ABBREVIATIONS AND ACRONYMS

ACQ	Annual Contract Quantities
A-RfA	Answer to the Request for Arbitration
Arbitration Agreement	Art. 10 of the Contract
Art(s).	Article(s)
Bcm	Billion cubic meters of natural gas
CER-*x*	Claimant's expert reports
C-I	Statement of Claim
C-II	Response to the Counterclaim
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant, Gasum or Counter- Respondent	Gasum Oy
Commission Gazprom Decision	Decision of the European Commission of 24 May 2018 "relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement" (Doc. CL-33/RBB-8)
Contested Invoices	Invoices contested by Gasum in this arbitration (see Joint Table of Invoices)
Contract	"Contract for the Sale and Purchase of Natural Gas", originally entered into on 12 March 1994, supplemented by 20 addenda
Contracts Act	Swedish Contracts Act (SFS 1915:218)
Contract Price	Price to be paid by Gasum for the off-taken natural gas
C-PHB	Claimant's Post-Hearing Brief
C-SC	Claimant's Submission on Costs
C-SCII	Claimant's comments to Respondent's Submission on Costs

CWS-*x*	Claimant's witness statements
Decree No. 172 or Decree	Decree issued by the President of the Russian Federation on 31 March 2022 "On the special procedure for the fulfilment by foreign buyers of obligations to Russian natural gas suppliers"
Doc. C-*x*	Claimant's factual exhibits
Doc. CL-*x*	Claimant's legal authorities
Doc. R-*x*	Respondent's factual exhibits Doc.
RL-*x*	Respondent's legal authorities
Down Payment	[REDACTED]
EEA	European Economic Area
EU	European Union
EU FAQ	"Frequently Asked Questions" issued by the EU Commission on 22 April 2022 EUR Euro
Exceptionality Clause	Art. 5 of Addendum 18 to the Contract
First Hardship Claim	Hardship Claim
Force Majeure Clause	submitted by
Gazprom Commitments	Gasum on 23 January 2020 Art. 9 of the Contract
	Commitments offered by Gazprom to the EU Commission in 2018 (Doc. CL-63)
GILP	Gas Interconnection Poland-Lithuania
H-*x*	Parties' demonstrative exhibits produced at the Hearing Hardship
Clause	Art. 11.7 of the Contract
Hearing	Evidentiary hearing held on 24, 26, 27 and 28 September 2022 in Stockholm
Historic Gas Price	Contract Price established in Art. 5 of Addendum 15 to the Contract
Hub Price	[REDACTED]
HT, Day *x*, p. *x*, l. *x*	Hearing Transcript, Day, Page, Line
Joint Table of Invoices	Table of invoices submitted jointly by the Parties on 17 October 2022
K Accounts	Special "K" type accounts that buyers of gas must open in Gazprombank pursuant to Decree No. 172

LNG	Liquefied natural gas
Make-Up Gas	Differed delivery of not off-taken gas to following years
MinAQ Obligation	Obligation to take-or-pay for a minimum annual quantity of gas MinDQ
Obligation	Obligation to take-or-pay for a minimum daily quantity of gas Neste
Neste Oy, a Finnish State-owned company	
New Table	Table "Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate" published by the Bank of Finland
P(p).	Page(s)
Para(s).	Paragraph(s)
Parties	Gasum and GPE
PCA	Permanent Court of Arbitration
[REDACTED]	[REDACTED]
RER-*x*	Respondent's expert reports
	Gazprom export LLC
Respondent, GPE or Counter-Claimant	
RfA	Request for Arbitration
R-I	Respondent's Response to the Claim and Counterclaim
R-II	Respondent's Note Explaining the Relevance of Evidence
R-PHB	Respondent's Post-Hearing Brief
R-SC	Respondent's Submission on Costs
R-SCII	Respondent's comments to Claimant's Submission on Costs
RUB	Rubles
RWS-*x*	Respondent's witness statements
Second Hardship Claim	Hardship Claim submitted by Gasum on 20 December 2021 SEK
Swedish Krona	
Table 3.2.9	Table referred to in Art. 6.1 of the Contract
TFEU	Treaty on the Functioning of the European Union
USD	United States Dollars
Third Hardship Claim	Hardship Claim submitted by Gasum on 3 May 2022 Waiver
Clause 2020	Art. 4 of Addendum 18 to the Contract
Waiver Clause 2021-2023	Art. 6 of Addendum 19 to the Contract

I. PERSONS INVOLVED IN THE ARBITRATION

1. The Parties

1.1 Claimant and Counter-Respondent

1. The Claimant is Gasum Oy, a company organized under the laws of Finland, with VAT no. FI 09698193 ["Gasum", "Claimant" or "Counter-Respondent"]. The contact details of Gasum are as follows:

Mr. Mika Wiljanen, CEO
Gasum Oy
Revontulenpuisto 2 C
FI-02151 Espoo,
Finland
Email: mika.wiljanen@gasum.com

2. Claimant is represented in these proceedings by: Mr.
Anders Forss
Mr. Jussi Nieminen Ms.
Ilona Karppinen
Castren & Snellman Attorneys Ltd PO
Box 233, FI-00131 Helsinki, Finland
Emails: anders.forss@castren.fi
jussi.nieminen@castren.fi
ilona.karppinen@castren.fi

Mr. Robin Oldenstam Mr.
Kristoffer Löf
Mr. Andreas Johansson Ms.
Hanne Aarsheim
Mannheimer Swartling AdvokatbyrA AB PO Box
1711, 111 87 Stockholm,
Sweden
Emails: robin.oldenstam@msa.se
kristoffer.lof@msa.se
andreas.johansson@msa.se
hanne.aarsheim@msa.se

1.2 Respondent and Counter-Claimant

3. The Respondent is Gazprom export LLC, a company organized and existing under the laws of the Russian Federation, with VAT no. 7729717374 ["GPE", "Respondent" or "Counter-Claimant"] and with the following contact details:

   Ms. Elena V. Burmistrova, Director General, Mr. Dmitry Averkin, Deputy Director General Gazprom export LLC
   2a, Ostrovskogo Sq., Litera A Saint Petersburg 191023 Russian Federation
   Emails: e.burmistrova@gazpromexport.gazprom.ru d.averkin@gazpromexport.gazprom.ru

4. Respondent is represented in these proceedings by: Mr. Vladimir Khvalei
   Mr. Roman zykov
   Ms. Alexandra Shmarko Mansors
   Dukhovskoy pereulok, 17 bld 12, 4th Floor
   Moscow, 115191,
   Russian Federation
   Email: vladimir.khvalei@mansors.com roman.zykov@mansors.com alexandra.shmarko@mansors.com

   * * *

5. The Tribunal shall refer to Gasum and GPE jointly as the "Parties" and individually as a "Party".

2. The Arbitral Tribunal

6. On 13 May 2022 Claimant appointed as arbitrator Mr. Yves Derains, whose contact details are: Mr. Yves Derains
   Derains & Gharavi 25,
   rue Balzac
   75008 Paris France
   Email: yvesderains@derainsgharavi.com

7. On 15 June 2022 Respondent appointed as arbitrator Prof. Dr. Klaus Peter Berger, whose contact

details are as follows:
Prof. Dr. Klaus Peter Berger
Hoelderlinstrasse 38
50968 Koeln Germany
Email: kpberger@netcologne.de

8. On 6 July 2022 the co-arbitrators appointed Prof. Dr. Juan Fernández-Armesto as "umpire" ["President of the Tribunal"], in accordance with Art. 10.4 of the Contract [1], whose contact details are:

Prof. Dr. Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas 102, 8° izda.
28006 Madrid spain
Email: jfa@ifarmesto.com

9. The members of the Tribunal confirm that they are impartial and independent and that they have disclosed, to the best of their knowledge, all circumstances likely to diminish the Parties' confidence in their impartiality or independence.

3. Permanent Court of Arbitration

10. The Permanent Court of Arbitration ["PCA"] has been designated to manage amounts deposited by the Parties to cover the Tribunal's fees and expenses. The contact details of the PCA are as follows:

Permanent Court of Arbitration Attn: Mr.
Martin Doe
Peace Palace
Carnegieplein 2 2517
KJ The Hague The
Netherlands
Email: mdoe@pca-cpa.org

4. The Administrative Secretary

11. On 12 July 2022 the Parties agreed on the appointment of Ms. Sofia de Sampaio Jalles to act as Administrative Secretary, in order to perform the support requested by the Tribunal in accordance

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[1] Doc. C-1, Art. 10.4: "[…] The two arbitrators shall elect an umpire. If, within 30 days after the appointment of the second arbitrator, the arbitrators do not reach an agreement on the election of the umpire, the latter will be appointed, upon request of any of the Parties, by the President of the Chamber of Commerce in Stockholm. In this case the umpire is considered to be neither citizen of Russia nor Finland."

with para. 26 of the Terms of Appointment [2]. All notifications and communications should be addressed at:

Ms. Sofia de Sampaio Jalles
Armesto & Asociados
General Pardiñas, 102, 8° izda.
28006 Madrid Spain
Email: ssi @jfarmesto.com

II. PROCEDURAL HISTORY

1. The Arbitration Agreement

12. The present arbitration arises out of or in connection with the "Contract for the Sale and Purchase of Natural Gas", originally entered into by Respondent and Claimant's predecessor, Neste Oy, on 12 March 1994, which has since been altered and supplemented by 20 addenda [hereinafter collectively referred to as the "Contract"] [3].

13. By Request for Arbitration dated 13 May 2022 ["RfA"], Gasum sought to initiate arbitration proceedings against Gazprom under Art. 10 of the Contract, which contains the following arbitration agreement [4] ["Arbitration Agreement"]:

"ARTICLE 10 ARBITRATION

10.1 The Parties shall try to settle in an amicable way all controversies and/or disagreements which may arise out of or in connection with this Contract.

10.2 Failing a friendly agreement on any controversy and/or disagreement, except those provided for in Article 4.4., the same shall be settled by Arbitration having its seat in Stockholm (Sweden).

10.3 The Board of Arbitration shall consist of two arbitrators and an umpire.

10.4 The Party which desires to apply to Arbitration in order to settle any controversy and/or disagreement under this Contract shall give notice of it to the other Party by registered letter, indicating the name and address of the appointed arbitrator, who may be a citizen of any country, and the subject of the controversy and/or disagreement.

Within 30 days from the receipt of the said letter the other Party shall designate its arbitrator, who may be also a citizen of any country, and give notice of it to the first Party by registered letter

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[2] Terms of Appointment of 1 August 2022 signed by the Parties and the members of the Tribunal.

[3] Doc. C-1 (Original Contract and Addenda 1 to 19) and Doc. C-22 (Addendum 20).

[4] Doc. C-1, Art. 10.

indicating the name and address of the appointed arbitrator.

Should the Party which was given notice of the submission of the controversy and/or disagreement to Arbitration not nominate its arbitrator within the fixed period of time, then such arbitrator, upon request of the other Party, shall be appointed by the President of the Chamber of Commerce in Stockholm. The two arbitrators shall elect an umpire. If, within 30 days after the appointment of the second arbitrator, the arbitrators do not reach an agreement on the election of the umpire, the latter will be appointed, upon request of any of the Parties, by the President of the Chamber of Commerce in Stockholm. In this case the umpire is considered to be neither citizen of Russia nor Finland.

The arbitration award shall be made by a majority of votes within 3 months from the date of the election or appointment of the umpire. Any dispute arising from this Contract is to be decided in accordance with it's [sic] provisions and the laws of Sweden.

10.5 The arbitration costs shall be assessed by the Arbitration.

[REDACTED]

10.7 The arbitration award shall be final and binding upon both Parties."

2. Seat of arbitration, language and applicable law

14. The Parties have agreed that the seat of the arbitration is Stockholm, Sweden, in accordance with Art. 10.2 of the Contract [5].

15. The language of the arbitration is English in accordance with para. 41 of the Terms of Appointment.

16. Art. 10.4 of the Contract provides that:
"Any dispute arising from this Contract is to be decided in accordance with it's [sic] provisions and the laws of Sweden."

17. Furthermore, pursuant to para. 35 of the Terms of Appointment, the arbitration procedure is governed by the Terms of Appointment, the agreement between the Parties, and the determinations by the Tribunal. Considering that the seat of the arbitration is Stockholm, Sweden, the procedural rules of Swedish law applicable to arbitration are applied subsidiarily to all procedural matters. Mandatory procedural provisions of Swedish arbitration law shall in any case be respected.

3. Commencement of the arbitration

18. On 13 May 2022 Claimant filed a RfA against Respondent and appointed Mr. Derains to act as arbitrator in the arbitration. The RfA was accompanied by Docs. C-1 to C-7 and Docs. CL-1 and CL-2.

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[5] Terms of Appointment, para. 30.

19. Respondent filed its Answer to the RfA and Counterclaim ["A-RfA"] on 15 June 2022, appointing Prof. Dr. Berger as arbitrator. The A-RfA was accompanied by Docs. R-1 to R-16 and Docs. RL-1 to RL-19.

20. On 6 July 2022 the co-arbitrators appointed Prof. Dr. Fernández-Armesto as President of the Tribunal.

21. On 8 July 2022 the Arbitral Tribunal set the proceedings in motion by issuing communication A 1.

22. On 13 July 2022 the Arbitral Tribunal and the Parties held virtually a first procedural conference, during which they discussed the conduct of the proceedings and the applicable procedural timetable.

4. Terms of Appointment and Procedural Order No. 1

23. On 15 July 2022 the Arbitral Tribunal sent the Parties a draft of the Terms of Appointment and draft Procedural Order No. 1, together with the Procedural Timetable, for the Parties' comments [6].

24. On 25 July 2022 Claimant filed its comments to both drafts [7]. On 26 July 2022 Respondent answered these comments and made further suggestions to both drafts [8]. On 27 July 2022 the Tribunal granted Claimant the opportunity to reply to Respondent's suggestions [9], which Claimant did on 29 July 2022 [10].

25. On 1 August 2022 the Tribunal issued the final version of the Terms of Appointment for signature, as well as Procedural Order No. 1 and the procedural calendar.

26. On 9 August 2022 the Administrative Secretary circulated the Terms of Appointment signed by the Parties and the members of the Tribunal.

5. Written submissions

A. Statement of Claim

27. On 17 July 2022 [11] Claimant filed its Statement of Claim ["C-I"] together with the following evidence:

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[6] Communication A 3.
[7] Communication C 12.
[8] Communication R 7.
[9] Communication A 5.
[10] Communication C 13.

[11] As amended on 18 July 2022, pursuant to Claimant's request (communication C 9) and the Tribunal's leave (communication A 4) for Claimant to file a revised Statement of Claim with minor corrections.

- Factual exhibits C-8 to C-130;

- Legal authorities CL-3 to CL-80;

- The witness statements of Mr. Jouni Haikarainen, former senior vice president at Gasum ["CWS-1"]; Mr. Dan Sandin, former head of Gasum's portfolio management ["CWS-2"]; Mr. Jouni Liimatta, Head of Trading and Optimizing at Gasum ["CWS-3"]; Mr. Anders Malm, Senior Vice President for Portfolio Management and Trading at Gasum ["CWS-4"]; and Mr. Mika Wiljanen, Chief Executive Officer of Gasum ["CWS-5"]; and

- The expert reports of: Dr. Leena Sivill and Matthias Laue of AFRY Management Consulting ["CER-1"]; Professor Boel Flodgren, from the department of Business law, School of Economics and Management of Lund University, Sweden ["CER-2"]; Messrs. Benoit Durand, Francesco Rosati, Nuno Alvim and Ms. Paula Makela of RBB Economics ["CER-3"]; Judge Christopher Vajda QC, former judge of the United Kingdom and Northern Ireland at the Court of Justice of the European Union ["CER-4"]; and Mr. Anders Tallberg, Senior Fellow, Hanken and SSE Executive Education ["CER-5"].

Motion to exclude evidence

28. On 12 August 2022 Respondent filed a motion to exclude evidence presented by Claimant with its Statement of Claim [12]. Claimant responded to this motion on 18 August 2022 [13]. On 19 August 2022 the Arbitral Tribunal dismissed Respondent's motion, on the basis that it lacked legal grounds [14].

B. Response to the Claim and Counterclaim

29. On 30 August 2022 Respondent filed its Response to the Claim and Counterclaim [15] ["R-I"] together with the following evidence:

- Factual exhibits R-18 to R-121;

- Legal authorities RL-22 to RL-99;

- The witness statement of Mr. Igor Telenchak, Deputy Head of Department of gas exports for North and South-West Europe, Head of Directorate of South-West Europe and Baltic States of GPE ["RWS-1"]; and

- The legal opinion of Professor Christina Ramberg ["RER-1"]; the expert report of Dr. Peters from Gas Value Chain Company ["RER-2"]; and the expert report of Ms. Olga Maydanik and Mr. Vladimir Nefediev from Technologies of Trust - Consulting LLC (formerly PricewaterhouseCoopers Advisory

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[12] Communication R 12.

[13] Communication C 16.

[14] Communication A 10.

[15] As corrected and resubmitted on 30 August 2022 with communication R 13.1.

LLC) ["RER-3"].

C. Response to the Counterclaim

30. On 11 September 2022 Claimant filed its Response to the Counterclaim [16] ["C-II"] together with the following evidence:

- Factual exhibits C-131 to C-148;

- Legal authorities CL-82 to CL-133;

- The second witness statements of Mr. Jouni Haikarainen, former senior vice president at Gasum ["CWS-6"] and Mr. Mika Wiljanen, Chief Executive Officer of Gasum ["CWS-7"]; and

- The second expert report of AFRY ["CER-6"].

D. Additional evidence

31. On 13 September 2022 Respondent filed an application with the Tribunal, asking for [17]:

- The exclusion of certain sections of the Response to the Counterclaim and evidence filed therewith from the record; or

- Alternatively, an opportunity to address the arguments presented by Gasum in the Response to the Counterclaim, including filing of the reply, expert reports and witness statements, by the end of 22 September 2022.

32. After hearing Gasum [18], the Tribunal granted Respondent the opportunity to marshal evidence in accordance with para. 15 of Procedural Order No. 1 *(i.e.,* strictly limited to evidence that could not have been previously filed into the record and which becomes necessary in view of the arguments raised and the evidence marshalled with Claimant's Response to the Counterclaim), and if necessary, to file a short note explaining the relevance of such evidence, by Sunday 18 September 2022, not later than 19:00h CET [19].

33. Accordingly, on 18 September 2022 GPE filed a Note Explaining the Relevance of Evidence ["R-II"], together with the following evidence [20]:

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[16] Communication C 21.

[17] Communication R 14.

[18] Communication C 22.

[19] Communication A 15, para. 27.

[20] Communication R 17.

- Factual exhibits R-122 to R-134;

- Legal authorities RL-100 to RL-117;

- The second witness statement of Mr. Igor Telenchak, Deputy Head of Department of gas exports for North and South-West Europe, Head of Directorate of South-West Europe and Baltic States of GPE ["RWS-2"] [21] and the first witness statement of Mr. Yury Borisovich Diyachenko, Head of Trading and Auctions Department of GPE ["RWS-3"].

34. As authorized by the Tribunal, Respondent further provided a detailed description of two experts reports to be filed no later than 20 September 2022. Accordingly, on 20 September 2022 Respondent filed on the record:
- The second expert report of Dr. Peters from Gas Value Chain Company ["RER-4"] and the second expert report of Ms. Olga Maydanik and Mr. Vladimir Nefediev from Technologies of Trust - Consulting LLC ["RER-5"].

6. Hearing

35. In July and August 2022, the Parties and the Tribunal exchanged several submissions regarding the modality of the evidentiary hearing ["Hearing"]. On 1 August 2022 the Tribunal decided to hold a hybrid Hearing, with each Party and its team connecting remotely from their preferred location, and the three members of the Tribunal meeting at a same location, different from that of the Parties and their counsel [22]. On 16 August 2022 the Tribunal decided to reconsider its decision and to hold the hearing in person in Stockholm, Sweden [23].

36. On 5 September 2022 the Tribunal sent the Parties a draft Procedural Order on the organisation of the Hearing [24]. The Parties submitted their joint comments to the draft Procedural Order on 16 September 2022. On 19 September 2022 the Parties and the Tribunal held virtually a pre-Hearing conference, during which they discussed the Parties' comments to the draft Procedural Order. On 21 September 2022 the Tribunal issued Procedural Order No. 2 [25].

37. The Hearing took place on 24, 26, 27 and 28 September 2022 at the Grand Hotel, located in Södra Blasieholmshamnen 8, 103 27 Stockholm, Sweden.

38. The following factual and expert witnesses attended the Hearing and were examined by counsel to the Parties:
- Mr. Jouni Liimatta, Head of Trading and Optimizing at Gasum;

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[21] On 20 September 2022 GPE filed a corrected version of this witness statement.

[22] Communication A 6.
[23] Communication A 9.
[24] Communication A 13.
[25] Communication A 16.

- Mr. Dan Sandin, former head of Gasum's portfolio management;

- Mr. Mika Wiljanen, Chief Executive Officer of Gasum;

- Mr. Igor Telenchak, Deputy Head of Department of gas exports for North and South-West Europe, Head of Directorate of South-West Europe and Baltic States of GPE;

- Dr. Leena Sivill and Mr. Matthias Laue of AFRY Management Consulting;

- Dr. Peters from Gas Value Chain Company;

- Ms. Olga Maydanik and Mr. Vladimir Nefediev from Technologies of Trust - Consulting LLC;

- Professor Boel Flodgren, from the department of Business Law, School of Economics and Management of Lund University, Sweden; and

- Professor Christina Ramberg, professor of private law in the Department of Law at Stockholm University.

39. The Parties produced demonstratives H-1 to H-5 [26] at the Hearing.

40. The Hearing was recorded and transcribed, and the Parties and the Tribunal were provided with the Hearing transcript ["HT"].

41. At the end of the Hearing, the Tribunal asked the Parties if there were any due process issues that the Parties would like to raise. The Parties confirmed that their due process rights had been respected throughout the proceedings [27].

7. Post-Hearing submissions

42. At the end of the Hearing, the Parties and the Tribunal discussed the post-Hearing phase. The Parties and the Tribunal's agreements were reflected in Procedural Order No. 3.

43. The Parties filed their post-Hearing briefs on 13 October 2022 [28] [the Tribunal shall refer to Claimant's post-Hearing brief as "C-PHB" and to Respondent's as "R-PHB"].

44. On 17 October 2022 the Parties filed a "Joint Table of Invoices".

45. The Parties filed their submissions on costs on 27 October 2022 [29] [the Tribunal shall refer to Claimant's submission on costs as "C-SC" and to Respondent's as "R-SC"]. And on 28 and 29 October

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[26] "H-1" – Claimant's Opening Presentation; "H-2" – Respondent's Opening Presentation; "H-3" – Presentation by AFRY; "H-4" – Presentation by Dr. Peters; "H-5" – Presentation by TeDo.
[27] HT, Day 4, p. 104, ll. 1-22.

[28] The Parties agreed to an extension of the deadline for the filing of the post-Hearing briefs (see communication A 17).
[29] The Parties agreed to an extension of the deadline for the filing of the Submissions on Costs (see communication A 18).

2022 Gasum and GPE, respectively, filed comments to the other Party's submission on costs ["C-SCII" and "R-SCII"].

8. Evidence

46. Claimant has marshalled the following evidence in the proceedings: Factual exhibits C-1to C-148

Legal authorities CL-1 to CL-134

Witness statements CWS-1 to CWS-7

Expert reports CER-1 [30], CER-2 [31], CER-3 [32], CER-4 [33], CER-5 [34], CER-6 [35]

47. Respondent has submitted the following evidence in the course of the arbitration: Factual exhibits R-1 to R-140

Legal authorities RL-1 to RL-118

Witness statements RWS-1 to RWS-3

Expert reports RER-1 [36], RER-2 [37], RER-3 [38], RER-4 [39], RER-5 [40]

48. The Arbitral Tribunal has reviewed and examined all the evidence submitted by both Parties and discussed it at length throughout this Award.

9. Costs of the Arbitration

49. In accordance with Section 38 of the Swedish Arbitration Act, the Parties were invited to establish a

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[30] Together with exhibits AFRY-1 to AFRY-37.
[31] Together with exhibits BF-1 to BF-48.
[32] Together with exhibits RBB-1 to RBB-29.
[33] Together with exhibits CV-1 to CV-44.
[34] Together with exhibits AT-1 to AT-10.
[35] Together with exhibits AFRY-38 to AFRY-47.
[36] Together with exhibits CR-1 to CR-22.
[37] Together with exhibits WP-1 to WP-32.
[38] Together with exhibits TEDO-1 to TEDO-110 and TEDO-129 to TEDO-204, and Appendices.
[39] Together with exhibits WP-33 and WP-34.
[40] Together with exhibits TEDO-205 to TEDO-248 and resubmitted TEDO-136.

deposit for the Tribunal's fees and expenses. The Parties deposited [REDACTED] each.

50. The costs of the arbitration shall be established in section VI.2 *infra.*

10. Time period for issuance of the award

51. Pursuant to Art. 10.4 of the Contract:
"The arbitration award shall be made by a majority of votes within 3 months from the date of the election or appointment of the umpire."

52. Considering that the President of the Tribunal was appointed by the co-arbitrators on 6 July 2022, the deadline of three months for the issuance of the award would expire by 6 October 2022. However, the Parties agreed to extend the deadline for the issuance of the award until 15 November 2022 [41].

53. The present award is issued within the established deadline.

11. Signature of the award

54. Subject to any requirements of mandatory law that may be applicable, the Parties have agreed that any award be signed by the members of the Arbitral Tribunal in counterparts, and that all such counterparts be assembled in a single electronic file and notified to the Parties by email or any other means of telecommunication that provides a record of the sending thereof [42].

55. Hard copies of the award will thereafter be dispatched to the Parties at the addresses of their legal representatives identified in section I.1 *supra* [43].

III. FACTUAL BACKGROUND

56. The Parties' dispute arises out of or in connection with the Contract for the Sale and Purchase of Natural Gas [previously defined as the "Contract"]. The Parties discuss Gasum's obligation to take- or-pay for a minimum annual quantity of gas [the "MinAQ Obligation"], the obligation to take-or-pay for a minimum daily quantity of gas [the "MinDQ Obligation"] and Gasum's right to terminate the Contract.

1. The Contract

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[41] Terms of Appointment, para. 55.

[42] Terms of Appointment, para. 58.

[43] Terms of Appointment, para. 59.

57. Under the Contract, Gasum - a Finnish State-owned company - is obliged to take and pay, or, if not taken, pay for certain minimum volumes of natural gas each year. GPE - the export arm of the Russian State-owned gas company Gazprom PJSC -is obliged, in turn, to deliver the gas to Gasum at the Russian-Finnish border in Raikkola, Imatra [44].

A. Execution of the Contract

58. A long-term gas supply contract offers the seller constant cash-flows and guaranteed market sales for an extended period. It also incentivizes the seller to invest in the infrastructure required for the production and transportation of the natural gas. The buyer, in turn, obtains the availability and supply of the specified quantities of gas during the term of the contract [45].

59. In 1971, the USSR and Finland signed an Intergovernmental Agreement on the construction of the USSR-Finland pipeline to arrange for gas supplies to Finland -a country that has no natural gas of its own and until recently was, in relation to natural gas, isolated from the rest of Western Europe, having no access to other pipelines [46].

60. The construction of the pipeline, financed by the USSR Ministry of Oil and Gas Industry (the predecessor of Gazprom PJSC) [47], was completed in 1974. That same year, V/O Sojuznefteexport and Neste Oy ["Neste"], a Finnish State-owned company, signed the first contract for gas supply to Finland [48].

61. On 12 March 1994 Neste and VEP Gazexport (the predecessor of GPE) agreed to extend the supply of gas for 20 more years until 31 December 2014, and this agreement was formalized in the Contract which gives rise to this arbitration [49]. Later that year, Neste assigned the Contract to Gasum [50], with the plan to increase the annual consumption of natural gas in Finland and to construct new gas distribution networks.

62. When the Contract was signed, the natural gas market in Finland remained isolated from other European Union ["EU"] Member States [51]. Gasum had the monopoly of natural gas: it acted as sole importer, as sole system operator and as the only wholesale supplier. GPE, for its part, operated as the single supplier of natural gas [52], through Imatra, which was the only entry point for the import of gas into Finland [53].

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[44] Doc. C-1, Art. 2.

[45] R-I, p. 12.

[46] C-I, para. 43; R-I, para. 34.

[47] See R-I, para. 35.

[48] See R-I, para. 36.

[49] See R-I, para. 37.

[50] See R-I, para. 37. At the time, Gasum was a newly incorporated joint venture of Neste and RAO Gazprom (predecessor of Gazprom PJSC). Today, Gasum is a Finnish State-owned company.

[51] CER-2, fn. 87; Doc. AFRY-1: Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas dated 13 July 2009. "Isolated" refers to a Member State not directly connected to the interconnected system of any other Member State and having only one main external supplier (Art. 49).

[52] CER-2, para. 105 *et seq*.

[53] CER-2, para. 22.

B. Relevant parameters of the Contract until 2020

63. From 1994 to 2021 the Parties amended the Contract by agreeing to Addenda 1 through 20 [54]. These Addenda modified, *inter alia,* the supply volumes, the duration of the Contract, the price and the obligations of the Parties.

64. The Tribunal will provide a brief overview of the main contractual parameters that are relevant to understand the present dispute, including the main contractual modifications until 2020.

a. ACQ

65. Under the Contract, the Parties agreed that GPE is obliged to make available annually certain quantities of natural gas, which Gasum is entitled to off-take [the "Annual Contract Quantities" or the "ACQ"] [55]. The ACQ represents the total volume of gas expected to be supplied by GPE and off- taken by Gasum, under normal market conditions during a given delivery year [56].

66. When entering into the Contract in 1994, the Parties originally agreed to an ACQ of [REDACTED]. In the Contract, the Parties indicated that [REDACTED] [57].

67. The Parties subsequently agreed to increase this ACQ and extend their agreement: in Addendum 11 of 2005 Gasum and GPE *(pro memoria:* two monopolies controlled by the Finnish and Russian States, respectively) agreed to [REDACTED].

68. The trend inverted starting in 2011: the Parties progressively reduced the ACQ and, in parallel, further increased the duration of the Contract [58].

69. The most important amendment was Addendum 15 of 2015 [59]: the Parties agreed to reduce the ACQ [REDACTED] [60]; [REDACTED] [61].

b. MinAQ

70. Under the Contract and subsequent Addenda, the Parties also established minimum annual quantities that Gasum had to off-take [62] [the "Minimum Annual Quantities", or the "MinAQ"].

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[54] Doc. C-1 (Contract and Addenda 1 to 19) and C-22 (Addendum 20).

[55] Doc. C-1, Art. 2.1.

[56] CER-2, para. 20.

[57] Doc. C-1, Art. 2.1.

[58] Doc. C-1, [REDACTED] Doc. C-1, Addendum 13.

[59] This Addendum was signed after Gasum had brought an arbitration against GPE in 2015. The Parties settled their disagreements by signing Addendum 15.

[60] Doc. C-1, Addendum 15, Art. 1; CER-2, para. 23.

[61] Doc. C-1, [REDACTED]

[REDACTED] [63].

71. [REDACTED] [the "Down Payment"].

72. To mitigate the impact of this payment, Gasum was entitled to defer delivery of the not off-taken gas to the following years [the "Make-Up Gas"] [64]. Gasum could off-take the Make-Up Gas in any subsequent year, provided that Gasum had off-taken the MinAQ corresponding to such year [65]. [REDACTED] [66].

73. Addendum 15 of 2015 set the MinAQ at [REDACTED] [67].

C. Contract Price

74. Initially, the price [the "Contract Price"] derived from a formula set forth in [REDACTED] [68]:

[REDACTED]

75. [REDACTED] [69]:

76. First, in 2005 the Parties decided [REDACTED]:

- [REDACTED];

- [REDACTED]; and

- [REDACTED].

77. Second, through Addendum 15 of 2015 the Parties amended the Contract Price to [REDACTED] [70]:

- [REDACTED];

- [REDACTED] and

- [REDACTED].

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[62] Doc. C-1, Arts. 6.4, 7.2, 8.1.2; CER-2, para. 21.
[63] Doc. C-1, Art. 7.2.
[64] Doc. C-1, Art. 8.1; CER-2, para. 21.
[65] Doc. C-1, Art. 7.2.
[66] CER-2, para. 21.
[67] Doc. C-1, Addendum 15, Art. 2; CER-2, para. 23.

[68] Doc. C-1, Art. 5.6.
[69] Doc. C-1.
[70] Doc. C-1, Addendum 15, Art. 5.

d. Hardship Clause

78. The Contract contains the following "Hardship Clause" [71]:

[REDACTED]

e. Force majeure clause

79. Finally, the Contract comprises a "*Force Majeure* Clause", which provides that [72]:

[REDACTED]

80. In Addendum 17 of November 2019, Gasum (a company 100%-owned by Finland) and GPE (a Russian State-controlled company) decided to complement this *force majeure* provision by explicitly agreeing that [73]:

[REDACTED]

2. January 2020: Liberalization of Finnish market

81. Until the end of 2019 the Finnish gas market was subject to a double monopoly: GPE was the only supplier and Gasum the only buyer, transmitter and wholesaler of gas.

82. The 2017 Finnish Natural Gas Market Act put an end to this situation as of 1 January 2020 [74]. On that date, Gasum lost its monopolistic position as the sole supplier of natural gas and the Finnish market opened for competition [75]. The liberalization coincided with the commissioning of the "Balticconnector", a new pipeline connecting Finland and Estonia [76]. This implied that GPE ceased to be the only supplier of pipeline gas to Finland.

83. In parallel, Gasum was forced to unbundle its activities as transmission system operator and wholesale supplier: its function as transmission system operator was transferred to a new State- owned company, Gasgrid Finland [77].

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[71] Doc. C-1, Art. 11.7.

[72] Doc. C-1, Art. 9.

[73] Doc. C-1, Addendum 17, Art. 3.

[74] CER-2, para. 107. See also Doc. AFRY-10; Doc. AFRY-11; Doc. CL-5.

[75] C-I, para. 63.

[76] CER-2, para. 107.

[77] CER-2, para. 125.

3. First Hardship Claim (23 January 2020)

84. During 2018 and 2019, Gasum contacted GPE to discuss the continuation of the Contract after the forthcoming liberalization. GPE, however, indicated that the changes, if any, should be agreed upon once the liberalization had occurred and its actual effects could be gauged [78].

85. On 3 January 2020, three days after the liberalization of the natural gas market, Gasum indicated to GPE that it would like to meet to formally discuss the effects of the Balticconnector on its activities [79]. After a meeting on 22 January 2020, the Parties agreed that Gasum would submit a hardship claim [the "First Hardship Claim"] [80].

86. As agreed by the Parties, on 23 January 2020 Gasum submitted the First Hardship Claim, in which it requested to initiate negotiations pursuant to the Contract's Hardship Clause. Gasum referred to the following events in support of its Claim [81]:

- Gasum had lost nearly half of its market share after the Finnish gas market liberalization and the opening of the Balticconnector;

- The flow of natural gas from the Baltic countries through the Balticconnector to Finnish customers, sold at prices significantly lower than what Gasum could offer on the basis of the Contract Price, was affecting Gasum's ability to sell gas;

- There was a projected further loss of competitiveness as of June 2020, when the capacity of the Balticconnector was set to increase; and

- The volume commitments under the Contract were based on the total demand of natural gas in Finland (pursuant to Art. 2.1 of the Contract), but this was no longer in line with reality, since alternative natural gas suppliers had taken up a considerable share of the liberalized Finnish market.

87. Accordingly, Gasum sought to increase its competitiveness in the gas market and, therefore, to review the provisions of the Contract to [82]:

- Reasonably reduce the MinAQ Obligation;

- Reduce the price level; and

- Change the indexation of the Contract Price.

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[78] C-I, paras. 74, 226 and 383; R-I, paras. 138-155.
[79] Doc. C-126. See also CWS-1, para. 9.
[80] R-I, para. 195.
[81] Doc. C-32, p. 1.
[82] Doc. C-32, p. 1.

