SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	26 March 2015	T 10470-10
Division 020108	Stockholm	

CLAIMANT
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MATTER
Challenge of arbitration award given on 24 September 2010

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.

2. PJSC Ukrnafta is ordered to compensate Carpatsky Petroleum Corporation for its litigation costs in the amounts of SEK 1,654,657 and USD 122,240, plus interest on the amounts pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment until the day of payment. The amounts comprise costs for legal counsel in the amounts of SEK 1,550,000 and USD 90,500, respectively.

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BACKGROUND

PJSC Ukrnafta (Ukrnafta) – formerly OJSC Ukrnafta – is a limited liability company registered in the Ukraine, and Carpatsky Petroleum Corporation (Carpatsky) is a limited liability company registered in the state of Delaware, USA. On 14 September 1995, SE Poltavanaftogaz (a subsidiary of Ukrnafta) and Carpatsky Petroleum Corporation (a predecessor to Carpatsky, registered in the state of Texas, USA) entered an agreement named "Joint Activity Agreement N. 410/95" (the Cooperation Agreement). The cooperation involved extraction of natural gas from and development of the natural gas field of Rudivsko-Chervonozavodsky. The intention was that Ukrnafta would mainly contribute the extraction of natural gas from certain sources, whereas the counterparty's contribution would mainly comprise contribution of funding, technology and certain advanced equipment. In the years of 1996 and 1998, respectively, the parties entered certain addenda agreements. These provided that the cooperation would continue until 2023.

In 1996, Carpatsky Petroleum Corporation of Texas was merged into Carpatsky, and the former ceased to exist.

For a number of years, Carpatsky struggled with liquidity and did not provide the agreed capital contributions. As from 2003 no further investments were made by the parties.

In January of 2007, the Ukrainian government enacted a new regulation called Decree 31, which entailed that companies operating in the gas and oil extraction industries and which were owned, directly or indirectly, by the state to 50 percent or more, were obliged to sell their products to the state-owned Naftogaz at prices set by a public authority. The cooperation of the parties was affected by Decree 31. It was impossible to produce and sell gas at a profit for as long as Decree 31 remained in force.

In September of 2007, Carpatsky filed a request for arbitration against Ukrnafta. Carpatsky asserted that Ukrnafta had breached the agreement and moved that, amongst other things, Ukrnafta should be ordered pay to Carpatsky a certain

amount as compensation for losses. Ukrnafta, for its part, asserted that Carpatsky had breached the agreement and moved that Carpatsky should be ordered to pay compensation for losses to Ukrnafta.

Following arbitration proceedings in Stockholm, an arbitration award was given: SCC V (124/2007). The arbitration award provided that Ukrnafta had breached the agreement by preventing Carpatsky to participate in the cooperation on equal terms as from 2004. The arbitration award entailed, amongst other things, that the Cooperation Agreement was terminated, and that Ukrnafta was ordered to pay to Carpatsky the amount of USD 145.7 million plus interest and compensation for costs.

MOTIONS

Ukrnafta has moved that the Court of Appeal shall annul the arbitration award in its entirety, provided, however, that Ukrnafta has stated that items 4 a-e of the operative part of the award do not, in Ukrnafta's opinion, form part of the arbitration award.

Carpatsky has disputed the annulment of the arbitration award.

The parties have claimed compensation for litigation costs.

GROUNDS OF THE PARTIES

Ukrnafta

The arbitral tribunal exceeded its mandate or, in the alternative, committed procedural errors that likely affected the outcome in the following respects (items 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116)).

Decree 31

In the arbitration, it was undisputed that Decree 31 would have to be repealed in order for a loss to occur. In the arbitration, Carpatsky maintained that Decree 31 would cease to apply at certain given times. Initially, it was maintained that

Decree 31 would cease to apply on 31 December 2008. When this date had come and gone without Decree 31 having ceased to apply, the date was adjusted to 31 December 2009. When also this date had come and gone without Decree 31 having ceased to apply, July of 2010 was instead stated as the ultimate date for when Decree 31 would cease to apply. The arbitration award was given on 24 September 2010, i.e. after July 2010. Carpatsky had not referenced any other dates when Decree 31 would be repealed. Thus, at the time for the arbitral tribunal's review, Carpatsky had not referenced any alternative date for when Decree 31 would be repealed or any assertion for what would apply at that time, which had not already been established as factually incorrect. Nevertheless, the arbitral tribunal concluded that Decree 31 would be repealed prior to the expiry of the agreement term in 2023. This was a legally relevant circumstance which had not been referenced by Carpatsky. Irrespective of whether Carpatsky would be deemed to have referenced a point in time after July of 2010 for the repeal of Decree 31, the arbitral tribunal omitted to determine when Decree 31 would be repealed.

