CLAIMANT
EMFESZ Elsö Magyar Földgáz és Energiakereskedelmi és Szolgáltató Korlátolt Felelösségü Társaság (Emfesz)
Szabadság tér 7
HU-1054 Budapest
Hungary

RESPONDENT
Rosukrenergo AG (RUE)
7 Bahnhofstrasse
6300 Zug
Switzerland

Counsel: Advokaterna Jörgen Almelöv, Johan Sidklev, Pamela Lannerheim Angergård and Magnus Fridh
Setterwalls Advokatbyrå AB
Box 1050
101 39 Stockholm

MATTER
Challenge of arbitral award

CHALLENGED ARBITRAL AWARD
Arbitral award rendered in Stockholm on 17 March 2011, see annex 1.

JUDGMENT OF THE COURT OF APPEAL

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

2. Emfesz shall compensate RUE for its litigation costs before the Court of Appeal partly in the amount of British pound GBP 73,741, of which GBP 69,633.44 comprises costs for legal counsel, partly in the amount of SEK 3,399,395, of which SEK 3,088,000 comprises costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act (SFS 1975:635) from the day of the judgment of the Court of Appeal until the day of payment.

BACKGROUND

On 23 December 2004, Emfesz and RUE signed an agreement for supply of natural gas (the Agreement). The Agreement entitled Emfesz to, by way of current calls, so called nominations, annually acquire up to three billion cubic metres of gas with a corresponding duty for RUE to supply the requested amount of gas. On 22 October 2009, RUE commenced arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce. RUE claimed Emfesz for gas supplied from September 2008 until April 2009, plus interest on payment for said and earlier supplies. Emfesz contended, inter alia, that payment was already made by set-off with a claim for damages based on a violation of the Agreement by RUE which had caused Emfesz damages. In the arbitration Emfesz raised a counterclaim (the "counterclaim") regarding the same claim for damages to the extent this had not been used to pay RUE's main claim. As arbitrators were appointed P.R. and C.W.L., who jointly appointed J. W.R., *QC*, as chairman. On 17 March 2011, the arbitration award was rendered. The award obliged Emfesz to pay, inter alia, USD 527 million to RUE regarding gas supplies plus interest. Emfesz's counterclaim was rejected.

MOTIONS

Emfesz has requested that the Court of Appeal shall annul the arbitral award rendered between the parties in Stockholm on 17 March 2011.

RUE has objected the request.

The parties have claimed compensation for their litigation costs.

MOTIONS BY THE PARTIES

Emfesz

1. The arbitral tribunal exceeded its mandate when basing its assessment on a circumstance not referenced by the parties, namely that the last day on which Emfesz made daily nomination of gas was on 23 April 2009. This constitutes an excess of mandate or a procedural error (34 § first paragraph 2 and 6 respectively, Arbitration Act [1999:116]).

2. The arbitral tribunal has not examined the circumstance that the Agreement was a frame-work agreement, that separate agreements were concluded on each nomination and that RUE therefore was not entitled to withhold the supply of gas because of Emfesz's failure to pay for gas according to such an earlier agreement. This constitutes an excess of mandate or a procedural error (34 § first paragraph 2 and 6 respectively, Arbitration Act).

3. The arbitral tribunal rejected Emfesz's request to postpone the main hearing and the request to allow Emfesz to hear new witnesses. By doing so, Emfesz was deprived of the possibility to answer RUE's claims in an appropriate manner. This constitutes an procedural error (34 § first paragraph 6, Arbitration Act).

RUE

1. The fact that the arbitral tribunal in the award stated that 23 April 2009 was the last day of the daily nomination is not such an error as can entail annulment of the award, neither has it affected the outcome.

2. It appears from the arbitral award that the arbitral tribunal examined the circumstance alleged by Emfesz that separate agreements were concluded by each nomination and it appears that the arbitral tribunal has considered the individual nominations as part of the Agreement and not as separate agreements. How the contractual relationship between the parties shall be interpreted is in any event a legal issue. In any case, what is stated by Em-

fesz has not had any impact for the outcome even if separate agreements would be found to have been concluded by each nomination.

