BRIEFING NOTE: ISSUE ESTOPPEL AND ABUSE OF PROCESS IN ARBITRATION ENFORCEMENT PROCEEDINGS

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

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(1) Introduction

1. On 31 March 2020, Butcher J handed down judgment in *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm). Butcher J refused to set aside an order of Knowles J recognising an SCC arbitration award, and in doing so he considered the application of issue estoppel and abuse of process to the enforcement of arbitration awards and, in particular, the different weight to be given to decisions of the curial court compared with other enforcing courts.

(2) The Facts

2. On 24 September 2010, an arbitration award in SCC-administered arbitration proceedings ("**the Award**") was issued in favour of the Claimant ("**CPC**") in which the Tribunal awarded CPC US$145.7m against the Defendant ("**Ukrnafta**"). Knowles J subsequently made orders granting CPC permission to enforce the Award under s.101 Arbitration Act 1996 ("**AA**").

3. Ukrnafta applied to set the Knowles J order aside invoking a whole host of bases, but when it came to the trial it limited itself to three arguments:[1] (1) the absence of an arbitration agreement between itself and CPC; (2) procedural irregularity, in that the arbitral tribunal ("**the Tribunal**") dealt with an issue which was not pleaded or dealt with on the evidence; and (3) procedural irregularity in the method adopted for calculating damages.

4. At the time that the dispute arrived at the Commercial Court, multiple proceedings had already been brought in respect of the Award and the arbitration generally,

[1] Ukrnafta had also originally sought to run a case that the Award had been obtained by fraud, but this was summarily dismissed by Carr J (as she then was) in an earlier decision ([2019] 1 Lloyd's Rep. 296).

including in Sweden (the Courts of the seat), Ukraine (Ukrnafta's 'home state') and the USA.

(3) The Agreement to Arbitrate

5. The main thrust of the argument before Butcher J concerned the question whether there was a written arbitration agreement between CPC and Ukrnafta for the purposes of ss.100 and 103(2)(b) AA.

6. The important context underscoring all of Ukrnafta's arguments was as follows: Ukrnafta contended that the contract (the '1998 Addendum') relied upon by CPC as containing a written agreement to arbitrate was in fact executed by a now non-existent entity with the same name ("**CPC Texas**"), which was incorporated under the Laws of Texas. In 1996, CPC Texas changed its legal domicile from Texas to Delaware by merging CPC Texas into a newly formed Delaware entity also named CPC (*i.e.* the claimant in these proceedings) ([4]). As such, Ukrnafta argued there was no written arbitration agreement under the law to which the parties subjected it, or the law where the award was made (s.103(2)(b) AA).

The applicable law of the arbitration agreement

7. The first question was therefore what law governed the question whether there was a written arbitration agreement in the 1998 Addendum. Ukrnafta contended that Ukrainian law governed the question (unsurprisingly, as it had a 2013 judgment in its favour from the Ukrainian Courts to the effect that there was no valid agreement between the parties). Butcher J rejected this argument:

   7.1. Butcher J held that Ukrnafta was estopped, by its conduct in the original SCC arbitration, and in the Swedish Court proceedings, from contending that any law other than Swedish law governed the arbitration agreement. He accepted CPC's contention that Ukrnafta had "*repeatedly asserted, without reservation, that Swedish law governed the arbitration agreement*", and said:

> "*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." (at [65]).

7.2. In the event that his conclusions were incorrect, Butcher J further considered what the applicable law of the arbitration agreement was on general principles, adopting the three-stage enquiry required by English common law rules (see *Sul America v Enesa Engenharia* [2012] EWCA Civ 638, [25]). He considered that a choice of law clause in the 1998 Addendum that "*the law of substance of Ukraine*" was to apply "*on examination of disputes*" was only to apply to substantive issues, but not a choice of law governing the arbitration agreement ([67]). There was therefore no express choice of law.

7.3. In the absence of an express choice of law, he accepted CPC's argument that there was an implied choice of Swedish law: (1) because the choice of SCC arbitration and Stockholm as the place of arbitration were "*strong indicator*[s] *of an implied choice of Swedish law*"; and (2) because by choosing Sweden as the seat, the parties must be taken to have known that they were agreeing to the Swedish Arbitration Act, which provides for Swedish law to govern the arbitration agreement in the absence of an express choice of law (at [70]).

7.4. In any event, Butcher J considered that the law with which the 1998 Addendum had its closest and most real connection was the law of Sweden.

The arguments

8. It then fell to the Court to determine the substantive issues concerning the agreement to arbitrate under Swedish law. Applying Swedish law, Butcher J accepted CPC's first argument, that there was a valid arbitration agreement between CPC and Ukrnafta in the 1998 Addendum (see [76]).