The arbitral tribunal committed a procedural error by rejecting Ukrnafta's request to submit into evidence a new law on price regulations in the Ukraine (the so-called Natural Gas Act). The evidence could not have been referenced earlier. The rejected evidence established that Decree 31 would remain in force for the foreseeable future. If Ukrnafta had been allowed to reference the evidence, the arbitral tribunal would likely not have concluded that Ukrnafta was liable for damages, or at least would have set the amount of the damages to substantially lower amount.

Intentional breach of contract

The Cooperation Agreement only entitled the parties to compensation for direct losses (Section 20.1). The arbitral tribunal concluded that Section 20.1 was not applicable, since Ukrnafta had committed an intentional breach of contract, and that liability for damages could not be limited in such cases under Ukrainian law.

- However, Carpatsky had not duly referenced that the breach of contract was intentional or that the limitation of liability had for that reason ceased to apply.
- In any event, the reference was made only after the arbitration had been declared closed or after the arbitral tribunal had informed the parties that no new circumstances could be referenced.
- Ukrnafta was not in a position to foresee that the arbitral tribunal would base its arbitration award on that legal provision. Thus, Ukrnafta was prevented to argue its case by, e.g., reference legally relevant circumstances and evidence on the issue.
- The arbitral tribunal neglected to consider Ukrnafta's other objections concerning the limitation of liability, since the arbitral tribunal had concluded that Ukrnafta had intentionally breached the contract. However, Ukrnafta had explained that these other objections were independent of the objection concerning the limitation of liability.

Compensation for post-termination loss

In the arbitration, Carpatsky did not explicitly claim compensation for losses arisen after the termination of the Cooperation Agreement (post-termination loss). Nevertheless, the arbitral tribunal awarded compensation for such losses.

The calculation model

In the arbitration, both parties referenced expert witnesses concerning the amount of the loss, and thereby instructed the arbitral tribunal how to calculate the loss, if any. The parties employed the same calculation model, namely a model which yielded the discounted cash-flow of future payments (the DCF Method). When using the model, the parties inserted different values into the assumptions used by the method, and thereby ended up with different amounts for the loss, where the loss equals the net present value of future payments.

The arbitral tribunal exceeded its mandate by using adjusted values for some of the assumptions, but not using the calculation model that the parties had used. The arbitral tribunal simply subtracted the items. In any event, the arbitral

tribunal committed a procedural error that likely affected the outcome of the case. Ukrnafta was not granted the opportunity to comment on the adjustments and was thus deprived of the opportunity argue its case.

Funds to invest

When determining the loss, the arbitral tribunal incorrectly assumed that Ukrnafta had attested that Carpatsky held sufficient funds to invest in the parties' cooperation. In the arbitration, Ukrnafta had clearly denied the assertions made in this respect.

Further, the arbitral tribunal incorrectly assumed that Ukrnafta did not reference any evidence to disprove that Carpatsky would have used these funds to invest.

Carpatsky

It is denied that the arbitral tribunal exceeded its mandate or that any procedural errors occurred. In the event that the Court of Appeal would conclude that procedural errors did occur as maintained by Ukrnafta, they did in any event not affect the outcome.

Decree 31

In the arbitration, Carpatsky referenced that Decree 31 would be repealed during the contractual term, i.e. prior to 2023. No specific date was referenced. The fact that Carpatsky's expert witness referenced various dates as the basis for the calculation of the "Discounted Cash Flow" is another matter. Such a calculation requires an assumption on when the payments will commence. The date for a possible repeal of Decree 31 did not end up having any direct importance in the arbitration award.

The arbitral tribunal did not commit a procedural error by not allowing Ukrnafta's evidence.

Intentional breach of contract

In the arbitration, Carpatsky maintained that a direct loss had been incurred. Further, Carpatsky asserted that Ukrnafta had committed an intentional breach of

contract. At this point in time, the arbitration had not yet been declared closed. The assertion was sufficiently concrete. The relevant principle on intentional breach of contract was brought up by the arbitral tribunal during the main hearing. It is disputed that Ukrnafta did not have the opportunity to argue its case.

