19-20011

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OJSC UKRNAFTA,

Plaintiff-Appellant,

—v.—

CARPATSKY PETROLEUM CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF FOR DEFENDANT-APPELLEE CARPATSKY PETROLEUM CORPORATION

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No. 19-20011

OJSC UKRNAFTA,

Plaintiff-Appellant,

v.

CARPATSKY PETROLEUM CORPORATION,

Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendant-Appellee Carpatsky Petroleum Corporation ("Carpatsky") is a wholly owned subsidiary of Kuwait Energy plc. Kuwait Energy plc is a wholly owned subsidiary of United Energy Group Limited, a company publicly listed on the Hong Kong Stock Exchange (00467.HK). According to its most recent financial reports, the following persons or entities have a 10% or greater beneficial or attributable interest in United Energy Group Limited: Zhang Hong Wei; 名澤東方投資有限公司; 東方集團有限公司; Huilan Investment Limited; He Fu International Limited; Million Fortune Enterprises Limited; United Petroleum & Natural Gas Holdings Limited; and United Energy Holdings Limited. Carpatsky is represented in these proceedings by MoloLamken LLP (Robert K. Kry and Sara E.

Margolis) and Hilder & Associates, P.C. (Philip H. Hilder and Stephanie K. McGuire) and was formerly represented by Andrews Kurth Kenyon LLP (Stuart C. Holliman, Kelly S. Sandill, and Ashley S. Lewis). Carpatsky is or was represented in related foreign matters by other lawyers including Advokatfirman Lindahl KB, François Ameli, Bird & Bird, Cirio Advokatbyrå AB, Huw Davies QC, EnGarde, Goltsblat BLP, Herbert Smith Freehills, Lustenberger Rechtsanwälte KLG, Meshari Al Osaimi, NautaDutilh, Salans, Felix Wardle, and James Willan. Carpatsky is moving for leave to submit *in camera* a supplemental certificate of interested persons concurrently with the filing of this brief.

Plaintiff-Appellant OJSC Ukrnafta states that it is owned 50% (plus one share) by PJSC National Joint-Stock Company Naftogaz of Ukraine, which in turn is owned 100% by the State of Ukraine. It is represented by Yetter Coleman LLP (R. Paul Yetter, Christian J. Ward, and Elizabeth A. Wyman).

June 19, 2019

/s/ Robert K. Kry
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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Carpatsky Petroleum Corporation agrees that oral argument is appropriate in this case given the significance of the dispute and the importance of the arbitration principles presented.

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PRELIMINARY STATEMENT

One of the main reasons parties to an international agreement include an arbitration clause is that "it avoids 'hometown justice' – that is, it provides a neutral forum that avoids litigation in either party's home court." *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783, 793 n.16 (N.D. Tex. 2003), *aff'd*, 115 F. App'x 201 (5th Cir. 2004). That is what Carpatsky and Ukrnafta did here by agreeing to arbitrate disputes in Sweden. When Ukrnafta cheated Carpatsky out of its share of the profits of their joint enterprise, Carpatsky invoked that remedy and obtained a $150 million arbitral award. At every turn, however, Ukrnafta has sought to undermine the neutral forum to which it agreed.

The centerpiece of Ukrnafta's efforts is its contrived, hypertechnical theory – invented by its lawyers fifteen months into the arbitration – that, because Carpatsky changed its legal domicile from Texas to Delaware but erroneously stamped the contract containing the arbitration clause with its old Texas seal, there was no agreement to arbitrate. Ukrnafta got plenty of "hometown justice" out of that theory, convincing multiple Ukrainian courts that Carpatsky's president entered into a nonexistent agreement on behalf of a nonexistent entity. But every ***neutral*** forum to consider that theory has rejected it out of hand, holding either that the agreement is valid or that Ukrnafta forfeited the argument by raising it too late.

Despite the complete lack of merit to Ukrnafta's arguments, the company has succeeded in delaying these proceedings for years. The arbitral tribunal entered its Award ***nine years ago*** in September 2010. Yet these proceedings have dragged on for nearly a decade while Ukrnafta litigated meritless challenges in Sweden.

It is time for Ukrnafta's odyssey of avoidance to be brought to an end. The district court correctly held that Ukrnafta has no valid defense to confirmation and that the Award precludes all of its claims. That decision should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this dispute relating to an arbitration agreement under the Federal Arbitration Act, 9 U.S.C. §§ 203 and 205. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction under the Federal Arbitration Act where Carpatsky's notice of removal adequately alleges that the dispute relates to an arbitration agreement falling under the New York Convention.

2. Whether the district court properly confirmed Carpatsky's arbitral award where Ukrnafta failed to show any ground for denying confirmation under Article V of the New York Convention.

3. Whether the district court properly held that Ukrnafta's state-law claims are barred by the preclusive effects of the Award.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

A. The New York Convention

International arbitration is only effective if parties can enforce the awards that result. That is where the New York Convention comes in. Ratified by over 150 countries, the Convention establishes the basic framework for enforcement of foreign arbitral awards. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.[1]

Article I of the Convention specifies the awards to which it applies. 21 U.S.T. at 2519. Article II requires states to "recognize" arbitration agreements and to "refer the parties to arbitration" if they try to litigate instead. *Id.* Article III requires states to "recognize arbitral awards as binding." *Id.* Article IV sets forth the filing requirements for seeking recognition of an award. *Id.* at 2519-20. And Article V lists the narrow circumstances in which a court may deny recognition. *Id.* at 2520. A court "may refuse enforcement only on the grounds specified in Article V." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004).

[1] The Convention and related statutes are reproduced in an Addendum to this brief.

B. The Federal Arbitration Act

The United States implemented the New York Convention in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§201-208. The FAA provides that the Convention "shall be enforced in United States courts in accordance with this chapter." *Id.* §201.

To ensure uniform enforcement, the FAA grants federal district courts jurisdiction over any "action or proceeding falling under the Convention." 9 U.S.C. §203. It also includes a broad removal provision: "Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may . . . remove such action or proceeding to the district court . . . ." *Id.* §205. "[T]he ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal." *Id.*

II. FACTUAL BACKGROUND

A. The Joint Activity Agreement

This case arises out of a venture to develop petroleum resources in Ukraine. Carpatsky Petroleum Corporation is an oil and gas company with its principal place of business in Texas. ROA.68-69 ¶4. OJSC Ukrnafta is Ukraine's largest oil and gas company and is indirectly majority-owned by the Ukrainian government. ROA.110 ¶2.

In 1995, the parties entered into a Joint Activity Agreement ("JAA") to develop the Rudivsko-Chervonozavodsky Field in Ukraine. ROA.195. The parties agreed to pool their financial and technical resources to exploit the field. ROA.197-98 art. 3. As originally executed, the JAA provided for arbitration of any disputes in Ukraine. ROA.204 arts. 14.3, 14.4.

In June 1996, for unrelated tax and corporate law reasons, Carpatsky changed its legal domicile from Texas to Delaware. ROA.1028 ¶176; ROA.1024 ¶163. It did so by merging the Texas corporation into a newly formed Delaware entity with the same name. ROA.1028 ¶176. That change was a legal technicality with no practical impact: "The fact that [Carpatsky] was no longer incorporated in Texas had merely legal and tax implications for [Carpatsky] itself. Nothing in relation to the way that business was conducted with the partners of [Carpatsky] changed, and even the business address and the staff remained the same . . . ." ROA.1039 ¶205.[2]

In 1998, Carpatsky and Ukrnafta amended the JAA to provide for arbitration in the Arbitration Institute of the Stockholm Chamber of Commerce rather than in Ukraine. ROA.281, 292 arts. 20.4-20.5; *cf.* ROA.243, 258-59 arts. 20.3-20.5. The 1998 amendments identify Carpatsky as "Carpatsky Petroleum Corporation, USA"

[2] Throughout, this brief refers to the pre- and post-merger entities as "Carpatsky-Texas" and "Carpatsky-Delaware," and refers simply to "Carpatsky" when not necessary to distinguish the two.

and do not mention its state of incorporation. ROA.281. When Carpatsky's president signed the agreement, however, he erroneously stamped it with the old Texas corporate seal. ROA.280; *cf.* ROA.194.

During the early stages of the JAA, Ukrnafta contributed more capital than Carpatsky did, resulting in a reduction of Carpatsky's share in the business. ROA.987-88 ¶20. By early 2004, however, Carpatsky sought to restore its stake to 50% by making additional investments. ROA.991-92 ¶33. Ukrnafta refused to allow Carpatsky to participate on an equal basis. ROA.992 ¶¶35-36.

B. The Arbitration in Sweden

Carpatsky filed a request for arbitration in the Stockholm Chamber of Commerce on September 28, 2007. ROA.581. The request identified the claimant on its cover as "Carpatsky Petroleum Corporation (Delaware, United States)" and described Carpatsky as "a company incorporated and organized under the laws of the State of Delaware, U.S.A." ROA.581, 583. Carpatsky alleged that Ukrnafta breached the JAA by refusing to allow it to participate on an equal basis. ROA.590-92 ¶¶35-44. Ukrnafta filed an answer acknowledging that "UKRNAFTA and [Carpatsky] have agreed to proceed with the arbitration." ROA.999 ¶55.

