SVEA COURT OF APPEAL
Department 02
Division 020111

**JUDGMENT**
2022-03-09
Stockholm

Case no.
T 6254-20

**PARTIES**

**Claimant**
1. Public Joint Stock Company Gazprom
Nametkina Street No. 16
Moscow, GCP-7, 117420
The Russian Federation

2. Gazprom Export LLC
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The Russian Federation

Counsel for 1 and 2: Advokat Johan Sidklev and Advokat Shirin Saif
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Counsel for 2: Advokat Astrid Lundholm and LL.M. Oskar Magnusson
Same address

**Respondent**
Polskie Górnictwo Naftowe i Gazownictwo S.A.
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Counsel: Advokat Kristoffer Löf, Advokat Hanne Aarsheim and LL.M. David Akrad
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**MATTER**
Challenge of arbitral award rendered in Stockholm on 30 March 2020

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Judgment rendered by the Court of Appeal, see next page.



| Postal address | Visiting address | Phone | Telefax | Opening hours |
|---|---|---|---|---|
| P.O. Box 2290<br>103 17 Stockholm | Birger Jarls Torg 16 | 08-561 670 00<br>08-561 675 00<br>**E-mail**:<br>svea.hovratt@dom.se<br>www.svea.se | | Monday – Friday<br>09:00–16:30 |

**JUDGMENT OF THE COURT OF APPEAL**

1. The claim is rejected on the merits.

2. Public Joint Stock Company Gazprom and Gazprom Export LLC are jointly and severally liable to compensate Polskie Górnictwo Naftowe i Gazownictwo S.A for its litigation costs amounting to EUR 510 067, of which EUR 426 507 concerns legal fees, along with interest pursuant to section 6 of the Interest Act, from the date of the Court of Appeal's judgment until payment has been made.

3. The provision of confidentiality in Chapter 36 section 2 of the Public Access to Information and Secrecy Act shall continue to be applicable in relation to information regarding the parties' business relations in the Court's case document no. 2–4, 6, 10, 11, 13, 21–25, 53, 54, 59–66, 68, 79, 85–87, 89, 90, 93–95, 112, 115–119, 122–124, 142, 167, 177, 184, 185, 208, 225–227 and 229, that was presented during the Court of Appeal's main hearing which was held behind closed doors.

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## BACKGROUND

### The parties' contract and the dispute

PJSC (Public Joint Stock Company) Gazprom and Gazprom export LLC (jointly Gazprom) and Polskie Górnictwo Naftowe i Gazownictwo S.A. (PGNiG) entered into a gas supply agreement on 25 September 1996 concerning the supply of natural gas from Russia to Poland (the Yamal Contract). The price for the supply of gas is determined pursuant to a price formula consisting of several different elements that are linked to alternative sources of energy. The price formula has been chosen in order for the price to follow the market development of alternative energy sources that the parties have understood that the natural gas competes with.

Each party may, under certain conditions, request that the price formula shall be adjusted in accordance with what is specified in Article 7.5 of the contract. If the parties do not reach an agreement as to the adjustment of the formula, the matter may be referred to an arbitral tribunal by a party (Articles 7.5 and 15).

PGNiG made a request for arbitration on 13 May 2015, in order to resolve a dispute regarding revision of the price formula. The company requested that the price formula for the supply of natural gas was to be adjusted in a certain manner. Gazprom disputed PGNiG's request for relief. Professor Julian D M Lew QC, Professor Dr. Klaus Sachs and Dr. Christoph Liebscher MBA were appointed as members of the Arbitral Tribunal.

### The separate award

The Arbitral Tribunal rendered a separate award on 29 June 2018. In the separate award, the Arbitral Tribunal found that PGNiG had demonstrated that the conditions for price revision were fulfilled, but that PGNiG's request for price revision according to the specific price formula presented by the company could not be granted. Having reasoned on the matter of its jurisdiction pursuant to section 1 paragraph 2 of the

Swedish Arbitration Act (1999:116) – referred to as the SAA in the Separate Award – the Arbitral Tribunal stated the following in paragraph 274.

> Therefore, in conclusion, the Arbitral Tribunal finds that it has a mandate according to sec 1 (2) SAA to decide on a price revision under the Yamal Contract different from the one requested by [PGNiG] […] and rejected by the Arbitral Tribunal […].

