of the award, which it is for the party resisting enforcement to displace. (Diag Human SE v Czech Republic at [12-13]).

41. Nevertheless, the exceptions to enforcement specified in the New York Convention and in the 1996 Act are ones which concern the 'fundamental structural integrity of the arbitration proceedings' (Kanoria v Guinness [2006] 1 Lloyd's Rep 701 at [30], per May LJ). This court, when enforcement is challenged, is bound to consider the grounds for itself. In relation to challenges to the jurisdiction of the arbitrators, the court cannot simply defer to the arbitrators' decision, but is bound to revisit the question. It is clearly established that such challenges involve a rehearing of the matter, and not simply a review of the award, though on that rehearing the court will consider the award with attention and interest.

42. There was no dispute between the parties that the principles of issue estoppel may operate in the enforcement context, as in others. Thus, as held in Diag Human SE v Czech Republic (at [55-59]) an issue estoppel can arise from decisions of courts of other countries in relation to enforcement. In the present case, and given its history, arguments as to issue estoppel have featured prominently. There has also been a dispute as to what if any primacy should be accorded to decisions of the courts of the seat of the arbitration. I will return to these matters. However, given that there has been no agreement as to what matters are determined by issue estoppels, and as the parties continue to disagree on a number of the facts potentially relevant to the challenges to enforcement which Ukrnafta raises, particularly the 'No Arbitration Agreement point', they have adduced evidence, some of it oral evidence, for the purposes of this hearing.

43. There are also some issues as to the contents of Ukrainian and of Swedish law, each of which is said by one or other of the parties to be of relevance at various points in the argument. I have therefore had the benefit of expert Ukrainian and Swedish law evidence.

The Factual and Expert Evidence

44. It is convenient to give my assessment of the factual and expert evidence at this stage.

45. For its part, in addition to relying on documentary evidence before the court, Carpatsky relied on two statements which had originally been served in the arbitration of Robert Bensh who, from December 2000 to 2008 was Chairman and CEO of Carpatsky Delaware. For the purposes of this hearing, Carpatsky put those statements in under Civil Evidence Act notices.

46. Mr Bensh's evidence was to the following effect:

(1) At all times during his tenure he had acted on behalf of 'Carpatsky Petroleum Corporation' as a Delaware company; and that he had never acted on behalf of Carpatsky Texas, which had been merged into and succeeded by Carpatsky Delaware before his tenure.

(2) That Ukrnafta knew that he was acting on behalf of a Delaware entity and did not raise objections to that or any questions as to Carpatsky Delaware's status as a party to the JAA.

(3) As evidence of this he cited the facts: that he had attended Management Committee Meetings under the JAA; that at the first of such meetings which he had attended Mr Ivanov of Ukrnafta had asked him to provide evidence of his authorisation to act on behalf of Carpatsky Petroleum Corporation; that he had supplied to Mr Ivanov a copy of a Power of Attorney which authorised him to act on behalf of Carpatsky Delaware; and that this was accepted as proof of his status under the JAA.

(4) As further evidence, Mr Bensh said that he had provided Powers of Attorney to individuals from PNG to carry out operational functions in furtherance of the JAA, and that these had indicated that he was signing on behalf of a company organized and existing under the laws of the state of Delaware. These were never questioned by Ukrnafta or PNG, or by the people to whom the Powers of Attorney were given.

(5) Further, in 2001, Mr Bensh had written to Mr Kozak of Ukrnafta with regard to the anticipated transfer of income from the Joint Activity to 'Carpatsky Petroleum Corporation', and had informed Mr Kozak that it had opened a bank account with ING Bank in Ukraine and that funds should be wired to that account. The account information indicated that 'Carpatsky Petroleum Corporation' was a Delaware company. Similarly, in 2005 Cardinal Resources issued a prospectus which described 'Carpatsky Petroleum Corporation' as a subsidiary and stated that it was incorporated in Delaware. Mr Bensh said that this was a publicly available document but in any event he had arranged for several copies to be delivered to Ukrnafta.

(6) That there was never any attempt to conceal the fact that the relevant entity was a Delaware company and he and his company were always open about it.

47. Carpatsky further relied on a statement of Ms Zoya Frolova, who was director of the Representative Office of 'Carpatsky Petroleum Corporation' in Ukraine. Again, this had originally been served in the arbitration. In this statement Ms Frolova said that she had begun working for the company in July 2000. Her evidence was, in summary:

(1) That it had always been her understanding that she represented a Delaware company. She held a Power of Attorney from Carpatsky Delaware to take various actions, including managing the affairs of the Representative Office, and she had always been prepared to show this to Ukrnafta. She had a separate Power of Attorney from Mr Bensh, as CEO of Carpatsky Delaware, which allowed her to participate in Management Committee Meetings of the JAA, and that this was always demanded by Ukrnafta at Management Committee Meetings.

(2) She always stated that she represented a Delaware company, and indeed had only shortly before 2009 become aware that the company had been incorporated in Texas prior to 1996.

(3) She remembered a conversation with Mr Pustovarov, the CFO of Ukrnafta in 2005, in which they had discussed the fact that Carpatsky was a Delaware company.

48. Carpatsky also served a Civil Evidence Act notice in respect of certain parts of the evidence given by Mr Texas in the arbitration, and in particular evidence which he had given:

(1) That he had not deceived or attempted to deceive anyone about the merger; but had 'clearly explained to, at that time the foreign relationship department chief [of Ukrnafta], Mr [Leonid] Kusch[1], that we changed the corporate structure just simply because of these advantages what the Delaware set-up means.'

(2) That 'nothing changed'; 'the same people he [Mr Kusch] personally met before, he knew the key shareholders, nothing changed'.

(3) When Mr Texas had told Mr Kusch about the merger and creation of Carpatsky Delaware, Mr Kusch's attitude had been 'It was not an important issue. He said "No, you are the same, your company is the same, the members are. We are dealing with the same identity, the same entity."'. As far as Mr Texas recalled, Mr Kusch had never raised any concerns that the merger could affect the rights and obligations of the parties under the JAA.

49. For its part, Ukrnafta had indicated, in advance of the hearing, that it intended to call Ms Vasylets to give evidence. Relatively shortly before the hearing, however, Ms Vasylets indicated that she would not come to give evidence, and declined to participate in a video link. In those circumstances, Ukrnafta relied pursuant to the Civil Evidence Act on a written statement which had referred to and in effect endorsed the statement from her which had been served in the arbitration. That statement was to the effect that she had not known of the merger of Carpatsky Texas into Carpatsky Delaware until November 2008; that Mr Texas had never provided any documents indicating that he was acting on behalf of a company which was not Carpatsky Texas; and that even in autumn 2006 Ukrnafta had been supplied by Ms Frolova with material which included the constituent documents of Carpatsky Texas.

50. Mr Davies QC for Carpatsky submitted that it was regrettable that Ms Vasylets had not come to give evidence or participated in a videolink, because he would have wished to ask her, in particular, about a letter of 24 March 2005 which she prepared and which was sent to the First Deputy Minister of Oil and Power Energy of Ukraine. That letter had stated that:

> 'Cooperation with Carpatsky Petroleum Corporation (Delaware, USA) is carried out within the framework of two joint projects' [of which one was the JAA in respect of the RC Field]

and later

[1] The evidence was that Mr Kusch was head of Ukrnafta's foreign relationship department in the mid 1990s, and had died in 2000.

> 'In 2000, Bellwether Exploration Company, an American entity, became the owner of the company owner of the majority stock in Carpatsky Petroleum Corporation, changed management of CPC and appointed Mr Robert J Bensh on the position of President of the Company. Carpatsky Petroleum Corporation was re-registered in the state of Delaware, USA.'

51. Ukrnafta called Vyacheslav Kartashov to give evidence. Mr Kartashov is, and has since 2003 been, the Head of Ukrnafta's Legal Department. His evidence was that he had become aware that Carpatsky Texas had ceased to exist in 1996 only in November 2008, and that his recollection was that this 'came as a complete surprise to the management of Ukrnafta and both the Legal Department and the External Affairs and Corporate Relations Department'.

52. Mr Kartashov was cross-examined. During cross-examination he accepted that Ukrnafta had been aware that Carpatsky was paying its taxes in Delaware. More generally, however, and in particular when answering questions about the letter of 24 May 2005, which Ms Vasylets had prepared and he had approved, Mr Kartashov's evidence was characterised by an eagerness to argue the case on behalf of Ukrnafta, and indeed to make allegations which went beyond those which were put forward on its behalf by Mr Schaff QC at this hearing. I did not consider that he approached most of the issues about which he was asked objectively, as opposed to giving answers which he considered consistent with Ukrnafta's position.

