SVEA COURT OF APPEAL
Department 02
Division 020103

JUDGMENT
27 November 2019
Stockholm

Case No.
T 10191-17

PARTIES

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MATTER
Challenge of arbitral award rendered in Stockholm on 31 May 2017, and corrected on 9 August 2017

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The Court of Appeal's judgment, see following page.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of Public Joint Stock Company Gazprom.

2. Public Joint Stock Company Gazprom is ordered to compensate National Joint Stock Company Naftogaz of Ukraine for its litigation costs in the amounts of EUR 1,021,774.26 and Ukrainian hryvnia (UAH) 1,650,000, of which EUR 1,000,000 comprises costs for legal counsel, plus interest on the two former amounts pursuant to Section 6 of the Interest Act as from the date of the Court of Appeal's judgment until the date of payment.

3. The Court of Appeal rejects Public Joint Stock Company Gazprom's motion for compensation for litigation costs.

4. The Court of Appeal rejects Public Joint Stock Company Gazprom's motion for confidentiality.

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BACKGROUND

The parties

Public Joint Stock Company Gazprom (Gazprom) is a global energy company which, amongst other things, carries out geological prospecting, production, transport, storage, refining and sales of natural gas, gas condensates and oil. The company was incorporated in 1989 as part of the economic reforms in the Soviet Union from what was then called the Ministry for the Natural Gas Industry. In 1994, a privatization process of the company was initiated. At present, more than 50 percent of the company is directly or indirectly owned by the Russian state.

National Joint Stock Company Naftogaz of Ukraine (Naftogaz) is an oil and gas company, which is wholly owned by the Ukrainian state. The company was incorporated in 1998 and was then granted the ownership to, and control of, oil and gas assets in Ukraine. The company's operations include gas field prospecting as well as development, production, transport, storage and delivery of natural gas to end consumers.

The parties' agreement

On 19 January 2009, Gazprom and Naftogaz entered into a supply agreement concerning natural gas named Contract No. KP for the purchase and sale of natural gas for the period 2009-2019 (the Contract).

Two provisions of the said Contract are important to the action at issue: article 2.2 (the volume clause) and article 2.2.5 (the Take-or-Pay clause or the annual minimum volume).

Article 2.2 is worded as follows.

> 2.2. [Gazprom] undertakes to deliver, and [Naftogaz] undertakes to accept, within the period from 1 January 2009 to 31 December 2019, 40 billion cubic meters of the Natural gas, DAF the border of the Russian Federation and Ukraine and/or the border of the Republic of Belarus and Ukraine (Incoterms 2000), at the Delivery Points in 2009, and from 2010 52 billion cubic meters of the Natural gas per year (the "Annual Contract Volume" or "ACV") and pay for all the Gas delivered in accordance with the terms and conditions hereof.

Take-or-Pay provisions are common in long-term natural gas supply agreements, and place upon the purchaser an obligation to order and pay for, or only pay for, a certain volume each year. Under article 2.2.5, the volume for which Naftogaz at all events was obligated to pay constituted 80 percent of the total annual contract volume.

Article 2.2.5 is worded as follows.

2.2.5 Within each Year of Delivery [Naftogaz] is obliged to offtake and pay for, or pay for, if the volume was made available by [Gazprom] but not off-taken by [Naftogaz], not less than the following Minimum Annual Volume (the "MAV") of the Natural gas:
MAV = 0,8 x ACV.

Further, the Contract contained an arbitration clause stipulating that disputes arising out of or in connection with the Contract shall be settled by arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules). It further stipulates that the seat of the arbitration shall be Stockholm and that Swedish law shall apply to the dispute.

The arbitration proceeding

A dispute arose between the parties concerning the Contract. The parties filed a request for arbitration against each other, and the claims were dealt with within the scope of one arbitration (SCC case V 2014/078/80). The arbitral tribunal consisted of three arbitrators: advokat X (appointed by Naftogaz), former Supreme Court Justice Y (appointed by Gazprom) and the Chairman, advokat Z (appointed by the SCC).

In the arbitration Gazprom claimed, amongst other things, that Naftogaz should be ordered to pay compensation under the Take-or-Pay clause of the Contract. Naftogaz disputed the claim. With respect to articles 2.2 and 2.2.5 of the Contract, Naftogaz presented the following motions.

6.1) In relation to Articles 2.2 and 2.2.5, based on competition law or contract law

a) Declaring that with effect from 19 January 2009, or alternatively the earliest following date as determined by the Arbitral Tribunal, Article 2.2 is invalid or ineffective;
b) Declaring that with effect from the date of the award, Article 2.2 is replaced with a new provision which reads:

"2.2. The Seller undertakes to deliver and the Buyer undertakes to accept the Natural Gas during the period until '31' December 2019 on DAF conditions at the border of the Russian Federation/Ukraine

*and/or border the Republic of Belarus/Ukraine ('Incoterms-2000') at the Points of Delivery in the quantity of **14.5 billion cub. m. per year** (the '**Annual Contract Quantity'** or '**ACQ**') and pay for all the delivered Gas in accordance with the terms and conditions hereof;"*

c) Declaring that with effect from 19 January 2009, or alternatively the earliest following date as determined by the Arbitral Tribunal, Article 2.2.5 is invalid or ineffective; and

d) Subject to the Tribunal awarding any of the reliefs in 1.1) to and including 1.4.2), declaring that with effect from the date of the award, Article 2.2.5 is replaced with a new provision which reads:

*"2.2.5. During each Delivery Year, the Buyer shall take off and pay for, or only pay for, if the quantity was delivered by the Seller but not offtaken by the Buyer, at least the following Minimum Annual Quantity (the '**MAQ**') of the Natural Gas:*

***MAQ= 0.8 x ACQ – D**,*

Where D= the total sum of all quantities not made available for any reason by the Seller, and of all quantities not taken by the Buyer due to Force Majeure and/or agreed repair works in the Delivery Year.

The MAQ shall be paid for at a price equal to the arithmetic average of the factual prices 'Px' calculated according to Article 4 of this Contract and applicable in the relevant Delivery Year.

A quantity the Buyer has paid for but not taken pursuant to this Article 2.2.5 can be offtaken free of charge (made up) by the Buyer in the following Delivery Years, provided that the Buyer has offtaken the MAQ in the relevant Delivery Year. The first quantities to be made up are the quantities not offtaken in the Delivery Year which is furthest in time from the make-up year."

Gazprom disputed Naftogaz's motion 6.1 a)-d). Further, Gazprom presented an alternative motion as follows.

Further, to the extent that Naftogaz were to succeed in any of its claims to invalidate any of the provisions of The Contract, Gazprom also makes a claim to limit the effects of any such invalidity as follows:

Gazprom requests that the Tribunal limits the effects of any invalidity as far as possible.

On 8 May 2017, the arbitral tribunal decided to render a separate arbitral award in the arbitration (the Separate Award) as follows.

The Tribunal has considered the possibility and advantages of a Separate Award in accordance with Article 38 of the Arbitration Rules (cf. Section 29 of the Swedish Arbitration Act). This question has arisen as the result of an invitation from Gazprom, with which Naftogaz concurred, that the Tribunal, if it considers it appropriate, could seek the assistance of the Parties (and in particular their experts) in making calculations in relation to the Parties' respective claims, and that such calculations could be made and scrutinised for accuracy by both Parties' experts, based on parameters or scenarios selected and defined by the Tribunal.

To that end the Chairperson has had a telephone conference with Counsel of the Parties on 21 March 2017, and, in subsequent emails, the Tribunal has answered requests for clarifications made by the Parties. In such emails, Naftogaz has expressed its acceptance that a separate award be rendered, whereas Gazprom has expressed reservations.

In view of the above and of the advantages for the Parties of having as early as possible resolved the fundamental differences between them and of the enhanced reassurance that the numeric and quantifiable elements of the reliefs sought be correct, and, further, on the basis that the Tribunal has found that it has received from the Parties enough submissions on facts and law to render a Separate Award,

The Tribunal *decides* to render a Separate Award disposing of the issues of fact and law required to decide as regards the issues of principle:
(i) Whether there is there [sic] a right to price revision;
(ii) Whether there is a right to price determination;
(iii) Whether Gazprom has a right to take or pay payments;
(iv) What the price will be for off-taken gas but not paid for;
(v) Whether one or more contractual provisions shall be declared void or ineffective.

The Tribunal intends to have resolved all relevant legal and factual issues for answering these questions, and to have responded to all relevant declaratory requests regarding these issues, except as to certain elements and/or values of a numeric or quantifiable nature. All remaining issues, and any resulting monetary claims, will be left to be resolved in the Final Award, either based on an agreement by the Parties with the support of their experts, or on determinations by the Tribunal after further submissions by the Parties.

