SVEA COURT OF APPEAL | **MINUTES** | Case document no. 96
Department 02 | 17 April 2020 | Case No. T 8181-19
Division 020101 | Report in Stockholm

THE COURT
Judges of Appeal UI and ME (reporting and keeper of the minutes), and Deputy Associate Judge DB

REPORTER AND KEEPER OF THE MINUTES
Assistant Judge MV

PARTIES

Claimant
JSC Gazprom transgaz Belarus, 100219778
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Belarus

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Respondent
Energoprojekt Oprema a.d. Beograd, 077318
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The Republic of Serbia

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MATTER
Challenge of arbitral award; now the issue of dismissal of new challenge grounds etc.

CHALLENGED AWARD
Arbitral award given on 24 April 2019 in Stockholm

JSC Gazprom transgaz Belarus (Gazprom) has challenged the abovementioned arbitral award. As grounds for its challenge and as far as now relevant, Gazprom has argued mainly as follows.

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Ground I

The chairman of the arbitral tribunal has not had the qualifications agreed between the parties as he was not able to speak, read, write and understand spoken Russian fluently.

Ground II

In the preparation of procedural documents (Procedural Orders) as well as the arbitral award, the chairman enlisted the assistance of another person who was very well versed in Russian. It must be assumed that this person had a determining influence on the wording and contents of the procedural orders as well as the arbitral award. Therefore, procedural errors occurred which likely affected the outcome of the arbitration.

Ground IV

The chairman of the arbitral tribunal has not fulfilled the requirement of impartiality, because he has previously represented the Ukrainian state owned oil and gas company Naftogaz Ukraina in disputes with Gazprom's parent company. The circumstances were such that he was directly disqualified from the assignment as chairman.

Ground V

The chairman of the arbitral tribunal has not fulfilled the requirement of impartiality because he, when accepting the assignment, did not disclose that he had previously represented Naftogaz Ukraina in disputes with Gazprom's parent company and because he, in spite of the parties having agreed that the arbitral proceeding should be in Russian, failed to disclose that his competency in the Russian language was limited.

It is undisputed between the parties that the challenge grounds invoked by Gazprom under IV and V have been invoked after the expiry of the time limit set out in the Swedish Arbitration Act (1999:116), Section 34, third paragraph (as worded prior to 1 March 2019).

Energoobjekt Oprema a.d. Beograd (Oprema) has moved that the new challenge grounds IV and V shall be dismissed and that the Court of Appeal shall determine the motion for dismissal separately.

Oprema has further argued that challenge grounds I and II, and, in the event they are not dismissed, also IV and V, as invoked by Gazprom, have been precluded and that the Court of Appeal shall decide the issue of preclusion by way of an intermediate judgment.

In support hereof, Oprema has argued mainly as follows. Gazprom has invoked challenge grounds IV and V after the expiry of the time limit. Therefore, the new challenge grounds shall be dismissed. There are procedural-economical benefits to the Court of Appeal's review of the issue of preclusion by way of intermediary judgment. The issue of preclusion is easy to determine and could entail that several issues within the scope of the action at issue need not be reviewed. Further, an intermediary judgment could mean that a main hearing would become unnecessary since the oral evidence referenced by Gazprom mainly concerns challenge grounds I and II.

Gazprom has disputed the motion for dismissal and objected to the Court of Appeal determining the issue of preclusion by way of intermediary judgment.

Gazprom has further, as far as can be understood, requested that the Court of Appeal shall request a statement from the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), wherein the SCC shall be requested to provide information on

- its knowledge of the chairman's proficiency in Russian at the time he was appointed as chairman,
- any procedures applied to ensure that arbitrators have the specific competencies required,
- how many times it has appointed the chairman of the arbitral tribunal in arbitrations that would take place in Russian, and
- whether it was aware of the fact that the chairman of the arbitral tribunal had been a counsel in disputes against Gazprom's parent company and whether it deemed this

circumstance as irrelevant in the review of the chairman's suitability for the assignment as chairman.

In support thereof, Gazprom has argued mainly as follows. The time limit in the third paragraph of Section 34 is not absolute, and can be disregarded in the event of improper behavior. Such improper behavior did occur, since the chairman of the arbitral tribunal failed to disclose to the parties the circumstance that has been a ground for a challenge, and in fact declared that the disqualifying circumstance never occurred. Further, the chairman has acted improperly by failing to inform the parties on his lacking proficiency in Russian. As regards the issue of intermediary judgment, it would not lead to procedural-economical benefits that would justify the inconveniences caused by a division of the dispute. As regards the statement from the SCC, it is of vital importance to Gazprom.

