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The Challenges of the Arbitral Awards in the Gas Sales and Gas Transit Arbitrations in Stockholm, Sweden

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1. Background

The Arbitral Awards in the Gas Sales and the Gas Transit Arbitrations between PJSC Gazprom ("Gazprom") of Russia and NJSC Naftogaz ("Naftogaz") of Ukraine, rendered by an Arbitral Tribunal constituted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce and seated in Stockholm, Sweden, were challenged by Gazprom at the Svea Court of Appeal in Stockholm.[1]

It is claimed that the total value of the claims in the two arbitrations between Gazprom and Naftogaz makes the dispute the largest commercial arbitration in history and, when the total claims and counterclaims are summarized, comprises in total USD 125 billion.

In December 2019 and January 2020, Gazprom and Naftogaz entered into a settlement agreement whereby two challenges in the Svea Court of Appeal of the final awards rendered in the disputes by the Arbitral Tribunal were withdrawn. At the time of settlement, a challenge of a separate award had already been dismissed by the Svea Court of Appeal in November 2019.

The challenges were based on the challenge grounds provided by section 34, paras. 3 and 7 of the revised Swedish Arbitration Act as effective from 1 March 2019 (the "Act"). As a consequence of the settlement, a number of interesting questions raised by the challenges of the awards regarding the interpretation and application of the said provisions in the Act and the Arbitration Rules of the SCC will not be answered by the Svea Court of Appeal. However, elaborate and detailed arguments regarding the contentious issues in the challenge proceedings have been submitted by highly specialized counsel. Moreover, opinions from experts on Swedish arbitration law have been submitted addressing the various issues in dispute. The Svea Court of Appeal's judgment regarding the

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1 Svea Court of Appeal´s case reference nos. T 1019-17, T 2826-18 and T 3250-18.

challenge of the separate award is also of interest. In view of this, it might be of interest to practitioners and others interested in Swedish arbitration law to summarise some of the contentious issues and the pertinent arguments submitted in these challenge proceedings.

It should be emphasised that this article addresses only the issues that I have found to be of particular interest as regards the development of Swedish arbitration law. It goes without saying that, given the format of this article, I have been constrained to severely curtail an account of the appellate court's reasons in the judgment regarding the challenge of the separate award and the presentation of the parties' submissions and arguments in the challenge proceedings.

Furthermore, the documents available to the public in the Svea Court of Appeal have been heavily redacted for reasons of confidentiality, and thus it has been necessary to compile information regarding the positions of the parties and the reasoning of the Svea Court of Appeal with the help of information from other sources, such as the parties' websites and other publicly available information, rather than from the parties' exchange of submissions in the cases. Thus, due to the foregoing, another caveat is necessary, namely that it cannot be completely ruled out that misconceptions might arise regarding the circumstances of the disputes.

The two disputes between Gazprom and Naftogaz, which were addressed in two separate arbitrations but by the same Arbitral Tribunal, concerned agreements entered into by the two companies regarding the purchase and sale of gas from Gazprom to Naftogaz (the "Gas Sales Contract") and the transit of gas from Russia and other countries through the territory of Ukraine (the "Gas Transit Contract").

In June 2014, both Gazprom and Naftogaz initiated arbitration proceedings regarding the Gas Sales Contract under the rules of the SCC in Stockholm. The two arbitrations were consolidated into a single arbitration procedure (the "Gas Sales Arbitration"). This arbitration resulted in two awards: a separate award rendered in May 2017 on a number of issues of significance for the resolution of a final award, and a final award in December 2017.

In addition to the arbitral proceeding set out above, in October 2014 Naftogaz initiated arbitration at the SCC concerning the Gas Transit Contract (the "Gas Transit Arbitration"). As stated above, the Arbitral Tribunal appointed for the Gas Sales Arbitration was also appointed to adjudicate in the Gas Transit Arbitration and it decided that dispute in a final award in February 2018.

As the arbitrations were initiated in 2014 and, in the absence of an agreement to the contrary by the parties, the SCC Rules applicable in the arbitrations were the rules from 2010, which were in effect up to 1 January 2017. These are referred to below as the SCC 2010 Rules. As of 1 March 2019, *inter alia* section 34 of the Act, which includes the grounds for challenge, has been amended. The amendments included the transfer of the provision governing excess of mandate, from subsection 2 of section 34, para. 1 to subsection 3, and the transfer of

the provision governing procedural error from subsection 6 of section 34, para. 1 to subsection 7. In addition to the provision regarding excess of mandate, a requirement was added to the effect that only an excess of mandate that has probably affected the outcome is challengeable. In the discussion below, these challenge provisions are indicated with their new designations, notwithstanding that the earlier law was applicable in the proceedings.