53. Ukrnafta also adduced evidence from Mr Texas. A witness statement was served from him, which had included the statement that he 'did not inform Ukrnafta about the dissolution of [Carpatsky] Texas (not least because I did not myself appreciate that this was the effect of the merger) and the creation of [Carpatsky] Delaware because I did not want to upset Ukrnafta with all the name changes'; that he 'always considered that I was representing [Carpatsky] Texas'; and that 'I did tell Leonid [Kusch] on an informal basis, as a friend, of the changes I was making regarding … Carpatsky Petroleum Inc., and I probably would have told him about the creation of the Delaware company', but did not tell him that PNG would now be dealing with a new company.

54. Mr Texas gave evidence via videolink. From the very outset of his evidence he was at pains to say that he had no real recollection of any relevant matters at this stage, and that his memory had been much better '10 years ago'. He said on a number of occasions that he was 'bewildered' to be being asked questions about the case so long after the relevant events; that he did not remember matters even though they appeared in his witness statement for this action; and that he did not remember having always considered that he was representing Carpatsky Texas, or of being unaware that Carpatsky Texas had ceased to exist in the merger. He gave, as I thought, no credible reason as to why last year he had signed a witness statement which dealt with matters of which, a few months later, he professed a complete lack of recollection because of the passage of so many years since the events described.

55. Counsel for Ukrnafta was himself constrained to accept that to say that Mr Texas had not come up to proof would be an understatement.[2] In my judgment I could attach no

[2] Day 5/p. 10.

weight to the evidence contained in his witness statement for this action. Mr Texas did confirm, however, as I considered plausibly, that his memory of relevant matters had been better at the time he gave evidence in the arbitration.

56. Expert evidence on Swedish law was given by Mr Olof Rågmark, who is a member of the Swedish Bar Association and practises from his own law firm, Olof John Rågmark Advokatbyrå, on behalf of Carpatsky; and by Prof. Patrik Schöldström on behalf of Ukrnafta. Each was a well-qualified and helpful expert. There were only very limited issues between them.

57. Expert evidence on Ukrainian law was given by Prof. Evgen Kubko on behalf of Carpatsky, and by Prof. Natalia Kuznietsova on behalf of Ukrnafta. Each was a well-qualified expert. I formed the view that Prof. Kubko approached the issues on which he was asked to opine with rather more objectivity than did Prof. Kuznietsova, perhaps in part because she has been acting as expert for Ukrnafta in relation to this case since at least 2009. By way of example, I considered unrealistic her evidence that Ukrainian courts would not have regard, in assessing which of two putative parties had entered into a contract, to the fact that only one existed.

58. Against that background I turn to consider the three points which have been raised by Ukrnafta on this hearing, which I identified in paragraph 3 above.

The 'No Arbitration Agreement point'

59. Ukrnafta's case in relation to this issue was that the exception to enforcement in s. 103(2)(b) of the 1996 Act was applicable, in that there was no arbitration agreement which was 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. It further contended that there was no arbitration agreement 'in writing', which is a requirement for an arbitral award to be enforced as a New York Convention award under s. 101 of the 1996 Act by reason of s. 100(2)(a) of the 1996 Act.[3]

60. Ukrnafta contended that the agreement relied upon by Carpatsky Delaware in the 1998 Addendum was never concluded because it was executed on behalf of a non-existent entity, namely Carpatsky Texas; that Carpatsky Texas never had or could have acquired any rights thereunder; and that Carpatsky Delaware could not, therefore, have succeeded to any such rights. Ukrnafta further contended that no other arbitration agreement ever came about, and that the Svea Court of Appeal did not determine otherwise. It relied on the decisions of the Ukrainian courts in 2009 and in 2013/14 as establishing an issue estoppel in material respects.

61. Carpatsky Delaware puts its case as to the existence of an arbitration agreement in writing, in five different ways. They were as follows:

    (1) That there was a valid SCC arbitration agreement contained in the 1998 Addendum.

[3] Ukrnafta also contends that insofar as enforcement is sought under s. 66 of the 1996 Act, that also requires that the award should be pursuant to an arbitration agreement in writing, by reason of s. 5 of the 1996 Act.

(2) That irrespective of the validity of the 1998 Addendum when executed Ukrnafta acceded to the SCC arbitration agreement in the 1998 Addendum by performing the matrix contract (ie the JAA).

(3) That Ukrnafta had expressly agreed to arbitrate under the SCC Rules in 2007.

(4) That Ukrnafta's participation in the arbitration had given rise to a written arbitration agreement.

(5) That Ukrnafta had waived its right to advance its argument as to the absence of an arbitration agreement by failing to make it in a sufficiently timely manner.

I will consider each of these arguments in turn.

Was there a valid arbitration agreement contained in the 1998 Addendum?

62. The first issue which arises in this context is what law should be applied to determine the existence of an arbitration agreement in the 1998 Addendum. Ukrnafta contended that it was Ukrainian law. Carpatsky Delaware contended that it was not open to Ukrnafta to argue that it was other than Swedish law; and in any event contended that, applying English conflict of laws rules, it was Swedish law. As both parties recognised, the answer to this preliminary question may actually make no practical difference to the answer as to whether there was an arbitration agreement in the 1998 Addendum, given that the principles for determining the existence of an agreement are not very different between the two laws, and under each is likely to depend on my determination of the facts. Nevertheless, the question of the applicable law is logically first, is potentially significant to questions of issue estoppel, and was argued before me, and I will therefore state my conclusions on it.

63. As I have said, Carpatsky contended that it was not open to Ukrnafta to argue for the relevance to this question of a system of law other than Swedish law, because Ukrnafta had repeatedly asserted, without reservation, that Swedish law governed the arbitration agreement. In particular Carpatsky referred to: (i) Ukrnafta's Jurisdiction Challenge before the tribunal, dated 19 December 2008, in which Ukrnafta had asserted that 'The validity of the arbitration agreement is governed by Swedish law'; (ii) a further submission served in the arbitration on 24 February 2009 which stated '… the issue whether [the parties] have entered into a valid arbitration agreement shall be governed by Swedish law'; (iii) Ukrnafta's submission to the Swedish courts served on 3 March 2011, in which it was argued that no weight should be given to the tribunal's determination in respect of the 1998 Addendum because, in distinction to the main contract, Swedish law governed the arbitration agreement; and (iv) Ukrnafta's original case in these proceedings which, as set out in Mascarenhas 1, incorporated the case it had made to the Swedish courts.

64. Ukrnafta contended that its stance in the arbitration and in the Swedish courts had been one which it had adopted only because of Swedish conflicts of law rules which dictated that, unless the parties had reached an express agreement otherwise, the governing law of the arbitration agreement was the place of the venue. It argued that it was open to it in this jurisdiction to argue that applying English conflicts rules, the governing law was Ukrainian.

65. I consider that, in the present case, it is not open to Ukrnafta to change its position as to what is the law which governs the question of the validity of any arbitration agreement in the 1998 Addendum. That it was Swedish law was a stance which Ukrnafta put forward, without reservation, in the Swedish arbitration and in the proceedings before the curial courts, and indeed relied on that stance to attempt to gain an advantage when challenging the jurisdiction of the arbitrators. In my judgment, Ukrnafta accepted the applicability of Swedish law and can be said to be estopped by its conduct of the arbitration and the Swedish proceedings from taking a different position in these courts on enforcement. I consider that this approach is supported by that in James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 583. I recognise that that was a case in which the issue was whether conduct in performing an arbitration in Scotland precluded a subsequent contention that English was the curial and procedural law. I consider, however, that there are good reasons to apply a similar approach to an acceptance, in the arbitration and in the curial courts, that a particular system of law is the law governing the existence and validity of the arbitration agreement. In any but an exceptional case, it would be highly inconvenient, and generative of confusion and multiplication of arguments on enforcement, if a party was entitled to argue that an arbitration agreement is governed by one law before a tribunal (and the supervisory courts) and then to argue at enforcement that a different law is applicable to that issue.

66. If I am wrong in that conclusion, then I need to determine what the applicable law was. It was common ground that that is to be determined by English common law conflicts rules, as the Rome Convention does not apply to arbitration agreements. English common law conflicts rules require a three-stage enquiry: (i) have the parties made an express choice of law? (ii) if not, have they made an implied choice? (iii) if the answer to both questions is 'no', the arbitration agreement is governed by the system of law which has the closest connexion to the arbitration agreement. See *Dicey Morris and Collins on The Conflict of Laws*, 14th ed., para. 16R-001 (Rule 64(1)(a) and (b)); Sul America v Enesa Engenharia [2012] EWCA Civ 638, at [25].

67. In my judgment, in the present case, there was no express choice of the law applicable to the arbitration agreement in the 1998 Addendum. There was a choice of the 'law of substance of Ukraine' to apply 'on examination of disputes', which I consider means that Ukrainian law was to apply to substantive issues which formed part of a dispute between the parties, but was not a choice of the law which was to govern the arbitration agreement itself.