3. The decision of the arbitral tribunal of 27 November 2010 does not have the content as asserted by Emfesz. Emfesz has not been limited in its right to invoke evidence. Emfesz's entitlement to object against such decision is in any event precluded since Emfesz's reservation was imprecise. Emfesz may therefore be considered to have refrained from asserting any error in this part. In any event, the alleged error has not affected the outcome of the case.

THE PARTIES' RESPECTIVE CASES

In pleading their cases, the parties have inter alia stated:

Emfesz

Emfesz's motion that the arbitral award be annulled refers to the arbitral award in its entirety.

The first cause of dispute

In the arbitration, Emfesz referenced that RUE committed a fundamental breach of contract by not supplying the gas nominated by Emfesz after 27 April 2009. RUE objected, asserting that RUE did not have any duty to supply gas after 30 April 2009 since Emfesz did not nominate gas and that RUE in any event was entitled to cancel its performance because of Emfesz's actual breach of contract, which consisted of Emfesz not paying substantial amounts for gas which RUE had supplied because of earlier nominations.

It was not disputed between the parties that Emfesz had called for gas through daily nominations until 29 April 2009 for supply until 30 April 2009. In the arbitral award (8.6.11) it is stated that Emfesz made its last daily nomination on 23 April 2009. The arbitral tribunal stated that Emfesz had claimed damages by RUE regarding missing supplies for the period from 1 May 2009 and onwards but that Emfesz had not made any daily nominations under

that period and the arbitral tribunal found that RUE was not obliged to supply gas during that period and therefore did not violate the contract by not supplying any gas.

The arbitral tribunal has erroneously stated that the period for which Emfesz claimed damages was from 1 May and not from 27 April 2009. Furthermore, the arbitral tribunal has erroneously presumed that the last daily nomination took place on 23 April and not 29 April for supply on 30 April 2009. It is unclear from where the arbitral tribunal got that information, since not even RUE referenced that this would be the case. The arbitral tribunal has based its evaluation that RUE was not obliged to supply gas on a circumstance which has not been referenced by any party and the arbitrators have in that way exceeded their mandate. By founding their examination on erroneous facts, the arbitrators have in any case committed a serious procedural error.

The arbitral tribunal found that Emfesz's daily nominations entailed a duty for RUE to supply. If the tribunal had not exceeded its mandate, there would accordingly have been three days, 28-30 April 2009, with binding nominations. Provided RUE had wrongly cancelled its performance, this would entail that RUE had violated the contract by not supplying these days. After 30 April 2009, Emfesz ceased to nominate since it was clear that RUE would not supply any more gas. In the arbitration, Emfesz referenced that RUE on 27 April 2009 informed that the company would not supply any more gas (Non-Performance Notification) and that RUE thereby violated the contract which entitled Emfesz to damages. RUE contested that such a message had been advised. Emfesz referenced attestation and examination with the managing director of Emfesz, István Góczi. RUE referenced as evidence in rebuttal attestation and examination with the managing director of RUE, Dmitry Glebko. The arbitral tribunal chose to believe in Glebko's testimony, namely that RUE had not advised any message. Glebko stated that the main reason why RUE ceased to supply was that Emfesz ceased to nominate gas. The testimony goes well with the erroneous starting point that the last daily nomination referred to 23 April 2009. With the correct starting point, that RUE ceased to supply before Emfesz ceased to nominate, Góczi's ex-

planation that RUE's supplies ceased because RUE did no longer have access to gas, appears more trustworthy than that of Glebko. With a correct starting point the arbitral tribunal should have made a different weighing of evidence and found that RUE advised a Non-Performance Notification. The tribunal had then also reached the conclusion that RUE committed a fundamental breach of contract.