The object of this article is not to decide whether the Arbitral Tribunal did or did not commit any procedural errors but merely to elucidate the contents of Swedish arbitration law by using the arguments that were or could have been adduced in the challenge proceedings.

2. The separate award from May 2017 in the Gas Sales Arbitration, the outcome of the challenge and the challenge of the final award in the Gas Sales Arbitration

2.1 Background

In the Gas Sales Arbitration, Naftogaz claimed an adjustment of the price payable under the Gas Sales Contract and retroactive compensation for historic payments. Naftogaz claimed also that certain provisions of the Gas Sales Contract should be declared invalid or ineffective. Gazprom claimed payments of outstanding amounts for gas delivered and for gas accessible but not taken up under take-or-pay provisions in the Gas Sales Contract.

The separate award rendered in May 2017 regarding the Gas Sales Contract decided various issues of importance for the final outcome of the disputes and turned out to be very much in the favour of Naftogaz. The separate award was challenged by Gazprom.

In the proceedings before the Svea Court of Appeal, Gazprom claimed that two declarations of the Arbitral Tribunal in the dispositive part of the separate award should be set aside. Gazprom claimed that the Arbitral Tribunal had committed several errors which should result in the award being set aside. Gazprom claimed, *inter alia,* that the Arbitral Tribunal had exceeded the scope of its authority in its assessment of the parties' requests for relief. Naftogaz, in turn, argued that Gazprom's claims should be dismissed since no errors had been committed by the Arbitral Tribunal.

One of the challenge grounds was based on an assertion that the Arbitral Tribunal, in its decisions in the dispositive part of the award, had gone beyond the scope of the proceedings and thus exceeded its mandate.

The Svea Court of Appeal noted that an arbitral tribunal can be deemed to have exceeded its mandate if it goes beyond the parties' requests for relief. The

Court noted, however, that the challenged arbitral award was a separate award and not a final award and that Article 38 of the applicable SCC Rules 2010 stipulates that the arbitral tribunal may decide a specific issue or part of the dispute through a separate award. The Svea Court of Appeal held that, according to the wording of the dispositive part of the challenged rulings, the rulings did not constitute the Arbitral Tribunal's final ruling on the requests for relief submitted in the arbitration. It merely contained certain starting points for a ruling in a final review.

The appellate court then proceeded to consider whether, in the separate award, the Arbitral Tribunal had gone beyond the parties' motions in the arbitration. Gazprom argued that the award deviated from the scope of the proceedings. The Svea Court of Appeal clarified that when a specific issue is decided by way of a separate award, it is the rule rather than the exception that the ruling in the award does not correspond directly to motions submitted in the main case. For example, in order to review a claim in damages it might be more appropriate to decide first on specific issues, such as the 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 might be considered to deviate from the motion in the main case. Such a deviation does not constitute an excess of mandate or procedural error. According to the court, this was the case in the action at issue as the separate award merely contained certain starting points relevant to the final ruling on the adjusted contents of the Contract. Therefore, the Arbitral Tribunal had not gone beyond the parties' motions and the Svea Court of Appeal dismissed the challenge in this part.

Gazprom also argued that the award should be set aside on account of the Arbitral Tribunal's failure to provide procedural guidance. According to the appellate court, whether or not insufficient procedural guidance by an arbitral tribunal may serve as a ground for setting aside an arbitral award is an open question (the court referred to the Supreme Court case reported in NJA 1973, p. 740 and to the preparatory works to the Arbitration Act, Government Bill 1998/99:35 p. 120 *et seq*.). In any event, the court opined that it might constitute a challengeable error if the challenging party is able to justifiably argue that it was not granted an opportunity to properly argue a specific aspect of its case (the court referred to the commentary by Stefan Lindskog, Skiljeförfarande, En kommentar (Arbitration Procedure, a Commentary) 2012, p. 902 *et seq*. and to the Supreme Court case reported in NJA 2018, p. 291("Robot Grader"), para. 16).

Gazprom claimed in the challenge proceedings that the Arbitral Tribunal should have informed the parties that it intended to establish a formula for determination of the annual contract volume in the Contract, as neither party had presented such a motion.

The Court of Appeal found that the Arbitral Tribunal, through a decision, had provided procedural guidance to the parties as to which matters 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 the challenged operative part of the award. Consequently, Gazprom should not have been "surprised" by the contents of the award, as Gazprom had argued it was.

Leave to appeal the Svea Court of Appeal's judgment to the Supreme Court was denied.

2.2 My comments

There seem to be some basic principles to glean from the judgment of the Svea Court of Appeal. Its considerations in the judgment highlight the difference between a final award and an interim separate award in Swedish arbitration law. A final award may also be rendered in the form of a separate award in instances that decide a part of the dispute. In those cases, the bifurcation of the issues can be said to be of a vertical nature. In such cases, where the arbitrators render a final decision regarding the substantive matter, either in the form of a separate award or in a final award, the tribunal's ruling may not deviate from the requests for relief presented by the parties. For example, an arbitral tribunal may not decide to grant relief other than the relief requested by the parties or exceed the quantum stated in such a request.