Carpatsky filed its statement of claim in May 2008, again listing its domicile as "Delaware, United States." ROA.4962. Ukrnafta filed a statement of defense and counterclaims in June 2008. ROA.6387. Ukrnafta's submission raised no

concerns about Carpatsky's status as a Delaware corporation and contains no hint of any objection to the tribunal's jurisdiction. *Id.*

On December 19, 2008, ***fifteen months*** after the arbitration began, Ukrnafta for the first time objected to the tribunal's jurisdiction. ROA.1148 ¶15. According to Ukrnafta, Carpatsky's 1996 change in domicile rendered the 1998 amendments containing the Swedish arbitration clause invalid. ROA.1157 ¶¶52-54. Ukrnafta reasoned that the entity that purported to sign the 1998 amendments was actually Carpatsky-Texas, which had ceased to exist two years earlier. *Id.*

The arbitral tribunal rejected that argument in an April 22, 2009, Decision on Jurisdiction. ROA.1141 (ARE-1).[3] Under the Stockholm Chamber of Commerce's arbitration rules, Ukrnafta was required to raise any jurisdictional objections no later than its statement of defense. ROA.1164 ¶75. Ukrnafta's statement "d[id] not object to the Arbitral Tribunal's jurisdiction," and in fact "contain[ed] counterclaims." ROA.1163 ¶73.

The tribunal rejected the argument that the untimeliness should be excused because Ukrnafta did not learn of the change of domicile until late 2008. As it noted, "Claimant's identity is clearly stated in the Request for Arbitration dated 28 September 2007 which shows on its cover that Claimant is a Delaware company."

[3] Carpatsky's additional record excerpts, submitted herewith, are cited by tab number as "ARE-__."

ROA.1163 ¶70. Ukrnafta's experienced counsel "could not overlook the fact that a Delaware company had initiated the arbitration." *Id.*

The tribunal held a four-day hearing on the merits. ROA.1010 ¶112. It heard from fifteen fact and expert witnesses, and considered two rounds of pre-hearing briefs and two rounds of post-hearing briefs. *Id.*; ROA.1013 ¶142.

On September 24, 2010, the tribunal issued its Award. ROA.980 (ARE-2). Although the tribunal had already rejected Ukrnafta's jurisdictional challenge on timeliness grounds, the same change-of-domicile issue was relevant to the merits because Ukrnafta claimed that the invalidity of the JAA was a defense to liability. ROA.1021-22 ¶155. The Award therefore contains a lengthy discussion of the issue. ROA.1028-40 ¶¶175-209.

The tribunal held that Carpatsky-Delaware, not Carpatsky-Texas, executed the 1998 amendments. Under Delaware law, it explained, "the signature of an authorised officer is sufficient to bind the company." ROA.1030 ¶183. "The use of a wrong seal is legally irrelevant . . . ." ROA.1031 ¶185.

Ukrnafta urged that the 1998 amendments were invalid because Carpatsky never notified Ukrnafta about its change of domicile. ROA.1031-32 ¶186. The tribunal rejected that argument for three alternative reasons.

First, Carpatsky was not required to notify Ukrnafta. ROA.1031-34 ¶¶186-191. The JAA imposed no such requirement. ROA.1031-32 ¶186. And the tribunal found no such requirement under Ukrainian law. ROA.1032 ¶187.

Second, Ukrnafta "knew, and in any event could have known, about the change of [Carpatsky's] place of registration." ROA.1035 ¶196; *see* ROA.1034-38 ¶¶192-202. Carpatsky's president testified that he told Ukrnafta about the change. ROA.1034 ¶¶192. Carpatsky sent Ukrnafta numerous documents showing the change, such as a certificate identifying Carpatsky as "a company organized and existing under the laws of the State of Delaware, USA." ROA.1037-38 ¶¶200, 202 (emphasis omitted). Most strikingly, Ukrnafta's own chief protocol officer Svitlana Vasylets wrote a letter to the Ukrainian government in 2005 acknowledging that "***Carpatsky Petroleum Corporation was re-registered in the sate [sic] of Delaware, USA***." ROA.1038 ¶201.

Third, any lack of notice was immaterial because Ukrnafta had shown no harm from the change of domicile. ROA.1039-40 ¶¶204-207. The tribunal could "not identif[y] any . . . possible harm." ROA.1039 ¶204. "[S]ince the merger was carried out in 1996, the Parties have actively continued their contractual relationship," and "[n]othing in relation to the way that business was conducted . . . changed." *Id.* ¶¶204-205. Ukrnafta "was still dealing with a contracting partner with the same rights, obligations, liabilities and assets." *Id.* ¶206.

The tribunal ultimately found Ukrnafta liable for breaching the JAA. ROA.1056 ¶257. It awarded $145.7 million in damages plus interest, costs, and attorney's fees. ROA.1094-95 ¶361.

C. The Swedish Court Proceedings

Both during and after the arbitration, Ukrnafta challenged the proceedings in the Swedish courts. In March 2009, Ukrnafta sued Carpatsky in Swedish district court for a declaratory ruling that the tribunal lacked jurisdiction, raising the same change-of-domicile theory. ROA.2353-54. On December 13, 2011, the court rejected the claim. ROA.2351 (ARE-3). It relied on three alternative grounds.

First, the court held that the arbitration clause was valid. ROA.2374-76. Under the "separability theory," it noted, an arbitration clause must be considered separately from the contract in which it appears. ROA.2374. Consequently, even though the JAA contained a Ukrainian choice of law clause, the existence and validity of the arbitration clause was a matter of Swedish law. *Id.* Indeed, "[t]he parties in the case agree[d] that the issue of the validity of the arbitration agreement should be considered in accordance with Swedish law." ROA.2372.

Under Swedish law, Carpatsky's change of domicile did not render the agreement invalid. The change "cannot be deemed to have been of such relevance to Ukrnafta's intention to contract that the company's alleged mistaken belief about the circumstances should mean that a binding arbitration agreement between

Ukrnafta and [Carpatsky-Delaware] did not arise." ROA.2376. Carpatsky had "the same ownership structure and Articles of Association, the same activities and the same corporate management." ROA.2375. Its operations "continued to be pursued from the same office at an address in the State of Texas." *Id.* The "real implication . . . was limited in practice to a change of the registration district." *Id.* Ukrnafta's arguments about "administrative and legal requirements for foreign companies in Ukraine" were unavailing. *Id.*

Second, Ukrnafta accepted the 1998 amendments by its course of conduct. ROA.2376-79. Citing the numerous documents Ukrnafta received showing Carpatsky's Delaware domicile, as well as the letter that Ukrnafta sent to the Ukrainian government, the court held that "Ukrnafta had become aware of the merger . . . by the end of 2002." ROA.2377. By continuing to deal with Carpatsky without objecting, Ukrnafta "must be deemed to have entered into the arbitration agreement . . . through acceptance by conduct." ROA.2379.

Third, Ukrnafta forfeited its objection by not timely raising it in the arbitration. ROA.2379-80. The arbitral rules required Ukrnafta to object no later than its statement of defense. ROA.2379. Ukrnafta objected six months later. ROA.2379-80. The court rejected the argument that Ukrnafta only learned of the change in December 2008. Even apart from the evidence the court had already

cited, the filings in the arbitration itself showed that Ukrnafta learned about the change long before raising its objection. ROA.2380.

On November 30, 2012, the Swedish court of appeals affirmed. ROA.2418 (ARE-4). While stopping short of finding that Ukrnafta had ***actual*** knowledge of the change before late 2008, the court held that Ukrnafta ***should have known*** about it much earlier. ROA.2423-26. Carpatsky's request for arbitration showed that it was "formed in accordance with the legislation in Delaware." ROA.2425. Given that description, Ukrnafta "should have . . . become aware" of the basis for its challenge through a reasonable investigation. ROA.2426. The court declined to address the district court's two alternative holdings. ROA.2427. On June 14, 2013, the Swedish Supreme Court denied review. ROA.2509.

After the tribunal rendered its Award in September 2010, Ukrnafta brought a second challenge in the Swedish court of appeals, making the same arguments about an inability to present its case that it asserts here. On March 26, 2015, the court of appeals rejected that challenge. ROA.2519 (ARE-5).

The court of appeals denied Ukrnafta leave to appeal to the Swedish Supreme Court. ROA.2539. Ukrnafta sought review anyway. On December 9, 2016, the Supreme Court denied its application. ROA.2858.

III. PROCEEDINGS IN THE DISTRICT COURT

A. Ukrnafta's Claims Against Carpatsky

On February 23, 2009 – a year and a half into the arbitration – Ukrnafta sued Carpatsky in Texas state court. ROA.68. It asserted seven causes of action, all of them based on Carpatsky's change of domicile and the parties' relations under the JAA. ROA.68-78. Ukrnafta claimed that Carpatsky committed fraud and negligent misrepresentation by not disclosing its change of domicile when the parties entered into the 1998 amendments. ROA.71 ¶14; ROA.74-75 ¶¶28-35. It also claimed that Carpatsky-Delaware misappropriated trade secrets and unjustly enriched itself by obtaining information and profits to which only Carpatsky-Texas was entitled. ROA.73-76 ¶¶24-27, 36-38, 41.

Carpatsky removed the case to federal court under the FAA, alleging that the claims all related to the 1998 arbitration clause. ROA.13-15. Carpatsky then moved for a stay pending arbitration. ROA.555. The district court granted the stay. ROA.841. "[A]lthough Ukrnafta has recast its claims as torts," the court held, "the alleged dissemination of trade secrets and fraud allegations are based on the contractual relationship between Ukrnafta and Carpatsky," and those claims "f[ell] within the scope of the arbitration clause." ROA.845-48.

B. The Confirmation Order

After the arbitral tribunal issued its Award, Carpatsky moved to confirm the Award and to dismiss Ukrnafta's claims. ROA.956. The court denied the motion

without prejudice and stayed the case in light of Ukrnafta's ongoing litigation in Sweden described above. ROA.2004. After Ukrnafta finally exhausted those challenges six years later, the court lifted the stay. ROA.2909.