Compensation for post-termination loss

It is disputed that the arbitral tribunal awarded compensation for losses arisen after the termination of the Cooperation Agreement (post-termination loss).

The calculation model

Both parties referenced expert witnesses for the investigation of valuation of the loss, but the tribunal was not instructed regarding how it should evaluate the investigation. The arbitral tribunal was not provided with any detailed explanation of the mathematical models applied, and no expert witness informed on the so-called dynamic effects. The fact that the arbitral tribunal adjusted certain parameters does not entail that the arbitral tribunal took circumstances which had not been referenced into consideration. The investigation provided by expert witnesses does not constitute legally relevant circumstances, but is evidence on the amount of the loss (evidentiary facts). The calculation of the amount of the loss forms part of the arbitral tribunal's review of the merits and is irrelevant within the scope of challenge proceedings.

Funds to invest

The arbitral tribunal did not misunderstand Ukrnafta's position with respect to Carpatsky's financial strength to invest in the cooperation. The arbitral tribunal did not neglect to consider the evidence referenced by Ukrnafta. The arbitral tribunal's review of the merits – irrespective of whether or not it is correct – is not subject to review in challenge proceedings.

THE PARTIES' FURTHER DETAILS

Ukrnafta

Decree 31

Through the enactment of Decree 31, the opportunity to produce gas at a profit disappeared. When reviewing Carpatsky's motion for compensation for losses, Decree 31 thus entailed that no loss could arise for Carpatsky. These circumstances were undisputed between the parties. In light hereof, Carpatsky asserted that Decree 31 would be repealed on 31 December 2009. When this forecast was proven incorrect, it was instead asserted that Decree 31 would remain in force until July of 2010. This was stated in expert witness Mr. K's second supplementing report of August of 2009, to which Carpatsky referenced in its submission "Post Hearing Memorial II". At the time of the arbitral tribunal's review, it was clear that neither of these dates was correct. In light thereof, the arbitral tribunal ought to have concluded that no legally relevant circumstances had been referenced that could form the basis for a conclusion that Decree 31 would be repealed prior to the expiry of the contractual term in 2023. However, the arbitral tribunal failed to do so. Further, the arbitral tribunal failed to determine whether Decree 31 would be repealed at any other specified point in time, but instead considered the uncertainty as regards Decree 31 when determining the discount factor. During the arbitration, Ukrnafta asserted that it was not sufficient for the arbitral tribunal to assume that Decree 31 would be repealed at some point in time, but that the arbitral tribunal ought to identify at what specific point in time this would occur.

On 26 July 2010, Ukrnafta requested that the arbitral tribunal would allow Ukrnafta to submit into evidence the new law of 8 July 2010 on gas price regulations in the Ukraine (the Natural Gas Act) and certain supplementing documentation. In a letter from the arbitral tribunal of 28 July 2010, Ukrnafta was informed that the company would not be allowed to submit the law into evidence. Thereby, Ukrnafta was deprived of the right to argue its case in the arbitration. The Natural Gas Act had significant impact on the issue of state control of prices for natural gas and whether the then applicable price regime for

natural gas would be repealed. It had not been possible to reference the Act earlier. Article 34 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules) provides the possibility of reopening the proceedings after they have been closed. There were strong reasons for doing so in this case.

Intentional breach of contract

Section 20.1 of the Cooperation Agreement provides that a party's liability for losses is limited to direct losses. In the arbitration, the parties had different views on whether Carpatsky's claim related to direct losses as provided by the said provision. During the main hearing the arbitral tribunal brought up the issue of the effects of intentional breaches of contract under Ukrainian law on the issue of the limitation of liability as set out in the provision. After the arbitral tribunal had declared, pursuant to Article 25 of the SCC Rules, that the parties were no longer allowed to make further submissions, Carpatsky stated that Ukrainian law provided that provisions on limitation of liability should be disregarded in cases of intentional breaches of contract. However, Carpatsky's argument was limited to a brief account on the contents of Ukrainian law, without referencing any factual circumstances. The first opportunity for Ukrnafta to argue the newly introduced legal provision was in the submission "Post Hearing Brief II". Herein, Ukrnafta objected that the issue had been raised too late in the proceedings and that Carpatsky had not provided any details as to the manner in which Ukrnafta had intentionally breached the contract. Nevertheless, the arbitral tribunal based its conclusion on the fact that an intentional breach of contract had been committed and that Section 20.1 was consequently inapplicable. Ukrnafta's other objections were not commented.