Likewise, a court, or for that matter a tribunal, cannot issue a declaratory judgment in lieu of a requested order for specific performance. Nor can a court or a tribunal which finds that a plaintiff would be better served with relief other than that requested, order such relief. Since the SCC Rules stipulate that the relief sought must be specifically stated, claims requesting that the tribunal grant fair and equitable relief – which is not unusual in Common Law systems – may probably not be entertained if the other party moves that such claim be dismissed.

However, with respect to an interim award, where horizontal bifurcation has taken place regarding the issues to be resolved, in principle the arbitrators will not be exceeding their mandate if they decide on issues other than the issues that were intended to be addressed by the interim award or if they formulate the answers differently. This should be the case as long as the court does not transgress the parameters established by the parties' requests for relief and provided that the parties have been afforded the opportunity to present their respective case.

Gazprom also challenged the final award in the Gas Transit Arbitration with corresponding arguments; however, as a consequence of the parties' settlement, this challenge will not be heard by the Svea Court of Appeal.

3. The challenge of the award in the Gas Transit Arbitration

3.1 Background

The outcome of the Gas Transit Arbitration was also favourable to Naftogaz and Gazprom challenged the award. Three of the grounds for challenge will be addressed in this article.

The first challenge ground concerned the Arbitral Tribunal's decision to reject Gazprom's reliance on circumstances as an alternative ground of argument for its defence. According to Gazprom, this constituted a procedural error which, in accordance with section 34, para.1, subsection 7, had probably affected the outcome in the case.

The second challenge ground concerned the allegation by Gazprom that the Arbitral Tribunal disregarded evidence presented by Gazprom. This, too, constituted a procedural error which probably affected the outcome.

A third ground for challenge, which will also be addressed here, was that, according to Gazprom, the Arbitral Tribunal had delegated to an administrative secretary appointed by the Tribunal duties which the parties had agreed would be carried out by the arbitrators themselves. This constituted an excess of mandate pursuant to section 34, para. 1, subsection 3 of the Act. Moreover, the assignment of the duties to the secretary constituted a procedural error according to subsection 7 of the above provision since a non-arbitrator had carried out duties that were personally assigned to the arbitrators.

Naftogaz argued that no errors had been committed by the Tribunal.

I will address the alleged challenge grounds below in the order here mentioned but will start with some general observations regarding procedural errors in Swedish arbitration law.

3.2 About procedural errors as grounds for challenge under Swedish arbitration law

According to section 34, para. 1, subsection 7 of the Act, an arbitral award can be set aside at the request of a party if, through no fault of the party, an irregularity has occurred in the course of the proceedings which has probably affected the outcome of the case. The Act contains no definition of what is meant by "irregularity." On this issue, the Act differs from the corresponding rule in the UNCITRAL Model Law on Arbitration (Article 43(2)(iv)), which provides that an award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement is contrary to mandatory law) or the Model Law. According to the preparatory works to the Act, the reason for deviating from the Model Law was that misconduct on the part of the arbitration tribunal was conceivable which ought to cause the arbitration to be

cancelled after being challenged, even though no agreement or statutory rule had been violated.

With regard to procedural errors, the preparatory works to the Act[2] further state: "In order to meet the requirements for a more restrictive rule that still allows the parties to respond to what appears to be unacceptable misconduct in the procedure, one should seek a different solution [than the Finnish solution which addresses only breaches of the contradictory principle, *my note*]. The provision must necessarily be fairly general, but still be limited to more grievous errors. However, it is difficult to assess the materiality of an error in an arbitration process without at the same time reflecting on its significance for the outcome. It can hardly be argued that an error that has affected the outcome is insignificant. Therefore, a procedural error that has affected the outcome should, in principle, be capable of causing the award to be set aside, in whole or in part."

In this context, it may be of interest to note that the Inquiry[3] that presented proposals for the revisions of the Act that entered into force on 1 March 2019, also proposed an amendment to the provision regarding the challenge ground of procedural irregularities, to the effect that only grievous errors by the tribunal should cause an award to be set aside. However, this proposal was not included in the revised Act. The preparatory works to the revised Act[4] stated that the consequence of such an amendment would be that it would not be possible to set aside an arbitration award even though an error had affected the outcome. Such an arrangement would be difficult to justify and thus there were insufficient reasons to further restrict the wording of the provision.

