Neutral Citation Number: [2020] EWHC 3161 (Comm)

Case No: CL- 2017-000252

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 23/11/2020

Before :

Sir Andrew Smith
sitting as a Judge of the High Court

- -

Between :

PAO Tatneft	**Claimant**
- and -	
Ukraine	**Defendant**

- -
- -

Ricky Diwan QC and Emily Wood (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimant/Respondent**
Philip Edey QC (instructed by **Winston & Strawn**) for the **Defendant/ Applicant**

Hearing dates: 29 and 30 July and 21 September 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 November 2020 at 10:30 am.

Sir Andrew Smith:

Introduction

1. By an order made ex parte and dated 9 August 2017, Teare J granted PAO Tatneft ("Tatneft") permission to enforce a New York Convention Award dated 29 July 2014. By an application dated 31 January 2020, Ukraine applied to set aside the order in part. Previous challenges to the order brought by Ukraine have been rejected by Butcher J ([2018] EWHC 1797 (Comm)) and by Cockerill J ([2019] EWHC 3740 (Comm)). In my judgment, I adopt the terminology used in the earlier judgments.

2. The background to the case has been explained by Butcher J. In an arbitration under UNCITRAL Rules brought by Tatneft, a Russian oil company, on 21 May 2008 under an arbitration agreement in article 9 of a BIT between Ukraine and Russia, Tatneft was awarded damages in the principal sum of US $112 million. This comprised damages of $31 million in respect of the so-called "$31 million claim", which concerned shares in a Ukrainian company called Ukrtatnafta that Tatneft had acquired directly from the company, and of $81 million in respect of the "$81 million claim", which concerned shares in Ukrtatnafta that Tatneft indirectly acquired by buying interests in Seagroup, a US company, and in Amruz, a Swiss company: both had, Tatneft claimed, acquired shares in Ukrtatnafta from the company under agreements dated 1 June 1999. The consideration given for the shares was by way of promissory notes drawn and issued by Seagroup and Amruz respectively. In the event, only two of the 36 notes issued by Seagroup, 35 of which were for one million dollars and one for $845,132, were redeemed, and only one of the 30 notes issued by Amruz, for one million dollars each, was redeemed. The other notes were sold by Ukrtatnafta at a loss.

3. As Butcher J explained at paras 14 to 18 of his judgment, the Tribunal issued two awards: a "Jurisdiction Award" dated 28 September 2010, a partial award in which it considered and rejected challenges brought by Ukraine to its jurisdiction under the BIT and the admissibility of Tatneft's claims; and a "Merits Award", a final award issued on 29 July 2014, in which the Tribunal concluded that Ukraine had breached its obligation to treat Tatneft fairly and equitably, and made its order that Ukraine pay Tatneft damages. (Teare J's order was, of course, concerned directly with the Merits Award.)

4. On 13 November 2017, Popplewell J made an order by consent that Ukraine might make and have determined an application challenging the order of Teare J on the grounds of state immunity before acknowledging service and issuing any application challenging enforcement of the Tribunal's award on other grounds. Accordingly, on 16 January 2018 Ukraine made an application (the "State Immunity Application") whereby it sought to set aside Teare J's order on the grounds (i) that it was entitled to immunity under the State Immunity Act, 1978, and (ii) that Tatneft had not made proper disclosure about Ukraine's immunity when applying ex parte for the order.

5. In his judgment dated 13 July 2018 Butcher J refused the State Immunity Application He gave Ukraine permission to appeal upon one issue, the so-called "No Investment" point, which concerned only the $81 million claim. On 17 May 2019, however, the appeal was struck out after Ukraine had failed to provide security that had been ordered. Ukraine applied for permission to appeal to the Supreme Court against the order for

security and the order to strike out the appeal, but its application was refused on 11 December 2019.

6. Meanwhile, by an order dated 14 June 2019, the Court had directed that the $81 million claim be stayed until the application for permission to appeal to the Supreme Court had been decided, but the stay did not cover the $31 million claim. Accordingly, Cockerill J heard an application by Ukraine that enforcement of at least that part of the Award be refused because of the composition of the Tribunal and the arbitral procedure in that the Presiding Arbitrator had not, it was said, made proper disclosure. On 20 December 2019, Cockerill J rejected that challenge.

The issues in the application

7. Ukraine's present application is made under section 103(2)(d) of the Arbitration Act, 1996, which allows a court to refuse to enforce a New York Convention award because the party against whom it is made proves that "the award deals with a difference not contemplated by or falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration". It concerns only the $81 million claim: section 103(4) of the 1996 Act allows the court to enforce an award containing such decisions to the extent that it contains matters submitted to arbitration which can be separated, and it is common ground that the award of $31 million and that of $81 million can be so separated. In its application notice of 31 January 2020 Ukraine also contended that it would be contrary to public policy for the Court to enforce this part of the Award (see section 103(3) of the 1996 Act), but Mr Philip Edey QC, who represented Ukraine, did not pursue that argument: to my mind, he was right not to do so.

8. The arbitration agreement in article 9 of the BIT covers "Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments.". Butcher J explained (at para. 27 of his judgment) the legal analysis whereby the treaty provision gives rise to an arbitration agreement between Tatneft and Ukraine in respect of such disputes: the offer of Ukraine to arbitrate is considered to have been accepted by Tatneft when it brought the reference. The expression "Investments" is defined at article 1 of the BIT: "For the purposes of this Agreement: … 'Investments' means assets and intellectual property of all types that are invested by an investor of one Contracting Party within the territory of the other Contracting Party in accordance with the latter's legislation". (Here and elsewhere, I quote from translations of Russian and Ukrainian documents, none of which has been challenged.) Ukraine contends that Ukraine's offer to arbitrate, and so the arbitration agreement, relate only to investments made in accordance with Ukrainian legislation, and that the shares were not so issued to Seagroup and Amruz, relying on the evidence of a Ukrainian lawyer, Dr Yuliya Chernykh (the "illegality argument"). Her evidence was that, at the relevant time, article 13 of the Law on Business Entities specified how members and founding members of a company might make contributions to it, and that it was not permissible to do so by way of promissory notes. In support of this view, she referred, inter alia, to a Joint Resolution of the Cabinet Ministers of Ukraine and the National Bank of Ukraine dated 10 September 1992, no 528 of 1992 (the "Joint Resolution"), which restricted the legitimate use of promissory notes for payment and, in Dr Chernykh's view, excluded their use to contribute to a company's charter fund. Dr Chernykh also considered it illegal to use promissory notes for this purpose because of the combined operation of article 8(3) of the Law on Securities and Stock Exchange,

which provides that "Shares may be rendered to the recipient (purchaser) only after full payment of their value", and article 33 of the Law on Business Entities, which required that "[w]ithin the terms prescribed by the constituent meeting, but not later than one year after registration of a joint stock company, the shareholder shall pay up the full value of the shares".

9. Ukraine had another, logically anterior, argument, which I shall call "Ukraine's issue estoppel argument": that in any event, Tatneft is not entitled to dispute that Seagroup's and Amruz's share acquisitions did not comply with Ukrainian legalisation because the Ukrainian courts have so decided in proceedings to which both Ukraine and Tatneft were parties. It relies on decisions of the Ukrainian Supreme Court of 18 March 2008 in cases 28/198 and 28/199, and on decisions of the Kiev Economic Court of 28 May 2008 in case 28/198 and of 2 June 2008 in case 28/199, and the appellate courts upholding them.

10. On behalf of Tatneft, Mr Ricky Diwan QC and Ms Emily Wood submitted that Tatneft is not prevented by issue estoppel from disputing Ukraine's illegality argument, and, relying on the evidence of Mr Sergiy Gryshko, contended that there was no contravention of Ukrainian law. But Tatneft has other points. First, it has what I shall call its "threshold arguments":

    a. That Ukraine's application should be refused because it has waived any right to dispute the Tribunal's jurisdiction on the basis of the illegality argument, having failed to raise the challenge before the Tribunal (the "waiver argument);
    b. That Ukraine is estopped by the judgment of Butcher J from contending that the Merits Award deals with claims, or decides matters, beyond the scope of the submission to arbitration ("Tatneft's issue estoppel argument"); and
    c. That the Court should reject Ukraine's application as an abuse of process because Ukraine did not raise its argument on the State Immunity Application and it makes a collateral attack on the judgment of Butcher J (the "abuse of process argument").