A. Addendum 18 (19 May 2020)

88. The First Hardship Claim led to negotiations between the Parties [83]. On 19 May 2020 Gasum and GPE amended the Contract by entering into Addendum 18 [84]. In that amendment, the Parties agreed to [85]:

- Decrease the ACQ from [REDACTED]

- Reduce the MinAQ from [REDACTED] and

- Amend the Contract Price formula, which now included [REDACTED]:

o [REDACTED]

o [REDACTED]

89. [REDACTED] [86], [REDACTED]

Waiver Clause 2020

90. [REDACTED] [87]:

[REDACTED]

B. Addendum 19 (14 August 2020)

91. On 30 April 2020 Gasum sent a new proposal to GPE, asking to extend the volumes conditions that had been agreed in Addendum 18 for 2020 to the remainder of the duration of the Contract (2021 - [REDACTED]). [REDACTED] [88].

92. After lengthy discussions [89], on 14 August 2020 the Parties concluded Addendum 19, revising the terms of the Contract for the period between 2021 and 2023, *inter alia*, as follows [90]:

- Decreasing the ACQ from [REDACTED];

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[83] See H-2, slide 18 and section V.3.1.3B.b *infra*.
[84] Doc. C-1, Addendum 18.
[85] Doc. C-1, Addendum 18. See also CER-2, para. 25.
[86] Doc. C-1, [REDACTED]

[87] Doc. C-1, Addendum 18, Art. 4.

[88] Doc. C-65; Doc. C-66; Doc. R-53.
[89] See H-2, slide 20 and section V.3.2.3A.a *infra*. See also Doc. C-39; Doc. C-41; Doc. C-42; Doc. C-67.
[90] Doc. C-1, Addendum 19. See also CER-2, para. 26.

- Reducing the MinAQ from [REDACTED]; and

- Amending the Contract Price formula, such that from 1 January 2021 onwards the Contract Price [REDACTED]

93. Addendum 19 only affected delivery years 2021 through 2023. Thereafter, if the Parties did not agree otherwise, the gas volume commitments would revert to the pre-liberalization levels [91] - *i.e.*, to the quantities stipulated in Addendum 15 [REDACTED].

MinDQ

94. [REDACTED] [92]: [REDACTED] [93]

[REDACTED]

Waiver Clause 2021-2023

95. [REDACTED] [94]:

[REDACTED]

96. [REDACTED]

4. Negotiations throughout 2021

A. January 2021: Payment for not off-taken MinAQ

97. On 20 January 2021 GPE invoiced Gasum [REDACTED] for not off-taken volumes under the MinAQ Obligation in the delivery year 2020 [95]. Gasum paid this amount but requests its repayment in this arbitration.

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[91] See H-1, slide 26.

[92] RWS-1, para. 36; CWS-2, para. 22.

[93] Doc. C-1, [REDACTED]

[94] Doc. C-1, Addendum 19, Art. 6.

[95] Doc. C-37. See also Joint Table of Invoices, row 2.

B. February 2021: Gasum's further request for negotiations

98. On 10 February 2021 Gasum sent a new communication to GPE, claiming material hardship [96]. Gasum stated that it had now witnessed the first full year of the liberalization of the natural gas markets in Finland, Estonia and Latvia, together with the start-up of commercial operations of the Balticconnector. These developments had led Gasum to lose market share and had prevented it from meeting its contractual volume obligations. Gasum again requested to initiate negotiations to revise the volume commitments under the Contract [97].

99. GPE's response came on 25 February 2021 [98]: GPE refused to treat the situation as material hardship or to decrease Gasum's volume commitments under the Contract [99]. According to GPE, the changes mentioned by Gasum "were not unexpected" and the Parties had already addressed them by entering into Addenda 18 and 19 [100]. Nevertheless, GPE offered to hold a meeting with Gasum to discuss these issues [101].

C. April-July 2021: First Contested Invoices

100. In an invoice dated 6 April 2021, GPE required Gasum to pay EUR [REDACTED] for MinDQ volumes not off-taken during the month of March 2021 [102]. This first invoice was followed by invoices dated 11 May 2021 [103], 7 June 2021 [104] and 5 July 2021 [105] for the MinDQ volumes not off-taken in April, May, and June 2021, respectively, which amounted to a total of EUR [REDACTED].

101. By letters of 22 April 2021 [106] and 1 June 2021 [107], Gasum contested these invoices [together with later invoices, the "Contested Invoices" [108]] [REDACTED] [109]:

[REDACTED]

102. [REDACTED] [110].

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[96] Doc. C-43.
[97] Doc. C-43.
[98] Doc. R-70.
[99] Doc. R-70, pp. 2-3 of the PDF.
[100] Doc. R-70, p. 2 of the PDF.
[101] Doc. R-70, p. 3 of the PDF.

[102] Doc. C-12.
[103] Doc. C-13.
[104] Doc. C-14.
[105] Doc. C-15.
[106] Doc. C-44.
[107] Doc. C-45.
[108] C-I, fn. 5. [REDACTED]
[109] Doc. C-44.
[110] Doc. C-70.

D. August 2021: Gasum's proposal for renegotiation of the Contract

103. On 26 August 2021 Gasum once more approached GPE to propose a renegotiation of the Contract terms [111]. Gasum's petition was supported by the following arguments, most of which coincided with the First Hardship Claim [112]:

- The liberalization of the natural gas markets in Finland and common market area with Estonia and Latvia together with the start-up of commercial operation of Balticconnector in the beginning of 2020, had resulted in Gasum's loss of market share;

- The competition with other Baltic players through the Balticconnector and the Imatra import point would significantly impact Gasum's sales of gas; and

- The Contract did not reflect the market conditions, nor how natural gas was marketed and procured by customers.

104. Although GPE did not accept Gasum's proposal for a revision of the Contract [113], the Parties did enter into negotiations [114].

E. November 2021: Gasum without prejudice payment of Contested Invoices

105. On 1 October 2021 Gasum sent a letter to GPE, in which it insisted on the hardship in meeting the MinAQ Obligation [115]. Claimant contested once more GPE's invoices for not off-taken MinDQ volumes [116]. Nevertheless, Gasum understood that GPE was not willing to negotiate unless the payment of the MinDQ Obligation was resolved [117]:

[REDACTED]

106. In order to find an amicable solution, Gasum was prepared to make [118]:

[REDACTED]

107. Accordingly, on 1 November 2021 Gasum paid to GPE [REDACTED], including interest for late

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[111] Doc. C-48; Doc. C-49; Doc. C-50.
[112] Doc. C-49.
[113] R-I, para. 249.
[114] R-I, paras. 249-252; CWS-2, paras. 29-32; CWS-4, para. 14 *et seq*.; RWS-1, para. 47.

[115] Doc. C-88, p. 1 of the PDF.
[116] Doc. C-88, p. 1 of the PDF *in fine*.
[117] Doc. C-88, p. 2.
[118] Doc. C-88, p. 2.

payment [119].

F. December 2021: GPE's revision proposal

108. As a follow-up, on 9 December 2021 GPE sent Gasum a proposal for revising the terms of supplies for 2021-2023, suggesting that Gasum pay the outstanding MinDQ penalties, that the ACQ be reduced to [REDACTED] (with the respective Contract prolongation), and that the MinDQ be set at [REDACTED] of the daily quantity, while the penalty for not meeting the MinDQ would be reduced to [REDACTED] of the value of the not off-taken gas [120]:

[REDACTED]

5. Second Hardship Claim (20 December 2021)

109. On 20 December 2021 Gasum requested GPE to reconsider this last proposal and to engage in further negotiations [the "Second Hardship Claim"] [121]. In support of its petition, Gasum argued again that its market share had plummeted following the market liberalization and the increased capacity of the Balticconnector. Gasum also argued that the unprecedented increase in natural gas prices in the second half of 2021 had led to a severe decrease in consumption [122].

110. Gasum threatened to contest the volume commitments and GPE's interpretation of the Contract with all legal measures available, and informed [123]:

"In the spirit of transparency, [...] that it has commenced a detailed analysis of the anti-competitive behavior of Gazprom and will be forced to take action on the basis of this analysis and the Contract, unless Gazprom agrees to a viable commercial solution."

111. On 30 December 2021 GPE rejected Gasum's Second Hardship Claim, arguing that the events alleged as the basis for such Claim were very similar to the events already considered and settled in the First Hardship Claim. Nevertheless, GPE restated its commitment to hold further negotiations and consultations with Gasum and, if necessary, to escalate this issue if no agreement could be found [124].

112. On 4 February 2022 Gasum sent an email to GPE concerning GPE's proposal of 9 December 2021 [125]. Gasum would be willing to consider a commercial settlement for 2021-2023, as follows [126]:

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[119] Doc. C-125. See also CWS-2, para. 32; Joint Table of Invoices, rows 3-6.

[120] Doc. R-80.

[121] Doc. C-46.
[122] Doc. C-46, p. 2.
[123] Doc. C-46, p. 2.
[124] Doc. C-51.
[125] Doc. C-130.
[126] Doc. C-130.

[REDACTED]

113. The Parties' witnesses agree that this proposal was turned down by GPE [127], although the response has not been filed on the record.

6. Decree No. 172

114. On 24 February 2022 the hostilities between Russia and Ukraine broke out.

115. On 31 March 2022 the President of the Russian Federation signed the Presidential Decree No. 172 "On the special procedure for the fulfilment by foreign buyers of obligations to Russian natural gas suppliers", effective as of 1 April 2022 ["Decree No. 172" or the "Decree"] [128].

116. Under the Decree, any foreign buyer (such as Gasum) who intends to make a payment to a Russian natural gas supplier (such as GPE) must open two special "K" type accounts in Gazprombank:
- One in the contract's currency (e.g., in Euros), and

- One in Rubles.

117. The foreign buyer must then transfer the funds to the account in the contract currency. Upon receiving the funds, Gazprombank (acting upon an irrevocable order from the foreign buyer to act on its behalf) exchanges the amount into Rubles at the PJSC Moscow Exchange MOEX-RTS and transfers the Rubles to the other "K" type account of the foreign buyer at Gazprombank. Finally, Gazprombank transfers the resulting amount to the corresponding Russian gas supplier's Rubles account at Gazprombank [129]. The payment becomes effective once the Russian gas supplier receives the amount in Rubles in its corresponding Gazprombank account [130].

118. The Decree provides that failure to comply with this procedure would result in the Russian customs authorities prohibiting delivery of gas [131].

119. By letter of 1 April 2022 GPE requested Gasum to amend the Contract's payment provisions, in compliance with the Decree. GPE informed that, otherwise, it would be prohibited from delivering natural gas under the Contract [132].

7. Third Hardship Claim (3 May 2022)

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[127] CWS-2, para. 35; RWS-1, para. 53.

[128] Doc. RL-1, p. 2 of the PDF.
[129] Doc. RL-1.
[130] Doc. RL-1, Section 7.
[131] Doc. RL-1, Section 1.b) *in fine*.
[132] Doc. C-4.

120. On 3 May 2022 Gasum insisted on the continued and aggravated hardship that it was suffering and submitted a new hardship claim [the "Third Hardship Claim"] [133]. This time Gasum referred to the following events [134]:

- The competitive situation in the Finnish natural gas market, which resulted in Gasum losing nearly 50% of its market share to other natural gas importers;

- The soaring gas prices in the European gas markets during the second half of 2021; and

- The Russian military actions in Ukraine, which, combined with the high gas prices, had completely destroyed the demand for Russian gas on the Finnish market - in fact, a majority of Gasum's customers refused to buy Russian gas.

8. Halting of gas deliveries by GPE

121. On 5 May 2022 GPE notified Gasum that it had closed the bank account where payments under the Contract were to be made [135]. On that same day, GPE invoiced Gasum EUR [REDACTED] for gas delivered in April 2022 [136].

122. On 11 May 2022 Gasum informed GPE that it refused to amend the Contract's payment terms. Gasum indicated that it would continue to pay for gas delivered under the Contract in Euros, and that it expected GPE to provide an alternative account to make the payments [137].

123. On 13 May 2022 Gasum filed the Request for Arbitration against GPE.

124. On 18 May 2022 GPE once more asked Gasum to modify the Contract provisions to comply with Decree No. 172; otherwise, GPE would be forced to halt the supply of gas [138]. GPE further rejected Gasum's Third Hardship Claim, arguing that there was no proof of a substantial change of circumstances after the Parties signed Addendum 19 [139].

125. On 19 May 2022 Gasum notified GPE that it had paid the invoice of 5 May 2022 relating to the April 2022 deliveries of natural gas [140]. The payment had been made that same day to GPE's Euro bank account in Gazprombank, which Gasum had been using to pay the supply of liquefied natural gas ["LNG"] (GPE's LNG bank account remained open, since LNG fell outside the scope of the Decree) [141].

126. The following day, GPE informed Gasum that its attempt to pay for the April 2022 deliveries in GPE's

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[133] Doc. C-62.
[134] Doc. C-62.

[135] Doc. C-6.
[136] Doc. C-5.
[137] Doc. R-10, para. 1.
[138] Doc. C-102, Section 1.
[139] Doc. C-102, Section 2.
[140] Doc. C-100; Doc. C-101.
[141] C-I, para. 450.

Euro bank account was a direct violation of the payment procedure set out in Decree No. 172 [142]. Therefore, GPE declared that it could not accept such payment and that it would return the amount transferred - which it did, two days later [143]. GPE announced that deliveries under the Contract would be suspended starting at 07:00 am on 21 May 2022, if Gasum did not comply with the provisions of the Decree [144].

127. Gas deliveries under the Contract were effectively suspended as of 21 May 2022 and remain suspended until this day.

128. On 2 June 2022 GPE issued a new invoice for EUR [REDACTED] relating to the natural gas supplied to Gasum between 1 and 20 May 2022 [145]. On 30 June 2022 Gasum paid this invoice in full to GPE's LNG bank account [146]. However, on 4 July 2022 GPE rejected and returned the payment as non- compliant with the conditions of the Decree [147].

129. To this day the payment of gas delivered in April and May 2022 remains outstanding [148].

9. Contested Invoices

130. *Pro memoria:* on 1 November 2021 Gasum paid four Contested Invoices [149] on a without prejudice basis (see section 4.E *supra).* During the autumn of 2021 GPE did not invoice any MinDQ payments [150].

131. In 2022 GPE sent Gasum further invoices, which Gasum contests in this arbitration. The Tribunal will briefly summarize these invoices in this section.

132. On 10 January 2022 GPE sent four invoices to Gasum [151]:

- An invoice for [REDACTED] for not off-taken MinAQ quantities in delivery year 2021 [152];

- An invoice for EUR [REDACTED] for not off-taken MinDQ in October 2021 [153];

- An invoice for EUR [REDACTED] for not off-taken MinDQ in November 2021 [154]; and

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[142] Doc. C-104, p. 2.
[143] Doc. C-103.
[144] Doc. C-104, pp. 3-4.
[145] Doc. C-105.
[146] Doc. C-106.
[147] Doc. C-107.
[148] See Joint Table of Invoices, rows 15-16.

[149] Doc. C-125 (proof of payment of invoices Doc. C-12, Doc. C-13, Doc. C-14 and Doc. C-15). See also Joint Table of Invoices, rows 3-6.
[150] CWS-2, para. 33.
[151] See also Joint Table of Invoices, rows 7-10.
[152] Doc. C-11.
[153] Doc. C-16.
[154] Doc. C-17.

- An invoice for EUR [REDACTED] for not off-taken MinDQ in December 2021 [155].

133. On 18 February 2022 Gasum contested the legality of the invoices related to the not off-taken MinDQ [156]. Gasum did not pay any of the invoices sent in January 2022 and contests them in the current proceedings [157].

134. Between February and May 2022 GPE issued four new invoices to Gasum relating to not off-taken MinDQ volumes in 2022:
- [REDACTED] [158];

- [REDACTED] [159];

- [REDACTED] [160]; and

- [REDACTED] [161].

135. These invoices remain unpaid to this day and are challenged by Gasum in this arbitration [162].

IV. RELIEF SOUGHT

1. Claimant's prayers for relief

136. In its Statement of Claim, Claimant seeks the following relief [163]:

"(a) Gasum respectfully requests, with respect to the MinAQ Obligation, that the Arbitral Tribunal

(1) DECLARE that Gasum's obligation to take the MinAQ set out in Articles 7.2 and 8.1.1 of the Contract invalid or void or adjusted to zero effective as of 1 January 2020, or alternatively, as of 1 January 2021 until the end of the Contract,

and

(2) DECLARE that Gasum is relieved from payment of the Contested Invoices relating to the MinAQ

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[155] Doc. C-18.
[156] Doc. C-52.
[157] Joint Table of Invoices, rows 7-10.
[158] Doc. C-19.
[159] Doc. C-20.
[160] Doc. C-21.
[161] Doc. C-53.
[162] Joint Table of Invoices, rows 11-14.

[163] C-I, section XIII.

and any other payment obligations arising out of the invalid, void or adjusted MinAQ provisions set out in (a)(1) above.

(b) Further, Gasum respectfully requests, with respect to the MinDQ Obligation, that the Arbitral Tribunal

(1) DECLARE that Article 3 of Addendum 19 does not oblige Gasum to make any payments for non- taken MinDQ volumes,

or, in the alternative,

(2) DECLARE that Article 3 of Addendum 19 is invalid or void or adjusted to zero as of 1 January 2021 until the end of the Contract,

and

(3) DECLARE that Gasum is relieved from payment of the Contested Invoices relating to the MinDQ Obligation and any other payment obligations arising out of Article 3 of Addendum 19.

(c) Further, Gasum respectfully requests, with respect to Gazprom's suspension of deliveries as from 21 May 2022, that the Arbitral Tribunal

(1) DECLARE that Gazprom's suspension of deliveries constitutes a breach of contract? and

(2) DECLARE that Gasum is entitled to terminate the Contract with immediate effect? and

(3) DECLARE that the Contract is terminated with effect as from the date of the final award in this arbitration.

(d) Further, Gasum respectfully requests that the Arbitral Tribunal

(1) ORDER Gazprom to repay an amount of [REDACTED] relating to pre-payment of non-taken MinAQ volumes in 2020 together with interest thereon in accordance with section 6 of the Swedish Interest Act as from the date of this Statement of Claim until repayment is made;

and

(2) ORDER Gazprom to repay an amount of EUR [REDACTED] relating to the payment of non-taken MinDQ volumes, together with interest thereon in accordance with section 6 of the Swedish Interest Act as from the date of this Statement of Claim until repayment is made.

(e) Further, Gasum respectfully requests that the Arbitral Tribunal ORDER Gazprom to compensate Gasum for Gasum’s costs of arbitration, in an amount to be specified later, together with interest thereon in accordance with section 6 of the Swedish Interest Act, and for Gazprom alone to bear the compensation to the Arbitral Tribunal.

(f) Finally, Gasum respectfully requests that the Arbitral Tribunal grant such other or further relief

as the Arbitral Tribunal deems appropriate."

137. In the Response to the Counterclaim, Claimant asks that the Tribunal [164]:

"(a) REJECT all of Gazprom's requests for relief in their entirety for lack of merit as set out in this Response to Counterclaim as well as in Gasum's Statement of Claim;

and

(b) DECLARE that Gasum is entitled to set off its repayment claim as detailed in section XIII, paragraph (d) in Gasum's Statement of Claim, against Gazprom's claim for payment for the gas delivered in April and May 2022 as detailed in section VIII paragraph 1343 (vi) of Gazprom's Counterclaim;

and, if the Contract is not terminated under Gasum's main claim,

(c) DECLARE that the end-date of the Contract as set out in Article 2.2 as amended by Article 6 of Addendum 15, is adjusted to the date of the final award in this arbitration, or such other date that the Arbitral Tribunal deems appropriate."

2. Respondent's prayers for relief

138. In its Response to the Claim and Counterclaim, GPE requests the Tribunal [165]: "(i) To

dismiss all claims brought by Gasum;

(ii) To adjust payment terms of the Contract in accordance with Decree No. 172 as of 1 April 2022 and to formulate Article 6.3 of the Contract as follows:

"1. Unless the Parties agree otherwise in writing, any payments under this Contract shall be effected pursuant to the procedure established by the Decree No. 172 of the President of the Russian Federation "On the special procedure for the fulfillment by foreign buyers of obligations to Russian natural gas suppliers" dated 30 March 2022 ("Decree No. 172").

2. Gasum shall be responsible for taking any and all actions necessary to effect the payments in due time and in compliance with this Contract and Decree No. 172."

(iii) To order Gasum to pay for the MinAQ not off-taken in 2021 in the amount of [REDACTED]; or, alternatively, in the other amount as established by the Tribunal (plus accrued interest). In the latter case the Contract term shall be extended and the reduced MinAQ shall be transferred to the extended period of time;

(iv) To order Gasum to pay for not off-taken MinDQ in October 2021 - March 2022 in the aggregate

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[164] C-II, para. 103.

[165] R-I, para. 1343.

amount of EUR [REDACTED]; or, alternatively, in the other amount as established by the Tribunal (plus accrued interest);

(v) To order Gasum to pay for not off-taken MinDQ in April 2022 in the amount of EUR [REDACTED]; or, alternatively, in the other amount as established by the Tribunal (plus accrued interest). The payment should be made in accordance with the procedure prescribed by Decree No. 172 or in accordance with the other procedure, which would be found appropriate by the Arbitral Tribunal;

(vi) To order Gasum to pay for the natural gas delivered in April and May 2022 in the amount of EUR [REDACTED] (plus accrued interest) in accordance with the procedure prescribed by Decree No. 172 or in accordance with the other procedure which would be found appropriate by the Arbitral Tribunal;

(vii) To declare that Gasum is not entitled to terminate the Contract and that Gasum shall continue performance under the Contract;

(viii) To declare that if Gasum fails to continue performing its obligations under the Contract (which shall be adjusted taking into account the requirements of Decree No. 172), Gasum shall be liable for the Take-or-Pay payments for the minimum agreed annual volumes in the period from 21 May 2022 until [REDACTED];

(ix) Alternatively, if the Arbitral Tribunal finds that the introduction of the prohibitive measures by Decree No. 172 which prohibit the supply of natural gas due to Gasum's failure to pay for natural gas in accordance with the procedure specified in the said Decree constitutes an event of force majeure, to declare that the performance under the Contract should be suspended until the relevant impediments are eliminated;

(x) To order the Claimant to reimburse GPE all costs related to this arbitration, including compensation and fees to the Arbitral Tribunal, to the SCC (if applicable), and its legal costs."

139. In its opening presentation at the Hearing and in its Post-Hearing Brief, GPE slightly amended its prayer for relief to reflect the Tribunal's request for clarification regarding interest and to respond to Claimant's request for set-off [166]:

"(i) To dismiss all claims brought by Gasum;

(ii) To adjust payment terms of the Contract in accordance with Decree No. 172 as of 1 April 2022 and to formulate Article 6.3 of the Contract as follows:

"1. Unless the Parties agree otherwise in writing, any payments under this Contract shall be effected pursuant to the procedure established by the Decree No. 172 of the President of the Russian Federation "On the special procedure for the fulfillment by foreign buyers of obligations to Russian natural gas suppliers" dated 30 March 2022 ("Decree No. 172").

2. Gasum shall be responsible for taking any and all actions necessary to effect the payments in due time and in compliance with this Contract and Decree No. 172 through its type "K" accounts

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[166] H-2, slides 174 and 176; R-PHB, para. 238 (changes are signaled in red).

denominated in Euro".

(iii) To order Gasum to pay for the MinAQ not off-taken in 2021:

a. In the amount of [REDACTED] with the interest to be calculated based on the rate of [REDACTED] (from 21 January 2022 to 30 June 2022) and 8,5% (from 1 July 2022 to the end of 2022) for the period since 21 January 2022 until the date of payment (as of 13 October 2022 the interest on [REDACTED] amounts to [REDACTED], or

b. Alternatively, in the amount of [REDACTED] with the interest to be calculated based on the rate of [REDACTED] (from 21 January 2022 to 30 June 2022) and 8,5% (from 1 July 2022 to the end of 2022) for the period since 21 January 2022 until the date of payment (as of 13 October 2022 the interest on [REDACTED], or

c. Alternatively, in the other amount as established by the Tribunal. In the latter case the Contract term shall be extended and the reduced MinAQ shall be transferred to the extended period of time;

(iv) To order Gasum to pay for not off-taken MinDQ as follows:

a. In the aggregate amount of EUR [REDACTED] for 2021 and EUR [REDACTED] for January - March 2022 with the interest to be calculated based on the rate of [REDACTED] (from 21 January 2022 to 30 June 2022) and 8,5% (from 1 July 2022 to the end of 2022) (as of 13 October 2022 the interest on EUR [REDACTED] and [REDACTED] amounts to EUR [REDACTED], or

b. Alternatively, in the other amount as established by the Tribunal;

(v) To order Gasum to pay for not off-taken MinDQ in April 2022 in accordance with the procedure prescribed by Decree No. 172 or in accordance with the other procedure allowed by Russian law:

a. In the amount of EUR [REDACTED] with the interest to be calculated based on the rate of [REDACTED] (from 21 May 2022 to 30 June 2022) and 8,5% (from 1 July 2022 to the end of 2022) for the period since 21 May 2022 until the date of payment (as of 13 October 2022 the interest on EUR [REDACTED] amounts to EUR [REDACTED]), or

b. Alternatively, in the other amount as established by the Tribunal;

(vi) To order Gasum to pay for the natural gas delivered in April and May 2022 in accordance with the procedure prescribed by Decree No. 172 or in accordance with the other procedure ~~which would be found appropriate by the Arbitral Tribunal;~~ allowed by Russian law;

a. In the amount of EUR [REDACTED];

b. With the interest to be calculated based on the monthly lending rate of the commercial banks in Finland monthly published by the Bank of Finland (as of 13 October 2022 the interest on EUR [REDACTED].

(vii) To declare that Gasum is not entitled to terminate the Contract and that Gasum shall continue performance under the Contract;

(viii) To declare that if Gasum fails to continue performing its obligations under the Contract (which shall be adjusted taking into account the requirements of Decree No. 172), Gasum shall be liable for

the Take-or-Pay payments for not off-taken minimum agreed annual volumes in the period from 21 May 2022 until [REDACTED];

(ix) Alternatively, if the Arbitral Tribunal finds that the introduction of the prohibitive measures by Decree No. 172 ~~which prohibit the supply of natural gas due to Gasum's failure to pay for natural gas in accordance with the procedure specified in the said Decree~~ and non-payment by Gasum according to the Decree constitutes an event of force majeure, to declare that the performance under the Contract should be suspended from 21 May 2021 until the relevant impediments are eliminated. In such case (or in case when Tribunal decides to terminate the Contract) any payments due from Gasum to GPE should be immediately paid in EUR according to GPE instructions;

(x) To dismiss Gasum's request to set off its repayment claim of EUR [REDACTED] with Gazprom's claim for payment for the gas delivered in April and May 2022 in the amount of EUR [REDACTED];

(xi) To order the Claimant to reimburse GPE all costs related to this arbitration, including compensation and fees to the Arbitral Tribunal, ~~to the SCC (if applicable)~~ to the PCA, and its legal costs. [...]"

V. DISCUSSION

Gasum's Claims

140. Gasum has four categories of prayers for relief:

- A request for a declaration that Gasum is entitled to terminate the Contract with immediate effect, in view of GPE's suspension of its deliveries of gas in 2022, which in Gasum's submission constitutes a breach of Contract [167];

- A request for a declaration that the MinAQ Obligation is invalid, void or needs to be adjusted to zero as of 1 January 2020 or, in the alternative, as of 1 January 2021, until the end of the Contract; Gasum further seeks a declaration that it be relieved from the payment of the Contested Invoice relating to the MinAQ Obligation [168];

- A request for a declaration that Art. 3 of Addendum 19 does not oblige Gasum to make any payments relating to not off-taken MinDQ volumes, or, alternatively, a declaration that said provision is invalid, void or needs to be adjusted to zero, as of 1 January 2022 until the end of the Contract; likewise, Gasum seeks a declaration that it be relieved from the payment of the Contested Invoices relating to the MinDQ Obligation and any other payment obligation for Gasum arising out of Art. 3 of Addendum 19 [169];

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[167] C-I, paras. 567-571 and section XIII, (c).
[168] C-I, paras. 557-561 and section XIII, (a).
[169] C-I, paras. 562-566 and section XIII, (b).

- A request for an order for repayment relating to the pre-payment of not off-taken gas under the MinAQ Obligation in 2020 and of four Contested Invoices, relating to the non-taken gas under the MinDQ in 2021, plus interest [170].

141. Gasum submits that absent the requested relief, [REDACTED] [171]. If, on the other hand, the relief is granted, [REDACTED], GPE is paid for all the gas delivered and the Parties may go their separate ways [172].

142. GPE counters this by saying that Gasum's claims have no merit and should be dismissed entirely [173].

GPE's Counterclaims

143. GPE submits Counterclaims, which concern two periods of time: (i) the period before Decree No. 172 was adopted, *i.e.*, before 31 March 2022, and (ii) the period from 1 April 2022 onwards [174]:

- In the period until 31 March 2022, GPE submits that Gasum should pay the Contested Invoices, which include [175]:

o Payment for not off-taken MinAQ in 2021, plus interest; and

o Payments for not off-taken MinDQ in October-December 2021 and January-March 2022, plus interest.

- For the period after 1 April 2022, GPE's argumentation is threefold [176]:

o First, the Contract should be adjusted to comply with Decree No. 172, since Gasum's refusal to agree to the new payment procedure constitutes a breach of its duty of loyalty; alternatively, GPE submits that Section 36 of the Contracts Act provides for such an adjustment;

o Second, Gasum should pay for the natural gas delivered in April-May 2022 and for not off-taken MinDQ in April 2022, plus interest;

o Finally, Gasum should continue its performance under the Contract and be held liable to pay the MinAQ Obligation in the prospect periods from 21 May 2022 until [REDACTED].

o *Alternatively*, the Tribunal should find that the issuance of Decree No. 172 constitutes a *force majeure* event until the relevant impediment is eliminated; if the Tribunal makes such decision or decides to terminate the Contract, all payments due from Gasum to GPE should be immediately paid

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[170] C-I, paras. 572-573 and section XIII, (d).
[171] C-I, paras. 1 and 23.
[172] C-I, paras. 1 and 27.
[173] R-I, para. 1343(i); R-PHB, para. 238(i).

[174] R-I, para. 1228.
[175] R-I, para. 1230; R-PHB, para. 238(iii) and (iv).
[176] R-I, para. 1231; R-PHB, para. 238(ii), (v), (vi), (vii), (viii), (ix).

in Euros in accordance with the instructions of GPE.

144. Gasum responds to the Counterclaim by saying that [177]:

- The Counterclaim should be dismissed in its entirety;

- Gasum is entitled to set-off its repayment claim against GPE's claim for payment of the gas delivered in April and May 2022; and

- If the Contract is not terminated for breach of Contract under Gasum's main Claim, the Tribunal must adjust the end date of the Contract ([REDACTED]) to the date of the Final Award in this arbitration or such other date as the Tribunal deems appropriate.

145. GPE, in turn, argues that Gasum's set-off claim must be dismissed [178].

146. Finally, both Parties make claims for the reimbursement of the costs incurred with this arbitration [179].

Issues in discussion

147. The Parties' respective claims give rise to several issues that the Tribunal must determine:
- What are the consequences of Decree No. 172 for the Contract? (V.2)

- Should the provisions on Gasum's MinAQ Obligation be set aside or adjusted for being unconscionable? (V.3)

- Did the Parties conclude an agreement which obliges Gasum to pay a penalty if it is unable on any given day to take a minimum daily quantity of gas [the so-called "MinDQ Obligation"]? If so, should the provisions on Gasum's alleged MinDQ Obligation be set aside or adjusted for being unconscionable? (V.4)

- Are the provisions on Gasum's MinAQ and MinDQ Obligations invalid for being anticompetitive and abusive, in violation of competition law? (V.5)

- Does Gasum owe any outstanding payments to GPE? Must GPE repay any sums to Gasum? Can payment claims be set-off? (V.6)

148. Before answering these questions, the Tribunal must determine the applicable law (V.1).

149. The Tribunal will deal with the Parties' claims for interest and costs in a separate section (VI).

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[177] C-II, para. 103(a)-(c).
[178] R-PHB, para. 238(x).
[179] C-I, section XIII, (e); R-PHB, para. 238(xi).

V.1. Applicable law

150. The Arbitration Agreement provides that "[a]ny dispute arising from th[e] Contract is to be decided in accordance with it's [sic] provisions and the laws of Sweden" [180].

151. Therefore, in adjudicating the Parties' claims and counterclaims, the Tribunal shall have regard first to the provisions of the Contract, and then to the laws of Sweden.

152. In this chapter, the Tribunal will determine how the United Nations Convention on Contracts for the International Sale of Goods ["CISG"] and Swedish law interact, particularly with regard to the CISG provisions on hardship / *force majeure* and Section 36 of the Swedish Contracts Act (SFS 1915:218) ["Contracts Act"].

153. There are three other sets of mandatory provisions of law that have an impact in this arbitration:
- The provisions of EU competition law; considering that the Contract is governed by Swedish law, and that Sweden and Finland are Members States of the EU, the Parties agree that imperative provisions of EU competition law are applicable to this case; the Parties further agree that the Finnish competition law is applicable [181]; the Tribunal will discuss these provisions in section V.5.3 *infra;*

- The economic sanctions imposed by the EU on the Russian Federation, and their impact on the dealings between Gasum and GPE; the Tribunal will deal with the impact of these sanctions in section V.2.1.3 *infra;*

- The provisions of Russian law, such as Decrees No. 79 and No. 172, which, according to GPE, are mandatory and constitute a *force majeure* event; the Tribunal will address these provisions in section V.2.2.3 *infra.*

1. Claimant's position

154. Gasum submits that the CISG applies to the Contract since [182]:

- The CISG is part of Swedish law - the Contract's governing law;

- Both Finland and Russia (where Gasum's and GPE's respective places of businesses are located) have ratified the CISG prior to the signing of the Contract;

- The Contract concerns what Art. 1(1) of the CISG defines as a "sale of goods"; and

- The Contract does not exclude the application of the CISG and gas is not a good excluded under Art.

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[180] Doc. C-1, Art. 10.4.

[181] C-I, para. 305; R-I, paras. 378-379.

[182] C-I, para. 155 and fn. 181; CER-3, paras. 15-17.

2 of the CISG.

155. Gasum further recognizes that the provisions of the CISG, being *lex specialis* [183], take precedence over "national" law, so that Swedish law is only relevant to the extent that it supplements the CISG without contradicting it [184]. As such, the CISG governs, for instance, the interpretation of the Contract [185].

156. Gasum submits, however, that considering that neither the Contract nor the CISG govern the issue of "unconscionability", Section 36 of the Contracts Act [186] applies in this aspect [187]. Gasum notes that this seems to be common ground between the Parties, since GPE is also relying on Section 36 of the Contracts Act for part of its Counterclaim [188]. Claimant explains that Section 36 is a mandatory catch- all provision, meaning that a party cannot lawfully waive its application [189].

157. Gasum relies on the legal opinion of its legal expert, Professor Boel Flodgren [190].

Legal opinion of Professor Flodgren

158. Professor Flodgren confirms that the CISG is *lex specialis* in relation to the Swedish Sale of Goods Act (SFS 1990:931) and to the Contracts Act. Accordingly, the CISG is applicable to the Contract [191]. Professor Flodgren explains, however, that pursuant to Art. 4 of the CISG, the Convention only governs [192]:

> "[...] the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract."

159. Pursuant to its Art. 4(a), the CISG is not concerned with the validity of a contract or the validity of any of the contract's provisions or of any usage (including issues of the contract being "voidable" or "unenforceable"). It is also generally held that the possibility to modify a contract term or the whole of a contract is not covered by the CISG and is instead to be solved under national law [193].

160. Hence, Professor Flodgren avers that the provision on "unconscionability" contained in Section 36 of the Contracts Act may be applied in the dispute between Gasum and GPE [194].

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[183] *CER-3, para. 19.*
[184] C-I, fn. 181, citing Doc. CL-7.
[185] See C-I, para. 155 *et seq*.
[186] Reproduced in full in para. 184 *infra*.
[187] C-I, para. 206.
[188] C-I, para. 206.
[189] C-I, para. 208; CER-3, para. 44; H-1, slides 64 and 71.
[190] C-I, para. 208 *et seq*.
[191] CER-3, para. 20.
[192] CER-3, para. 22.
[193] CER-3, paras. 23-24.

161. Professor Flodgren explains that Section 36 of the Contracts Act is an exception to the general principles of freedom of contract and *pacta sunt servanda,* which are cornerstones of Swedish contract law [195]. This provision confers wide discretion upon the courts to "modify a contract in all respects and even to declare the whole contract invalid" [196]. Professor Flodgren goes on to explain that under Section 36, contracts or provisions may be set aside or modified *ex tunc* as well as *ex nunc* [197].