In paragraph 275 (i) and (ii) in the operative part of the Award, the Arbitral Tribunal determined that the conditions for price revision were met. Furthermore, in paragraph 275 (iii) in the operative part of the Award, the Arbitral Tribunal rejected PGNiG's request for price revision pursuant to the price formula put forth by the company. Finally, it was stated in paragraph 275 (v) in the operative part of the Award that the Arbitral Tribunal

> holds that all other matters, including but not limited to the justification of a price revision different from the one rejected in this First Award and cost reimbursement requests, will be decided at the later point in time after having heard the Parties in a subsequent phase of the proceedings, the details of which will be set forth by the Arbitral Tribunal after consultation with the Parties.

The Separate Award was challenged by Gazprom in the Svea Court of Appeal (case no. T 8990-18). In a judgement rendered on 23 December 2020, the Court of Appeal dismissed Gazprom's challenge on procedural grounds as regards the Arbitral Tribunal's decisions in paragraphs 274 and 275 (v) and rejected Gazprom's challenge on the merits in relation to paragraph 275 (i)–(iii).

**The Final Award**

The Arbitral Tribunal rendered the Final Award on 30 March 2020. In relation to the (then) forthcoming Final Award, PGNiG requested that the Arbitral Tribunal revise the price formula in a certain specified manner (paragraph 27 [a] in the Award) and that the Arbitral Tribunal should dismiss the proposal for price revision that Gazprom had put forth (paragraphs 27 [b-c]). The request for relief also included the following (paragraph 27 [d]).

> In event that the Arbitral Tribunal decides to apply different price relief from that suggested by Claimant as per its broad discretion under both Clause 7.5 of the Yamal Contract and Section 1 of the SAA, then, in [PGNiG's] view, in order to reach a "*fair and unbiased*" result in this arbitration, base its decision at the very least on the following assumptions […]

In paragraph 28 (a), Gazprom requested that the Arbitral Tribunal rejects the requests for relief put forth by PGNiG, and in paragraphs 28 (b)–(d), Gazprom presented an alternative position on price revision in the event that the Arbitral Tribunal would not reject PGNiG's requests for relief.

The Arbitral Tribunal determined a new price formula (paragraph 306 in the Final Award). The decision entailed that the Arbitral Tribunal granted respectively rejected the parties' requests for relief as follows (paragraph 289).

> […] the Arbitral Tribunal finds that [PGNiG's] requests (b)–(d) and [Gazprom's] request (a) are to be granted, [PGNiG's] request (a) and [Gazprom's] requests (b)–(d) are to be rejected.

## REQUESTS FOR RELIEF

Gazprom has requested that the Court of Appeal shall set aside the Final Award.

PGNiG has opposed to Gazprom's request for relief.

The parties have requested compensation for their litigation costs.

## LEGAL GROUNDS

### Gazprom

*The Arbitral Tribunal exceeded its mandate or jurisdiction*

By rendering the Final Award, the Arbitral Tribunal has exceeded its jurisdiction or mandate pursuant to section 34 paragraph 1, item 1 or 2 of the Swedish Arbitration Act (1999:116). The second phase of the arbitral proceedings would never have taken place, had the Arbitral Tribunal not erroneously found itself to have a mandate to supplement the contract in the Separate Award. Neither the Yamal Contract nor the parties' procedural acts during the arbitral proceedings included a joint instruction from the parties that provided the Arbitral Tribunal with a right to supplement the contract. Any potential consent has nonetheless been revoked during the course of the arbitral proceedings.

The Arbitral Tribunal has exercised the mandate to supplement the contract only by making the Final Award, as the decisions therein exceeds the procedural framework that the parties agreed on prior to the Arbitral Tribunal rendering the Separate Award. Thus, the Arbitral Tribunal could not have granted any of the requests for relief that PGNiG put forth in relation to the determination of the Final Award, without committing a challengeable error.

Furthermore, the Arbitral Tribunal did not keep within the scope of the parties' requests for relief.

In the Final Award, the Arbitral Tribunal granted PGNiG's request for relief in paragraph 27 (d), which included a request for supplementation of the contract. Thus, the Arbitral Tribunal has exercised the erroneous mandate to supplement the contract by not keeping within the scope of an ordinary judicial mandate, even when considering the new requests for relief and positions that the parties took after the Separate Award had been rendered. The Arbitral Tribunal has therefore decided something else in the Final Award compared to the parties' requests for relief and positions.