11. Further, Tatneft argued that, even if, as Ukraine contends, it is now apparent from the Ukrainian Court decisions of 2008 that the shares were issued to Seagroup and Amruz unlawfully, it does not mean that the investments giving rise to the $81 million claim were not made in accordance with Ukrainian legislation for the purpose of the BIT and within the meaning of the definition of "Investments" in the BIT (the "conformity requirement"), and so the $81 million claim was nevertheless covered by article 9 of the BIT and the arbitration agreement. It submitted that the conformity requirement must be satisfied at the time of the investment, and there was no contravention of Ukrainian law as it stood at the time of the Tatneft's investment in December 2007 (the "timing argument").

12. In its opening submissions, Tatneft advanced two other arguments about the conformity requirement, but these were not pursued. Mr Diwan explained that they did not arise as a result of how Ukraine had presented its case before me. The first was that, whatever the position with regard to the investments by Seagroup and Amruz, Tatneft's own investment in the shares in Seagroup and Amruz was in accordance with Ukrainian law. That is so, but it does not bear on Ukraine's complaint. Secondly, Tatneft submitted that the conformity requirement refers to fundamental principles of the

applicable law, and not to every minor infraction of it; and that Ukraine's complaints do not amount to a breach of a fundamental principle of the law of Ukraine. Certainly the conformity requirement does not exclude an investment from the protection of the BIT whenever there is a technical contravention: that is established by an authoritative series of decisions of ICSID tribunals, the rationale being that such wording should not be interpreted so as to allow states "to abuse the process by scrutinizing the investment *post festum* with the intention of rooting out minor or trivial illegalities as a pretext to free themselves from an obligation": Mamidoil Jetoil Greek Petroluem Products Société SA v Albania, 30 March 2015, ICSID case no. Arb/11/24 at para. 483. The matters of which Ukraine complains, if established, are not by way of such minor, technical or trivial illegalities. In my judgment, Tatneft was right not to pursue either of these two arguments.

The proceedings in foreign courts

13. The Tribunal's two awards have been considered in other courts. Most importantly, on 27 August 2014, Ukraine brought proceedings before the Paris Court of Appeal as the Court of the seat of the arbitration. It sought to have both the Jurisdiction Award and the Merits Award set aside for various reasons, including that the Tribunal lacked jurisdiction because of the illegality argument. On 29 November 2016 the Court declined to annul the awards, because, with regard to the illegality argument, it considered the challenge went to the merits of Tatneft's claim rather than the jurisdiction of the Tribunal. The judgment does not set out the Court's reasons for this decision.

14. There are also proceedings in the United States of America. On 30 March 2017, Tatneft issued proceedings in the District Court for the District of Columbia for enforcement of the Merits Award. Ukraine claimed state immunity, but this claim was finally rejected on 13 January 2020 when a petition for certiorari was refused by the United States Supreme Court. Ukraine then defended the proceedings with arguments about the composition of the Tribunal and various arguments that recognition and enforcement would be contrary to the public policy of the United States, but on 24 August 2020 (in the course of the hearing before me), those arguments were rejected by the District Court. Ukraine has appealed. When the proceedings were before the District Court, Ukraine applied to introduce a challenge to the jurisdiction of the Tribunal on the basis of the illegality argument, but the Court refused to allow it.

15. On 12 April 2017, Tatneft brought proceedings in the Russian Courts for the enforcement of the Merits Award. Ukraine defended them, inter alia on the basis that it would be contrary to Russian public policy to enforce an award in respect of investments which the Ukrainian courts had held to be illegal. On 11 March 2019, Ukraine's challenge was rejected by the Stavropol Region Arbitration Court (to whom the case had been transferred): the ruling was upheld by the North-Caucasus District Arbitration Court on 11 April 2019, and a cassation appeal by Ukraine was rejected by the Russian Supreme Court on 21 October 2019. Nothing in the rulings suggests that Ukraine invoked the illegality argument in these proceedings, or that it was considered by the Russian courts.

Ukraine's issue estoppel argument

16. Although logic might dictate otherwise, it is convenient to defer consideration of Tatneft's threshold arguments, and I shall consider first Ukraine's issue estoppel argument. It arises from litigation in Ukraine in two parallel actions, case 28/198, which concerned Seagroup's acquisition of shares in Ukrtatnafta, and case 28/199, which concerned Amruz's acquisition. Both actions were brought on 8 August 2001 against all the shareholders in Ukrtatnafta by the State Property Fund of Ukraine ("SPFU"), which was seeking to set aside the acquisitions on the basis that agreements of 1 June 1999 (and supplementary agreements of 29 May 2000, which extended the time for paying the promissory notes) were invalid because Seagroup and Amruz had not, when making them, complied "with the laws regulating the procedure of formation of authorized capitals of joint stock companies and the procedure of the bills circulation in Ukraine …". Tatneft was a third party to the proceedings, having petitioned to be joined in each case "on the side of the defendant".

17. In judgments of 28 November 2001 the Kiev Economic Court upheld the SPFU's claims. It concluded that under article 13 of the Law on Business Entities promissory notes were not legitimate contributions by members and founders of companies, and observed that this use of notes was not in accordance with the Joint Resolution. Seagroup and Amruz appealed to the Kiev Economic Court of Appeal, but the Court of Appeal agreed with the judgments at first instance, and on 14 March 2002 the appeals were dismissed.

18. Seagroup and Amruz brought a further cassation appeal to the Higher Economic Court of Ukraine, and by judgments dated 29 May 2002 the decisions of the lower courts were reversed and the claims by the SPFU were dismissed. The Higher Economic Court decided that (i) there was no breach of article 13 because the article allowed contributions to be made with securities, and promissory notes are stated by article 3 of the Law on Securities and Stock Exchange to be a type of security; and (ii) the obligation to pay for shares could be satisfied by the transfer of promissory notes. The Higher Economic Court judgments did not specifically refer to the Joint Resolution.

19. The SPFU sought to bring a further cassation appeal before the Supreme Court of Ukraine, but on 18 July 2002 the Supreme Court denied the cassation procedure (without examining the substance of the decisions), declaring its ruling final and not subject to appeal. A renewed cassation appeal was similarly denied on 1 November 2002.

20. The cases came to life again in 2008. The Ukrainian Prosecutor, on behalf of SPFU, applied to the Supreme Court for a cassation review of the decision of the Higher Economic Court of 29 May 2002 on the grounds of "a different application of the same provision of the law in similar cases". The Supreme Court, in decisions of 21 February 2008, "agreed that there [were] grounds for commencing cassation proceedings and renewed the missed cassation appeal period", and therefore admitted the cassation appeals. On 18 March 2008, the Court allowed the appeals on the ground that the contracts to issue shares to Seagroup and Amruz contravened article 13 because the debt obligations comprised in the promissory notes were not property or funds for the purposes of the article. The cases were remitted to the Economic Court for rehearing.

21. In judgments dated 28 May 2008 and 2 June 2008, the Kiev Economic Court declared the agreements of 1 June 1999 and the supplementary agreements invalid from the time that they were concluded. The Court referred to articles 13 and 33 of the Law on

Business Entities, article 8 of the Law on Securities and Stock Exchange and the Joint Resolution, and decided that it is not permissible to issue promissory notes as payment for shares because, when the notes are issued, no products are supplied and when the shares are issued, the price for them is not paid in full. The decisions were upheld by the Kiev Economic Court of Appeal on 7 and 8 August 2008. Cassation appeals were dismissed by the Higher Economic Court of Ukraine on 24 September 2008. By decisions of 27 November 2008 and 11 December 2008 the Supreme Court declined to entertain cassation appeals.