In the light of the foregoing, it can be concluded that what distinguishes a challengeable procedural error from other procedural errors that may occur is the effect of the error on the outcome, and not the possible negligence or degree of negligence that an arbitration panel has shown by committing the error. This is probably consistent with what distinguishes a grievous error from other errors in judicial proceedings in Sweden. It should also be noted that the wording of the statute does not grant a court discretion to refrain from setting aside the arbitral award if there has been a procedural error that probably affected the outcome. According to section 34, para. 1 subsection 7 the award "shall" be set aside if the requirements in the provision are met.

The next question, then, is obviously what constitutes an "irregularity" in the procedure. Examples cited in the preparatory works to the Act are where a party has not been duly represented in the proceedings or where the arbitrators have grossly misunderstood a procedural measure or ignored certain presented evidence. Violation of a legal standard derived from Swedish procedural law does not *ipso jure* result in a relevant procedural irregularity. No procedural

[2] Govt. Bill 1998/99:35, p. 148.
[3] SOU 2015:37, p. 132.
[4] Govt. Bill 2017/18:257, p. 50.

irregularity will normally be deemed to have occurred, e.g. as a consequence of the erroneous application by the arbitral tribunal of the rules pertaining to the burden of proof or the assessment of evidentiary value, even if the applicable standards can be said to pertain to procedural law.

It has to be assumed that Swedish procedural principles enshrined in judicial procedural law in some cases may serve as guidance for what might be considered to be a procedural irregularity in arbitrations in Sweden. It might also be said that it is not clear what significance is to be attached to the fact that the arbitration has been between international parties rather than domestic parties. For example, in the case reported in NJA 2009, p. 128 ("Soyak"), the Supreme Court consulted the rules in the Code of Judicial Procedure to interpret the SCC's requirement that the award must include reasons, despite the fact that the arbitration was between international parties and that a plethora of international sources was available. The Svea Court of Appeal[5] has also pointed out in a challenge procedure that, in arbitration proceedings involving foreign parties, it is not certain that the rules of the Code of Judicial Procedure are normative (the question concerned whether the arbitrators had exceeded their mandate, *my note*). The appellate court further stated: "Initially, the appellate court draws the following conclusion as to the importance of the Code of Judicial Procedure when assessing whether the arbitrators have exceeded their mandate. In the arbitration in this case, the parties are a Russian and an American company. The arbitration took place in Stockholm and, according to the parties' arbitration agreement, Swedish law was applicable to the dispute. The arbitration panel included a Russian and an American arbitrator. The chair of the arbitration tribunal was a Swedish lawyer and the parties were represented by Swedish counsel. In view of the strong connection to Sweden, both the parties and the arbitral tribunal must have been fully acquainted with and acquiesced to the relevant Swedish procedural law rules, including the importance of clearly presenting ultimate facts."

In the light of the above, it seems difficult to consistently disregard the possibility that a court might apply the conceptual apparatus of the Code of Judicial Procedure to a challenge. This is particularly so when Swedish and international arbitration law provide no guidance. Therefore, references to the Code of Judicial Procedure may be of significance also in challenge proceedings involving international parties. However, in my opinion, in certain contexts foreign sources of law should be accorded greater importance in international arbitrations than the principles of the Swedish Code of Judicial Procedure. The Supreme Court's ruling in NJA 2019 p. 171 ("Belgor), see paras. 14, 19 and 40, may serve as an example that there is now acceptance for such an approach. In this challenge matter, the Supreme Court referred to international sources of law.

[5] Judgment on 25 June 2015 in T 2289/14.

Another requirement, as stated above, is that it is probable that the procedural error has affected the outcome. As a starting point, the assessment of whether the prerequisite of the error having affected the outcome is fulfilled may be made by comparing the erroneous conduct with hypothetically correct conduct. The prerequisite is met if it is likely that the outcome would have been different in the case of correct conduct. Pursuant to the Supreme Court case reported in NJA 2019 p. 382 (“CicloMulsion”), a presumption that an error has affected the outcome may in some cases be warranted.

3.3 First challenge ground, the dismissal of the alternative ground

The alternative ground dismissed by the Arbitral Tribunal was cited by Gazprom in a submission on 9 February 2018 after the Tribunal had rendered the final award in the Gas Sales Arbitration, which was issued on 17 December 2017 (corrected on 17 January 2018). In the Gas Sales Arbitration, pursuant to a request from Naftogaz the Tribunal modified the terms of the Gas Sales Contract by applying section 36 of the Swedish Contracts Act. Section 36 permits a court to set aside or modify a contract term or condition if such term or condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. The provision is primarily intended to apply in disputes between consumers and commercial enterprises, but it has been applied also in commercial relationships.

The new defence argued by Gazprom was that a new circumstance had arisen due to the modification of terms of the Gas Sales Contract made by the Tribunal in the Gas Sales Arbitration rendered in December 2017 and January 2018. Gazprom argued that the Gas Transit Contracts and the Gas Sales Contract constituted a single contractual relationship and that the modification in the contract terms of the Gas Sales Contract pursuant to section 36 disrupted the balance of the contractual relationship comprised by the two agreements and that the terms of the Gas Transit Contract thus should be modified to a corresponding extent in favour of Gazprom, in order to restore the contractual balance.