The challengeable errors have influenced the outcome of the case, since the Arbitral Tribunal in the Final Award has awarded something else than what follows from the parties' requests for relief and positions. The errors have not been the fault of Gazprom, since Gazprom objected to the Arbitral Tribunal's mandate to supplement the contract.

**PGNiG**

*The Arbitral Tribunal has not exceeded its jurisdiction or its mandate*

The Arbitral Tribunal has not, already by rendering the Final Award, exercised a mandate to supplement the contract. The Arbitral Tribunal's decision to bifurcate the proceedings and render the Final Award at a later point in time (paragraph 275[v]) of

the Separate Award) is a procedural decision that is as such, not possible to challenge. The Arbitral Tribunal's procedural decision in this regard can therefore not in itself constitute an excess of jurisdiction or mandate.

There is an arbitration agreement between the parties providing the Arbitral Tribunal with jurisdiction to determine a new price (including a price formula). Thus, the Arbitral Tribunal had jurisdiction to determine the new price (including the price formula) that appears from the operative part of the Final Award, regardless of whether the Arbitral Tribunal exercised a mandate that is to be characterized as an ordinary judicial mandate or a mandate to supplement the contract.

The Arbitral Tribunal has also had a mandate to supplement the contract. The mandate follows from the substantive provisions of the Yamal Contract, in particular Article 7.5 that is governed by Russian law. The mandate defined by the Arbitral Tribunal pursuant to Article 7.5 of the Yamal Contract constitutes a mandate to supplement the contract under Swedish arbitration law. Furthermore, Gazprom confirmed during the proceedings that the Arbitral Tribunal had such mandate. A mandate that is based on the parties' contract cannot be unilaterally revoked.

Even in the absence of a mandate to supplement the contract, the Arbitral Tribunal has kept within its jurisdiction and mandate. The Arbitral Tribunal has in relation to the issue of the different components of the price formula decided something in between the parties respective requests for relief. Thus, the Arbitral Tribunal has not awarded something else or more - but something less - compared to PGNiG's requests for relief. In the event the Court of Appeal considers that the requests for relief cannot be compared numerically, there is still no excess of mandate since the discrepancy in such case falls within the scope for awarding something qualitatively different than what follows from the parties' requests for relief while still keeping within the scope of the ordinary mandate.

The Arbitral Tribunal's alleged excess of jurisdiction or mandate has not affected the outcome of the case since the Arbitral Tribunal only exercised an ordinary judicial

mandate in the Final Award. Not even if the Arbitral Tribunal is found to have wrongfully concluded that it had a mandate to supplement the contract, has it influenced the outcome of the arbitration.

*Gazprom's challenge is precluded*

Gazprom has waived or lost its right to invoke the alleged lack of mandate to supplement the contract as a ground for challenge.

Already in the submissions *Notice of Arbitration* and *Statement of Claim* in the Arbitration, PGNiG stated that the Arbitral Tribunal had a mandate to supplement the contract. Gazprom did not object to the Arbitral Tribunal's jurisdiction in its Statement of Defence in the arbitral proceedings, but confirmed that the Arbitral Tribunal had a mandate to supplement the contract. Gazprom has thus – if a mandate to supplement the contract did not already exist according the Yamal Contract – in agreement with PGNiG created such a mandate. Gazprom cannot at a later point of time unilaterally withdraw this mandate. Gazprom has thereafter participated in the arbitral proceedings without objecting to the Arbitral Tribunal's mandate to supplement the contract.

Gazprom's right to claim that Article 7.5 of the Yamal Contract is a part of the arbitration agreement and subject to Swedish is law is also precluded pursuant to section 34 paragraph 2 of the SAA.

**Gazprom**

*Gazprom's challenge is not in any part precluded*

It is disputed that Gazprom's challenge is precluded. PGNiG's initial submissions in the arbitration did not contain a request that the Arbitral Tribunal should supplement the Yamal Contract. It was not until the main hearing on 3–7 April 2017, that PGNiG stated that the Arbitral Tribunal pursuant to its mandate to supplement the contract could freely determine a new price if it were to dismiss PGNiG's request. Gazprom then objected to the assertion. Gazprom have also not before that acknowledged a

mandate to supplement the contract. Any consent has nonetheless been revoked during the course of the arbitral proceedings.