22. Before leaving the history of cases 28/198 and 28/199, I refer further to the decisions of the Supreme Court of 21 February 2008 to admit the appeals. The Supreme Court gave no reasons for its decisions: apparently it was conventional not to do so. In the Merits Award (at para. 325) the Tribunal concluded that the extension of the statutory deadline, which it considered required to admit the appeal, "does not appear to be justified in this context". This conclusion was reached after Ukrainian law experts before the Tribunal were "in agreement about … strict requirements for the courts to renew a limitation period …": para. 323. I had different evidence about this before me. In any case, in so far as the question matters, I must consider it afresh.

23. Dr Chernykh told me that there was a proper legal basis for the Supreme Court to renew the term for cassation review of the cases, and that the Court acted in accordance with the relevant procedural law. Mr Gryshko considered that the judgments of the Higher Economic Court of 29 May 2002 were final and not properly subject to further review or the ordinary cassation appeal process. He made two criticisms of the decisions of the Supreme Court to admit the cassation appeals in 2008: (i) that there was no basis on which the Supreme Court could properly have entertained the appeals; and (ii) that the applications were filed out of time, and there was no proper reason for extending the time limit.

24. Article 111-15 of the Ukraine Commercial Procedure Code ("UCPC") provides that the Supreme Court shall review in the cassation procedure the judgments or rulings of the Higher Economic Court in cases where they are appealed, inter alia, "in connection with the discovery of different application by the Higher Economic Court of the same legislative provision or other legal act in similar cases". The State Prosecutor appealed in 2008 on the basis that it had learned of an inconsistent decision of the Higher Economic Court in the case of Northland Power Darnytsia Inc v OJSC Financial Company Ukrnaftogaz (case 45/383), a judgment delivered on 14 November 2006. Mr Gryshko considered that there was no inconsistency between the decisions of the Higher Economic Court in cases 28/198 and 28/199 on the one hand and in the Northland Power case on the other. The Northland Power case considered the position when no payment had been made for founding shares that were issued: the charter of the company required a contribution for the shares of intangible assets, and they had not been transferred. The Higher Economic Court, having referred to article 8 of the Law on Securities and Stock Exchange and article 33 of the Law on Business Entities, had determined that no shares were acquired by the person to whom they were issued. Mr Gryshko considered the position fundamentally different from that in cases 28/198 and 28/199, in which the shares were acquired in consideration of promissory notes that had been issued.

25. Dr Chernyskh disagreed with Mr Greshko. She observed that the UCPC does not specify criteria for when cases are regarded as "similar" for the purpose of article 111-

15. She accepted that the Northlands Power case was not concerned with promissory notes or article 13 of the Law on Business Entities, but said that, like cases 28/198 and 28/199, it considered the proper application and effect of article 33 of the Law on Business Entities, and when founding shareholders were obliged to pay for shares. On those questions, she thought that the decisions (as she put it in cross-examination) "[went] in different ways". I found Dr Chernykh's evidence about this persuasive.

26. With regard to the appeals being late, the general position under article 111-116 of the UCPC is that a cassation appeal may be filed within one month of the judgment or ruling that is challenged. The explanation given by the State Prosecutor in the applications for the timing of the appeals, was that he had "learnt about the disputed Resolution [sc. the judgments of the High Economic Court in cases 28/198 and 28/199] as a result of examination of an application of Ukrtatnafta …, and therefore the term was defaulted for a valid reason". Mr Gryshko thought that the Prosecutor must have been aware of the cases since at least 2002 through his involvement in another case: case 8/604, which was brought in the Economic Court of the Poltava Region and in which the Court delivered a judgment citing the judgments of the Higher Economic Court in cases 28/198 and 28/199. As for the decision in the Northland Power case, which was said to have resulted in inconsistent decisions of the High Economic Court so as to give a proper basis for cassation appeals, the State Prosecutor did not apply for the cassation appeals until some 14 months thereafter.

27. Mr Gryshko agreed in cross-examination that the Supreme Court was entitled to accept a cassation appeal after the one month time limit had expired either (i) under article 116 of the UCPC if the grounds for the appeal arose after the one-month period, or (ii) under article 53 of the UCPC if there was a "material" reason, a criterion that, as Dr Chernykh explained, is not defined and affords the Courts "a broad margin of appreciation". In this case, the Prosecutor was able to rely on article 116 because he sought to bring the appeals on the grounds of inconsistency with the Northlands Power case. Nothing in the UCPC at the relevant time provided for the one-month time limit (or any time limit) to apply in these circumstances: while Mr Gryshko spoke of a practice in the Supreme Court to require that an application be brought within a month of the new material emerging, and I can well understand a reluctance in practice to entertain late appeals, I am not persuaded that this was an established rule or that the Supreme Court's decision to hear the appeals in cases 28/198 and 28/199 was contrary to an established practice.

28. In my judgment, Tatneft has not shown that there was anything irregular or unusual in the Supreme Court's decisions to hear the appeals.

29. Mr Edey submitted that an issue estoppel arises against Tatneft from (i) firstly the decisions of the Supreme Court of 18 March 2008, and (ii) secondly the decisions of the Higher Economic Court of 24 September 2008. In Good Challenger Navegante SA v Metalexportimport SA, [2003] EWCA (Civ) 1668, Clarke LJ identified (at para. 50) four conditions that must be satisfied in order to establish an issue estoppel, namely:

    a. That "the judgment must be given by a foreign court of competent jurisdiction";
    b. That "the judgment must be final and conclusive and on the merits";
    c. That "there must be identity of parties"; and

d. 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".

30. Mr Diwan expressly accepted that the condition about identity of parties was met. He did not advance any argument that the first two conditions were not satisfied. The issues determined by the Ukrainian courts in 2008 were whether the share purchases by Seagroup and Amruz were in accordance with Ukrainian legislation and were valid: these determinations were necessary for their decisions. The Courts had jurisdiction to decide those matters, and decided them after considering the merits, concluding (in the case of the Supreme Court) that they were contrary to article 13 of the Law on Business Entities, and also, after the Supreme Court had remitted the cases, that they were contrary to article 33 of the Law on Business Entities and article 8 of the Law on Securities and Stock Exchange.

31. However, Tatneft submitted that the determination of these issues was not binding upon it on this application. The starting point for this submission was that the English courts do not consider to be binding determinations of foreign courts on issues before them unless those determinations are regarded as conclusive by the foreign court that decided them: see MAD Atelier International BV v Manes, [2020] EWHC 1014 (Comm) and the discussion by Bryan J at paras 46ff of the speeches in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2), [1967] 1 AC 853. Tatneft then relied on an answer of Dr Chernykh in cross-examination, that the "binding force" of the decisions of the Higher Economic Court in 2002 was the "resolute force of the judgment, namely that the cassation was affirmed and the decisions of the first and second instance were reversed. So that's the binding force. The reasoning in this judgment was not binding on any court". Accordingly, it was submitted that, the reasoning not being binding, all that was conclusively decided by the Ukrainian Supreme Court in February 2008 and thereafter by the Kiev Economic Court and the appellate courts, and so all that could give rise to an issue estoppel, was that the share acquisitions by Seagroup and Amruz were invalid; that they conclusively decided nothing about the meaning of the statutory provisions that Ukraine contends were contravened; and that Ukraine's issue estoppel argument impermissibly gives the reasoning of the Supreme Court judgments a "more conclusive force" than it would be given in Ukraine.

32. Despite the clarity with which Mr Diwan presented this submission, I have difficulty in accepting it. First, it places more weight on Dr Chernykh's answer in cross-examination than it properly can bear: she gave it when being asked about the decisions of the Higher Economic Court in May 2002, and not about the binding nature of the Supreme Court decisions. Secondly, to my mind the Supreme Court's judgments must realistically be regarded as conclusively deciding that a contribution to a company's statutory fund by way of promissory notes was contrary to article 13 of the Law on Business Entities. This is confirmed in that the Court included at the end of its judgment a statement of "Legal Position" that "According to Article 13 of the Law of Ukraine 'On Business Entities' a contribution to the statutory fund may be in the form of property or monetary contribution, but not in the form of debt undertakings": the reference to "debt undertakings" was clearly to promissory notes. Although in 2008 such notations had no formal legal status, it puts the basis of the decision beyond doubt. Thirdly, as Mr Edey pointed out, even if the decisions of the Supreme Court did not

create the issue estoppel for which Ukraine contends, the decisions of the Higher Economic Court of 24 September 2008, upholding those of the Kiev Economic Court of 28 May and 2 June 2008, preclude Tatneft from disputing that the agreements of Seagroup and Amruz were invalid and must be set aside because they contravened Ukrainian legislation.