The arbitral tribunal rendered the Separate Award on 31 May 2017. That award was corrected on 9 August 2017. With respect to articles 2.2 and 2.2.5, the judicial decision stated the following:

For the Reasons set out above in this Award, the Tribunal decides as follows:
TO DECLARE

[…]

(4) That Articles 2.2. (“Volumes”) and 2.2.5. (“Take or Pay”) of the Contract are invalid as from 19 January 2009 and until the date of the Final Award;
(5) That from the date of the Final Award, in Article 2.2. (“Volumes”) of the Contract the Annual Contract Quantity (“ACQ”) shall be based on fifty per cent (50%) of Naftogaz' estimated annual actual needs for each year of the remaining term of the Contract from the date of the Final Award, where the actual needs of Naftogaz shall be understood to mean the total volume of gas that Naftogaz requires to import for supply to its customers in Ukraine, including fuel gas; where Article 2.2.5. (MAQ) shall be based on eighty per cent (80%) of ACQ and where Article 2.2.5. shall include a make-up gas provision; the details of the Volume and the Take or Pay provisions to be determined by the Parties in agreement, or, failing such agreement, decided by the Tribunal after further proceedings in the Arbitration.

The arbitral tribunal rendered its final award on 22 December 2017 (the Final Award). The Final Award is presently under review by Svea Court of Appeal regarding invalidity and challenge (case no. T 2826-18).

MOTIONS BEFORE THE COURT OF APPEAL

Primarily, Gazprom has claimed that the Court of Appeal shall set aside items 4 and 5 of the judicial decision of the Separate Award. In the alternative, Gazprom has claimed that the Court of Appeal shall set aside item 4 of the judicial decision of the Separate Award.

Naftogaz has disputed the claims.

The parties have claimed compensation for their litigation costs.

GROUNDS

Gazprom

Challenge ground 1: the arbitral tribunal has gone beyond the scope of the arbitral proceeding

In the arbitration, Naftogaz claimed that article 2.2 of the Contract should be declared invalid or without effect with respect to the time prior to the date of the Separate Award. Naftogaz further claimed that article 2.2 of the Contract, with respect to the time following the date of the Separate Award, should be declared to stipulate that the annual contract volume should amount to 14.5 billion cubic meters of natural gas.

Moreover, Naftogaz claimed that article 2.2.5 of the Contract should be declared invalid or without effect with respect to the time prior to the Separate Award during the time prior to the date of the Final Award. Naftogaz also claimed that article 2.2.5 of the Contract, with respect to the time following the date of the Final Award, should be declared to stipulate that the minimum annual volume to be ordered by Naftogaz should be determined in a manner similar to previously – i.e. 80 percent of the annual contract volume – but with deviation for certain deductions to be made for natural gas that was not made available or which could not be ordered due to force majeure. Naftogaz furthermore claimed that it should also be entitled to order the gas that had been paid for in the preceding year, but which had not been used.

In the arbitration Naftogaz's motions with respect to articles 2.2 and 2.2.5 were referred to as motion 6.1. Items a)-d) of motion 6.1 were not separate motions, but formed part of one single motion. Thus, for example, the arbitral tribunal could not have granted 6.1 a) and thereafter not decide on 6.1 b). Item b) of the motion sets a time frame for the declaration of invalidity (the invalidity is based on item a)), since b) meant that article 2.2 of the Contract, as from the date of a final arbitral award, would stipulate an annual contract volume of 14.5 billion cubic meters of natural gas. Nowhere is it to be read or understood that item b) was an alternative motion to item a). At any event, the items of the motion were cumulative.

As concerns the time after the Final Award, motion 6.1 meant that the two articles 2.2 and 2.2.5 of the Contract would be replaced by clauses stipulating substantially lower annual contract volumes and an allegedly reasonable Take-or-Pay clause (i.e. the commitment concerning minimum volumes).

Naftogaz claimed that the annual contract volume should be set to 14.5 billion cubic meters of natural gas and that Naftogaz's minimum volume commitment under article 2.2.5 of the Contract should be set to 80 percent thereof, which would amount to 11.6 cubic meters of natural gas.

Naftogaz claimed that the arbitral tribunal should base its decision on competition or contract law. Naftogaz was clear that the arbitral tribunal was not entitled to deviate from the wording of Naftogaz's declaratory claim concerning the two articles.

Gazprom informed Naftogaz that it had understood Naftogaz's motion in the above described manner and Naftogaz did not allege that Gazprom has misunderstood the motion.

Gazprom's position was primarily that articles 2.2 and 2.2.5 of the Contract should remain unaltered, i.e. that the annual contract volume should remain at 52 billion cubic meters of natural gas and that the minimum volume should remain at 80 percent thereof. In the alternative, Gazprom's position was that the articles should be adjusted as little as possible.

Thus, the arbitral tribunal was tasked with setting the annual contract volume (i.e. article 2.2) at a level between the parties' motions, i.e. no adjustment whatsoever, as per Gazprom's position, and 14.5 cubic meters, as per Naftogaz's motion.

The aforementioned means that the scope of the arbitration was 14.5-52 billion cubic meters for the annual contract volume and, consequently, 11.6-41.6 billion cubic meters of natural gas annually for the minimum volume commitment (because this was to be determined as 80 percent of the annual contract volume).

The arbitral tribunal, however, went beyond the parties' motions and referenced circumstances. By way of the Separate Award, the arbitral tribunal determined, with respect to articles 2.2 and 2.2.5 of the Contract, that the annual contract volume for each year of the remainder of the Contract's validity period should be determined by use of a formula that neither party had referenced, namely 50 percent of Naftogaz's estimated annual actual needs for gas imports for delivery to Ukrainian customers, including gas for fuel. The minimum amount of natural gas which Naftogaz would be obligated to order and pay for, or only pay for (i.e. the minimum commitment volume), under the Contract should be set at 80 percent of this volume.

Thus, the arbitral tribunal declared that the annual contact volume should be 50 percent of Naftogaz's estimated annual actual needs for each year of the remainder of the Contract period. Neither party had presented such a motion. The formula came as a surprise to both Gazprom and Naftogaz.

The formula determined by the arbitral tribunal in the Separate Award thus constituted a quantitative as well as a qualitative excess of mandate.

The quantitative excess consists of the arbitral tribunal's formula leading to an annual contract volume, and thereby also a minimum annual commitment, which was lower than the volume which followed from Naftogaz's motion and Gazprom's position, i.e. that Naftogaz's estimated annual actual needs were lower than Naftogaz itself had claimed.

The qualitative excess consists of the arbitral tribunal's, on its own initiative, having determined a formula – in spite of neither party having made such a motion or referenced such circumstances.

That the contract volume should be based on Naftogaz's estimated actual annual needs for natural gas for each year during the remainder of the Contract's validity period was a circumstance which neither party had invoked, referenced, argued or even discussed in the arbitration. Therefore, no circumstances or evidence had been referenced or invoked against or in support for the appropriateness of basing the determination of the annual contract volume for each year for the remainder of the Contract's validity period upon Naftogaz's estimated actual annual needs.

In order for the arbitral tribunal's formula to possibly generate a contract volume of 14.5 billion cubic meters (i.e. as per Naftogaz's motion), Naftogaz's import would have to equal or exceed 29 billion cubic meters. However, Naftogaz's import of natural gas to Ukraine has been lower than 29 billion cubic meters each year after 2012. Naftogaz was aware of this, but nevertheless opted to not adjust its motions until after the Separate Award had been rendered – and instead maintained its motion 6.1 for 14.5 billion cubic meters of natural gas per year. This was the case, although Naftogaz adjusted its motion 6.1 in other respects prior to the Separate Award was rendered. In short, the arbitral tribunal determined that the actual needs of Naftogaz should be estimated, and that the estimation should be based on other years than those Naftogaz had invoked (i.e. 2012-2013).

Item 5 of the judicial decision of the Separate Award goes beyond what the parties had claimed and invoked. Both items 4 and 5 of the judicial decision of the award are functions of the parties' motions in this part of the arbitration. The parties' motions concerning articles 2.2 and 2.2.5 thus formed the scope of the arbitral proceeding for items 4 and 5 of the judicial decision of the award. The error committed by the arbitral tribunal, which is eligible for challenge, thus affects both items 4 and 5. At any event, there is such a connection between the decisions in items 4 and 5 that it would be inappropriate to not set aside both items.

It is not possible to merely set aside the part of the decision in item 5 that relates to article 2.2 of the Contract. Articles 2.2 and 2.2.5 are so closely linked that this would be impossible.