Gazprom asserts that the Arbitral Tribunal's decision to award itself a mandate to supplement the contract was incorrect as a matter of Swedish law (lex arbitri). Gazprom took the same position already during the arbitral proceedings. Any preclusion of Gazprom's right to assert this can therefore not be eligible.

In the event that the Court of Appeal should find that Gazprom has objected too late, the time for Gazprom's objection has not influenced the arbitration.

## DEVELOPMENT OF THE PARTIES' POSITIONS

### Gazprom

When the arbitration was initiated, PGNiG did not raise the issue of a mandate to supplement the contract and subsequently it only made one specific request for relief in its *Statement of Claim* and thus no broader request for price revision. Gazprom objected to the request for relief as it did not meet the conditions for price revision. Gazprom acknowledged that the Arbitral Tribunal had the right to amend the price formula on the basis of an ordinary judicial mandate for an arbitral tribunal. Gazprom's position was in line with the assessment that had been made by an arbitral tribunal in a previous dispute between the parties.

At the hearing on 3-7 April 2017, PGNiG requested for the first time that the price should be determined freely with a mandate to supplement the contract, in the event that the company's specific request for relief should be dismissed. Gazprom then objected to this request. In Procedural Order 69, the parties were ordered by the Arbitral Tribunal to give their opinion on the matter of the Arbitral Tribunal's mandate. In a submission on 26 May 2017, Gazprom once again objected to the Arbitral Tribunal having a right to exercise a mandate to supplement the contract. Subsequent to a new hearing, the Separate Award was rendered. In this award, PGNiG's specific request for a price revision was dismissed by the Arbitral Tribunal,

but it considered itself to have a mandate to supplement the contract and continued the proceedings in order to exercise it.

Gazprom challenged the Separate Award, *inter alia*, on the basis of the fact that the Arbitral Tribunal had awarded itself a mandate to supplement the contract and therefore bifurcated the administration of the arbitration. The Court of Appeal rejected Gazprom's challenge in relation to the decision to bifurcate the proceedings as it was not considered to be a challengeable error. It is expressly provided in the Court of Appeal's judgment that the Court did not take a position on whether the Arbitral Tribunal had a mandate to supplement the contract.

Following the Separate Award, the Arbitral Tribunal took a considerably more active role in the proceedings. It conducted the proceedings and directed the parties' experts and thus the material they provided to the process. In Procedural Order 94, the Arbitral Tribunal requested documentation from the parties in order to formulate the price formula. It is further stated in the Procedural Order 97 that the experts were only allowed to take instructions from the Arbitral Tribunal. The Arbitral Tribunal thus acted on the basis of the mandate it considered itself to have in the Separate Award. The Arbitral Tribunal also expressed that it intended to supplement the contract. Gazprom participated in this part of the proceedings under protest.

The Arbitral Tribunal did not keep within the scope of an ordinary judicial mandate in the Final Award. The requests for a price formula put forth by the parties were not numerically comparable, as the components were parts of a complex formula with several variable parts. When the Arbitral Tribunal determined the price formula, it therefore ruled on something else than what PGNiG had requested. In the absence of a mandate to supplement the contract, the Arbitral Tribunal thus exceeded the scope of its mandate or jurisdiction.

A mandate to supplement the contract requires that the Arbitral Tribunal has a fully discretionary right to determine the content of the contract. The Yamal Contract contains several limitations. It is apparent from the beginning of Article 7.5 that a new price should be "fair and unbiased". Furthermore, it is stated that a new price formula

should be determined “in accordance with the provisions of this contract”. It is also clear that the Arbitral Tribunal shall take "into account" a number of conditions on the energy market when determining a price formula. Therefore, the Yamal Contract does not give the Arbitral Tribunal such a mandate to supplement the contract as referred to in section 1 paragraph 2 of the Swedish Arbitration Act.

**PGNiG**

It is not disputed that an arbitral tribunal has the right to continue the administration of the arbitration proceedings or allow new requests for relief. Hence, the Arbitral Tribunal has not committed any procedural error when it bifurcated the proceedings and subsequently rendered the Final Award. The parties also agree in the Court of Appeal that the Arbitral Tribunal had the right to determine a new price and change the content of the contract in that part. In the arbitral proceedings, large parts of the price formula were not in dispute. It is thus undisputed what the Arbitral Tribunal and the parties have done. However, the parties do not agree on the legal meaning of the documents.