68. As to the issue of whether there was an implied choice, the parties adopted different positions. Ukrnafta relied on the fact that the JAA had provided, in Article 1.10, for Ukrainian law to apply to the Parties' Joint Activity, and also on the choice of Ukrainian law to apply 'on examination of disputes' in the 1998 Addendum. It contended that the fact that the governing law of the substantive contract is Ukrainian law is a 'strong pointer towards an implied choice' of the proper law of the arbitration agreement, and cited Sul America v Enesa Engenharia, especially at [11] and [26] per Moore-Bick LJ.

69. By contrast, Carpatsky contended that there are a number of factors which outweigh the implication to be derived from the choice of the substantive law of Ukraine to govern the Joint Activity and the 'examination of disputes', and in particular the choice of Stockholm as a seat.

70. In my judgment, Carpatsky's argument on this issue is to be preferred, for the following reasons.

(1) In the first place, the choice of the SCC as the arbitral institution and of 'Stockholm, Sweden' as the place for the arbitration are, in the present case, a strong indicator of an implied choice of Swedish law to govern the validity and interpretation of the arbitration agreement. It was plainly a matter of importance to the parties to choose a neutral forum in the 1998 Addendum, in that they moved from a clause mandating arbitration in Kyiv in the JAA to one mandating arbitration in Stockholm in the 1998 Addendum. Having deliberately chosen a neutral forum to resolve their disputes it is reasonable to infer in the present case that they intended the law of that jurisdiction to determine issues as to the validity and ambit of that choice.

(2) By choosing Sweden as the seat for the arbitration, the parties must be taken to have known that they were agreeing to the application of the Swedish Arbitration Act, including section 48 thereof which provides that 'where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place and shall take place.' It was Mr Rågmark's evidence, and Ukrnafta itself contended, that under that provision, unless there is an *express* choice of law for the arbitration agreement, the governing law is the place of the venue, and that an *implied* choice of law, for example by reference to the law of the main contract, does not suffice to preclude the application of the law of the place of the venue. Accordingly, the parties must be taken to have known and agreed that by failing to make an express choice of law for the arbitration agreement, and by providing for a Swedish venue, they were impliedly agreeing to the application of Swedish law as the law of the arbitration agreement. An argument that this was an agreement that under Swedish law would be regarded as the governing law of the arbitration agreement only if the matter were being looked at in Sweden makes little sense. The parties can be taken to have intended that if Swedish law was to be the governing law of the arbitration agreement when the matter was looked at in Sweden, it should be the governing law of the arbitration agreement wherever it was looked at.

71. For these reasons, I consider that there was an implied choice of Swedish law as the law governing the arbitration agreement. If I am wrong about that, I nevertheless do not consider that there was an implied choice of Ukrainian law. The pointers in favour of Ukrainian law would be at least counterbalanced by the pointers away from it. Accordingly, if the analysis has reached this point, there was no express or implied choice of law and I would need to turn to the third stage of the enquiry, which is to ascertain the law with which the arbitration agreement has its closest connexion. That is generally the law of the seat of the arbitration: *Dicey Morris and Collins* (op. cit.) para. 16R-001 (Rule 64(1)(b)). As explained by Moore-Bick LJ in Sul America at [32]:

> 'In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance [ie the main contract in that case], whose purpose is unrelated to that of dispute resolution;

> rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective...'

Applying that reasoning, the law with which the arbitration agreement in the 1998 Addendum had its closest and most real connexion was the law of Sweden.

72. For those reasons the applicable law is Swedish law.

73. I therefore turn to consider whether, applying relevant principles of Swedish law, an arbitration agreement was validly concluded between Ukrnafta and Carpatsky Delaware in the 1998 Addendum.

74. The Swedish law experts were in agreement on the following matters:

(1) That under Swedish law a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

(2) A contract may be formed through acceptance by conduct, silence, or inactivity. A contract need not be made in or evidenced by a particular form. A contract may be proved by any means, including oral evidence. Although party intent is determinative in theory, the (objective) expression thereof will often determine the content of a contract.

(3) Swedish law adheres to the doctrine of the separability of arbitration agreements. The ineffectiveness or invalidity of the main substantive agreement says nothing *per se* about the effectiveness or validity of the arbitration agreement.

(4) The same rules and principles of law apply to the formation of arbitration agreements as apply to contracts in general. Hence, no specific form for the formation of arbitration agreements is required and an arbitration agreement may be formed by conduct, silence or inactivity; the consensual nature of an arbitration agreement is a factor to consider.

(5) The identification of the parties to an arbitration agreement is a question of fact.

(6) If a contract is concluded and one party was under a mistake, that *error in motivis* may lead to the contract being invalid and capable of being set aside if, but only if, the following four conditions are met: (i) the party's assumption must have existed when the contract was made; (ii) the assumption must have been relevant for the party's making of the contract (a relevant assumption being one that is determinative for that party in agreeing the contract); (iii) the other party must have realised or ought to have realised both the assumption and its relevance; (iv) the risk of the assumption being wrong is to be carried by the other party, which is to be determined on the basis of *skälighetsbedömning* (relevance / reasonableness).

(7) A party relying on an arbitration agreement carries the burden of proving the existence of an arbitration agreement; a party relying on grounds for invalidity will generally carry the burden of evidencing that invalidity.

75. Ukrnafta's argument that there was no arbitration agreement concluded in the 1998 Addendum is, in essence, that the Addendum was executed on behalf of Carpatsky Texas; that that meant that the Addendum was never concluded; and because there was never a concluded Addendum, there was never a concluded arbitration agreement, which was part of the 1998 Addendum.

76. In my judgment, and applying the principles of Swedish law to which I have referred, there was a valid arbitration agreement formed between Ukrnafta and Carpatsky Delaware in the 1998 Addendum. In coming to this conclusion, I make the following findings of fact:

(1) That, as he said in the arbitration (see paragraph [48] above), Mr Texas had informed Mr Kusch of the change in the corporate structure and that it had been prompted by the advantages of a Delaware domicile. On any view, that conversation must have taken place before Mr Kusch's death in 2000. But I read the relevant passage of the evidence that Mr Texas gave in the arbitration as indicating that the conversation took place shortly after the merger, and I find that to be most likely. No reason was suggested as to why this conversation should have taken place, not at or about the time of the merger, but only at some later point, and in particular after the 1998 Addendum was entered into. By that stage it would have been 'old news'.

(2) Mr Kusch was unconcerned about the change involving the introduction of a Delaware company about which Mr Texas had informed him. (See the evidence in paragraph [48(3)] above).

(3) From the time of the merger when Carpatsky Texas ceased to exist, Mr Texas had authority to act only on behalf of Carpatsky Delaware and not on behalf of Carpatsky Texas.

(4) Mr Texas intended to sign the 1998 Addendum on behalf of the Carpatsky entity which had survived and resulted from the 1996 merger. Whether or not he knew or remembered the legal details of that merger, his intention was to sign on behalf of the existing and relevant company, not on behalf of a non-existing one. It is absurd to attribute any other intention to him, and there is no reliable evidence that his intention was to sign the 1998 Addendum specifically on behalf of Carpatsky Texas.

(5) Ukrnafta was intending to contract with an existing not a non-existing entity, and more specifically it was intending to contract with the entity called 'Carpatsky Petroleum Corporation' which Mr Texas was representing and was authorised to represent.

(6) Ukrnafta was thereafter unconcerned as to whether the entity with which it had contracted was a Delaware or a Texas company. This is shown by the evidence of Mr Bensh referred to in paragraph [46] above, and that of Ms Frolova referred to in paragraph [47] above, which I accept.

77. In light of those matters, and because Ukrnafta on the one hand and Mr Texas and the company he represented on the other intended objectively, and indeed subjectively, to

enter into the 1998 Addendum with each other, there was an arbitration agreement in the terms provided for in the 1998 Addendum.

78. To the extent that Ukrnafta can say that it had not fully appreciated the significance of what Mr Texas had told Mr Kusch about the change in corporate structure, then this would potentially raise, in Swedish law, an issue of *error in motivis* (ie flawed assumptions of a party). As I understand it, as a matter of Swedish law, the onus of proof on this matter would lie on the party asserting that there was an operative *error in motivis*. I do not consider that Ukrnafta has demonstrated that there was. Indeed, it has not made any real attempt to do so. I have not been persuaded that the difference in the Carpatsky entity which was a counterparty was of any real significance to Ukrnafta in entering into the 1998 Addendum, or *a fortiori* that it was determinative in the sense indicated in the reports of the Swedish law experts. The terms of the definition of 'Parties' included in the 1998 Addendum indicates that Ukrnafta was content to regard as a party a legal successor of the participants who had initially concluded the JAA. There has been no demonstration that the factual position as summarised in paras. 204-207 of the Final Award is wrong.

79. I have not lost sight of the fact that Ukrnafta argued, in this context, that there could not, even applying Swedish law principles, be said to be a concluded arbitration agreement in the 1998 Addendum because the law governing the matrix contract was Ukrainian law and under that law the matrix contract, having been executed on behalf of a defunct company, was non-existent; and that it was recognised in Swedish law that where there is a single document evidencing and containing a matrix contract and an arbitration agreement, the signature on that document would have to be regarded as being put on it on behalf of the same corporate entity in respect of the matrix contract and the arbitration agreement.