The arbitral tribunal went beyond the scope of the proceeding determined by the parties' motions and referenced circumstances. Thereby, the arbitral tribunal exceeded its mandate (item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act), or, alternatively, the arbitral tribunal's handling of this aspect constituted a procedural error (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

The procedural error occurred without having been caused by Gazprom and has, or at least likely has, affected the outcome because the decision constituted a deviation from the scope of the proceeding determined by the parties.

The question whether the procedural error affected the outcome shall be determined in relation to the Separate Award. The scope of the proceeding leading up to the Final Award would not have been the same without the excess of mandate or procedural error. The fact that the parties adjusted their respective motions following the Separate Award was due to the arbitral tribunal's having reached challengeable decisions in the Separate Award. The parties would not have adjusted their motions if the arbitral tribunal would have kept within the scope determined by the parties' respective motions and positions and referenced circumstances.

After the Separate Award had been rendered, the arbitral tribunal was bound to adhere to the formula for the quantification of the annual contract volume for each year of the remainder of the Contract's validity period set forth in the Separate Award. Prior to the Separate Award had been rendered, neither party had presented any arguments whatsoever concerning Naftogaz's estimated actual annual needs for the coming years (and there was no reason for the parties to do so). Thus, the judicial decision of the Separate Award directly caused the parties to adjust their motions and positions to coincide with the formula determined by the arbitral tribunal.

Gazprom has not lost the right to invoke the errors that serve as challenge grounds. After the Separate Award had been rendered, Gazprom objected against the arbitral

tribunal's decision and reserved the right to challenge the arbitral award. In its submissions following the Separate Award, Gazprom stated, amongst other things, the following:

> This Submission to the Tribunal, including the proposed contractual wording and calculations set out herein, is made without prejudice to Gazprom's position as set out in all pleadings submitted prior to the issue of the Separate Award.
>
> For the avoidance of doubt, Gazprom reserves all its rights to challenge the Separate Award and any final or other award issued by the Tribunal. Neither this Submission, Gazprom's participation in without prejudice negotiations with Naftogaz regarding the outstanding issues from the Separate Award, nor Gazprom's participation in this final stage of the proceedings arising further to the issue of the Separate Award, should be taken as a waiver of Gazprom's rights to challenge either the Separate Award or any final or other award issued by the Tribunal in these proceedings.

Gazprom adjusted its motions after the Separate Award, because the decision in item 5 of the judicial decision of the award dislodged the parties' previous motions. Moreover, this was the reason that Naftogaz adjusted its motion.

The reason that Gazprom did not claim for dismissal of Naftogaz's adjustment of its claims concerning articles 2.2 and 2.2.5 of the Contract was that the arbitral tribunal was bound by the decisions set forth in the Separate Award. Gazprom had declared its reservations to the Separate Award and reserved the right to challenge it before the court of jurisdiction. Thereafter, Gazprom loyally participated in the arbitration. The only recourse that remained for Gazprom to change items 4 and 5 of the Separate Award was to challenge them before general courts.

The procedural error has not only affected the decision in item 5 of the judicial decision of the Separate Award. The error that serves as the ground for challenge concerns both items 4 and 5 of the judicial decision of the Separate Award. The reason is that items 4 and 5 decide on the same motion, items 4 and 5 are based on the same conclusion described in the grounds of the award, and that items 4 and 5 concern the same articles of the Contract. At any event, there is such a connection between the decisions in items 4 and 5 that it would be inappropriate to not set aside both items.

Challenge ground 2: the arbitral tribunal has committed errors in its substantive guidance of the proceeding

Neither party had claimed or invoked the formula determined by the arbitral tribunal for the determination of the annual contract volume, i.e. that the annual contract volume should be set at 50 percent of Naftogaz's estimated actual annual needs.

In the arbitration, Naftogaz claimed that the arbitral tribunal should determine the annual contract volume to a specific volume: 14.5 billion cubic meters. Naftogaz had based its motion on the assumption that the annual contract volume should not exceed 50 percent of Naftogaz's historic import needs for the years 2012-2013 (in other words: 29/2 = 14.5 billion cubic meters of natural gas). The only time Naftogaz provided an explanation for the motion was in its Statement of Claim. Thereafter, Naftogaz never discussed how the calculation of the annual contract volume claimed by Naftogaz should be made. Naftogaz never stated that the arbitral tribunal should affirm a calculation method based on Naftogaz's estimated actual annual needs or determine the volumes based on such a method. Naftogaz itself had calculated and thereafter presented a claim that reflected what the company itself found was a reasonable annual contact volume and to what percentage of the annual minimum commitment it should reach.

Irrespective of whether the arbitral tribunal has gone beyond the procedural scope set by the parties' motions and referenced circumstances, the arbitral tribunal ought to have informed the parties of its intention to determine a formula for the determination of the annual contract volume of the Contract, which neither of the parties had claimed. In such case, Gazprom could have presented arguments as to why it was inappropriate, which Gazprom was now unable to do. Instead, the formula came as a surprise to Gazprom as well as Naftogaz.

Thereby, the arbitral tribunal has failed in its substantive guidance of the proceeding, which deprived Gazprom of the opportunity to adequately argue its case. Thereby, the arbitral tribunal has exceeded its mandate (item 2 of the first paragraph of Section 34 of

the Swedish Arbitration Act), or, alternatively, committed a procedural error (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

The procedural error occurred without having been caused by Gazprom and has, at least likely, affected the outcome. The question of whether the procedural error has affected the outcome shall be determined with respect to the Separate Award.

Gazprom has not lost the right to invoke the error, which serve as ground for the challenge. In this respect, Gazprom references the same circumstances which were referenced for challenge ground 1.

In addition, Gazprom has not lost the right to invoke the error due to the arbitral tribunal's statements during the arbitration hearing to the effect that the parties should not expect any substantive guidance of the proceeding by the arbitral tribunal. There was no reason for Gazprom to object to the arbitral tribunal's statements, since they did not constitute a procedural decision.

Challenge ground 3: the arbitral tribunal has failed to provide complete grounds for its reasoning

Articles 2.2 and 2.2.5 of the Contract govern the annual contract volume of natural gas which Gazprom is obligated to deliver to Naftogaz and which Naftogaz is obligated to accept and the minimum volume which Naftogaz must order each year and/or pay for (i.e. the minimum volume commitment). The provisions are relevant to Naftogaz's case as well as to Gazprom's counterclaim.

With respect to Naftogaz's motions concerning articles 2.2 and 2.2.5 of the Contract, Gazprom's position was, in the main, that the wording of articles 2.2 and 2.2.5 of the Contract should remain unaltered. In the alternative, Gazprom stated that the articles should be adjusted as little as possible. Gazprom's position was the same with respect to the time prior, as well as subsequent, to the date of the Separate Award.

As regards Gazprom's counterclaim, the company claimed for its own part, amongst other things, that Naftogaz should be ordered to pay for natural gas as per the Take-or-

Pay provision (article 2.2.5 of the Contract) (Gazprom's Motion 1). Gazprom's motion for fulfillment in this respect constituted the majority of Gazprom's counterclaim.

Gazprom also presented an alternative motion (Motion 2), in the event that Naftogaz's motion for invalidity of articles 2.2 and 2.2.5 of the Contract would be successful for the time prior to the arbitral award was rendered. Gazprom clarified its motion as follows.

> If, however, the Tribunal were to find that (contrary to Gazprom's position) certain provisions of Contract KP were, or should be declared to be, invalid or ineffective, Gazprom asks that the Tribunal should not reject the Take or Pay Claims, but should limit the effects of any alleged invalidity so far as possible. This request is made both as an alternative position in response to Naftogaz's defence, and as a separate claim as set out in claim (16) below.

The motion meant, in the event that the arbitral tribunal would conclude that articles 2.2 and 2.2.5 of the Contract were unreasonable and should be adjusted under Section 36 of the Swedish Contracts Act, that Gazprom's Take-or-Pay claims should not be rejected in their entirety, but be granted to such lower amounts that would follow from the calculations of the new volumes that would result from the adjusted articles 2.2 and 2.2.5 of the Contract. Further, Gazprom submitted adjusted claims for payment, which clarified how Gazprom's Motion 2 should be calculated in the event that Naftogaz's motion 6.1 would be granted.

In the arbitration, Naftogaz referenced the same circumstances in support of their motions as for the disputing of Gazprom's motions in the counterclaim. These grounds were discussed in the grounds of the award, but only as regards Gazprom's Motion 1.