PGNiG made a request for relief according to a specific formula. However, the Arbitral Tribunal was not limited to grant the price formula presented, but could award less. PGNiG also stated, already in its *Statement of Claim,* that the Arbitral Tribunal had a mandate to supplement the contract. In its *Statement of Defence*, Gazprom confirmed that the Arbitral Tribunal had a mandate to revise the price formula. The objection put forward by Gazprom concerned that the Arbitral Tribunal was not entitled to change any other conditions than the price formula in the Contract.

In the opening statement at the hearing on 3-7 April 2017, PGNiG explained that the Arbitral Tribunal was not bound by its request for relief. Gazprom objected that it had only defended against certain indexation and that it needed time to object to a new claim. According to Gazprom, it was ”inappropriate” to submit a new request for relief as it was made too late in the proceedings.

The Arbitral Tribunal decided in the Separate Award to continue the proceedings.

In the reasons of the award, it expressed its mandate. The Arbitral Tribunal found that it follows directly from the Yamal Contract that it had a mandate to supplement the contract.

Following the Separate Award, the parties were permitted to submit five submissions and three hearings were held. For example, one hearing was held in which the parties were allowed to put forth arguments regarding a report prepared jointly by the parties' experts. Accordingly, there was no element of surprise for either party. Furthermore, it is not uncommon for an arbitral tribunal to give instructions to experts.

In the Final Award, the Arbitral Tribunal determined a price formula that was based on expert opinions and data contained in the case. The parties agreed on large parts of the price formula. The only thing the Arbitral Tribunal thus had to take into consideration was the weight two components should be given in the price formula. PGNiG requested a weighting by certain percentages for the two components, while Gazprom requested a different weighting for the same components. The Arbitral Tribunal decided an indexation of the components which was below what PGNiG had requested but above what Gazprom had requested, with respect to the two components. The Arbitral Tribunal has thus decided on a new price formula based on the parties' requests for relief. Furthermore, the determined price formula would only apply retroactively. The Arbitral Tribunal was therefore able to review the monetary outcome for the entire period for which the formula would apply.

## EVIDENCE

The parties have relied on written evidence.

## THE COURT OF APPEAL'S REASONING

### The meaning of a right to supplement the contract

Pursuant to section 34 of the Swedish Arbitration Act, in its wording prior to 1 March

2019 which applies in this case, an arbitral award shall be set aside upon the request of a party, *inter alia*, if the award is not covered by a valid arbitration agreement between the parties or if the arbitral tribunal has exceeded its mandate.

In short, Gazprom's claim is based on the fact that the Arbitral Tribunal has erroneously made the assessment that it had a mandate to supplement the contract. In the absence of such a mandate, the Arbitral Tribunal has exceeded its mandate or jurisdiction only by rendering the Final Award, and also by determining a price formula that went beyond PGNiG's requests for relief. According to Gazprom, a mandate to supplement the contract presupposes that the Arbitral Tribunal could freely make a discretionary determination of the content of the contract. If there is a basis as to how the Tribunal is to determine the content of the agreement, it is a question of an "ordinary judicial mandate" for the Arbitral Tribunal, according to Gazprom.

Thus, as Gazprom has construed its challenge, it is a central matter what is meant by a mandate to supplement the contract, as well as what mandate the Arbitral Tribunal have had in that regard.

Section 1 of the SAA expresses what falls within the scope of what is arbitrable, *i.e.* what matters can be referred to an arbitral tribunal for adjudication (see Govt. Bill 1998/99:35 p. 210). The second paragraph of the section states that the parties may allow the arbitrators to supplement a contract in addition to what follows from the interpretation of contracts. The provision was introduced so that the arbitral tribunals authority to supplement contracts would be clearly stated by law (Govt. Bill p. 61). It thus aims to clarify the limits of what is arbitrable in this respect.

The competence of an arbitral tribunal may thus include a right to supplement contracts in such respects where there is no basis for how the assessment is to be made and this regardless of whether the mandate may be considered as exercise of law (Govt. Bill p. 61). However, such a lack of guidance for the arbitral tribunal's assessments is not, in the opinion of the Court of Appeal, a prerequisite for a right to supplement the contract within the meaning of the law, but constitutes the outer

limit for the matters that may be referred to an arbitral tribunal. It follows from this, that it is not meaningful to maintain any sharp distinction between a right to supplement a contract and a right to, for example, gap filling (*cf.* Lindskog, Skiljeförfarande, En kommentar (Commentary to the Arbitration law), 2020, p. 281 note 1120). Neither the text of the law nor the preparatory work contains any definition of a right to supplement contracts or even an attempt to define such a right.