162. Professor Flodgren submits that the concept of "unconscionability" does not have a defined meaning; however, it applies when an obligation is so onerous that it can be classified as unconscionable [198]. In determining whether a clause in a contract is unconscionable, regard shall be had to [199]:

- The content of the contract,

- The circumstances surrounding the conclusion of the contract and later occurring circumstances, as well as

- Any other circumstances.

163. The second paragraph of Section 36 clarifies that this provision is primarily meant to permit the modification of contracts where there is an *unequal* bargaining power between the parties [200]. Likewise, modification or setting aside of a contract term may be motivated when there is a disproportion between the parties' respective benefits under the contract [201]. Professor Flodgren suggests that a classical situation of modification of contracts under Section 36 is when in a long- term contract circumstances occur, which cause a change of the conditions underlying the balance between the parties, resulting in an unconscionable situation for one of the parties [202].

164. Professor Flodgren goes on to give various examples of circumstances which may warrant the application of Section 36, as well as of Swedish and arbitral cases in which the courts/tribunals applied Section 3 6 [203]. These include several cases in which the Swedish Supreme Court applied Section 36 in business-to-business relations [204].

165. Professor Flodgren concludes that Section 36 gives the Tribunal extensive powers, either to modify a particular contract provision found unconscionable, rewrite other parts of the contract to find a balance, or even to declare the whole contract invalid [205].

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[194] CER-3, para. 24.
[195] CER-3, para. 43.
[196] CER-3, para. 49. See also paras. 44 and 46 and H-1, slide 65.
[197] CER-3, para. 49.
[198] CER-3, para. 50.
[199] CER-3, para. 46.
[200] CER-3, para. 47.
[201] CER-3, para. 52.
[202] CER-3, para. 54.
[203] CER-3, paras. 53-73.
[204] CER-4, paras. 56-60 and 62.
[205] CER-3, para. 74.

2. Respondent's position

166. GPE argues that the CISG prevails over the laws of Sweden in relation to the Contract, since it is an international treaty to which Sweden is a party [206]. Thus, the CISG governs matters not regulated by the Contract [207], in accordance with Art. 6 of the CISG [208].

167. GPE claims that it follows that Gasum should first seek legal remedies under the CISG, and only thereafter seek legal remedies in a secondary statute, such as the Contracts Act [209]. GPE argues that Gasum is trying to bypass the CISG and obtain protection under the Contracts Act, particularly in terms of hardship and force majeure [210].

168. GPE submits that the circumstances to which Gasum refers as the basis for the application of Section 36 of the Contracts Act are similar to those of hardship or force majeure under the CISG [211]. It is GPE's position that Gasum should first seek to be exempted from the performance of its obligation under Art. 79 of the CISG, before having recourse to the provisions of the Contracts Act [212]. Even though Art. 79 does not expressly refer to "hardship", it is generally accepted that said provision governs situations of hardship and change of circumstances, as confirmed by Professor Flodgren [213].

169. According to GPE, to determine which legal provision applies, the Tribunal should [214]:

- Identify the relevant facts and their impact on the Contract's performance;

- Once the relevant facts are established, determine the legal provisions applicable to such factual circumstances; if there are several competing legal provisions, the one that has priority should apply (in this case, the CISG);

- Only thereafter, analyze the relevant remedies available under the CISG; the mere fact that Section 36 provides remedies that are different from those of Art. 79 of the CISG does not justify its application.

170. GPE argues that to establish force majeure or hardship under Art. 79 of the CISG, a party must demonstrate that the event that prevents the performance [215]:

- Was unforeseeable at the time of concluding the contract;

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[206] R-I, para. 323.
[207] R-I, para. 323.
[208] Doc. BF-3, Art. 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."
[209] R-I, para. 327.
[210] R-I, paras. 328-329.
[211] R-I, para. 330.
[212] R-I, para. 332; R-PHB, paras. 4-5.
[213] R-I, paras. 334-335, citing to Docs. RL-33, RL-34, RL-35 and RL-36.
[214] R-PHB, paras. 9-12.
[215] R-I, para. 336.

- Was beyond a party's control;

- Could not be avoided or overcome.

171. GPE explains that if at least one of these elements is not met, an event cannot be qualified as force majeure or hardship. GPE argues that Gasum, aware of the shortfalls of its case regarding a hardship claim under the CISG, seeks to apply Section 36 of the Contracts Act [216].

172. It is thus GPE's submissions that Gasum cannot overstep Art. 79 of the CISG and go directly into Section 36. Gasum must first try to seek protection under the CISG and try to save the Contract, and only if it becomes unfeasible, invoke the subsidiary provisions of Swedish national law, such as Section 36 [217].

173. In any case, GPE argues that Gasum's arguments under Section 36 must also fail. GPE relies on the legal opinion of its expert, Professor Christina Ramberg.

Legal opinion of Professor Ramberg

174. Professor Ramberg provides evidence on the scope of Section 36 of the Contracts Act [218]; she has not addressed the interaction between the CISG and Section 36 of the Contracts Act.

175. Professor Ramberg explains that unconscionable contract terms can be adjusted or set aside pursuant to Section 36 of the Contracts Act [219]. However, since the enactment of this provision in 1976, only seven cases before the Swedish Supreme Court have dealt with this matter, and only four contracts were deemed unconscionable [220].

176. Professor Ramberg recognizes that this provision may seem strange for lawyers outside of Nordic countries, not only because it is very general and lacks firm prerequisites, but also because it is a mixture of legal concepts, such as lack of free will, *laesio enormis* and hardship. Furthermore, it makes it possible not only to modify the contract, but also to invalidate it [221].

177. According to Professor Ramberg, Section 36 is a mandatory provision, that cannot be excluded by agreement of the parties. It is based on fundamental principles such as vigilance, good faith and fair dealing, *venire contra factum proprium* and fair exchange [222]. The purpose is to modify the unconscionable part of the contract as little as possible to abolish the unconscionability and make the contract conscionable. The adjustment is not meant to balance the contract, but only to ensure that the contract is not unconscionable, *i.e.,* not extremely unbalanced [223].

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[216] R-I, para. 340; R-PHB, para. 15.
[217] R-I, para. 342.

[218] RER-1.
[219] RER-1, para. 10.
[220] RER-1, para. 76.
[221] RER-1, para. 11.
[222] RER-1, para. 12.

178. Professor Ramberg submits that only limited circumstances may give rise to a setting aside - a party's risk of becoming insolvent is irrelevant. From the wording of the first paragraph of Section 36, there are four types of circumstances that a judge must assess when determining whether a contract term is unconscionable [224]:

- The contents of the agreement;

- The circumstances prevailing at the time the agreement was entered into;

- The subsequent circumstances; and

- The circumstances in general.

* * *

179. In sum, GPE submits that the broad language of Section 36 of the Contracts Act, coupled with the lack of straightforward criteria for its application, potentially gives judges and arbitrators a tool for derailing nearly any commercial deal (such as happened in the Naftogaz Supply arbitration). Therefore, it was always understood among Swedish lawyers (including Professor Flodgren and Claimant's counsel in this arbitration) that Section 36 must be applied with the utmost caution [225]. GPE argues that, ultimately, judges exercise discretion when deciding to apply Section 36 on a case- by-case basis. For that reason, the related case-law is limited and not demonstrative [226].

3. Decision of the Tribunal

A. Interaction between CISG and Swedish law

180. SO, The Parties and their experts agree that:
- The Contract is governed by Swedish law and Sweden is a signatory of the CISG;

- The Contract concerns what the CISG defines as a "sale of goods between parties whose places of business are in different States";

- The two "different States" in this case, Finland and Russia, are parties to the CISG [227]; and Gasum and GPE have their places of business in Finland and Russia, respectively;

- The good sold (natural gas) is not excluded by the CISG [228];

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[223] RER-1, para. 13.
[224] RER-1, paras. 14-16.
[225] R-I, paras. 350-352 and 375.
[226] R-I, para. 376.

[227] Doc. BF-3, Art. 1(1): "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
(a) when the States are Contracting States; […]"
[228] Doc. BF-3, Art. 2.

- The Contract does not exclude the application of the CISG; and

- The provisions of the CISG, which is an international treaty, take precedence over Swedish law.

181. Therefore, the CISG governs matters which are not regulated by the Contract, while Swedish law governs matters not regulated by the CISG.

B. Interaction between Art. 79 CISG and Section 36 Contracts Act

182. The Parties, however, discuss the interaction between Art. 79 of the CISG and Section 36 of the Contracts Act:
- While Claimant submits that since neither the Contract nor the CISG governs the issue of "unconscionability", Section 36 of the Contracts Act applies in this regard [229],

- GPE argues that the Tribunal must apply the test of Art. 79 of the CISG to any of Gasum's claims based on change of circumstances, and not Section 36 of the Contracts Act [230].

183. Art. 79 is the first article of Section IV of the CISG, which concerns "exemptions", and provides as follows [231]:

"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

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[229] C-I, para. 206.
[230] R-I, para. 332; R-PHB, para. 4 *et seq*.
[231] Doc. BF-3, pp. 24-25.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

184. Section 36, in turn, is part of Chapter 3 of the Contracts Act, which concerns the "invalidity of certain legal acts". It establishes that [232]:

"A contract term or condition may be modified or set aside 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. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety.

Upon determination of the applicability of the provisions of the first paragraph, particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship.

The provisions of the first and second paragraphs shall apply mutatis mutandis to questions relating to the terms of legal acts other than contracts.

The provisions of section 11 of the Consumer Contracts Act (SFS 1994:1512) shall also apply to the modification of contractual terms relating to consumers."

185. Both Art. 79 and Section 36 concern situations where the principle of *pacta sunt servanda* is derogated; these provisions, however, result in legal consequences that are markedly different.

a. Art. 79 of the CISG

186. Art. 79 exempts a party from the failure to perform its obligations due to an impediment that:
- Is beyond its control;

- Could not be expected; and

- Could not have been avoided.

The legal consequence is that while the impediment lasts, the party is exempted from performing its contractual obligations, without the other party having the right to make a claim for damages. It is generally accepted that this provision applies in situations of "hardship" or *"force majeure",* even though these concepts are not expressly mentioned [233].

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[232] Doc. CL-2.

[233] Doc. RL-33, CISG Advisory Council Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020 ["CISG Opinion No. 20"], paras. 0.6-0.8.

187. Nevertheless, Art. 79 of the CISG does not permit an adjudicator (be it a judge or an arbitrator) to adapt the contract or to bring the contract to an end. In general, adaptation of contract is not contemplated or allowed under the CISG [234]. As for termination, it is only possible through a declaration by the aggrieved party - not by order of the adjudicator [235].

b. Section 36 of the Contracts Act

188. By contrast, Section 36 of the Contracts Act does not deal with exemption of performance, but rather with the validity of the terms of a contract.

189. Section 36 is based on the general (and very broad) concept of "unconscionability", which does not exempt a party from performing its obligations, but permits the adjudicator to modify or set aside the terms of a contract or the contract in its entirety. It is a concept particular to the Scandinavian countries, based on fundamental principles of law, such as vigilance, good faith, fair dealing, etc. [236]. Contrary to Art. 79, Section 36 clearly permits adaptation of contract and even termination of contract by order of the adjudicator.

190. The Tribunal's findings are supported by the opinion of the Parties' experts. Claimant's expert, Professor Flodgren, argues that the possibility to modify a contract term or the whole of a contract is not covered by the CISG and is instead to be solved under national law [237]. This is not denied by Respondent's expert, Professor Ramberg.

191. In view of the above, the Tribunal decides in favor of Claimant that Art. 79 of the CISG does not prevent the Tribunal from applying Section 36 of the Contracts Act, because both provisions pursue inherently different goals - exemption of performance vs. adaptation (or even termination) of contract. Consequently, the Tribunal will apply either one of them, depending on the issues to be resolved and the circumstances of the case.

192. The fact that Respondent itself relies on Section 36 of the Contracts Act as an alternative to its request that the Tribunal modify Art. 6.3 of the Contract [238], only reinforces the Tribunal's conclusion.

C. Scope of Section 36 of the Contracts Act

193. Since both Parties rely on Section 36 of the Contracts Act in their claims, the Tribunal must define the scope of this provision.

194. The Parties and their experts seem, in essence, in agreement [239].

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[234] Doc. RL-33, CISG Opinion No. 20, para. 12.1 *et seq*.
[235] Doc. RL-33, CISG Opinion No. 20, paras. 13.1-13.3.

[236] CER-3, para. 42; RER-1, paras. 11-12.
[237] CER-3, paras. 23-24.
[238] R-I, para. 1288 *et seq*.

195. The Parties' experts share the opinion that Section 36 is a mandatory provision under Swedish law that cannot be waived by the Parties' agreement [240]. It authorizes adjudicators not only to modify or set aside "unconscionable" contract terms [241], but also to modify a contract in its entirety, including the possibility to set it aside, either with *ex tunc* or *ex nunc* effects [242].

Unconscionability

196. What is the meaning of "unconscionability"?

197. The Parties' experts seem to agree that a contractual term is "unconscionable" when it creates an extreme unbalance between the parties' respective benefits under the contract [243]. Ultimately, the goal of Section 36 is to put an end to such extreme unbalance [244]. The Parties' experts also concur that Section 36 mainly (but not exclusively) protects situations where there is an unequal bargaining power between the parties - including business-to-business relationships, where one party has an inferior position [245].

198. Under which circumstances can an adjudicator find that a contract term is unconscionable?

199. The Parties' experts accept that adjudicators have very broad discretion and that their decision must rely on the four elements mentioned in Section 36 [246]:

- The contents of the contract: a contract term should not be considered in isolation, but rather in view of the contract as a whole, having regard *inter alia* to factors such as [247]:

  o whether the term is balanced by other clauses,

  o if the term deviates from standard practice in the industry,

  o if the term is a standard clause or an individually negotiated clause,

  o if one party has an inferior bargaining position,

  o if the clause gives one of the parties an unacceptable advantage;

- The circumstances prevailing at the time of negotiation of the contract: a contract may be deemed unconscionable when negotiated under conditions where one of the parties is inhibited from

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[239] HT, Day 4, p. 55, l. 23 – p. 56, l. 2: "I've a few questions for you around your report. […] I'll try to make this brief at first because I just want to establish that there is a lot of common ground actually." (Mr. Oldenstam, Claimant's counsel, to Professor Ramberg, Respondent's expert).
[240] CER-3, para. 44; RER-1, para. 12.
[241] CER-3, para. 46; RER-1, para. 12.
[242] CER-3, paras. 49 and 74; RER-1, para. 13.

[243] CER-3, para. 52; RER-1, para. 13.
[244] HT, Day 4, p. 53, ll. 12-20; RER-1, para. 13. See also Doc. BF-43, para. 33; Doc. BF-31, para. 3852.
[245] CER-3, paras. 47-48 and 55-56; RER-1, paras. 14 and 76-77. See also Doc. BF-28 and Doc. BF-43, para. 33.
[246] CER-3, para. 46; RER-1, para. 16.
[247] RER-1, paras. 18-19.

expressing its free and true intention to be bound by the contract (cases of threat, fraud, usury, mistake in expression); Section 36 will also apply if a party abuses its counterparty's inferior bargaining position to persuade the counterparty to accept very unfavorable contract terms [248]; nevertheless, each party bears the risk for misjudging the reasons why it would be favorable to conclude a contract, for not reading the contract terms carefully or for misunderstanding their meaning [249];

- Subsequent circumstances: Section 36 in this respect is similar to concepts such as hardship, supervening events, frustration, *force majeure*, change of circumstances and *rebus sic stantibus* in other jurisdictions; the general rule under Swedish law, as emphasized by its Supreme Court, is that each party bears the risk for supervening events [250]; but, as Professor Ramberg explains, supervening events may cause a contract (or some of its terms) to become unconscionable, if the following four cumulative prerequisites are met [251]:

o *First,* it must be a material supervening event that fundamentally alters the equilibrium of the contract;

o *Second,* the event must have been reasonably unforeseeable at the time of conclusion of the contract;

o *Third,* the supervening event must be outside the aggrieved party's sphere of control;

o *Fourth,* the event must not be such that it was assumed by the disadvantaged party; many contracts entail deliberate risk taking; the contract is not unconscionable when the risk materializes.

- Any other relevant circumstances: Professor Ramberg argues that "unconscionability" is a relative concept, meaning that the contract term must be compared with something else. Relative factors include the parties' positions before the contract, what is normal and what could be expected [252].

200. In Swedish judicial practice, Section 36 is seldom applied in business-to-business relationships - in this area of the law, the principles of *pacta sunt servanda* and *rigor commercialis* tend to prevail [253]. From her analysis of Swedish and arbitral case-law, Professor Flodgren concludes that [254]:

"[...] section 36 is used to modify also different types of commercial contracts, although with some restrictiveness in order to respect the parties' freedom of contract and not to interfere without a very good reason in the risk-sharing and agreed rights and obligations between commercial parties." [Emphasis added]

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[248] RER-1, paras. 24-25, 32.
[249] RER-1, paras. 37-38.
[250] RER-1, paras. 39-40.
[251] RER-1, para. 45 *et seq*.
[252] RER-1, para. 54.
[253] RER-1, para. 14; HT, Day 4, p. 11, l. 11-25 (Professor Flodgren); HT, Day 4, p. 90, ll. 3-17 (Professor Ramberg); Doc. BF-43, para. 33. See also Doc. BF-31, para. 3850.
[254] CER-1, para. 73.

V.2. Consequences of Decree No. 172

201. In its initial version, Art. 6.3 of the Contract provided that Gasum should make payments as follows [255]:

[REDACTED]

202. After Finland abandoned its currency from Finnish Markka (FIM) in 2002 [256], the Parties agreed to amend Art. 6.3 by signing Addendum 7 [257]:

[REDACTED]

203. On 16 January 2015 the Parties once again agreed to amend [REDACTED] Euros (EUR) [258]:

[REDACTED]

Decree No. 172

204. On 31 March 2022 the President of the Russian Federation issued Decree No. 172 [259]. This Decree requires European buyers to pay for the natural gas exported by Russian gas suppliers by way of pipeline in Rubles, under a new payment regime [260]. This new payment regime, applicable since 1 April 2022, works as follows:

- A foreign buyer is required to open two special "K" type accounts in Gazprombank ["K Accounts"], one denominated in Rubles and another in the foreign currency provided for in the gas contract - in this case Euros [261];

- The foreign buyer transfers the funds in Euros to the K Account [262];

- Gazprombank is in charge of selling the funds through an auction organized by PJSC Moscow Exchange MOEX-RTS, in which the Euros are changed into Rubles [263];

- Gazprombank then transfers the Rubles to the Ruble-K Account of the foreign buyer, and thereafter

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[255] Doc. C-1, Art. 6.3 (p. 14).
[256] Doc. C-1, Addendum 7, Introduction (p. 41).
[257] Doc. C-1, Addendum 7, Art. 4 (p. 43).
[258] Doc. C-1, Addendum 14, Art. 1 (p. 66).

[259] Doc. RL-1.
[260] Doc. RL-1, Art. 1.
[261] Doc. RL-1, Arts. 2 and 3.
[262] Doc. RL-1, Art. 6.
[263] Doc. RL-1, Art. 6.

transfers the resulting amount to the Russian supplier's Ruble-account at Gazprombank [264];

- The obligation of the foreign buyer to pay for gas shall be considered "performed" as of the date the funds are received on the Ruble account of the Russian supplier at Gazprombank [265].

205. GPE has presented the following scheme summarizing these transactions [266]:

206. After the issuance of Decree No. 172, GPE required an amendment to the Contract, for payments to be made in Rubles in accordance with the procedure set out in Decree No. 172 [267] - which Gasum rejected [268]. After GPE closed (most of) its regular Euro-accounts [269], Gasum made payments for the gas delivered in April and until 21 May 2022 to an alternative Euro-account held by GPE [270]. GPE refused the payment, remitted the funds back to Gasum [271], and Gasum never effected the payment in accordance with the procedure set forth in Decree No. 172.

Suspension of deliveries

207. On 21 May 2022, GPE suspended deliveries of natural gas to Gasum, alleging that Gasum had failed to comply with its payment obligation and that Decree No. 172 forced GPE to do so [272].

208. The situation continues to this day. Since 21 May 2022 GPE has not supplied, and Gasum has not received, any further supply of gas under the Contract.

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[264] Doc. RL-1, Art. 6.
[265] Doc. RL-1, Art. 7.
[266] R-I, para. 291.
[267] Doc. C-4.
[268] Doc. C-63/R-10.
[269] Doc. C-5.
[270] Doc. C-100. This is the account used for LNG, which is not affected by Decree No. 172.
[271] Doc. C-102; Doc. C-103; Doc. C-107.

[272] C-I, para. 458; R-I, paras. 1218-1219.

The Parties' positions in brief

209. In this arbitration, Gasum argues that GPE's conduct constitutes a breach of GPE's fundamental undertakings, which entitles Gasum to terminate the Contract. Hence, Gasum asks the Tribunal to declare that Gasum may terminate the Contract with immediate effect [273].

210. GPE, on the other side, contends that Decree No. 172 constitutes a *force majeure* event. GPE submits that it had no other option but to suspend deliveries under the Contract, and therefore such suspension cannot constitute a fundamental breach, permitting Gasum to terminate the Contract. GPE claims that Gasum has a duty of loyalty to accept the modification of Art. 6.3 of the Contract, so that its text complies with the requirements of Decree No. 172 [274].

Issues to be determined

211. The Tribunal must determine three main issues:

- Was Gasum obliged to accept the modification of the payment terms of the Contract to incorporate the provisions of Decree No. 172? Alternatively, can the Tribunal amend the Contract to incorporate such provisions? (1.)

- Does Decree No. 172 constitute a *force majeure* event, leading to the suspension of the performance of the Contract until the relevant impediments are eliminated? And if such impediments are not eliminated in a reasonable period of time, how can the deadlock be resolved? (2.)

- Did GPE breach its contractual obligations when it suspended the deliveries of gas to Gasum in May 2022, entitling Gasum to request and the Tribunal to declare the termination of the Contract? (3.)

1. Contractual modification

1.1 Respondent's position

212. As a primary remedy in its Counterclaim, GPE seeks to adjust the payment mechanism set forth in Art. 6.3 of the Contract [275], so that it is formulated as follows [276]:

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[273] C-I, para. 22 and section XIII, (c).

[274] R-I, sections VI.10 and VII(B); R-PHB, paras. 166-167.

[275] R-I, paras. 1256 and 1343(ii); R-PHB, para. 238(ii).

[276] R-PHB, para. 238(ii). See also R-I, para. 1343(ii).

[REDACTED]

213. It is GPE's position that Gasum's refusal to agree to the amended payment procedure constitutes a breach of its duty of loyalty (A.). Alternatively, Section 36 of the Contracts Act provides the Tribunal with discretion to make such an adjustment (B.) [277]. GPE argues that, contrary to Claimant's contention, the requested modification would entail no risks or cost for Gasum (C.) [278].

A. Art. 6.3 of the Contract should be adjusted based on the duty of loyalty

214. GPE notes that the Contract's Hardship clause (Art. 11.7) binds the Parties to act in good faith and to search for an amicable solution if one of them suffers material hardship due to a substantial change in business, monetary, technical or commercial conditions [279].

215. Professor Ramberg also explains that the principle of good faith, or loyalty, is part of Swedish law, and is particularly strong when the contract is of a long-term cooperative nature [280]. This principle of loyalty applies even when not explicitly set out by law; it implies that a party has a contractual obligation to reasonably modify the contract provided that such modification entails no cost and causes no problem for such party [281].

216. GPE argues that it has always been committed to its contractual obligations. In this occasion, GPE is legally and physically unable to continue deliveries of gas due to regulatory prohibitions. Indeed, the Russian Federal Customs Service does not permit gas to flow anymore. Therefore, GPE suggested an amendment to the Contract. GPE argues that in the past the Parties have made two nearly identical adjustments to Art. 6.3 of the Contract, which did not cause any prejudice to the Parties [282].

217. GPE purports that there is nothing irregular or particularly difficult in the fact that from time to time it is necessary to revisit the Contract’s payment terms, to adjust them to new circumstances [283].

218. It is GPE’s position that by refusing to adjust Art. 6.3 pursuant to the Contract’s Hardship Clause, Gasum is neglecting its duty to act in good faith, in an attempt to walk away from the Contract [284].

219. In sum, GPE argues that the Parties are in the habit of revisiting the Contract’s terms from time to time pursuant to the Contract’s Hardship Clause. GPE has always tried to accommodate Gasum’s requests for adjustment of the Contract. Regrettably, in this instance Gasum has failed in its

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[277] R-I, para. 1259; R-PHB, para. 195.
[278] R-PHB, para. 201.

[279] R-I, para. 1267.
[280] R-I, para. 1268, citing to RER-1, para. 8.
[281] R-I, paras. 1269-1270, citing to RER-1, para. 104 and Doc. RL-91.
[282] R-I, paras. 1272-1276; R-PHB, paras. 196-197.
[283] R-I, paras. 1277-1278.
[284] R-I, paras. 1271 and 1277-1278; R-PHB, para. 198.

contractual duty of loyalty and unreasonably disagreed to adjust the payment terms [285]. Thus, GPE asks the Tribunal to modify the Contract (adjusting Art. 6.3) based on the principle of loyalty [286]. According to GPE, this adjustment is especially appropriate considering that Decree No. 172 does not expose Gasum to any risks [287].

B. *Alternatively,* Art. 6.3 should be adjusted pursuant to Section 36

220. As an alternative to the application of the duty of loyalty, GPE argues that the Tribunal should adjust Art. 6.3 of the Contract pursuant to Section 36 of the Contracts Act.

221. GPE argues that Section 36 applies when it becomes unconscionable for one party to continue its performance under the contract. Unconscionable means that for GPE to preserve the *status quo* under the Contract would require substantially more efforts than would be expected. In result, the unconscionable provision can be adjusted or set aside [288].

222. GPE submits that the application of Section 36 is permissible only in exceptional circumstances - which clearly occur in the present case. The Contract's payment method contradicts the imperative provisions of Decree No. 172 and cannot be implemented without drastic consequences for GPE (e.g., such as penalties levied by Russian authorities). It also prevents GPE from meeting its contractual obligations [289].

223. GPE submits that it is in the best interest of both Parties to adjust the Contract, rather than terminate it (as suggested by Claimant). The adjustment of the payment mechanism will preserve the rights of both Parties and, ultimately, save the Contract [290].

C. No risk or cost for Gasum

224. GPE argues that, contrary to Gasum's suggestion (as reflected in section 1.2C *infra*), it is not true, either as a matter of law or fact, that payment in accordance with the Decree would expose Gasum to significant commercial risks (a.) or to the risk of violating EU sanctions (b.) [291].

a. No commercial risk for Gasum

225. As to the issue of commercial risks, GPE makes four main arguments [292].

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[285] R-I, paras. 1283-1285.
[286] R-I, para. 1286.
[287] R-I, para. 1287.

[288] R-I, para. 1288.
[289] R-I, para. 1290.
[290] R-I, paras. 1291-1292.

[291] R-I, para. 1296; R-PHB, para. 201.

226. First, it is true that the Decree requires Gasum to open two K Accounts with Gazprombank (one in Euros and one in Rubles). However, the procedure of opening the accounts is straightforward and does not require any special efforts from Gasum [293]. This can be done remotely, through an e-mail application, providing Gazprombank with a few documents; the account is opened by Gazprombank within two days [294]. Furthermore, Gazprombank does not charge any fees for opening and maintaining the K Accounts or for the sale of foreign currencies.

227. Second, Gasum's transfer of Euros to its Euro-K Account does not make it dependent on Gazprombank or deprive it of control over the payment procedure. Gasum provides Gazprombank with an irrevocable order for the transactions (including exchanging Euros to Rubles and crediting GPE's account). Gazprombank completes the transactions within two business days starting from the day following the date when Euros are credited to Gasum's Euro-K Account [295]. Thus, the proposed payment mechanism does not entail any additional burden for Gasum [296].

228. Third, Gazprombank is prohibited from suspending operations on the K Accounts, arresting or withdrawing moneys from these accounts to fulfil any obligations that are not related to a payment under the Contract [297].

229. Lastly, GPE argues that the payment is deemed properly made if done within the time frame provided for in Art. 6 of the Contract. The risk that "the Russian government could unilaterally determine if and when Gasum has made payment 'in good faith' (e.g. by implementing new legislation)" is not justified, either factually or legally, and Gasum did not even attempt to substantiate this statement [298].

b. No risk of violating EU sanctions

230. GPE also disagrees with Gasum's position on EU sanctions. According to GPE, there are currently no EU legal acts that would prevent companies from buying natural gas from GPE, opening bank accounts with Gazprombank or paying through said bank. In particular, there are no new restrictive measures, specific to the payment for the gas supplies from Russia, adopted by the Council of the European Union [299].

231. GPE submits that Gasum has failed to provide any evidence of the illegality of the new payment method; this is because there is no circumvention of EU sanctions [300].

232. First, because there is no EU Regulation to that effect.

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[292] R-I, para. 1296.
[293] R-I, paras. 1297 and 1302; R-PHB, para. 202.
[294] R-I, paras. 1297-1300; R-PHB, para. 202.
[295] R-I, paras. 1303-1305, citing to Doc. RL-4; R-PHB, para. 203.
[296] R-I, para. 1306.
[297] R-I, para. 1310.
[298] R-I, paras. 1312-1313, citing to C-I, para. 483.
[299] R-I, paras. 1318-1319; R-PHB, paras. 204-206.
[300] R-I, paras. 1319-1320.

233. On 22 April 2022 the EU Commission issued a "Frequently Asked Questions" ["EU FAQ"] in relation to the payments for natural gas. In paragraph 4, the Commission clearly states that the existing sanctions do not prohibit engagement with Gazprom or Gazprombank, except in well-defined cases. Likewise, the sanctions do not prohibit opening an account with Gazprombank [301].

234. Second, in the EU FAQ, the Commission explains that its only concern is a potential involvement of the Russian Central Bank. However, the Central Bank is not involved in the payment process under the Decree. Currency exchanges are done by Gazprombank through a private company (Moscow Exchange MOEX-RTS) and the payments are cleared through its subsidiary (the National Clearing Center) [302].

235. Third, GPE submits that, except for a few buyers, most GPE buyers have agreed to perform payments in accordance with Decree No. 172 [303] ([REDACTED] [304]).

236. Lastly, since 1 April 2022 until today, none of the buyers who decided to adopt the new payment mechanism have become the subject of EU investigations or been prosecuted or penalized by EU authorities [305].

237. In view of the above, GPE avers that Gasum's arguments about a potential violation of EU sanctions lack any legal or factual basis and must be dismissed [306]. This is even more so considering that Gasum has not offered any evidence demonstrating the illegality or impossibility of the new payment procedure. In fact, Gasum did not even seek advice from EU lawyers on this matter [307].

* * *

238. Therefore, GPE argues that the minor adjustment of the payment procedure under the Contract will not expose Gasum to any risks or costs [308].

1.2 Claimant's position

239. Gasum contends that GPE's request for adjustment of Art. 6.3 of the Contract - in the terms suggested by GPE - should be rejected at the outset because it goes far beyond transforming the currency of the Contract from Euros to Rubles. It subjects Gasum to the general effects of the Decree and is thus too broad and unspecific [309]. It amounts to giving the Russian Central Bank a *carte blanche* to interfere in the Parties' contractual relationship [310]. For instance, the Decree requires payment for

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[301] R-I, para. 1321, citing to Doc. C-18; R-PHB, para. 207.
[302] R-I, para. 1322; R-PHB, para. 208.
[303] R-II, para. 12, citing to RWS-2, paras. 15, 16, 18; Doc. R-123; Doc. R-124; R-PHB, para. 209.
[304] R-I, para. 1323, citing to Doc. RL-99.
[305] R-I, para. 1324; R-PHB, para. 209.
[306] R-I, para. 1325.
[307] R-PHB, paras. 210-213.
[308] R-I, para. 1314.

[309] C-II, para. 49; C-PHB, item 167.
[310] C-PHB, para. 95.

gas delivered to be made "in full"; this means that if Gasum considered itself entitled to pay a lower amount than the one invoiced by GPE (e.g., for reasons of set-off, or others), it would be obliged to pay the invoice "in full" [311].

240. Furthermore, Gasum submits that GPE's request for relief should also be rejected because it attempts to adjust the Contract's payment terms with retroactive effect from 1 April 2022. This means that Gasum's payments of the April and May 2022 invoices, which were made in good faith, could suddenly be deemed to constitute a breach of Contract [312].

241. All in all, Gasum argues that Art. 6.3 of the Contract cannot be adjusted based on an alleged breach of the duty of loyalty (A.) or by application of Section 36 of the Contracts Act (B.) [313]. Such an adjustment would expose Gasum to significant risks (C.) [314].

A. Art. 6.3 cannot be adjusted based on alleged breach of duty of loyalty

242. Gasum argues that GPE's claim for modification of Art. 6.3 based on the Swedish duty of loyalty must be dismissed for several reasons [315]:

243. First, Gasum has not acted in a disloyal manner when refusing to agree to GPE's unilateral demand to amend the payments terms of the Contract [316].

244. Second, GPE's reliance on the Swedish duty of loyalty is misplaced. Since the Contract is governed by the CISG, GPE cannot rely on the duty of loyalty under Swedish internal law to modify the Contract [317].

245. Third, even if the Swedish duty of loyalty were to apply, it does not yield the result argued by GPE.

246. Professor Ramberg herself has recognized that under Swedish internal law, a tribunal may not amend a contractual term *solely* based on an alleged breach of the duty of loyalty; such principle may only serve as a support for interpreting and applying other legal rules and contractual provisions [318].

247. Fourth, GPE's contention that the Parties have created a custom of amending the contractual currency as between themselves is incorrect. The Parties have *agreed* (not unilaterally imposed) adjustments to Art. 6.3 on only two occasions since the execution of the contract. In any case, the

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[311] C-II, para. 50; C-PHB, item 168.
[312] C-II, para. 51.
[313] C-PHB, para. 94.
[314] C-PHB, item 169.

[315] C-II, para. 53.
[316] C-II, para. 54.
[317] C-II, para. 55; C-PHB, item 162.
[318] C-II, paras. 56-57; C-PHB, item 163.

Parties have never enforced amendments of payment terms absent consent of one Party, let alone created a custom to that effect [319].

B. Art. 6.3 cannot be adjusted based on Section 36

248. Gasum notes that GPE alleges that Art. 6.3 of the Contract has become unconscionable for two reasons [320]:

249. First, GPE alleges that said provision must be adjusted to preserve the Parties' rights under the Contract.

250. Gasum contends, however, that this argument rests on the false premise that Gasum has no rational reason to refuse paying in accordance with the Decree. In fact, paying in accordance with the Decree would expose Gasum to significant risks that were not part of the Parties' agreed bargain (as further discussed in section C *infra*) [321].

251. Second, GPE alleges that the Decree prevents the Contract from being implemented in line with the Parties' original intentions, and this has put GPE in an unbearable position. Gasum submits that this, too, is incorrect [322]:

- *First,* Gasum argues that GPE would not find itself in an unbearable position if the Parties were to go their separate ways; [REDACTED] [323];

- *Second,* GPE will get paid for gas delivered to Gasum until this date; the Decree does not prevent GPE from *receiving* payment in Euros for deliveries already made; it simply prohibits GPE from *continuing* deliveries of natural gas if payment is not made in accordance with the Decree [324]; and

- *Third,* GPE has cut its gas supply to other European buyers; there is no reason to assume that changing the payment terms would make GPE implement the Contract in line with the Parties' original intentions [325].

252. In sum, Gasum asks the Tribunal to reject GPE's request for an amendment of Art. 6.3 of the Contract. Forcing Gasum to abide by the Decree would in itself be unconscionable, particularly in light of the fact that [326]:

- The Decree is a measure issued by GPE's controlling shareholder;

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[319] C-II, para. 58; C-PHB, para. 165.

[320] C-II, para. 60.
[321] C-II, para. 61.
[322] C-II, para. 62.
[323] C-II, para. 63; C-PHB, item 170.
[324] C-II, para. 64.
[325] C-II, para. 65.
[326] C-II, para. 66. See also C-PHB, para. 95.