On October 2, 2017, the district court issued an order confirming the Award. ROA.5424. The court rejected Ukrnafta's argument that the Award was invalid under Article V.1(a) because there was no arbitration agreement between Ukrnafta and Carpatsky-Delaware. ROA.5437-45. The parties disagreed over what law governed that issue. Ukrnafta invoked Ukrainian law on the ground that the JAA contains Ukrainian choice of law clauses. ROA.5437. It urged that Ukrainian courts had held the arbitration clause invalid. *Id.* Carpatsky claimed that Swedish law applied because Sweden was the seat of the arbitration. *Id.* Swedish courts applying Swedish law had upheld the arbitration clause. *Id.*

The district court agreed with Carpatsky. As it noted, this Court decided a similar issue in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004). The agreements in that case contained Indonesian choice of law clauses but also arbitration clauses designating Switzerland as the seat of arbitration. *Id.* at 290 & n.30. This Court held that Swiss arbitration law governed. *Id.* at 291-93. "Applying the *Karaha II* strong presumption that the procedural law of the place of arbitration applies," the district court held that Swedish rather than Ukrainian law governed. ROA.5445.

The court also rejected Ukrnafta's other challenges. Carpatsky's failure to submit a certified copy and certified translation of the arbitration agreement with its initial application did not deprive the court of jurisdiction. ROA.5432-35. Article II was not a basis for denying confirmation. ROA.5435-36. Ukrnafta's Article V.1(b) claim failed because Ukrnafta had "ample opportunity to present evidence" in the arbitration. ROA.5445-52. And Ukrnafta's remaining Article V defenses failed as well. ROA.5452-64.

C. The Summary Judgment Order

On November 13, 2018, the district court granted summary judgment to Carpatsky on Ukrnafta's state-law claims, finding them all barred by the issue preclusive effects of the Award. ROA.6403.

For one thing, "[t]he tribunal's finding that the merger resulted in no harm precludes Ukrnafta from relitigating that issue." ROA.6421. "Ukrnafta would have to prove it suffered harm due to the merger to make out each of its tort claims, with the possible exception of unjust enrichment." *Id.* The tribunal found no such harm: "[The] fact that [Carpatsky] was no longer incorporated in Texas had merely legal and tax implications for [Carpatsky] itself. Nothing in relation to the way that business was conducted with the partners of [Carpatsky] changed, and even the business address and the staff remained the same." *Id.*

The trade secret and unjust enrichment claims were also precluded by the tribunal's finding that Carpatsky-Delaware "succeeded into all rights and obligations of [Carpatsky-Texas]." ROA.6422 (emphasis omitted). Given that finding, Carpatsky-Delaware could not have acted improperly by receiving trade secrets or other benefits to which Carpatsky-Texas was entitled. *Id.*

The court did not reach Carpatsky's alternative argument that claim preclusion applied because Ukrnafta's claims could have been asserted in the arbitration and arose out of the same nucleus of operative facts. ROA.6423.

On December 6, 2018, the district court entered a partial final judgment under Rule 54(b), severing certain claims that Ukrnafta allegedly wanted to pursue against another defendant. ROA.6463, 6465. Ukrnafta appealed. ROA.6471. Two months later, the court dismissed all remaining claims based on Ukrnafta's failure to prosecute and failure to comply with a court order. Dist. Ct. Dkt. 88.

SUMMARY OF ARGUMENT

I. The district court had jurisdiction under the FAA. This Court held in *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002), that the FAA grants jurisdiction so long as the notice of removal ***alleges*** that the case relates to an arbitration agreement falling under the Convention. *Id.* at 671-72. Ukrnafta does not dispute that Carpatsky's notice ***alleges*** that here. Ukrnafta barely mentions *Beiser*, even though that case is binding precedent and obviously dispositive.

II. The district court correctly confirmed the Award. A court "may refuse enforcement only on the grounds specified in Article V." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004). Ukrnafta's principal argument – that Carpatsky's change of domicile meant there was no arbitration agreement – is properly analyzed as a validity challenge under Article V.1(a). That challenge fails for two reasons.

First, Ukrnafta forfeited the argument by not timely raising it in the arbitration. Ukrnafta was required to object no later than its statement of defense. It did not object until ***six months*** later – ***fifteen months*** after the arbitration began. Ukrnafta knew or should have known about Carpatsky's change of domicile much earlier. Its own senior officer wrote in 2005 that "Carpatsky Petroleum Corporation was re-registered in the sate [sic] of Delaware, USA." ROA.1038 ¶201 (emphasis omitted). And Carpatsky's September 2007 request for arbitration described Carpatsky as "a company incorporated and organized under the laws of the State of Delaware, U.S.A." ROA.583.

Second, the arbitration agreement is valid. Under Article V.1(a), a validity challenge is governed by "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, . . . the law of the country where the award was made." 21 U.S.T. at 2520. The Award here was "made" in Sweden, and the parties did not "subject[]" the arbitration clause to any other law

within the meaning of Article V.1(a). Swedish law therefore governs. The only evidence of Swedish law in the record is the Swedish district court's decision upholding the agreement. The agreement is accordingly valid. The Ukrainian decisions on which Ukrnafta relies are irrelevant.

Ukrnafta's Article V.1(b) challenge fares no better. Ukrnafta had ample opportunity to address the Ukrainian restrictions on damages caps and did so at length. ROA.4117-18 ¶¶320-330. The tribunal did not depart from the parties' damages models but in fact adopted the precise risk adjustment that Ukrnafta's own expert proposed. And the tribunal did not deny Ukrnafta due process by declining to accept new evidence that was only marginally relevant and was submitted ***ten months*** after the record closed.

Ukrnafta's remaining challenges are all meritless.

III. The district court properly held that the Award precludes Ukrnafta's state-law claims. So long as an arbitration "afforded litigants the 'basic elements of adjudicatory procedure,'" the award "collaterally estops relitigation of the previously determined issues." *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991).

The tribunal's finding that Ukrnafta suffered no harm from Carpatsky's change of domicile precludes Ukrnafta from proving virtually all of its claims. That Ukrnafta chose not to put on any evidence of harm in response to Carpatsky's

arguments at the arbitration does not mean the issue was never adjudicated or litigated. And the fact that lack of harm was only one of several grounds on which Ukrnafta lost is not a basis for denying preclusive effect.

The tribunal's finding that Carpatsky-Delaware succeeded to all of Carpatsky-Texas's rights forecloses Ukrnafta's trade secret and unjust enrichment claims. Ukrnafta's speculation that Carpatsky might have received trade secrets unrelated to the JAA contradicts its own pleadings and is irrelevant regardless.

Finally, claim preclusion independently bars Ukrnafta's claims. The state-law claims arise from the same nucleus of operative facts as the arbitration. Ukrnafta could and should have asserted its claims there.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's confirmation of an arbitral award for clear error as to findings of fact and *de novo* as to questions of law. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004). It reviews summary judgment rulings *de novo*. *Id.*

II. THE DISTRICT COURT HAD JURISDICTION

Section 205 of the Federal Arbitration Act provides for removal where an action "relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205. According to Ukrnafta, that standard was not met because the

Swedish arbitration clause "never came into existence" due to Carpatsky's change of domicile. Ukrnafta Br. 25. That argument ignores binding precedent.

This Court addressed Section 205 at length in *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002) – a case that Ukrnafta barely mentions. *Beiser* held that "[t]he language of § 205 strongly suggests that Congress intended that district courts . . . be able to assess their jurisdiction ***from the pleadings alone***." *Id.* at 671 (emphasis added). Section 205 permits jurisdiction to be "shown in the petition for removal" and contains no evidentiary requirements. *Id.* (emphasis omitted). Thus, "just as [a court] determine[s] whether a plaintiff's claim arises under federal law from the complaint alone, the statute directs us to determine whether a defendant's defense arises under federal law from the 'petition for removal' alone." *Id.* "As a result, absent the rare frivolous petition for removal, as long as the defendant claims in its petition that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim." *Id.* at 671-72.

Section 205 is "one of the broadest removal provisions . . . in the statute books." *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). It permits "easy removal" whenever a defendant can "assert a nonfrivolous connection" to an arbitration agreement. *Certain Underwriters at Lloyd's v. Warrantech Corp.*, 461 F.3d 568, 575-76 (5th Cir. 2006). The inquiry is confined

to "the face of the pleadings and the removal notice" alone. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324 (11th Cir. 2018).

Carpatsky clearly met that standard. The notice of removal cites and attaches the 1998 amendments containing the arbitration clause. ROA.13, 21. It alleges that all of Ukrnafta's claims relate to that agreement. ROA.13, 68-78. And it alleges that Carpatsky-Delaware is a party to the agreement. ROA.13. Ukrnafta may think that last allegation is wrong. But that is irrelevant under *Beiser*. All that matters is what the notice of removal plausibly ***alleges***.[4]

Citing *Arnold v. HomeAway, Inc.*, 890 F.3d 546 (5th Cir. 2018), and *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5th Cir. 2003), Ukrnafta argues that the district court should have decided the existence of the 1998 agreement before compelling arbitration because Ukrnafta was pursuing an "existence" rather than "validity" challenge. Ukrnafta Br. 26-32. But those cases have nothing to do with ***federal jurisdiction***. They address the standards a court should apply in deciding whether to ***compel arbitration***. *See, e.g.*, *Arnold*, 890 F.3d at 550; *Outokumpu*, 902 F.3d at 1322-27 (explaining this distinction). The cases thus provide no support for the argument Ukrnafta actually makes, namely,

[4] Ukrnafta claims that only a party to the arbitration agreement can remove a case. Ukrnafta Br. 32-35. But Section 205 permits any "defendant" to remove. 9 U.S.C. § 205; *see QPro Inc. v. RTD Quality Servs. USA, Inc.*, 718 F. Supp. 2d 817, 823-24 (S.D. Tex. 2010). Regardless, the issue is academic because the notice of removal sufficiently alleged that Carpatsky-Delaware ***was*** a party to the agreement.

that the district court should have remanded to state court for lack of jurisdiction. Ukrnafta Br. 24.