Consequently, whether the arbitral tribunal has a right to supplement the contract, or how far that right extends, cannot be assessed on the basis of an intended definition of what constitutes a mandate to supplement the contract within the meaning of the law. Instead, it is the underlying arbitration agreement and other documents, and what can be read from the provisions therein concerning the limits of the arbitral tribunal's mandate, that may have an impact on the arbitral tribunal's right to supplement the contract. This is also the starting point in the preparatory works (see a. Govt. Bill. p. 62 and p. 210 *et seq*.). A limit for the arbitral tribunal thereby consists of what is considered as arbitrable, pursuant to section 1 paragraph 2 of the Swedish Arbitration Act.

In line with the above, a right for the arbitral tribunal to supplement a contract does not result in procedural rules being set aside. Another issue is that the arbitral tribunal's scope to administer a case may be affected by how far-reaching its mandate is. For example, if the arbitral tribunal has a wide discretionarily scope to determine the content of a contract, the referring to facts and circumstances should not be awarded the same significance as in other disputes (see Gov. Bill. p. 144). However, basic rules, such as the right to present a claim, must naturally always be upheld.

**The Arbitral Tribunal's right to supplement the contract in the present case**

The Arbitral Tribunal applied Russian law (in this case the CISG) in interpreting the Yamal Contract, including Article 7.5. The Tribunal considered that the Yamal Contract gave it a mandate to supplement the contract pursuant to section 1 paragraph

2 of the SAA (see, *inter alia*, paragraphs 62 and 269 of the Separate Award).

The parties to the arbitration agreed that the Arbitral Tribunal was mandated to bring forward a new price formula (in the event that one of the so-called trigger criteria was met). The disagreement concerned whether this assignment should qualify as a mandate under section 1 paragraph 2 of the SAA (see paragraphs 207, 208 and 210 of the Separate Award). However, as accounted for above, the Court of Appeal considers that such a legal qualification of a mandate lacks independent effect.

The Court of Appeal, which applies Swedish arbitration law, agrees with the Arbitral Tribunal's conclusion that the parties' contract entailed that it had the right to supplement the contract by revising the price formula. Some points of reference for the assessment are included in the Yamal Contract, but these are not particularly restrictive of the Arbitral Tribunal's room for manoeuvre. It is clear, for example, that an adjustment must be ”fair and unbiased” and that certain market conditions must be taken into account. Thus, it should be considered that the Arbitral Tribunal had a wide discretion to revise the price formula.

As stated above, Gazprom has asserted that the Arbitral Tribunal only had an ”ordinary judicial mandate” and not a ”mandate to supplement the contract”, and that any admission concerning a mandate to supplement the contract has nonetheless been revoked during the course of the arbitral proceedings. Since the right to supplement the contract follows from the parties' Contract, this authority for the Tribunal cannot, in the opinion of the Court of Appeal, be revoked unilaterally (see Lindskog, p. 282). In the present case, however, it is of less significance, since Gazprom also accepted that the Tribunal had the right to revise the price formula as long as thiswas made within the scope of what Gazprom has chosen to call an ordinary judicial mandate.

**The Arbitral Tribunal has not committed any error by rendering the Final Award**

Gazprom has claimed that the Arbitral Tribunal exceeded its mandate or its

jurisdiction already by rendering the Final Award, since the operative part of the award goes beyond the requests for relief submitted in relation to the (then) forthcoming Separate Award.

The bifurcation of the proceedings must be seen in the light of the fact that the Arbitral Tribunal considered it necessary to allow the parties to carry out their actions with regard to possible adjustments of the price formula other than those presented ahead of the Separate Award (see, *inter alia*, paragraphs 214 and 275 [v] of the Separate Award). Following the bifurcation, both parties were offered the opportunity to reason on the matter, PGNiG was allowed to make new requests for relief and the expert opinions was supplemented.