80. Leaving out of consideration for the moment questions of issue estoppel, to which I will return, I consider that there are two compelling answers to this argument.

81. In the first place, in my judgment, and applying Ukrainian law principles in relation to whether a contract was concluded and with whom, the 1998 Addendum (ie the matrix contract itself) was a contract made between Ukrnafta and Carpatsky Delaware.

82. While the Ukrainian law experts disagreed as to how they should be applied in the present case, there was, as I saw it, no substantial difference between them as to the principles of Ukrainian law governing whether a contract was entered into and between which parties. In summary:

    (1) For there to be a valid agreement, the contents of the transaction must not be contrary to the rules of Ukrainian law, the parties must have had the required legal capacity, and their acts and deeds must have conformed to their internal will to enter into a contract.[4]

[4] C/397.

(2) There were no special requirements or rules to determine the identity of the persons who entered into an agreement.[5]

(3) There was no mandatory requirement for the use of a seal of a legal entity as a precondition to finding that an agreement had been concluded and was valid.[6]

(4) The issue of whether a contract has been concluded is an issue of fact for the court to decide, having considered all the relevant and admissible evidence which is adduced by the parties.[7]

(5) There are very few exclusionary rules as to the evidence which may be admitted in relation to such issues. The court has a 'high discretion' in this regard. There is, for example, no rule that evidence of subjective intentions or of post-contract performance is inadmissible.[8]

83. Thus, and in broad terms, it was established that Ukrainian law, like Swedish law, regards the questions of whether the parties had the intention to create a contract and who were the parties to any contract as essentially questions of fact, to be assessed on the basis of all the evidence, and there are few categories of evidence which are regarded as *per se* inadmissible. This point was recognised by Ukrnafta at the hearing, because it was accepted that whether Swedish or Ukrainian law governed was unlikely to make a difference to the outcome of these issues, because the relevant questions were essentially ones of fact.[9]

84. In these circumstances, the factual findings I have made, and the reasoning in paragraphs [76-77] apply as much in relation to an analysis of the conclusion of the 1998 Addendum under Ukrainian law as they do to an analysis of the conclusion of the arbitration agreement in the 1998 Addendum under Swedish law. The 1998 Addendum was concluded between Ukrnafta and the entity called 'Carpatsky Petroleum Corporation' which existed at the time and which Mr Texas represented at that point.

85. Insofar as the expert evidence of Ukrainian law was relevant to how the factual investigation would be carried out, I regarded the following evidence of Prof. Kubko as credible and compelling:

> "[41] While I agree … that 'only the existing entity may perform an act' and that 'the persons entering into an agreement have to be existent', I would like to emphasise that it is obvious and logical that if acts have been performed (an agreement was signed, or there was other conduct), it means that the parties really

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[5] C/398.
[6] C/399.
[7] Day 4/ 9, 12.
[8] Day 4/21-22, 41, 69.
[9] Day 5/p. 71, Mr Schaff QC said 'As you will have noted, after all the paper that has been expended on the issue it does seem to us, bluntly, that the applicable law issues are in a sense fairly academic … because this is essentially a question of fact. And it is a question of fact at the threshold question of: on whose behalf was the 1998 addendum and its agreement executed? And it is almost certainly a question of fact at various stages of the enquiry as to whether some fresh agreement came into being on contractual analysis, which, frankly, doesn't seem to be particularly surprising in either Sweden or Ukraine and doesn't seem to be particularly different.'

> exist and they express their will in a certain form. If parties do not exist, they cannot perform any acts.
>
> [42] In the present case, the 1998 Addendum was signed by the parties who really existed and whose representatives really signed this Addendum.
>
> ...
>
> [45] … if the contracting party did not exist then there could be no signed written contract. But here there was a party (ie Carpatsky [Delaware]) that existed at the time, was the successor to Carpatsky [Texas] (and therefore had all the rights and obligations under the JAA), and which thereafter performed the JAA. The fact that the 'old' seal of Carpatsky [Texas] was used is a shortcoming of the procedure for the formalisation of the 1998 Addendum, but it does not have a decisive importance.'

86. The second answer is that I did not find it to be established that there was any principle in Swedish law that, if a matrix contract is regarded, as a matter of its non-Swedish governing law, as not having been concluded because signed on behalf of a non-extant company, the Swedish law-governed arbitration agreement would necessarily be regarded in the same way despite the fact that if judged as a matter of Swedish law there would otherwise be regarded as being an arbitration agreement with an extant company. It is no doubt the case that, given that the question would be regarded by Swedish law as one of fact, it would not be contemplated that there would be different answers.[10] But it was not established that there was any principle of Swedish law by which a conclusion of fact reached in the context of the different governing law of the matrix contract should necessarily prevail over the – *ex hypothesi* different - conclusion of fact which would be reached in the context of the Swedish law enquiry as to whether an arbitration agreement was made and between whom.

87. For those reasons I conclude that there was an arbitration agreement between Ukrnafta and Carpatsky Delaware contained in the 1998 Addendum.

Accession to the arbitration agreement in the 1998 Addendum by performance of the matrix contract?

88. Carpatsky's second argument is that Ukrnafta acceded to the arbitration agreement in the 1998 Addendum by performing the matrix contract.

89. Given my conclusions in relation to Carpatsky's first way of putting the case, this issue does not arise, because Ukrnafta was already a party to the arbitration agreement in the 1998 Addendum.

Agreement to arbitrate under SCC Rules in 2007

90. Carpatsky's third argument is that there was an agreement by Ukrnafta to arbitrate with Carpatsky Delaware after the service of the arbitration Request by the agreement

[10] This is what I understood Mr Rågmark's evidence to be at Day 3/61-64.

between the parties' representatives that SCC Rules should apply, which is recorded in Ukrnafta's Answer served on 28 November 2007.

91. I consider that Carpatsky is correct to contend that the law governing the question of whether an arbitration agreement was concluded at this stage was Swedish law. The possibility that conduct of the parties' representatives in the context of a Swedish arbitration might give rise to an agreement even if there had not been one before was or ought to have been obvious. In Sweden, any such agreement would be regarded as governed by Swedish law pursuant to s. 48 of the Swedish Arbitration Act. Insofar as the matter has to be determined by English conflicts of law rules, any such agreement was governed by Swedish law, either because in the absence of express choice of another law, the parties must be taken to have impliedly chosen Swedish law because that would be the law applied in Sweden under s. 48 of the Swedish Arbitration Act, or because Sweden, as the seat of the arbitration, was the country whose laws had the closest and most real connexion with the arbitration agreement.

92. I have already set out the applicable principles of Swedish law. The question, here again, is essentially one of fact. In my judgment an arbitration agreement between Carpatsky Delaware and Ukrnafta was formed, even if one had not previously existed. The Request for Arbitration stated that the claimant was 'Carpatsky Petroleum Corporation (Delaware, United States)' and in paragraph 5 said that 'Carpatsky Petroleum Corporation' was a company incorporated and organized under the laws of the state of Delaware. That was enough to identify the party claiming in the arbitration as Carpatsky Delaware. True it is that paragraph 5 stated that the claimant company had its 'registered seat' at an identified place in Houston, Texas, but that did not create any real ambiguity, because Carpatsky Delaware did have an office at the address. In those circumstances, when Ukrnafta's representatives agreed that the arbitration should proceed under SCC Rules, they must be taken to have been agreeing with Carpatsky Delaware to arbitrate its claims against Ukrnafta. If there was not already an arbitration agreement between Ukrnafta and Carpatsky Delaware, this agreement created one.

93. In my judgment this was an arbitration agreement 'in writing' for the purposes of s. 100(2)(a) of the 1996 Act. The meaning of that term in Part III of the 1996 Act (including under s. 100(2)(a)) is the same as in Part I, and thus falls to be interpreted in accordance with s. 5 of the 1996 Act. The arbitration agreement made by the agreement to proceed with the arbitration under SCC Rules was either an agreement made in writing within s. 5(2)(a), bearing in mind the extended definition of the concept of 'made in writing' provided for in s. 5(3), or was made by an exchange of communications in writing within s. 5(2)(b).

Arbitration Agreement by participation in the arbitration and exchange of pleadings

94. The position is very similar in relation to Carpatsky's fourth argument, which is that there was, in any event, an arbitration agreement in writing formed by Ukrnafta's participation in the arbitration, and in particular that the service of the Request constituted an offer to arbitrate, which was accepted by Ukrnafta's service of its Answer without reservation in relation to jurisdiction, and by its subsequent participation by the submission of a Defence and Counterclaim.

95. Again, I consider that whether an arbitration agreement was formed at this stage is governed by Swedish law. The Swedish law experts were in agreement that an arbitration agreement could arise by the exchange of pleadings in an arbitration.