9. Following that conclusion, Butcher J addressed CPC's further arguments concerning the existence of an agreement to arbitrate:

9.1. Butcher J accepted that even if there was no agreement to arbitrate contained within the 1998 Addendum, one was formed between the parties after CPC (not CPC Texas) served its request for arbitration and Ukrnafta served its

response thereto without any reservation as to jurisdiction. He considered at [92] that: "*when Ukrnafta's representatives agreed that the arbitration should proceed under SCC Rules, they must be taken to have been agreement with* [CPC] *to arbitrate its claims against Ukrnafta*". This conclusion followed, in part, from the fact the 1998 Addendum had provided for UNCITRAL rules to apply, but the parties had instead agreed to proceed under the SCC Rules.

9.2. He further accepted that an agreement to arbitrate *also* arose from Ukrnafta's participation in the proceedings, and exchange of pleadings. Ukrnafta's Answer to the Request for Arbitration failed to provide any reservations concerning jurisdiction ([96]-[98]).

10. A further interesting issue in the case was whether an arbitration agreement in writing arose as a result of waiver or a failure on the part of Ukrnafta to take a jurisdiction point when it ought to have done so (as the Swedish Svea Court of Appeal had determined). Butcher J considered that the question did not need to be answered, and that as a result a decision on the point was better left for a case in which the point was decisive (at [102]).

Issue estoppel and an agreement to arbitrate

11. Finally, on the existence of an agreement to arbitrate, Ukrnafta contended that there was an issue estoppel operating in its favour as a result of proceedings in 2009 and 2013 in Ukraine, both in relation to the existence of an arbitration agreement, and the validity of the underlying contract.

12. Butcher J accepted the requirements of issue estoppel identified in *Good Challenger Naveganta SA v Metalexportimport SA (the "Good Challenger")* [2003] EWCA Civ 1668, [50]. In particular, he considered that as the Ukrainian decisions did not address the question of the existence of an arbitration agreement under Swedish law they created no issue estoppel (there being no 'identity of subject matter' between the proceedings) ([108]).

13. Ukrnafta had put forward a further argument: that the 1998 Addendum itself (which was governed by Ukrainian law), rather than the arbitration agreement (which was

governed by Swedish law), was invalid as a matter of Ukrainian law, and CPC was issue estopped from arguing otherwise. Although Butcher J had already disregarded that argument as a matter of substance at [81]-[87], he went further, and held that he would nevertheless have exercised his discretion not to recognise an issue estoppel in any event. He considered that doing so would be unjust for a number of reasons, which he stated at [110] as follows:

> "*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*" (emphasis added).

Butcher J thereby gave effect to the principle that issue estoppel is always subject to an overriding consideration of justice.

(4) Procedural irregularity, issue estoppel and the principle in *Henderson v Henderson*

14. Ukrnafta raised two issues of procedural irregularity by which it alleged that the Knowles J order should be set aside. First, at the end of the arbitration hearing a Ukrainian law limitation of liability issue arose, which had not been addressed thus far, and was only addressed in writing in the post-hearing briefs. Ukrnafta contended that this was a failure of due process, because it did not have an opportunity properly to present its case. Secondly, Ukrnafta argued that the Tribunal's treatment of the model for the assessment of damages also constituted an abuse of process.

15. CPC denied this, but also contended that these arguments were not open to Ukrnafta, either (i) because they had been raised by Ukrnafta in its proceedings to challenge the

Award before the Swedish courts, and the US District Court for the Southern District of Texas in challenge and enforcement proceedings respectively, and rejected; or (ii) because even if these complaints had not been expressly made, Ukrnafta could have advanced these complaints in either or both of these proceedings. CPC's case was therefore that those decisions gave rise to issue estoppels, or engaged the abuse of process rule in *Henderson v Henderson* [1843–60] All ER Rep 378.

16. CPC also relied upon Colman J's judgment in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, pp.660-661, to the effect that the English courts would not reinvestigate matters which had been considered by the supervisory court in the absence of 'exceptional circumstances'. As Colman J stated, "*where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will … 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*". Ukrnafta contended that Colman J's judgment could not stand in light the decisions of the Court of Appeal ([2009] EWCA Civ 755) and Supreme Court ([2010] UKSC 46) in *Dallah Co v Ministry of Religious Affairs of Pakistan*, which it argued made clear that a party resisting enforcement did not have to seek to set it aside in the curial courts.