- The Decree specifically targets GPE;

- The Decree is not legally binding for Gasum; and

- Gasum would be exposed to significant risks if it were forced to pay in accordance with the Decree.

C. There are substantial risks for Gasum

253. Gasum states that, contrary to GPE's contention, payment in accordance with the Decree would expose Gasum to two risks [327]:

- First, Gasum would face commercial risks, since it would lose control of the payment procedure and become subject to the will of the Russian State (a.); and

- Second, Gasum would risk violating EU sanctions (b.).

a. The Decree exposes Gasum to commercial risks

254. Gasum argues that the Decree goes further than merely requiring an amendment of the agreed payment currency from Euros to Rubles.

255. It implies that Gasum has to open two accounts with Gazprombank and grant Gazprombank and irrevocable order to convert the funds [328]. The Decree declares that payment has not been validly made until the final step (*i.e.*, credit of exchanged Rubles to GPE's Ruble-K Account) has been completed. This forces Gasum to rely on Gazprombank as its agent in order to execute payments [329].

256. Gasum submits that if it were forced to depend on Gazprombank in such a way, it would lose control over the payment procedure, and be deprived of its right to choose whom it entrusts with its financial assets [330]. Gasum argues that no duty of loyalty gives rise to an obligation to tolerate such risks or loss of control [331].

257. Gasum is not convinced by GPE's argument that a delayed currency exchange would not expose Gasum to any risk of GPE suspending deliveries [332]. Under the Decree, the Russian government can unilaterally determine if and when Gasum has made payment in "good faith" [333]. Gasum further argues that gas deliveries to Gasum would still be banned under the Decree if EU sanctions would

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[327] C-I, para. 477; C-PHB, items 169-170.

[328] C-I, paras. 478-479; C-PHB, item 167.
[329] C-I, para. 480.
[330] C-I, para. 480; C-PHB, item 171.
[331] C-I, para. 480.
[332] C-I, para. 481.
[333] C-I, para. 482.

prevent Gazprombank or the Moscow Stock Exchange from completing the currency conversion from Euros to Rubles [334].

b. The Decree's payment procedure violates EU sanctions

258. Gasum argues that by paying in accordance with the Decree or by otherwise submitting to the changed payment terms demanded by GPE, it faces the risk of violating EU sanctions [335]. Gasum points, in particular, to EU Regulation No. 833/2014 [336].

259. First, Claimant submits that Art. 5(a) of this EU Regulation provides that it is prohibited to directly or indirectly engage in, or otherwise deal with, certain financial transactions, including any money- market instruments issued after 9 March 2022 by [337]:

- Russia and its government,

- The Central Bank of Russia, or

- A legal entity acting on behalf or at the direction of the Central Bank of Russia.

260. It is Gasum's position that the Central Bank of Russia is involved in the implementation of the payment mechanism under the Decree. Indeed, the Central Bank has the power to [338]:

- Determine how the payment procedure and currency conversion should be implemented;

- Set the rules for the currency conversion accounts that Gasum would have to open in Gazprombank under the Decree; and

- Give official explanations on issues related to the implementation of the Decree.

261. Second, Gasum avers that payment in accordance with the Decree would also likely violate Art. 5 of the EU Regulation. Under that provision, it is prohibited to directly or indirectly be engaged in, or otherwise deal with, certain financial transactions, including any money-market instruments issued after 12 April 2022 by Gazprombank. Gasum contends that the K Accounts that Gasum must open in Gazprombank would likely be considered to be "money-market instruments" [339].

262. Third, Gasum argues that complying with the Decree may also violate Art. 3 of the EU Regulation, pursuant to which it is prohibited to be part of any "arrangement" financing any entity operating in the Russian energy sector. Gasum submits that "financing" means "any action whereby an entity disburses its economic resources". This would exclude payments of the price for goods or services.

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[334] C-I, para. 483.

[335] C-I, paras. 484 and 495; C-PHB, item 170.

[336] C-I, para. 485, citing to Doc. C-116.

[337] C-I, para. 485.

[338] C-I, paras. 485-487.

[339] C-I, para. 488.

From Gasum's point of view, paying in accordance with the Decree cannot be deemed to constitute a payment in line with normal business practice [340].

263. Lastly, Gasum notes that under Art. 12 of the EU Regulation it is also prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions in the Regulation [341].

264. In an attempt to disassociate the Central Bank of Russia from the Decree, on 5 May 2022, the Russian President signed the Presidential Decree No. 254 "on the temporary procedure for the fulfilment of financial obligations in the sphere of corporate relations to certain foreign creditors" [342]. This Decree clarifies that the Central Bank is - currently - not directly involved in the chain of settlements under the Decree with the implied risk that the situation may change.

265. Gasum argues that this constitutes a clear attempt to circumvent EU sanctions [343]. According to Gasum, the European Court of Justice has found that to "participate knowingly and intentionally" includes being aware that there is a risk that the participation may have the object or effect of circumventing sanctions [344].

266. Notwithstanding these potential violations, Gasum recognizes that to date there are no firm and legally binding answers at the EU level on whether payment to the K Account violates EU sanctions [345]. Likewise, Gasum acknowledges that the responses of European buyers to the Decree have differed [346]. However, Gasum argues that it is not aware of any European buyers that have agreed to "adjust the contracts" with GPE in accordance with the Decree [347].

267. In sum, Gasum argues that in the absence of binding answers from the EU, Gasum would risk violating EU sanctions by agreeing to amend the Contract to comply with the Decree, or to otherwise submit to the changed payment terms demanded by GPE [348]. If the Tribunal were to find that Gasum must pay in accordance with the Decree, Gasum would have to choose between either defaulting on its payment obligations under the Contract or risk violating EU sanctions [349].

* * *

268. In view of the above, Gasum argues that if it is forced to pay in accordance with the Decree it will - in the short term - bear significant risks in direct conflict with the terms of the Contract. In the long term, it would set a precedent that opens the door for governments to unilaterally force amendments of contracts entered into by State-controlled companies [350].

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[340] C-I, para. 489.
[341] C-I, para. 490; C-II, para. 73.
[342] Doc. RL-2.
[343] C-I, paras. 490-492.
[344] C-II, para. 73.
[345] C-I, para. 493; C-II, para. 67.
[346] C-I, para. 494.
[347] C-II, para. 74.
[348] C-I, para. 495.
[349] C-I, para. 495.
[350] C-I, paras. 495-496.

1.3 Decision of the Tribunal

269. GPE asks the Tribunal to declare that Art. 6.3 of the Contract must be amended so that any payments thereunder can be effected pursuant to the procedure established by Decree No. 172 [351].

270. If the Tribunal were to grant the relief sought by GPE and Decree No. 172 were to apply, Gasum would have to pay for the gas supplied by GPE as follows [352]:

- Gasum would have to open two special K Accounts in Gazprombank, one denominated in Rubles and another in Euros [353];

- Gasum would have to transfer the payments under the Contract in Euros to the Euro K Account [354];

- Gazprombank would sell the funds through an auction organized by PJSC Moscow Exchange MOEX-RTS, in order to exchange the Euros into Rubles [355];

- Gazprombank would then transfer the Rubles to the Ruble K Account of Gasum, and subsequently transfer the resulting amount to GPE's Ruble K Account at Gazprombank [356].

271. Significantly, the Decree provides that the payment made by Gasum would not be considered final until the Rubles have been credited to GPE's Ruble K Account [357]:

> 7. The obligation of a foreign buyer to pay for the supplies of natural gas under subparagraph "a" of paragraph 1 of this Decree shall be considered performed from the date of remittance of funds received from the sale of foreign currency, carried out under paragraph 6 or subparagraph "a" of paragraph 10 hereof, on the rouble account of the Russian supplier in the Authorized Bank.

A. Duty of loyalty in Swedish law

272. Professor Ramberg explains that some contracts expressly govern how the parties should deal with governmental decisions that affect a contract's payment provisions. When there are no express contract terms and the parties have a history of dealing with governmental decisions in a certain manner, such historic behavior may indicate that the parties implicitly intended to continue dealing with such decisions in the same manner in the future [358].

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[351] R-PHB, para. 238(ii).
[352] Doc. RL-1, Art. 1.
[353] Doc. RL-1, Arts. 2 and 3.
[354] Doc. RL-1, Art. 6.
[355] Doc. RL-1, Art. 6.
[356] Doc. RL-1, Art. 6.
[357] Doc. RL-1, Art. 7.

[358] RER-1, paras. 101-102.

273. Professor Ramberg notes that when there is neither an express contract term nor relevant historic behavior of the parties, Swedish law recognizes that contracts contain an implicit duty of good faith or loyalty [359], which requires a party to adopt certain actions when a "supervening event" occurs - such as the emission of a governmental decree that affects the performance of payment obligations [360].

274. Nevertheless, as noted by Professor Ramberg, this duty of good faith or loyalty only requires one party to accept a proposal of contractual modification by the other party if such modification entails no costs or risk [361]:

> "The party is only obliged to adopt [sic] its behavior to the extent it does not entail costs. The party may not refuse to modify its behavior unless it can demonstrate that the non-modification is rational. In other words, the case implicates that there is an implicit term that a party may not abuse the wording of the contract and escape its contractual obligations by refusing to make a small modification that causes no real cost or problem." [emphasis added]

B. The procedure of Decree No. 172 entails financial risks for Gasum

275. In the present case, the Contract is silent regarding how the Parties should deal with government decisions that affect payment terms. Nevertheless, in the past the Parties did agree to modify the Contract's payment terms due to governmental changes. They did so on two occasions, to accommodate requests of Gasum:
- [REDACTED] [362], [REDACTED] [363];

- [REDACTED] [364].

276. But these two occasions are clearly distinct from the present case:
- These amendments occurred by mutual agreement of the Parties; and

- There is no evidence that these amendments entailed any costs or risks for any of the Parties.

277. The present case is different.

278. In the Tribunal's opinion there are indeed potential risks associated with the payment procedure of Decree No. 172.

279. Under the currently applicable payment regime, Gasum makes the payment by giving an order to

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[359] HT, Day 4, p. 54, ll. 1-13 (Professor Ramberg).
[360] RER-1, paras. 103-104.
[361] RER-1, para. 104.

[362] Doc. C-1, Addendum 7, Introduction.
[363] Doc. C-1, Addendum 7, Art. 4.
[364] Doc. C-1, Addendum 14, Art. 1.

the bank of its choice to credit an account in Euros designated by GPE. Gasum is discharged of its payment obligation as soon as the payment amount in Euros is credited to GPE's designated account.

280. By contrast, the payment procedure under Decree No. 172 requires Gasum to open two K Accounts at a new bank, which is not that of its choice and is directly associated with GPE (Gazprombank). It also requires Gasum to give irrevocable instructions to Gazprombank to carry out the exchange of Euros into Rubles. And, more importantly, Gasum only discharges its payment obligations once the conversion process from Euros to Rubles has taken place and once the Rubles have been credited by Gazprombank to GPE's K Account [365]. This process, which is entirely in the hands of Gazprombank, implies that the financial risk lays with Gasum until the Rubles enter GPE's account.

281. Even assuming that the transactions by Gazprombank are completed within two business days, as suggested by GPE [366], it is undeniable that Gasum incurs a risk that was not part of the Parties' original bargain.

282. The procedure contained in Decree No. 172 is untested and the precise financial risk it entails for Gasum is difficult to gauge. It is true that the duty of loyalty is a guiding principle of Swedish law. But - as described by GPE's Swedish legal expert, Professor Ramberg - that duty cannot be stretched to require Gasum to accept risks which, in the original distribution of risks agreed upon in the Contract, did not lie within Gasum's sphere.

C. There is a risk of violation of EU sanctions

283. Furthermore, it is dubious whether the Decree No. 172 is or is not contrary to the sanctions imposed by the EU on the Russian government and other State authorities.

284. On 22 April 2022 the European Commission issued a list of FAQ with six questions and answers, which give a Delphic answer to the question of whether payment in accordance with Decree No. 172 would be in conflict with EU sanctions [367].

285. GPE has also indicated that a number of European gas buyers have acquiesced to make payments in accordance with the new procedure [368] - it is unclear, however, whether any of them have changed their contracts' payment terms.

286. That said, the question of the compatibility of payment pursuant to Decree No. 172 and EU sanctions is not finally settled. The risk that EU sanctions - which are progressively becoming more wide- ranging - are incompatible with the payment procedure suggested by GPE cannot be excluded.

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287. In sum, considering that the amendment proposed by GPE to the Contract's payment terms seems

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[365] Doc. RL-1.

[366] R-I, para. 1305; Doc. RL-4, Section II, p. 3.

[367] Doc. C-118.

[368] R-II, para. 12, citing to RWS-2, paras. 15, 16, 18; Doc. R-123; Doc. R-124.

to entail risks for Gasum, Gasum is not obliged, based on its duty of loyalty, to accept such unilateral modification.

D. Section 36 of the Contracts Act is not applicable

288. GPE asks, alternatively, that the Tribunal apply Section 36 of the Contracts Act to adjust Art. 6.3 of the Contract [369].

289. As noted in section V.1.3.C *supra,* in this case, Section 36 of the Contracts Act requires the Tribunal to assess whether circumstances subsequent to the conclusion of the Contract (*i.e*., the issuance of Decree No. 172) created a situation of extreme unbalance between the Parties, which justifies the Tribunal intervening in the Parties' agreement to modify the Contract's provisions to put an end to this situation.

290. For the same reasons described above, there is no case of unconscionability.

291. First, the Tribunal is unconvinced that Decree No. 172 has fundamentally altered the equilibrium of the Contract's payment terms in a way that favors Gasum to the detriment of GPE.

292. Second, GPE's argument rests on the false premise that Gasum has no valid or rational reason to refuse paying in accordance with the procedure of the Decree. Gasum has indeed a valid and rational reason to deny its consent to the Contract modification proposed by GPE: as already established, payment in accordance with the Decree would expose Gasum to significant risks that were not part of the Parties' agreed bargain.

* * *

293. In view of the above, the Tribunal dismisses GPE's request that Art. 6.3 should be amended to comply with the Decree's payment method. Considering the risks surrounding the new payment procedure, Gasum cannot be forced to amend the Contract and accept a different payment procedure.

2. Force Majeure

2.1 Respondent's position

294. GPE argues that the issuance of Decree No. 172 constituted a *force majeure* event that prohibited GPE from resuming gas deliveries, unless Gasum complied with the mandatory payment mechanism introduced by the Decree [370].

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[369] R-I, para. 1292.

295. GPE explains that, pursuant to the Decree, Russian natural gas suppliers are [371]:

- On the one hand, barred from receiving payments in any form other than that stipulated by Decree No. 172;

- On the other hand, prohibited from delivering gas supplies unless the buyers comply with the new payment mechanism.

296. As a Russian entity, GPE was obligated to comply with this mandatory payment mechanism; otherwise, it could be subject to penalties levied by the Russian authorities, and other adverse consequences [372].

297. Furthermore, GPE explains that pursuant to para. 1(b) of the Decree, the Russian customs authority prohibits delivery of natural gas in cases of non-compliance with said Decree. The Central Energy Customs of the Russian Federation ruled that, effective 21 May 2022, GPE was prohibited from supplying natural gas to Gasum under the Contract [373]. In light of this, GPE argues that it had no other option but to suspend the deliveries [374].

298. Accordingly, GPE submits that the issuance of Decree No. 172 constituted a *force majeure* event, as provided in Art. 9.1 of the Contract and Art. 79 of the CISG, providing sufficient grounds for GPE to suspend deliveries [375].

299. GPE argues that the occurrence of a *force majeure* event was confirmed by a certificate issued by the Chamber of Commerce and Industry of the Russian Federation on 1 June 2022 in accordance with Art. 9.3 of the Contract [376].

300. GPE further notes that in Addendum 17 to the Contract, the Parties explicitly agreed that acts of governmental authorities can constitute a *force majeure* event [377]. GPE argues that, contrary to Gasum's contention, the fact that GPE is a State-owned company does not prevent it from relying on a *force majeure* defense. GPE is a commercial enterprise that is a separate entity from the Russian Federation itself [378].

301. GPE argues that it is well-established that a State-owned company is entitled to rely on a *force majeure* event if the following criteria, identified by Pierre Lalive, are met [379]:

- The action of the State authorities is based on a political decision invoking national sovereignty (A.);

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[370] R-I, para. 1149(a); R-PHB, para. 173.
[371] R-I, paras. 1150-1151, citing to para. 1(b) of Decree No. 172.
[372] R-I, para. 1152.
[373] R-I, paras. 1153, 1157.
[374] R-I, para. 1158; R-PHB, para. 174.
[375] R-I, para. 1159.
[376] R-I, para. 1160, citing to Doc. R-13; R-PHB, para. 175.
[377] R-I, para. 1163, citing to Addendum 17, Art. 3.
[378] R-I, para. 1165, citing to RL-96; R-PHB, para. 176.
[379] R-I, para. 1166, citing to Doc. RL-97.

- The action of the State authorities was not initiated to benefit the corporate interests of the State- owned company (B.); and

- The action of the State authorities must have the same effect on private-sector enterprises in the given country as on the State-owned company (C.).

302. GPE argues that each of these criteria is met in the present case [380].

A. Decree No. 172 is aimed at protecting Russian national sovereignty

303. GPE submits that Decree No. 172 was issued for purely political purposes, in response to the international sanctions imposed on Russia in late February and March 2022 [381]. Decree No. 172 was issued in addition to Decree No. 79 and was promulgated in pursuit of the same goals ("to protect the national interests of the Russian Federation"), in order to ensure the stability and national security of Russia.

304. Thus, the Decree reflected considerations of public policy [382].

B. The issuance of Decree No. 172 was outside of GPE's control

305. GPE states that Claimant's assumption that Decree No. 172 was issued in the interest and for the benefit of GPE contradicts the principle of separation between the State and State-owned entities. Gazprom (and its subsidiary GPE) is an independent company with its own corporate goals, management, revenues, and liabilities, which are distinguishable from any of its shareholders, including the Russian State. Any other logic would render Gasum's hardship claims meaningless, because Gasum's financial difficulties could conceivably be resolved by financial aid from the Finnish state (since Gasum is a wholly State-owned company) [383].

306. The Russian Federation's interests in issuing Decree No. 172 were the implementation of national policy and the protection of national security. Therefore, the interests of GPE and of the Russian Federation are clearly distinct from each other [384].

307. Furthermore, being a Russian company, GPE must comply with Russian laws and regulations. Decree No. 172 has a normative value, applies *erga omnes* and its provisions are imperative in nature [385]. Contrary to Claimant's allegations, Decree No. 172 bears no resemblance whatsoever to

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[380] R-I, para. 1167.

[381] R-I, para. 1168; R-PHB, para. 177.

[382] R-I, paras. 1169-1170.

[383] R-I, paras. 1175-1176.

[384] R-I, para. 1177.

"an ownership directive from the controlling shareholder of a company" [386].

308. In addition, at the time the Contract and its Addenda were concluded, GPE could not have foreseen this sort of *force majeure* event [387]. The initiator of Decree No. 172 was the President of the Russian Federation, and not GPE. GPE has not benefitted from the Decree - on the contrary [388].

309. Thus, GPE argues that it is incorrect to state that Decree No. 172 was issued for the benefit of GPE (or Gazprom). [REDACTED] [389].

C. Decree No. 172 would have the same effect on private-sector enterprises

310. Finally, GPE notes that the provisions of Decree No. 172 do not specifically refer to GPE by name, but rather use the generic term "Russian suppliers." This means that Decree No. 172 was not aimed at changing the payment procedure for the gas supplied specifically by GPE. Should there be any other Russian gas suppliers, whether State-owned or private-sector companies, Decree No. 172 would have the exact same effect on them, as on GPE [390].

* * *

311. In view of all of the above, GPE argues that the issuance of Decree No. 172 constitutes a *force majeure* event for GPE, irrespective of the fact that GPE is a State-owned company. GPE would have to commit gross violations of Russian law to deliver gas to Gasum without an amendment of the Contract. This *force majeure* event entitles GPE to suspend its performance until the relevant impediments are eliminated [391].

312. GPE asks the Tribunal to declare that Gasum is not entitled to terminate the Contract and that Gasum must continue to perform its obligations under the Contract [392].

2.2 Claimant's position

313. Gasum argues that GPE is not entitled to suspend its performance under the Contract given that the issuance of the Decree is not a *force majeure* event [393]. In essence, Gasum argues that GPE cannot

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[385] R-I, para. 1179.
[386] R-I, para. 1181.
[387] R-I, para. 1182.
[388] R-I, para. 1180.
[389] R-I, para. 1183; R-PHB, para. 177.

[390] R-I, para. 1185; R-PHB, para. 177.
[391] R-I, paras. 1186-1190 and 1343(ix); R-PHB, paras. 178 and 238(ix).
[392] R-I, para. 1343(vii); R-PHB, para. 238(vii).

[393] C-II, paras. 81-83; C-PHB, para. 97.

invoke a situation created by its controlling shareholder as an excuse for its failure to deliver gas, given the degree of identity between the Russian government and GPE [394].

314. Gasum generally accepts the test identified by GPE to determine whether a State-owned company is entitled to rely on a *force majeure* event. Gasum argues that the criteria identified by Pierre Lalive are cumulative and none is met in the present case [395] (A. to C.). Furthermore, Gasum submits that there is another criterion that GPE has not taken into account: that of exteriority [396] (D.).

315. It is Gasum's position that if the Tribunal were to find that there is *force majeure* and that performance must be suspended, the Tribunal should adjust the duration of the Contract, so that termination occurs as of the date of issuance of the Final Award - otherwise, the Parties will be in a deadlock [397] (E.).

A. The Decree is not a political decision of national sovereignty

316. Gasum argues that the Decree is an instrument tailored to interfere with, and adjust, the commercial contracts of one majority State-owned and State-controlled company only - GPE. Gasum avers that the Decree is similar to an ownership directive from the controlling shareholder of a company *(i.e.,* the Russian government) directed at the company it controls (*i.e*., GPE through its parent company Gazprom PJSC) [398]. According to Gasum, this conclusion is supported by [399]:

- The close links between GPE and the Russian State [400];

- The fact that the Russian government has previously exercised a combination of its shareholder's rights and legislative powers to transfer GPE's profit for 2021 to the Russian federal budget [401];

- The active role that the Russian government takes in managing GPE's affairs; and

- The fact that GPE is helping the Russian government weaponize gas supplies by fabricating *force majeure* events.

B. The Decree aims to interfere with GPE's commercial contracts

317. Furthermore, Gasum argues that the Decree explicitly aims to interfere in GPE's commercial contracts, by changing the payment terms to the benefit of its controlling shareholder - the Russian government. Accepting that the Decree constitutes a *force majeure* event enables the Russian

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[394] C-I, paras. 532-539.
[395] C-II, paras. 82-83; H-1, slide 207 *et seq*.; C-PHB, item 172.
[396] H-1, slide 207; C-PHB, item 172.
[397] C-II, paras. 89-91; C-PHB, para. 97.
[398] C-I, para. 472; C-II, para. 84.
[399] C-II, para. 85.
[400] C-I, paras. 461-467.
[401] C-I, paras. 466-467.

government to abuse its governmental authority to pressure Gasum - something it can come to do again in the future [402].

C. The Decree exclusively targets payments of GPE

318. Finally, the Decree provides that all "Russian suppliers" have to adhere to the new payment procedure for pipeline gas supplies.

319. Gasum submits that it is undeniable that the Decree exclusively targets payments for GPE's exports of natural gas, since GPE is a legal monopoly as a matter of Russian law [403]. Consequently, the Decree has no effect on privately owned enterprises [404].

320. In fact, the Decree is not a legislative act of general application [405]; it is an instrument specifically tailored to interfere with and adjust the commercial contracts of one State-owned and State- controlled company only: GPE [406].

D. GPE is wholly controlled by the Russian government

321. Gasum argues that there is no element of exteriority since GPE's majority shareholder - Gazprom PJSC - is wholly controlled by the Russian State. Indeed, Gazprom is majority-owned by the State. Furthermore, all its top executives have ties to the Russian government or are intimately linked to President Putin [407].

322. Gasum avers that it is clear that the Russian government uses GPE as a vehicle to further the State's interests [408] and President Putting actively manages Gapzrom's affairs [409].

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323. In view of the above, Gasum requests that the Tribunal reject GPE's request for a declaration that it is entitled to suspend its performance due to *force majeure* [410].

E. Gasum is not obliged to pursue performance under the Contract

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[402] C-II, para. 86; C-PHB, item 179.

[403] C-I, para. 468; C-II, para. 87.
[404] C-PHB, item 179.
[405] C-II, para. 87.
[406] C-I, para. 472; C-PHB, item 177.

[407] H-1, slide 210; C-PHB, item 181.
[408] H-1, slide 211; C-PHB, item 181.
[409] H-1, slide 212.
[410] C-II, para. 88.

324. Gasum argues that, should the Tribunal find that GPE's suspension of gas deliveries was justified due to *force majeure* (*quod non*), the Tribunal should nonetheless dismiss GPE's request for Gasum to continue performance under the Contract [411].

325. First, because recent developments show that the Contract will likely remain in a state of limbo for many years to come [412]. The situation of *force majeure* places the Parties in a deadlock: GPE cannot deliver gas, unless Gasum complies with the Decree; Gasum, on its part, is legally prevented from subjecting itself to the Decree due to EU sanctions [413].

326. Second, if the Tribunal were to find that GPE's suspension is justified due to the Decree, it would place Gasum in an unbearable and uncertain position. GPE's controlling shareholder (the Russian government) could at any time decide that GPE shall resume deliveries under the Contract, making it impossible for Gasum to plan its operations [414].

327. Accordingly, if the Tribunal were to find that GPE's suspension of gas deliveries was justified due to *force majeure*, Gasum asks the Tribunal to:

- Invalidate Art. 9.4 of the Contract in accordance with Section 36 of the Contracts Act and declare that Gasum is entitled to terminate the Contract [415]; or

- Adjust or partly invalidate the [REDACTED] in accordance with Section 36 of the Contracts Act, so that the Contract is scheduled to end upon the issuance of the Final Award in this arbitration, or such other date that the Tribunal deems appropriate [416].

2.3 Decision of the Tribunal

328. After duly considering the Parties' positions, the Tribunal partially sides with both.

329. Applying the Contract's *Force Majeure* Clause (A.), the Tribunal finds that the issuance of Decree No. 172 constitutes indeed an event of *force majeure* that legitimately justifies the suspension of gas supplies by GPE (B.). Nevertheless, if this *force majeure* situation is not solved within a reasonable period of time, the Parties cannot remain in a deadlock; in such case, the Contract will have to be terminated (C.).

A. The regulation of *force majeure* in the Contract

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[411] C-II, para. 89; C-PHB, paras. 5 and 98-99.
[412] C-II, para. 90.
[413] C-PHB, para. 99 and items 190-191.
[414] C-II, para. 91; C-PHB, item 192.
[415] C-PHB, para. 101(a).
[416] C-II, paras. 91 and 103(c); C-PHB, paras. 5 and 101(b).

a. Original *Force Majeure* Clause

330. When executing the Contract in 1994, the Parties agreed to include a *Force Majeure* Clause (see para. 79 *supra* for the Clause in full). Originally, the Contract stated that [REDACTED] [417]. [REDACTED] [418].

331. When any of such circumstances arose, the party for whom it became "impossible" to perform its obligations should immediately inform the other party through written notice [419].

332. The Parties expressly established that [REDACTED] [420]. [REDACTED] [421].

333. The Parties established that [REDACTED] [422].

334. Lastly, the Parties agreed that [REDACTED] [423].

b. Addendum 17

335. On 29 November 2019, at a time when both were still State-controlled monopolies, the Parties decided to amend the *Force Majeure* Clause and agreed that "acts of governmental authorities" would also fall into the definition of *"force majeure* circumstances" [424]:

[REDACTED]

336. The purpose of this provision seems clear: the Parties consciously chose to extend the concept of *force majeure* to situations where the impossibility to deliver (or to purchase) gas was caused by governmental decisions adopted either by Finland or Russia.

c. Requirements of *force majeure*

337. The Parties' agreement to include a *Force Majeure* Clause in the Contract and to define certain *force majeure* "circumstances", does not mean that the general requirements for making an actual finding of *force majeure* were waived.

338. For a circumstance to be actually considered *force majeure* it must be simultaneously

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[417] Doc. C-1, Art. 9.1.
[418] Doc. C-1, Art. 9.1.
[419] Doc. C-1, Art. 9.2.
[420] Doc. C-1, Art. 9.3.
[421] Doc. C-1, Art. 9.3.
[422] Doc. C-1, Art. 9.4.
[423] Doc. C-1, Art. 9.4.

[424] Doc. C-1, Addendum 17, Art. 3 [Emphasis added].

uncontrollable, unforeseeable and unavoidable.

339. These requirements stem from a reasonable interpretation of the Contract; indeed, the Contract provides that it must have become "impossible" for a party to comply with its obligations.

340. They further stem from Art. 79(1) of the CISG, which provides that a party will be exempted from performing its obligations if there are circumstances beyond its control, that could not be expected or avoided [425]:

"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." [Emphasis added]

341. These requirements are also derived from Art. 7.1.7(1) of the UNIDROIT Principles [426], which are frequently used by Swedish Courts to complement Swedish law [427].

B. Decree No. 172 constitutes a *force majeure* circumstance

342. A reading of Decree No. 172 shows that in accordance with this regulation [428]:

- Russian natural gas suppliers, such as GPE, are barred from receiving payments in any form other than that stipulated by Decree No. 172 and are prohibited from delivering gas unless the buyers comply with the new payment mechanism, as provided in Art. 1(b):

"[...] further supply of natural gas by the Russian supplier to [...] foreign buyers [...] is prohibited, if the payment deadline for gas supplied under this contract is due, but the foreign buyer has not made payment or made it in foreign currency, and (or) not in full, and (or) to an account in a bank, which is not an authorized bank as per paragraph 2 of this Decree [...]"

- The Decree further stipulates that the Russian customs authority is charged with prohibiting the delivery of natural gas in cases of non-compliance with the Decree, as provided in Art. 1(b):

"If the customs authority receives information about a violation of this procedure, then it shall decide to prohibit such delivery."

343. In line with this provision, on 20 May 2022, the Central Energy Customs of the Russian Federation

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[425] See also Doc. CL-75, p. 1133: "The promisor is exempted under Article 79 if the failure to perform is due to (a) an impediment which is beyond his control, (b) unforeseeable, and (c) unavoidable in the sense that the promisor could not reasonably be expected to avoid or overcome the impediment or its consequences."

[426] Art. 7.1.7(1) of the UNIDROIT Principles of International Commercial Contracts (2010).

[427] CER-3, para. 41: "[…] legislation regarding general contract law is scarce, so in this area case law and legal doctrine are of utmost importance. Solutions are often arrived at through reasoning derived from general principles of contract law."; RER-1, paras. 39-40; HT, Day 4, p. 62, ll. 20-25 and p. 71, ll. 8-16 (Professor Ramberg).

[428] Doc. RL-1.

ruled that, given the lack of payment by Gasum in accordance with the provisions of the Decree, GPE was prohibited from supplying natural gas under the Contract to Gasum starting from 07:00am on 21 May 2022 [429]:

> Considering the above. we inform Gazprom export LLC about the prohibition of further deliveries of natural gas to Gasum Oy (Finland) under the Contract dated 12 March 1994 according to para. 1
> b) of the Decree of the President of the Russian Federation starting from 07:00. 21 May 2022 until the elimination of the circumstances being the basis for the prohibition.

344. The Tribunal understands that GPE, as a Russian entity, is obliged to comply with this prohibition; otherwise, it may be subject to penalties levied by the Russian authorities [430].

Certificate from the Chamber of Commerce and Industry

345. Furthermore, the Tribunal notes that the Chamber of Commerce and Industry of the Russian Federation issued a certificate on 1 June 2022 confirming that the Decree was *force majeure,* in accordance with the terms of Art. 9.3 of the Contract [431]:

> The Chamber of Commerce and Industry of the Russian Federation certifies the occurrence of the force majeure circumstances (force majeure) under the Contract, which prevent Gazprom export LLC, the Russian Federation, from performing the obligations to supply natural gas to Gasum Oy, the Republic of Finland, under the Contract in full and on time, namely: the introduction of the prohibitive measures by Decree No. 172 of March 31, 2022 of the President of the Russian Federation "On special procedure for the fulfillment of obligations by foreign buyers to Russian natural gas suppliers" which prohibit the supply of natural gas due to non-performance by Gasum Oy, the Republic of Finland of payment for natural gas in accordance with the procedure specified in the said Decree, from 21 May 2022 until such obstacles are eliminated.

346. Gasum says that this certificate does not constitute proof of a *force majeure* circumstance.

347. It is true that the Tribunal is not bound by the certificate of the Russian Chamber of Commerce when deciding on whether Decree No. 172 constituted a *force majeure* circumstance - the Contract says that certificates issued by a Chamber of Commerce constitute sufficient proof of *force majeure,* but that, if the counterparty objects, the decision must be taken by the arbitral tribunal.

a. The Tribunal’s decision

348. After carefully considering the facts and weighing the Parties' arguments, the Tribunal does find that the requirements of *force majeure* are met in the present case, because the governmental

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[429] Doc. R-11.

[430] R-I, paras. 1152 and 1290.

[431] Doc. R-13, p. 3.

action meets the three necessary requirements:

- Unforeseeable: it is undeniable that the Decree was unforeseeable when the Parties signed the Contract in 1994, but also in 2019 when Addendum 17 was approved, and even in 2021, when the last amendment to the Contract was entered into [432]; the Decree is a direct consequence of the sanctions imposed on the Russian Federation in the aftermath of the Russian-Ukrainian conflict;

- Unavoidable: the Decree is *ius cogens;* non-compliance by GPE with the terms of the Decree may give rise to sanctions; furthermore, the Russian Central Energy Customs, which controls enforcement, has explicitly prohibited GPE from supplying gas to Gasum; and

- Uncontrollable: the Decree is a norm of general application, issued by the President of the Russian Federation; the issuance of a norm of general application is the prerogative of the State; as such, it is not controllable by a publicly-listed company, listed in the Moscow stock exchange, as is Gazprom PJSC [433].

b. Gasum's counterargument

349. Gasum makes a counterargument: the Decree was passed for the benefit of GPE, a State-controlled company, which either proposed or at least accepted the rule.

350. The Tribunal, upon reflection, is not convinced.

351. Gasum's argument brings up the difficult question of whether State-owned or controlled companies are entitled to invoke *force majeure* based on regulations or actions adopted by the State that owns or controls the company.

Lalive's opinion

352. In an old article, cited by both Parties [434], Pierre Lalive notes that there is a concept of *force majeure* applicable only to State enterprises, which requires that the following conditions be simultaneously fulfilled [435]:

- The action of the State authorities must be a political decision of national sovereignty;

- The action of the State authorities must not have been taken in favor or in the interest of the State's own enterprise; and

- The action of the State authorities must have the same effect on private-sector enterprises as on

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[432] Doc. C-22, Addendum 20.
[433] Doc. C-110, p. 137.

[434] R-I, para. 1166; C-II, para. 82 *et seq*.; H-1, slide 207.
[435] Doc. RL-97, p. 294.

the State-owned company.

353. It seems that these three requirements are met in this case:

354. First, Decree No. 172 was issued "in addition to" a number of other decrees of the President of the Russian Federation, including Decree No. 79, which was adopted "to protect the national interests of the Russian Federation" [436]. Decree No. 172 was adopted as a countermeasure against the sanctions imposed on the Russian Federation, in the aftermath of the Russian-Ukraine conflict.

355. It is thus a political decision based on the protection of national sovereignty.

356. Second, there is no evidence whatsoever that Decree No. 172 was issued in the interest of GPE.

357. On the contrary, this very arbitration is proof that the Decree, and the consequences it entails, have been detrimental for GPE - it has lost significant business, due to the fact that counterparties have refused to submit to the requirements of the Decree.

358. Third, the third requisite is also met. The Decree does not discriminate between State-owned and private companies. As noted by GPE, the provisions of Decree No. 172 use the generic term "Russian suppliers" and do not refer specifically to GPE. Therefore, if there were any other Russian suppliers of gas, they would be equally affected by Decree No. 172.

An additional argument

359. There is an additional argument, irrespective of whether the requirements described by Pierre Lalive are or are not relevant.

360. In Addendum 17, the Parties - both companies controlled by the Russian and the Finnish States - added a clause to their Contract, inserting a proviso which up to then had been absent: that "acts of governmental authorities" should be considered *force majeure* circumstances (provided that the general requirements already analyzed in para. 347 *supra* are met).