The Arbitral Tribunal's decision to bifurcate the proceedings is a not challengeable error and Gazprom's claim in that part has previously been rejected by the Court of Appeal. In addition, it can be stated that an arbitral tribunal has the right to divide the proceedings and to render partial awards (see Article 32.1 of the UNCITRAL Arbitration Rules [1976] which was applicable to the arbitration).

According to the Court of Appeal, there is no support for Gazprom's view that the Arbitral Tribunal in the Final Award was prevented from awarding anything other than the requests for relief submitted before the Separate Award. Such a view would in reality entail that the Arbitral Tribunal has not had the possibility to divide the proceedings since any addition, for example new requests for relief, would then be prohibited. As accounted for above, the Court of Appeal considers that the Arbitral Tribunal had the right to supplement the contract, but that this qualification is not in itself of any independent significance (*cf.*, *inter alia*, paragraph 250 of the Separate Award). The way in which the Arbitral Tribunal chose to qualify its mandate is irrelevant to the assessment of the Arbitral Tribunal's right to bifurcate the proceedings in order to be able to address the issue of the revision of the price formula in an appropriate manner. Furthermore, it has not been alleged that the amendments to the claim put forth by PGNiG were inadmissible. Accordingly, the Court of Appeal considers that the Arbitral Tribunal has not exceeded its mandate or jurisdiction, or

committed any other challengeable error, already by rendering the Final Award.

**The Arbitral Tribunal has not ruled beyond the requests for relief sought**

As stated above, an arbitral award may be set aside if the arbitral tribunal has exceeded its mandate. If the Tribunal has gone beyond the parties' requests for relief, it may be a constitute an excess of mandate (see, for example, Govt. Bill p. 143).

The price formulas requested by the parties to be determined are complex and consists of several variable components. It can therefore be difficult to assess how a deviation from a particular formula affects the financial outcome. Prior to the Final Award, the parties had agreed on large parts of the formula and the disagreement that existed concerned how two components should be weighted in the formula. In that part, PGNiG primarily requested a certain value for the components, while Gazprom, for its part, presented a formula with a different weighting of the same components (see paragraphs 258 to 261 of the Final Award). The Arbitral Tribunal determined a formula that was between what the parties had requested and corresponded to an average value of the proposals put forward by the experts (paragraph 271 of the Final Award).

Although the parties respective requests for relief are difficult to calculate financially, they can be said to be on the same scale, since only the weighting of two components has been disputed. PGNiG had requested that the Arbitral Tribunal should use its broad mandate to determine a different formula in the event that the Arbitral Tribunal would not accept the one put forward by the company. The formula that was determined by the Arbitral Tribunal was further the result of a joint statement of the experts involved in the case. Gazprom has thus had every reason to expect that the outcome could be a compromise between the parties' requests for relief and to bring its action on that basis. In addition, the Arbitral Tribunal has had a wide discretion to establish a new price formula, which indicates that the Arbitral Tribunal had the right to determine a formula somewhere in between the parties' requests for relief (see Lindskog, a. a., p. 283 and Heuman, Festskrift till Ulf K.

Nordenson (Essays in honour of Ulf K. Nordensson), 1999, p. 192 *et seq*.).

In summary, the Court of Appeal considers that the Arbitral Tribunal in its operative part of the Award has not awarded anything else than what has followed the parties' respective requests for relief and positions. Hence, the Arbitral Tribunal has not exceeded its mandate or jurisdiction by establishing the price formula that was decided in the Final Award.

**The issue of preclusion**

PGNiG has asserted that parts of Gazprom's challenge are precluded pursuant to section 34 paragraph 2 of the SAA. Since the Court of Appeal has not found that the Arbitral Tribunal has committed any errors that will lead to the Award being set aside, the matter of preclusion lacks independent significance. Nevertheless, the following can be said in the matter.

First, PGNiG has objected that Gazprom's right to invoke the alleged lack of a mandate to supplement the contract as a ground for challenge is precluded.

Although PGNiG addressed the issue of the Arbitral Tribunal's mandate to supplement the contract in its *Statement of Claim*, it did not become of actual relevance until the hearing on 3 and 7 April 2017 when the company clarified its position in that part. Both the Arbitral Tribunal and Gazprom perceived PGNiG's request at the hearing as something new and Gazprom objected at the time. Accordingly, the Court of Appeal does not consider that Gazprom, by participating in the proceedings without objection or in any other way, may be regarded as having waived the opportunity to invoke the lack of a mandate to supplement the contract. The company's right to invoke that circumstance is therefore not precluded.