Compensation for post-termination loss

Paragraph 318 of the arbitration award states that Carpatsky did not claim compensation for future losses. Despite this, the arbitral tribunal notes that Carpatsky's expert witness Mr. K's calculations were based on both historic as well as future losses (see paragraphs 329 and 332 of the arbitration award).

The calculation model

In its determination of the loss, the arbitral tribunal used Mr. K's calculations but made certain adjustments thereto. The adjustments related to, amongst other things, the starting point, assumptions on gas prices and volumes as well as the discounted interest rate. In connection thereto, the arbitral tribunal neglected to consider the dynamic effects of the model designated by the parties. This characteristic of the model entails that adjustments of values based on certain assumptions also affect values having been assigned other values [*sic!*]. This involves complex interactions between different assumptions, upon which both parties based their calculations. If the model used by the parties had been applied, the loss would have been USD 62.5 million, instead of the awarded USD 35.7 million. Thus, the arbitral tribunal did not use the designated calculation model and did not grant the parties the opportunity to comment on the said adjustments in relation to the calculation model.

Funds to invest

In the arbitration, Carpatsky maintained that the company had funds available for investments and that these funds would have been invested into the cooperation if Ukrnafta had not breached the agreement. Carpatsky maintained that Ukrnafta's breach of contract prevented Carpatsky's investments under the Cooperation Agreement and that this had caused Carpatsky's loss. Ukrnafta, for its part, maintained that Carpatsky – even if it would be concluded that a breach of contract had been committed – had not incurred any loss. Ukrnafta explained this so, that Carpatsky also in an alternative, hypothetical, course of events in which the breach of contract had not occurred, would not have had funds to invest or at least would have opted to refrain from investing. Despite this, the arbitral tribunal concluded that Ukrnafta's expert witness Mr. E had not questioned whether Carpatsky had had the funds to invest pursuant to the Cooperation Agreement (paragraph 343 of the arbitration award).

In November of 2009, Ukrnafta referenced certain evidence to show that Carpatsky's finances were poor, amongst other things, a Power Point

presentation and a report from Ernst & Young. The arbitral tribunal did not, however, take this evidence into consideration.

Carpatsky

Decree 31

The issue of the possible repeal of Decree 31 was devoted substantial time in the arbitration. Ukrnafta maintained that Decree 31 would remain in force for the duration of the contractual term and that the parties' cooperation would not yield any profit. Carpatsky, for its part, maintained that Decree 31 would be repealed during the contract's validity. Carpatsky's case was not limited to any specific dates. The referencing of the dates did not limit the company's case, but were mainly used for K's calculations. Further, the arbitral tribunal did not assign any particular importance to the date for a possible repeal of Decree 31 in the arbitration award. Instead, the arbitral tribunal considered this risk within the scope of the choice of discounting factor. Each particularity of the calculation of the loss is not a legally relevant circumstance, which must be referenced, and an arbitral tribunal is not obliged to use the exact calculation model as used by the parties.

Ukrnafta's request to submit the Natural Gas Act into evidence was made on 26 July 2010. This was ten months after the main hearing, and almost six months after the arbitral tribunal had declared the arbitration closed pursuant to Article 34 of the SCC Rules. At the time of Ukrnafta's request, the arbitral tribunal had a solid understanding of how to deal with the uncertainty surrounding Decree 31. Not re-opening the arbitration under such circumstances does not constitute a procedural error. Having regard to the reasoning of the arbitral tribunal, any consideration of the relevant documents would not have affected the outcome of the case.

Intentional breach of contract

In the arbitration, Carpatsky referenced that Ukrnafta had intentionally breached the agreement. The factual circumstances upon which the arbitral tribunal based

its decision were that Ukrnafta was aware that Carpatsky was interested in participating in the exploitation and that Ukrnafta nevertheless denied the company the opportunity to participate. Carpatsky detailed these circumstances already in the submission "Statement of Claim" and these circumstances were vital in the arbitration.

Legal provisions do not form part of what a party must reference. The relevant legal provision was brought up by the arbitral tribunal during the main hearing in order to bring its importance to the parties' attention. Carpatsky thereafter provided more details on the issue in the submission "Post Hearing Memorial I" and Ukrnafta dealt with the issue in the submission "Post Hearing Brief II". This was noted by the arbitral tribunal (see paragraph 325 of the arbitration award). The arbitral tribunal decided on Ukrnafta's objection on the possibility under Ukrainian law to apply provisions on limitations of liability and concluded that the parties had had ample opportunity to argue their respective cases during the arbitration. In any event, the actions of the arbitral tribunal did not affect the outcome of the case, since the losses were actually direct.