Gazprom's Motion 1 was discussed in paragraphs 3860-3861 of the grounds to the Separate Award. In paragraph 3860 of the Separate Award, the arbitral tribunal concluded that articles 2.2 and 2.2.5 of the Contract should be declared invalid as from 19 January 2009 until the date of the Separate Award. In paragraph 3861, the arbitral tribunal declared that "[c]onsequently, Gazprom's claim for payment based on the Take-or-Pay provisions must fail." Thereby, the arbitral tribunal did consider Gazprom's Motion 1 in its grounds.

The fact that the arbitral tribunal in paragraph 3861 only took into account Gazprom's Motion 1 is evident from the preceding paragraph 3860: "[t]he Tribunal holds that Articles 2.2 and 2.2.5 as these articles are now formulated shall be declared invalid."

Thereafter, the arbitral tribunal should have considered Gazprom's Motion 2.

On this issue, however – as far as can be gathered – only the following has been noted with respect to Gazprom's Motion 2: "[w]ith respect to past time, there is no need to complete the Contract further." This statement is a decision, and therefore requires that grounds shall be provided. However, there are no grounds provided for the decision. This is startling, considering the value of Gazprom's Motion 2. On this issue, the grounds are so incomplete that Gazprom has been unable to determine whether the arbitral tribunal reviewed Gazprom's Motion 2 at all (and there is nothing in the grounds that would indicate that the arbitral tribunal did review Gazprom's Motion 2).

Article 36 of the SCC Rules stipulates that an arbitral award shall contain grounds. The arbitral tribunal's grounds with respect to Gazprom's Motion 2 are so incomplete that the situation can be equated to when no grounds whatsoever have been provided. The actions of the arbitral tribunal constitute a procedural error (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

The procedural error occurred without having been caused by Gazprom and likely affected the outcome.

The question whether the procedural error affected the outcome shall be determined with respect to the Separate Award. The procedural error did not only affect the outcome of the decision in item 4 of the judicial decision of the Separate Award. There is such a connection between items 4 and 5 of the judicial decision of the Separate Award that it would be inappropriate to only set aside the decision in item 4. Thereby, the procedural error likely affected the outcome also in item 5.

Naftogaz

Challenge ground 1

The arbitral tribunal did not go beyond the parties' motions

When the arbitral tribunal decided to render the Separate Award, its intention was to determine all relevant legal and factual matters at a level of principle, as was required in order to finally decide on all issues set forth in the decision. Further, the arbitral tribunal would address the declaratory requests related to the matters set forth in the decision. In the Separate Award, the arbitral tribunal did just that and decided certain motions as well as certain matters of principle and disputed issues of relevance for motions that were not decided therein.

The arbitral tribunal's decision in items 4 and 5 of the judicial decision of the award are not a decision on one single motion. In the arbitration prior to the date of the Separate Award, Naftogaz presented four separate declaratory requests concerning article 2.2 (the undertaking to sell) and article 2.2.5 (the undertaking to purchase) – motions 6.1 a) and b) concerned article 2.2 of the Contract and motions 6.1 c) and d) concerned article 2.2.5 of the Contract.

Motions 6.1 a) and c) meant that articles 2.2 and 2.2.5 of the Contract should be declared invalid as from 19 January 2009. The motions were not limited such that articles 2.2 and 2.2.5 should be declared invalid in the time prior to the Separate Award, but intended to achieve total invalidity, i.e. they concerned invalidity for the entirety of the contract period. Motions 6.1 b) and d) meant that articles 2.2 and 2.2.5 of the Contract, respectively, should be declared to have certain specific content as from the date of an arbitral award rendered in the case. Naftogaz's motions concerned articles 2.2 and 2.2.5 thus partially overlapped; motions 6.1 a) and c) could be fully granted while motions in 6.1 b) and d) could be partially granted. In sum, the motions and Gazprom's objection to adjustment meant that the scope of the proceeding for article 2.2 was total invalidity, i.e. from 0 cubic meters to 52 *billion [translator's correction*] cubic meters, for the duration of the contract period. For article 2.2.5, the motions and Gazprom's objection seeking adjustment set the scope for the proceeding from 0 cubic meters to 41.6 *billion [translator's correction*].

By way of item 4 of the operative part of the award, the arbitral tribunal finally decided Naftogaz's motions 6.1 a) and c). Following this, there was no need for another ruling on these matters and no such ruling was given. Thus, item 4 of the judicial decision of the award is a partial award. Item 4 does not go beyond the parties' motions.

Item 5 of the judicial decision of the award concerns Naftogaz's motions 6.1 b) and d). The arbitral tribunal did not finally decide motions 6.1 b) and d) by way of item 5 of the judicial decision of the award. Instead, the arbitral tribunal decided on certain matters at a level of principle relevant to motions 6.1 b) and d), namely that the provisions should be adjusted and certain principles for how the contents of articles 2.2 and 2.2.5 should be determined in the forthcoming adjustment. Thus, item 5 is an intermediary ruling. For intermediary rulings, the parties' motions do not set the scope of the proceeding. Therefore, item 5 of the judicial decision of the award cannot be considered a quantitative nor a qualitative excess of the scope set by the parties' motions.

In the event that it would be relevant to compare the decision in item 5 of the judicial decision of the award to the parties' motions, the decision does not in any respect go beyond the parties' motions, whether quantitatively or qualitatively.

The arbitral tribunal never discussed the issue of the quantitative sizes of the undertaking to sell nor the undertaking to purchase. Because item 5 of the judicial decision of the award does not contain numerical values, the decision cannot go beyond the parties' motions in any quantitative respect. And even if it were possible to transfer the decision in item 5 of the judicial decision of the award to numerical values, the decision falls in the span between Naftogaz's position (0 cubic meters of natural gas for the undertaking to sell as well as the undertaking to purchase) and Gazprom's main position (52 *billion [translator's correction*] cubic meters of natural gas for the undertaking to sell and 41.6 *billion [translator's correction*] cubic meters of natural gas for the undertaking to purchase).

<u>The arbitral tribunal did not decide on a circumstance which had not been referenced</u>

Gazprom's assertion that the arbitral tribunal decided on a circumstance which had not been referenced is a separate ground for challenge.

Naftogaz disputes that the arbitral tribunal has decided on a circumstance which had not been referenced. Prior to the Separate Award, Naftogaz referenced several circumstances which, according to Naftogaz, meant that the relevant provisions of the Contract were unreasonable and thereby invalid as per their wording, *inter alia* that the contract volume exceeded 50 percent of Naftogaz's estimated actual needs. Naftogaz further stated that the provisions must be adjusted such that the contract volume would not exceed 50 percent of Naftogaz's estimated actual needs.

In the Separate Award, the arbitral tribunal decided that articles 2.2 and 2.2.5 were invalid for the time prior to the final award in the arbitration. Concerning the time after the final award, the arbitral tribunal decided by way of item 5 of the judicial decision of the award that article 2.2 should be adjusted and set forth the principles for how that adjustment should be carried out. In this respect, the arbitral tribunal stated that "from the date of the Final Award, in Article 2.2. ('Volumes') of the Contract the Annual Contract Quantity ('ACQ') shall be based on fifty percent (50%) of Naftogaz' estimated annual actual needs." The decision in these respects corresponded to circumstances which Naftogaz had referenced to support that articles 2.2 and 2.2.5 of the Contract should be held unreasonable. Further, the decision corresponded to Naftogaz's position that the provisions must be adjusted such that the contract volume did not exceed 50 percent of Naftogaz's estimated actual needs.

The alleged excess of mandate or procedural error did not affect the outcome

Item 5 of the judicial decision of the award is an intermediary award. In order for the alleged excess of mandate or procedural error to affect the outcome, it is required that the final outcome was affected. The Final Award, however, is not based on the possible legal effects of item 5. Instead, it is based on the parties' procedural actions following the Separate Award.

If Gazprom, following the Separate Award, would have maintained its earlier motions then it would have been possible for the arbitral tribunal to affirm Gazprom's undertaking to sell within the span that followed from the parties' motions prior to the Separate Award. However, following the Separate Award and prior to the Final Award, Gazprom adjusted its motions concerning articles 2.2 and 2.2.5 of the Contract. Also Naftogaz adjusted its motions. Gazprom claimed that the company's undertaking to sell should be set to one of certain

alternative volumes. Gazprom also adjusted its arguments after the undertaking to sell had been set to 50 percent of Naftogaz's estimated actual needs and argued that Naftogaz's import needs could be set at certain alternative volumes. As of the parties' adjustments of their respective motions following the Separate Award, the framing for the proceeding for the Final Award ended up different than the scope of the Separate Award. Moreover, Gazprom did not move for dismissal of Naftogaz's motions and evidence concerning article 2.2 and referred to the binding effect of item 5 of the operative part of the Separate Award during the hearing following the Separate Award to support that certain of Naftogaz's new motions should be dismissed or rejected without a review of their merits. In addition thereto, Gazprom omitted to object to any perceived error with respect to the arbitral tribunal's decision concerning article 2.2 (and only did so with respect to the undertaking to purchase in article 2.2.5) and refrained from objecting to the Separate Award with respect to article 2.2, and instead accepted the award in these respects. The scope of the proceeding would have been exactly the same also without the alleged excess of mandate or procedural error. Consequently, the outcome would also have been the same.