33. As I shall explain, I accept Ukraine's illegality argument. It is therefore unnecessary for me to reach a firm conclusion about its issue estoppel argument, and, despite my serious doubts about Mr Diwan's argument, I shall not do so.

34. I add, for the sake of completeness, that, in the Good Challenger case, Clarke LJ also explained that the "application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice" (loc cit at para. 54). In this regard, having examined the authorities, he observed that "the correct approach is to apply the principles [that he had identified] unless there are special circumstances such that it would be unjust to do so" (para. 79). At one point in the hearing, it appeared that Tatneft might contend that it would be unjust to accept Ukraine's issue estoppel argument because the Supreme Court should not have entertained the appeals in 2008, but the point was not developed by Mr Diwan. In any case, I have concluded that the decisions of the Supreme Court to hear the appeals cannot properly be criticised. If I were deciding Ukraine's issue estoppel argument, I would see no basis for concluding that it would not be just to accept Ukraine's issue estoppel argument.

The illegality argument

35. Mr Edey submitted that for two reasons I can determine the illegality argument without deciding between the differences between Dr Chernykh and Mr Gryshko about the meaning of Ukrainian legislation. Both reasons are compelling.

36. First, my task is not to interpret the relevant provisions of the Ukrainian legislation myself, but to determine how Ukrainian courts have interpreted and would interpret them: Lazard Bros & Co v Midland Bank Ltd, [1933] AC 289, 298 per Lord Wright, and Yukos Capital Sari v OJSC Rosneft Oil Co, [2014] EWHC 2188 at para. 26 per Simon J. In cross-examination, Mr Gryshko, while maintaining his own interpretation of the legislation, accepted that "any Ukrainian lawyer now asked to advise on the article 13 question [sc. whether it was contrary to article 13 of the Law on Business Entities to pay for founding shares with promissory notes] would rely on the 2008 decision [sc. the decisions in cases 28/198 and 28/199], not the 2006 decision [apparently a reference to the Supreme Court decision of 18 April 2006, to which I refer below]", considering that otherwise they would "put [their] client at risk". I understood this answer to mean that he accepted that Ukrainian courts would hold that payment by way of promissory notes is contrary to article 13. Certainly, I conclude that they would so decide the question.

37. Secondly, the Ukraine Supreme Court has, as I have explained, reached a clear decision that the share purchases of Seagroup and Amruz were contrary to Ukrainian legislation. The English court is not bound in all circumstances to apply a decision of a foreign court. However, when there is a clear decision of the highest foreign court on a question of the interpretation of its legislation, it will be given very great weight and other evidence will carry little weight against it: Bankers & Shippers Insurance Co. of New York v Liverpool Marine & General Insurance Co. Ltd, (1926) 24 Ll L Rep 85.

In my judgment, there are no special circumstances that would justify me in preferring evidence of expert witnesses over the evidence provided by the decisions of the Supreme Court. Even if there were merit in the criticisms of the decision in 2008 to hear the appeals (and I consider that there is none), it would not invalidate the reasoning of the Supreme Court's judgments or detract from the views expressed as evidence of Ukrainian law.

38. I add that the decisions of the Supreme Court in cases 28/198 and 28/199 were the clearer with regards to the "article 13 question", and therefore the more powerful evidence, because of the statement of "Legal Position". Dr Chernykh explained that at that time the Supreme Court was starting to adopt the practice, in cases which it regarded as deciding an important legal question, of stating a "Legal Position" in notations of this kind, with the purpose of promoting consistency in judicial decisions, although, as I have said, in 2008 such notations had no formal legal standing. I accept that evidence: Mr Gryshko offered no other convincing explanation for the notation.

39. In these circumstances, I shall, without intending any disrespect to them, deal with the helpful evidence of Dr Chernykh and Mr Gryshko without referring to all their points. As I have indicated, Dr Chernykh considered that the investments by Seagroup and Amruz were not in conformity with Ukrainian legislation for two reasons. The first is based on article 13 of the Law on Business Entities of 1991, which concerns contributions to the charter or statutory fund of a Ukrainian company made in return for shares in the company. The article provided that, "Contributions of members and founding members of a company may be buildings, constructions, equipment and other tangible assets, securities, rights for the use of land, water and other natural resources, buildings, constructions, equipment as well as other property rights (including for intellectual property), funds including in foreign currency." It continued, "It shall be prohibited to use budget funds, funds obtained on credit and against pledging for contributing into the authorized capital". Dr Chernykh considered that contributions by way of promissory notes do not conform with article 13 because they represent debt undertakings of the issuer, rather than property.

40. Mr Gryshko disagreed: he considered promissory notes to be covered by article 13 because they are "securities". He relied on the statutory definition of "securities" in article 3 of the Law on Securities and Stock Exchange 1991: "In accordance with this Law, the following types of securities may be issued and circulated in Ukraine: shares, domestic republican and local bonds, corporate bonds, treasury republican obligations, savings certificates, promissory notes, privitasation vouchers." Further, Mr Gryshko considered that, if promissory notes are not, for this purpose, to be regarded as "securities", promissory notes are a form of property, and so covered by the term "other property rights": he cited in particular a decision of the Supreme Court in case 17/81 dated 3 December 2002, in which it was said "a promissory note as a security is a property of its owner". He also cited legislation as support for his view: (i) the Law on Property, 1991, which provided at article 13(1) that "Objects of the private property rights shall be residential buildings …[various other categories of property] …, monetary funds, shares, other securities, as well as other property or consumer and production designation", and at article 26(2) that "Contribution by participants of a business entity may consist of fixed and working capital, monetary funds, securities"; and (ii) the Law on Foreign Investments, which provided at article 4 that "Foreign investors shall have the right to make all types of investment …in the following forms:

(a) …; (b) …; (c) purchase of immovable or movable property not directly prohibited by the laws of Ukraine, including houses, apartments, premises, equipment, vehicles and other property objects, by direct receipt of property or property complexes or in the form of shares, bond and other securities".

41. Dr Chernykh acknowledged both that "formally" promissory notes fall within the statutory definition of securities and that, as she put it in cross-examination, "in abstract" securities are property. The essential difference between her and Mr Gryshko is that she considered that a literal interpretation of article 13 would undermine its purpose: as she put it, "the composition of the statutory fund of a company solely of promissory notes representing debt undertakings leads to manifest injustice for the company creditors".

42. Mr Gryshko accepted in cross-examination that "the widely held view among practitioners and legal scholars" is that the purpose of article 13 was to ensure that newly-formed companies have capital to start their operations, and to protect their creditors or potential creditors. He and Tatneft made three main points in response to Dr Chernykh.

43. First, Mr Gryshko considered that Ukrainian principles of statutory interpretation do not permit an interpretation of article 13 that departs from its literal meaning because "The Ukrainian courts, as a general rule, take a textual approach to the interpretation of statutes which means that effect should be given to all of the language used in a statutory provision", and that "recourse to a teleological interpretation of the law (i.e. interpretation based on views as to the purpose of a law), … is permitted only in exceptional cases in which such an interpretation is found to be necessary to avoid undermining constitutional rights of a citizen or a manifest injustice. Usually, teleological interpretation of the law is practised with respect to statutory provisions limiting access to justice".

44. Dr Chernykh's view was that Ukrainian law was less restrictive about adopting a teleological approach to statutory interpretation, but she also considered that, even if it were permitted only in cases involving human rights or to avoid manifest injustice, it would be a proper approach to interpreting article 13 in view of the manifest injustice that would otherwise result for company creditors. Mr Gryschko was not able to provide any case law or academic authority to support his narrow view of when Ukrainian courts will give weight to the purpose of a statutory provision. On the other hand, in her rebuttal report Dr Chernykh provided weighty judicial authority to support her opinion. I found her evidence on this question more convincing.