Compensation for post-termination loss

The arbitral tribunal ordered Ukrnafta to compensate for the loss that occurred at the time for the breach of contract. The arbitral tribunal valuated the loss at the time for the breach of contract and estimated the loss by applying the DFC Method, i.e. by discounting expected revenue to its net present value. The arbitral tribunal did not award compensation for losses that arose after the termination of the Cooperation Agreement (post-termination loss). The amount awarded falls within the scope of Carpatsky's claim in the arbitration.

The calculation model

When determining the amount of the loss, the arbitral tribunal applied, just as the parties did, a net present value model. After evaluating the information provided by the expert witnesses and other evidence, the arbitral tribunal concluded that neither party's calculation could be accepted without adjustment, and so adjusted the main parameters. This does not constitute an error giving cause for

annulment. The parties had not provided the arbitral tribunal with a joint instruction on how to calculate the amount of the loss. The arbitral tribunal is free to calculate the amount of the loss as it sees fit, based on the referenced evidence. The arbitral tribunal is not bound by the parties' respective calculations of the loss, but is free to evaluate the evidence as it deems proper. The determination of the amount of the loss forms part of the arbitral tribunal's review of the merits of the case.

Funds to invest

In the arbitration, the parties had differing opinions on Carpatsky's financial ability and intentions to invest in the cooperation. In the arbitration award, the arbitral tribunal correctly accounted for the parties' positions. Ukrnafta's expert witness Mr. E in his report questioned whether Carpatsky intended to invest funds in the cooperation, but not that Carpatsky actually had sufficient funds to do so. The arbitral tribunal did not misunderstand what Mr. E had asserted. Further, the arbitral tribunal did not disregard evidence referenced by Ukrnafta. The reason that the evidence is not specifically mentioned in the arbitration award is that it related to another point in time than that deemed relevant by the arbitral tribunal.

THE INVESTIGATION

Upon Ukrnafta's request, expert witness Mr. S has been heard. Ukrnafta has also referenced a written opinion produced by Mr. S.

Both parties have referenced the arbitration award and various documents submitted in the arbitration. The parties have explained that the contents of the documents are not disputed, but that they draw different conclusions from the contents.

GROUNDS

Legal starting points

Item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award shall be annulled if the arbitral tribunal has exceeded its mandate. If the arbitral tribunal bases its decision on a legally relevant circumstance, which has not been referenced by a party, the arbitral tribunal should generally be deemed to have exceeded its mandate, albeit that particular caution should be had in international disputes. In such disputes, the same level of compliance with Swedish procedural concepts cannot be expected. Further, excess of mandate can be at hand if the arbitral tribunal bases its decision on a line of legal reasoning that the parties have agreed should fall outside the scope of the review. However, an arbitration award cannot be successfully challenged based on the review of the merits of the case. (See Government Bill 1998/99:35 p. 139 and 145 f.)

Item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award may be annulled if a procedural error occurred that likely affected the outcome. This could be the case if the arbitral tribunal disregarded a joint instruction from the parties or if a material procedural error occurred, e.g. if a party was not granted the opportunity to sufficiently argue its case (see, e.g., Lindskog, Skiljeförfarande En kommentar, 2nd ed., p. 895).

Decree 31

As grounds for its claim for compensation for losses in the arbitration, Carpatsky asserted that Ukrnafta had breached the agreement by preventing Carpatsky from participating in the cooperation on which they had agreed, and that Carpatsky thereby incurred a loss in the claimed amount. A pivotal issue for the review of whether Carpatsky had incurred a loss was the possible repeal of Decree 31. The arbitral tribunal based its decision on the conclusion that Decree 31 would be repealed prior to the expiry of the contractual term, i.e. prior to 2023. The question is whether Carpatsky, as Ukrnafta has asserted, did not reference this

and whether the arbitral tribunal as a result exceeded its mandate, or committed a procedural error that affected the outcome.