96. At paragraphs [70]-[74] of its award on jurisdiction the tribunal said this:

> "[70] … Most significantly, Claimant's identity is clearly stated in the Request for Arbitration dated 28 September 2007 which shows on its cover that Claimant is a Delaware company, with more detail given on page 2. Thus, Respondent must have been aware of Claimant's identity, at the start of this arbitration, when Respondent was moreover assisted by experienced counsel who could not overlook the fact that a Delaware company had initiated the arbitration against Respondent.
>
> [71] On 28 November 2007, Respondent filed an Answer to the Request for Arbitration in which it also nominated an arbitrator. This Answer did not contain any reservations concerning jurisdiction.
>
> [72] Claimant's Statement of Claim is dated 13 May 2008 and identifies Claimant as 'Carpatsky Petroleum Corporation (Delaware, United States)'. It 'reiterates' the Request for Arbitration and goes on to describe the joint activity and the dispute.
>
> [73] Respondent's Statement of Defence is dated 23 June 2008. It opposes the relief claimed by Claimant in substance and contains counterclaims. It does not object to the Arbitral Tribunal's jurisdiction, nor does it contain any reservations in respect of the Tribunal's jurisdiction.
>
> [74] The Arbitral Tribunal holds that by engaging in the arbitration without reservation, Respondent has entered into an arbitration agreement with Claimant [Carpatsky Delaware]. This occurred at latest when Respondent submitted its Statement of Defence...."

97. While not binding upon me, I find this reasoning persuasive. Like the tribunal I consider that, even if there was no arbitration agreement between them before this point, an agreement to arbitrate between Ukrnafta and Carpatsky Delaware was reached by the service of pleadings and by Ukrnafta's participation in the arbitration up to and including the service of the Statement of Defence. The Request for Arbitration should be regarded as an offer to arbitrate, reiterated by the Statement of Claim, and this was accepted by the service of the Answer and/or the Statement of Defence.

98. Again, I consider that this was an agreement 'in writing' for the purposes of s. 100(2)(a) of the 1996 Act, interpreted in accordance with s. 5 of the 1996 Act. It is within s. 5(2)(b), as being an agreement made by an exchange of communications in writing, or is within s. 5(3), and thus s. 5(2)(a), in that the parties by their conduct of the arbitration agreed to arbitrate by reference to terms which were in writing, namely the arbitration clause in the 1998 Addendum as modified by the agreement to arbitrate under the SCC Rules.

Arbitration agreement by waiver of right to challenge jurisdiction of arbitrators

99. Carpatsky's fifth argument was that there was, or must be considered to be, an agreement to arbitrate by reason of the fact that Ukrnafta waived its right to challenge the jurisdiction of the tribunal. Carpatsky relied on the fact that, as the tribunal (in paragraph 75 of its decision on Jurisdiction) and the Svea Court of Appeal (in its 30 November 2012 decision) found, an objection to the jurisdiction of the tribunal on a basis concerning the existence, validity or applicability of the arbitration agreement should, in accordance with Article 24(2)(ii) of the SCC Rules, have been brought no later than the Statement of Defence in the arbitration, and was not.

100. Carpatsky submits that when there has been a waiver of a right to object to the arbitrators' jurisdiction, which is effective in accordance with the terms of the rules governing the arbitration, then this should be regarded as an agreement to arbitrate, and indeed as being an agreement in writing for the purposes of s. 5 of the 1996 Act. It relied on *Born: International Commercial Arbitration Awards*, iii., 3483, which states that waiver is a universally accepted basis for submission to an arbitration agreement, and that there is 'no serious question' that a party can waive its right to challenge the existence of an arbitration agreement for the purposes of enforcement.

101. Mr Schaff QC for Ukrnafta submitted strongly that a waiver, even if effective under the procedural rules of the arbitration, did not constitute an agreement to arbitrate. He submitted that the argument that it did was analogous to the argument that an award might be enforced against a party, notwithstanding that it was not a party to an arbitration agreement, if it had not challenged the award in the curial courts. That argument, he said, had been comprehensively rejected in Dallah Co v Ministry of Religious Affairs of Pakistan [2011] 1 AC 763.

102. This is an important point, and one on which neither side could point to any direct authority in this jurisdiction. Given my findings in relation to the other arguments of Carpatsky on this issue, it is not necessary for my decision in relation to enforcement. I therefore prefer not to express a concluded view on it. It would be preferable for it to be decided in a case in which it was decisive.

Is there an issue estoppel relevant to the 'No Arbitration Agreement point'?

103. At the hearing both parties contended that there was an issue estoppel in its favour which was relevant to the determination of the 'No Arbitration Agreement point'. Ukrnafta relied on the decisions of the Ukrainian courts in the 2009 proceedings and the 2013 proceedings. Carpatsky relied on the 2012 decision of the Svea Court of Appeal.[11]

104. The requirements of an issue estoppel were identified by Clarke LJ in Good Challenger Navegante S.A. v Metalexportimport S.A. [2003] EWCA Civ 1668 at [50] as follows: (1) that the judgment must be given by a foreign court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings.

[11] The decision of the Stockholm District Court of 13 December 2011 was not relied on as creating an issue estoppel, because it had been the subject of an appeal.

105. Given the conclusions which I have expressed above, it seems to me clear that no issue estoppel has any significant bearing on the result of the 'No Arbitration Agreement point'. This is because I have concluded that an arbitration agreement was concluded in accordance with Carpatsky's third and fourth arguments set out above, namely in 2007 or 2008 by the agreement between the parties' representatives and/or by Ukrnafta's participation in the arbitration. There was no determination of the Ukrainian courts in relation to those issues, and I did not understand Ukrnafta to contend otherwise.

106. Equally, as I have not decided that there was an arbitration agreement by reason of Ukrnafta's having lost the right to object to the jurisdiction of the tribunal, the decision of the Svea Court of Appeal of 30 November 2012 does not give rise to an issue estoppel which is of significance to my determination on the 'No Arbitration Agreement' point.

107. The issue of whether there is an issue estoppel as a result of the 2009 and/or 2013 Ukrainian decisions which affects Carpatsky's first argument, namely that there was an arbitration agreement in the 1998 Addendum, is thus not determinative of any matter on this application. I should, nevertheless, express my conclusions in relation to it.

108. For these purposes I will assume that each of the 2009 and 2013 Ukrainian decisions can be said to be decisions 'on the merits', within the meaning of that concept explained by Lord Brandon in DSV Silo und Verwaltungsgesellschaft mbH v The Owners of The Sennar ('The Sennar') (No. 2) [1985] 1 WLR 490 at 499. Nevertheless, it is clear that none of the Ukrainian decisions decided, or considered, the question of whether there was a separable arbitration agreement with Carpatsky Delaware contained in the 1998 Addendum, if this issue was addressed as a matter of Swedish, as opposed to Ukrainian, law. Yet the issue with which I am concerned is, ultimately, that laid down in s. 103(2)(b) of the 1996 Act, namely whether the arbitration agreement is or is not valid under the law to which the parties subjected it, or failing any indication thereon, under the law of the place where the award was made. That, as I have found, is Swedish law. Accordingly, as the Ukrainian courts did not address the question of the existence of an arbitration agreement as a matter of Swedish law, I do not consider that they were deciding the same issue as the statutorily prescribed one which I have to determine.[12]

109. I recognise that this point does not apply to the determination of whether the 1998 Addendum itself, rather than the arbitration agreement, was valid, for that is a matter of Ukrainian law. Accordingly, Ukrnafta can still contend that at least the issue addressed in paragraph [84] above should be regarded as concluded by an issue estoppel. Even were that the case, however, it would have no effect on my decision in relation to Carpatsky's first argument, because of the point in paragraph [86] above.

110. In any event, I would have concluded, had it been necessary, that to recognise an issue estoppel as precluding Carpatsky from successfully contending that there was a valid

[12] At least in parts of its argument, Ukrnafta accepted that a decision on such an issue but applying a different law would not give rise to an issue estoppel: Ukrnafta opening skeleton, heading before and para. 83, para. 88, para. 89(b).

agreement between itself and Carpatsky Delaware contained in the 1998 Addendum, would be unjust, and that no estoppel should be recognised for that reason. As Ukrnafta itself accepted, applying what was said by Lord Upjohn in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2) [1967] 1 AC 853 at 947, and by Lord Keith in Arnold v National Westminster [1991] 2 AC 93 at 109, issue estoppel is always subject to an overriding consideration of justice. In my judgment it would not be in accordance with justice to recognise an effective issue estoppel to the effect that the 1998 Addendum did not constitute a valid agreement in circumstances where (1) the action in the Ukrainian courts which led to that finding was one which was brought after the arbitration had been commenced, (2) the decision alleged to found the issue estoppel was made after the arbitration tribunal had determined that it had jurisdiction, (3) that action was commenced in the courts of a state different from the neutral place chosen for the arbitration and which was the 'home state' of one of the parties, (4) the eventual award in the arbitration finding that there was a valid agreement has been upheld by the curial courts, and (5) the finding which is said to give rise to the issue estoppel is different from that which this court, having received evidence on the relevant issue, would itself make in the absence of an issue estoppel (see paragraph [84] above). In my judgment it would significantly undermine the effectiveness of the international scheme for enforcement of arbitration awards to recognise an issue estoppel which might bar enforcement of the award in such circumstances and would be unjust.