Moreover, even if *Arnold* or *Will-Drill* required the district court to determine the existence of the 1998 agreement before compelling arbitration, that would not entitle Ukrnafta to any relief on this appeal. A court "must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61; *see also* 28 U.S.C. §2111. "The burden of proving substantial error and prejudice is upon the appellant." *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 842 (5th Cir. 2004). The district court's failure to resolve Ukrnafta's challenge before staying the case did not prejudice Ukrnafta because – as explained below – Ukrnafta's challenge is unavailing: The arbitration clause is a valid, existing agreement, and Ukrnafta forfeited its challenge in any event. Thus, even if the district court had resolved this issue back in 2009, the governing principles would have required the court to resolve it in Carpatsky's favor.

III. THE DISTRICT COURT PROPERLY CONFIRMED THE AWARD

Under the New York Convention, a court "may refuse enforcement only on the grounds specified in Article V." *Karaha Bodas*, 364 F.3d at 288. Those defenses are "construed narrowly." *Id.* Ukrnafta challenges the Award on nearly every ground imaginable. That quantity-over-quality approach fails: All of Ukrnafta's arguments are meritless.

A. Carpatsky's Change of Domicile Is No Basis for Denying Confirmation

Ukrnafta's primary theory – repeated throughout its brief – is that, due to Carpatsky's change of domicile, the 1998 arbitration clause never came into existence as a valid agreement between Ukrnafta and Carpatsky-Delaware. Ukrnafta Br. 33-34, 38-44, 45. Although Ukrnafta tries to ground that claim in a variety of provisions, it is properly analyzed under Article V.1(a), which permits denial of recognition where the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." 21 U.S.T. at 2520.[5]

Ukrnafta's challenge fails for two independent reasons.

1. *Ukrnafta Forfeited Its Argument by Not Timely Raising It in the Arbitration*

A party "waive[s] any objection to the arbitrator's jurisdiction" by not raising it during the arbitration. *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*,

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[5] While this Court's cases distinguish between "validity" and "existence" challenges for purposes of the FAA, *see Arnold*, 890 F.3d at 550, the New York Convention considers all such claims to be challenges to the existence of a valid arbitration agreement under Article V.1(a), *see* 3 Gary B. Born, *International Commercial Arbitration* §26.05[C][1][b], at 3452 (2d ed. 2014) ("Article V(1)(a) extends broadly to all issues concerning the validity of [the alleged arbitration agreement], including issues of . . . existence . . . ."); 3 *id.* §26.05[C][1][c][ii], at 3457-59 (discussing claims of "nonexistence of the underlying contract" as a species of validity challenge under Article V.1(a)); *cf. China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003).

611 F.2d 580, 584 (5th Cir. 1980); *see also Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 720-21 (D.C. Cir. 2008). The objection must have been timely under the applicable rules. "[I]f a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration." *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 368 (2d Cir. 2003); *see also Ass'n of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352, 358 (7th Cir. 1986) ("[A] court will only examine questions of the arbitrator's jurisdiction when they are raised in a timely fashion.").

Ukrnafta did not timely object here. The Stockholm Chamber of Commerce's Arbitration Rules require that "any objections concerning the existence, validity or applicability of the arbitration agreement" be raised no later than the statement of defense. ROA.5847 art. 24(2)(ii); *see also* ROA.5843 art. 5(1)(i). Ukrnafta did not object in its statement of defense. ROA.6387. The first time it did so was in a submission on December 19, 2008 – ***six months*** after its statement of defense and ***fifteen months*** after the arbitration began. ROA.1164.

Ukrnafta claims it could not have objected sooner because it only learned about Carpatsky's change of domicile in late 2008. That assertion cannot be squared with the record. Even before the arbitration, Carpatsky sent Ukrnafta numerous documents clearly showing its Delaware domicile, including powers of

attorney, visa-related documents, and a certificate describing itself as "a company organized and existing under the laws of the State of Delaware, USA." ROA.1037-38 ¶¶200, 202 (emphasis omitted). ***Ukrnafta's own senior officer*** wrote to the Ukrainian government in 2005 that "Carpatsky Petroleum Corporation was re-registered in the sate [sic] of Delaware, USA." ROA.1038 ¶201 (emphasis omitted). And Carpatsky's request for arbitration in September 2007 referred on its cover to "Carpatsky Petroleum Corporation (Delaware, United States)" and described Carpatsky as "a company incorporated and organized under the laws of the State of Delaware, U.S.A." ROA.581, 583.

Plainly, Ukrnafta knew no later than September 2007 that Carpatsky had changed its domicile from Texas to Delaware. At the very least, Ukrnafta was on notice of some change by that date and should have ascertained the details by making basic inquiries. It failed to do so.

That is what the Swedish courts concluded. ROA.2379-80 (ARE-3); ROA.2423-26 (ARE-4). Those courts are uniquely well positioned to determine whether a party complied with Swedish arbitration rules. And since Sweden is the "primary jurisdiction" with paramount authority over the Award, its decisions are entitled to special consideration. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) ("[T]he power and authority of the local courts of the rendering state remain of paramount importance.").

Ukrnafta insists that any failure to object constituted only an agreement "by conduct," not an agreement "in writing" as required for recognition under the Convention. Ukrnafta Br. 20, 38. That is incorrect. Where parties exchange submissions in an arbitration without objecting to jurisdiction, the filings qualify as an "agreement in writing." *See* 1 Gary B. Born, *International Commercial Arbitration* §5.02[A][2][j], at 692 (2d ed. 2014) ("Born") ("written submissions [in arbitration], not raising any objection to jurisdiction," constitute a "written agreement to arbitrate"); UNCITRAL Model Law on International Commercial Arbitration art. 7(2) (1994) (agreement in writing includes "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another").

In any event, whether or not Ukrnafta's participation without objection constituted a separate written agreement, Ukrnafta still forfeited its right to object. Courts regularly confirm awards under the Convention where a party forfeited an objection, whether or not the forfeiture qualifies as a written agreement. *See* 3 Born §26.05[C][1][h], at 3482-86 ("waiver is a universally-accepted basis" for confirmation); *Sistem Mühendislik Inşaat Sanayi Ve Ticaret, A.Ş. v. Kyrgyz Republic*, 741 F. App'x 832, 834 (2d Cir. 2018) (respondent "waived its jurisdictional argument by failing to raise that challenge during the arbitration").

Forfeiture rules apply to domestic arbitrations. *See Piggly Wiggly*, 611 F.2d at 584. There is no reason for a different rule in the international sphere.

2. *The Arbitration Agreement Is Valid Under Swedish Law*

Ukrnafta's challenge fails on the merits regardless. Ukrnafta points to Ukrainian statutes and Ukrainian court decisions applying Ukrainian law to claim that there was no valid arbitration agreement. Ukrnafta Br. 33-34, 38-45. Those arguments are all beside the point because Swedish law governs.

Article V.1(a) of the Convention contains an express choice of law provision: The relevant law is "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, . . . the law of the country where the award was made." 21 U.S.T. at 2520. Here, the Award was "made" in Sweden. ROA.1096. So Swedish law governs unless the parties "subjected" the arbitration clause to a different law. Ukrnafta claims they did so by including Ukrainian choice of law provisions in the JAA. Ukrnafta Br. 41. That is incorrect. To "subject" an arbitration clause to a law other than the place of arbitration, the provision must ***specifically address*** the law governing the arbitration clause. A general choice of law clause in the broader contract is not sufficient.

The leading authorities make that clear. "[A] choice of law clause for the contract in general is not sufficient as choice of law for the arbitral clause." Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a*

Uniform Judicial Interpretation 293 (1981) ("van den Berg"). "[I]f a contract contains a general choice of law clause and provides in the arbitral clause that arbitration is to be held in a country with a different law, the latter indication must be deemed to prevail over the former." *Id.*; *see also* 3 Born §26.05[C][1][e][i][1], at 3463-65 (a "general choice-of-law clause in [the] underlying contract" is not sufficient to select the law governing the arbitration clause); 3 *id.* §25.04[A][5][a], at 3203 ("Th[e] default rule is very clearly the law of the arbitral seat, not the law governing the parties' underlying contract."); *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 152-53 (D.D.C. 2018) (applying Dutch law based on arbitral seat despite Ghanaian choice of law clause in broader contract).[6]

This Court has decided a closely analogous issue under Article V.1(e), which permits denial of recognition where an award has been set aside by "the country in which, or under the law of which, that award was made." 21 U.S.T. 2520. In *Karaha Bodas*, an Indonesian company agreed to arbitrate in Switzerland but obtained a judgment from its home courts purporting to annul the award. It claimed that Indonesian law was the law "under . . . which[] th[e] award was

[6] Professor van den Berg and Professor Born are perhaps the world's leading authorities on the New York Convention and international commercial arbitration. This Court and the Supreme Court regularly treat their views as authoritative. *See, e.g.*, *Karaha Bodas*, 364 F.3d at 291 & nn.32, 34, 37; *BG Grp. plc v. Republic of Argentina*, 572 U.S. 25, 43 (2014); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 & n.21 (1985).

made" for purposes of Article V.1(e) because the contracts contained Indonesian choice of law clauses. 364 F.3d at 288-91 & n.30. This Court disagreed: By "expressly agree[ing] that Switzerland would be the site for the arbitration," the parties "presumptively selected Swiss procedural law to apply." *Id.* at 291. The contract's references to Indonesian law fell "far short" of rebutting the "strong presumption that designating the place of the arbitration also designates the law under which the award is made." *Id.* at 292.