361. The timing of Addendum 17 is relevant.

362. It was signed in November 2019, when, due to the conflict in Crimea, sanctions against Russia had already been imposed [437] and the possibility of government interference was evident. At that stage, both Parties agreed that government action (be it by the Finnish or the Russian State), which rendered performance of the Contract "impossible", would constitute *force majeure.* The Parties thus waived any possible "exteriority" requirement and authorized Gasum to invoke the actions of the Finnish State, and GPE those of the Russian State, as circumstances of *force majeure*.

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[436] Doc. RL-98.

[437] See, e.g., Doc. R-130 and Doc. R-132. See also HT, Day 2, p. 98, l. 8 - p. 99, l. 6.

363. In his article, Pierre Lalive acknowledges, albeit *en passant,* that when in a contract the parties expressly include among the circumstances constituting *force majeure* "measures taken by the authorities", their intent is to distinguish, for purpose of the *force majeure* clause, between State authorities and parties to the contract [438].

364. This is precisely what happened in the present case.

365. In view of the above, the Tribunal concludes that Decree No. 172 and the subsequent order by the Russian Central Energy Customs to suspend deliveries as of 21 May 2022 constitute *force majeure* circumstances.

C. Consequences of *force majeure*

366. The *Force Majeure* Clause (read in conjunction with Art. 79(1) of the CISG) provides rules on the consequences of a finding of *force majeure* [439]:

- Performance of obligations under the Contract is suspended;

- Consequently, there is no breach of Contract by any of the Parties;

- [REDACTED]

- [REDACTED]

a. Negotiations

367. The circumstances which gave rise to *force majeure* were the issuance of Decree No. 172 by the President of the Russian Federation on 31 March 2022 and the subsequent order by the Russian Central Energy Customs to suspend deliveries as of 21 May 2022.

368. [REDACTED] provides that if:
[REDACTED]

369. [REDACTED]

370. [REDACTED]

371. [REDACTED]

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[438] Doc. RL-97, p. 294, citing to the *Framatome-AEOI* case.

[439] Doc. C-1, Art. 9.

b. Termination

372. [REDACTED]

373. [REDACTED]

374. Gasum argues that this contractual provision places the Parties in an unbearable deadlock and that the Tribunal should modify it, applying Section 36 of the Contracts Act [440].

375. The Tribunal agrees.

376. To avoid an unbearable deadlock, the Tribunal finds that, [REDACTED]

377. The Tribunal's power to declare this right to unilateral termination of the Contract derives from Section 36 of the Contracts Act.

378. Section 36 of the Contracts Act authorizes the Tribunal to modify a contractual "term or condition" if it is unconscionable [441]:

> "A contract term or condition may be modified or set aside if such term or condition is unconscionable having regard the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. [...]"

379. The Tribunal finds that the provision of Art. 9.4 *in fine* of the Contract is indeed unconscionable.

380. In coming to this conclusion, the Tribunal finds the following reasons compelling:

381. First, both Parties agree that application of Section 36 may be warranted when there are developments over time that are different from what the parties were able to foresee when they concluded the agreement [442] - and in this case the issuance of Decree No. 172 was totally unforeseeable.

382. Second, Professor Ramberg opines that [REDACTED] [443].

383. Third, a contract cannot be suspended *sine die.* Parties cannot be bound to a contract indefinitely when performance is legally impossible. There is no certainty when Russia will derogate Decree No. 172 and when the legal impossibility for the performance of the Contract will disappear.

384. Fourth, the present situation of uncertainty is highly detrimental to both Parties: Gasum cannot sign supply contracts with other sellers, to procure the gas it needs, while GPE is unable to enter into

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[440] C-PHB, paras. 2 and 4.
[441] Doc. CL-2.
[442] C-I, paras. 212-213; A-RfA, para. 110.
[443] Doc. CR-2, p. 7: " [REDACTED]

long-term contracts with other takers of gas for the quantities which are already allocated to Gasum under the Contract.

385. Consequently, the Tribunal, using the powers bestowed upon it by Section 36 of the Contracts Act, decides [REDACTED].

386. The new text of Art. 9.4 *in fine,* modified by the Tribunal, reads as follows:

[REDACTED]

387. For the avoidance of doubt, [REDACTED]

388. The unilateral declaration of any of the Parties terminating the Contract shall have no impact upon the payment of the amounts awarded in the present Award.

389. If, at the date of termination of this Contract, there remain quantities of gas which Gasum has paid for, but not taken (under [REDACTED], the contractually agreed rules foreseen in [REDACTED] shall apply.

3. Breach of Contract

3.1 Claimant's position

390. Gasum submits that it is not obliged to accept GPE's unilateral amendment of the Contract's payment terms for three reasons [444]:

- First, because the Contract provides that payments shall be made in Euros by a transfer of funds from Gasum's bank to an account nominated by GPE [445]; the convoluted payment mechanism of the Decree is incompatible with the straightforward and agreed payment terms of the Contract [446]; furthermore, the general rule under Swedish law is that foreign mandatory law lacks effect -hence, the Decree has no direct legal effect on the Contract [447];

- Second, as explained in section 1.2C *supra,* Gasum argues that payment in accordance with the Decree would expose Gasum to significant risks (including potential violations of EU sanctions) [448]; and

- Third, GPE's attempt to unilaterally amend the payment terms of the Contract also amounts to an

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[444] C-I, section X.
[445] C-I, para. 473.
[446] C-I, para. 475.
[447] C-I, para. 476.
[448] C-I, para. 477 *et seq*.; C-PHB, item 170.

abuse of its dominant position, as per Art. 102(d) of the Treaty on the Functioning of the European Union ["TFEU"]; since GPE's request for amendment is unconnected to the ordinary course of trade between the Parties or the subject-matter of the Contract, any amendment of Art. 6.3 of the Contract would be invalid as a matter of competition law [449].

391. Since Gasum is not obliged to accept GPE's unilateral amendment of the Contract's payment terms, it follows that GPE had no valid reason to suspend performance of its obligations under the Contract [450]. Therefore, it is Gasum's position that GPE's suspension of gas deliveries (GPE's main contractual obligation [451]) constitutes a fundamental breach of Contract, which entitles Gasum to terminate the Contract [452], pursuant to Arts. 25 and 49 of the CISG [453].

392. Gasum further explains that, since GPE has failed to resume deliveries within the additional period fixed under Art. 47(1) of the CISG, Gasum is also entitled to terminate the Contract, in accordance with Art. 51(2) of the CISG [454].

393. *Alternatively,* Gasum considers that even if the Tribunal were to find that GPE has not yet committed a fundamental breach of Contract, Gasum is nevertheless entitled to terminate the Contract under Arts. 72(1) and 73(2) of the CISG, since a fundamental breach of contract will occur [455]. Gasum claims that GPE has already informed that it will not perform and has effectively suspended its performance without justification. Furthermore, it cannot be expected that gas deliveries will be resumed for the foreseeable future [456].

394. Gasum claims that GPE has in any event lost its right to any contractual remedies for an alleged late payment. Indeed, under Swedish law, a creditor loses its right to contractual remedies if it refuses to accept payment [457].

395. Finally, Gasum claims that GPE's suspension of deliveries on 21 May 2022 is an abuse of dominant position in the form of limiting output [458].

3.2 Respondent's position

396. GPE considers that Gasum has no grounds to terminate the Contract, for several reasons [459].

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[449] C-I, paras. 498-500.
[450] C-I, para. 501.
[451] C-PHB, item 176.
[452] C-I, paras. 501-502; C-PHB, para. 96.
[453] C-I, paras. 501-504; C-PHB, item 173.
[454] C-I, para. 514.
[455] C-I, para. 522; C-PHB, item 174.
[456] C-I, para. 531.
[457] C-I, paras. 540-555.
[458] C-I, para. 511.

[459] R-I, section VI.10; R-PHB, paras. 166-167.

397. First, GPE submits that any unilateral termination calls for a high threshold that is not met in the present case. Unilateral termination is a remedy of last resort under the CISG [460]: only a *fundamental* breach may serve as grounds for unilateral termination; however, in the present case, such a high standard is not met since GPE never refused to perform the Contract. Once Decree No. 172 was issued, GPE was effectively prohibited from supplying gas until proper payment was received under the provisions of the Decree [461].

398. Second, GPE argues that the suspension and non-resumption of the gas deliveries cannot be considered a fundamental breach of the Contract because GPE's suspension was justified for two reasons [462]:

- *First*, because the issuance of Decree No. 172 constituted a *force majeure* event that prohibited GPE from resuming deliveries until Gasum complied with the Decree's provisions; and

- *Second,* Gasum itself breached a substantial part of its obligations by failing to effect payments of MinAQ and MinDQ, thus giving GPE the right to suspend performance under Art. 71 of the CISG.

399. Third, GPE contends that Gasum has no grounds to terminate the Contract since there is no guarantee that a fundamental breach of the Contract would occur. The mere fact that GPE demanded that Gasum comply with the provisions contained in Decree No. 172 does not indicate that GPE would commit a fundamental breach and suspend deliveries. GPE claims that performance will only be suspended while Gasum refuses to comply with the Decree. Moreover, GPE regards the termination of the Contract as a disproportionate measure, since there is no reason to think that Decree No. 172 will not eventually be canceled or amended [463].

400. Finally, GPE argues that the suspension of supplies to Gasum does not amount to an infringement of EU competition law: the interruption of gas supplies was justified and proportionate. GPE did not decide of its own volition to suspend supplies but was forced to do so by the terms of the Decree, in light of Gasum's refusal to amend the Contract [464].

3.3 Decision of the Tribunal

401. The Tribunal has found that GPE's suspension of gas deliveries was justified by a *force majeure* situation.

402. As provided in Art. 79(1) of the CISG [465]:

"A party is not liable for a failure to perform any of his obligations if he proves that the failure was

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[460] R-PHB, para. 168.
[461] R-I, paras. 1138-1145; R-PHB, paras. 168-170.
[462] R-I, paras. 1146-1207; R-PHB, paras. 171 and 179-181.
[463] R-I, paras. 1208-1212.
[464] R-I, paras. 1213-1227.

[465] Doc. BF-3, p. 24.

due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." [emphasis added]

403. It follows that GPE's suspension of performance cannot constitute a fundamental breach of Contract and Gasum's request for a declaration of breach must be dismissed.

V.3. MinAQ Obligation

404. *Pro memoria:* under the Contract, the Parties established a MinAQ Obligation for Gasum [466], [REDACTED] [467]. If Gasum failed to meet this Obligation in a given delivery year, it had to pay for each unit of gas not off-taken, [REDACTED] as a Down Payment. To mitigate the impact of this measure, Gasum could off-take the Make-Up Gas in any subsequent year, provided that Gasum had off-taken the MinAQ corresponding to such year [468]. In such case, the Make-Up Gas would be [REDACTED] [469].

405. Prior to 2020, Addendum 15 had set the MinAQ to [REDACTED] [470]. In 2020 the Parties amended the MinAQ volumes twice:

- In Addendum 18 of May 2020 the Parties agreed to reduce the MinAQ from [REDACTED] [471];

- In Addendum 19 of August 2020 the Parties agreed to reduce the MinAQ from [REDACTED] [472].

406. If there was no subsequent agreement among the Parties, on 1 January 2024 Gasum's gas volume commitments would revert to the levels established in Addendum 15 [473]. This means that from [REDACTED]

The Parties' positions in brief

407. Gasum argues that the liberalization of the Finnish gas market, the coming on stream of the Balticconnector pipeline and a general rise in gas prices throughout 2021, reduced Gasum's market share and its ability to resell the gas purchased under the Contract. Gasum submits that, as a result, it has been unable to take the MinAQ in 2020 and 2021. [REDACTED] [474].

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[466] Doc. C-1, Arts. 6.4, 7.2, 8.1.2; CER-2, para. 21.
[467] Doc. C-1, Art. 7.2.
[468] Doc. C-1, Art. 7.2.
[469] CER-2, para. 21.
[470] Doc. C-1, Addendum 15, Art. 2; CER-2, para. 23.
[471] Doc. C-1, Addendum 18. See also CER-2, para. 25.
[472] Doc. C-1, Addendum 19. See also CER-2, para. 26.
[473] See H-1, slide 26.

408. According to Gasum, this situation has been further aggravated since early 2022, due to the conflict between Russia and Ukraine. Some major customers have refused to purchase gas of Russian origin, further reducing Gasum's ability to resell the MinAQ volumes it is obliged to purchase under the Contract [475].

409. It is Gasum's position that [REDACTED] [476]; GPE, in turn, has benefited disproportionately from the high price environment [477].

410. Accordingly, Gasum argues that the MinAQ Obligation is unconscionable within the meaning of Section 36 of the Contracts Act and must be set aside or adjusted to zero effective as of 1 January 2020 (or, alternatively, as of 1 January 2021) until the end of the Contract [478].

411. GPE opposes Gasum's requests and argues that Gasum is trying to cure its own poor commercial decisions by trying to invalidate the Contract conditions, which were discussed in detail between the Parties and accepted, or even proposed, by Gasum [479].

412. GPE submits that there are no legitimate factual or legal grounds for Gasum to fail to comply with its MinAQ Obligation, and that the relevant provisions are not invalid or void [480]. Claimant's request to invalidate or adjust its volume obligations retroactively as of 1 January 2020, or 1 January 2021, is, in fact, a request to destroy the Parties' agreement, the terms of which Gasum either proposed itself or agreed to after long negotiations in good faith [481].

Issues to be determined

413. The Tribunal must determine whether the MinAQ Obligation must be set aside or adjusted on grounds of unconscionability for any of the following years:
- 2020 (1.);

- 2021 (2.);

- 2022 (3.);

- 2023 [REDACTED] (4.).

1. 2020

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[474] Doc. BF-2; CER-3, paras. 5-8.
[475] Doc. BF-2; CER-3, para. 9.
[476] C-I, paras. 141-149; C-PHB, para. 12; H-1, slides 11 and 41. See also CER-1, para. 55.
[477] Doc. BF-2; H-1, slide 36.
[478] C-I, paras. 205, 559-560 and section XIII, (a)(1).
[479] R-I, para. 313.
[480] R-I, paras. 321-322.
[481] R-I, paras. 31-32.

1.1 Claimant' s position

A. The 2020 MinAQ Obligation is unconscionable

414. Gasum requests the Tribunal to declare that the MinAQ Obligation as of 1 January 2020 until the end of the Contract must be adjusted to zero or set aside, pursuant to Section 36 of the Contracts Act [482].

415. Claimant submits that when the Contract was entered into, Finland was an island isolated from the rest of the gas market, and Gasum, like GPE, held a monopolistic position. As such, the Contract was never intended to work in a liberalized market [483]. When the Parties negotiated Addendum 15, they were in a pre-liberalization situation, without any expectation of when the Finnish market would open. Once it became clear that the market would open in 2020, Gasum approached GPE to negotiate an amendment to the Contract. However, GPE refused to adjust the Contract until after the market opening, when Gasum would already actually be in a situation of hardship [484]. And, indeed, when the market opened in 2020, Gasum's loss of market share was unprecedented when compared to other market openings [485].

416. Claimant submits that January 2020 is the first alternative date for the adjustment or setting aside of the MinAQ Obligation for two main reasons [486]:

417. First, because 2020 marks the start of Gasum's hardship [487]. When the Finnish gas market opened for competition on 1 January 2020, Gasum lost nearly half of its market share [488]. Gasum argues that in a scenario where there were oversized volume commitments, Gasum was incapable of meeting its MinAQ Obligation [489].

418. Second, because this period is characterized by GPE's unwillingness to negotiate in good faith. GPE only agreed to provide a temporary relief to Gasum by way of Addendum 18 and then Addendum 19 [490]. Gasum, who found itself in an inferior bargaining position in relation to GPE, had no real alternative but to agree to the terms offered by GPE in Addenda 18 and 19 [491]. And under Addendum

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[482] C-I, para. 559.

[483] H-1, slides 16-17.

[484] H-1, slides 77-80. See also H-1, slide 21, citing to CWS-1, paras. 6 and 8; CWS-2, paras. 6-8.

[485] H-1, slides 22 and 81.

[486] C-I, para. 560.

[487] See C-I, paras. 56-69. Claimant considers that the following events significantly impacted on Gasum's position as a supplier of gas on the Finnish natural gas market: (i) the Balticconnector's start of operations, which allowed for natural gas to be transported to Finland from Baltic states and the other way around; (ii) transfer of the ownership and operation of the transmission system to a separate entity, which, prior to the transfer, accounted for more than 90% of Claimant's profit; (iii) creation of an Inter-Transmission System Operator Compensation Agreement, which led to the creation of a regional natural gas market that comprises Finland, Estonia and Latvia ; and (iv) Gasum's competitors entering into the Finnish market and offering a lower and gas-indexed price.

[488] CER-2, Figure 5.5; H-1, slide 6.

[489] C-I, para. 269 *et seq*.

[490] H-1, slides 23, 82 and 87.

[491] C-I, para. 218 *et seq.*; H-1, slide 88.

18 the [REDACTED] [492].

B. The Waiver Clause does not affect Gasum's claim

419. Gasum considers that the introduction of the Waiver Clause 2020 in Addendum 18 was a product of GPE's superior bargaining position. In Gasum's words GPE "attempt[ed] to further tie Gasum to obligations which [GPE] knew Gasum could not likely meet" [493].

420. Consequently, Gasum claims that the Waiver Clause 2020 should be considered unconscionable and, thus, set aside under Section 36 of the Contracts Act. In any event, Gasum considers that GPE's competition laws violations render the Waiver Clauses equally inoperative [494].

1.2 Respondent's position

A. Gasum's claim has been waived

421. GPE argues that when the Parties agreed to a significant revision of the Contract in Addendum 18, they also agreed to waive any potential claims related to the MinAQ for 2020 [495].

422. GPE denies that it abused its position when negotiating the Waiver Clause. Contrary to Gasum's allegations, the Waiver Clause was the result of equal negotiations between the Parties [496]. In fact, Gasum amended the wording of the Waiver Clause 2020 several times [497].

423. Therefore, GPE submits that by including Waiver Clause 2020 in Addendum 18, Gasum waived any potential claims in relation to the MinAQ Obligation related to the period of 2020 [498].

B. The 2020 MinAQ Obligation is valid

424. GPE argues that the events referred to by Gasum cannot constitute *force majeure* or hardship under Art. 79 of the CISG in relation to Gasum's MinAQ Obligation in 2020 (a.). GPE also considers that the MinAQ Obligation cannot be adjusted to zero or declared void as of 1 January 2020 under Section 36 of the Contracts Act (b.) [499].

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[492] H-1, slide 24, citing to CER-6, Figure A.2.

[493] C-I, para. 239.
[494] C-I, para. 239.

[495] R-I, para. 208; R-PHB, paras. 17-18; H-2, slide 63.
[496] R-I, para. 852.
[497] R-I, para. 852.
[498] R-I, para. 940.

a. There is no *force majeure* or hardship under Art. 79 of the CISG

425. GPE submits that Gasum should first and foremost prove its case under Art. 79 of the CISG. Art. 79 contains very strict criteria for an event to be considered hardship or *force majeure:* the event must be simultaneously unforeseeable, unavoidable and uncontrollable [500]. GPE considers that none of these criteria are met in the present case [501]:

- Gasum could have foreseen the liberalization of the market when concluding Addendum 18 [502]; indeed, the 2020 Finnish gas market liberalization had been expected for several years [503] and Gasum had information about other gas markets where similar liberalization experiences had taken place [504]; and

- Gasum could have overcome its alleged difficulties, had it been more proactive [505].

426. Therefore, GPE considers that the events described by Gasum cannot constitute *force majeure* or hardship under Art. 79 of the CISG, and Gasum's failure to meet its MinAQ Obligation is not justified [506].

b. The requirements of Section 36 of the Contracts Act are not met

427. GPE argues that Section 36 of the Contracts Act should be applied restrictively [507]. Accordingly, GPE considers that Gasum's MinAQ Obligation cannot be declared void or adjusted to zero as of 1 January 2020 based on Section 36 for the following reasons [508]:

- First, Section 36 applies mainly in situations where the Parties do not have equal bargaining power; however, the Parties had equal bargaining power when they concluded Addendum 18 and Gasum could have negotiated the terms it wanted [509];

- Second, Addendum 18 is the result of commercial negotiations between the Parties, and Gasum was not under any pressure [510];

- Third, the other circumstances referred to by Gasum, such as the alleged disproportion between

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[499] R-I, para. 390.

[500] H-2, slide 70; R-PHB, para. 15.
[501] R-PHB, para. 15; H-2, slide 71.
[502] H-2, slides 71-72.
[503] R-I, para. 401.
[504] R-I, para. 407.
[505] R-I, para. 462; H-2, slide 71.
[506] R-I, paras. 393 and 462.

[507] R-I, para. 465.
[508] R-I, para. 465.
[509] R-I, paras. 466 *et seq*. and 514.
[510] R-I, paras. 491 *et seq*. and 514.

the Parties' benefits under the Contract or Gasum's negative financial condition [511], are irrelevant for the application of Section 36 of the Contracts Act [512]; and

- Finally, when concluding Addendum 18, Gasum had all possible expertise and Finnish market knowledge at its disposal - much more than GPE did [513].

1.3 Decision of the Tribunal

428. Gasum asks the Tribunal to declare that the MinAQ Obligation for the year 2020 is unconscionable and must be set aside or modified pursuant to Section 36 of the Contracts Act, essentially based on either one of two grounds:
- Gasum's loss of nearly half of its market share overnight when the market opened on 1 January 2020, which made Gasum unable to meet its MinAQ Obligation [514];

- The circumstances prevailing at the time Addendum 18 was entered into, namely GPE's superior bargaining position and the pressure and time constraint Gasum was under, further render the 2020 MinAQ Obligation unconscionable [515].

429. The Tribunal finds that Gasum waived any claim related to the 2020 MinAQ Obligation when it agreed to include Waiver Clause 2020 in Addendum 18 (A.). Furthermore, the Tribunal is not convinced that Gasum was in an unequal bargaining position when it negotiated Addendum 18 and, therefore, there is no case of unconscionability (B.).

A. Gasum waived claims related to the 2020 MinAQ Obligation

a. Facts

430. *Pro memoria:* Before the 2020 liberalization, the Parties had last amended the Contract in 2015, which had set the MinAQ Obligation at [REDACTED] [516]. At the time, the date of liberalization of the Finnish natural gas market was not yet known.

431. Three years before, on 27 June 2017, the Finnish Parliament had adopted the "Natural Gas Market Act", announcing that the Finnish market would open for competition once the Balticconnector

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[511] R-I, para. 512.
[512] R-I, paras. 512 and 514.
[513] R-I, para. 514.

[514] H-1, slides 6 and 81.
[515] C-I, para. 282; H-1, slides 78-83, 111.

[516] Doc. C-1, Addendum 15, Art. 2; CER-2, para. 23.

came into operation [517].

432. In 2018 and 2019 Gasum contacted GPE to discuss the continuation of the Contract after the forthcoming liberalization. GPE, however, indicated that the changes, if any, should be agreed upon once the liberalization had occurred and its actual effects could be gauged [518].

433. When the liberalization of the natural gas market took place on 1 January 2020, Gasum invited GPE to formally discuss the effects of the Balticconnector on its activities [519]. After a meeting on 22 January 2020, the Parties agreed that Gasum would submit a hardship claim [520].

434. As agreed by the Parties, on 23 January 2020 Gasum submitted the First Hardship Claim, in which it requested to initiate negotiations pursuant to Art. 11.7 of the Contract, referring to the following events in support of its claim [521]:

- Gasum had lost nearly half of its market share after the Finnish gas market liberalization and the opening of the Balticconnector;

- The flow of natural gas from the Baltic countries through the Balticconnector to Finnish customers, sold at prices significantly lower than what Gasum could offer considering the Contract Price, was affecting Gasum's ability to sell gas;

- There was a projected further loss of competitiveness as of June 2020, when the capacity of the Balticconnector was set to increase; and

- The volume commitments under the Contract were based on the total demand of natural gas in Finland (pursuant to Art. 2.1), but this was no longer in line with the reality, since alternative natural gas suppliers had taken up a considerable share of the liberalized Finnish market.

435. Accordingly, Gasum sought to increase its competitiveness in the gas market and, therefore, review the provisions of the Contract, *inter alia,* to reduce the MinAQ Obligation [522].

436. The First Hardship Claim led to negotiations between the Parties and on 19 May 2020 they amended the Contract by entering into Addendum 18 [523]. In that amendment, the Parties agreed, *inter alia,* to reduce the MinAQ from [REDACTED] [524] - meaning that in subsequent years, the MinAQ Obligation would go back to its level of [REDACTED].

b. Analysis

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[517] RER-2, para. 115; Doc. WP-6.
[518] C-I, paras. 74, 226 and 383; R-I, paras. 138-155.
[519] Doc. C-126. See also CWS-1, para. 9.
[520] R-I, para. 195.
[521] Doc. C-32, p. 1.
[522] Doc. C-32, p. 1.
[523] Doc. C-1, Addendum 18.
[524] Doc. C-1, Addendum 18. See also CER-2, para. 25.

437. In Art. 5 of Addendum 18 the Parties agreed that the reduction in the MinAQ Obligation was exceptional and applicable only for the year 2020. They also established that the MinAQ should not be recalculated or otherwise modified in the framework of a future arbitration [the "Exceptionality Clause"] [525]:

[REDACTED]

438. It follows from this provision that the Parties, both large enterprises controlled by the Finnish and the Russian States, voluntarily consented to curtail the Tribunal's powers to modify the 2020 MinAQ Obligation.

439. Furthermore, in Art. 4 of Addendum 18 the Parties included Waiver Clause 2020, which expressly provides that Gasum "waives any potential claims" regarding the MinAQ Obligation for the year 2020 [526]:

[REDACTED]

440. The Parties agree that in interpreting the Contract (and its amendments) the Tribunal should be guided by the interpretation principles of the CISG [527].

441. That said, the wording of Arts. 4 and 5 of Addendum 18 is unequivocal and requires no interpretation [528]. The Parties agreed that:

- [REDACTED]

- [REDACTED]

- [REDACTED]

442. Even if the Tribunal were to interpret these provisions in light of the principles contained in Art. 8 of the CISG [529], the Tribunal's conclusion would be unaltered. It was GPE who suggested the wording of the Waiver Clause 2020 and of the Exceptionality Clause. And Gasum clearly understood what it was agreeing to, as demonstrated by Gasum's conduct throughout the negotiation process (i) and as confirmed by the testimony of Claimant's own witness (ii).

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[525] Doc. C-1, Addendum 18, Art. 5.

[526] Doc. C-1, Addendum 18, Art. 4.

[527] C-I, para. 155.

[528] Doc. RL-93, p. 142: "Schmidt Kessel purports that two basic principles of interpretation of contracts must apply in the context of the application of [Art. 8 of the CISG]. The first is to give priority to the text of a contract over all other elements of interpretation set out in Article 8(3) of the CISG. This principle has generally been adopted in comparative law. […]".

[529] Doc. BF-3, Art. 8: "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

(i) Negotiation of Waiver Clause 2020 and Exceptionality Clause

443. As will be seen in further detail in section B *infra,* after Gasum submitted the First Hardship Claim, the Parties entered into negotiations which led GPE to send Gasum a first price proposal on 17 February 2020 [530]. Thereafter, the Parties exchanged a series of term sheets, which eventually led to a first draft of Addendum 18. This draft was sent by GPE on 4 March 2020 and it included the following wording regarding the waiver of potential claims and the exceptionality of Addendum 18 [531]:

[REDACTED]

444. On that same day, Gasum replied to GPE, thanking it "for accommodating Gasum's requests" regarding a series of issues. Gasum proposed only two modifications to the draft Addendum sent by GPE:
- One by which Gasum sought to clarify the gross calorific value of gas; and

- Another to the Waiver Clause 2020.

The changes to this Waiver Clause, in mark-up, specified that Gasum was waiving potential claims "regarding the Contract Quantity and Contract Price for the year 2020" but that it reserved the right to invoke the same market changes in future procedures [532]:

[REDACTED]

445. Gasum did not propose any changes to the Exceptionality Clause reflected in paragraph 4.

446. On 6 March 2020 GPE responded to Gasum and added a few additional edits to the Waiver and Exceptionality Clauses, making clear that the waiver of claims related not only to the Contract Price and the ACQ, but also to the "MinAQ" (paragraph 3). Likewise, GPE made clear that the MinAQ could not be recalculated or modified in the framework of future arbitration proceedings (paragraph 4) [533]:

[REDACTED]

447. On 9 March 2020 Gasum indicated that it had approved most of the amendments introduced by GPE "with exclusion of the hardship provision". The minimal changes introduced by Gasum were the following [534]:

[REDACTED]

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[530] Doc. R-44, pp. 2-3.
[531] Doc. R-44, document attached.
[532] Doc. R-45, document attached.
[533] Doc. R-117, p. 4 of the PDF.
[534] Doc. R-118, p. 5 of the PDF.

448. On 11 March 2020 GPE responded to the modifications made by Gasum in the latest version of the draft. GPE asked Gasum to explain the deletion of the sentence "if it refers to hardship under [REDACTED] remained unchanged for the year 2020, GPE also suggested to delete the reference to "MinAQ" in the first limb of the Exceptionality Clause (now paragraph 5), but not in the second limb [535]:

[REDACTED]

449. On that same day Gasum answered to GPE with further comments to the draft (marked as "A4R3" and "A6R5" *infra),* explaining the reasons that had led Gasum to delete the sentence regarding hardship in the Waiver Clause and accepting the removal of the reference to MinAQ in the first limb of the Exceptionality Clause. Gasum declared that they were "happy to explain [their] view on the subject over telephone" [536]:

[REDACTED]

450. The final version of Addendum 18 shows that GPE accepted the changes proposed by Gasum to the Waiver Clause and the deleted sentence was not included [537]:

[REDACTED]

451. The Exceptionality Clause remained drafted with the wording accepted by both Parties on 11 March 2020 [538]:

[REDACTED]

452. The history of these negotiations shows that:
- GPE proposed to include the Waiver Clause 2020 and the Exceptionality Clause in Addendum 18;

- Gasum had ample opportunity to submit comments to the Waiver Clause 2020 and to the Exceptionality Clause; and

- Gasum made use of such opportunity and introduced several modifications to the Waiver Clause 2020 and the Exceptionality Clause.

453. Gasum's conduct proves beyond any doubt that Gasum fully understood what it was agreeing to, *i.e.*, that it was waiving all its claims regarding the 2020 MinAQ Obligation, which could also not be recalculated or modified in the framework of subsequent arbitration.

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[535] Doc. R-119, p. 5 of the PDF.
[536] Doc. R-120, p. 5 of the PDF.
[537] Doc. C-1, Addendum 18, Art. 4.
[538] Doc. C-1, Addendum 18, Art. 5.

(ii) Testimony of Claimant's witness

454. If the above evidence was not enough, Mr. Dan Sandin, who was responsible for negotiating Addendum 18 on behalf of Gasum, confirmed under oath that Claimant understood what it was agreeing to [539]:

> "Q. [Mr. Khvalei] How did you understand this clause [*i.e.*, Art. 4 of Addendum 18]?
>
> A. [Mr. Sandin] We understood the clause as it's written.
>
> Q. [Mr Khvalei] As what?
>
> A. [Mr. Sandin] As it's written. [...]
>
> [REDACTED]
>
> A. [Mr. Sandin] Our lawyer, internal lawyer did review the document."

455. In view of the above, Gasum is barred from bringing a claim to modify or set aside the MinAQ Obligation for the year 2020 due to the changes provoked by the liberalized market, because it willingly waived such claims when agreeing to introduce Waiver Clause 2020 and the Exceptionality Clause in Addendum 18.

C. Gasum's counterargument

456. Gasum makes a counterargument: that it could not have waived a claim under Section 36 of the Contracts Act, because it is a mandatory provision of Swedish law [540].

457. Both Parties' legal experts have indeed confirmed that Section 36 is a mandatory provision of Swedish law that, in principle, cannot be waived by the Parties' agreement [541].

458. However, prompted by the Tribunal's questions, Professor Ramberg has recognized that parties could choose to contract out of Section 36 for events that were known at the time of signing the waiver [542]:

> "Q. [Mr. Derains] [...] you cannot contract out the application of Section 36, so I think that you mean also that you cannot in the contract write that: I waive in advance any claim based on Section 36; is that correct?
>
> A. [Professor Ramberg] That is a correct understanding.

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[539] HT, Day 2, p. 89, ll. 1-22.

[540] See C-PHB, para. 75 and item 72.

[541] CER-3, para. 44; RER-1, para. 12.

[542] HT, Day 4, p. 84, l. 11 – p. 85, l. 16 (Professor Ramberg).

Q. [Mr. Derains] Okay. So far I understand. My question is the following. Can you waive retrospectively claims based on Section 36 and say, well, I waive any claims for the past, based on Section 36?

A. [Professor Ramberg] Well, this is a difficult -- I would say only if when you make that waiver you are aware of the facts that would trigger Section 36. So for instance if I have been fraudulent towards you, you can later say: okay, Professor Ramberg, I understand that you have been fraudulent. I waive my rights based on that fraud. But if you were not aware of my fraud and you waive any rights based on Section 36, that wouldn't be a valid waiver. [...]

Q. [Professor Berger] With respect to future events, because you just said that the waiver can be considered in the connection of supervening events, which by their very nature are future events?

A. [Professor Ramberg] If I say in the contract that I waive any rights to rely on Section 36 due to bad weather conditions, unforeseen bad weather conditions in the future, such a waiver would be valid and in effect prevent Section 36 from coming into operation if the contract becomes unbalanced due to bad weather."

459. The Tribunal agrees with the position of Professor Ramberg: a party can waive claims for facts that were known or could reasonably have been known to it at the time of signing the waiver agreement.

460. In this particular case, Gasum, fully aware that it had lost nearly half of its market share in the first few months of the liberalization of the Finnish gas market, agreed to waive *any* potential claims regarding the MinAQ Obligation. It also agreed that this provision could not be the object of modification through subsequent arbitration. Gasum knew or ought to have known that by waiving *any* potential claim it was also waiving claims under Section 36 of the Contracts Act - otherwise it should have specified that this was not its intention.

B. Gasum was able to negotiate the terms of Addendum 18

461. Gasum makes an additional argument: when negotiating Addendum 18, Gasum was in an unequal bargaining position vis-à-vis GPE for two reasons [543]:

- First, Gasum had already tried to engage in negotiations in 2018 and 2019, but GPE had stalled, waiting for Gasum to be left with no alternative but to negotiate an unfavorable MinAQ Obligation [544]; and

- Second, when GPE finally agreed to negotiate in 2020, Gasum was already in a situation of hardship; faced with huge purchase commitments, Gasum had no choice but to agree to GPE's proposals under Addendum 18 - the alternative would have been to default on its off-take obligations [545].

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[543] C-PHB, para. 13. See also H-1, slide 111.

[544] C-I, paras. 74, 226 and 383; H-1, slides 79-80.

[545] C-I, para. 81; C-PHB, para. 15; HT, Day 2, p. 49, ll. 1-4 (D. Sandin).

462. For this reason, Gasum submits that both the Waiver Clause 2020 and the 2020 MinAQ Obligation are unconscionable within the meaning of Section 36 of the Contracts Act and must be set aside [546].

463. Even assuming, *arguendo,* that the Parties could not have waived a claim under Section 36 of the Contracts Act, the Tribunal is not convinced that any of the terms of Addendum 18 are unconscionable.

464. As discussed in section V.1.3.C *supra,* for the Tribunal to make a finding of unconscionability it would have to find that there was an extreme unbalance between the Parties' respective benefits under Addendum 18 in light of all relevant circumstances, including the circumstances prevailing at the time of the negotiation of the Addendum.

465. The contemporary evidence on the record related to the 2018 and 2019 attempts to negotiate (a.) and to the 2020 negotiation of Addendum 18 (b.), does not support Gasum's argumentation.

a. 2018-2019 negotiations

466. There are several undisputed facts between the Parties:

- In 2018, Gasum requested GPE to hold negotiations to adjust certain terms of the Contract in light of the upcoming liberalization of the Finnish gas market and the launch of the Balticconnector [547];

- Between 2018 and 2019 the Parties held several meetings [548];

- In the context of those meetings Gasum presented its forecasts on how the market would evolve after 1 January 2020 and what potential revisions should be made to the Contract [549];

- Despite these exchanges, GPE stated that it was not possible to revise the Contract merely based on forecasts and impending circumstances that had not yet materialized [550].