The 'Article 20.1 point'

111. This is the first of the two points on 'procedural irregularities' which Ukrnafta pursued at this hearing.

112. The background to the point is that, in the arbitration, Carpatsky had claimed damages for the losses which it had suffered by reason of Ukrnafta's refusal to allow it to 'top up' its interest in the JAA. This was a claim for loss of profits. Ukrnafta contended that, as a claim for lost profits, it was not a claim for 'direct losses' and accordingly that recovery was barred by Article 20.1 of the JAA, which I have quoted above. Carpatsky, in response, contended that its claim was for direct loss and was permitted under Article 20.1 of the JAA, and that damages which were not direct losses could in any event be recovered pursuant to Article 33 of Ukraine's Foreign Economic Activity Law, which imposed a 'full material liability' on a wrongdoer.

113. At the arbitration hearing in September 2009, towards the end of Prof. Kuznietsova's evidence, which was in effect the end of the hearing as well, the Chairman of the tribunal asked her whether any limitation of liability could be invoked even if the wrongdoer had intentionally breached the contract. Prof. Kuznietsova's evidence was to the effect that it could. There was then some subsequent treatment of this issue in the post hearing briefs, which will be referred to later. In the Final Award, at paragraphs 323-325, the tribunal found that Ukrnafta's liability was not limited by Article 20.1 because it had been in intentional breach of the JAA in that, knowing that Carpatsky had been interested in participating in the drilling of new wells, Ukrnafta had prevented it from doing so. The tribunal further found that whether Ukrnafta had known that, legally, its conduct amounted to a breach was not relevant; and that Article 614 of the Ukrainian Civil Code was a provision that prevented the limitation of liability in the case of intentional conduct. The tribunal considered that the point had not been raised too late: it had been raised during the hearing with Prof.

Kuznietsova; Carpatsky had dealt with it in its first post hearing brief, and Ukrnafta had responded in its second post hearing brief. 'Hence, both Parties had ample opportunity to set out their respective positions with regard to the legal issue.'

114. Ukrnafta contended before me that this constituted a serious irregularity, which had involved a failure of due process. It contended that the point was one which not been advanced by either party, lacked factual or expert support, and which it had not been able properly to explore in the post hearing submissions in the arbitration. It said further that the tribunal had not referred to its argument that Article 614 of the Civil Code was not applicable to agreements entered into before 1 January 2004. And it referred to the fact that there had been no Ukrainian law evidence on the meaning of 'intentional', or as to what would be required to be shown if the issue was potentially relevant. Ukrnafta contended that, in these circumstances, the exception to enforcement provided by s. 103(2)(c) of the 1996 Act was applicable, in that it was unable to present its case. Alternatively, s. 103(2)(e) was applicable, in that the arbitral procedure was not in accordance with the agreement of the parties.

115. Carpatsky denied that there had been any procedural irregularity. It contended that Ukrnafta had had proper opportunity to present its case; and that if and insofar as it did not do so, that was its responsibility.

116. As a primary point, however, Carpatsky contended that this complaint was not open to Ukrnafta in these enforcement proceedings. It pointed to the following matters:

> (1) That in the Swedish challenge proceedings, Ukrnafta had made a complaint that the tribunal had exceeded its mandate or committed a procedural error in the way in which it dealt with Article 20.1, and that these complaints had been rejected by the Svea Court of Appeal in its judgment of 26 March 2015; and
>
> (2) That Ukrnafta had again raised issues as to the tribunal's treatment of Article 20.1 in the Texas proceedings, and its case had been rejected by the US District Court.

117. Carpatsky contended that in circumstances where a remedy had been refused by the supervisory or curial court (ie here the Swedish courts) in relation to the conduct of the arbitration, the English court would not reinvestigate matters which had been considered by the supervisory court in the absence of 'exceptional circumstances'. In any event, it submitted that the decisions of the Svea Court of Appeal and of the US District Court gave rise to issue estoppels. It further contended that there was room in this connexion for the application of the principle in Henderson v Henderson whereby, if a party had brought an unsuccessful challenge before the curial court, it might be precluded from raising not just the points which it had then taken but points which, with reasonable diligence, it should have taken.

118. In support of its contention that it would only be in 'exceptional circumstances' that the English courts would re-examine matters which had been considered by the supervisory courts, Carpatsky referred to and relied upon what was said by Colman J in Minmetals Germany GmbH v Ferco Steel Ltd [1999] CLC 647, at 660-661, as follows:

> 'In the present case, the public policy issue arises in the context of a New York Convention award made pursuant to a Chinese arbitration clause by the agreed Chinese arbitral authority. In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure, but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award.
>
> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated.'

119. Mr Schaff QC for Ukrnafta contended that much of what Colman J had said in Minmetals could not stand in the light of the decisions of the Court of Appeal and Supreme Court in Dallah. He submitted that what Dallah had made clear was that a party resisting enforcement of an award did not have to seek to set it aside in the curial courts and could rely in the enforcement court on the invalidity of the award notwithstanding that it had not sought to do so. He recognised that Dallah was a case in which there had been no challenge before the curial courts; and that if an unsuccessful challenge were made in the curial courts it might 'give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought', to use the words of Lord Collins in Dallah at [98]. But he submitted that that simply recognised that such a decision could create an issue estoppel in accordance with normal principles. There was no room for any particular primacy or unusual deference to be accorded to decisions of the curial courts.

120. I accept Mr Schaff QC's submission that a party is not precluded from resisting enforcement on the grounds set out in s. 103(2) of the 1996 Act by reason only of the fact that it has not challenged the award in the curial courts; and that it would 'rarely, if ever, be right to recognise or enforce [an award] solely on the grounds that [the

party opposing enforcement] has failed to take steps to challenge it before the supervisory court' (Dallah in the Court of Appeal at para. [61] per Moore-Bick LJ).

121. Nevertheless, in my judgment 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, as Colman J said in Minmetals. This is reflected in s. 103(5) of the 1996 Act, which expressly provides that the English court may adjourn questions of enforcement pending a decision of the curial courts on an application to set aside or suspend an award. Furthermore, in assessing whether there is an issue estoppel arising from a decision of the supervisory courts in relation to a procedural issue in relation to the arbitration, this court should not adopt an overly-narrow approach to whether the same issue as was raised before it has been decided by the supervisory court.

122. Whether there is an issue estoppel always depends on whether there is 'substantial identity between the *res judicata* and an issue in the later proceedings' (see *Spencer Bower and Handley: Res Judicata* (5th ed.), 8.05). In my judgment, in the present context, if substantially the same complaint as to the procedural fairness or irregularity of the arbitration, which is presented to this court as a reason for non-enforcement under s. 103(2)(c), (d) or (e) of the 1996 Act, has been made and decided upon by the supervisory court, then that should be regarded as precluding the point being raised again, unless it can be plainly perceived that it would cause injustice to recognise an issue estoppel in the circumstances. In determining whether the complaint is substantially the same, I consider that it is necessary to look at whether the complaint made to the supervisory court relied on substantially the same factual allegations as to what the tribunal did or did not do, and relied on those matters as being a failure to comply with a standard or requirement which is the same as or not materially different from those laid down in s. 103(2)(c), (d) and (e) of the 1996 Act.

123. Further, I consider that there is scope in this context for the application of the Henderson v Henderson abuse of process principle; and thus that it is open to the court to find that it is an abuse of its process for a party to raise here a challenge to enforcement which it could and should have raised in challenge proceedings which have taken place in the curial court. That there is room for the application of such an approach in relation to foreign proceedings is clear from Dallal v Bank Mellat [1986] 1 QB 441, esp at 451-4, 462-3; and that the approach is applicable in the context of the enforcement of New York Convention awards was recognised by the Hong Kong Special Administrative Region Court of Appeal in Hebei Import and Export Corp. v Polytek Engineering Co. Ltd. (1999) 2 HKCFAR 111. For there to be a finding of an abuse of process the English court would have to be satisfied that the relevant point could and should have been raised in the proceedings which have taken place in the curial court and that there were no special circumstances which made the application of the principle inappropriate.

124. I do not regard the recognition of the potential application of the Henderson v Henderson principle in this context as being inconsistent with the decision or reasoning of the Court of Appeal or Supreme Court in Dallah. It is one thing to say that a party is not precluded from bringing a challenge to enforcement of an award under s. 103(2) by reason of not having challenged the award in the curial courts; it is another to say that, if he has indeed challenged the award in those courts unsuccessfully, he should be able to bring forward before an English enforcing court

another aspect of such a challenge which he could have put before the supervising court. I consider that there are good grounds for saying that he should not, unless there are special circumstances which render the application of any such principle inappropriate. To recognise that the Henderson v Henderson principle is potentially applicable in relation to decisions of the supervisory courts on procedural issues would appear to me to be consistent with the policy of sustaining the finality of decisions of the supervisory courts recognised in Minmetals.