That approach makes sense. The whole point of international arbitration is to avoid "hometown justice" by resolving disputes in a neutral forum. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) ("[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting . . . ."). That is why Article V.1(e) makes the arbitral seat the "primary jurisdiction" with sole authority to annul an award. *See Karaha Bodas*, 364 F.3d at 287. Because the arbitral seat has primary responsibility for determining the award's validity, that jurisdiction's laws should also govern the arbitration agreement's validity.

That approach is also consistent with basic severability principles. An arbitration clause is normally considered separate from the contract in which it appears. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). For that reason, a general choice of law clause in the broader contract should not

determine the law governing the arbitration clause specifically. *See* 3 Born §26.05[C][1][e][i][1], at 3464-65 (relying on "presumptively separable" status of arbitration clauses); ROA.2374 (same rationale from Swedish court).

Finally, that rule is consistent with the approaches of other Convention signatories. The Swedish court followed that rule here – indeed, the parties "agree[d]" that Swedish law applied. ROA.2372, 2374. Courts in other countries have taken a similar approach.[7] Those interpretations are entitled to due weight. *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) (Wisdom, J.) ("A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."); *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("[Courts] can, and should, look to decisions of other signatories when [they] interpret treaty provisions. . . . [I]t is reasonable to impute to the [signatories] an intent that their respective courts strive to interpret the treaty consistently.").

Applying those principles here, the JAA contains no provision that addresses the law governing the arbitration clause with sufficient specificity to displace the law of the arbitral seat as the presumptively applicable law. Ukrnafta points to

[7] *See, e.g.*, *C v. D*, [2007] EWCA Civ. 1282, ¶¶16-29 (Eng.); *XL Ins. Ltd. v. Owens Corning*, [2001] 1 All E.R. (Comm.) 530, 540-43 (Eng.); *Thai-Lao Lignite Co. v. Gov't of Lao People's Democratic Republic*, [2017] 9 C.L.J. 273, ¶¶164-171 (Malay.); *cf. Sulamérica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, [2012] EWCA Civ. 638, ¶29 (Eng.).

Article 1.7's general statement that "[t]he Parties ***in their joint activity*** shall be governed by the Ukrainian law." ROA.3309 (emphasis added). That language says nothing about the arbitration clause. Ukrnafta also points to Article 20.4's instruction that "[d]isputes shall be considered subject to the material law of Ukraine." ROA.3346. But that means only that the arbitrators must ***apply*** Ukrainian "material" law – *i.e.*, ***substantive*** law – in adjudicating disputes. It does not mean the arbitration clause itself is governed by Ukrainian arbitration law.

Ukrnafta's position is even weaker than the respondent's in *Karaha Bodas*. The choice of law clauses there stated that "[t]his Contract shall be governed by the laws and regulations of [the] Republic of Indonesia" – broad language that was insufficient only because it did not refer ***specifically*** to the arbitration clause. 364 F.3d at 290 n.30. Here, the choice of law clauses refer only to the law governing the parties' "joint activity" and to the "material law" to be applied in resolving disputes. They do not even ***purport*** to govern the arbitration clause.

Ukrnafta claims that Ukrainian law governs because Ukraine was the arbitral seat in the ***1995*** agreement and therefore supposedly the "primary jurisdiction." Ukrnafta Br. 39-40. That argument is baseless. Under Article V.1(a)'s choice of law rules, what matters is where the award was "made" and whether the parties "subjected" the arbitration agreement that was the basis for the arbitration to some different law. 21 U.S.T. at 2520. The Award here was made in Sweden in an

arbitration instituted under the 1998 Swedish arbitration clause. ROA.584, 980. No arbitration took place in Ukraine; no party invoked the 1995 Ukrainian arbitration clause; and no one claims the 1995 clause somehow authorized the Swedish arbitration. That clause has no conceivable relevance.

Swedish law therefore applies. The only evidence in the record as to whether the arbitration agreement is valid under Swedish law is the Stockholm district court's decision applying Swedish law to uphold the agreement. ROA.2374-76 (ARE-3). As that court explained, under Swedish law, Carpatsky's change of domicile "cannot be deemed to have been of such relevance to Ukrnafta's intention to contract that the company's alleged mistaken belief about the circumstances should mean that a binding arbitration agreement between Ukrnafta and [Carpatsky-Delaware] did not arise." ROA.2376. Carpatsky had "the same ownership structure and Articles of Association, the same activities and the same corporate management." ROA.2375. Its operations "continued to be pursued from the same office at an address in the State of Texas." *Id.* The "real implication . . . was limited in practice to a change of the registration district." *Id.* The arbitration agreement was therefore valid under Swedish law despite the change of domicile.

Ukrnafta did not argue below, and does not argue now, that the Swedish courts misinterpreted or misapplied Swedish law. Still less has it offered an argument so persuasive as to justify disregarding the primary jurisdiction's

interpretation of its own arbitration laws. Ukrnafta has therefore forfeited any such argument. Ukrnafta asserts only that the arbitration clause is invalid under Ukrainian law and Ukrainian court decisions. Ukrainian law does not apply, so those arguments are all beside the point.[8]

B. Ukrnafta Was Not Denied an Opportunity To Present Its Case

Article V.1(b) permits denial of recognition where a party "was not given proper notice . . . or was otherwise unable to present [its] case." 21 U.S.T. at 2520. That provision imposes only "minimal requirements of fairness" – "an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Karaha Bodas*, 364 F.3d at 298-99. It does not mandate "the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure." *Id.* at 299.

The Swedish court of appeals rejected all three of Ukrnafta's arguments. ROA.2534, 2536, 2537 (ARE-5). So did the district court below. ROA.5445-52. This Court should do the same.

1. *The Statutory Exception to the Damages Cap*

Article 20.1 of the JAA purports to limit damages to direct losses, but the tribunal held the provision unenforceable because Article 614 of the Ukrainian Civil Code bars damages limitations for intentional breach. ROA.1076-77 ¶¶323-

[8] The tribunal found the 1998 amendments valid even under Ukrainian law. ROA.1028 ¶176; ROA1032-34 ¶¶187-191. In the unlikely event the Court finds that Ukrainian law applies and that Ukrnafta preserved its challenge, it should remand the issue to the district court for a determination.

325. Ukrnafta claims it was "blindsided" by that ruling. Ukrnafta Br. 46-50. It misstates the record.

The tribunal raised this issue during the hearing on the merits. It asked Ukrnafta's expert whether Ukrainian law had any provision stating that, "in case of intentional breach, a limitation of liability cannot be invoked." ROA.3786-87 at 100:22-101:2. Ukrnafta's expert responded – incorrectly – that "[t]here is no such rule in the Ukrainian law." ROA.3787 at 101:3. Soon after, in the course of discussing a different provision, Ukrnafta's expert alluded to the issue again, stating that "if it is the case that the parties have limited this possibility of compensation of losses, then this limitation should be able to occur." *Id.* at 104:2-5. The tribunal interjected that "[t]his may be one of the points on which the parties will certainly elaborate in the post-hearing briefs." *Id.* at 104:6-8.

At the end of the hearing, the tribunal ordered two rounds of post-hearing briefs. ROA.3807. It wanted them to be wide-ranging so it could render its award "essentially based on the post-hearing briefs." ROA.3789 at 111:21-22. There was no page limit. ROA.3790 at 113:24-114:2. While closing the evidentiary record, the tribunal stated that, "if any party wishes now to file further documents," it could submit "an application to that effect." ROA.3792 at 124:1-8; *see also* ROA.3793 at 125:4-5 (submissions "should be the subject of a written request").

In its first post-hearing brief, Carpatsky took up the tribunal's invitation and explained that Ukrnafta's expert was "flatly wrong": Article 614 prohibits limitations of liability for intentional breach. ROA.3938-39 ¶¶394-398.

Ukrnafta responded in its second post-hearing brief. Over eleven full paragraphs, it argued that Article 614 did not apply and that, in any event, the evidence showed that any breach was unintentional. ROA.4117-18 ¶¶320-330. Ukrnafta did not request permission to reopen the evidentiary record.

The tribunal considered and rejected Ukrnafta's arguments. Citing other evidence, it found that Ukrnafta's breach was in fact intentional. ROA.1077 ¶324. The limitation of liability was therefore void. *Id.* ¶325.

On that record, the notion that Ukrnafta lacked an opportunity to address this issue is sheer fiction. Ukrnafta had a full opportunity to respond and in fact did so. If it wanted to submit more evidence, it could have sought permission to do that too. The assertion that Ukrnafta refrained only because it "legitimately expect[ed]" the tribunal to reject the argument as untimely (Ukrnafta Br. 48) is belied by the fact that Ukrnafta argued this issue at length and cited evidence in the existing record as support. ROA.4117-18 ¶¶320-330.

Moreover, this whole issue came about only because ***Ukrnafta's own expert*** testified incorrectly that a provision like Article 614 did not exist. Had Ukrnafta's expert correctly answered the tribunal's question, or even candidly admitted that

she did not know or needed to check, the parties could have explored this issue at the hearing and submitted whatever evidence they pleased. Ukrnafta cannot fairly complain about the consequences of its own expert's false testimony. If this was a problem at all, it was a problem of Ukrnafta's own making.[9]

2. *The Risk Adjustment*

Ukrnafta complains that the tribunal adopted a damages measure "advanced by neither party." Ukrnafta Br. 50. That is another misstatement of the record.