Oprema has objected to the Court of Appeal requesting a statement from the SCC and has argued, amongst other things, that it is for the parties to procure the evidence in the present proceeding.

Oprema has further, in response to Gazprom's objection to the dismissal of challenge grounds IV and V, mainly argued as follows. Improper behavior cannot lead to the disregard of the deadline set out in the third paragraph of Section 34. Even if the behavior would be deemed improper, then only improper behavior on the part of Oprema could be taken into account. At any event, no improper behavior occurred on the part of the arbitral tribunal, since the chairman of the arbitral tribunal, in connection with his appointment, informed the parties that he had previously represented Naftogaz Ukraina in disputes with Gazprom's parent company. Further, the chairman did not behave improperly when he did not inform the parties about his proficiency in the Russian language, which were actually adequate. Further, the other requirements for disregarding the deadline cannot be deemed fulfilled.

Following a presentation, the Court of Appeal makes the following

DECISION (to be given on 6 May 2020)

1. The Court of Appeal dismisses challenge grounds IV and V as invoked by JSC Gazprom transgaz Belarus.
2. The Court of Appeal rejects Energoprojekt Oprema a.d. Beograd's request for intermediary judgment.
3. The Court of Appeal rejects JSC Gazprom transgaz Belarus's request for a statement from the Arbitration Institute of the Stockholm Chamber of Commerce.

Grounds for the decision

Dismissal of challenge grounds

The previous wording of the third paragraph of Section 34, which shall be applied in the action at issue, stipulates that challenge of an arbitral award shall be opened within three months of the day when the party was provided with the arbitral award. The same provision further stipulates that a party may not invoke new challenge grounds after the expiry of the deadline.

Also the now annulled Act on Arbitrators (1929:145), contained a provision in its Section 21 with a deadline for opening challenge proceedings. However, that provision did not include any equivalent to the deadline for the invoking of new challenge grounds as stipulated in the current Swedish Arbitration Act. Nevertheless, in NJA 1996 p. 751, the Supreme Court held that the deadline in Section 21 of the Act on Arbitrators for the opening of challenge proceedings also applied to the parties' right to invoke new grounds for the challenge in ongoing challenge proceedings. In the preparatory works to the Swedish Arbitration Act, the government agreed with the view adopted in the said case, and stated that the principle should be explicitly set out in the Swedish Arbitration Act. It was also noted that the purpose of the rules governing these issues was a prompt and final decision and that this purpose would be undermined if a party would be allowed to invoke new grounds in a challenge proceeding after the expiry of the deadline (Government Bill 1998/99:35 p. 148).

The Court of Appeal concludes that neither the provisions of the Swedish Arbitration Act nor the preparatory works support that it would be possible to disregard the time limit

incorporated into the third paragraph of Section 34 on the invoking of new challenge grounds. No statements in support thereof can be found in caselaw. In the absence of such support, the Court of Appeal concludes that even if there would have been improper behavior on the part of the chairman of the arbitral tribunal, this could not lead to the disregarding of the deadline. Therefore, the challenge grounds invoked by Gazprom after the expiry of the deadline shall be dismissed.

Request for intermediary judgment

The Code of Judicial Procedure, Chapter 17, Section 5, second paragraph, states that a separate judgment, a so-called intermediary judgment, can be given concerning one or several circumstances if it is appropriate, taking into account the investigation into the case. The Court of Appeal does not find that, even taking into account the arguments presented by Oprema, it would be procedural-economically beneficial to give an intermediary judgment concerning whether challenge grounds I and II invoked by Gazprom shall be considered precluded. Therefore, Oprema's request for an intermediary judgment shall be rejected.

Request for statement

The Code of Judicial Procedure, Chapter 35, Section 6, stipulates that the parties are responsible for the evidence. The same section stipulates that the court is barred from procuring evidence in disputes where out-of-court settlements are permitted.

The statement Gazprom has requested that the Court of Appeal shall procure is such evidence for which the company is responsible. It cannot be viewed as such a statement as envisaged by Chapter 40 of the Code of Judicial Procedure, and therefore the Court of Appeal has no legal standing to procure the statement. Thus, Gazprom's request that the statement from the SCC shall be procured shall be rejected.

Appeals

The decision under item 1 may not be appealed (see Swedish Arbitration Act, Section 43, second paragraph).

The decisions under items 2 and 3 may only be appealed in connection with an appeal of a judgment or final decision, and only to the extent the Court of Appeal grants leave to appeal.

MV

Minutes shown/