In any event, it is disputed that the alleged excess of mandate or procedural error likely affected the outcome with respect to items 4 or 5 of the judicial decision of the award. At any event, the alleged excess of mandate or procedural error did likely not affect the parts of item 5 of the judicial decision of the award which concern the undertaking to purchase (article 2.2.5). Thus, the Court of Appeal shall at any event allow the part of the judicial decision of the award which concerns the undertaking to purchase, based on 80 percent of 50 percent of Naftogaz's volume needs and that this undertaking shall include a make-up provision, to remain – even if the part of the decision which concerns the undertaking to sell would be set aside.

If the Court of Appeal would conclude that an excess of mandate or procedural error occurred, Naftogaz disputes that it would have affected the outcome negatively for Gazprom as regards article 2.2. That article constitutes an undertaking for Gazprom. If that undertaking would have been lower than the minimum number allowed by the scope of the proceeding, then the error negatively affected Naftogaz– not Gazprom.

Gazprom has lost the right to invoke the alleged excess of mandate or procedural error

Gazprom has lost the right to challenge item 4 of the judicial decision of the award as well as item 5, to the extent it concerns the undertaking to sell in article 2.2.

Following the Separate Award, Gazprom took procedural actions in the arbitration which are incompatible with the Separate Award being anything but completely and fully valid.

Gazprom presented its own adjusted motions concerning articles 2.2 and 2.2.5, and in support thereof explicitly referenced the decision in item 5 of the Separate Award. Moreover, Gazprom adjusted its argumentation on the merits such that the parties' reasoning concerning the contents of articles 2.2 and 2.2.5 overlapped. Further, Gazprom chose to not move for dismissal of Naftogaz's motions and evidence to the extent they concerned the volumes of the undertaking to sell and purchase, respectively, in articles 2.2 and 2.2.5. Moreover, Gazprom moved for dismissal and rejection of Naftogaz's motions concerning articles 2.2.2, 2.2.3 and 2.2.4 under reference to items 4 and 5 of the Separate Award. Further, Gazprom did not request any interpretation of the Separate Award. In addition, Gazprom omitted to object to any perceived error with respect to the arbitral tribunal's decision concerning article 2.2 (and only objected with respect to the undertaking to purchase in article 2.2.5) and refrained from objecting to the Separate Award as regards article 2.2 and instead chose to act in line with the award in these respects.

Gazprom's objection did not relate to item 4 of the judicial decision of the award. Already for this reason has Gazprom lost the right to challenge item 4 of the judicial decision of the award. As regards item 5, Gazprom did not object to the manner in which the principles for its undertaking to sell in article 2.2. had been determined and not against the arbitral tribunal's conclusions concerning "ACQ", but objected only to the decision concerning the undertaking to purchase. Gazprom did not object to the arbitral tribunal's handling of the grounds and referenced circumstances. Moreover, Gazprom's actual reliance on the decisions for its benefit mean that the company by implicit actions has lost the right to invoke the alleged excess of mandate or procedural

error (preclusion under the second paragraph of Section 34 of the Swedish Arbitration Act).

Challenge ground 2

The arbitral tribunal did not fail to provide substantive guidance of the proceeding

The arbitral tribunal did not go beyond the scope of the proceeding. Moreover, it cannot have been surprising that the arbitral tribunal applied the relevant formula. In the arbitration, Naftogaz argued that the undertaking to sell should not exceed 50 percent of Naftogaz's estimated actual needs. Gazprom also argued against Naftogaz's assertions that the undertaking to sell should be determined on the basis of Naftogaz's estimated actual needs and how Naftogaz had calculated this volume. The question of whether the undertaking to sell should be determined on the basis of Naftogaz's "estimated actual needs" was a main question in the arbitration. Thus, item 5 of the operative part of the award did not come as a surprise to either party.

Moreover, Gazprom does not maintain that either party would have been ambiguous in any of their respective procedural actions. Since no ambiguous procedural action occurred in the arbitration, there was no need for any substantive guidance of the proceeding.

At any event, the arbitral tribunal only has a limited duty to provide substantive guidance of the arbitration. Gazprom was represented by three barristers, DLA Piper's London and Moscow offices, Advokatfirman Vinge in Stockholm as well as other lawyers. As far as has been gathered, Gazprom also retained the assistance of Professor Lars Heuman. Moreover, the arbitral tribunal informed the parties that no substantive procedural guidance should be expected. Gazprom did not object thereto.

In view of the above, Gazprom's challenge cannot be granted on the grounds that the arbitral tribunal failed in its duty to provide procedural guidance.

The alleged excess of mandate or procedural error did not affect the outcome

On this issue, Naftogaz refers to the same circumstances invoked under the corresponding heading under challenge ground 1.

Gazprom has lost the right to invoke the alleged excess of mandate or procedural error

On this issue, Naftogaz refers to the same circumstances invoked under the corresponding heading under challenge ground 1.

In addition thereto, Gazprom's omission to object to the arbitral tribunal's statement that no procedural guidance should be expected entails that the company has lost the right to invoke the alleged excess of mandate or procedural error.

Challenge ground 3

The arbitral tribunal has not failed to provide complete grounds for its conclusions

While it is true that an arbitral award shall contain grounds, there are no requirements as to how they shall be worded. The Separate Award is 790 pages long, of which 620 pages contains the recitals and 80 pages contains the grounds and conclusions. The contents are of high quality and are easy to understand. The arbitral tribunal took into account the parties' assertions and evidence, which follows from, amongst other things, the following statement in the arbitral award.

> In deciding the parties' claims, as set out in this Award, the Tribunal has carefully considered all of the submissions made and evidence adduced by the Parties, including allegations, witness/expert statements, legal authorities, and arguments not mentioned in the discussion below or otherwise in this Award. The reasoning given below summarizes what the Tribunal considers relevant for its decisions. If and to the extent that facts, witness/expert statements, legal authorities, or arguments advanced by the Parties are not addressed in the reasoning, they would not have changed the Tribunal's conclusions.

In the arbitration, Naftogaz presented a declaratory claim concerning article 2.2.5 (and also article 2.2). Naftogaz requested that the arbitral tribunal should declare that the article was invalid or should be adjusted as from 19 January 2009. For the period after the Final Award, Naftogaz moved for certain adjustments, but only on the condition that Naftogaz benefited from a certain, revised, price on the natural gas. Otherwise,

Naftogaz claimed full invalidity also in these respects. Here, Naftogaz also invoked that the article was unreasonable under Section 36 of the Swedish Contracts Act and also violated competition law.

Gazprom's counterclaim comprised a claim for payment under the Take-or-Pay provision (2.2.5 of the Contract) (Motion 1). The purpose of Gazprom's alternative motion was not that articles 2.2 and 2.2.5 of the Contract should be adjusted as little as possible. Instead, the purpose of the motion was that the arbitral tribunal should limit the effects of the possible invalidity as far as possible (Motion 2).

Naftogaz disputed Gazprom's motions and invoked seven separate grounds in support thereof. One of these was that it was the Take-or-Pay provisions itself which could not be applied, because it was unreasonable and therefore invalid under Section 36 of the Swedish Contracts Act for the period covered by the counterclaim. Further, it was invoked that the article violated competition law.

Thus, the grounds based on competition law and unreasonableness were relevant to Naftogaz's main case as well as to Naftogaz's disputing of Gazprom's counterclaim. The grounds were doubly relevant.

The arbitral tribunal took into account and detailed its reasoning concerning Naftogaz's declaratory claim, as well as Gazprom's Motion 1 and Motion 2.

First, the arbitral tribunal considered over twelve pages of Naftogaz's doubly relevant grounds concerning the violation of applicable competition law, see pages 751-763. Thereafter, the arbitral tribunal considered Naftogaz's second through sixth grounds for disputing the counterclaim. This covered five pages, see pages 763-768.

After this, the arbitral tribunal considered the doubly relevant grounds for unreasonableness under Section 36 of the Swedish Contracts Act. This was discussed over approximately five pages, see pages 768-772. First, the arbitral tribunal detailed the contents and applicable scope of Section 36 of the Swedish Contracts Act. Thereafter, the arbitral tribunal considered the circumstances referenced by Naftogaz in support of the unreasonableness, invalidity and adjustment. Thereafter, in paragraph

3861, the arbitral tribunal arrived at the following conclusion on the issue of whether the articles should be declared invalid or ineffective for the time prior to the arbitral award.

