

# No “Second Bite At The Cherry”: English Court Prevents Party Raising NY Convention Defences to Enforcement Already Decided in Other Jurisdictions

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The recent English High Court decision in *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm) provides useful guidance on the English courts’ approach to determining whether a party is entitled to resist the enforcement of an award on one of the grounds set out in s. 103(2) of the Arbitration Act 1996 (which implements the grounds for refusal of recognition and enforcement of awards set out in Article V of the 1958 New York Convention), in circumstances where similar issues have already been addressed, or should reasonably have been addressed, in earlier proceedings in other jurisdictions relating to the recognition or enforcement of the award.

The High Court’s decision arose from PJSC Ukrnafta’s (“**Ukrnafta**”) challenge to Carpaty Petroleum Corporation’s (“**Carpatsky**”) application to enforce a USD 145.7m final SCC award dated 24 September 2010. Ukrnafta had already brought unsuccessful challenges before the Svea Court of Appeal in Sweden (as the seat of

the arbitration) and the US District Court in Texas (in the context of enforcement), and Carpatsky successfully contended that Ukrnafta was precluded from challenging the award again before the English courts.

This post focuses on the High Court's treatment of Ukrnafta's argument that the tribunal had dealt incorrectly with a point of law in respect of limitation of loss, and had thereby both failed to give Ukrnafta an opportunity to present its case and departed from the arbitration procedure agreed by the parties.

Ukrnafta also sought to argue that the tribunal lacked jurisdiction because there was no valid arbitration agreement between the parties and that the tribunal had misapplied the damages model used by the parties. These arguments were likewise dismissed.

## **Background to the High Court Proceedings**

Carpatsky and Ukrnafta were party to a joint venture to develop and exploit the Rudivisko-Chervonozavodskiy gas field in Ukraine. The terms of the joint venture were set out in a Ukrainian law governed Joint Activity Agreement (the "**JAA**"), pursuant to which each party was to provide 50% of the investment in the project.

Between 1997-2003 Carpatsky suffered financial difficulties and as a consequence reduced its investment from 50% to around 15%. However, from 2004 its fortunes improved and it sought to restore its stake to 50%. Ukrnafta refused to agree and in 2007 Carpatsky commenced arbitration proceedings to recover its lost profits. The arbitration (seated in Stockholm under the SCC Rules 2007) lasted until 2010 and concluded with a final award in Carpatsky's favour.

One of the issues determined in the award was whether Carpatsky's claim for loss of profits was excluded by Article 20.1 of the JAA, which restricted recoverable losses to those that were "*direct*". The tribunal concluded that under Ukrainian law, while Article 20.1 would generally exclude a claim for loss of profits, Carpatsky's claim was not so limited because Ukrnafta had *intentionally* breached the JAA by preventing Carpatsky from investing in the project.

Following the issuance of the award, Ukrnafta brought proceedings in Sweden (as the supervisory jurisdiction) seeking to have the award set aside on the basis that

Carpatsky had not “*duly invoked*” the point regarding the intentionality of Ukrnafta’s breach – instead, the point had been raised by the tribunal at the final hearing – and that Ukrnafta had not been able to present its case on the issue. Separately, Ukrnafta also sought to challenge enforcement of the award in Texas, arguing again that it had been unable to present its case. Both the Svea Court of Appeal in Sweden<sup>[fn]</sup>Judgment dated 26 March 2015.<sup>[/fn]</sup> and the US District Court in Texas<sup>[fn]</sup>Judgment dated 2 October 2017.<sup>[/fn]</sup> rejected Ukrnafta’s arguments.

## **The Arguments before the High Court**

Ukrnafta argued that the tribunal’s treatment of Article 20.1 constituted a serious irregularity, which operated to bar the enforcement of the award under s. 103(2) of the Arbitration Act 1996 (which gives effect in England and Wales to the grounds to resist enforcement of an award set out in Article V of the New York Convention). Ukrnafta sought to resist enforcement on two alternative grounds, contending that either:

- It had been unable to present its case (pursuant to s. 103(2)(c) of the 1996 Act); or
- The arbitration procedure had not been in accordance with the parties’ agreement (pursuant to s. 103(2)(e) of the Act).