45. Next, Mr Gryschko referred to two decisions which he considered inconsistent with the Supreme Court decisions of 18 March 2008: a decision of the Supreme Court in case 15/559, dated 18 April 2006, and a decision of the Economic Court of the Poltava Region in case 8/604, dated 12 November 2002. In the 2006 judgment, the Supreme Court decided that, at the time that Seagroup and Amruz invested in Ukrtatnafta, Ukrainian law did not prohibit promissory notes being used to purchase company shares, noting that "Article 13 of the Ukrainian Law 'On Business [Entities]' stipulates that, contributions from participants and founders of a company may include, among others, securities, while Article 3 of the Ukrainian Law 'On Securities and Stock Exchange' lists notes among securities". The Economic Court of the Poltava Region in case 8/604 referred to the decisions of the Higher Economic Court in cases 28/198

and 28/199, and agreed that, "When the Agreement of Foundation and Activities of the Company was signed, the current legislation did not place restrictions on the use of promissory notes for payment of securities issued by a company …". However, as Dr Chernykh explained, the Ukrainian judicial system does not have a principal of stare decisis. In any case, the fact remains that, in the 2008 decisions, the Supreme Court took a different view about the legitimacy of contributing to a charter fund by way of promissory notes, the decision being the more authoritative because of the stated "Legal Position".

46. The other main attack on Dr Chernykh's view about article 13 was the argument that the same reasoning might be applied to other securities, such as shares or bonds. Dr Chernykh accepted that there was some force in this point, and understandably acknowledged that it is unclear where the line should be drawn with regard to which securities were permitted under article 13. I too see force in the point, but am not persuaded that it significantly undermines Dr Chernykh's evidence. One consideration might be, as Dr Chernykh suggested, a difference in the regulatory regimes regarding different types of securities. However that might be, it appears from the evidence before me that Ukrainian law is wary about the use of promissory notes: in particular, this is illustrated by the Joint Resolution, which states that "promissory notes/bills of exchange may be issued only for payment of supplied commodities". (It was not disputed that a resolution of the Cabinet is a form of legislation in Ukraine, subordinate to the Constitution and statutes of the Central Rada. A Joint Resolution of the Cabinet and Central Bank is, as Mr Gryshko explained, relatively unusual but not unique.) Although the Joint Resolution was passed in 1992, subsequent to the Law on Business Entities, and does not directly inform the proper interpretation of article 13, the very fact that it shows specific concern about the use of promissory notes and bills of exchange goes some way to answer the argument that, if a purposive interpretation of article 13 is adopted, it would necessarily apply equally to other securities.

47. I refer briefly to Ukraine's Law on Circulation of Promissory Notes of 2001, since there was considerable discussion of it in the expert evidence. It expressly prohibited contributions to charter funds by way of promissory notes. The legislation did not come into force until 4 May 2001 and has no retrospective effect, as Dr Chernykh confirmed, and therefore does not apply to Seagroup's and Amruz's share acquisitions in 1999. Dr Chernykh's view was that the 2001 legislation did not represent a change in the law: Mr Gryshko disagreed, pointing out that it is recorded in the travaux préparatoires: "… what is also important: Article 12 of this draft law prohibits using promissory notes as a contribution to the charter capital of a business association". However that may be, this enactment further indicates concern about the use of promissory notes, and so supports Dr Chernykh's view that, if article 13 is to be interpreted purposively so as to prohibit contributions by way of promissory notes, the same interpretation would not necessarily be extended to other securities.

48. Both Dr Chernykh and Mr Gryshko gave clear and helpful evidence in support of their preferred interpretation of article 13. If I need to decide between them, I would prefer the evidence of Dr Chernykh: to my mind, her core point that Mr Gryshko's literal interpretation of the article would defeat its purpose should prevail. Moreover, her view is reinforced by her other main reason for her view that the investments of Seagroup and Amruz did not comply with Ukrainian legislation, based on article 8(3)

of the Law on Securities and Stock Exchange and article 33 of the Law on Business Entities.

49. The question whether the investments complied with these provisions turns upon whether the issue of the promissory notes amounted to payment of the value of the shares. Mr Gryshko considered that it did, maintaining that "failure to pay under promissory notes constitutes a failure to honour the promissory notes rather than a failure to make payment under the contracts of sale and purchase of shares", and endorsing the views expressed by the Higher Economic Court in its 2002 decisions in cases 28/198 and 28/199. Dr Chernykh disagreed. I again prefer the views of Dr Chernykh. First, Dr Chernykh explained that legal scholars from the Soviet era drew a distinction between a promissory note being issued and payment being made by means of a promissory note. (Mr Gryshko sought to answer this by referring to a different view expressed by Prof Lazar Lunts, a Soviet jurist, in Money and Monetary Obligations in Civil Law, but I do not find that persuasive because the contrary view was expressed in a later work of Prof Lunts, written jointly with Prof Ivan Novitskin, General Study of Obligations.) Secondly, Dr Chernykh is supported by the reasoning of the Higher Economic Court in a judgment of 6 June 2006 in case 19/413, Donestsk v DA-LV LCC, in which it was held that "the transmission of the promissory note as a debt obligation cannot be equated in this case with advance payment in money for goods".

50. Accordingly, I uphold Ukraine's illegality argument.

Tatneft's timing argument and the conformity requirement

51. As I have said, Tatneft contended that the $81 million claim meets the conformity requirement, and so is covered by the arbitration agreement, even if Ukraine succeeds in its estoppel argument or the illegality argument (or both). It submitted that, under the definition of "Investments" in article 1 of the BIT, the question whether an investment complies with domestic legislation is to be assessed at the time that it was made, and provided that an investment was lawful then, it does not fall outside the definition if it ceases to be lawful later: if such a legal development is relevant at all, it goes only to the merits of a claim, and not to the arbitrators' jurisdiction. Thus far, Tatneft's argument is uncontroversial: as the Tribunal put it at para. 197 of the Jurisdiction Award: "… the language of Articles 1(1) and 2(1) of the …BIT indicates that [Tatneft's] investment should be in conformity with the host State's legislation at its initiation, but does not convey the meaning that this would have to be a permanent requirement".

52. Tatneft then said that, when it made its investment in 2007, the Ukrainian Court decisions in force, which the Supreme Court had refused to review, had held that the share acquisitions of Seagroup and Amruz were in accordance with Ukrainian legislation. Again, that is not disputed.

53. Tatneft went on to submit that, therefore, its investment was made at a time when the law of Ukraine held them to be lawful, and the later decisions of the Courts in 2008 do not affect the position as far as the jurisdiction of the Tribunal is concerned. I cannot accept that step in the argument. First, the investments that give rise to the $81 million claim are the investments made by Seagroup and Amruz in 1999. The question whether they conformed with the legislation of Ukraine in force when Tatneft bought

the shares of Seagroup and Amruz is beside the point. Further, the timing argument fails to distinguish between the lawfulness of the investment under the prevailing Ukrainian legislation and what was stated to be lawful in decisions of the Ukrainian Courts prevailing in December 2007. As Mr Edey put it in his closing submissions, "The lawfulness of that direct/indirect acquisition of the Ukrtatnafta shares was the same as a matter of Ukrainian legislation in 1999 … as it was in December 2007 as it was at any time thereafter". The relevant legislation did not change, and the decisions of 2008 explained it.

Tatneft's issue estoppel argument and the abuse of process argument

54. I must therefore consider what I have called Tatneft's threshold arguments, and I start with Tatneft's issue estoppel argument and its abuse of process argument, which are related and which I shall take together. They invoke legal principles covered by the portmanteau term of res judicata, and a more general procedural rule against abuse of process: see Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd., [2013] UKSC 46 per Lord Sumption at para. 17. Having referred to cause of action estoppel, the rule in Conquer v Boot, [1928] 2 KB 336 and the doctrine of merger, Lord Sumption described these manifestations of the general rule, issue estoppel and the rule in Henderson v Henderson: "Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties … Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson, (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones".