125. I was referred to the decision in Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd[2018] EWHC 2713 (Comm). Cockerill J there recognised what she called the 'Minmetals principle'. It was also submitted to me, however, and in particular by reference to paragraphs [58]-[59] of her judgment,[13] that Cockerill J adopted an approach in this area whereby there could be no issue estoppel if there were a new 'iteration' or 'manifestation' of an argument, and that it would only be if the argument was 'exactly the same with no differences' as that put before the curial court that there would be an issue estoppel. I do not read Cockerill J as having been seeking to confine the potential application of issue estoppel in this area in that fashion, and I do not consider that would be a correct description of the circumstances in which an issue estoppel might arise in this context. Furthermore, it does not appear that Cockerill J was addressed with arguments as to the potential applicability of the Henderson v Henderson principle.

126. What I have said above relates to decisions by the supervisory courts. There may be different considerations as to whether to recognise an issue estoppel as a result of decisions of *enforcement courts* other than the supervisory courts, including in particular how those decisions might relate to what has been held (or not held) by the supervisory courts. There seems no reason why there should be a different approach to identifying, for the purpose of issue estoppel, whether the issue decided by another enforcement court in relation to a procedural objection relating to the arbitration is the same as or different from that being raised in an English court which is being asked to enforce an award. It may well be, however, that English courts would not apply a Henderson v Henderson approach to decisions of enforcement courts, or would less readily consider that there was any abuse of process involved in a point being taken here which could have been but was not taken in such a court.

127. Against that background, it is necessary to consider the two decisions relied upon by Carpatsky in rather more detail. I did not understand there to be any dispute that the decisions of the Svea Court of Appeal in the Swedish challenge proceedings and of the US District Court of 2 October 2017 were (a) decisions of courts of competent jurisdiction; (b) between the same parties; and (c) final and conclusive and on the merits. The question is whether they decided the same issue as is now raised.

128. In the Svea Court of Appeal, the court summarised Ukrnafta's argument as involving that the tribunal had exceeded its mandate or that there had been an irregularity in the course of the proceedings which probably influenced the outcome within s. 34(2) and (6) of the Swedish Arbitration Act because (a) Carpatsky had not 'duly invoked' the point that Ukrnafta's breach was intentional, (b) Carpatsky had invoked the point only after the proceedings were declared to have been closed, (c) Ukrnafta had not had an

[13] Ukrnafta's Closing Submissions, para. 125(d).

opportunity to present its case on intentional breach by 'invoking legal facts and adducing evidence on the issue' and (d) the tribunal had not considered Ukrnafta's other objections on the point.

129. The Svea Court of Appeal's decision in relation to this appears at pages 16-18 of its judgment. It held:

> (1) That Carpatsky had raised the issue of Ukrnafta's breach being intentional in its first post hearing brief and that this was permissible in accordance with Article 34 of the SCC Rules;
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> (2) As to the suggestion that Ukrnafta had not had sufficient opportunities to present its case: the point had been raised by the chairman during the hearing; Ukrnafta had had, and taken, the opportunity to deal with the point further in its second post hearing brief; and 'the conclusion to be drawn from this is that Carpatsky's position on the issue of an intentional breach of contract must have been apparent to Ukrnafta and that the company had been afforded sufficient opportunity to present its case';
>
> (3) Given the tribunal's conclusion that Ukrnafta had committed an intentional breach of contract there was no reason for the tribunal to consider other objections presented by Ukrnafta concerning a limitation of liability under Article 20.1;
>
> (4) Accordingly, 'In the opinion of the Court of Appeal, the mandate has thus not been exceeded nor an irregularity committed during the arbitration proceedings in these respects.'

130. In my judgment, Ukrnafta's Article 20.1 complaint in these proceedings is substantially the same complaint which was made to and rejected by the Svea Court of Appeal in the Swedish challenge proceedings, and that that court's decision was on the same issue as is sought to be raised now. I thus conclude that it created an issue estoppel.

131. I would add that if, which I do not consider to be the case, any refinements of the argument now put forward on this point by Ukrnafta mean that what is involved is a different issue, then those points should have been put forward in the Swedish challenge proceedings, and the Henderson v Henderson abuse principle would preclude Ukrnafta from successfully raising those points in these proceedings.

132. In case I am wrong in relation to that conclusion as to the preclusive effect of the decision of the Svea Court of Appeal, it is necessary to consider further the decision of the US District Court for the Southern District of Texas of 2 October 2017. One of the arguments put forward by Ukrnafta to the District Court as to why, pursuant to Article V of the New York Convention, the Final Award should not be enforced was that it had been unable to present its case, and in particular that it had not had the opportunity to respond to the imposition of damages in excess of the contractual limitation of liability (see pages 22-23 of Memorandum Opinion and Order).

133. At pages 23-27 of the Memorandum Opinion and Order the US District Judge, Judge Gray H. Miller, conducted a detailed analysis of what had occurred at the arbitration. Having done so, he concluded:

> 'Here, in order to determine if Ukrnafta was afforded due process, the court must determine whether Ukrnafta was given an opportunity to respond at a meaningful time and in a meaningful manner. The arbitration tribunal clearly instructed the parties that it 'would like to be able to make [its] award essentially based on the post-hearing briefs'. It advised the parties to discuss 'all issues which are important and relevant and have been discussed here', and it specifically requested briefs 'that can stand very much on their own'. There was no page limitation. And the tribunal advised the parties to let it know if something was 'strange or unclear'. Moreover, it gave the parties a procedure for requesting to file more documents. The written instructions did contain an instruction that the parties could not amend or supplement their cases in the post-hearing briefing, but [Carpatsky's] legal argument countering what Ukrnafta's expert said in the hearing regarding Ukrainian law was within the bounds of 'issues which are important and which have been discussed here. Ukrnafta had a chance to respond to the argument in its response brief, and there was a procedure for requesting to submit more documents if Ukrnafta felt that was necessary to adequately rebut [Carpatsky's] assertions in its post-hearing brief.
>
> The court finds that Ukrnafta had sufficient notice that this was an issue in the case and sufficient ways in which to adequately address the issue. It had an opportunity to be heard and was thus afforded due process. … Ukrnafta's objection that it was not afforded due process because it did not have an opportunity to respond to the limitation of liability issue is OVERRULED.'

134. Most of the aspects of Ukrnafta's argument in front of the Texas court on this point were identical or virtually identical to its complaint to this court, and in particular that it had not been given a proper opportunity to present its case on the issue of the non-applicability of the limitation of liability contained within Article 20.1 of the JAA. It seems to me clear that the complaint made on this score in Texas was substantially the same as that made here and in rejecting it the decision of the Texas court was a decision on the same issue as is now sought to be raised here. In particular, it does not appear to me that there was any significant difference between what the US District Court would have considered to amount to a relevant failure of due process and what the English court would consider a proper opportunity for a party to present its case. There also appear to me no other reasons why an issue estoppel should not be recognised as a result of the decision of the US District Court, not least because it is not inconsistent with the decision of the supervisory court.

135. In those circumstances, I find that, even if no issue estoppel arose as a result of the decision of the Svea Court of Appeal, there is an issue estoppel as a result of the decision of the US District Court.

136. Accordingly, I do not consider that an objection to enforcement on the basis of procedural irregularity in relation to the way in which the Article 20.1 point was dealt with is open to Ukrnafta. Even if it had been, I would not have been persuaded that Ukrnafta had made out a case for non-enforcement under s. 103(2)(c) or (e). Specifically:

(1) Even if not constrained by it by reason of an issue estoppel, I agree with the reasoning of the US District Court that Ukrnafta had an opportunity to address the issue of whether intentional breach was an answer to reliance on Article 20.1.

(2) Equally, I agree with the analysis of the Svea Court of Appeal that the tribunal's direction of 8 September 2009 that the parties should not amend or supplement their cases from then on, did not preclude Carpatsky from developing the point as to intentional breach, given that that point had been raised at the hearing and given that the proceedings were not declared concluded for the purposes of Article 34 of the SCC Rules until February 2010.