Hence, the situation is that the Take or Pay provisions rules deviate from generally accepted principles of competition law, but there is no competition law to be applied. The Tribunal considers that this is such a special situation where the Section 36 would actually be applied in a commercial relation to achieve the balance that would otherwise have been obtained by applying the competition law provisions. The Tribunal holds that Articles 2.2 and 2.2.5 as these articles are now formulated shall be declared invalid. Even taking into account that the EnCT was not binding on Ukraine until February 2011 the Tribunal holds that the invalidity shall have effect from 19 January 2009 until the date for this Award.

Because the arbitral tribunal concluded that articles 2.2 and 2.2.5 of the Contract should be declared invalid as from 19 January 2009 until the Final Award, Gazprom's claim for payment under article 2.2.5 was rejected (Motion 1). As regards the time prior to the final arbitral award, Gazprom's motion to limit the effects of any possible invalidity as far as possible (Motion 2) was also rejected. In paragraph 3861, the arbitral tribunal stated with respect to Gazprom's counterclaim "Consequently, Gazprom's claim for payment based on the Take-or-Pay provisions must fail." The rejection covered all of Gazprom's claims for payment, i.e. Motion 1 because the arbitral tribunal had concluded that the grounds for the claims, article 2.2.5, had been declared invalid, as well as Gazprom's motion to limit the effects of any possible invalidity as far as possible, i.e. Motion 2. Nothing prevented the arbitral tribunal from considering the validity of articles 2.2 and 2.2.5 of the Contract concurrently with reviewing all of Gazprom's claims for payment, since the relevant grounds were doubly relevant.

Further, in paragraph 3862, the arbitral tribunal arrived at the following conclusion as regards Naftogaz's declaratory claim. "With respect to past time, there is no need to complete the Contract further. For the future, however, the Contract must be adjusted to obtain the appropriate context. This is also what Naftogaz has requested."

Thereafter, in paragraphs 3863 and 3864, the arbitral tribunal moved on to the adjustment of the Contract for the time following the Final Award.

The part of the grounds to which Gazprom has referred to, paragraph 3862, does not concern Gazprom's counterclaim, but rather Naftogaz's main case. The arbitral tribunal did, however,

review all seven of Naftogaz's grounds for disputing Gazprom's counterclaim and detailed its conclusions concerning the ground which eventually was successful, i.e. Section 36 of the Swedish Contracts Act.

Thus, the arbitral tribunal has detailed its reasoning for its conclusions on Gazprom's counterclaim, the grounds for Naftogaz's disputing it – particularly the ground based on Section 36 of the Swedish Contracts Act which was ultimately successful – as well as Naftogaz's declaratory claim in no less than 21 pages. The arbitral tribunal has also detailed the specific reasons for its conclusion that articles 2.2 and 2.2.5 was unreasonable and the consequences this had for Gazprom's counterclaim and Naftogaz's declaratory claim.

In short, the grounds provided by the arbitral tribunal are not incomplete and no procedural error occurred.

The alleged procedural error did not affect the outcome

The outcome would not have been affected, even if the arbitral tribunal had provided more detailed grounds as to why Gazprom's counterclaim could not be granted.

Further, the motions Gazprom asserts were not considered in the grounds relate to payments during the period 2012-2016. The motions thus relate to the issue of whether articles 2.2 and 2.2.5 of the Contract were valid for past time, i.e. until the date of the arbitral award. That question was settled by way of item 4 of the judicial decision of the award. Item 5 of the judicial decision of the award, however, relates to the question of how the articles should be applied in the future. This means that the alleged procedural error could not at all have affected item 5 of the judicial decision of the award.

Item 5 of the judicial decision of the award is not a final decision. The decision merely states that the articles shall be adjusted on the basis of certain stated principles. The final adjustment and the wording for the future was determined first in the Final Award. This means that the alleged procedural error cannot have had any impact whatsoever on item 5 of the judicial decision of the award.

THE INVESTIGATION

The parties have invoked documentary evidence.

GROUNDS OF THE COURT OF APPEAL

Starting points for the review

A fundamental starting point is that the court within the scope of challenge proceedings shall not carry out a review of the merits of the arbitral tribunal's decisions. Thus, only if errors occurred in the proceeding itself which led to a party's interests having been infringed is it possible to set aside an arbitral award upon its being challenged. (Government Bill 1998/99:35 p. 139.)

The first paragraph of Section 34 of the Swedish Arbitration Act – in the wording applicable prior to 1 March 2019, the wording applicable to the action at issue – stipulates that an arbitral award shall be set aside following challenge by a party when, amongst other things, the arbitrators have exceeded their mandate (item 2) or if, without it having been caused by a party, a procedural error occurred which likely affected the outcome (item 6). The second paragraph stipulates that a party shall not be entitled to invoke a circumstance, which the party by participating in the proceeding without objection or otherwise must be considered have waived to invoke.

Gazprom has maintained that several errors occurred in the arbitration, which should be considered as excesses of mandate or procedural errors. For each of the alleged errors, Gazprom has asserted that they likely affected the outcome and that Gazprom has not lost the right to invoke the error.

First, the Court of Appeal will review the claim that the arbitral tribunal went beyond the scope of the proceeding (challenge ground 1). Thereafter, the Court of Appeal will review the claim that the arbitral tribunal failed to provide substantive guidance of the proceeding (challenge ground 2). Finally, the Court of Appeal will review the claim that the arbitral tribunal has failed to provide complete grounds (challenge ground 3).

The assertion that the arbitral tribunal went beyond the scope of the proceeding (challenge ground 1)

The arbitral tribunal should be deemed to have exceeded its mandate if it went beyond the parties' motions (Government Bill 1998/99:35 p. 145 and, e.g., Lindskog, *Skiljeförfarande, En kommentar*, 2012, p. 871). More prudence is required in the review of whether an arbitral tribunal has exceeded its mandate if it, in an international arbitration, has based its decision on a legal fact which had not been referenced by a party (Government Bill 1998/99:35 p. 145 and NJA 2016 p. 51, paragraph 14).

In the case at issue, the challenged arbitral award is a separate award. Article 38 of the SCC Rules of 2010 stipulates that the arbitral tribunal may decide a specific issue or part of the dispute through a separate award. A corresponding rule is set out in the first paragraph of Section 29 of the Swedish Arbitration Act, which gives the arbitral tribunal the right to decide a part of the dispute or a specific issue relevant to resolving the dispute through a separate award.

In the arbitration, both Gazprom and Naftogaz presented motions that concerned articles 2.2 and 2.2.5 of the Contract. As regards Naftogaz's motion 6.1 a)-d), it is clear from the wording as well as the clarifications provided by Naftogaz at, amongst other things, the main hearing of the arbitration, that these were four motions that, depending on the arbitral tribunal's conclusions, could be granted and rejected separately. The said entails that the arbitral tribunal could have, for example, granted motions 6.1 a) and c) concerning invalidity of articles 2.2 and 2.2.5, but rejected motions 6.1 b) and d) concerning the new contents of articles 2.2 and 2.2.5. Thereby, the scope of the proceeding covered the possibility that there no longer should be any annual contract volume or annual minimum volume.

Items 4 and 5 of the judicial decision of the Separate Award concern articles 2.2 and 2.2.5 of the Contract. In item 4, the arbitral tribunal has decided that articles 2.2 and 2.2.5 are invalid as from 19 January 2009 until the date of the final arbitral award. In item 5, the arbitral tribunal has set forth certain conclusions with respect to the contents of articles 2.2 and 2.2.5 for the future as from the date of the final arbitral award.

The Court of Appeal concludes that neither item 4 nor 5 entails the arbitral tribunal's final ruling on the motions concerning articles 2.2 and 2.2.5. For example, item 4 does not include any specific information on the ultimate date of the invalidity, since it merely includes a reference to the date of the final arbitral award. Correspondingly, in item 5, there is no date as from which the new contractual content should commence to apply. There is other wording in item 5 that clarifies that it does not constitute the arbitral tribunal's final ruling.

First, item 5 contains wording that, amongst other things, the annual contract volume shall be based on a certain percentage etc. without it being numerically specified how large that volume should be. Further, item 5 clarifies that article 2.2.5 should include a make-up gas provision, but how that provision should be worded is not set out. Finally, item 5 explicitly sets out that further details concerning articles 2.2 and 2.2.5 shall be determined later, either by way of agreement between the parties or by a ruling from the arbitral tribunal.