The second cause of dispute

RUE objected to Emfesz's assertion of breach of contract, asserting that it did not have any importance whether Emfesz nominated, since RUE would still have been entitled to cancel the supplies as Emfesz had not paid for the gas which RUE had supplied because of earlier nominations. Emfesz objected to this, asserting that RUE would not have been entitled to cancel the supplies, stating, inter alia, that the Agreement is a covering agreement according to which separate sales contracts are entered into at each order. The duty to supply follows from each such separate sales contract and there is no duty to supply according to the Agreement as such. It is therefore not possible to cancel the supplies under the Agreement, since these must be cancelled under the separate contracts. According to those, RUE did not have the right to cancel the performance with reference to Emfesz violating the contract under other separate contracts.

RUE referenced an opinion by Professor Christina Ramberg supporting its right to cancel the performance. Ramberg does not comment on the character of the Agreement but, in spite of this, expresses herself categorically and states that RUE has cancelled the performances rightfully because of Emfesz's late payments. In the arbitration, Emfesz referenced a statement of opinion from Professor Bert Lehrberg, who had reached the conclusion that RUE was not entitled to cancel the supplies. Decisive for the issue was the character of the Agreement. The arbitral tribunal's evaluation of RUE's right to cancel the performances is remarkably short and is concluded in two paragraphs in the arbitral award (8.6.13-14). Emfesz's objection that the Agreement is a covering agreement, and the consequences of such an evaluation, has not been mentioned by the arbitral tribunal. By not examining this ob-

jection, the arbitral tribunal has exceeded its mandate since the tribunal thereby has made an incomplete evaluation of the dispute. The arbitral tribunal has in any event committed a procedural error which most likely has affected the outcome of the case.

The third cause of dispute

On 22 November 2010, two weeks before the planned main hearing in the arbitration, RUE submitted extensive evidence and new circumstances, inter alia an agreement between Emfesz and RosGas AG concerning gas supplies from RosGas AG to Emfesz. When Emfesz took notice of this evidence and these circumstances, Emfesz realized there was a need for additional time for preparing its action and that it would not be possible to answer RUE's allegations and evidences with the evidence that Emfesz had referenced up to then. In letters dated 24 and 25 November 2010 Emfesz requested the arbitral tribunal to either postpone the main hearing or to reject parts of the new material which RUE had submitted. Emfesz stated that regarding the Rosgas agreement, Emfesz had to have a possibility to show that the image of the course of events and of István Góczi that RUE tried to create was incorrect and that the case called for further investigation and that Emfesz would need to reference additional witnesses and additional attestations from Góczi. In the arbitral award this has erroneously been reproduced as Emfesz requesting to submit additional attestation from Góczi regarding the Rosgas agreement.

By a decision dated 27 November 2010 the arbitral tribunal rejected Emfesz's request to postpone the main hearing and to submit complementing evidence. The tribunal stated that it was sufficient that Emfesz complemented with an additional attestation from Góczi.

On 30 November 2010, Emfesz reserved its rights against the decision. The objection concerning procedural error is thus not precluded.

The decision of the arbitral tribunal implies that Emfesz has not had the opportunity to present its case in the extent necessary. A party being denied to defend itself against information submitted at a late stage of the proceedings has in the legal literature been said to be a typical example of a disputable procedural error.

RUE

If Emfesz's action would be successful, the arbitral award shall only be annulled in the part concerning the counterclaim. Emfesz's challenge only refers to the counterclaim.

The first cause of dispute

It is not disputed that the last daily nomination was made on 29 April 2009 and that the detail in the arbitral award that this would have been 23 April 2009 is incorrect, probably due to a typo.