55. With regard to issue estoppel, Lord Sumption went on to consider the decision of the House of Lords in Arnold v National Westminster Bank plc, [1991] 2 AC 93, and in particular the speech of Lord Keith in that case, and he concluded (at para. 22) that it is authority that "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised". (By "should have been raised", Lord Sumption clearly meant that it should have been raised then, if it was to be raised at all.)

56. The authoritative modern exposition of the rule in Henderson v Henderson is that of Lord Bingham in Johnson v Gore Wood, [2002] 2 AC 1, 31B: "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all". Lord Bingham continued:

> "I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that

> because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before".

57. To my mind, it is of no real importance whether Tatneft's argument be regarded as one of issue estoppel or a Henderson v Henderson complaint. The principles overlap: in particular, the rule in Henderson v Henderson, as originally stated by Wigram V-C, applies to "every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time", and the scope of issue estoppel is similar: Virgin Atlantic Airways at para. 21. Neither principle raises an absolute bar to an argument which could and should have been raised earlier, and both require Lord Bingham's "broad, merits-based" assessment by reference to the public and private interests that are engaged.

58. The terms of the State Immunity Application were, in material part, that the order of Teare J should be set aside "on the grounds that the Court lacks jurisdiction and Ukraine is entitled to State immunity under [section] 9 of the [State Immunity Act, 1978]". Section 9 provides that, "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration". Tatneft submits that therefore the issue before Butcher J, which Ukraine is precluded from re-litigating, was whether Ukraine had agreed to submit to arbitration the dispute that gave rise to the award that the subject of Teare J's order, including the part relating to the $81 million claim; and that his decision on the issue was that it had done so. He therefore refused Ukraine's application: he could not otherwise have done so (except on the basis of Ukraine's non-disclosure complaint, which is irrelevant for present purposes).

59. Ukraine argued that this submission formulates the issue in too general terms, and that the issues that Butcher J decided were the three arguments that it had advanced in support of its case that it had not lost its immunity: the arguments that Butcher J labelled in his judgment as the "No Investment point", the "Timing point" and the "Abuse of Rights point". He upheld Ukraine's argument on none of these three points, and therefore refused the State Immunity Application.

60. I agree with Ukraine about this. In ordinary civil litigation in which a claimant asserts a cause of action, the determination of the claim may give rise to a cause of action estoppel, and the determination of its ingredients, or the ingredients of the defence to it, may give rise to an issue estoppel. As I see it, similarly the issues determined on the State Immunity Application, which might trigger an issue estoppel, were the "ingredients" of Ukraine's case, the grounds that it maintained arguments that it had not lost its state immunity by agreeing to arbitration of the disputes.

61. There is no dispute that Ukraine could have raised the illegality argument on the State Immunity Application. The essential questions are (i) whether it should have done so,

and (ii) whether in all the circumstances Ukraine should be barred from raising the illegality argument.

62. I shall deal first with four preliminary matters. First, there is no reason of principle that abuse of process, by way either of issue estoppel or of the rule in Henderson v Henderson, cannot, in an appropriate case, preclude an application that a New York award should not be enforced: see Alexander Brothers Ltd v Alstom Transport SA and anor, [2020] EWHC 1584 (Comm). Mr Edey did not argue otherwise.

63. Secondly, Tatneft introduced its issue estoppel argument in the course of the hearing before me (which overran its time-estimate and had to be adjourned part-heard). Mr Edey submitted that, because of this, the argument should be treated with "considerable circumspection". I do not accept that: it is a question of law, and is to be considered on its merits.

64. Next, it is a condition of issue estoppel that the decision giving rise to it is final. Mr Edey described the State Immunity Application as "interlocutory", and submitted that it is therefore less likely to bar a subsequent illegality argument. Some kinds of interlocutory applications are indeed unlikely to give rise to an issue estoppel, and therefore, as Andrew Baker J observed in Gruber v AIG Management France SA, [2019] EWHC 1676 at para. 11, a bar is less likely to arise from an earlier stage in the same proceedings. This point is answered by the explanation given by Buckley J in Zeiss Stiftung v Rayner & Keeler (No 3), [1970] Ch 506, 539A/B of what is meant by "final" and "interlocutory" in this context: "Many interlocutory orders, such, for instance, as an interim injunction limited to take effect until judgment or further order, clearly involve no final decision of any issue between the parties either expressly or, since they depend only upon a prima facie case being made out, by implication. Finality for this purpose means that a decision (a) is one which does not ex facie … leave something to be determined or ascertained before the decision can become effective or enforceable, and (b) is not subject to subsequent discharge rescission, modification or any other form of review by the court or tribunal making the decision". In my view, the decision of Butcher J is of the nature of a final order.

65. Fourthly, on its State Immunity Application, as Butcher J recorded in his judgment at para. 3, Ukraine expressly reserved "the right to contend that the Court should refuse to recognise and enforce the Merits Award under section 103 of the 1996 Act, if it is unsuccessful at the present hearing. The parties have agreed that such objection will be considered at a future hearing if necessary. In the meantime, Ukraine has not submitted to the jurisdiction". The purpose of hearing the State Immunity Application separately and first in cases such as this is to avoid any question that a state might be said to have submitted to the jurisdiction of this Court simply by issuing a challenge under section 103. It is not to allow a state to reserve to itself a "right" to have re-determined on an application under section 103 arguments about the scope of the arbitration agreement which had already been argued and determined against the state. Likewise, I cannot accept that Ukraine was entitled to reserve a "right" to raise arguments on the section 103 application about the scope of the arbitration agreement if Ukraine should properly have raised them on the State Immunity Application. The reservation of rights does not, to my mind, materially assist Ukraine to answer Tatneft's issue estoppel and the abuse of process arguments.

66. Of course, there is nothing unusual, still less improper, in a state challenging the Court's jurisdiction on the ground of immunity under the 1978 Act, and then subsequently raising a separate challenge to enforcement under section 103 of the 1996 Act. But this broad proposition begs the question whether it is permissible if, as here, the separate challenge is based upon an argument which, if accepted, would afford state immunity.

67. Mr Edey accepted that Ukraine was aware of the illegality argument when it presented the State Immunity Application. It had already raised it in the French annulment proceedings. I infer that Ukraine made a deliberate decision not to raise the illegality argument. It is of some interest that in the American proceedings Ukraine sought to introduce the argument only when its state immunity argument was finally rejected. Ukraine has not explained its decision, and it is not obliged to do so: the onus of proving issue estoppel or abuse is on the party alleging it. But Ukraine's reticence makes it the more difficult to accept that it was pursuing some proper litigation strategy. For my part, I cannot perceive any proper interest that Ukraine might have had in deferring its illegality argument until the section 103 application, and thereby extending these proceedings and deferring their resolution. This bears upon Lord Bingham's "broad, merits-based judgment which takes account of the public and private interests involved".

68. The private interests that are engaged require that no one should be vexed unnecessarily by litigation, and in particular should not be oppressed by successive hearings in the same matter. In my judgment, Tatneft has been so vexed, and I would, if necessary, conclude that it has (as Lord Bingham put it) been unjustly harassed. The successive hearings are the more oppressive to Tatneft because Ukraine has not paid the costs awarded against it at earlier stages of this litigation.

69. Mr Edey submitted that Tatneft has not been vexed twice in the same matter because they have not had to meet the illegality argument twice. This does not meet the point: it will always be the case that the point is not argued twice when the nature of the abuse is a failure to raise an argument that could and should have been. Tatneft has had to argue in successive hearings the question whether the dispute was covered by the arbitration agreement. Indeed, the issues on Ukraine's two applications are more closely connected than that: the issue on both is whether the $81 million claim is in respect of an "Investment" within the definition in article 1 of the BIT.