Against this background, the Court of Appeal finds that the contents of item 5 is too incomplete to conclude that the arbitral tribunal has determined a "formula", as Gazprom has argued. The Court of Appeal's conclusion is that the arbitral tribunal in item 5 merely has stated certain relevant starting points for the final ruling of the adjusted contents of articles 2.2 and 2.2.5 of the Contract.

Then, the question is if the arbitral tribunal in item 5 went beyond the parties' motions in the arbitration.

Gazprom has argued that item 5 qualitatively deviates from the scope of the proceeding.

As the Court of Appeal has set out above, an arbitral tribunal is entitled to rule on a specific issue by way of a separate award. When a specific issue is decided by way of a separate award, it is the rule rather than the exception that the judicial decision of the award does not correspond directly to motions in the main case. In order to review a claim for damages, for example, it could be more appropriate to first decide on specific issues such as statute of limitations or whether liability is at hand by way of a separate award. In such circumstances, it is not relevant whether the review of such matters leads to a ruling in the separate award,

which could be considered to deviate qualitatively from the motion in the main case. Such a deviation does not constitute an excess of mandate or procedural error.

This is the case in the action at issue. Item 5 merely contains certain starting points relevant for the final ruling on the adjusted contents of articles 2.2 and 2.2.5 of the Contract. Therefore, the arbitral tribunal has not gone beyond the parties' motions in any qualitative aspect.

Gazprom has also argued that item 5 leads to an outcome which is quantitatively (with respect to volumes) outside – lower than – the scope of the proceeding.

As the Court of Appeal has already noted, item 5 merely contains certain starting points for the final ruling on the adjusted contents of articles 2.2 and 2.2.5 of the Contract. The Court of Appeal finds that these starting points give the arbitral tribunal options within the scope of the proceeding in its review for the final arbitral award. Therefore, it is not possible on the basis of item 5 to draw any certain conclusions about which annual contract volume and minimum volume that would be determined in the final review. To this should be added that the scope of the proceeding – as noted by the Court of Appeal above – included that there no longer should be any annual contract volume or minimum volume. The Court of Appeal therefore concludes that the arbitral tribunal did not go beyond the parties' motions in any quantitative aspect.

The next question to answer is whether the arbitral tribunal in any other respect has deviated from the scope of the proceeding. Gazprom has asserted that in the arbitration neither of the parties had referenced, argued for or even discussed the possibility that the contract volume should be based on Naftogaz's estimated actual annual needs of imports of natural gas for each year of the remainder of the Contract's validity period.

The starting points relevant for the final review set forth by the arbitral tribunal in item 5 appear to be an application of the principles applied in the German so-called E.ON case.

Questions concerning the applicability of the E.ON case, the choice of the percentage of 50 percent and the volume to which Naftogaz's actual needs of import of natural gas should be estimated appear as relevant to the part of the arbitration which concerned articles 2.2 and

2.2.5 of the Contract. The Court of Appeal finds that it has been established that the parties in the arbitration explicitly argued these matters in written submissions prior to the main hearing, at the main hearing as well as in written submissions following the main hearing.

For example, in the Sur-reply and rejoinder to counterclaim of 31 May 2016, paragraphs 162 and 168, Naftogaz argued that the annual contract volume for the remainder of the contract period as from the date of the Final Award, on the basis of the principles from the E.ON case, should be 50 percent of Naftogaz's actual needs for import of natural gas.

Further, for example the Post-hearing submissions of 15 November 2016, paragraphs 540 f. and 641 f., clarify that Gazprom in the arbitration objected to the application of the principles from the E.ON case and that the amount of the annual contract volume should be as low as 50 percent of Naftogaz's estimated actual need for import of natural gas.

Thus, the Court of Appeal's conclusion is that the arbitral tribunal in item 5 has not gone beyond the parties' references.

Gazprom has also argued that the arbitral tribunal's ruling in item 5 means that an estimation of Naftogaz's actual needs should be carried out for other years than those Naftogaz had invoked.

The Court of Appeal concludes that the arbitral tribunal's decisions with respect to the present question are based on calculations and evaluation of the referenced evidence, which forms part of the review of the merits. Even if the arbitral tribunal would have committed errors in the review of the merits, no such excess of mandate or procedural error as asserted by Gazprom has occurred. (Cf. NJA 2019 p. 171, paragraph 49).

In sum, the Court of Appeal's conclusion concerning challenge ground 1 is that no such deviation from the scope of the proceeding as argued by Gazprom has occurred. Consequently, no excess of mandate or procedural error has occurred.

The assertion concerning insufficient substantive procedural guidance (challenge ground 2)

Whether or not insufficient procedural guidance by the arbitral tribunal could serve as ground for the setting aside of an arbitral award is considered an open question (see NJA 1973 p. 740, cf. Government Bill 1998/99:35 p. 120 f.). At any event, a challengeable error could have occurred if the challenging party can justifiably argue that it has not been granted opportunity to properly argue its case in a specific aspect (see, e.g., Lindskog, *Skiljeförfarande, En kommentar*, 2012, p. 902 f., cf. NJA 2018 p. 291, paragraph 16).

According to Gazprom, the arbitral tribunal should have informed the parties that it intended to determine a formula for the determination of the annual contract volume in the Contract, when neither party had presented such a motion.

Already in its review of challenge ground 1, the Court of Appeal has concluded that it cannot be said that the arbitral tribunal has determined a formula and that the arbitral tribunal has not gone beyond the parties' motions and references.

Further, the Court of Appeal has in the review of challenge ground 1 concluded that in the arbitration, Gazprom argued that the principles from the E.ON case should not be applied and that the amount of the annual contract volume should be higher than 50 percent of Naftogaz's estimated actual annual needs for import of natural gas. Thereby, there can be no doubt that Gazprom actually used the opportunity to argue its case on the now relevant aspects.

In addition, on 8 May 2017 the arbitral tribunal gave a decision in which it informed the parties that it intended to render a separate award and the matters it would decide thereby. The decision clarifies, amongst other things, that the arbitral tribunal intended to decide certain issues relevant to whether any contractual provision should be declared invalid and whether Gazprom was entitled to payments based on the so-called Take-or-Pay provision.

The Court of Appeal finds that the arbitral tribunal, by way of the decision of 8 May 2017, provided procedural guidance to the parties concerning which matters that would be decided through the separate award. Therefore, Gazprom ought to have realized that a possible outcome of the arbitral tribunal's review would be the actual outcome set forth in item 5.

Consequently, Gazprom should not have been "surprised" by the contents of item 5, as Gazprom has argued it was. The arbitral tribunal had no obligation to provide advance notice of the outcome of its review.

Therefore, the Court of Appeal's conclusion on these matters is that no such error as alleged by Gazprom occurred in the arbitration. Thus, no excess of mandate or procedural error occurred.

The assertion concerning failure to provide complete grounds (challenge ground 3)

Article 36 (1) of the SCC Rules of 2010 stipulates that the arbitral tribunal shall render its ruling in writing and shall, unless the parties have agreed otherwise, set out the grounds for its reasoning. Therefore, failure by the arbitral tribunal to set out the grounds can constitute a procedural error. However, it has been established through case-law that only the complete absence of grounds, or grounds that are so incomplete that, taking into account relevant circumstances, they must be equated to a situation in which no grounds have been provided, could constitute a procedural error (see NJA 2009 p. 128).

Paragraph 3452 of the Separate Award provides that Gazprom in the arbitration presented an alternative motion that the arbitral tribunal should limit the effects of a possible declaration of invalidity of any provision in the Contract as far as possible.

In paragraph 3861 of the Separate Award, the arbitral tribunal has stated that Gazprom's claims for payment based on the Take-or-Pay provisions should not be granted. Paragraph 3861 is opened by the word "Consequently", which is a reference to the preceding paragraphs of the grounds, which were thereby included in the grounds as to why the claim for payment should not be granted. By the use of the word "Consequently", the arbitral tribunal stated that the same grounds that serve as the justification for the decision on Naftogaz's motion 6.1 a) and c) concerning invalidity of articles 2.2 and 2.2.5 of the Contract also apply to the decision on Gazprom's motions on the same issues. The Court of Appeal finds that it is irrelevant whether the arbitral tribunal in this context stated the claim for payment in singular or plural form.

Further, in paragraph 3862, the arbitral tribunal has stated that there is no need to complete the Contract for past time, but in the following paragraphs proceeded to provide its reasoning for how articles 2.2 and 2.2.5 of the Contract should be completed for future time, i.e. for the remainder of the contract period. With respect to these paragraphs, it must be held that the grounds for Naftogaz's motions 6.1 a) and c) and Gazprom's motion to limit the effects of any invalidity coincide.