Naftogaz objected to the new defence and requested that it be dismissed pursuant to Article 25 of the SCC Rules.

The English version of the SCC Rules 2010 provides as follows in Article 25, Amendments: “At any time prior to the close of proceedings pursuant to Article 34, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other circumstances.”

The Tribunal found that if it admitted the new defence, it would be required to fundamentally change the agreed procedural timetable and provide for a new round of document requests and a second evidentiary hearing which would cause a significant delay in the rendering of the final award, thereby severely prejudicing Naftogaz and the Ukrainian State. The Tribunal also noted that Gazprom had not presented any credible justification for the introduction of the new defence at the very late stage in the proceedings, a mere 19 days before the planned rendering of the final award, and that there would be serious consequences if the Tribunal were to admit it. Consequently, the Tribunal found it inappropriate to allow the new defence and dismissed it.

Thus, pursuant to Article 25 a party is entitled to amend or supplement a claim as long as it is not "inappropriate" to allow it. The right of the tribunal to deny a party the right to amend or supplement a claim may, however, conflict with a party's right to present its claim. Needless to say, such a right constitutes a fundamental principle of both Swedish and international arbitration law. Gazprom claimed in the challenge proceedings that its alternative ground should have been allowed pursuant to Article 25 and that its right to present its case had been denied by the arbitrators. Hence, Gazprom claimed that the Tribunal's dismissal constituted a procedural error under section 34, paragraph 1, subsection 7 and that it had probably affected the outcome.

According to section 24, para. 1 of the Act, the arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases. Moreover, the English version of the SCC Rules 2010 states as follows in Article 19, Conduct of the Arbitration:

> "(1) Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate.
>
> (2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case."

The fact that a party has not been given a reasonable opportunity to present its case may result in an award being set aside or enforcement denied if it is a foreign award. In a recent ruling by the Supreme Court, reported in NJA 2018, p. 219, enforcement of a foreign award was denied after the arbitration panel was deemed not to have afforded a party an opportunity to present its case in accordance with the international principles regarding arbitration proceedings that the Supreme Court found applicable in the matter. Thus, citing this principle, the Supreme Court affirmed the weight of the principle by refusing enforcement despite the fact that the defendant had unsuccessfully challenged the arbitration in the country where the award was rendered.

In an even more recent judgment, reported in NJA 2019, p. 171, the Supreme Court ruled in a challenge matter in which it was argued by the party challenging the award that the arbitral tribunal's dismissal of its request for an extension of time to submit an expert report, and the tribunal's failure to appoint an inde-

pendent expert, constituted a procedural error since the party was deprived of its right to present its case.

The party in question had repeatedly requested leave to submit an expert opinion. The arbitral tribunal rejected the request as it would unacceptably delay the proceedings. The tribunal also stated that such an opinion could not have any major significance in relation to the counterparty's claims. According to the tribunal, the significance of the opinion would be limited to the party's own counterclaims in the proceedings. The arbitral tribunal noted that its decision did not prevent the party in question from withdrawing its counterclaim to pursue it in a new arbitration proceeding.

The Supreme Court began by emphasizing that the arbitral tribunal is entitled to conduct the arbitration in the manner it deems appropriate. A provisional timetable must be established. The arbitral tribunal has a mandate to decide, *inter alia*, when submissions must be submitted, including documents on which the parties wish to rely. The tribunal and the parties should scrupulously adhere to the adopted provisional timetable.

The Supreme Court further explained that the tribunal may grant a party an extension of time if it is not deemed inappropriate. In making that assessment, regard should be given to the stage of the proceeding when the decision is taken, the prejudice that the extension might cause the other party, as well as other circumstances. It is the arbitral tribunal that is in the best position to assess whether a request for an extension shall be granted or rejected in light of the reasons presented by the parties. As a starting point, the arbitral tribunal's decision should hold, unless the decision appears indefensible. Another prerequisite for the setting aside of an arbitral award due to the arbitral tribunal's response to a request for an extension is that the challenging party did not itself cause its predicament. The party in the arbitration that has invoked such circumstances must show that it was precluded from presenting and arguing its case in a timely manner due to circumstances beyond its control and which it should not have foreseen, and that there were no clearly acceptable alternatives for presenting and arguing the case.

The Supreme Court found in the matter at hand that the party challenging the award had not established that the arbitral tribunal's handling of the proceedings was indefensible. Thus, the action in this respect was rejected.