A significant factor in estimating lost profits was the risk of Ukrainian price regulation – indeed, at the time of the arbitration, Ukraine's Decree 31 fixed gas prices so low that the project was not profitable at all. Ukrnafta Br. 50-51. Carpatsky's expert opined that a 15.76% discount rate was sufficient to account for such risks. ROA.4359 ¶¶131-132.

Ukrnafta's expert responded with two alternative models. In the first, he opined that Decree 31 would remain in force indefinitely and thus damages would be zero. ROA.3499 ¶9.2.1. In the second, he assumed Carpatsky's premise that Decree 31 would likely be repealed but advocated a much higher discount rate to account for the risk: 22.5% (19% net of inflation). ROA.3500-02 ¶¶9.3.1-9.3.4.

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[9] The claim that Carpatsky misled the Swedish court is false. Ukrnafta Br. 49-50. Carpatsky's argument was entirely accurate. *Compare* ROA.4220 at 50:1-51:5 *with* ROA.3787 at 104:2-9. But the dispute is a sideshow. This Court need not rely on the Swedish court decision because Ukrnafta's opportunity to address this issue is clear from the arbitral record itself.

The tribunal rejected Ukrnafta's more extreme approach, noting that Ukraine had promised the International Monetary Fund that it would repeal Decree 31. ROA.1086 ¶337(k). It rejected Carpatsky's model too. *Id.* Instead, it "adopted [Ukrnafta's second] approach and factored this issue of Decree 31 into the discount rate," applying the precise 19% rate Ukrnafta advocated. *Id.* The impact was massive, reducing Carpatsky's damages by nearly 25%. *Id.* ¶337(*l*).

The tribunal thus did not adopt an approach "advanced by neither party." Ukrnafta Br. 50. It adopted ***Ukrnafta's*** approach (albeit its less preferred alternative). Ukrnafta protests that its expert's "discount rate took into account Ukraine's general political and economic uncertainties but did not include any uncertainty regarding the repeal date of Decree 31." Ukrnafta Br. 51. That is not true. The expert expressly relied on the risk of "significant regulation" in "the natural gas industry in Ukraine," including "decrees which remove the entire profitability of the project." ROA.3491-92 ¶¶7.4.3, 7.5.1-7.5.3. Ukrnafta's entire argument thus rests on a fiction. A party cannot claim it was denied an opportunity to be heard when the tribunal adopts an approach ***the party itself*** proposed.[10]

[10] Ukrnafta points out that Decree 31 was still in force when the tribunal issued its Award in September 2010, even though Carpatsky's baseline model assumed a December 2009 repeal date. Ukrnafta Br. 51-52. The tribunal was well aware of that development and concluded that its massive risk adjustment was sufficient to account for it. ROA.1086 ¶337(k).

Even if the tribunal had devised an entirely new measure of damages, that would not violate due process. A tribunal is not required to accept one party's model or the other's. *See Russo v. Ballard Med. Prods.*, 550 F.3d 1004, 1018 (10th Cir. 2008) (jury may award damages "somewhere in between the extremes suggested"); *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1015 (9th Cir. 1997). The tribunal's approach was hardly so drastic or unforeseeable a departure from the parties' proposals that it denied Ukrnafta due process. Moreover, the tribunal discussed its approach at the hearing, and both experts responded. ROA.4852 at 177:2-178:9; ROA.4866-67 at 236:12-240:9. Ukrnafta thus had ample opportunity to be heard.

3. *The New Ukrainian Legislation*

Ukrnafta complains that the tribunal refused its post-hearing submission on new Ukrainian price regulations. Ukrnafta Br. 52-53. Ukrnafta made that request in July 2010, more than ***ten months*** after the evidentiary record closed, and after the tribunal made clear it would accept new evidence only in "exceptional circumstances." ROA.4906; ROA.4909; ROA.3792 at 124:1-8. That was not a denial of due process either.

A tribunal is not required to accept any and all new evidence submitted after the record closes, even if relevant to some degree. The exclusion of evidence justifies denying recognition only if it deprives the party of a "fundamentally fair

hearing." *Karaha Bodas*, 364 F.3d at 298-99; *see also Castleman v. AFC Enters., Inc.*, 995 F. Supp. 649, 653 (N.D. Tex. 1997) ("Arbitration awards will not be set aside due to the arbitrator's refusal to hear evidence unless the exclusion of the contested evidence prevented the parties from receiving a fundamentally fair hearing."). The parties had ample opportunity throughout the proceedings to submit evidence regarding Ukrainian price regulation and the risk of further regulation. The tribunal had even allowed Ukrnafta to supplement the record once already in January 2010 with new evidence on Ukrainian price regulation. ROA.2534. The tribunal was not required to keep accepting rolling evidentiary submissions until the very day the Award issued.

The tribunal did not simply ignore Ukrnafta's request. It ruled that Ukrnafta had not shown "exceptional circumstances" to reopen the record. ROA.4909. That is the standard the Stockholm arbitration rules prescribe. ROA.5848 art. 34. And the tribunal reasonably applied that standard here. The tribunal's damages measure already included a ***massive*** adjustment for the risk of price regulation. ROA.1086 ¶337(k)-(*l*). And the tribunal knew that, even as late as the Award, Ukraine still fixed prices at an unprofitable level. ROA.1086 ¶337(k). Evidence of new legislation confirming that bleak state of affairs would have been just one more data point regarding risks that were already well appreciated and a damages model that was just an estimate in any event. Moreover, reopening the record

would have spawned more dueling submissions and further delayed the Award. The tribunal's ruling did not deny Ukrnafta a fundamentally fair hearing.[11]

C. Ukrnafta's Remaining Challenges Are Meritless

Ukrnafta offers a grab bag of additional challenges. All are meritless.

1. *Article II*

Ukrnafta argues that Carpatsky's change in domicile gives rise to a separate challenge under Article II because there was no "agreement in writing" between Carpatsky-Delaware and Ukrnafta. Ukrnafta Br. 38-40. That theory adds nothing to Ukrnafta's Article V.1(a) argument.

Article II and Article V address different topics. Article II addresses motions to compel arbitration, while Article V addresses petitions to recognize awards. 21 U.S.T. at 2519-20; *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262-64 (11th Cir. 2011). Once a tribunal has issued an award, a court "may refuse enforcement only on the grounds specified in Article V." *Karaha Bodas*, 364 F.3d at 288.

To be sure, Article V.1(a) cross-references Article II and thus permits a challenge to an award on the ground that there was no "agreement in writing." *See*

[11] Ukrnafta asserts in a footnote that the tribunal ignored evidence of Carpatsky's inability to invest. Ukrnafta Br. 46 n.2. Ukrnafta forfeited that argument by not raising it below and by raising it here only in a footnote. *See Stearman v. Comm'r*, 436 F.3d 533, 537 (5th Cir. 2006); *Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016).

21 U.S.T. at 2520; van den Berg 284-87. But such a challenge is still an Article V.1(a) challenge subject to the forfeiture and choice of law rules of that provision. Ukrnafta did not timely object in the arbitration, and the arbitration clause is a valid "agreement in writing" under Swedish law. Ukrnafta cannot change that result by invoking Article II rather than Article V.1(a).

2. *Article IV*

Article IV requires a party seeking confirmation to submit a certified copy and certified translation of the arbitration agreement at the time of its application. 21 U.S.T. at 2519-20. Ukrnafta urges that Carpatsky did not strictly comply with that rule because its then-counsel filed only an uncertified translation. Ukrnafta Br. 37. Ukrnafta does not dispute that a certified copy and translation were ***already in the record*** because Ukrnafta had filed them with an earlier motion. ROA.206, 266, 281; ROA.110-14. Nor does it deny that Carpatsky filed ***another*** certified translation after Ukrnafta objected. ROA.1658, 1671, 1685; *see also* ROA.5532-34, 5808, 5822, 5823 (yet another certified copy and certified translation). Nonetheless, Ukrnafta claims that the failure to submit the materials with the application was a jurisdictional defect that requires dismissal. Ukrnafta Br. 37.

That is incorrect. A rule is jurisdictional only if it "'clearly state[s]' that [it] is jurisdictional; absent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*,

568 U.S. 145, 153 (2013); *see also Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848-50 (2019); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). Nothing in Article IV remotely satisfies that "clear statement" rule.[12]

Because Article IV is not jurisdictional, the district court had discretion to excuse compliance if it would be a pointless formality. *See, e.g.*, *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998, 1003 (5th Cir. 1997) (court may "excuse[] technical noncompliance where the purposes of the requirements have been satisfied"). That was the case here. Certified copies and certified translations were ***already in the record***. As the court explained, "[s]ometimes procedural rules need to be viewed through a lens of reason." ROA.5433. Indeed they do.

Moreover, the fact that a rule is mandatory does not mean dismissal is the only remedy for noncompliance. If an appellant fails to comply with this Court's formatting rules, this Court does not dismiss the appeal – it orders correction of the defect. 5th Cir. R. 32.5. That was the more proportionate remedy here too.

3. *Article V.1(a) Capacity*

Article V.1(a) also permits denial of recognition where "[t]he parties to the agreement . . . were, under the law applicable to them, under some incapacity." 21 U.S.T. at 2520. Ukrnafta claims that Carpatsky-Delaware lacked capacity to enter

[12] In *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004), there was no written arbitration agreement ***at all***. *Id.* at 1289-90. And to the extent the case suggests that Article IV's certification requirements are jurisdictional, it is no longer good law after cases like *Sebelius* and *Arbaugh*.

into the 1998 amendments because Ukrnafta never consented to contract with a Delaware entity. Ukrnafta Br. 33. That is not a proper capacity challenge.