467. Gasum argues that GPE's behavior constituted an abuse of superior bargaining position, which left Gasum with no other option but to negotiate unfavorable terms in Addendum 18 [551].

468. The Tribunal does not agree with Gasum.

469. The Contract's Hardship Clause, which is the instrument that permits a Party to invite its counterparty to negotiate a review of the Contract, prescribes [REDACTED] [552]:

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[546] C-I, section VI.B; C-PHB, para. 63 (see also para. 75).

[547] C-I, para. 73 *et seq*.; R-I, paras 138 *et seq*.; Doc. R-34.

[548] See Doc. R-30; Doc. R-31; Doc. R-34. See also H-2, slide 15.

[549] See Doc. R-34, pp. 2-5.

[550] C-I, para. 74; R-I, para. 152. See also RWS-1, paras. 13-15; CWS-1, para. 8; C-PHB, para. 8; HT, Day 2, p. 47, ll. 2-14 (D. Sandin).

[551] C-I, paras. 74, 226, 374 and 383.

[552] Doc. C-1, Art. 11.7.

[REDACTED]

470. [REDACTED] In 2018 and 2019 Gasum was requesting a review of the Contract, based on conditions that had not yet changed. In fact, there was no certainty whether a change would materialize on that date. More importantly, the consequences of the potential change (the liberalization of the Finnish natural gas market) were completely unknown to the Parties. Such consequences could not have been known until at least after the liberalization of the market in 2020 [553].

471. In these circumstances, the Tribunal finds that in 2018 and 2019 GPE legitimately refused to negotiate an amendment to the Contract based on the Hardship Clause. The Tribunal concludes that there was neither bad faith, nor an abuse of dominant position on the part of GPE (if any dominant position exists - the Tribunal will address this issue in further detail in section V.5.3 *infra)*.

b. Addendum 18 negotiations

472. The evidence produced by the Parties shows that Gasum was able to negotiate Addendum 18 on a level playing field.

473. On 3 January 2020, three days into the liberalization of the market, Gasum informed GPE that the Contract Price was not competitive compared with Baltic competitors importing gas through the Balticconnector and suggested discussing the lessons of the first weeks of the market opening in Saint Petersburg later that month [554].

474. GPE agreed to hold a meeting, which ended up taking place on 22 January 20 2 0 [555]. As agreed in the meeting, one day later, Gasum submitted the First Hardship Claim [556]. Gasum requested an overall revision of the Contract provisions to ensure its competitiveness, including a "reasonable reduction of the MinAQ":

[REDACTED]

475. In an email dated 31 January 2020, following up on the First Hardship Claim, Gasum sent a proposal to GPE, informing that they were ready to start negotiations [557]. Gasum noted that their principal disadvantage in competitive terms was that the Contract Price was [REDACTED] Gasum proposed to defer the adjustment of the Contract volumes (including the MinAQ Obligation) to later in the year and simply to change the Contract Price to [REDACTED] [558]. Gasum suggested to see "how the market reacts" and, if necessary, further adjust the price and/or the volumes by the end of the year. Thus, Gasum implicitly recognized that the actual impact of the liberalization on its business could not yet

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[553] Doc. R-34, pp. 2-5.

[554] Doc. C-126.

[555] Doc. R-38.

[556] Doc. C-32. See also above para. 86 for a more detailed explanation of the First Hardship Claim.

[557] Doc. R-39.

[558] See Doc. R-39 in which Gasum proposes: [REDACTED]

be fully gauged.

476. That same day GPE confirmed that they were ready to meet for negotiations [559].

477. On 11 February 2020 Gasum sent its pricing proposal for the period between March and December 2020, taking into account different MinAQ volumes [REDACTED] [560]:

[REDACTED]

478. Gasum suggested that the Parties should agree on the 2020 commercial terms as soon as possible and, in parallel, pursue negotiations until the summer regarding the commercial terms that would apply from 2021 and beyond [561].

479. On 17 February 2020, GPE sent to Gasum an initial proposal which sought to accommodate Gasum's requests. In this proposal, the Contract volumes remained unchanged (ACQ [REDACTED] and MinAQ [REDACTED]), but the Contract Price was [REDACTED] [562]:

[REDACTED]

480. Two days later, on 19 February 2020, Gasum and GPE held a meeting in Saint Petersburg. After the meeting, on 20 February 2020, GPE sent a revised version of the term sheet to Gasum, which reflected the discussions held by the Parties [563]:

Following our meeting in SPB yesterday and phone call today please find attached the updated draft. The volume adjustment is introduced as well as the new formula structure.

481. At Gasum's behest, the document contained [REDACTED] In its comments, GPE noted that the decrease in ACQ led to a new MinAQ [REDACTED] [564]

[REDACTED]

482. In an email of 21 February 2020 Gasum accepted the updated proposal and indicated that [565]:

"We are pleased with the quick response to our needs and negotiation process enabling us to react the competition. We still remain a bit concerned about the committed volumes due to the fact that some of the sales for the summer months has already been closed. However, we have decided to accept you[r] proposal as such for the calendar year 2020 [...]". [Emphasis added]

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[559] Doc. R-40.
[560] Doc. R-114.
[561] Doc. R-114.
[562] Doc. R-41.
[563] Doc. R-42, attached document.
[564] Doc. R-42, attached document. See also para. 88 *supra* for a more detailed explanation of the terms contained in the proposal.
[565] Doc. R-43.

483. On 4 March 2020, GPE sent the draft of Addendum 18 in which the commercial terms agreed by the Parties were included. Gasum did not object or comment to the terms of supplies. In fact, on that same day, Gasum thanked GPE for providing a draft Addendum and for "accommodating [Gasum's] requests" [566].

484. After negotiations on the Waiver Clause 2020 [567] and internal approval by the management of GPE [568], on 19 May 2020 the Parties executed the final version of Addendum 18 [569].

485. There is no contemporary evidence that Gasum ever declared that GPE was acting in an abusive manner or in bad faith. On the contrary: the Parties' negotiations were cordial, GPE conceded to Gasum's requests on several issues and Gasum expressed its satisfaction with the outcome of the discussions. The Tribunal has no doubt that each Party intended to reach an agreement as aligned as possible with its own interests and that there were reasonable compromises on both sides.

486. The main evidence on which Gasum relies in support of its claim that GPE allegedly used abusive negotiations tactics are statements from its witnesses [570]. However, these *ex-post facto* considerations are not only refuted by GPE's witness [57]1 but also are not corroborated by the contemporaneous evidence surrounding the Parties' negotiations.

487. In fact, the negotiation process demonstrates that the Parties were acting on a level playing field and reached an agreement which seemed optimal at the time, while they waited to see how the liberalization of the market would further impact Gasum in the coming months.

488. Therefore, the Tribunal is unconvinced that Gasum found itself in an unequal bargaining position when negotiating Addendum 18 that would render the 2020 MinAQ Obligation, or the Waiver Clause 2020, unconscionable.

* * *

489. In view of the above, the Tribunal dismisses Gasum's claim to modify or set aside the MinAQ Obligation for the year 2020 on grounds of unconscionability.

2. 2021

2.1 Claimant’ s position

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[566] Doc. R-45.

[567] See section V.3.1.3A.b(i) *supra*.

[568] Doc. R-46; Doc. R-47.

[569] See Doc. R-49; Doc. R-50; Doc. R-51; Doc. R-52.

[570] C-PHB, para. 9 (citing to HT, Day 2, p. 47, ll. 22-24 and p. 48, ll. 5-23; CWS-1, paras. 6-8, 10-11, 14; CWS-2, paras. 8-10, 12-13) and para. 24 (citing to CWS-1, para. 8; CWS-2, paras. 9-12; CWS-4, para. 14).

A. The 2021 MinAQ Obligation is unconscionable

490. Gasum argues that the Tribunal should declare that the MinAQ Obligation for 2021 is unconscionable with regard to circumstances at the time of conclusion of Addendum 19 [572] (a.) and in light of subsequent circumstances severely affecting Gasum's ability to perform under the Contract [573] (b.). Therefore, the 2021 MinAQ Obligation must be invalidated or adjusted to zero [574].

a. Gasum's inferior bargaining position and the pressure it was under render the MinAQ unconscionable

491. It is Gasum's position that the Parties did not have equal bargaining power when they negotiated Addendum 19: Gasum is a much smaller company than GPE, the Contract was of great importance to its business and Gasum found itself severely affected by the liberalization of the Finnish gas market [575].

492. Throughout the negotiations, Gasum repeatedly proposed that the lower MinAQ of [REDACTED] should continue to apply. However, GPE rejected this and insisted on a MinAQ at [REDACTED] even though Gasum made clear that it would unlikely be able to off-take such volumes [576]. Gasum found itself with little choice but to accept Gazprom's take-it-or-leave-it proposal. Ultimately, Gasum agreed to a MinAQ of [REDACTED], because the alternative would have been to go back to the even higher volume commitments under Addendum 15 [577].

493. Gasum submits that GPE's abuse of its superior bargaining position when imposing the MinAQ Obligation in Addendum 19 warrants the application of Section 36 of the Contracts Act [578].

b. Subsequent circumstances have rendered the MinAQ unconscionable

494. Gasum further argues that the 2020 events (liberalization of the Finnish gas market, Gasum's loss of market share, etc.), coupled with an unforeseeable and unprecedented rise in gas prices in 2021 (i.), and GPE's uncooperative conduct in the second half of 2021 (ii.), only aggravated Gasum's hardship and further render the 2021 MinAQ Obligation unconscionable [579].

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[572] C-I, para. 240 and section VI.B.
[573] C-I, section VI.C (para. 243 *et seq*.)
[574] C-I, paras. 242-243.

[575] C-I, paras. 219-227.
[576] C-I, paras. 231-232.
[577] C-I, para. 232.
[578] C-I, paras. 218-240.

[579] C-I, paras. 100, 109, 216, 560.

(i) Unprecedented rise in gas prices

495. Gasum argues that in 2021 gas prices in Europe rose to unprecedented levels [580]. This led to a contraction in the demand for natural gas in Finland, which was completely unforeseeable when the Parties concluded Addendum 19 [581]. This decrease in demand directly impacted Gasum's gas sales, which fell considerably below the MinAQ in 2021 [582]. [REDACTED] [583].

496. Gasum points out that GPE agrees that an unforeseeable change in circumstances may warrant the application of Section 36 of the Contracts Act [584]. It is Gasum's position that the extreme increase in prices was wholly unforeseeable when the Parties concluded Addendum 19 [585]. Accordingly, Gasum submits that the MinAQ Obligation became unconscionable and must be set aside pursuant to Section 36 of the Contracts Act [586].

(ii) GPE's conduct in 2021

497. Gasum submits that GPE benefitted hugely from these high prices, [REDACTED] [587]. Furthermore, Gasum claims that GPE took advantage of Gasum's hardship following the unprecedented increase in gas prices in two ways:

- By reducing its gas supplies to Europe, which in turn further contributed to the extreme rise in European gas prices [588]; and

- By refusing to agree to a change of delivery point [589].

498. According to Gasum, this constituted not only an abuse of GPE's dominant position, but also rendered the MinAQ Obligation unconscionable, pursuant to Section 36 [590].

499. Gasum avers that should the CISG apply instead, GPE's conduct amounts to a breach of its good faith obligation, which also renders the MinAQ unconscionable [591].

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[580] C-I, para. 247; CER-6, Figure A.7; H-1, slide 7; C-PHB, para. 10.
[581] H-1, slides 31 and 97.
[582] CER-2, Figure 5.15; H-1, slide 33.
[583] C-I, para. 216.
[584] H-1, slide 95, citing to R-I, para. 110.
[585] C-I, para. 245; H-1, slide 96.
[586] C-I, para. 245.
[587] H-1, slide 99.
[588] C-I, para. 258; H-1, slides 29 and 98.
[589] C-I, para. 260.
[590] C-I, para. 245.
[591] C-I, para. 253.

B. The Waiver Clause does not affect Gasum's claim

500. Gasum submits that when negotiating Waiver Clause 2021-2023 in Addendum 19, its intention was to limit the Waiver so as not to exclude certain grounds for bringing a claim [592]. This is why Gasum did not accept the broad wording suggested by GPE and deleted the words *"based on any grounds"* [593]. It follows that GPE knew (or could not have been unaware) that Gasum did not intend to waive any non-contractual grounds (such as unconscionability, competition law, duress, etc.) when negotiating Addendum 19 [594].

501. Therefore, Gasum contends that the grounds it invokes in the present arbitration *(i.e.,* Section 36 of the Contracts Act and competition law) are not covered by the Waiver Clause. Even if the Waiver would cover those grounds, it would have no legal effect, since Section 36 of the Contracts Act and competition law constitute mandatory law and cannot be contractually waived [595].

502. In any event, given that Gasum found itself in an unequal bargaining position in the negotiations, the Waiver Clause must be considered unconscionable and be invalidated by virtue of Section 36 of the Contracts Act [596].

2.2 Respondent's position

A. Gasum's claim has been waived

503. GPE contends that in Addendum 19 the Parties waived any potential claims regarding the MinAQ volumes for 2021-2023. The Parties also agreed that the First Hardship Claim was fully settled [597].

504. GPE denies that it abused its position when negotiating Waiver Clause 2021-2023. GPE states that, contrary to Gasum's allegations, the Waiver Clause was the result of equal negotiations between the Parties [598]. In fact, Gasum proposed the final wording of the Waiver Clause 2021-2023, which GPE accepted [599].

505. As to Gasum's argument that certain types of claims are still permissible despite the Waiver Clause, GPE disagrees. GPE accepted Gasum's final wording of the Waiver Clause 2021-2023, understanding that Gasum waived *all* potential claims in relation to the MinAQ, without exceptions, regardless of their grounds [600].

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[592] C-PHB, paras. 74-75.
[593] C-PHB, para. 74.
[594] C-PHB, item 74.
[595] C-PHB, paras. 74-75 and item 72.
[596] C-I, para. 239; C-PHB, para. 75 and item 75.

[597] H-2, slide 64; R-PHB, paras. 17, 19-20.
[598] R-I, para. 852.
[599] R-I, para. 852.

506. GPE submits that according to the principles of loyalty (*i.e.*, good faith) and *venire contra factum proprium,* Gasum is estopped from alleging that the Waiver Clause is inoperative or non-binding. Gasum never explained to GPE what it meant when it excluded the wording *"based on any grounds*" [601].

507. Lastly, the fact that Section 36 of the Contracts Act is a mandatory law provision is irrelevant. GPE is not arguing that the application of this provision was excluded by the Parties. Rather, GPE argues that under Swedish law Parties are free to agree on a waiver clause to exclude any potential claims between them, and Section 36 does not prohibit this [602].

508. Therefore, GPE submits that by including Waiver Clause 2021-2023 in Addendum 19, Gasum waived any potential claims in relation to the MinAQ Obligation related to the period of 2021 [603].

B. The 2021 MinAQ Obligation is valid and enforceable

a. There is no *force majeure* or hardship under Art. 79 of the CISG

509. GPE argues that Gasum cannot invoke hardship or *force majeure* under Art. 79 of the CISG in relation to the 2021 MinAQ Obligation [604]. This is because:

510. The increase in prices was not unforeseeable: at the time of concluding Addendum 19 Gasum could have foreseen the increase in natural gas prices in the second half of 2021 [605]. [REDACTED] [606] (in fact, one of these price hikes had already taken place in 2017-2018) [607]. It follows that market changes cannot be considered "unforeseeable circumstances", as confirmed by Professor Ramberg [608].

511. The increase in prices could have been overcome or avoided by Gasum [609]: Gasum could have purchased additional storage capacity and stored volumes. It could also have used the Contract's daily flexibilities to sell short-term products when the price was higher than under the Contract. Finally, Gasum could have sold the Make-Up Gas not taken in previous years for a lower price than competitors [610].

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[600] R-PHB, paras. 28-32.
[601] H-2, slide 65; R-PHB, para. 33.
[602] H-2, slide 65; R-PHB, paras. 35-39.
[603] R-I, para. 940.

[604] R-I, para. 759; H-2, slide 71.
[605] R-I, para. 762 *et seq*.; H-2, slides 70-71.
[606] R-I, paras. 865-908; H-2, slides 74 and 85.
[607] H-2, slide 73.
[608] H-2, slides 71 and 75, citing to RER-1, para. 47.
[609] R-I, para. 771 *et seq*.; H-2, slides 70-71 and 78.
[610] H-2, slide 78.

b. The requirements of Section 36 are not met

512. GPE also denies that the events that took place after 1 January 2021 constitute grounds for invalidation or adjustment of the MinAQ Obligation under Section 36 of the Contracts Act [611].

513. First, GPE submits that the Parties had equal bargaining powers when concluding Addendum 19 [612]. Addendum 19 was the result of commercial negotiations between the Parties initiated by Gasum [613].

514. Second, GPE finds that the alleged "subsequently arising circumstances" are irrelevant for establishing the unconscionability of the MinAQ Obligation under the Contract and should be disregarded by the Tribunal [614]. As mentioned above, GPE considers that the increase in gas price in the second half of 2021 could have been foreseen - and should have been part of Gasum's assumptions - when concluding Addendum 19 [615]. Furthermore, GPE argues that it is not responsible for the price hike in Europe [616] and that it was under no obligation to change the gas delivery point upon Gasum's request [617].

2.3 Decision of the Tribunal

515. Gasum submits that the MinAQ Obligation for 2021 is unconscionable and must be set aside or modified, pursuant to Section 36 of the Contracts Act, on the basis of one of two grounds [618]:

- Having regard to the circumstances prevailing at the time when Addendum 19 was entered into: Gasum submits that it found itself under pressure and in an inferior bargaining position, that left it with no option but to accept the 2021 MinAQ Obligation and Waiver Clause 2021-2023 [619] (A.);

- Having regard to subsequent circumstances: the unforeseeable and extreme price increase of natural gas in the fall of 2021, to which GPE contributed, further render the 2021 MinAQ Obligation unconscionable [620] (B.).

516. The Tribunal will analyze each of these grounds in turn, to determine whether there is a case of unconscionability.

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[611] R-I, para. 805.
[612] R-I, para. 809 *et seq*.
[613] R-I, para. 828 *et seq*.
[614] R-I, para. 858 *et seq*.
[615] R-I, para. 865 *et seq*.
[616] R-I, para. 889 *et seq*.
[617] R-I, para. 909 *et seq*.

[618] See also H-1, slide 111.
[619] C-I, paras. 218-220, 233, 239-240, 282.
[620] C-I, paras. 244-251, 283.

A. Parties had equal bargaining position when negotiating Addendum 19

a. Facts

517. *Pro memoria,* before Addendum 19 was signed, the situation was that once Addendum 18 expired, from 2021 until [REDACTED] the Contract would go back to the Addendum 15 volumes, *i.e.*, ACQ [REDACTED] and MinAQ [REDACTED] [621].

518. As it had already anticipated while negotiating Addendum 18 [622], on 30 April 2020 Gasum sent a draft Addendum 19 to GPE regarding the future of the Contract considering the new liberalized market conditions [623]. In essence, in this draft Gasum proposed to:

- Extend the volume conditions that had been established in Addendum 18 for the year 2020 to the remainder of the duration of the Contract, *i.e.*, ACQ of [REDACTED] and MinAQ of [REDACTED]; and

- [REDACTED]

519. This draft also contained provisions on the possibility for the Parties to request Contract Price revisions once every three years and regarding trade sanctions [624]. It did not, however, include a waiver clause.

520. The Parties agreed to discuss this proposal over the phone on Thursday 7 May 2020 [625]. Six days later, Gasum thanked GPE for the "very constructive telco last Thursday" and sent a new version of Addendum 19, which was now divided into two parts: a commercial one, with the terms previously proposed on 30 April, and a legal one, containing the provisions on Contract Price revisions and trade sanctions [626]. Gasum proposed to keep the Contract's flexibility provisions as they were.

521. In the meantime, on 19 May 2020 the Parties signed Addendum 18 [627].

522. On Friday 29 May 2020 the Parties held a call in which Gasum's CEO participated regarding draft Addendum 19, after which Gasum sent an updated proposal to GPE on 1 June 2020 [628]. In line with its initial proposal, Gasum suggested to maintain the same flexibility, and to reduce ACQ and MinAQ to [REDACTED] and [REDACTED] respectively. Gasum, however, accepted to add a [REDACTED]. Gasum noted that its market share was close to 53% and that it would likely not be able to meet its

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[621] Doc. C-1, Addendum 15.
[622] Doc. R-114.
[623] Docs. C-65, C-66 and R-53.
[624] Doc. C-66, Arts. 4 and 5.
[625] Doc. R-54.
[626] Doc. R-55/C-127/C-128.
[627] Doc. R-52; Doc. C-26.
[628] Doc. C-33 and C-73.

MinAQ for 2020. Therefore, Gasum was "not able to commit to higher ACQ" [629].

523. Two days later, on 3 June 2020, GPE thanked Gasum for this new offer and sent a new term sheet, hoping that it would be "helpful to meet [Gasum's] requests". GPE also pointed out that it considered 2020 an exceptional year, which conditions should not be extrapolated to the rest of the long-term Contract [630]:

[REDACTED]

524. The term sheet suggested to maintain the ACQ at [REDACTED] [631]:

- [REDACTED]

- [REDACTED]).

525. Accordingly, the total MinAQ amounted to [REDACTED], to which different prices applied [632]:

[REDACTED]

526. Two days later, Gasum thanked GPE for the "constructive discussion" and counterproposal. Gasum reiterated its loss of market share, which was likely to continue during the second half of 2021 due to the increased capacity of the Balticconnector. Therefore, Gasum proposed to agree on a *temporary* reduction of the take-or-pay [633]:

[REDACTED]

527. GPE immediately asked Gasum to clarify whether it was asking for an ACQ of [REDACTED] for the next three years, "to avoid any misunderstanding" [634].

528. Gasum clarified its position on 8 June 2020. From 2021 to the end of 2023 Gasum agreed to split the ACQ in two [635]:

- [REDACTED]

- [REDACTED]

529. This led to a total MinAQ of [REDACTED] [636]. The remaining provisions, including the Contract Price,

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[629] Doc. C-33.
[630] Doc. C-73/C-38.
[631] Doc. C-39. See also RWS-1, paras. 31-32.
[632] Doc. C-39.
[633] Doc. R-56/C-34.
[634] Doc. R-56.
[635] Doc. R-57/C-36.
[636] [REDACTED]

would be the ones suggested in GPE's last proposal. According to Gasum, this [637]: [REDACTED]

530. On 15 June 2020 Gasum wrote to GPE asking whether it would be willing to consider a temporary MinAQ of [REDACTED] for the next two years, since Gasum was seriously concerned that it would not be able to reach the volume commitments with the price level indicated by GPE. GPE asked what the price proposal in such scenario was, but Gasum did not respond [638].

531. On the following day GPE sent a new counterproposal, abandoning the division of the ACQ into two components. [REDACTED] and the Contract Price would be [REDACTED] The term sheet also included certain commitments regarding MinDQ [639] (which will be analyzed in more detail in section V.4.1.3 *infra).*

532. On 17 June 2020 Gasum thanked GPE for its counterproposal and confirmed its acceptance of the term sheet, asking GPE to provide a draft version of the Addendum [640].

533. On 30 June 2020 GPE provided Gasum with draft Addendum 19 [641]. The draft established the ACQ [REDACTED] It also contained a provision on MinDQ. The draft further established that "starting from the Year 2021 onwards" the Contract Price would be [REDACTED] Finally, it contained a draft of Waiver Clause 2021-2023 (which was combined with certain provisions on Contract Price revisions) [642].

534. Two days later Gasum sent its comments, suggesting only the deletion of part of draft Waiver Clause 2021-2023, as follows [643]:

[REDACTED]

535. On the following day, GPE asked Gasum to clarify why it had removed the waiver of its right to invoke the same market changes of the First Hardship Clause. According to GPE, Gasum had already invoked those market changes twice and should not open a precedent to continue invoking these same changes [644].

536. The Parties scheduled a call for 9 July to discuss this open issue [645]. Thereafter, on 13 July, [REDACTED] [646]:

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[637] Doc. R-57/C-36.
[638] Doc. C-35/C-74.
[639] Doc. C-40; Doc. C-41.
[640] Doc. C-42.
[641] Doc. C-67/R-58; Doc. C-68/R-109.
[642] Doc. C-68/R-109.
[643] Doc. R-59.
[644] Doc. R-60.
[645] Doc. R-61, pp. 1-2.
[646] Doc. R-61, attached document, p. 5.

[REDACTED]

537. On 14 July 2020 Gasum deleted [REDACTED] and informed that it was ready to conclude Addendum 19 [647].

538. Thereafter, the Parties still opened discussions regarding the possibility to request Contract Price revisions [648] and the Waiver Clause 2021-2023 eventually became independent from the Contract Price revision clause [649].

539. On 14 August 2020 the Parties signed Addendum 19 [650].

b. Gasum waived claims related to 2021 MinAQ Obligation

540. In its final wording, the Waiver Clause 2021-2023 provides that [651]:

[REDACTED]

541. The wording of this provision is unequivocal and requires no interpretation. [REDACTED] From the history of the negotiations described above, the Tribunal is fully convinced that Gasum understood what it was agreeing to and did not suffer from an unequal bargaining position:
- GPE proposed to include the Waiver Clause 2021-2023 in Addendum 19;

- Gasum had ample opportunity to submit comments to Waiver Clause 2021-2023; and

- Gasum made use of such opportunity and introduced several modifications to the Waiver Clause 2021-2023.

542. Therefore, Waiver Clause 2021-2023 is not unconscionable and there are no grounds to set it aside.

c. No unconscionability of Addendum 19

543. Gasum submits, nevertheless, that it retained the right to submit claims under Section 36 of the Contracts Act, not only because Gasum excluded the wording [REDACTED] from the Waiver Clause, but also because Section 36 is a mandatory provision of law that cannot be waived.

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[647] Doc. R-62.

[648] Doc. R-63; Doc. R-64; Doc. R-65; Doc. R-66; Doc. R-67; Doc. R-105; Doc. R-68. It should be noted that the Parties were at the same time negotiating Addendum 20 – which effects are not in dispute in the present arbitration.

[649] Doc. R-66, attached document, p. 5, Art. 6.

[650] Doc. C-1, Addendum 19/Doc. C-2. See also Doc. R-69 with the signature process.

[651] Doc. C-1, Addendum 19, Art. 6.

544. Even if Gasum's argument is accepted, the Tribunal also finds that there is no reason to set aside the 2021 MinAQ Obligation having regard to the circumstances prevailing at the time of conclusion of Addendum 19.

545. Once again, Gasum's contention of unbalance or abuse in the negotiations seems to stem mainly from *ex post facto* witness testimonies [652], which are not corroborated by the contemporaneous evidence surrounding the history of the negotiations of Addendum 19.

546. The evidence demonstrates that in April 2020, merely four months after the liberalization of the Finnish market had taken place, Gasum pushed GPE to negotiate a complete reconfiguration of their contractual relationship. Gasum's proposal implied a significant reduction of the minimum volumes that Gasum was required to off-take, at a significantly different price, for the same Contract duration.

547. It is evident that any market liberalization implies a loss of market share for a monopolistic player. Assuming, as suggested by Gasum, that good faith requires that the counterparty to an ex- monopolistic player, who sees its market position undermined due to liberalization, should be ready to renegotiate, this good faith obligation does not equate to a blank check; the counterparty is not obliged to accept changes which imply an upheaval in the Parties' contractual bargain - particularly, if the changes are all to the detriment of the counterparty.

548. GPE did not agree to Gasum's initial proposition - and this disagreement does not amount to a breach of its good faith obligation. After a series of cordial meetings and exchanges, the Parties finally consented to a compromise solution, which would apply for three years, while they waited to see how Gasum continued to adapt to the loss of its monopolistic position.

549. The substance of the exchanges between the Parties leaves the Tribunal fully convinced that they negotiated on equal terms and that both made compromises. Gasum had a full opportunity to submit its requests and to make counteroffers to the proposals made by GPE. The Parties repeatedly thanked each other for their respective efforts to accommodate each other's interests and for the "constructive" talks. This was even reflected in the "Whereas" of Addendum 19, which provides that [653]:

> The Parties have been engaged in commercial discussions with respect to certain terms of the Natural Gas deliveries as of 2021 and have found an amicable and mutually beneficial solution as described in this Addendum Na 19 (hereinafter referred to as the "Addendum").

550. The Tribunal has no doubt that if the solution found was neither "amicable" nor "mutually beneficial", Gasum would have suggested the deletion of this wording; it did not.

551. The Tribunal's findings are corroborated by one final piece of contemporary evidence: in September 2021 Ms. Johanna Lamminen - Gasum's former CEO, who was directly involved in the negotiations of Addendum 19 - left her position at Gasum. On this occasion, she wrote a goodbye message to GPE, thanking for their "good cooperation" throughout the years and confirming that the Parties had

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[652] C-PHB, item 29, 31 and 34 citing to CWS-2.

[653] Doc. C-1, Addendum 19, Whereas [Emphasis added].

"always managed to reach 'win-win' solutions" [654]:

"After my previous quiet "banking" life, working in Gasum was a challenge, but a positive one, thanks to devotion and input of GASUM team. The company managed to go through unbundling and several M&A deals, diversified the scope of services, introduced customer-friendly interfaces and increased its geographic coverage. All that would not be possible without good cooperation with Gazprom and Gazprom export personnel in particular. We always managed to reach "win-win" solutions even in difficult situations, respecting each other's interests and restrictions. I appreciate your open and prompt response to Gasum's ideas and proposals on all levels, following our Clients' business demands. I hope that the spirit of cooperation will remain in companies' future relations." [Emphasis added]

552. Although Gasum has tried to portray this message as proof that it had no other choice but to "try to maintain a good relationship" with GPE [655], the remaining evidence on the record proves that there was indeed a spirit of cooperation between Gasum and GPE.

553. In view of the above, the Tribunal concludes that the circumstances prevailing at the time Addendum 19 was entered into do not support Gasum's contention of unconscionability.

B. Subsequent circumstances do not make the 2021 MinAQ Obligation unconscionable

554. Gasum submits that there was a completely unforeseeable change of circumstances after the Parties concluded Addendum 19: the gas price in Europe reached unprecedentedly high levels in the second half of 2021. [REDACTED] [656]. This led to a decrease in demand for natural gas and a significant decline in Gasum's sales volumes [657]. According to Gasum, these dramatic changes and their impact alone render the 2021 MinAQ Obligation unconscionable [658] (a.).

555. Furthermore, Gasum submits that GPE contributed to the soaring prices by reducing its gas supply to Europe during the second half of 2021, further rendering the MinAQ Obligation unconscionable [659] (b.).

556. The Tribunal is unconvinced on both grounds.

557. For the Tribunal to decide that there is a case of unconscionability, the Tribunal would have to find that the subsequent circumstances were reasonably unforeseeable at the time Addendum 19 was concluded and led to a manifest disequilibrium in the Parties' interests in the Contract [660].

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[654] Doc. R-122.
[655] H-1, slide 93.

[656] C-I, paras. 245-247; H-1, slide 96.
[657] C-I, para. 248; H-1, slide 97.
[658] C-I, para. 250.
[659] C-I, para. 251; H-1, slides 29 and 98.
[660] See section V.1.3.C *supra*.

a. Price fluctuations are to be expected

558. The Tribunal finds that the spike in gas prices was not unforeseeable and did not fundamentally alter the equilibrium of the Contract.

559. Throughout 2019 and 2020, [REDACTED] [661]. [REDACTED]

560. [REDACTED]

561. [REDACTED] For instance, in early 2018 two "disruptive events" [662] led to a significant price increase in February 2018 [663]:

562. Professor Ramberg notes that in contracts for speculative goods (such as gas), it is foreseeable that there may be price variations due to changes in demand or supply for such goods [664]:

> "Commercial parties must take into account the risk of future variations in for instance market conditions, currency, prices on speculative goods such as oil, metals, cereals and shipping costs. That there may be price variations due to changes in demand or supply are foreseeable when

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[661] Doc. R-121; H-2, slide 22.

[662] Dr. Peters explains that the Austrian Baumgarten gas importing and processing plant on 12 December 2017 and the extreme cold spell named the "Beast from the East" at the end of February to the beginning of March in 2018, led to a significant increase in prices (RER-2, para. 224).

[663] RER-2, Figure 18, p. 64.

[664] RER-1, para. 47, citing to Doc. CR-15, p. 359, Doc. CR-16, p. 117 and Doc. CR-17, p. 104; Doc. BF-32, pp. 319-321.

the contract concerns speculative goods. That a market functioning may change considerably is foreseeable when there is awareness that a market is transforming to liberalisation. A party who has taken into account (or ought to have taken into account) a future event does not deserve legal protection as it should have protected itself either by a contract term, by insurance or in the futures market or refrained from concluding the contract at all." [Emphasis added]

563. Gasum consciously chose to assume the risk of market variations. The principle of *pacta sunt servanda* implies that it is not for the Tribunal to alter the risk allocation between the Parties, save in well-proven unforeseeable circumstances.

564. This conclusion is further reinforced by Waiver Clause 2021-2023. As noted by Professor Ramberg, a waiver clause heightens the burden of proof for unconscionability [665]:

"When the parties have expressed in the contract that they will not claim that a term may not be modified, they have indicated to a future judge that the term has been carefully drafted, that they are aware of that supervening events may entail a distorted equilibrium and that they are in agreement that each party shall assume the risk for such events."

565. In the present case, Waiver Clause 2021-2023 specifically provided that Gasum waived any potential claims regarding the MinAQ and the Contract Price for the years 2021-2023. When accepting this clause Gasum implicitly indicated that it was aware that supervening events, such as natural gas price variations, could entail a distortion of the contractual equilibrium.

566. There is an additional argument: market variations did not pose a significant risk for Gasum. Gasum, who is mainly a trader of gas, [REDACTED]

b. The rise in gas prices is not attributable to GPE

567. Claimant says that the spike in gas prices in the second half of 2021 is attributable to GPE.

568. The Tribunal finds that there is no evidence that GPE was responsible for the soaring gas prices; in fact, these seem to have been the result of a perfect storm in the European gas market [666].

569. [REDACTED] [667]. In fact, there are many other market players and the gas price is the result of a complex and delicate equation, which is influenced by many exogenous factors [668].

570. In December 2021 Mr. Jack Sharples, a research fellow with the Oxford Institute for Energy Studies [669], conducted a study in which he analyzed in detail the causes of the dramatic 2021 rise in

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[665] H-2, slide 66.

[666] Doc. WP-21, p. 35. See also RER-2, paras. 49-51.

[667] RER-2, paras. 53 and 243-249. See also Doc. WP-31, p. 10.

[668] Doc. WP-8, pp. 23-25; RER-2, paras. 219-223.

[669] The Oxford Institute for Energy Studies is an independent energy research institute.

prices from a European supply-side perspective [670] (two other papers were dedicated to the influence of demand and trading in this rise [671]).

571. Mr. Sharples' conclusion is that such rise was attributable to "a series of unfortunate events" including the fact that the global LNG demand grew faster than the global LNG supply. This unbalance was caused by a bounce back in the demand in the premium Asian market, due to a combination of post-COVID economic recovery, cold weather in the first quarter of 2021, and the LNG buyers' determination not to be caught short in the winter 2021/2022. These factors tightened the market. And the effect was further exacerbated by a decline in domestic European gas production and a net decline in pipeline imports. Furthermore, concern over supply availability in mid-winter contributed to sustained high gas prices [672].

572. The facts indicated by Mr. Sharples have been acknowledged by Gasum itself in its 2021 financial review [673]:

"The prices of gas and emission allowances started to increase in the beginning of 2021 and accelerated in the second half of the year. Several factors contributed to the rise in prices. However, the main contributing factor was the uncertainty related to the gas supply.

European gas storage levels were historically low ahead of the winter season, which continued to bring market imbalances as supply remained unchanged or even declined when Russian gas producers were mainly filling up their domestic storage. The La Niña weather pattern appeared for a second consecutive winter, bringing cold air to Asia in particular, which increased demand for LNG shipments in Northeast Asia." [Emphasis added]

573. Mr. Sharples' paper gave particular attention to pipeline imports from Russia and recognized that there is no other company that "has anything like the influence of Gazprom in a tight European market". Mr. Sharples explains that GPE faced domestic calls on its production that limited its ability to offer additional volumes to the European spot market in the summer 2021 [674]. Mr. Sharples adds that, starting in November 2021, [REDACTED] [675].