3.4 My comments

The main principle is that amendments and supplements are allowed until the close of proceedings, pursuant to Article 34 of SCC Rules 2010. The arbitration process is characterized by a high degree of flexibility compared to judicial proceedings. This should be understood in light, *inter alia*, of the fact that arbitration is a single instance procedure and that legal disadvantages and forfeiture

of rights may occur in the event a party is not granted the right to amend its case. Therefore, the starting point is that opportunities to amend or supplement a case in arbitration should be more flexible and more generous than allowed by the rules of the Code of Judicial Procedure, which provides for a multi-instance procedure.

By comparison, according to Chapter 43, section 10 of the Code of Judicial Procedure, a new ground or new ultimate fact can always be invoked by a party in judicial proceedings until the main hearing has commenced (provided the party has not previously been ordered to finalize its action or defence). Even after the commencement of the final hearing, a party is entitled to invoke new grounds or legal facts unless it can be assumed that, in so doing, the party is attempting to delay the trial or to surprise the opposing party, or the party otherwise acts in some improper manner or is grossly negligent.

In international arbitration, there is a liberal stance regarding a party's right to amend or supplement its case. For example, the following is stated by Gary Born, in his standard work on international arbitration: "In practice, arbitral tribunals are generally highly reluctant to refuse to allow parties to amend existing claims or defences, as distinguished from a claimant introducing a completely new claim or counterclaim. Arbitral tribunals frequently reject arguments that a party's pleadings cannot be amended, often holding that flexibility and fairness require permitting parties to develop and refine their respective cases."[6]

In this context, it should also be noted that references to a new rule of law to be applied to previously cited ultimate facts should not constitute such an amendment or supplement of the action or defence entailing that permission is required pursuant to Article 25 of SCC Rules 2010. Such modifications should be accepted even if they are entered at a late stage. This is so unless the parties have otherwise agreed.

In the Supreme Court case reported in NJA 2019, p. 171, referred to above, the court referred to the case reported in NJA 2018, p. 291. As emphasized by the Supreme Court in the latter case, it is the defendant in the enforcement proceedings who bears the burden of proving that a challengeable error has occurred. Thus, also in challenge proceedings, the starting point is that the party challenging the award bears the burden of proving that a procedural error occurred.

However, it has to be surmised that the challenging party is not required to "prove" that the arbitral tribunal has erred from a legal standpoint. Whether a procedural error pursuant to the Act has occurred is a legal assessment. Legal assessments cannot be proven. What the challenging party must prove is the facts relevant to the judicial review. In this context, the grounds on which the arbitration board made its decision are of key importance. Here, the starting point was that the Arbitration Tribunal had made its decision on the grounds set out in the decision to reject the amendment.

[6] Gary Born, International Commercial Arbitration, 2nd ed., § 15.08(Y).

In the case reported in NJA 2019, p. 171, the challenging party claimed *inter alia* that the refusal to grant an extension to submit an expert opinion prevented him from presenting his case. The Supreme Court held that the arbitral tribunal is in the best position to assess whether a request for an extension shall be granted or rejected, in light of the reasons presented by the parties. As a starting point, according to the Supreme Court the decision of the arbitral tribunal should hold, unless the decision appears indefensible. The Supreme Court did not clarify whether this means that only grievous errors committed by a tribunal are challengeable. With respect to aforementioned statement in the Government Bill to the recent amendments to the Act, namely that all errors affecting the outcome are challengeable, it has to be surmised that the Supreme Court's view that only indefensible errors can cause the award to be set aside should be limited to cases where the challenged decision is of a discretionary nature, as in the case at hand.

With regard to the challenge ground addressed by the Svea Court of Appeal in the present case, based on the wording of Article 25 in the SCC Rules 2010 it has to be surmised that the tribunal is required to assess the effect that the amendment or supplement will have on the proceedings. The Tribunal held that there would be serious consequences for the other party if the Tribunal were to admit it.

Although the wording of Article 25 provides no clarification, the prejudice caused to the other party by rejecting an amendment or supplementation must also be weighed in. In the event the rejection has the consequence that the amendment or supplement that a party wishes to make cannot be raised in a new arbitration on *res judicata* grounds subsequent to the issuance of the final award, this must be considered by the tribunal when assessing whether the amendment or supplementation should be accepted or rejected.[7]

According to the wording of the decision taken by the Tribunal, no such assessment was made by the Tribunal. It is not clear whether this would suffice for the court to surmise that this was not taken into regard by the Tribunal. However, it seems that the general rule should be that the tribunal has taken into account such considerations as presented in the reasons for the decision.

It is impossible to make any assessment as to whether the Tribunal's decision may constitute a challengeable error, since such an assessment would have been affected by a number of circumstances not taken into considerations here. However, it is apparent that the Supreme Court, through its decision in the case reported in NJA 2019 p. 171, has established a very restrictive interpretation of section 34, para.1, subsection 7 and the threshold for setting aside awards on account of this provision has been set much higher.