70. Ukraine seeks to answer this complaint by pointing out that, if it had succeeded on the State Immunity Application, there would have been a saving because the illegality argument would never have been heard. I am not persuaded by that argument: of course, if Ukraine had asserted the illegality argument on the State Immunity Application, it might properly have invited the Court to consider how, as a matter of case management, the different arguments might most efficiently be determined. This would have been the proper course whereby a party would fulfil its duty under rule 1.3 of the Civil Procedure Rules to help the court to further the overriding objective. Ukraine did not do so: it did not let either the Court or Tatneft know that it might later seek to raise the illegality argument.

71. The public interest to which Lord Bingham referred is, in general terms, the efficient and proper disposal of litigation and that "litigation should not drag on for ever": Barrow v Bankside Members Agency, [1996] 1 WLR 257, 260B/C. It was inefficient for the court to have to decide piecemeal the proper application of the definition of

"Investments" in article 1 of the BIT as a result of Ukraine keeping the illegality argument in reserve, and deploying it to mount a separate challenge against the $81 million claim under section 103.

72. But the public interest is further engaged by two other considerations in this case. The first is the nature of these proceedings. The English Courts favour supporting international arbitration by making it straightforward to have awards recognised and enforced internationally, unless good reason to do otherwise is shown. This is the intention of the New York Convention, and of sections 100 to 103 of the 1996 Act, which give effect to it. Accordingly, the public interest demands that challenges to enforcement be resolved efficiently and without unwarranted delay.

73. Secondly, the illegality argument entails a collateral attack on the decision of Butcher J. As I have said, the necessary basis for his decision was that Ukraine had agreed to submit the dispute about the $81 million claim to arbitration. By the illegality argument, Ukraine maintains that it had not done so: that Butcher J's decision was wrong. Lord Bingham identified as an additional consideration whereby proceedings are the more abusive that they entail such a collateral attack, and so the risk of bringing the administration of justice into disrepute.

74. I conclude that it would be contrary both to Tatneft's private interest and to the public interests that are engaged to allow Ukraine, having decided not to raise the illegality argument on the State Immunity Application, now to do so. It should have raised it on the State Immunity Application if it was going to deploy it at all.

75. Ukraine also submitted that, whatever the procedural history of the $81 million claim, it was not such as to warrant enforcement of the Merits Award if the Tribunal had no jurisdiction to make it. This point has a superficial appeal, but in my judgment a specious one: the Award was challenged, inter alia, on the basis of the illegality argument in the Courts of France, which the parties had chosen to be the seat of the reference. As Cockerill J recently put it in Alexander Bros Ltd v Alstom Transport SA, (loc cit) at para. 73, "Under the New York regime, as it is applied in England & Wales, significant weight is given to the determination of the Court of the seat". This is so regardless of whether the English Court would have made the same determination. In Carpatsky Petroleum Corp v PJSC Ukrnafta, [2020] EWHC 769 (Comm), Butcher J referred to the public interest in "sustaining the finality of decisions of the supervisory courts on properly referred procedural questions arising from the arbitration" (at para. 121). I conclude that, in all the circumstances, it would be unjust for Ukraine to be permitted to raise the illegality argument now.

The waiver argument

76. It is therefore not necessary for me to decide the waiver argument, but I accept it and shall explain my reasons for doing so. Section 103(2) of the 1996 Act provides that, if the condition stated in section 103(2)(d) or one of the other conditions is satisfied, then enforcement of the award "may be refused". As Mance LJ explained in Dardana Ltd v Yukos Oil Co, [2002] EWCA Civ 543 at para. 8, these words do not introduce an "open discretion", and "[t]he use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by, for example, another agreement or estoppel".

77. Ukraine raised objections to the jurisdiction of the Tribunal on these grounds: (i) that Ukrtatnafta was a joint venture between governments, those of Tatarstan and Ukraine, and the dispute was not between a state and an investor so as to be covered by the BIT; (ii) that Tatneft was not an investor protected by the BIT because it was controlled by the Government of Tatarstan; (iii) that, because Tatneft's participation in Ukrtatnafta had a political flavour, it did not make an investment within the meaning of the BIT; and (iv) that, even if Tatneft's participation was an investment, it was not made in conformity with Ukrainian law, as required by the BIT. These challenges were rejected by the Tribunal.

78. The fourth challenge was based in part on article 33 of the Law on Business Entities and article 8 of the Law on Securities and Stock Exchange. (It also invoked a "parity" principle in the so-called "Ukrtatnafta Treaty" of 4 July 1995 between Ukraine and the Government of the Republic of Tatarstan for the incorporation of Ukrtatnafta and other documents constituting it, the principle being that parity would be maintained between the Tatar and the Ukrainian interests; and the investment was said to be part of a scheme to acquire a majority interest.) Ukraine argued that, although listed as a shareholder when Ukrtatnafta was registered in December 1995, Tatneft had made no contribution until 14 August 2000 (and then paid only $1 million, further shares being later acquired from Zenit Bank, a Russian commercial bank that Tatneft had co-founded), but that it had participated in shareholder meetings without having any right to do so and contrary to article 41(2) of the Law on Business Entities: this provides that "[t]he right to participate in a general meeting of shareholders shall be vested in the persons holding shares as on the date of the general meeting (other than the constituent meeting)". As to this, the Tribunal decided (at para. 188 of the Jurisdiction Award) that, "True enough, [the] payment was done late and through an intricate financial arrangement involving Zenit Bank, but there is no evidence that the late capital contribution caused Tatneft's investment to be illegal".

79. This fourth challenge was directed only to Tatneft's direct participation in Ukrtatnafta (with which the $31 million claim was concerned). Mr Edey accepts that Ukraine did not deploy the illegality argument to challenge the Tribunal's jurisdiction in respect of the claim about Tatneft's participation through acquisition of interests in Seagroup and Amruz, the $81 million claim. Ukraine did not explain in its evidence or submissions why it did not do so. It is not disputed that Ukraine knew at the relevant time the facts on the basis of which it now asserts that the share purchases by Seagroup and Amruz were unlawful. It was submitted, however that there is no proper reason to conclude that Ukraine appreciated that it might rely on them to dispute the Tribunal's jurisdiction over the $81 million claim. Mr Edey invited me to conclude that the point was overlooked: why otherwise, it was said, would Ukraine not deploy the illegality argument when disputing the Tribunal's jurisdiction on other ground? I do not accept that submission. I infer that Ukraine deliberately chose not to take the illegality point before the Tribunal. The Jurisdiction Award states (at para. 205) that Ukraine "notes that the payment of founding shares with promissory notes, as these companies did, is contrary to Ukrainian legislation. While it is unnecessary, in [Ukraine's view], to resolve these issues because Tatneft's claims are inadmissible, these 'oddities' further undermine the legitimacy of the claims". Ukraine was represented before the Tribunal by King & Spalding LLP and the Ukrainian firm of Grischenko & Partners, and it would be surprising if such lawyers overlooked the point, having argued that the payment for the shares was contrary to Ukrainian legislation and having challenged the Tribunal's

jurisdiction on the grounds that Tatneft's direct investment did not conform with Ukrainian legislation. It is indeed on the face of it strange that, in these circumstances, the illegality argument was not deployed in the reference to challenge jurisdiction, but Mr Edey's submission about this loses much of its force because similarly, for some reason, Ukraine did not raise it on the Sovereign Immunity Application despite being aware of it.

80. Mr Edey also relied on the judgment of Butcher J in answer to the waiver argument: Tatneft had argued before him that, because Ukraine had not advanced before the Tribunal its arguments about the scope of the arbitration agreement, it could not claim state immunity on the grounds that claims against it were outside the arbitration agreement: it submitted that the Court should adopt an approach comparable to that adopted when determining challenges to awards under section 67 of the 1996 Act and to give effect to the policy reflected in sections 31 and 73(1) of the Act. That argument was rejected: while Butcher J did not "exclude the possibility that a waiver of such points could have been made in the course of an arbitration under a bilateral investment treaty", he considered that "what would at least be required would be conduct which clearly indicated that the state was foregoing reliance on a particular point not just for the purposes of the arbitration but for wider purposes including any subsequent issues as to state immunity before a national court", and he did not consider that Ukraine had so conducted itself: loc. cit. at para. 37.