17. Butcher J made the following two key points on the correct approach to abuse of process and issue estoppel in the enforcement context:

    17.1. First, a party is not precluded from resisting enforcement under s.103(2) AA by reason only that it has failed to challenge the award in the curial courts ([120], accepting Moore-Bick LJ in the Court of Appeal in *Dallah* at [61]); and

    17.2. Secondly, there is nevertheless a public interest to be accorded to sustaining the finality of the decisions of the curial courts on properly referred procedural issues arising from the arbitration (citing Colman J in *Minmetals*) (at [121]). This is reflected in s.103(5) AA, wherein the English court may adjourn enforcement proceedings pending a decision of the curial courts on an application to set aside.

18. As to issue estoppel, Butcher J accepted ([122]) that if "*substantially the same complaint as to the procedural fairness or irregularity of the arbitration*" which is presented to the English court as a reason for non-enforcement has been presented to the supervisory court and rejected, this would 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*".

19. Butcher J, in the same paragraph, gave the following guidance as to when a complaint is *"substantially the same*":

> *"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 (3) of the 1996 Act*."

20. He also considered (at [123]-[124]) that there was scope for the application of the doctrine in *Henderson v Henderson* despite the decisions of the Court of Appeal and Supreme Court in *Dallah*. It is therefore open to the courts (in an appropriate case) to find that it is an abuse of process for a party to raise a challenge that it could and should have raised in challenge proceedings in the curial court. The decision of Cockerill J in *Eastern European Engineering v Vijay Construction (Pty) Ltd* [2018] EWHC 2713 (Comm) at [58]-[59] should not be read as endorsing the approach that there is no issue estoppel just because the challenging party is able to come up with a new iteration or manifestation of an argument.

21. However, Butcher J recognised that there was a difference in approach as between curial courts and enforcing courts, at [126]:

> *"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."*

22. Against that background, Butcher J considered that Ukrnafta's limitation of liability complaint was barred by issue estoppel, and that any refinements on it which meant that the Court was being asked to consider a different issue would be an abuse of process under the rule in *Henderson v Henderson*. This applied both to the decision of the Swedish Svea Court of Appeal, but also to the decision by the Texas District Court ([130]-[134]). There was also an issue estoppel in relation to the damages model point ([146]) by reference to the Swedish Svea Court of Appeal's decision.

23. In the circumstances, Butcher J refused Ukrnafta's application to set aside the order granting permission to enforce the award.

(5) Conclusions and takeaways

24. The Commercial Court's decision underscores the importance of decisions of the curial courts to all parties in arbitration. Although the decision in *Dallah* can provide some relief to a party who has not challenged enforcement in the curial courts, parties who fail in the curial courts may find it very difficult to succeed in the same or similar arguments before the English courts. Of course, this presents respondents with a double-edged sword: if they bring all of their arguments before the curial court and lose, an issue estoppel may arise preventing them from relying on the same points before the English courts on an application for enforcement. But, if they choose to keep some arguments in reserve (perhaps in the hope that an English court will be more likely to accept them than the curial court), they may be prevented from relying on them by the abuse of process doctrine.

25. Also interesting is the differing weight that was put on decisions of the Swedish curial courts as compared with enforcing courts. Butcher J considered that the Texas District Court was also capable of creating an issue estoppel in CPC's favour. However, he refused to accept that the same would also be true of the Ukrainian Courts' decisions in Ukrnafta's favour. This emphasises the broad considerations that apply when issue estoppel and abuse of process are considered, and underscores that their underlying aims include public policy and justice.

26. The decision represents, once again, a pro-enforcement approach on the part of the English courts, but it should be remembered that issue estoppel and abuse of process will not always provide assistance to a party seeking enforcement. For example, where enforcement rests on a question of public policy, the English courts have considered that there is no issue estoppel where the public policy of the jurisdiction in question differs from English public policy (e.g. *Yukos Capital SARL v Rosneft (No 2)* [2012] EWCA Civ 855, [151]).

27. An interesting point arising from the judgment, which remains undecided, is whether an arbitration agreement in writing can arise from waiver or a failure to take a jurisdiction point before a tribunal, when it ought to have done so. There does not appear to be any English authority directly on this point, though the point is considered in practitioner's texts (e.g. Born *International Commercial Arbitration Awards* Vol III, page 3483). Since s.5(2)(c) AA permits an arbitration agreement in writing simply to be 'evidenced' by writing, one might assume that a written arbitration agreement can arise by waiver, evidenced by the parties' pleadings in the arbitration, which would prevent a party resisting enforcement from denying the existence of such an agreement. However, whether that is correct as a matter of English law falls to be decided in another case.

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