Ukrnafta has maintained that Carpatsky in the arbitration merely referenced that Decree 31 would be repealed at three different specific points in time. According to Ukrnafta, Carpatsky first referenced 31 December 2008, then 31 December 2009 and, when also that date had come and gone, finally referenced July of 2010 as the last point in time at which Decree 31 would be repealed. Ukrnafta has referenced, amongst other things, that Carpatsky in one submission to the arbitral tribunal of 30 November 2009 (Post Hearing Memorial II) stated that Carpatsky's expert witness Mr. K had adjusted his calculations to accommodate the assumption that Decree 31 would cease to apply as from the start of 2010 and that the claim for compensation was based on this assumption. Ukrnafta has also referenced that Mr. K in his second revised report assumed that Decree 31 would be repealed no later than in July of 2010. Carpatsky has maintained that it in the arbitration referenced that Decree 31 would cease to apply at some point during the contractual term, but that no specific date was referenced.

Initially, the Court of Appeal notes that the arbitral award does not state that Carpatsky referenced any specific dates for the assumption on when Decree 31 would cease to apply.

The investigation has further established that the adjusted points in time for the repeal of Decree 31, which Ukrnafta asserts that Carpatsky has referenced, relate to information provided in Carpatsky's expert witness Mr. K's calculations of the incurred loss. However, that which an expert witness references in calculations does not constitute references by a party in the arbitration. That the expert witness made adjusted calculations based on various points in time does not, in the Court of Appeal's opinion, establish that Carpatsky referenced these points in time in support of its case in the arbitration. Further, the fact that Carpatsky in the arbitration made references to these adjusted calculations cannot be taken to mean that the points in time were referenced in the manner asserted by Ukrnafta. Instead, the investigation shows that Carpatsky on several occasions stressed that the company deemed the point in time at which Decree 31 would cease to apply

as uncertain. For example, Carpatsky stated in its submission of 30 October 2009 (Post Hearing Memorial I) that the issue was not "if" Decree 31 would be repealed but merely "when" and that Mr. K had mentioned that the most likely scenario was that Decree 31 would be repealed in the near future. However, no specific point in time was mentioned by Mr. K. It is also evident that Ukrnafta in its submission of 30 October 2009 (Post Hearing Brief I) objected that it was not sufficient that the arbitral tribunal assumed that Decree 31 would be repealed at some point in time, but that it should identify a specific point in time. Also this statement supports that Carpatsky had not provided a specific point in time to be evaluated by the arbitral tribunal.

Therefore, it is the conclusion of the Court of Appeal that the investigation presented by Ukrnafta before the Court of Appeal does not establish that Carpatsky referenced certain specific dates for when Decree 31 would cease to apply. Further, the Court of Appeal concludes that the investigation does not establish that the arbitral tribunal – as asserted by Ukrnafta – was obliged to determine a specific date for when Decree 31 would cease to apply. Consequently, the Court of Appeal concludes that the arbitral tribunal has not exceeded its mandate or committed a procedural error in these respects.

As regards Ukrnafta's assertion that the arbitral tribunal incorrectly disallowed Ukrnafta's request to submit a document into evidence, it has been established that Ukrnafta on 26 July 2010 requested to be allowed to submit to the arbitral tribunal a copy of the Natural Gas Act. On 28 July 2010, the arbitral tribunal responded in writing that it was not at that time necessary that Ukrnafta submitted a copy of the act, but that the tribunal noted that this could become relevant at a later stage.

As regards the arbitral tribunal's procedural dealings in this respect, the parties have referenced Article 34 of the SCC Rules, which undisputedly was applicable to the relevant arbitration. The said article provides that the arbitral tribunal shall declare the proceedings closed when the parties have had reasonable opportunity to present their cases. Prior to rendering the final arbitration award, the arbitral

tribunal may on its motion or upon the application of a party reopen the proceedings in exceptional cases (same article).

The investigation has established that the arbitral tribunal on 4 February 2010 declared the proceedings closed in the sense set out in Article 34 of the SCC Rules. Thus, Ukrnafta's request was made thereafter. Then, the arbitration had been open for several years and the parties had both prior to and after the main hearing had ample opportunity to argue the issue of possible continued price regulation of gas in the Ukraine. At the end of January of 2010 Ukrnafta had requested and been allowed to supplement the investigation with evidence on the price regulation. Against this background, the Court of Appeal concludes that that, which Ukrnafta stated in its submission to the arbitral tribunal of 26 July 2010 did not constitute exceptional reasons to reopen the proceedings at that stage. Thus, no procedural error occurred.