For its part, Carpatsky contended that neither bar to enforcement applied, on the basis of the following arguments:

- In circumstances where the validity of the award had already been investigated by the supervisory courts in Sweden, the English court should only reinvestigate the validity of the award in “*exceptional circumstances*”, per the decision in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647. This was not such an exceptional circumstance, so the award should be upheld.
- In any event, the decisions of the Swedish and Texas courts gave rise to issue estoppels on the application of ordinary principles, so as to bar Ukrnafta’s challenge.
- Alternatively, the principle in *Henderson v Henderson* [1843] 3 Hare 100 – prohibiting a party from raising a point in proceedings which it could and should have raised in previous proceedings – should be applied in

circumstances where the earlier proceedings were those before foreign supervisory courts. Accordingly, Ukrnafta should be precluded from raising new points which it could have raised in the Swedish courts.

- Even if none of the above arguments were successful, neither of the bars to enforcement which Ukrnafta had pleaded were made out on the facts.

## **The High Court's Decision**

The High Court began by noting that there was no obligation on a party to seek to have an award set aside by the relevant supervisory courts before challenging its enforcement in other jurisdictions. This was clear from the decisions of the Court of Appeal and Supreme Court in *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763. However, where a party had sought to have an award set aside by supervisory courts, there was a clear public interest in sustaining the finality of the decisions of those courts, as had been recognised in *Minmetals*. This policy was reflected in s. 103(5) of the 1996 Act (implementing Article VI of the New York Convention), which allows an English court to adjourn an enforcement application pending the decision of a supervisory court on whether to set aside or suspend an award.

The policy also applied when a Court was deciding whether there was an issue estoppel, such that the Court should not adopt an “*overly narrow approach to whether the same issue as was raised before it had been decided by the supervisory court*”. Accordingly, if a party had already raised “*substantially the same factual allegations*” before a supervisory court to seek to have the award set aside on grounds which were “*the same as or not materially different*” from those set out in s. 103(2) of the 1996 Act, the English Court would consider that the issue had already been decided. The Court opined that the same approach should apply when the court whose decision was the basis of the alleged estoppel was an *enforcement* court rather than a *supervisory* court. On the facts, the Court concluded that issue estoppels arose from the decisions of both the Swedish court and the Texas court.

Alternatively, the Court stated that the rule in *Henderson v Henderson* applied to the Swedish proceedings. To the extent that the arguments Ukrnafta was making now differed from those it had made before the Swedish court (which the Court did

not accept), Ukrnafta should have made these arguments in the Swedish court and it was precluded from raising them now. While the Court was thus clear that the rule in *Henderson v Henderson* applied to points which could have been raised in *supervisory* court proceedings, it indicated that the rule might not apply where a party had failed to raise a point before another *enforcement* court.

Finally, the Court concluded that – the above aside – neither of the bars to enforcement which had been pleaded were made out on the facts.

## **Comment**

The Court's decision is consistent with a recent pro-enforcement trend in the English courts' approach to challenges to New York Convention awards, in circumstances where there have been previous unsuccessful challenges to the award in question.

The Court's decision echoes that in *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 2713 (Comm), in which the Court held that an issue estoppel arose in respect of an argument to resist enforcement which had already been made before the courts of the seat in France. In that case, the Court also noted that what it referred to as the "*Minmetals* principle" would apply to preclude further challenges which were "*less than compelling*" in circumstances where "*substantially the same*" challenges had already been brought before the French courts and they had upheld the award. While the Court in that case did not refer to the rule in *Henderson v Henderson*, its reasoning created a similar effect by effectively precluding not only arguments which had *already been raised* in previous proceedings, but also arguments which *should have been raised* in those proceedings.

The High Court's decision in this case appears to go further than previous cases, however, in confirming the application of *Henderson v Henderson* to the enforcement of arbitral awards in England, in circumstances where there have already been proceedings seeking to have the award set aside by the courts of the seat of the arbitration. This means that not only may a party be estopped from raising issues in English enforcement proceedings which it *has raised* in previous proceedings before the courts of the seat, it may also be estopped from raising issues which it *should have raised* in those proceedings.

While the Court was careful to confine its decision to cases where the relevant issues had been decided by foreign supervisory courts and not to extend it to decisions of foreign enforcement courts, it is possible that a future court would hold that the principle in *Henderson v Henderson* also applies where a party ought to have raised a point in previous enforcement proceedings. The case highlights that parties should think carefully when deciding whether to seek to have an award set aside by the courts of the seat of the arbitration, as there is a significant risk they may be bound by any decision made in subsequent enforcement proceedings. Moreover, parties should be alive to the risk that, if they do seek to have an award set aside by the relevant supervisory courts or to resist enforcement in other jurisdictions, failing to raise a point in those proceedings may preclude them from raising that point in subsequent enforcement proceedings in the English courts.