81. I do not consider that the judgment of Butcher J provides support for Ukraine against the waiver argument. On the State Immunity Application, the question was whether Ukraine has agreed in writing to submit the dispute to arbitration. The argument about waiver before Butcher J was whether, even if Ukraine had not so agreed, it had nevertheless lost its substantive right to state immunity by not raising jurisdictional challenges before the Tribunal. He therefore had to consider whether Ukraine's conduct clearly indicated that it was foregoing reliance on its state immunity, and (unsurprisingly) concluded that it did not. He reached no conclusion about whether it has waived any objection to the Tribunal's jurisdiction "for the purposes of the arbitration", which, as I see it, is what is relevant to the waiver argument before me.

82. Mr Edey did not dispute that a party can waive for the purposes of the New York Convention an objection that a claim falls outside the submission to arbitration, but he denied that Ukraine's conduct constituted waiver. Under English law, as Mr Edey submitted, a party waives a right by election if it makes an unequivocal representation by words or conduct communicated to the other party that it intends to abandon one of two courses available to him, provided that when he does so he knows both the relevant facts giving rise to his right to choose between the two courses but also his right to do so: Peyman v Lanjani, [1985] 1 Ch 457, 500G per Slade LJ.

83. But, to my mind, this submission, and the discussion of waiver by election, miss the point. The expression "waiver" is a "vague term, used in many senses": see Ross T Smyth & Co Ltd v T D Bailey, Son & Co. (1940) 164 LT 102, 106 per Lord Wright. In its waiver argument, Tatneft does not contend that Ukraine waived or abandoned a substantive right conferred by the BIT. Its contention is that, by arguing the merits in the reference without challenging jurisdiction on the basis of the illegality argument, Ukraine acceded to having the merits of the $81 million claim determined by the Tribunal regardless of its illegality argument. If the matter depended on English law, I would accept that Ukraine has waived that objection to the Tribunal's jurisdiction.

84. However that might be, Mr Diwan had a more fundamental point. He did not present the waiver argument by reference to English law, but by reference to what he described as "a universally accepted and fundamental rule of international arbitration". The arbitration agreement in the BIT is not governed by English law, and the discretion under section 103(2) to enforce an award notwithstanding one (or more) of the specified circumstances obtains does not depend solely on English law. As Lord Collins explained in Dallah Co v Ministry of Religious Affairs of Pakistan, [2010] UKSC 46 at para. 127, "Since section 103(2)(b) [and, of course, the same applies to section 103(2)(d)] gives effect to an international convention, the discretion should be applied in a way to give effect to the principles behind the Convention". Certainly, as both Lord Collins and Mance LJ in Dardara v Yukos Oil (cit sup) emphasised, the discretion must be exercised on the basis of recognised legal principles, but they are not confined to principles of domestic English law. Both Mance LJ and Lord Collins cited van den Berg, The New York Convention of 1958 (1981), who gives examples of when a party might be estopped from invoking a ground for refusal of enforcement by reference to international citations (at pp.265,266). In International Commercial Arbitration (2nd Ed, 2014), Prof. Gary Born (at p. 3482) states that it is "well-settled that a party can waive its right to challenge an arbitrator's jurisdiction, including the right to raise jurisdictional challenges in subsequent recognitional proceedings", either expressly or by implication from conduct; and goes on to explain (at p. 3484) that, "If a party fails to raise a jurisdictional challenge during the arbitral process, it generally will not be permitted to raise that challenge in opposition to an action to recognize or enforce the award". I consider that there is a widely-accepted legal principle in international arbitration that the failure to raise a plea as to jurisdiction operates as a waiver of the point that was not raised.

85. In response to this argument, Mr Edey submitted that Ukraine cannot be said to have waived any objection to the Tribunal's jurisdiction on the basis of the illegality argument because in the course of the reference it challenged the Tribunal's jurisdiction, albeit on the other grounds. This raises the question whether (i) if a party wishes to dispute the merits of a claim before a tribunal acting under the UNCITRAL rules without waiving grounds for challenging its jurisdiction, he must assert those grounds before the tribunal, or (ii) it suffices for him simply to object to the tribunal's jurisdiction, albeit on other grounds. Mr Diwan contended for the first alternative, and Mr Edey contended for the second.

86. I agree with Mr Diwan. Firstly, the wording of the UNCITRAL Arbitration Rules, which governed the arbitration under the BIT, supports him. Article 21 provides:

> "1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the arbitration agreement.
>
> …
>
> 3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counterclaim, in the reply to counterclaim".

The plural term "objections" in article 21.1 contemplates, I think, that the plea to jurisdiction should raise specific objections, not just a general challenge to it.

87. Next, although the point is not exactly covered by the text books cited by Mr Diwan, I find in them at least implicit support for the proposition that a party to an international arbitration who disputes the merits of a claim before arbitrators, can preserve an argument that they have no jurisdiction only by raising that argument, and not by a general challenge. In particular, this is the implication of the International Council for Commercial Arbitration's Guide to the Interpretation of the 1958 New York Convention, a Handbook for Judges, which states: "The general principle of good faith (also sometimes referred to as waiver or estoppel) that applies to procedural as well as to substantive matters, should prevent parties from keeping points up their sleeves". It cites in support of this proposition article 4 of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006: "A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time shall be deemed to have waived his right to object".

88. There is further support for Tatneft's argument in the decision of Aikens J in Primetrade AG v Ythan Ltd (The "Ythan"), [2005] EWHC 2399 (Comm). The case arose from an arbitration with its seat in England, and a question before the Court was whether Primetrade AG was entitled to raise an argument about the Tribunal's jurisdiction, or whether it was precluded from doing so by section 73 of the 1996 Act: "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making … any objection (a) that the tribunal lacks substantive jurisdiction … he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time that he took part, or continued to take part, in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds of objection". Of course, in as much as it concerned an English arbitration, this authority is not directly applicable to this case. But, as is clear from the Report of the Departmental Advisory Committee on Arbitration Law, section 73 was modelled on, and had the same aims as, article 4 of the UNCITRAL Model Law, although it did not exactly echo it. At para. 59 of his judgment, Aikens J said this: "It is clear that the intention behind section 73 is to ensure that a party objecting to jurisdiction, who has decided to take part in the arbitral proceedings, should bring forward his objections in those proceedings before the arbitrators. He should not hold them in reserve for a challenge to the jurisdiction in the court". Aikens J concluded that "the words 'any objection' and 'that objection' in section 73 must mean 'any ground of objection' and 'that ground of objection'".

89. In support of his decision, Aikens J cited the judgment of Colman J in JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd, [2004] EWHC 245. That case too concerned an English arbitration, and the application before Colman J was a challenge to an award under section 67 of the 1996 Act on the grounds that the arbitrator had no jurisdiction. In his judgment, Colman J said this (at para. 63): "The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under section 67 the issue as to jurisdiction must normally have been raised before the arbitrator if it is to be raised under a section 67 application challenging the award". I consider the principle of openness and fair

dealing similarly demands that, if a tribunal's jurisdiction is to be challenged on an application to enforce an award made after argument on the merits, that challenge should normally have been raised before the tribunal.

90. In my judgment, therefore, a decision to enforce the award would be in accordance with recognised legal principle, and properly within the restricted discretion under section 103(2) of the 1996 Act, notwithstanding that the $81 million claim fell outside the terms of the submission to arbitration. For reasons that I have explained when considering Tatneft's other threshold arguments, I consider it right to exercise that discretion to uphold the order for enforcement of the Merits Award.

Conclusions

91. Although I accept Ukraine's illegality argument and reject Tatneft's timing argument, I conclude (i) that its application should be rejected as an abuse of the process of the Court and barred by issue estoppel, and (ii) that, in any event, I would decline to exercise my discretion under section 103 of the 1996 Act to set aside the order of Teare J with regard to the $81 million claim.

92. I am grateful to all counsel for their submissions. I also ask that they seek to agree an order to give effect to this judgment.