Intentional breach of contract

The investigation has established that the Cooperation Agreement contained a provision on the limitation of a party's liability to "direct losses" (Section 20.1). The arbitral tribunal concluded in the arbitration award that Section 20.1 was inapplicable since Ukrnafta had intentionally breached the contract and that Ukrainian law under such circumstances provided that liability could not be limited by way of agreement. The question is whether in connection thereto the mandate was exceeded or a procedural error occurred as asserted by Ukrnafta.

From Carpatsky's submission "Statement of Claim" it is clear that Carpatsky maintained that Ukrnafta had committed a breach of contract by actively preventing Carpatsky from continued investments under the Cooperation Agreement. It is further clear that Carpatsky, in the submission of 30 October 2009 (Post Hearing Memorial I) maintained that Ukrainian law provides that an agreement which limits liability in cases of intentional breaches of contract is invalid (pursuant to article 614 of the "Civil Code"). The submission also provides that Section 20.1 of the Cooperation Agreement – in the event that the arbitral tribunal would conclude that Ukrnafta had committed an intentional

breach of contract – would not prevent Carpatsky to be fully indemnified for its loss (including lost income) since all such limitations are without binding effects.

The Court of Appeal concludes that Carpatsky must be deemed to have, at least through the submission of 30 October 2009, asserted that Ukrnafta's breach of contract was intentional and that the limitation of liability as a result was inapplicable. At this point in time, the grounds referenced by Carpatsky in support of its claim that the actions had been intentional were sufficiently clear. As noted by Ukrnafta, Carpatsky's supplementation 30 October 2009 was made after the arbitral tribunal had reminded the parties about the contents of Article 25 of the SCC Rules and declared that the parties were no longer allowed to supplement their cases. The said Article also provides, however, that the parties may at any time, up until the proceedings having been declared closed under Article 34, amend or supplement their cases as long as the arbitral tribunal does not find it inappropriate. The investigation has established that the arbitral tribunal during the main hearing brought up the issue of the contents of Ukrainian law on the possibility to limit liability in cases of intentional breaches of contract and concurrently stated that the parties were allowed to revert on this issue in their post-hearing submissions. Considering the aforementioned, and considering that Carpatsky's supplementation was made prior to the arbitral tribunal on 4 February 2010 declared the proceedings closed pursuant to Article 34 of the SCC Rules, the Court of Appeal concludes that Carpatsky's supplementation was made in the appropriate order. Therefore, the Court of Appeal's conclusion is that the arbitral tribunal did not exceed its mandate by considering the now relevant circumstances in its decision and, further, that the arbitral tribunal did not commit a procedural error in connection therewith.

As regards the issue of whether Ukrnafta did not have proper opportunity to present its case, the chairman of the arbitral tribunal, as noted above, brought up the issue of Ukrainian law on limitations of liability in the context of intentional breaches of contract during the main hearing in September of 2009, and that the parties were given the opportunity to come back to this issue. After both parties had submitted supplementary submissions in October of 2009, and Carpatsky in connection therewith clarified its position on the issue of intentional breaches of

contract, the parties were yet again given the opportunity to submit supplementary submissions to the arbitral tribunal. In compliance therewith, Ukrnafta presented its views on Carpatsky's statements on intentional breaches of contract and the contents of Ukrainian law in its submission of 30 November 2009. The inference from this is, according to the Court of Appeal, that Carpatsky's views on intentional breaches of contract must have been clear to Ukrnafta and that the company was given appropriate opportunity to argue its case.

Given the conclusion drawn by the arbitral tribunal – namely that Ukrnafta had intentionally breached the contract and that the liability could not be limited under Section 20.1 – there was no reason, as far as has been established, for the arbitral tribunal to consider the remaining objections Ukrnafta had raised on limitation of liability under the said provision. This means, according to the Court of Appeal, that Ukrnafta has not established that the arbitral tribunal incorrectly failed to consider any objections otherwise raised by Ukrnafta.

Thus, the Court of Appeal concludes that no excess of mandate or procedural error occurred during the arbitration in these respects.

Compensation for post-termination loss

The arbitration award provides that Carpatsky claimed compensation for the value of its investment under the Cooperation Agreement and that the arbitral tribunal did review this motion. The arbitral tribunal estimated and valuated the loss at the time for the breach of contract. The Court of Appeal concludes that it is not possible from the arbitration award to infer that the arbitral tribunal awarded compensation for a loss that had not been claimed by Carpatsky. Nothing in the investigation would imply that this was the case. Thus, Ukrnafta has not established that any excess of mandate or procedural error occurred in this respect.