After the arbitral tribunal had established that valid daily nominations were missing, the tribunal examined whether RUE had violated the Agreement subject to a presumption that there had been valid nominations. The arbitral tribunal established that it could not come into question that a possible omission by RUE to supply according to Emfesz's alleged nominations would constitute a violation of the contract. This was the case since RUE at that point in any event was entitled to withhold its performance until Emfesz had paid RUE the substantial amounts which were due (arbitral award 8.6.12). Thus, it appears clearly from the reasons for the judgment that the error concerning dates of nominations lacked importance for the outcome of the case since the arbitral tribunal found that RUE, even if the nominations had been made according to Emfesz's allegations, would not have violated the contract. Besides, Emfesz has not submitted any claim for damages regarding the period 28-30 April 2009 but the claim was calculated by Emfesz from 1 May 2009. Even if the claim for damages had referred to these days, the claim for three days would only have concerned some high percentage of the claims in the case and in principle could not have affected the outcome or the distribution of costs. Nor is it likely that the arbitral tribunal would have made another evaluation of Góczi's trustworthiness if it had assumed that there were binding nominations on 28-30 April 2009.

The second cause of dispute

It is clear that the arbitral tribunal did notice Emfesz's argument about covering agreement. It appears from the arbitral award that professor Lehrberg was heard in the case and that it

refers to his attestation (2.4.8 and 8.6.15 respectively). From the documentation it also appears that the argument about covering agreement had been subject to a clear discussion at the hearing before the arbitral tribunal. The reasons of the judgment still shows that the tribunal chose to go for RUE's line. The arbitral tribunal describes the large amounts which Emfesz owed to RUE "under the Agreement" (8.6.12 and 8.6.14) and refers to Professor Ramberg's conclusions on the right to withhold the performance under "an agreement". The arbitral tribunal had apparently considered the individual purchase calls as a part of the Agreement. - Since an arbitral tribunal is not bound by the legal reasoning by the parties but is free in its substantial evaluation it is not meaningful to ask whether an alleged error consisting of the arbitral tribunal not having listened to one of the parties' legal argumentation can have affected the outcome. It is however clear that the grounds for challenge do not exist.

The third cause of dispute

As appears from the arbitral tribunal's decision 27 November 2010 Emfesz's evidence was not limited, instead the tribunal rejected Emfesz's request to postpone the main hearing but also allowed, with deviation from the established time table and rules of procedure, Emfesz to reference witness statement from Góczi or testimony from Góczi and testimony from Emfesz's other witnesses in points of fact. Neither in the letters dated 24 and 25 November nor at the telephone conference which preceded the arbitral tribunal's decision did Emfesz explicitly request to hear specific witnesses. In practice, Emfesz did not take advantage of the possibilities to hear additional witnesses that the arbitral tribunal allowed the company. It must thus be considered that Emfesz has abstained from asserting an error in this part.

It further appears from the arbitral tribunal's decision that the reasons for not postponing the hearing was, inter alia, that the Rosgas agreement was not new to Emfesz, that Emfesz itself should have submitted the agreement to the extent that it was included in the arbitral tribunal's order of discovery in August 2010, that the dates for hearings were decided long time in advance, that a postponement would entail great costs, that the delay regarding the correspondence in November 2010 to a large extent was because of Emfesz and that the is-

sues to be dealt with during the hearing in December had been present since the beginning of the proceedings. An arbitral tribunal has, within the rules of procedure, a large mandate to make decisions it finds appropriate.

If the Court of Appeal would be of the opinion that the arbitral tribunal has committed an error by not postponing the hearing or by "limiting Emfesz's evidence", the error has in any case not affected the outcome of the case.

FINDINGS OF THE COURT OF APPEAL

The Court of Appeal has decided the case after a main hearing. Tamás Gazda has at the request of Emfesz been heard as witness. Documentary evidence has been referenced. Emfesz has also referenced stated opinions by Professor Bengt Lindell and Professor Lars Heuman, whereas RUE has referenced a stated opinion of jur. dr., former Head of Division to the Court of Appeal Thorsten Cars.