[7] Marie Öhrström, SHS: En handbok och regelkommentar för skiljeförfarande (Engl: A Handbook and Commentary on Arbitration), p. 193.

3.5 The second ground; the disregarded evidence

The second challenge ground involved the allegation by Gazprom that the Arbitral Tribunal had disregarded evidence presented by Gazprom. According to Gazprom, this also constituted a procedural error according to the provision above.

Gazprom summarized as follows its motion for setting aside the award on this ground. The parties disagreed as to the calculation of certain costs that had been saved due to lower fuel consumption. The parties presented expert evidence and each party alleged that the costs in question should be calculated on the basis of the calculation by its respective expert.

The Arbitral Tribunal stated that it realized that it could not delve deeply into the highly technical arguments in relation to statistical methodologies and the differences between the methods addressed in the expert reports. Moreover, the Arbitral Tribunal stated that there was nothing to contradict a conclusion that using an average was fair. In conclusion, the Tribunal decided that the volume of saved gas should be calculated as the average result of the two models proposed by the experts.

As I understand the information available, the parties had argued their respective cases before the Tribunal on the basis of the common position that the costs in questions should be reviewed and determined on the basis of an evaluation of the evidence presented by the parties.

According to Swedish arbitration law, the decisions of an arbitration tribunal regarding disputed substantive issues must, unless the parties have otherwise agreed, be based on rules concerning the burden of proof and the evaluation of evidence. Courts and arbitral tribunals do not enjoy discretion to abstain from applying these rules and instead decide the issues on a discretionary basis. A provision to this effect has recently been included in Swedish law through an amendment to the Act, whereby a new provision (section 27a, para. 3) provides that the arbitrators may base the award on *ex aequo et bono* considerations only if the parties have authorized them to do so. This is a principle that was applied also in earlier law, but the rule has now found its way into the Act.

Under Swedish law, there is a single general procedural rule that allows estimates of reasonableness when determining the damage in quantitative terms. The provision in Chapter 35, section 5 of the Code of Judicial Procedure (which can also be applied in arbitration proceedings) provides that if full proof cannot be presented at all, or only with difficulty, the court may estimate the damage at a reasonable amount. This may also be done provided that adduced proof can be assumed to involve costs or inconvenience that are disproportionate to the amount of the damage and the claimed compensation concerns only a lower amount.

Thus, the provision only gives the tribunal a mandate, under certain conditions, to estimate damage incurred as a reasonable amount.

3.6 My comments

The incorrect application of rules governing the assessment of evidence, or rules governing reliance on proof or the burden thereof, does not normally constitute a procedural error; instead, it constitutes a substantive, non-challengeable error. However, failure to apply the rules pertaining to evidence and the rendering of an arbitrary award instead can obviously be deemed to constitute a procedural error.

It should also be mentioned that according to Article 29 of the SCC Rules 2010, an arbitration panel may appoint an expert to express an opinion on specific questions in the event the arbitration panel lacks sufficient expertise to assess the evidence.

In the present case, a discretionary assessment has been made of a cost which was not based on law, the parties' presentation of their respective positions or any agreement by the parties. The Arbitral Tribunal may thereby have deviated from the procedural rules that the parties assumed would apply in the arbitration. From a general standpoint, the Arbitral Tribunal may thereby have committed a procedural error. However, it should be noted that the documentation in the matter is insufficient to pass any final judgment on the question.

As highlighted above, another requirement that must also be satisfied in order to set aside an award due to a procedural error is that the error probably affected the outcome. This requirement is not dealt with here.

3.7 The third challenge ground, the administrative secretary to the Tribunal was involved in decision-making

In its third challenge ground, Gazprom alleged that, contrary to an agreement by the parties that the administrative secretary should only perform administrative duties, the Arbitral Tribunal had allowed the secretary to be involved in the adjudication of the dispute by assigning to the secretary the task of writing the reasons for the award and partaking in the deliberations of the Tribunal. According to Gazprom, this gave rise to two challengeable procedural errors. The first error was that the Tribunal had assigned to the secretary tasks that the arbitrators were mandated to perform according to the parties' agreement. The second procedural error was that the arbitrators had allowed the administrative secretary to influence the outcome of the award despite the fact that the secretary was not appointed as arbitrator. This constituted an excess of mandate on the part of the Tribunal or, alternatively, a procedural error which probably affected the outcome.

To substantiate its allegations, Gazprom submitted a report by an expert in linguistic analysis regarding the authorship of the reasons in the award. In the

report, the expert concluded that it was extremely likely that the secretary wrote significant portions of the reasons.