The calculation model

In the arbitration, the parties had different views on whether Carpatsky had incurred any loss. In support of its assertion on the amount of the loss, Carpatsky referenced a calculation made by Mr. K. For its part, Ukrnafta referenced certain calculations made by Mr. E. The arbitration award provides that the arbitral tribunal based its review of the amount of the loss on Mr. K's calculations, but that the arbitral tribunal adjusted certain values and concluded that the amount of the loss was a different amount.

The Court of Appeal concludes that the arbitral tribunal's valuation of the loss relates to the merits of the case, and the fact that the arbitral tribunal, in Ukrnafta's opinion, reached an incorrect conclusion by not considering certain circumstances of importance for the calculation does not in and of itself constitute grounds for challenge. If a party is of the opinion that certain conclusions must be drawn from the evidence, there is nothing to prevent the arbitral tribunal from inferring something entirely different, and even if the parties are surprised by the conclusions of the arbitral tribunal, that itself does not constitute any excess of mandate or a procedural error (Heuman, Skiljemannarätt, p. 619).

As mentioned above, an error subject to challenge could occur if the arbitral tribunal goes beyond a joint party instruction, e.g. on the application of certain provisions of law or on the proceedings as such. However, the mere fact that both expert witnesses in their respective calculations used certain joint assumptions cannot, according to the Court of Appeal, be taken to mean that the parties had provided the arbitral tribunal with a binding instruction to calculate the amount of the loss in a specific manner. The arbitration award or the parties' statements during the arbitration to which Ukrnafta has otherwise referenced do not indicate that the parties had provided such an instruction as Ukrnafta asserts. Therefore, the Court of Appeal concludes that no excess of mandate or procedural error occurred in respect of the arbitral tribunal's calculation of the amount of the loss.

As noted above, the fact that the arbitral tribunal deviated from the parties' calculations of the amount of the loss is a part of the arbitral tribunal's review of the merits. The arbitral tribunal was not obliged to provide the parties an opportunity to comment thereon. Thus, no procedural error occurred in this respect.

Funds to invest

The arbitration award provides that Ukrnafta denied that Carpatsky had incurred any loss. Further, it provides that Ukrnafta's position was that Carpatsky had not established that it had sufficient funds to invest or that Carpatsky, even if funds were available, would have used them to invest in the cooperation (paragraph 338). In accordance therewith, the arbitral tribunal stated in its grounds that it was for Carpatsky to establish that funds were available and that they would have been invested on 18 April 2005, i.e. the time of the breach of contract (paragraph 342). There is nothing in the arbitration award to support that the arbitral tribunal – as Ukrnafta asserts – incorrectly assumed that Ukrnafta had attested that Carpatsky had sufficient funds to invest and nothing otherwise would indicate that this was the case. The fact that the arbitration award contains a note that Ukrnafta's expert witness had not questioned that Carpatsky in 2004/2005 had sufficient funds to invest (paragraph 343) does not in the Court of Appeal's opinion lead to any other conclusion. Thus, Ukrnafta has not shown that any excess of mandate or procedural error occurred in this respect.

It is undisputed that Ukrnafta in November of 2009 referenced certain evidence on Carpatsky's financial situation, which was also allowed by the arbitral tribunal. As Ukrnafta has maintained, this evidence is not specifically referenced in the arbitration award. Neither this fact, nor what is actually stated in the arbitration award leads to the conclusion that the arbitral tribunal incorrectly based its decision on Ukrnafta not having referenced any evidence to disprove that Carpatsky would have used these funds to invest. Thus, Ukrnafta has not established that any excess of mandate or procedural error occurred in this respect.

Conclusion summary

In sum, the Court of Appeal has concluded that no excess of mandate or procedural error as asserted by Ukrnafta has occurred in the arbitration. Therefore, Ukrnafta's motion shall be rejected.

Litigation costs

Upon this outcome, Ukrnafta shall compensate Carpatsky for its litigation costs before the Court of Appeal. The claimed amount is reasonable.

Appeal

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the case involves issues of interest for the development of case law where it is important that an appeal is reviewed by the Supreme Court.

The Court of Appeal concludes that there are no grounds to grant leave to appeal the decision.

The decision of the Court of Appeal may not be appealed.

The decision has been made by: Senior Judge of Appeal CL and Judges of Appeal UB and AK, reporting Judge of Appeal.