PGNiG has further alleged that Gazprom's right to claim that Article 7.5 of the Yamal Contract is part of the arbitration agreement and subject to Swedish law is precluded.

According to the Court of Appeal's assessment, what Gazprom has put forward in this part is primarily to be regarded as a legal argument and not as an invoked fact. Nonetheless, it is clear from the investigation that Gazprom in the arbitral proceedings relied on Article 7.5 of the Yamal Contract and Swedish law on the matter of the Arbitral Tribunal's right to supplement the contract. Thus, any preclusion cannot be said to have occurred in this part either.

**Litigation costs**

Gazprom shall, as losing party, compensate PGNiG for its litigation costs (Chapter 18, section 1 of the Code of Judicial Procedure).

PGNiG has claimed compensation in an amount of EUR 510 067. The amount comprises fees for counsel amounting to EUR 426 507 and fees for work provided by Rymarz Zdort, who was counsel in the underlying arbitral proceedings, amounting to EUR 83 560.

Gazprom has submitted to the Court of Appeal to adjudicate whether the requested amount is reasonable.

A challenge is a review of the arbitration in formal terms. Nevertheless, the material that the parties had to review in order to bring their action has been extensive. Furthermore, some of the issues that have arisen in the case may be considered difficult and labour-intensive. It is also understandable that there was a need to consult counsel in the arbitration, in order for the challenge to be appropriately dealt with. Furthermore, the underlying value of the subject matter is large. In summary, the Court of Appeal considers that the requested amount is reasonable.

**Confidentiality**

The confidentiality provisions in Chapter 36, section 2 of the Public Access to Information and Secrecy Act (2009: 400) shall continue to be applicable for

information on the parties' business relations in the documents that was presented during the Court of Appeal's main hearing behind closed doors.

**Appeal**

Pursuant to section 43 paragraph 2 of the SAA, the Court of Appeal's judgment may not be appealed. However, the Court of Appeal may allow the judgment to be appealed, if it is of importance as a matter of precedence that the appeal is heard by the Supreme Court.

The issues concerning arbitral tribunals right to supplement a contract that have surfaced in this case have not been subject to a closer review by the Supreme Court. The Court of Appeal considers that it is of importance that the appeal is examined by the Supreme Court and thus allows the judgment to be appealed.

**HOW TO APPEAL**, see Appendix A.
Appeal to be submitted by 6 April 2022.

The following have partaken in making the judgment: Judge of Appeal Kenneth Nordlander, Judge of Appeal Mats Holmqvist and Judge of Appeal Thomas Edling, reporting judge.

# How to appeal the decision of the Court of Appeal

Anyone who wants to appeal the Court of Appeal's decision must do so by writing to the Supreme Court. However, the appeal must be sent or submitted to the Court of Appeal.

## Latest time to appeal

The appeal must have been received by the Court of Appeal no later than the date specified at the end of the Court of Appeal's judgment.

Decision on detention, restrictions according to chapter 24, section 5 a of the Code of Judicial Procedure or travel bans may be appealed without a time limit.

If the appeal has been received in due time, the Court of Appeal forwards the appeal and all documents in the case to the Supreme Court.

## Leave to appeal in the Supreme Court

A leave to appeal is required for the Supreme Court to assess matter. The Supreme Court may grant leave to appeal only if

1. it is of importance as a matter of precedence that the appeal is heard by the Supreme Court, or if

2. there are extraordinary reasons for such an examination, *e.g.* that there are grounds for a new assessment, that there has occurred a grave procedural error or that the outcome of the case in the Court of Appeal is obviously due to gross inadvertence or gross mistake.

## The content of the appeal

The appeal must contain information about:

1. the appellants name, address and phone number,
2. the decision being appealed (name and department of the Court of Appeal and date of the decision and case number);
3. the change in the decision requested by the appellant;
4. the reasons which the appellant wishes to state for a revision of the judgment;
5. the reasons which the appellant wishes to state for granting leave to appeal, and
6. the evidence relied on by the appellant and what is to be proved by each piece of evidence.

## Simplified service

If the case is appealed, the Supreme Court may use simplified service when sending documents in the case, provided that the recipient there or in any previous instance has received information about such service.

## More information

For information regarding the process in the Supreme Court, see www.hogstadomstolen.se

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