In support of its assertions, Gazprom referred to a number of legal sources such as the SCC Rules of Arbitration, as worded since 2017 and which include rules pertaining to administrative secretaries and the SCC Guidelines for Arbitrators. Gazprom also cited UNCITRAL: Notes on Organizing Arbitral Proceedings, the ICC Practice Note – Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration and the Young ICCA Guide on Arbitral Secretaries. The essence of these rules and guidelines appears to be that the arbitral tribunal may not delegate to an administrative secretary decision-making functions or the performance of any essential duties of an arbitrator. Gazprom also referred to the discussion regarding administrative secretaries caused by the challenge proceedings in the case between former shareholders in Yukos Oil and the Russian Federation.

Moreover, Gazprom referred to a recent challenge case decided by the Svea Court of Appeal on 24 November 2017 in case no. T 10896-16. This case seems to be of a particular value as the Svea Court of Appeal was intended to adjudicate the challenge currently under discussion.

In case T 10896-16 the parties had agreed to the arbitral tribunal appointing an administrative secretary. The party challenging the award alleged that, in violation of the parties' instructions and the arbitrators' mandate, the tribunal had used the secretary not only for purely administrative duties but also for substantive legal work, such as preparing draft recitals and draft procedural decisions and reviewing the grounds and the parties' arguments as to matters proven through the evidence. The challenging party also claimed that large parts of its case were not referred to in the recitals, with the result that the tribunal had not taken note of them. Had the work not been delegated to the secretary, this would not have occurred.

Both the chairman and the administrative secretary gave evidence in the appellate court. The secretary testified that she had participated in drafting the recitals by including in them the parts of the written submissions considered relevant, based on the chairman's instructions. According to the secretary's testimony, the chairman reviewed the document, gave instructions and worked on the text himself. The chairman testified that he had full control over all documents and that all work performed by the administrative secretary had been under his supervision and subject to his control.

The Court of Appeal found that the instructions given to the arbitration tribunal, namely that the parties expected the arbitrators to prepare the recitals, procedural decisions, etc. did not mean that the administrative secretary was precluded from participating in the drafting of the recitals in the manner she did. The expression "prepare" must be understood to refer to the final version of the document. The Court of Appeal stated that it had been shown that the tribunal did not delegate to the administrative secretary responsibility for the final

version of the recitals. Nor was there any evidence to show that her work had affected the decisions taken by the arbitrators. Instead, according to the Court of Appeal, such work seemed to be in line with what is customary in arbitration proceedings where an administrative secretary is appointed. Accordingly, no excess of mandate or procedural error had occurred. The Court of Appeal denied leave to appeal to the Supreme Court.

3.8 My comments

The appellate court's reasons seem to indicate that the duties delegated to the administrative secretary may not contravene the parties' instructions and the duties performed by the secretary must not influence the outcome of the award. This seems to be perfectly in line with the international sources referred to above.

Arbitration is based on the premise that the arbitrators who have been mandated by the parties shall decide and prepare the award. Thus, it is the arbitrators' prerogative to decide on the contentious issues referred to them. The mandate given to the arbitrators is of a personal nature and duties thereunder cannot be performed by anyone else. In order to fulfil their duties, it is incumbent on the arbitrators that they do not allow others, such as an administrative secretary, to influence their decisions. Thus, a secretary cannot be tasked with deciding on substantive or procedural matters or to present proposals as to how these matters should be decided. This may also be the case in the very unlikely scenario that the parties have instructed the arbitrators to so utilize the services of a secretary. In the event the secretary has participated in the decision-making progress contrary to the parties' instructions, this constitutes a challengeable error.

As stated above, the party challenging the award bears the burden of proving that an excess of mandate or a procedural error was committed and that the error probably affected the outcome. If it is unclear to what extent and in what way an administrative secretary has participated in preparing the award, the outcome should be based on whether the party challenging the award has proven its allegations.

In the event the arbitrators have allowed an administrative secretary to prepare a considerable part of the reasons for the award, a challengeable error has been committed. It is unclear whether this constitute an error pursuant to the challenge ground concerning excess of mandate (subsection 3) or a procedural error (subsection 7). The fact that the arbitrators can hardly be said to have exceeded their mandate, but rather have failed to perform the mandate entrusted to them, may constitute a reason for considering the error to constitute a procedural error pursuant to subsection 7. This would mean that, in the proceedings, the Gazprom would have to prove that the error probably affected the outcome and that the error was not imputable to Gazprom.

With respect of the first requirement, it is of interest that, in the case reported in NJA 2019, p. 382, the Supreme Court clarified that a presumption that an error has affected the outcome may be justified in some cases by the fact that, by their nature, it is difficult to prove that certain errors have affected the outcome of the case, while at the same time they may have the consequence that it may be seriously questioned whether or not the proceedings have been acceptable. This reasoning may be applicable in a case such as the present one, as it would be extremely difficult to assess the allegations that parts of the reasoning were prepared by the administrative secretary, the extent to which this had taken place, and which parts of the award were affected by the error.