(3) Had Ukrnafta considered that it needed further evidence on the issue of intentional breach and whether intentional breach was an answer to its reliance on Article 20.1, it could have made an application to the tribunal. It did not do so. That is notwithstanding that it did make a 'Motivated Request' for the introduction of additional evidence on other matters. That Request was made on 13 November 2009, ie after the submission of the first post hearing briefs by each party.[14]

(4) Ukrnafta has particularly emphasised, at the present hearing, that it had raised the argument that Article 614 of the Civil Code was not applicable because of the date of entry into of the JAA, but the tribunal had not mentioned its arguments on this score. However, a failure by the tribunal expressly to mention a point does not amount to the denial to a party of the ability to present its case within s. 103(2)(c) of the 1996 Act. Furthermore, if Ukrnafta had had a cogent complaint about the failure by the tribunal to deal with this point, it could have sought that the tribunal should correct, interpret or add to the Final Award in this respect – as it did in a number of others - but it did not do so.[15]

(5) As to s. 103(2)(e), in order to rely on that provision successfully Ukrnafta would have had to 'show a material breach of the arbitration agreement that was not an inconsequential irregularity' (per Cockerill J in Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd at [63]). Given that the arbitration was conducted pursuant to SCC Rules, Ukrnafta would have had to establish a material and consequential breach of SCC Rules, or possibly of Swedish law. It has not done so. Furthermore, a case that there had been a breach of mandate by the tribunal was rejected by the Svea Court of Appeal. That is a decision by an authoritative Swedish court that there had not been a breach of the arbitration agreement in the way in which the tribunal dealt with the issue of intentional breach. I find it highly persuasive, even if it does not determine the answer I should give.

The 'Damages Model point'

137. Ukrnafta's second complaint of procedural irregularity relates to the treatment of the model for the assessment of damages.

[14] E5/136.
[15] E7/149.

138. It contends that the tribunal made two serious errors in its application of the damages model used by the experts. It says that the tribunal took the wrong starting point in using a figure of US$436 million as the basis of its calculations. That, it says, overlooked a further deduction of US$18 million which Carpatsky's expert, Mr Kaczmarek, had accepted should be deducted. It contends that, taking that US$18 million into account, the starting point should have been US$418 million.

139. Secondly, Ukrnafta says that the tribunal failed to approach the experts' model on the undisputed basis that multiple adjustments to assumptions inputted into the model by Mr Kaczmarek would have a non-linear effect on the resulting calculations. Ukrnafta contends that had this been appreciated and the model correctly applied to the correct starting point the quantum figure at which the tribunal should have arrived was US$83.2 million less than that which was awarded.

140. Ukrnafta recognises that it sought to have these mistakes corrected by the tribunal under Articles 41 and 42 of the SCC Rules and s. 32 of the Swedish Arbitration Act by its request dated 22 October 2010, but the tribunal declined the invitation.[16] As Ukrnafta submits, this was on the basis that the tribunal considered that this was, if anything, a case of 'wrong thinking' which it had no power to correct.

141. Ukrnafta's case is that the tribunal's failures in these respects were 'serious departures from the agreed or undisputed basis upon which [it] was to approach the calculation of [Carpatsky's] damages'.[17] This is said to have amounted to (a) a denial to Ukrnafta of the opportunity to present its case on the combined effect of the varied assumptions; (b) the tribunal's exceeding its mandate by, in effect, applying a model which was not that proposed by the parties' experts; and (c) the tribunal's adoption of an approach which was not in accordance with the agreed procedure.[18] I understood (a) to be a s. 103(2)(c) challenge, and (b) and (c) to be a s. 103(2)(e) challenge to enforcement.

142. Carpatsky's response was as follows:

> (1) In the first place, it contended that this challenge was a 'dressed up' attempt to challenge the tribunal's assessment of the evidence. As such it was wholly impermissible. Even if, which Carpatsky denied, the tribunal had made an error of fact, it was not challengeable by way of due process challenge.
>
> (2) In any event, there was an issue estoppel in relation to this challenge, deriving either from the 2015 decision of the Svea Court of Appeal in the Swedish challenge proceedings or from the decision of the US District Court.

143. I will take first the question of issue estoppel.

144. In the Swedish challenge proceedings, Ukrnafta made very detailed submissions as to the errors made by the tribunal in relation to damages, which included significant argumentation as to the error involved in the application of the model in a linear way, and as to the error of US$18 million, and an overall contention that the award had

[16] E7/149, 150, 151.
[17] Ukrnafta's Closing Submissions, para. 132.
[18] Ukrnafta's Skeleton Argument, para. 155.

been overstated by some US$83 million.[19] The Svea Court of Appeal summarised Ukrnafta's position, insofar as relevant to the point which Ukrnafta maintains on this application, as follows:

> 'Both parties adduced expert evidence during the arbitration proceedings in respect of the size of the loss, and showed through this evidence how the arbitral tribunal should calculate such loss, if any. The parties used the same calculation model, namely a model that expressed the discounted cash flow of future payments …
>
> The arbitral tribunal exceeded its mandate by setting adjusted values for some of the assumptions, but failed to apply the calculation model used by the parties. The arbitral tribunal simply subtracted the items. In any event, the arbitral tribunal committed an irregularity in the course of the proceedings that had an impact on the outcome of the case. Ukrnafta was not afforded an opportunity to express its views on the adjustments and was therefore denied the opportunity to present its case.'

145. The Svea Court of Appeal rejected this challenge at page 19 of its decision. The reasoning of the court was as follows:

> 'The Court of Appeal concludes that the arbitral tribunal's estimate of the loss is a substantive assessment and that the circumstances that the arbitral tribunal, according to Ukrnafta, had come to an incorrect result by not considering certain circumstances of importance when making the calculation cannot as such form grounds for challenge. If a party considers that certain conclusions should be drawn from the evidence, there is nothing preventing the arbitral tribunal from drawing completely different conclusions, and even if the parties are surprised by the arbitral tribunal's conclusions, this is no issue of any mandate having been exceeded or irregularity in the course of the proceedings having been committed.
>
> As mentioned above, this may on the other hand have been an issue of an irregularity that could form grounds for challenge if the arbitral tribunal had gone beyond a joint instruction provided by the parties, e.g. concerning the application of legal rules or the proceedings. However, in the opinion of the Court of Appeal, the mere circumstance that both of the experts in their calculations proceeded on the basis of certain common assumptions does not mean that the parties can be deemed to have provided a binding instruction to the arbitral tribunal to calculate the loss in a certain way. Nor does the arbitration award or the information provided by the parties during the arbitration proceedings, which Ukrnafta otherwise pointed out, suggest that the parties should have provided such instructions as alleged by the company. In the assessment of the Court of Appeal, the conclusion is therefore that no mandate has been exceeded nor any irregularity in the course of the proceedings committed as regards the arbitral tribunal's calculation of the loss.
>
> As concluded above, the fact that the arbitral tribunal deviated from the parties' calculations of the loss constitutes part of the tribunal's substantive assessment.

[19] E7/155A, especially para. 4.5 at 3842.25-33.

> There was no obligation for the tribunal to afford the parties an opportunity to express their views on this. Nor has there therefore been any irregularity in the course of the proceedings in this respect.'

146. In my judgment, the same complaint was made to and rejected by the Svea Court of Appeal as is being made on this application. By that I mean that there was a complaint based (a) on the same allegations as to what the tribunal did which it should not have done and (b) on the same allegations as to the standards which this contravened (namely breach of mandate and failure to afford Ukrnafta with a proper opportunity to present its case). The Svea Court rejected that complaint as a necessary part of its decision. In my judgment that created an issue estoppel which precludes Ukrnafta from arguing the same point again now.

147. Given my conclusions in relation to the preclusive effect of the decision of the Svea Court of Appeal, it is not necessary for me to form a concluded view as to whether the decision of the US District Court, which dismissed what seems to have been a very similar complaint, also created an issue estoppel. In this case, the arguments of Ukrnafta to the US District Court do not appear quite as clearly from the Court's judgment as they do in relation to the Article 20.1 point, and I have not been shown the submissions which were put in by the parties in the Texas enforcement proceedings. In view of those matters, I prefer not to an express a concluded view on this further alleged issue estoppel.

148. In case I am wrong as to there being an issue estoppel arising as a result of the Svea Court of Appeal, I will give my own conclusions as to whether Ukrnafta has a valid ground for resisting enforcement of the Final Award by reason of the way in which the tribunal dealt with the damages model. I consider that it does not. If the tribunal went wrong in the manner contended for by Ukrnafta, that was not a failure to conform to the arbitration agreement. The arbitration agreement was governed by Swedish law and I would in any event, even without an issue estoppel, have seen no reason not to accept the conclusion of the Swedish courts that there was no breach of mandate, which I see as addressing this issue. Nor was this a case where Ukrnafta did not have a fair opportunity of presenting its case. Both parties had ample opportunity to address the tribunal on damages; both parties submitted expert's reports; and both parties' expert witnesses attended the hearing and were cross-examined. This is, rather, a case where Ukrnafta says that the tribunal got the answer wrong by misunderstanding or misapplying the evidence, and reaching a result which did not follow rationally from the evidence. Those are not grounds for non-enforcement of an award under s. 103, any more than they would be grounds for setting aside or remission under s. 68 (see UMS Holdings Ltd v Great Station Properties SA [2017] EWHC 2398 (Comm) especially paras. 28 and 37-38).

Conclusion

149. In the result Ukrnafta's application to set aside the order granting permission to enforce the Final Award fails and will be dismissed.