574. What the evidence seems to show is that [REDACTED] There is no evidence, however, that the purpose of GPE's conduct was to manipulate the global gas price in general or the European hub prices [REDACTED] in particular.
* * *

575. In view of the above, the Tribunal dismisses Gasum's claim to modify or set aside the MinAQ Obligation for the year 2021 on grounds of unconscionability.

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[670] Doc. WP-21, pp. 3 and 35.
[671] Doc. WP-18.
[672] Doc. WP-21, pp. 32-33. See also Doc. WP-5, para. 3, and Doc. WP-9, pp. 7-8, which identify similar factors.
[673] Doc. C-71, p. 3.
[674] Doc. WP-21, p. 33.
[675] Doc. WP-21, p. 33.

3. 2022

3.1 Claimant' s position

576. Gasum argues that when in February 2022 the Russian Federation *(i.e.,* GPE's controlling shareholder) commenced a war in Ukraine, the demand for Russian gas in Finland disappeared, further making it impossible for Gasum to meet its MinAQ Obligation [676]. Gasum points to the following events stemming from the Russian military actions in Ukraine as causes for the decrease of the demand for Russian gas:

- First, the public sentiment against the war waged by Russia has led customers to quickly move away from Russian gas to gas from alternative sources or alternative fuels [677];

- Second, the EU has taken measures to reduce future reliance on Russian gas imports, which will accelerate the emergence of alternative sources of supply, thereby drastically affecting the future demand for Russian natural gas throughout the EU [678];

- Finally, Finland, together with its neighbor Estonia, has announced plans to stop imports of Russian gas by the end of 2022; the two countries have leased a floating and regasification vessel for ten years with capacity to replace the Russian supplies of natural gas under the Contract [679].

577. Gasum submits that Russia's war in Ukraine in the spring of 2022 was wholly unforeseeable at the time of concluding Addendum 19 and that its consequences are such as to render the 2022 MinAQ Obligation unconscionable [680].

3.2 Respondent's position

A. Gasum's claim has been waived

578. GPE contends that in Addendum 19, the Parties waived any potential claims regarding the MinAQ Obligation for 2021-2023 [681], including for the period of 2022 [682].

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[676] CER-2, Figure 2.1; H-1, slides 8, 32 and 100; C-PHB, para. 10.
[677] C-I, para. 120.
[678] C-I, para. 123; C-PHB, para. 11.
[679] C-I, para. 124; C-PHB, para. 11.
[680] C-I, paras. 245 and 283; H-1, slide 111.

[681] R-PHB, paras. 17-20.
[682] R-I, para. 940.

B. The 2022 MinAQ Obligation is valid

a. There is no *force majeure* or hardship under Art. 79 of the CISG

579. GPE denies that there is *force majeure* or hardship under Art. 79 CISG regarding the 2022 MinAQ.

580. First, GPE argues that the price fluctuations caused by the Russian-Ukrainian conflict in 2022 were foreseeable [683].

581. Second, GPE considers that Gasum has failed to demonstrate that it was not able to overcome the negative consequences of the war in Ukraine [684]. The Contract Price remained competitive. It was Gasum's failure to take advantage of the Contract conditions which resulted in the loss of opportunity to sell additional gas on the Finnish and Baltic markets [685].

582. Gasum could have sold additional quantities if it had taken advantage of the opportunities offered by the liberalized market [686]. Gasum could also have sold gas to different European markets since, as of May 2022, Finland and the Baltic countries were connected to the European gas pipeline system through the Gas Interconnection Poland-Lithuania ["GILP"] [687].

b. The requirements of Section 36 are not met

583. GPE denies that the MinAQ Obligation in 2022 can be set aside or adjusted under Section 36 of the Contracts Act. GPE argues that the decrease of consumer's demand for Russian natural gas is not proven and, even if proven, Gasum could have overcome it:
- First, the level of consumption of Russian Gas in Europe has not been reduced yet [688];

- Second, discussions about the nationality of natural gas are irrelevant as gas in an international pipeline has no nationality [689]; and

- Third, Finnish customer's negative attitude towards the origin of natural gas is overstated and not supported by the evidence marshalled by Gasum [690].

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[683] H-2, slide 77.
[684] R-I, paras. 420-462, 771-804 and 994; H-2, slide 78.
[685] R-I, para. 996.
[686] R-I, para. 997; R-PHB, para. 194.
[687] R-I, para. 998; R-PHB, para. 194.

[688] R-I, paras. 1000-1001; RER-3, para. 3.42.
[689] R-I, para. 1002; RER-2 para. 76; R-PHB, paras. 189-192.
[690] R-I, paras. 1003-1034.

3.3 Decision of the Tribunal

584. On 24 February 2022 the hostilities between Russia and Ukraine broke out and on 1 April 2022 Decree No. 172 entered into force. As previously determined [691], the Contract became affected by a *force majeure* event. Since 21 May 2022 until the date of this Award, GPE has not supplied any gas to Gasum. The Contract is effectively suspended due to *force majeure* and there is no expectation that the cause of *force majeure* will disappear before the end of 2022.

585. The question which the Tribunal must address is whether the MinAQ agreed upon by the Parties for the year 2022 is unconscionable, as the Claimant alleges, and the Respondent denies.

586. In this instance, the Tribunal sides with Claimant.

587. The 2022 MinAQ was agreed for a Contract in which GPE was ready to supply, and Gasum ready to take gas from 1 January through 31 December 2022. In reality, gas supply was interrupted as of 21 May 2022. The MinAQ penalizes Gasum if [REDACTED] of the Make-Up Gas, with the right to take said gas in future years, provided it is capable of off-taking the MinAQ applicable in a given year.

588. Professor Ramberg, GPE's legal expert, recognizes that a contract may become unconscionable due to supervening events when four cumulative prerequisites are met [692]:

- First, there must be a material supervening event that fundamentally alters the equilibrium of the contract;

- Second, the event must have been reasonably unforeseeable at the time of conclusion of the contract;

- Third, the supervening event must be outside the aggrieved party's sphere of control; and

- Fourth, the event must not be such that it was assumed by the disadvantaged party; many contracts entail deliberate risk taking; the contract is not unconscionable when the risk materializes.

589. The Tribunal's finding of *force majeure* (see section V.2.2.3B *supra)* implies that the elements identified by Professor Ramberg are met in the present case:

590. First, the *force majeure* situation fundamentally altered the equilibrium of the Contract.

591. GPE has suspended all gas deliveries, because payment is not being made in accordance with Decree No. 172. It follows that, since 21 May 2022, Gasum is effectively barred from meeting its 2022 MinAQ Obligation and no further off-take is expected for 2022 [693].

592. Second, there is no doubt that both the Russian-Ukrainian conflict and the issuance of Decree No.

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[691] See section V.2.2.3B *supra*.
[692] RER-1, para. 45 *et seq*.
[693] H-3, slide 13.

172 were completely unforeseeable at the time of conclusion of Addendum 19.

593. Likewise, the Parties could not have predicted that the Contract performance would become suspended in 2022 as a result of these *force majeure* circumstances.

594. Third, the Russian-Ukrainian conflict, the issuance of Decree No. 172 and the ensuing *force majeure* are clearly outside of Gasum's sphere of control.

595. Lastly, Gasum could not have contractually assumed the risk of being unable to off-take the MinAQ Obligation, in a situation where, as of May 2022 and until the date of this award in November 2022, it was prevented from doing so due to a *force majeure* circumstance.

596. Therefore, the Tribunal finds that the MinAQ Obligation for 2022 has become unconscionable due to subsequent circumstances and must be set aside in accordance with Section 36 of the Contracts Act.

597. The Tribunal's decision is not affected by the Parties' consent to include Waiver Clause 2021-2023 in Addendum 19. The Parties' intention could not have been to waive claims such as the present one. They could only have wanted to exclude claims for facts that were either known or reasonably foreseeable at the time of signing the waiver [694].

4. 2023 onwards

4.1 Claimant's position

598. Gasum argues that the MinAQ Obligation for the future must be set aside or modified to zero, because circumstances subsequent to the conclusion of Addendum 19 have fundamentally altered the equilibrium of the Contract. Accordingly, the effects of the Contract are totally different to those assumed at its conclusion or at the conclusion of any of the subsequent Addenda, including Addendum 19 [695].

599. Gasum argues that in view of the current panorama, it will never be able to take the prescribed MinAQ volumes in the future, let alone any of the Make-Up Gas, which it can only off-take if it has previously taken the MinAQ [696]. This situation will be further aggravated in 2024, once the terms of Addendum 15 become applicable again. This Addendum, which was signed when Gasum was still in a monopolistic position, is no longer in line with the reality of the Finnish gas market [697].

600. Given that there is no way for Gasum to take anything near the MinAQ for the foreseeable future and, thus, no way for Gasum to take any Make-Up Gas, the MinAQ provision has *effectively* become

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[694] See also HT, Day 4, p. 84, l. 11 – p. 85, l. 16 (Professor Ramberg).

[695] C-I, paras. 261 and 283.

[696] H-1, slide 34.

[697] H-1, slides 76-77.

an unconscionable penalty, which must be set aside [698].

601. In sum, Gasum argues that the MinAQ Obligation has become excessively onerous and that the equilibrium under the Contract has been fundamentally changed due to circumstances beyond Gasum's control [699].

4.2 Respondent's position

602. GPE avers that Gasum's claims for invalidation or adjustment of the MinAQ Obligations for any future period should be dismissed for the same grounds put forward in previous years [700]. In essence, GPE considers that:

- Gasum cannot invoke hardship or *force majeure* based on the negative effects of liberalization since Gasum knew the prospective effects of liberalization and the possibility for gas prices to increase and could have overcome those changes in the gas market; and

- The argument that there is no demand for gas of Russian origin is not convincing, given that once natural gas enters the European pipeline system it becomes indistinguishable from any other gas in the grid; the alleged impossibility to sell gas of Russian origin in the European market is thus unfounded [701].

603. GPE notes that the Contract is valid [REDACTED] and that the circumstances which allegedly render the MinAQ unconscionable from 2023 to the end of the Contract can change at some point in the future. Moreover, GPE observes that the next revision of the Contract Price is [REDACTED] [702].

4.3 Decision of the Tribunal

604. The Tribunal must determine the MinAQ Obligation from 2023 onwards.

605. The present contractual situation as regards the MinAQ Obligation is the following:
- The MinAQ Obligation [REDACTED];

- In the negotiations which took place in 2020 and which crystallized in Addenda 18 and 19, the Parties could not reach agreement as regards the MinAQ Obligation for the years 2024 and beyond; absent such agreement, on 1 January 2024, Addendum 15 (which had been signed in 2015) will become applicable, and so will the MinAQ established therein - [REDACTED]

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[698] C-PHB, para. 64.
[699] C-PHB, para. 68.

[700] R-I, para. 1037.
[701] R-PHB, paras. 180-192.
[702] R-I, para. 1038; H-2, slide 101.

606. Summing up: the MinAQ Obligation for 2023 has been agreed to amount to [REDACTED] no agreement has been reached, and the old and higher figure of [REDACTED] agreed upon pre- liberalization, will become applicable again.

A. Main scenarios

607. The Tribunal has already established that, [REDACTED] [703].

608. If the Parties do find an agreement as regards *force majeure,* it is to be expected that the agreed solution will also include an arrangement as regards the MinAQ Obligation (and the ACQ) for the future years.

609. *Quid* if, [REDACTED] the Parties are unable to find an agreed solution?

610. In this case, the Tribunal has already foreseen that each Party will be entitled to call for a unilateral termination of the Contract [704]. Upon termination, there will be no further ACQ or MinAQ Obligation.

B. The subsidiary scenario

611. There is a third possible scenario: [REDACTED] (or with the Parties having reached an agreement to solve the *force majeure* situation, but not on the applicable MinAQ Obligation).

612. If this scenario were to materialize, the agreed MinAQ Obligation would amount (as explained in para. 606 *supra)* to [REDACTED].

613. Gasum's claim relates to this third scenario.

614. Gasum argues that, in this scenario, the agreed MinAQ Obligation must be set aside or modified to zero, because circumstances subsequent to Addendum 19, and even more to Addendum 15, have fundamentally altered the equilibrium of the Contract. In view of the current panorama, and the sequels of the conflict in Ukraine, Gasum avers that it will never be able to take and resell the necessary volumes of gas in Finland. Therefore, Gasum requests that the Tribunal apply Section 36 of the Contracts Act to set aside or modify the agreed MinAQ [705].

615. Respondent holds the opposite opinion: GPE says that Gasum cannot invoke Section 36, because it was aware of the prospective effects of liberalization, and dismisses the argument that there will be no demand for Russian gas, arguing that gas that enters the European pipeline system becomes indistinguishable from any other gas [706].

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[703] See section V.2.2.3C.a *supra*.
[704] See section V.2.2.3C.b *supra*.

[705] See section V.3.4.1 *supra*.
[706] See section V.3.4.2 *supra*.

616. The Tribunal must distinguish between 2023 (a.) and the years 2024-[REDACTED] (b.).

a. 2023

617. As regards the MinAQ Obligation for 2023, the Tribunal sides with GPE.

618. Gasum argues that the [REDACTED] must be reduced to zero, because the liberalization of the market constitutes a subsequent circumstance which fundamentally altered the equilibrium of the market.

619. The Tribunal disagrees.

620. The MinAQ Obligation for 2023 was agreed upon in Addendum 19, signed on 14 August 2020, when Gasum already had more than seven months of experience regarding the effects of liberalization on the Finnish gas market; [REDACTED] corresponds to the minimum amount of gas which Gasum, with the knowledge accumulated during these months, believed it could resell in Finland (or re- export through the Balticconnector) in that year.

Gasum's other argument

621. Gasum submits a second argument: that if it is obliged to off-take these gas quantities, it will be placed in an impossible position, because there is virtually no future demand for Russian gas on the Finnish market [707]. Gasum's expert says that the supply risks associated with Russian gas, the high gas prices, and the declined image of Russia as a gas supplier, will cause the demand for Russian gas to collapse [708].

622. GPE counters that once natural gas enters the European pipeline system it becomes indistinguishable from any other gas in the grid and that the alleged impossibility to sell gas of Russian origin in the Finnish market is unfounded [709].

623. On this point, the Tribunal also tends to agree with GPE.

624. Mr. Liimatta, Gasum's Head of Trading, agreed under cross examination that [710]:

> "There is no way of having a guarantee of origin for each individual molecule of gas moving in the pipelines."

625. Dr. Peters, Respondent's expert, reached a similar conclusion [711]:

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[707] H-1, slide 48.
[708] CER-2, para. 253.
[709] R-I, para. 1002; R-PHB, para. 189 *et seq*.; H-2, slide 54.
[710] HT, Day 2, p. 24, ll. 15-17.

"The specificity of an entry-exit system is that there is no concept of a physical 'point-to-point path' for the gas anymore, i.e. transportation defined by a particular physical route. Rather, any physical molecules injected by way of entry into the grid comprising the 'virtual point' become part of a commingled quantity of energy. The respective registered shipper having injected physical molecules into the virtual point loses ownership of such physical molecules and instead receives an entitlement to an 'anonymous' quantity of energy commensurate his nominated physical entry."

626. Gasum's own expert contradicts Gasum's position that the demand of Russian gas will be zero, by acknowledging that in 2023 there will be projected demand of Russian gas in Finland (although in his opinion, such demand will only be [REDACTED] [712]).

627. And there is an even more convincing reason for dismissing Gasum argument: during 2022 Gasum has continued to purchase LNG gas from GPE, for regasification in Finland and resale to Finnish consumers (these exports are not subject to Decree No. 172, and there is no prohibition for exporting LNG gas from Russia and importing it into Finland) [713]. There is no evidence in the record that the Russian LNG gas has been rejected by the Finnish end users.

628. Summing up, the Tribunal dismisses Claimant's argument that the MinAQ Obligation agreed upon in Addendum 19, and applicable for the year 2023, which amounts to [REDACTED], is unconscionable.

629. That said, the MinAQ Obligation of [REDACTED] was agreed on the understanding that GPE would supply, and Gasum would be able to off-take, gas during the 365 days of the year 2023.

630. In the scenario under discussion, the *force majeure* situation may extend to certain days of the year 2023 - and during these days, GPE will be unable to supply and Gasum unable to off-take gas under the Contract. The [REDACTED] MinAQ Obligation was agreed upon on the understanding that the year 2023 would not be affected by *force majeure.* If it is, the MinAQ Obligation should be reduced proportionally, by taking into consideration the days in the year 2023 when the performance of the Contract is suspended due to *force majeure*.

b. 2024 onwards

631. The situation is different as regards the MinAQ Obligation for the period 2024 through [REDACTED].

632. The MinAQ Obligation of [REDACTED] period was agreed upon in Addendum 15 - an agreement signed in 2015, at a time when GPE was the monopolist supplier of the Finnish pipeline gas market, and Gasum the monopolist buyer and distributor of gas in Finland; at that time, liberalization of the Finnish gas market was not imminent.

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[711] RER-2, para. 76.

[712] CER-2, paras. 249-253 and Figure 5.44; CER-6, para. 1; C-PHB, para. 28.

[713] H-2, slide 89. See also Doc. C-100 and Doc. C-101.

633. When the Parties negotiated Addendum 19 in 2020 and accepted that it would apply only to the years 2021 to 2023, there must have been a tacit understanding that a new negotiation would take place in the future, to agree on the ACQ and MinAQ Obligation for the succeeding years, preventing the application of the MinAQ Obligation agreed in the 2015 Addendum 15.

634. Simple economic logic underpins this assumption: Addendum 15 provides for a MinAQ Obligation of [REDACTED] - significantly higher than the [REDACTED]. This increase is contrary to commercial logic. Upon liberalization, Gasum was having difficulties in defending its shrinking market participation. There was no indication that this trend would reverse, and that in 2024 (and in the succeeding years) Gasum would be able to increase its market participation. Therefore, when the Parties agreed in Addendum 19 to a three-year MinAQ horizon, they could not have envisaged that after 2023 Gasum would be able to regain the quota established in 2015, under completely different circumstances.

635. The Parties' negotiations (reflected in detail in sections 1.3B.b and 2.3A.a *supra)* confirm this conclusion: Addenda 18 and 19 were always meant to be temporary agreements, applying while the Parties navigated the first years of market liberalization. Thereafter, the Parties would reevaluate the circumstances and decide the new applicable volumes under the Contract.

Section 36 of the Contracts Act

636. Section 36 of the Contracts Act provides that if a contract term is unconscionable, having regard to the contents of the agreement, to subsequent circumstances or to circumstances in general, the Tribunal is empowered to modify or to set aside such term [714].

637. Using the powers vested in it by Section 36, the Tribunal finds that the Parties' agreement, established in Addendum 15, that the MinAQ Obligation [REDACTED] has indeed become unconscionable due to subsequent circumstances and must be modified.

638. The modification should follow the same pattern of previous amendments agreed upon by the Parties regarding the ACQ and the MinAQ:
- [REDACTED]

- [REDACTED]

- [REDACTED]

639. The Tribunal is unable to establish the new ACQs which Gasum can expect to resell in the Finnish and export markets in 2024 and beyond. The economic and market circumstances can vary enormously from now till then. In the past, both Parties have shown an admirable capacity to negotiate and to find amicable solutions, reducing the ACQ to satisfy Gasum's necessities and capabilities. The Tribunal hopes that, in this case, the Parties will again be able to reach agreement, applying the parameters identified above.

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[714] Doc. CL-2.

640. If - against the expectations of the Tribunal - such agreement proves elusive, the Parties always have the possibility of solving the controversy through a new arbitration, under Art. 10 of the Contract.

V.4. MinDQ Obligation

641. Art. 3 of Addendum 19 introduced a new provision relating to "minimum" daily quantities of gas, which did not previously feature in the Contract terms [715]:

[REDACTED]

642. Thus, starting in January 2021:
- [REDACTED]

- [REDACTED]

643. [REDACTED]

The Parties' positions in brief

644. GPE argues that by agreeing to include Art. 3 in Addendum 19, Gasum clearly bound itself to take the MinDQ Obligation or to pay for the gas not off-taken below the MinDQ. Since signing Addendum 19, GPE has invoiced Gasum [REDACTED] for non-taken MinDQ [716].

645. Gasum contests these invoices and rejects GPE's interpretation of Addendum 19 [717]. Gasum submits that its intention when negotiating and signing this contractual amendment was to lessen - and not to increase - the burden of the volume commitments previously agreed between the Parties [718]. It follows that GPE's interpretation of this provision cannot be accurate, as it would lead to an unconscionable result.

Issues to be determined

646. The Tribunal must determine the following issues:
- What is the impact of Art. 3 of Addendum 19? Have the Parties entered into an agreement to the effect that Gasum must satisfy a MinDQ Obligation? (1.)

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[715] Doc. C-1, Addendum 19, Art. 3 [Emphasis added].

[716] Docs. C-12 to C-21 and C-53. See also Joint Table of Invoices, rows 3-9 and 11-14.

[717] C-I, paras. 153-154; CER-3, para. 3.

[718] H-1, slide 52.

- If the answer to the last question is affirmative, then must the provisions on the MinDQ Obligation be modified or set-aside? (2.)

1. Interpretation of Art. 3 of Addendum 19

1.1 Claimant's position

647. Gasum argues that the first issue that the Tribunal must decide is whether Gasum's or GPE's interpretation of Art. 3 of Addendum 19 prevails [719].

648. Gasum argues that the test under Art. 8 of the CISG is to determine if GPE, or a reasonable person, "knew or could not have been unaware" of Gasum's intent [720]. Gasum avers that, based on this standard, it is clear that GPE knew or had to know that Gasum would have never accepted to include a MinDQ provision in the Contract entitling GPE to invoice Gasum for any non-taken MinDQ volumes over and above the take-or-pay payments under the MinAQ, for several reasons [721].

649. First, the purpose of Addendum 19 was to relieve, and not burden, Gasum from the high pre- liberalization commitments set out in Addendum 15 [722].

650. Second, throughout their negotiations the Parties exchanged term sheets, in which they only discussed volumes and Contract Prices [723]. It is true that these mentioned Daily Contract Quantities, but they did not mention any penalty in case Gasum failed to off-take MinDQ [724]. After this exchange of term sheets, GPE reverted with a draft Addendum 19, but never mentioned that it had changed the conditions agreed to in the term sheets [725].

651. Third, in any case, and as testified by Gasum's witnesses, the take-or-pay wording inserted by GPE could not be understood as a separate sanction in addition to the MinAQ Obligation already set out in the Contract [726]. Gasum claims that this interpretation is irreconcilable with other terms of the Contract, such as Art. 8, and would yield unreasonable results [727]. It also entails that GPE would be paid twice for the same gas through the MinAQ and MinDQ. GPE could even receive an additional payment by selling the not off-taken gas to a third party at market price [728].

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[719] C-I, para. 154.
[720] C-I, paras. 155-158; H-1, slide 53.
[721] C-I, paras. 151-203; H-1, slide 52 *et seq*.
[722] H-1, slide 52, citing to CWS-2, para. 24.
[723] H-1, slide 54.
[724] C-I, paras. 165-173; H-1, slides 54-55; C-PHB, item 3.
[725] H-1, slide 56, citing to Doc. C-67.
[726] H-1, slides 57 and 58, citing to CWS-2, para. 23.
[727] C-I, paras. 183-203; C-PHB, item 9.
[728] C-I, paras. 200-202; H-1, slide 13; C-PHB, para. 61 and item 7.

652. Fourth, Gasum's interpretation of Art. 3 is also demonstrated by the fact that GPE's invoicing for the MinDQ Obligation took Gasum by surprise. Gasum immediately reacted against GPE's invoices in its letter of 22 April 2021.

653. Finally, neither the Contract nor Addendum 19 include any mechanism that gives GPE the right to invoice a separate MinDQ penalty to Gasum. Art. 8.1 of the Contract establishes the "Buyer's deficiencies". The only buyer deficiency relates to a failure by Gasum to off-take the MinAQ in a Contract year. When the Parties signed Addendum 19, they explicitly stated that "all other terms and conditions not covered in the present Addendum shall remain as stipulated in the Contract". It follows that a failure to off-take the MinAQ remains the only deficiency for which Gasum can be penalized [729].

1.2 Respondent's position

654. GPE disputes Gasum's assertions and holds that the Parties consciously agreed to introduce the MinDQ Obligation in Art. 3 of Addendum 19 [730].

655. First, the provisions of Art. 3 of Addendum 19 are unambiguous and clearly stipulate Gasum's obligation to pay for non-taken MinDQ. GPE claims that the textual interpretation of a contract must prevail in cases where the provision is straightforward and leaves no margin to interpretation as in the case at hand. For this reason, GPE refutes Gasum's suggestion that the MinDQ must be construed as a mere technical regulation that entails no additional obligations [731].

656. Second, GPE sustains that Gasum was aware of the actual meaning of Art. 3 of Addendum 19. MinDQ Obligations being common contractual terms, it is hard to believe that Gasum, an experienced player in the gas industry, did not understand its meaning. Moreover, GPE avows that, far from being hidden, the MinDQ was as clearly formulated as any other provision in draft Addendum 19 [732].

657. Finally, GPE asserts that it had no doubts that Gasum was interpreting Art. 3 of Addendum 19 in the same manner as GPE. GPE explains that it suggested the MinDQ Obligation at the beginning of the Parties' negotiations and during that time, despite several disagreements regarding other provisions, Gasum never objected to the wording of Art. 3. Therefore, GPE states that even if Gasum did not understand the true meaning of Art. 3 of Addendum 19, GPE could not have been aware of this fact [733].

1.3 Decision of the Tribunal

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[729] H-1, slide 60.

[730] R-I, paras. 1058-1059.

[731] R-I, paras. 1060-1064.

[732] R-I, paras. 1065-1071.

[733] R-I, paras. 1072-1079.

A. Facts

658. When executing the Contract in 1994, the Parties decided to have three main types of quantity commitments: annual quantities, quarterly quantities, and daily quantities, as follows [734]:

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

659. Significantly, however, Art. 7 did not provide for the consequences of a failure by GPE to make available or by Gasum to off-take any of these quantities. Instead, these consequences were specified in another provision, Art. 8, entitled "Non-taken and Deficient Quantities and Off- Specification Quality". In this clause, the Parties included a list of "Buyer's deficienses" (sic), pursuant to which Gasum would have to *pay if it failed* to off-take its minimum quantity commitments. These deficiencies concerned only a failure to meet the MinAQ [735]:

[REDACTED]

660. The Parties also included a list of "Seller's deficienses" (sic): GPE would be deemed to not have fulfilled its obligations if the quality of gas did not meet the necessary requirements or if the available quarterly quantity of gas was lower than that requested by Gasum [736]:

[REDACTED]

661. In subsequent amendments, the Parties agreed to modify the volumes for the ACQ, the MinAQ and the MaxDQ. Nevertheless, up to Addendum 19, they never introduced a concept of "MinDQ".

662. The Tribunal will not reiterate the facts surrounding the negotiations of Addendum 19, which were discussed in detail in section V.3.2.3A.a *supra.* In the present section, the Tribunal will merely focus on the Parties' discussions relevant for the MinDQ Obligation.

Summary

663. *Pro memoria:* in the context of the Parties' negotiations of Addendum 19, on 3 June 2020, GPE sent

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[734] Doc. C-1, Art. 7, entitled "Programs and Quantity Commitments".
[735] Doc. C-1, Arts. 8.1.1 and 8.1.2.
[736] Doc. C-1, Art. 8.2.

a first term sheet, proposing to split the ACQ into two parts, to which different flexibilities and prices would apply [737]. In this term sheet, GPE made certain proposals regarding the Daily Contract Quantities and introduced the concept of "MinDCQ":

[REDACTED]

664. When Gasum sent its comments, it did not object to the Daily Contract Quantities [738].

665. On 16 June 2020, GPE sent a new proposal (in response to a proposal made by Gasum), dropping the division in ACQ and offering to set it at [REDACTED] The updated term sheet specified that the DCQ in winter would be equal to [REDACTED] and the DCQ in summer would be equal to [REDACTED] [739]:

[REDACTED]

666. One day later, Gasum thanked GPE and confirmed its acceptance of the term sheet, asking GPE to produce a draft version of the Addendum [740].

667. On 30 June 2020 GPE provided Gasum with the draft Addendum 19 [741]. The previously discussed and agreed Daily Contract Quantities were included in draft

[REDACTED]

668. Between the months of June and July 2020 the Parties exchanged several drafts of Addendum 19. None of these versions changed the wording of the MinDQ provision, which remained unaltered, until the final version signed on 14 August 2020, as can be seen below [742]:

[REDACTED]

B. Analysis

669. Gasum seeks a declaration from the Tribunal that Art. 3 of Addendum 19 does not oblige Gasum to make any payments for non-taken MinDQ volumes [743]. Gasum contests the existence of the MinDQ Obligation as alleged and interpreted by GPE, and submits that the Tribunal must interpret Art. 3 taking into account that [744]:

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[737] Doc. C-39. See also RWS-1, paras. 31-32.
[738] Doc. R-56/C-34; Doc. R-57/C-36; Doc. C-35/C-74.
[739] Doc. C-40; Doc. C-41.
[740] Doc. C-42.
[741] Doc. C-67/R-58; Doc. C-68/R-109.
[742] See Docs. R-59, R-61, R-62, R-68, R-69 with the signature process, and C-1, Addendum 19/Doc. C-2.

[743] C-I, Section XIII, (b), (1).
[744] C-I, para. 17; C-PHB, items 1-6.

- GPE knew or could not have been unaware that Gasum did not intend to introduce the MinDQ Obligation in Addendum 19 (Art. 8(1) of the CISG); or, in the alternative

- A reasonable person in the gas industry, placed in the same situation, would not have understood the MinDQ Obligation (Art. 8(2) of the CISG).

670. GPE disputes Gasum's assertion and holds that the Parties consciously agreed to introduce the MinDQ Obligation in Art. 3 of Addendum 19 [745].

671. The Tribunal must thus decide which of the Parties' interpretation of Art. 3 of Addendum 19 prevails. After carefully analyzing the Parties' positions and the facts of the case, the Tribunal finds that the Parties did enter into an agreement, and that under such agreement Gasum is obliged to pay for non-taken MinDQ volumes.

672. The Tribunal's conclusion is based on several reasons.

673. First, Addendum 19 is a 3-page document without any small print provisions. [REDACTED]. The clarity of the language used leaves little margin, if any, for interpretation [746].

674. Second, the application of Art. 8 of the CISG [747] does not support Gasum's case. Art. 8(1) of the CISG establishes that:

"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

675. Pursuant to Art. 8(3), in determining the intent of the party making the statement or the understanding that a reasonable person would have had, the Tribunal is to consider all relevant circumstances, including the negotiations, any practices which the Parties have established between themselves, usages and any subsequent conduct of the Parties.

676. The history of the negotiations shows that:

- GPE was the party which proposed to include a MinDQ Obligation in Addendum 19, and it did so in the initial term sheet; it follows that GPE (not Gasum) is the author of the "statement" that is being interpreted;

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[745] R-I, para. 1059.

[746] Doc. RL-93, p. 142: "Schmidt Kessel purports that two basic principles of interpretation of contracts must apply in the context of the application of [Art. 8 of the CISG]. The first is to give priority to the text of a contract over all other elements of interpretation set out in Article 8(3) of the CISG. This principle has generally been adopted in comparative law. […]".

[747] Doc. BF-3, Art. 8: "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

- GPE introduced the MinDQ Obligation in an early stage of the Parties' discussions and reiterated the existence of such Obligation in the successive drafts of Art. 3 of Addendum 19; and

- Gasum did not propose modifications to the draft Art. 3 of Addendum 19, even though it proposed amendments to other provisions of the draft.

677. The plain language used by GPE in draft Art. 3 of Addendum 19 regarding the MinDQ Obligation is self-explanatory and could not have led Gasum astray. Gasum knew or ought to have known that GPE was seeking to introduce a MinDQ Obligation in the Contract.

678. In the original [REDACTED], the [REDACTED]

679. In the draft [REDACTED]

680. When GPE introduced the MinDQ language in the successive drafts of Addendum 19, an experienced player in the gas industry such as Gasum, advised by an experienced legal department [748], cannot have overlooked the economic consequences of the plain language to which it was consenting. Therefore, the Tribunal cannot accept the argument that Gasum was unaware of the actual meaning of the MinDQ Obligation.

681. This conclusion is reinforced when considering Addendum 19 wholistically. At Gasum's request, GPE consented to decrease the MinAQ Obligation and to change the Contract Price; in return, GPE sought to introduce the MinDQ, with the purpose of off-setting the impact of these changes [749]. As explained by Respondent's witness, Mr. Telenchak:

"The essence of the MinDQ obligation was that we accommodated Gasum in terms of annual quantities, the seasonality of off-take [REDACTED] and the price that Gasum requested us for back in 2019, but in return, we wanted to have a guarantee from the buyer that the buyer would make at least minimal [REDACTED]

682. Third, the evidence marshalled does not support Gasum's argument that GPE knew or ought to have known that Gasum was not consenting to the introduction of a MinDQ Obligation. There is no evidence that Gasum ever objected to GPE's proposal. How could GPE have known that Gasum did not agree to the MinDQ Obligation, when, during lengthy negotiations, Gasum never exteriorized its disagreement?

683. Considering the foregoing, the Tribunal concludes that in Addendum 19 the Parties entered into a valid agreement regarding the MinDQ Obligation, pursuant to which Gasum became obliged to pay for non-taken MinDQ volumes.

2. The unconscionability of the MinDQ Obligation

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[748] HT, Day 2, p. 51, ll. 21-24 and p. 96, ll. 9-10.

[749] RWS-1, para. 36.

2.1 Claimant's position

684. Gasum claims that, assuming it is bound to pay for non-taken MinDQ volumes, the circumstances prevailing at the time of conclusion of Addendum 19, combined with other factors that arose thereafter, render the MinDQ Obligation unconscionable within the meaning of Section 36 of the Contracts Act [750].

685. First, Gasum argues that, when negotiating and signing Addendum 19, it found itself in an inferior bargaining position and under much pressure. Gasum's relatively small size and the importance that the Contract had to Gasum made it difficult for Gasum to decline the terms offered by GPE in Addendum 19. Furthermore, GPE provided misleading information, when it introduced the MinDQ in the draft, since it never drew Gasum's attention to this provision or explained its purpose. These two factors *per se* render the MinDQ Obligation unconscionable [751].

686. Second, after the conclusion of Addendum 19, two events further unbalanced the Parties' positions:

- The extreme increase in the price of natural gas, to which GPE contributed to, during the fall of 2021; and

- The war waged by the Russian Federation in Ukraine in the spring of 2022.

687. These wholly unforeseeable events virtually destroyed demand for Russian natural gas and make the MinDQ Obligation unconscionable [752].

688. Third, GPE benefits massively from the MinDQ under the Contract at Gasum's expense. GPE will not only be paid twice for volumes that Gasum will never be able to take, but will also be able to sell those volumes elsewhere [753]. The clear disproportion between the Parties' respective benefits under the Contract make the MinDQ unconscionable *per se;* in this case, [REDACTED] [754].

689. Fourth, Gasum claims that, as it stands, the MinAQ Obligation already entails a *de facto* penalty for non-taken gas, [REDACTED] [755].

690. Finally, GPE suffers no economic loss as a result of Gasum's failure to take the MinDQ volumes [756]. In turn, Gasum's volume commitments are [REDACTED], which is another indication that the MinDQ Obligation is unconscionable [757].

691. In view of the above, Gasum asserts that the MinDQ Obligation must be set aside or modified as of 1

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[750] C-I, paras. 281-284, 291.
[751] C-I, paras. 234-236, 242 and 282.
[752] C-I, paras. 245, 251, 253 and 283.
[753] C-1, paras. 200-202 and 284; H-1, slide 13; C-PHB, para. 61 and item 7.
[754] C-I, paras. 263-268.
[755] C-I, paras. 269-276. [REDACTED]
[756] C-PHB, item 8.
[757] C-I, paras. 279 and 284.

January 2021 pursuant to Section 36 of the Contracts Act.