Article V.1(a)'s capacity clause deals with situations where a party is under some disability that prevents it from contracting – for example, where a state entity lacks statutory authority to contract, or where a purported agent lacks authority to bind the party. *See* van den Berg 275-82; 3 Born §26.05[C][2][c]-[d], at 3491-92. Ukrnafta does not deny that Carpatsky-Delaware had the ***capacity*** to enter into contracts or that Carpatsky's president was authorized to sign contracts on its behalf. Its argument goes to the agreement's validity, not Carpatsky's capacity.

In any event, under Article V.1(a), the law governing capacity is "the law applicable to [the party]" – in this case, the law of Delaware as the state of incorporation. 21 U.S.T. at 2520; 1 Born §4.07[A], at 626-27. Under Delaware law, a corporate officer's signature is sufficient to bind the company, with or without a seal. *See Peyton-Du Pont Sec. Co. v. Vesper Oil & Gas Co*., 131 A. 566, 567 (Del. Super. Ct. 1925). Even in the rare contexts where a seal is required, a corporate officer's use of the wrong seal does not affect the agreement's validity. *See Rabinovich v. Liberty Morrocco Co.*, 125 A. 346, 347-48 (Del. 1924).

4. *Article V.1(c)*

Article V.1(c) permits denial of recognition where an award decides matters "beyond the scope of the submission to arbitration." 21 U.S.T. at 2520. Ukrnafta

claims the Award violates that provision by awarding lost profits without regard to the procedures in Article 21.7 of the JAA. Ukrnafta Br. 53-54. That is incorrect.

The tribunal did not award damages under Article 21.7. The Award does not mention Article 21.7. ROA.980. Although a member of the tribunal alluded to the provision at the hearing, he mentioned it only "by analogy." ROA.3791-92 at 118:11-13, 120:23-121:5, 121:24-122:2.

Nor does Article 21.7 limit the damages the tribunal could award. Article 21.7 prescribes a procedure for valuing Ukrnafta's interest in joint property in the event of a wind-up. ROA.293 art. 21.7. Nothing in that provision, by its terms or reasonable implication, limits the lost profits the tribunal could award to Carpatsky for breach of contract in an arbitration under Article 20.4.

5. *Article V.1(d)*

Article V.1(d) permits denial of recognition where "the arbitral procedure was not in accordance with the agreement of the parties." 21 U.S.T. at 2520. Ukrnafta urges that it never agreed to arbitrate with Carpatsky-Delaware and only agreed to arbitrate with Carpatsky-Texas in Ukraine. Ukrnafta Br. 54-55. The latter point is irrelevant because no party claims that the original 1995 agreement authorized the Swedish arbitration. The former argument is a validity challenge under Article V.1(a), not an arbitral procedure challenge under Article V.1(d).

6. *Article V.2(b)*

Article V.2(b) permits denial of recognition if it would be "contrary to the public policy of [the forum]." 21 U.S.T. at 2520. That defense is "construed narrowly to be applied only where enforcement would violate the forum state's ***most basic notions of morality and justice***." *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1016 (5th Cir. 2015) (emphasis added). Ukrnafta does not come close to making that showing.

Ukrnafta urges that Ukrainian courts have held the arbitration agreement invalid and that honoring the Award would therefore have negative consequences under Ukrainian law. Ukrnafta Br. 55-57. But this Court already held in *Karaha Bodas* that "[a home-state] court's annulment ruling is not a defense to enforcement." 364 F.3d at 310. Ukrnafta cannot avoid that result by reinventing the same theory as a public policy defense.

The whole point of international arbitration is to avoid "hometown justice" by resolving disputes in a neutral forum. *See Mitsubishi*, 473 U.S. at 630. Allowing a party to walk away from an award merely because its own home courts have held the award invalid would defeat that objective. That remains true even if a state takes the further step of attaching civil or even criminal consequences to compliance with the award. Those concerns loom especially large where a party is indirectly majority-owned by its own government. ROA.110 ¶2.

United States public policy does not favor allowing foreign states or their majority-owned enterprises to renege on arbitration agreements merely because they decide they would rather not pay. Ukrnafta's theory would wholly undermine something that actually ***is*** United States public policy: the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi*, 473 U.S. at 631.[13]

7. *Manifest Disregard*

Ukrnafta finally argues that the tribunal "manifestly disregarded" the Ukrainian statute of limitations. Ukrnafta Br. 57-60. Under the Convention, however, a court "may refuse enforcement only on the grounds specified in Article V." *Karaha Bodas*, 364 F.3d at 288. Manifest disregard is not listed, so it is not a defense. Every circuit to address the issue agrees. *See Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20-23 (2d Cir. 1997); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996). This Court does not apply the "manifest disregard" defense even to domestic

[13] The two "comity" cases Ukrnafta cites do not involve international arbitration. Ukrnafta Br. 57. Moreover, Ukrnafta fails to note that one of the cases was reversed by the Supreme Court on the very point for which Ukrnafta cites it. *See Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), *vacating In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

arbitrations. *See Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009). *A fortiori*, it is not a defense under the Convention.[14]

In any event, Ukrnafta's statute of limitations argument would not amount to "manifest disregard," even if that defense did exist. *See, e.g.*, *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004).

IV. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON UKRNAFTA'S STATE-LAW CLAIMS

The district court also correctly held that the arbitral tribunal's findings preclude all of Ukrnafta's state-law claims against Carpatsky. All the claims revolve around the same change of domicile addressed at length in the arbitration. ROA.68-78. Issue preclusion applies because the tribunal's findings prevent Ukrnafta from proving one or more elements of each claim. Claim preclusion applies because the claims arise out of the same nucleus of operative facts and should have been asserted in the arbitration.

A. The Award Is Entitled to Preclusive Effects

This Court has rejected the notion that an arbitral award has no preclusive effects merely because it was "rendered in an arbitration proceeding, rather than in

[14] *Bayer CropScience AG v. Dow Agrosciences LLC*, 680 F. App'x 985 (Fed. Cir. 2017), is not to the contrary. There, the court "assume[d]" that "the standards governing both international and domestic arbitration[s] apply" and addressed manifest disregard only because it was a potential ground for vacatur of ***domestic*** awards. *Id.* at 992-93. *Karaha Bodas*'s one passing reference to manifest disregard in its Article V.1(e) discussion does not imply that manifest disregard is a freestanding defense to confirmation. 364 F.3d at 290.

a 'court of law.'" *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1136 (5th Cir. 1991). So long as an arbitration "afforded litigants the 'basic elements of adjudicatory procedure,'" the award "collaterally estops relitigation of the previously determined issues." *Id.* at 1137; *see also Grimes v. BNSF Ry. Co.*, 746 F.3d 184, 188 (5th Cir. 2014) ("[W]hen an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings . . . .").

That standard is plainly met here. This was a sophisticated international arbitration under the auspices of a well-respected authority, the Arbitration Institute of the Stockholm Chamber of Commerce. ROA.980. The governing rules gave the parties ample opportunity to contest the claims. ROA.5839. Both sides were represented by counsel. ROA.982-83 ¶¶1-2. They submitted witness statements, expert reports, and multiple rounds of pre- and post-hearing briefs. ROA.1008-13 ¶¶101-104, 115, 121, 142. The merits hearing spanned four days and featured fifteen fact and expert witnesses subject to cross-examination. ROA.1010 ¶112; *e.g.*, ROA.3761.

Those proceedings plainly afforded "basic elements of adjudicatory procedure." *Universal Am. Barge*, 946 F.2d at 1137. They provided more due process than most ***judicial*** proceedings. Ukrnafta's only response is to cross-

reference its Article V.1(b) arguments and urge that the standard on summary judgment is "significantly different." Ukrnafta Br. 70-71. As shown above, however, Ukrnafta's Article V.1(b) arguments are so patently meritless that they fail under any standard.

B. Ukrnafta's Claims Are Barred by Issue Preclusion

Issue preclusion applies where "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005). Each of those requirements is met here.

1. *Lack of Harm*

All of Ukrnafta's claims (with the possible exception of unjust enrichment) require Ukrnafta to show ***injury*** from Carpatsky's change of domicile.[15] The tribunal specifically found that Ukrnafta suffered no such injury. The tribunal could "not identif[y] any . . . possible harm." ROA.1039 ¶204. "[S]ince the merger was carried out in 1996, the Parties have actively continued their contractual relationship," and "[n]othing in relation to the way that business was

[15] *See, e.g.*, *Bank of Tex., N.A. v. Glenny*, 405 S.W.3d 310, 313 (Tex. App. Dallas 2013, no pet.) ("pecuniary loss" an element of negligent misrepresentation); *In re FirstMerit Bank*, 52 S.W.3d 749, 758 (Tex. 2001) (injury an element of fraud); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366-67 (Tex. App. Dallas 2009, writ denied) ("damages" an element of misappropriation of trade secrets); *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000) ("actual damages or loss" an element of tortious interference with contract).

conducted . . . changed." *Id.* ¶¶204-205. Moreover, the merger had "no impact on [Ukrnafta] as a creditor" because Ukrnafta "was still dealing with a contracting partner with the same rights, obligations, liabilities and assets." *Id.* ¶206. That finding is fatal to Ukrnafta's claims.