Evaluation of the Court of Appeal

The first cause of dispute

It is not disputed in the case that Emfesz made the last daily nomination on 29 April 2009 regarding supply 30 April 2009. The detail in the arbitral award that this happened on 23 April 2009 is thus incorrect. It is a question of factual error but there is nothing in the arbitral award suggesting that the arbitral tribunal has based its judgment in the case on this detail. It is therefore not a question of excess of mandate on the part of the tribunal. Emfesz has asserted that it could be a question of procedural error which probably has affected the outcome. Emfesz has then stated that the arbitral tribunal would have made another evaluation of Góczi's trustworthiness regarding the so called Non-Performance Notification if the error had not occurred. It appears far-fetched that the error would have affected the weighing of evidence, nor is there any support in the arbitral award for such impact. According to the evaluation of the Court of Appeal, such an error which probably has affected the outcome has consequently not been in question.

The second cause of dispute

As RUE has stated, it appears from the account of presented evidence in the arbitral award and from the argumentation in the judgment that the arbitral tribunal did examine the argument about covering agreement lodged by Emfesz and that the arbitral tribunal has considered the individual nominations as a part of the Agreement. Consequently, it has in this part not occurred any excess of of mandate or procedural error. Emfesz's claim cannot be approved on this ground.

The third cause of dispute

Emfesz has asserted that the arbitral tribunal's decision on 27 November 2010 limited the company's possibilities to reference evidence and to execute its claim. RUE has asserted that Emfesz's right to complain of procedural error in this part is precluded according to Section 34 second paragraph of the Arbitration Act, since Emfesz has not sufficiently clearly made a reservation to the arbitral tribunal's decision. Emfesz has, however, though briefly, in an official letter to the arbitral tribunal dated 30 November 2010 made a reservation to the decision. The Court of Appeal does not find that Emfesz should be considered to have abstained from asserting procedural error in this part.

The Court of Appeal establishes that Emfesz neither in writing nor at the telephone conference which preceded the arbitral tribunal's decision has specified which witnesses they wished to hear in the case. The arbitral tribunal has had reasons to assume that no other persons than those already referenced by Emfesz would come into question. It follows from Section 21 of the Arbitration Act and from the rules of The Arbitration Institute of the Stockholm Chamber of Commerce that the arbitrators shall conduct the procedure impartially, adapted to its purposes and fast. According to the Arbitration Rules, the arbitral tribunal has, observing the rules and the parties' agreements, a great liberty to conduct the procedure in the way which the arbitral tribunal finds appropriate.

According to the Court of Appeal's evaluation, Emfesz's opportunity to effectively present its case have not been limited in any undue way by the decision dated 27 November

2010. On the contrary, the decision appears well-balanced. The Court of Appeal cannot see that the arbitral tribunal has committed any procedrual error. Emfesz's claim cannot, neither in this part, be approved.

Conclusion, litigation costs

The claimant's claims shall consequently be entirely rejected. At this outcome, Emfesz shall compensate RUE's litigation cost in the Court of Appeal. Emfesz has handed the evaluation of the reasonableness of the claimed amount to the court. According to Chapter 18 Section 8 of the Code of Judicial Procedure, compensation for litigation expenses shall correspond to the costs for the preparation of the legal proceeding and the execution of the claim plus counsel's fees, as long as the costs have reasonably been called for in order to attend the party's right. Compensation shall according to the same section of law also be paid for work and waiting time because of the legal proceedings.

On the part of the Swedish counsel, RUE has claimed compensation regarding counsel's fees with SEK 3,938,650. Apart from SEK 88,000, which are referred to the day of the main hearing, the amount is not specified. RUE has indeed executed its claim with great care and skilfulness. This taken into consideration, along with the character and scope of the case, the claimed compensation still appears high. There is nothing to remark on the 88,000 concerning the day of the main hearing. The Court of Appeal finds that counsel's fees in addition to that of three million SEK may be considered reasonably called for in order to attend RUE's right. The claimed compensation for expenses, as well as the claim for counsel's fees and expenses concerning the English law firm DLA Piper UK LLP, appears reasonable.

The judgment of the Court of Appeal may according to Section 43 second paragraph of the Arbitration Act not be appealed.

The judgment has been made by Court of Appea chief judge C.R., Judge of Appeal M.E., reporting judge, and deputy Associate judge of Appeal A.B.. Unanimous.