The Court of Appeal shall not, in challenge proceedings, review whether an arbitral tribunal's grounds are legally accurate or convincing, since this would be a review of the merits of the case.

The Court of Appeal concludes that there is no absence of grounds as regards Gazprom's motion to limit the effects of a declaration of invalidity of articles 2.2 and 2.2.5 of the Contract. Further, the Court of Appeal finds that the grounds in the action at issue cannot be considered so incomplete that they should be equated to a situation in which no grounds have been provided. Thus, no such procedural error as asserted by Gazprom has occurred.

Summary of conclusions

The Court of Appeal has concluded that it has not been established that any excess of mandate or procedural error occurred. As a result, there is no need to review whether the errors asserted by Gazprom affected the outcome of the arbitration or whether Gazprom has lost its right to invoke them. The conclusions of the Court of Appeal mean that Gazprom's motions shall be rejected.

Litigation costs

The Court of Appeal notes that Naftogaz has been successful in the main case, but has lost several procedural questions. This circumstance does not justify a different allocation of the litigation costs than as per the main rule in the Code of Judicial Procedure, Chapter 18, Section 1 (cf. NJA 2016 p. 87). Thus, Naftogaz shall be considered the winning party in the dispute as a whole, because Gazprom's motions were rejected on their merits.

However, Gazprom has claimed certain compensation even if it were to lose the case. This motion relates to compensation for work with respect to serving notice (EUR 30,000), confidentiality (EUR 120,000) and motions for dismissal (EUR 200,000).

Gazprom's motion is based on assertions that Naftogaz has avoided being served, has opposed confidentiality in violation of explicit provisions and has presented baseless motions for dismissal. The circumstances referenced by Gazprom can in a legal sense be labeled as a claim that Naftogaz has by negligence caused Gazprom to incur costs (see Code of Judicial Procedure, Chapter 18, Section 6). The Court of Appeal finds that Naftogaz has not acted negligently. Further, the Court of Appeal finds that there is no legal basis for an exception to the main rule in the Code of Judicial Procedure, Chapter 18, Section 1 or elsewhere, which would entail that Gazprom is entitled to compensation on the basis of its claim. Therefore, Gazprom's claim shall be rejected.

Naftogaz has claimed compensation for litigation costs in the amounts of EUR 1,337,013.60 for legal counsel, UAH 1,918,309.60 for time spent, and EUR 21,774.26 and UAH 757,208.61 for expenses.

Gazprom has not attested any amount as reasonable as such. This means that the Court of Appeal must decide the reasonableness of the claimed amounts.

The Court of Appeal finds no reason to question that work corresponding to the claimed amount for legal counsel has been carried out for the present proceeding.

When determining whether the claimed compensation for legal counsel is reasonable, the main factor is time spent. Regard should be had to the nature and scope of the dispute as well as the care and skill with which the work has been carried out. Also other circumstances, such as the value of the dispute and the importance the outcome of the case otherwise has had to the relevant party. (See NJA 1997 p. 854).

First, the Court of Appeal finds that the importance of the outcome to Naftogaz, including the value of the underlying dispute, imply that substantial work by legal counsel has been justified. This alone cannot, however, determine the question of reasonableness.

The dispute has been pending before the Court of Appeal for approximately two years, albeit that Naftogaz was not served notice thereof until after a few months. The proceeding has included a preparatory oral hearing and a main hearing during four days.

The Court of Appeal concludes that the circumstances relevant in the present action have been of limited scope, but that the written submissions and investigation submitted by the parties have been extensive. Further, Naftogaz's counsel must have been well-informed about the circumstances as well as the investigation since they were involved in the arbitration. In addition, the present challenge proceeding has not involved complicated legal issues.

The manner in which Naftogaz has structured its team of legal counsel – four lawyers and five associates from two different law firms – appears as an unjustifiably large staffing as such for the dispute before the Court of Appeal.

The Court of Appeal notes that in the written exchanges there has been components – certain repetitions, accounts of the contents of legal provisions as well as pleadings – that have not reasonably been justified to protect Naftogaz's interests. Moreover, Naftogaz has presented several motions for dismissal due to preclusion, but has only been successful with one of them. In spite of this, there are no grounds to hold that the work has not been carried out skillfully.

Naftogaz has, shortly before the main hearing and following the completion of the preparatory stages of the present dispute – without acceptable excuse – requested adjustments to the Court of Appeal's summary of the parties' respective cases. This despite Naftogaz having had the opportunity for almost a year to propose adjustments to the summary so that it would properly reflect Naftogaz's case. In this aspect, the work cannot be deemed to have been carried out with sufficient care, particularly when taking into account that Naftogaz was aware that the summary would serve as the basis for the Court of Appeal's review.

In sum, the Court of Appeal finds that it has not been reasonably justified to for counsel to spend as much time as they have. With particular regard to the importance of the outcome for Naftogaz, the Court of Appeal finds that a reasonable amount for legal counsel shall be EUR 1,000,000.

As regards the other items, the Court of Appeal finds as follows. The cost for Naftogaz's time spent appears as unjustifiably large, also when taking into account the importance of the outcome. Further, certain expenses for hotels and air travel appear as unreasonably high. The Court of Appeal finds that the compensation to Naftogaz shall be UAH 1,300,000 for time spent, and EUR 21,774.26 and UAH 350,000 for expenses.

In sum, the Court of Appeal holds that Gazprom shall compensate Naftogaz for its litigation costs in the manner set forth in the operative part of this judgment.

Confidentiality

Gazprom has claimed that the Court of Appeal shall order that the confidentiality provision of the Public Access to Information and Secrecy Act, Chapter 36, Section 2 (2009:400) shall continue to apply to a substantial portion of the information set out in documents submitted in the present action and presented at the main hearing before the Court of Appeal behind closed doors. The information concerns, amongst other things, contents of agreements. According to Gazprom, the information constitutes trade secrets, because they relate to Gazprom's business and operational conditions, which Gazprom keep confidential and the disclosure of which could harm Gazprom from a competition perspective.

Naftogaz has objected to the motion for confidentiality and has *inter alia* argued that the information has already been disclosed or that Gazprom at any event would not suffer material damage if they were disclosed.

During the Court of Appeal's management of the dispute and during the main hearing, the Court of Appeal has preliminarily held that certain information shall be kept confidential. When the Court of Appeal finishes its dealing with the action, it must determine whether the confidentiality shall continue to apply for that information (see the Public Access to Information and Secrecy Act, Chapter 43, Section 5, 2nd paragraph).

According to the Public Access to Information and Secrecy Act, Chapter 36, Section 2, confidentiality at a court in actions or matters shall apply to information concerning the business and operational circumstances of a private person, if it can be assumed that the person which the information concerns will suffer material damage if the information is

disclosed. The confidentiality provision's applicability is limited to situations in which the need for confidentiality is real, since the requirement for confidentiality to remain is that the damage that could occur through the disclosure of the information must be material. In general, the confidentiality provision should be applicable in instances where trade secrets could otherwise disclosed (see Government Bill 2017/18:200 p. 103). Information concerning business and operational circumstances that the trader would prefer to keep confidential, but the disclosure of which would not have considerable financial consequences shall not be considered confidential. (See Government Bill 1979/80:2, part A, p. 248).

The Court of Appeal finds that some of the information for which Gazprom has requested confidentiality indeed is such information about a private person's business and operational circumstances which could fall under the scope of the Public Access to Information and Secrecy Act, Chapter 36, Section 2. However, it has become evident that much of that information was disclosed a long time ago. For example, reports referenced by Naftogaz state that the Contract was made public already early in 2009 (see, e.g., The Russo-Ukrainian gas dispute of 2009: a comprehensive assessment, Oxford Institute for Energy Studies, 2009). For such information that has not been disclosed, it could nevertheless be questioned whether confidentiality would be appropriate. Information about Gazprom's business and operational circumstances on adjacent markets have been made public in, amongst other things, a decision by the EU Commission of 24 May 2018 (Case AT.39816) and by Gazprom as part in another case before the Court of Appeal in which it has refrained from requesting confidentiality (case no. T 7931-16). Further, the Court of Appeal notes that more than ten years have passed since the Contract was concluded and that the contract period will soon expire. Therefore, the Court of Appeal finds that for the information which has not yet been disclosed the need for confidentiality is so limited that it cannot be assumed that Gazprom would suffer material damage by the disclosure of the information.

Thus, the Court of Appeal's conclusion is that no confidentiality provision shall continue to apply to the information in the present case. Therefore, Gazprom's request for confidentiality shall be rejected.

Appeals

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

The Court of Appeal finds no reason to grant leave to appeal.

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

The decision has been made by: Judges of Appeal KN, HC and AE, reporting.