Ukrnafta asserts that harm was not adjudicated or litigated in the arbitration because ***Ukrnafta*** chose not to put on any evidence of harm. Ukrnafta Br. 62-64. But ***Carpatsky*** argued lack of harm as a reason to reject Ukrnafta's position. *See* ROA.6323 ¶553 ("The merger had no impact on the outstanding rights and obligations of [Carpatsky] vis-à-vis Ukrnafta. In fact, following the merger, it was 'business as usual' between the two parties because nothing had changed but for [Carpatsky's] place of incorporation."); ROA.6374 at 101:5-21 (no "disadvantages to creditors for being in one state or the other"); ROA.6376-77 at 112:15-115:7 (similar). The tribunal relied on those arguments in its decision. ROA.1039-40 ¶¶206-207 nn.110-111. As the district court explained, "Ukrnafta's tactical decision not to put on any evidence in response to those arguments, even if based on a mistaken belief about [their] relevance, does not mean the issue was not 'actually litigated' in the arbitration." ROA.6421.

Ukrnafta asserts that the finding of no harm was "unnecessary to the tribunal's holding" because, by that point in its decision, the tribunal had already ruled against Ukrnafta on other grounds too. Ukrnafta Br. 63-64. But that does

not make the finding "[d]icta regarding irrelevant matters." *Id.* at 64. It was merely an alternative holding.

The traditional rule is that alternative holdings are entitled to full preclusive effect. *See, e.g.*, *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 254-55 (3d Cir. 2006); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Deweese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982); *In re Westgate-Cal. Corp.*, 642 F.2d 1174, 1176-77 (9th Cir. 1981); *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926) (Hand, J.) ("[I]f a court decides a case on two grounds, each is a good estoppel."); *see also Herrera v. Wyoming*, 139 S. Ct. 1686, 1710-11 (2019) (Alito, J., dissenting). That approach makes sense: A losing party should not be rewarded by denying the judgment preclusive effects merely because the party's arguments were so bad that they failed for multiple independent reasons.

In *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981), this Court declined to apply that traditional rule to ***offensive*** collateral estoppel. *Id.* at 1168-73. But the Court expressly distinguished ***defensive*** collateral estoppel and stated that it was not deciding the issue for that context. *Id.* at 1171. The Court's concerns about unknown future plaintiffs do not apply where a party uses a judgment defensively. *Hicks* therefore should not be extended to cases of

defensive collateral estoppel. *See Adaptix, Inc. v. AT&T Mobility LLC*, No. 6:12-cv-17, 2015 WL 12696219, at *3 (E.D. Tex. Sept. 29, 2015).

Nor should *Hicks* be extended to arbitral awards. *Hicks* relied in part on concerns that, where a judgment rests on alternative grounds, the losing party may not have sufficient incentive to appeal. 662 F.2d at 1168. That rationale makes no sense for arbitral awards, which are ***designed*** to be final and non-appealable. *See Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) ("finality" one of the "most attractive features" of arbitration); ROA.292 art. 20.4 (tribunal to "finally resolve" disputes); ROA.2531 (award "cannot be . . . challenged on substantive grounds"). For that reason too, *Hicks* does not apply.[16]

2. *Successor Status*

Ukrnafta's trade secret and unjust enrichment claims are also precluded by another finding. The tribunal found that "[Carpatsky-Delaware] was the successor of [Carpatsky-Texas] and with the merger acquired all of the latter's rights and obligations." ROA.1029 ¶177. Ukrnafta concedes that ***Carpatsky-Texas*** was entitled to possess its trade secrets. ROA.73-74 ¶26. The tribunal's finding thus

[16] The *Restatement (Second) of Judgments* on which *Hicks* relied, while denying preclusive effects to alternative holdings by ***trial*** courts, endorses the opposite rule for alternative holdings by ***appellate*** courts. *See* Restatement (Second) of Judgments §27 cmts. i, o (1982). Arbitral awards are comparable to appellate decisions in that both are meant to be the last word.

forecloses its claims: Carpatsky-Delaware was entitled to receive any trade secrets or other benefits to which Carpatsky-Texas had access.

Ukrnafta responds by speculating that Carpatsky may have acquired other trade secrets beyond the scope of the JAA. Ukrnafta Br. 64. That argument fails for multiple reasons. First, Ukrnafta pled the opposite in its complaint: It alleged that it provided the trade secrets to Carpatsky-Texas "[p]ursuant to the terms of the JAA" and that "the JAA required it." ROA.73-74 ¶¶24, 26; *see also* ROA.6422 ("Ukrnafta pled that it provided trade secrets pursuant to the JAA."). Ukrnafta cannot amend its complaint on appeal. Second, the tribunal's finding was not limited to rights under the JAA. The tribunal found that Carpatsky-Delaware succeeded to "***all*** of [Carpatsky-Texas's] rights and obligations." ROA.1029 ¶177 (emphasis added). For both reasons, Ukrnafta's argument fails.[17]

C. Ukrnafta's Claims Are Barred by Claim Preclusion

Claim preclusion independently forecloses Ukrnafta's suit. Claim preclusion applies where "(1) [t]he parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause

[17] As Carpatsky pointed out below, Ukrnafta's unjust enrichment claim is also facially deficient because "there can be no recovery for unjust enrichment if the same subject is covered by [an] express contract." *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (quotation marks omitted). The district court did not reach that issue.

of action was involved in both actions." *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999). Whether two proceedings involve the same "claim" under the fourth element turns on whether they arise out of "the same nucleus of operative facts." *Id.* (emphasis omitted).

Ukrnafta asserts that there is no common nucleus of operative facts because there is a "large gap" between the development of oil and gas fields in Ukraine and its provision of trade secrets to Carpatsky. Ukrnafta Br. 69. But Ukrnafta defines the relevant facts far too narrowly. This Court has held that "[i]t is difficult to imagine a more common nucleus of operative facts" than where "[t]he contracts at issue are the very . . . agreements which were the basis of the [earlier case]." *In re Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993); *see also Vela v. Enron Oil & Gas Co.*, No. 5:02-cv-37, 2007 WL 1564562, at *7 (S.D. Tex. May 29, 2007) ("Courts define a given 'nucleus of operative facts' broadly such that . . . a common nucleus exists if a plaintiff's claims arise out of the same contract upon which the prior adjudication centered.").

By that standard, there is no gap whatsoever, let alone a "large gap," between the two proceedings. The claims in the arbitration all arose out of the JAA. ROA.1014-16 ¶144. Ukrnafta pled below that it provided trade secrets to Carpatsky "[p]ursuant to the terms of the JAA." ROA.73 ¶24. All of Ukrnafta's

other claims relate to the parties' contractual relationship as well, which is why the district court referred them all to arbitration. ROA.68-78; ROA.847-48.

Ukrnafta protests that it raised Carpatsky's change of domicile as a jurisdictional issue and defense in the arbitration rather than an affirmative claim. Ukrnafta Br. 68. That is irrelevant. What matters is that the two proceedings arose out of the same nucleus of facts and that Ukrnafta could have asserted its state-law claims as counterclaims in the arbitration. *See, e.g.*, *Dillard v. Sec. Pac. Brokers, Inc.*, 835 F.2d 607, 609 (5th Cir. 1988) (claim preclusion barred negligence claim against broker because it could have been raised as counterclaim in broker's earlier suit over fraudulent checks). Indeed, Ukrnafta ***did*** assert counterclaims in the arbitration – just not these ones. ROA.6400-02.

Finally, even if Ukrnafta's state-law claims did not arise out of the same nucleus of facts as the arbitration, they would still be subject to arbitration pursuant to the arbitration clauses in the parties' agreements. ROA.847-48. As a result, if the district court did not grant summary judgment on claim preclusion grounds, it should have dismissed the claims for failure to arbitrate. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

CONCLUSION

The district court's judgment should be affirmed.

June 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 19, 2019, this brief was filed by ECF and served by ECF on R. Paul Yetter, Christian J. Ward, and Elizabeth A. Wyman, attorneys for Ukrnafta.

/s/ Robert K. Kry
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/s/ Robert K. Kry
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STATUTORY ADDENDUM

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SA1

MULTILATERAL

Recognition and Enforcement of Foreign Arbitral Awards[1]

Convention done at New York June 10, 1958;[2]
Accession, with declarations, advised by the Senate of the United States of America October 4, 1968;
Accession, with said declarations, approved by the President of the United States of America September 1, 1970;
Accession of the United States of America, with said declarations, deposited with the Secretary-General of the United Nations September 30, 1970;
Proclaimed by the President of the United States of America December 11, 1970;
Entered into force with respect to the United States of America December 29, 1970.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

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[1] For note by the Department of State, see p. 2561.
[2] Texts as certified by the Secretary-General of the United Nations.

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UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

TIAS 6997

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. [1]

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforce-

[1] For note by the Department of State, see p. 2561.

ment shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive

any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [1] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, [2] or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting

[1] 27 LNTS 157; 92 LNTS 301.
[2] TS 993; 59 Stat. 1055.

State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit hy such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to tbe Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by tbe Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after tbe date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. Tbis Convention, of wbich the Chinese, English, Frencb, Russian and Spanish texts shall be equally authentic, shall be deposited in tbe archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

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United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Refs & Annos)

9 U.S.C.A. § 203

§ 203. Jurisdiction; amount in controversy

Currentness

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

CREDIT(S)

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

Notes of Decisions (40)

9 U.S.C.A. § 203, 9 USCA § 203
Current through P.L. 116-19.

End of Document

SA8

United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Refs & Annos)

9 U.S.C.A. § 205

§ 205. Removal of cases from State courts

Currentness

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

CREDIT(S)

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

Notes of Decisions (53)

9 U.S.C.A. § 205, 9 USCA § 205
Current through P.L. 116-19.

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