692. *Alternatively,* Gasum claims that there are other legal grounds that allow the Tribunal to arrive at the same conclusion [758]:

- First, GPE's conduct amounts to a breach of the CISG good faith requirement, which also renders the MinDQ Obligation unconscionable [759]; and

- Second, Art. 11.7 of the Contract establishes that the Parties have the obligation to "relieve" the hardship suffered by one party "in a manner equitable to both parties", and permits the Tribunal deem the MinDQ unconscionable [760].

2.2 Respondent's position

693. GPE considers that the MinDQ Obligation is not unconscionable and there are no grounds for its invalidation or adjustment. GPE asserts that Gasum should honor the MinDQ Obligation for several reasons.

694. First, the Parties had equal bargaining powers when they concluded Addendum 19 and GPE never abused Gasum's alleged inferior bargaining position [761]. The MinDQ was the result of commercial negotiations and Gasum's position under Addendum 19 was very favorable and balanced vis-à-vis GPE. [REDACTED] [762]. In any case, GPE claims that Gasum's alleged inferior bargaining position would not be sufficient for the application of Section 36 of the Contracts Act [763]. Therefore, GPE is of the view that the MinDQ cannot be deemed unconscionable under Section 36 of the Contracts Act [764].

695. Second, the gas price increase and the Russian-Ukrainian conflict were not caused by GPE and were, in any case, foreseeable events:

- *First,* GPE argues that [REDACTED] [765]; GPE also denies that it caused the price hike in Europe (which was in fact caused by the weather, the post COVID-19 economy and other problems related to energy sources) [766];

- *Second,* GPE avers that the Russian-Ukrainian conflict could have been foreseen and is irrelevant for the application of Section 36 of the Contracts Act; this conflict had no impact in the demand for Russian natural gas in Finland, since gas has no nationality once it is included in a gas network; in any case, the reality is that Gasum continues to buy LNG from Russia [767].

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[758] C-I, para. 254 *et seq*.
[759] C-I, para. 254.
[760] C-I, para. 255.

[761] R-I, para. 1080; H-2, slide 85.
[762] R-I, para. 856; H-2, slide 84.
[763] H-2, slides 82 and 83.
[764] R-I, para. 857; H-2, slide 85.
[765] R-I, paras. 865-908; H-2, slide 85.
[766] R-I, para. 895.

696. Third, GPE denies that it benefits massively from the MinDQ Obligation at Gasum's expense or that the MinDQ entails overly high penalties. [REDACTED] [768]. [REDACTED] [769].

697. GPE submits that the functions and nature of the MinAQ and MinDQ Obligations are essentially different [770]:

- [REDACTED] [772] [771];

- [REDACTED] [773].

698. Therefore, GPE asserts that Gasum must honor these contractual terms which are ordinary in the gas industry [774].

699. [REDACTED] In any case, it is not the first time that Gasum claims [REDACTED] given its contractual commitments vis-à-vis GPE [775].

700. In any event, should the Tribunal find that the MinDQ must be adjusted according to Section 36 of the Contracts Act, GPE avers that such adjustment should be very limited and could never reach zero. The adjustment must be determined in accordance with the TeDo Expert Report which defined that [776]:

- The revised MinDQ for winter should be [REDACTED];

- The revised MinDQ for summer should be [REDACTED]

701. Furthermore, GPE acknowledges that the not off-taken daily quantities paid for by Gasum as part of the MinDQ Obligation are not included in the calculation of the payment for not off-taken MinAQ [777]. Should the Tribunal decide that there should be an economic relation between the MinAQ and the MinDQ Obligations, then the amounts payable by Gasum should be corrected. If the Tribunal decides to remove the alleged "double payment effect", then [778]:

- The first step in this exercise would be to determine the quantities that Gasum failed to off-take on a daily basis in 2021 (as indicated by GPE in para. 61 of its Post-Hearing Brief);

- The second step would be to correct the amount of Gasum's payment for the MinAQ for 2021,

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[767] R-I, paras. 993-1037; H-2, slides 85 and 89.
[768] R-PHB, paras. 40-44, 52.
[769] R-PHB, para. 51.
[770] R-PHB, para. 41 *et seq*.
[772] H-2, slide 96; RER-1, paras. 61, 63.
[771] H-2, slide 93.
[773] H-2, slide 96; RER-1, paras. 61, 63; R-PHB, paras. 40-48.
[774] R-I, para. 1095.
[775] R-I, para. 984-988; H-2, slide 100; RER-1, para. 48.
[776] R-PHB, paras. 49 and 53-54, citing to RER-3, paras. 6.17 (table 10), 3.37 and 3.47.
[777] R-PHB, paras. 55-58.
[778] R-PHB, paras. 59-66.

taking into account the quantities that Gasum pays as part of its MinDQ Obligation.

2.3 Decision of the Tribunal

702. Gasum seeks a declaration that the MinDQ Obligation between 1 January 2021 and the end of the Contract must be set aside or adjusted to zero for being unconscionable within the meaning of Section 36 of the Contracts Act [779].

703. The Waiver Clause 2021-2023 contained in Addendum 19 does not refer to claims related to the MinDQ Obligation [780]. This is logical, considering that the MinDQ Obligation was introduced for the first time in Addendum 19 and that consequently no claims with regard to the MinDQ could have existed as of that date.

704. After duly considering the Parties' respective positions, the Tribunal finds that the MinDQ Obligation, as set out in Art. 3 of Addendum 19, is indeed unconscionable within the meaning of Section 36 of the Contracts Act and must be adjusted (A.). Furthermore, the MinDQ Obligation is suspended for as long as the *force majeure* situation continues (B.).

A. The MinDQ Obligation is unconscionable and must be adjusted

a. The MinDQ Obligation is unconscionable

705. The Tribunal has already determined that:
- When the Parties agreed to Addendum 19, they were in an equal bargaining position [781]; and

- The Parties entered into a valid agreement regarding the MinDQ Obligation, pursuant to which Gasum became obliged to pay for non-taken MinDQ volumes [782].

Therefore, and contrary to Gasum's argument, the circumstances prevailing at the time of conclusion of Addendum 19 do not render the MinDQ Obligation unconscionable.

706. Furthermore, for the reasons described in section V.3.2.3B *supra,* the Tribunal finds that the sharp increase in the price of natural gas was not unforeseeable and, thus, this subsequent event does not render the MinDQ Obligation unconscionable -again contrary to Gasum's position.

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[779] C-I, paras. 280-281 and section XIII, (b)(2).
[780] Doc. C-1, [REDACTED] . Claims for MinDQ are clearly not encompassed in this waiver.

[781] See section V.3.2.3A *supra*.
[782] See section V.4.1.3 *supra*.

707. That said, when determining whether a contractual term is unconscionable, the Tribunal should have regard not only to "the circumstances prevailing at the time the agreement was entered into [and] subsequent circumstances", but also to "the contents of the agreement" and "circumstances in general" [783].

708. Having regard to both the contents of the agreement and other relevant circumstances, the Tribunal finds that the MinDQ Obligation is indeed unconscionable - as pleaded by Gasum.

Excessively severe penalty

709. The MinDQ Obligation, as drafted in Art. 3 of Addendum 19, is an unconscionably severe penalty.

710. The Parties agree that a penalty is a payment obligation, triggered by a default of a contractual obligation, which does not correspond to an actual economic loss [784]. Professor Ramberg confirms that [785]:

> "[...] A penalty is not the same thing as a remedy. A remedy for breach intends to restore the positive Vertragsinteresse/expectation interest. A penalty intends to provide more compensation from the party in breach than the positive Vertragsinteresse/expectation interest." [Emphasis added]

The MinDQ Obligation is a penalty

711. Does Gasum's MinDQ Obligation constitute a penalty, which sanctions Gasum's failure to off-take the agreed MinDQ volume in a given day?

712. In the Tribunal's opinion the MinDQ Obligation is indeed a penalty, [REDACTED]

713. [REDACTED].

714. The situation of GPE is exactly the opposite: it never delivers the gas, but it still obtains [REDACTED]. But that is not the end of the story: GPE can resell that gas to another client on that same day, or it can direct it into storage, and resell it later, either to Gasum or to a third party - [REDACTED]

The penalty exceeds actual damage

715. What is the actual damage suffered by GPE as a consequence of Gasum's breach?

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[783] Doc. CL-2, Section 36. See also section V.1.3.C *supra*.

[784] C-PHB, item 19; H-1, slides 102-103; RER-1, paras. 60-61.

[785] R-I, para. 962; RER-1, para. 61.

716. The Tribunal sees two possible sources of damages:

- The first is the inconvenience of having to redirect the gas, either to another client or into storage; the cost of this inconvenience must be small (GPE has not provided any quantification);

- Additionally, GPE will run a risk: the possibility that, when it resells the gas, t[REDACTED] this risk cannot be significant (GPE again has not provided a quantification): the sales to Gasum were [REDACTRD]

717. By any calculation, the damage suffered by GPE, caused by Gasum's failure to take the MinDQ volume on a given day, must be [REDACTED]

718. Is there in the file an approximate calculation of the actual damage suffered by GPE?

719. Throughout their negotiation, but at different moments in time, both GPE and Gasum proposed that the MinDQ Obligation be reduced to [REDACTED] of the Contract Price (see paras. 738-741 *infra)*. In the Tribunal's opinion, this percentage has a high probability of representing a fair estimate of the damage caused to GPE as a consequence of Gasum's default.

The MinDQ is not the only penalty

720. There is a second argument which further supports the Tribunal's opinion that the MinDQ Obligation is an excessive penalty.

721. The MinDQ Obligation is not the only penalty for the failure to off-take gas on a given year. At the end of the year, a second penalty looms: [REDACTED]

722. GPE has confirmed that the quantities paid by Gasum under its MinDQ Obligation are not taken into consideration in the calculation of Gasum's MinAQ Obligation [786].

723. There is thus a double penalty for the gas not off-taken on a given day. The Tribunal's initial opinion that the MinDQ Obligation is an excessive penalty, is reinforced by the existence of a second penalty, the MinAQ Obligation, which again sanctions the same breach.

Excessive penalties are unconscionable

724. Professor Ramberg explains that penalty provisions are prone to be held unconscionable under Section 36 of the Contracts Act [787]:

"If it is absolutely clear that it is a penalty clause intended to overcompensate the counterparty then the way to attack it is through Section 36 [of the Contracts Act]".

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[786] HT, Day 2, p. 206, l. 13 – p. 207, l. 20; R-PHB, para. 51.

[787] HT, Day 4, p. 87, l. 23 – p. 88, l. 2 (Professor Ramberg).

725. Similarly, Professor Flodgren lists a non-exhaustive number of circumstances that may warrant the application of Section 36. In her opinion overly high penalties for contractual breaches or disproportionate advantages in the performance of the contract may render a provision unconscionable [788].

726. Professor Flodgren finds that it is highly likely that a Swedish Court applying Section 36 of the Contracts Act would find the MinDQ Penalty unconscionable and invalidate it in whole or part. She particularly refers to the fact that overly high penalties are generally held to be deemed unconscionable [789].

727. In the arbitral case *NJSC Naftogaz v. Gazprom,* the tribunal found that the take-or-pay clause was very similar to a penalty and declared it unconscionable under Section 36 of the Contracts Act [790]. The tribunal found, *inter alia,* that [791]:

> "According to Naftogaz, the Take or Pay clause in this case operates as a penalty clause and the penalty is far higher than Gazprom's loss, if any at all. The Tribunal would agree to this; in fact, this particular Take or Pay clause is very similar to a penalty clause. The Tribunal notes that in NJA 2012
> p. 597 the Supreme Court pointed out that the total compensation under a penalty clause could be so great that this can be a reason for modifying such condition in a commercial contract."

728. Section 36 of the Contracts Act thus permits the Tribunal to modify a penalty clause, if it concludes that it overcompensates a Party [792].

729. In the Tribunal's opinion, the MinDQ Obligation creates a clear disproportion between the Parties' respective benefits under the Contract [793].

730. In view of the above, the Tribunal concludes that the MinDQ Obligation is unconscionable.

b. Consequences of unconscionability

731. Section 36 of the Contracts Act provides the Tribunal with discretion to either modify or set aside unconscionable contractual terms [794].

732. Professor Ramberg argues that the Tribunal's intervention should be minimal and simply aim at putting an end to the unconscionability [795]. It is only when the Contract balance can no longer be restored that the Tribunal should opt to set aside an unconscionable contractual term.

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[788] CER-3, para. 53.
[789] CER-3, paras. 53(6) and 97.
[790] Doc. BF-31, paras. 3845-3864.
[791] Doc. BF-31, paras. 3856 and 3864.
[792] Doc. BF-29.
[793] H-1, slides 13 and 104; CER-3, para. 95.

[794] CER-3, para. 46; RER-1, para. 12.
[795] RER-1, para. 13, 69; HT, Day 4, p. 53, 12-19, p. 55, ll. 12-20 (Professor Ramberg).

733. The Tribunal concurs.

734. It would not be appropriate to entirely set aside the MinDQ Obligation, which was part of the Parties' bargain when concluding Addendum 19. Instead, the Tribunal decides to modify Art. 3 of Addendum 19, in order to adjust the MinDQ Obligation to a level that no longer makes this term unconscionable.

The appropriate modification

735. What is the appropriate adjustment?

736. Respondent accepts that Section 36 empowers the Tribunal to modify the unconscionable provision to put an end to the unconscionability. In its post-Hearing brief GPE has submitted several proposals to adjust the MinDQ Obligation [796].

737. The Tribunal, however, decides to take a different avenue, which is based on the Parties' negotiations after the execution of Addendum 19.

Summary of facts

738. *Pro memoria:* on 9 December 2021 GPE sent Gasum a proposal for revising the 2021-2023 terms of supplies, suggesting, *inter alia,* [REDACTED], which in turn would be equal to [REDACED]

739. In this proposal, GPE offered that the penalty for not meeting the MinDQ be reduced to [REDACTED] of the value of the not off-taken gas [797]:

[REDACTED]

740. On 4 February 2022 Gasum sent an email to GPE in response to GPE's proposal of 9 December 202 [798], accepting to consider a commercial settlement for 2021-2023 [799]. Under this proposed settlement, Gasum offered to pay a penalty equal to [REDACTED] of the Contract price of the not off-taken gas for having breached the MinDQ Obligation.

741. The Parties' witnesses agree that this proposal was not immediately accepted by GPE - for reasons not pertaining to the [REDACTED] MinDQ Obligation [800]. On 24 February 2022 the hostilities between Russia and Ukraine broke out, unsettling any further negotiations between the Parties. And on 31 March 2022 Russia issued Decree No. 172.

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[796] R-PHB, paras. 53-66.

[797] Doc. R-80.
[798] Doc. C-130.
[799] Doc. C-130.
[800] CWS-2, para. 35; RWS-1, para. 53.

742. The Tribunal is convinced that, were it not for the Russian-Ukrainian conflict, the Parties would have reached an agreement by which:
- The MinDQ would be set at a reasonable percentage of the [REDACTED];

- The penalty for Gasum's failure to off-take the MinDQ Obligation would be reduced to [REDACTED] of the Contract Price in the respective month.

Decision

743. In view of the above, using the powers bestowed by Section 36 of the Contracts Act, the Tribunal decides to modify [REDACTED], reducing Gasum's MinDQ Obligation to [REDACTED] of the average Contract Price in the respective month, applied to the gas which Gasum has failed to off-take [the "Adjusted MinDQ Obligation"].

744. Except for the Adjusted MinDQ Obligation (and other obligations declared unconscionable by the Tribunal in the present award - see sections V.2.2.3C.b, V.3.3.3 and V.3.4.3B *supra),* all other terms and conditions agreed upon between Gasum and GPE in the Contract and its successive Addenda remain in full force and effect.

745. Specifically, the Tribunal finds no reason to modify the MinAQ Obligation, there being no overlap between the Adjusted MinDQ Obligation and the MinAQ Obligation:
- The Adjusted MinDQ Obligation is a fair estimation of the damage actually suffered by GPE, caused by Gasum's failure to off-take the agreed MinDQ volumes;

- While the MinAQ Obligation, coupled with Gasum's right to receive Make-Up Gas, represents a standard take-or-pay structure, which is common in the gas industry, and is not *per se* unconscionable.

B. The Adjusted MinDQ Obligation is suspended during the *force majeure* period

746. The Tribunal has already established that the promulgation of Decree No. 172 and the subsequent order by the Russian Central Energy Customs to suspend deliveries as of 21 May 2022 constitute *force majeure* circumstances. As of 21 May 2022 and while the *force majeure* persists, GPE's obligation to supply and Gasum's obligation to off-take are suspended [801].

747. The necessary consequence is that Gasum's Adjusted MinDQ Obligation is also suspended, for as long as the *force majeure* situation continues.

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[801] See sections V.2.2.3 and V.2.3.3 *supra*.

V.5. Competition law

748. The Parties agree that European and national competition laws are applicable to the present case, and that an arbitral tribunal seated in Sweden and applying Swedish law is competent to apply EU competition law [802].

749. Art. 102 of the TFEU provides that:
"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." [Emphasis added]

750. Gasum contends that the MinAQ and MinDQ Obligations constitute a violation of Art. 102 of the TFEU and are thus null and void [803] (1.). GPE disputes Gasum's claim, arguing that it should be rejected as it does not correlate with the reality of either EU or Finnish competition laws [804] (2.).

751. The Tribunal will briefly summarize the Parties' positions and then make its decision (3.).

1. Claimant's position

752. Gasum argues that the traditional bargain of the bilateral monopoly take-or-pay agreement (which used to serve a legitimate purpose) is no longer present in the relationship between GPE and Gasum [805]. In essence, Gasum argues that [806]:

- It is undeniable that in the relevant market (A.) GPE holds a dominant position [807] (B.); and

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[802] C-PHB, items 76-77; R-I, paras. 378-379; H-2, slides 60, 88.

[803] C-I, paras. 295-296 and 329. Gasum clarifies that it does not seek an order for damages as a consequence of GPE's alleged violations but reserves the right to do so in a potential future, separate proceeding (C-I, para. 301); C-PHB, item 78 *et seq*.

[804] R-I, para. 519.

[805] C-I, paras. 302-304.

[806] C-I, para. 307(a) and (b).

- GPE is liable of abuse of such position in the form of exclusive dealing, unfair trading conditions, discrimination and partitioning of the internal market [808] (c.).

753. Given that GPE's behavior violates Art. 102 of the TFEU, Gasum seeks a declaration that the MinAQ and MinDQ Obligations are null and void as from 1 January 2020 and 1 January 2021, respectively [809].

A. Definition of relevant market

754. To establish whether there is an infringement of Art. 102 of the TFEU, the first step is to determine the *relevant market.* Gasum submits that:

- The relevant *product* market on which GPE sells pipeline gas to Gasum is the market for "upstream wholesale supply of gas"; this encompasses the physically available alternatives for the Finnish gas grid from 1 January 2020 until May 2022 (*i.e*., Russian pipeline gas from Imatra and Russian regasified LNG plus gas coming into Finland through the Balticconnector) [810];

- As to the *geographic* scope of the market, it is limited to Finland, or, under a conservative approach, to Finland and the Baltic States [811].

755. According to Claimant, the above conclusion coincides with the findings of the EU Commission in a series of cases, including one related specifically to GPE [812].

B. GPE has a dominant position in the relevant market

756. Gasum argues that its expert, RBB, has found that GPE is *dominant* on the relevant market. Again, this is fully in line with the Commission's case law [813].

757. First, until 21 May 2022, GPE's *de facto* market share was estimated at [REDACTED] in the combined Finnish/Baltic region. Case law of the EU Courts provides that market shares above 50% create a presumption for dominance [814].

758. Furthermore, all other relevant factors strengthen the conclusion of dominance, namely [815]:

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[807] C-I, para. 308 *et seq*.; C-PHB, para. 79.
[808] C-I, Figure 23.
[809] C-I, paras. 301 and 307(c); C-PHB, para. 76.

[810] C-I, para. 309; C-PHB, para. 80 and item 104.
[811] C-I, para. 309, citing to CER-5, section 3.3; C-PHB, para. 82.
[812] C-I, para. 310, citing to Docs. CL-23 to CL-28, and Doc. CL-33.

[813] C-I, para. 311, citing to CER-5, section 4 and Doc. CL-33.
[814] C-I, paras. 313-315, citing to Doc. CL-33 and CER-2; C-PHB, para. 84 and item 119.

- The existence of high barriers to entry;

- The absence of any significant countervailing buyer power; and

- GPE's exclusive control over large raw material resources and transport infrastructure.

C. GPE has abused its dominant position

759. Gasum asserts that by imposing the MinAQ and MinDQ Obligations in Addenda 18 and 19, GPE abused its dominant position in several ways [816]. Accordingly, these Obligations are null and void by application of Art. 102 of the TFEU [817].

760. First, the present case is an abuse of dominant position in the form of *exclusive dealing*.

761. This refers to the situation where a dominant actor (GPE) excludes competition by tying up all or most of a customer's demand for a product. Gasum considers that the MinAQ and MinDQ volumes have *de facto* induced Gasum to obtain all its gas requirements from GPE and deterred entry of new players [818].

762. Gasum argues that there are two tests that the Tribunal may choose to apply to determine exclusive dealing: the *Hoffmann-La Roche "per se"* test or the *Intel* rebuttable presumption test. Gasum submits that [819]:

- The traditional *Hoffmann-La Roche per se* test applies and is met; this objective test proves that the MinAQ and MinDQ Obligations constitute *de facto* exclusive obligations that violate Art. 102 [820];

- Under the *Intel* test a dominant firm may rebut a presumption of abuse, by presenting evidence indicating that the exclusivity did not have the capacity to foreclose demand [821];

- Even if *Intel* is applied, the *Hoffmann-La Roche* test still creates a presumption not rebutted in this case;

- Even if the presumption had been rebutted by GPE, the volume commitments have foreclosed Gasum's demand well beyond the requisite standard; and

- GPE has provided no obj ective justification for this foreclosure.

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[815] C-I, para. 317; C-PHB, para. 84.

[816] C-I, Section VII.C.

[817] C-PHB, para. 77.

[818] C-I, Section VII.C.1; C-PHB, para. 85.

[819] C-PHB, para. 86.

[820] C-PHB, item 87.

[821] C-PHB, item 88.

763. Second, Gasum submits that there is also an abuse of dominant position in the form of *unfair trading conditions*.

764. This behavior comprises the imposition, by a dominant firm, of terms which require a customer to pay for goods that it does not receive [822].

765. In the present case, GPE (the dominant firm) has refused to meet Gasum's reasonable requests for Contract adjustments [823]. GPE has imposed and is enforcing a one-sided obligation on Gasum to pay for volumes that GPE knows Gasum can neither use nor offload. Gasum avers that GPE's imposition of discretionary and disproportionate MinAQ and MinDQ levels [824], which it knew Gasum would not be able to use [825], amounts to an exploitative abuse [826].

766. Third, there is also an abuse of dominant position in the form of *abusive discrimination*.

767. Under Art. 102 of the TFEU this conduct is described "as applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" [827].

768. Gasum submits that GPE has agreed to [REDACTED] [828]. As a result of GPE's actions, Gasum has become uncompetitive and has lost a significant market share [829].

769. Fourth, there is an abuse of dominance in the form of *partitioning of the internal market.*

770. Gasum explains that throughout the 2021 negotiations it proposed several alternatives to solve the effects of the extremely high prices. One of these solutions was to change the delivery point for at least some of the gas from Imatra at the Finnish-Russian border to somewhere else in Central Europe. A change of delivery point would have enabled Gasum to sell (at its own cost) part of the contractual volumes to other European markets where the shortage of gas was severe and demand high [830].

771. [REDACTED] [831]. [REDACTED] Gasum would have avoided the negative financial consequences of not being able to meet the MinAQ Obligation [832].

772. Finally, the Parties agree that abusive conduct may be deemed lawful if there is an objective justification to it.

773. However, in the present case, GPE has not raised any objective justification for its abuses under Art.

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[822] C-PHB, item 91.
[823] C-PHB, para. 87.
[824] C-I, Section VII.C.2.5.
[825] C-I, Section VII. C.2.2; H-1, slides 149-150.
[826] C-PHB, items 92-94.
[827] C-I, para. 401.
[828] C-I, para. 403; H-1, slides 141-144; C-PHB, para. 91.
[829] C-I, para. 416; H-1, slides 141-144; C-PHB, para. 91.
[830] C-I, para. 112.
[831] C-I, fn. 121 and para. 256; C-PHB, para. 89.
[832] C-I, Section VII.C.4; H-1, slides 138-139.

102 of the TFEU [833]. Even in theory, the MinAQ Obligation cannot be justified by reference to the original Contract value, as the initial investment had been recouped by 2018 at the latest [834].

* * *

774. In sum, Gasum argues that after the liberalization of the Finnish gas market in January 2020 GPE abused its dominant position. GPE benefitted massively from the volumes under the Contract, at Gasum's expense [835]. For this reason, the MinAQ and MinDQ Obligations should be invalidated.

2. Respondent's position

775. GPE notes that EU competition law protects competition in general, and not individual competitors or customers [836]. GPE argues that there is no foreclosure of competition on the Finnish market [837]. In fact, Gasum's decrease in market share since the liberalization of the Finnish market is a sign that competition is effective [838].

776. In any case, GPE denies that its conduct amounts to a violation of EU or Finnish competition laws and argues that Gasum has failed to [839]:

- Define the relevant market where GPE is active (A.);

- Prove that GPE holds a dominant position on said relevant market (B.); and

- Establish that GPE had an abusive conduct in the relevant market (C.).

777. Therefore, GPE submits that the Tribunal must reject Gasum's claims regarding the invalidity of the MinAQ and MinDQ Obligations [840].

A. Definition of relevant market

778. GPE submits that there is a principle in competition law: the determination of the relevant market requires an *ex novo* analysis in every single case; the analysis made in previous cases of the European Commission or courts is insufficient [841]. It follows that the Tribunal is not required to follow the Commission's previous conclusions but rather needs to undertake a separate analysis

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[833] C-PHB, para. 93 and item 103.
[834] C-PHB, item 160.
[835] C-I, para. 263 *et seq*.

[836] H-2, slide 106, citing to Doc. RL-65, para. 6 and Doc. RL-72, para. 63.
[837] H-2, slide 107.
[838] H-2, slide 108.
[839] R-I, para. 523; H-2, slides 110, 112, 122; R-PHB, para. 68.
[840] R-I, paras. 519-520.

[841] R-PHB, para. 72-73.

applicable to this case [842].

779. With regard to the relevant *product* market, GPE submits that:

- Considering that LNG is actively marketed in Finland and the Baltic states, as confirmed by Gasum's own officer, LNG constitutes part of the relevant product market; moreover, there is no dispute that LNG infrastructure is present in Finland and the Baltic states; thus, LNG is an inalienable element of the product market [843]; and

- In the case of Finland, the product market shall also include biomethane (also known as biogas) and alternative energy sources, such as wind power, crude oil, coal, solar energy, etc. [844].

780. As to the relevant *geographic* market, GPE argues that it should include Europe as a whole. Contrary to Gasum's interpretation, the European Commission has never denied the possibility of extending the market to the European Economic Area ["EEA"]. On the contrary, in a recent decision, the Commission again underscored such possibility [845]. The Commission has foreshadowed that the relevant energy market will become European-wide or at least regional, and such finding in the present case would not contradict the Commission's approach [846].

B. Absence of dominance by GPE

781. GPE avers that Gasum's wrong definition of the relevant market has led it to qualify GPE erroneously as holding a dominant position [847].

782. First, Gazprom's current share on the European market is low. The President of the European Commission has recently recognized that at the beginning of the Russian-Ukrainian conflict [REDACTED] of European gas imports were of Russian origin; however, today they are down to [REDACTED] [848]. GPE notes that the Commission has recognized that a market share below 40% provides a safe assumption of the absence of a dominant position. Accordingly, Gasum's statement that Gazprom PJSC and GPE jointly hold a dominant position in the market does not even pass a *prima facie* test [849].

783. Second, Gasum has countervailing buyer power, since it has a market share of 59% and can influence the behavior of GPE. This is also proven by the fact that GPE accommodated Gasum's requests to decrease the MinAQ quantities and to [REDACTED] [850].

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[842] R-PHB, para. 75.
[843] R-PHB, paras. 88-89.
[844] R-PHB, para. 90 *et seq*.
[845] R-PHB, paras. 99-103, citing to Doc. RL-105.
[846] R-PHB, para 104.

[847] R-PHB, para. 123.
[848] H-2, slide 121; R-PHB, para. 124, citing to Doc. RL-65.
[849] R-PHB, paras. 125-126.
[850] H-2, slide 123.

784. Third, GPE has no substantial price-setting power. In fact, the Contract Price under Addenda 18 and 19 was established pursuant to Gasum's requests and fully in line with Gasum's interests [851].

785. In any event, even if GPE and Gazprom PJSC have a dominant position in the relevant market, this would not *per se* amount to a violation of competition law [852].

C. Absence of abuse by GPE

786. As regards the alleged abuse related to the MinAQ and MinDQ Obligations, GPE maintains that it has not breached EU competition law for several reasons [853].

787. First, the MinAQ and MinDQ Obligations do not constitute *exclusive dealing.* In any case, *prima facie* exclusive dealing is not prohibited if there is no aim to exclude competitors [854]. GPE indicates that:

- Take-or-pay provisions *per se* have not been considered a breach of EU competition law [855]; and

- The Contract contains no territorial restrictions for Gasum to resell gas or any other sort of prohibitions [856].

788. Second, the MinAQ and MinDQ Obligations do not constitute *unfair trading* conditions. The main criteria for finding a violation on this basis is proportionality. GPE submits that the terms of Addenda 18 and 19 were proportionate and aimed at balancing Gasum's and GPE's rights and obligations [857].

789. Third, the MinAQ and MinDQ Obligations do not constitute *abusive discrimination*. GPE argues that:

- Other contracts with Baltic buyers contain different terms and conditions (e.g., duration, flexibility, payment terms, etc.) that ended up affecting the gas price [858];

- Gasum has not suffered any competitive disadvantage (*i.e.*, due to excessive volumes or higher pricing resulting from the MinAQ Obligation); GPE considers the daily flexibility included in the Contract as an advantage which Gasum failed to use for its own benefit [859].

790. Fourth, [REDACTED] does not amount to a *partitioning of the market.* GPE holds that [860]:

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[851] H-2, slide 124.
[852] R-PHB, para. 127.

[853] R-I, section VI.1.D.4. See also R-PHB, para. 128.
[854] R-I, paras. 618-623; H-2, slide 127.
[855] R-I, paras. 630-632; H-2, slide 128.
[856] R-I, paras. 626-629; H-2, slide 128.
[857] R-I, paras. 652-692; H-2, slide 129.
[858] R-I, paras. 699-704; H-2, slide 130.
[859] R-I, paras. 724-728; H-2, slide 131.
[860] R-I, paras. 731-754; H-2, slides 132-134.

- [REDACTED]

- The Finnish market had not been isolated when Gasum requested a change of the delivery point and, thus, the delivery swaps would not have influenced the competition in the market.

3. Decision of the Tribunal

791. The European Court of Justice points out that arbitral tribunals have the duty to apply European competition law [861]. There are two main provisions of European competition law which may come to be applied by tribunals:

- Art. 101 of the TFEU, which prohibits cartels and other agreements that could disrupt free competition in the European internal market; and

- Art. 102 of the TFEU, which regulates monopolies and prohibits an undertaking from abusing its dominant position within the internal market.

792. The present case concerns only the application of Art. 102 of the TFEU. Gasum says that GPE breached Art. 102 of the TFEU, and, consequently, seeks a declaration by this Tribunal that the MinAQ and MinDQ Obligations are null and void as from 1 January 2020 and 1 January 2021, respectively.

793. The Tribunal has already found that some of the MinAQ and the MinDQ Obligations are unconscionable:
- As regards the MinAQ Obligation, the Tribunal has found that:

o The MinAQ Obligation for 2022 is unconscionable and must be set aside;

o The MinAQ Obligation for 2024- [REDACTED] is unconscionable and must adjusted by agreement of the Parties, if there is no prior termination of the Contract.

- As regards the MinDQ Obligation, the Tribunal has found that it is also unconscionable and must be modified, reducing this Obligation to [REDACTED] of the Contract Price of the not off-taken gas.

794. Claimant is now asking that the Tribunal go one step further, to declare the MinAQ Obligation (to the extent that it is conscionable) and the Adjusted MinDQ Obligation null and void, such contractual provisions being the result of an abuse of dominant position by GPE *after 1 January 2020 (i.e,* once the Finnish gas market was liberalized).

795. It is true that the abuse by an enterprise of its dominant position, in breach of Art. 102 of the TFEU, may result, under private law, in the nullity of certain contractual terms and conditions, imposed

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[861] Doc. RL-81, *Polskie Górnictwo Naftowe I Gazownictwo / Commission (Engagements De Gazprom)*, paras. 290-292. See also CER-4, paras. 26-27, citing to *Eco Swiss China Time Ltd v Benetton International NV*.

by the dominant enterprise on other participants in the relevant market [862]. The difficulty in this case is that, from the evidence available on the record, neither the European Commission, nor the Finnish or Swedish competition authorities, have investigated GPE's alleged abuse of its dominant position in Finland in recent years. There is thus no decision, from the authorities which have the powers to investigate and the duty to decide:

- Defining the relevant market on which GPE and Gasum are active;

- Determining whether GPE indeed has a dominant position in said market, taking into consideration the specific characteristics of that market, including Gasum's participation in it; and

- Finally deciding whether the MinAQ and MinDQ Obligations, agreed upon during the period when the Finnish gas market had been liberalized, in fact are abusive and deserve to be set aside.

796. Gasum is requesting the Arbitral Tribunal to perform all these tasks, none of which has been assumed by the competent Competition Authorities. While the Tribunal is indeed empowered to perform such tasks, the Parties have not drawn the Tribunal's attention to any decision, either by an arbitral tribunal or by a Swedish court, in which the adjudicator has done so.

797. In order to adjudicate Gasum's claim, the Tribunal will first review the only similar investigation performed by the European Commission (A.); thereafter, it will apply the conclusions which can be derived from this investigation to the present case (B.), eventually dismissing Claimant's competition law claim (C.). The Tribunal will finally devote a separate section to the *Naftogaz* arbitral award (D.).

A. The Commission's investigation in Central and Eastern Europe

798. The European Commission investigated Gazprom PJSC and GPE's potentially abusive practices, and their compatibility with Art. 102 of the TFEU, in the upstream wholesale supply of natural gas [863] in eight Central and Eastern European Member States [864] (including the three Baltic States).

799. The Commission identified three potentially abusive practices that raised concerns regarding their compatibility with Art. 102 of the TFEU in these Central and Eastern European countries [865]:

- First, Gazprom's decision to include territorial restrictions in its supply agreements with wholesalers and with some industrial customers (such as destination clauses and export bans); the Commission also found that Gazprom may have hindered the cross-border sale of gas via equivalent measures, such as metering requirements and a restrictive policy regarding changes of gas delivery points;

- Second, Gazprom may have pursued an unfair pricing policy, by charging excessive prices to some

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[862] See CER-4, paras. 28-31.

[863] Doc. CL-33 – EC Decision Case AT.39816 of 24 May 2018 – *Upstream Gas Supplies in Central and Eastern Europe*.

[864] Namely in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia.

[865] Doc. CL-33/RBB-8, para. 3.

wholesalers, compared with Gazprom's costs or with benchmark prices; using price formulae based on oil indexation may have contributed to the excessive prices; and

- Third, Gazprom may have leveraged its dominance, by conditioning gas supplies and gas prices in Bulgaria and Poland on obtaining certain non-related infrastructure commitments from the respective Bulgarian and Polish partners.

800. Upon its investigation, the Commission [866]:

"[...] came to the provisional conclusion that Gazprom is dominant on the markets for the upstream wholesale supply of natural gas (hereinafter 'gas') in each of the eight Central and Eastern European Member States, namely in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia (hereinafter jointly referred to as 'CEE'). Further, the Commission came to the provisional conclusion that Gazprom engaged in the overall strategy of fragmenting and isolating the CEE gas markets and restricting the free flow of gas across CEE with a view to be able to maintain higher prices in some CEE countries."

801. To address the Commission's competition concerns, in 2018 Gazprom offered a series of commitments [867] [the "Gazprom Commitments"].

802. The Commission considered that these Commitments effectively "remove its competition concerns and comply with the principle of proportionality" [868]. Therefore, the Commission decided that there were no longer grounds for action on its part and brought the proceedings to an end [the "Commission Gazprom Decision"] [869].

Gazprom's Commitments in Central and Eastern Europe

803. As part of the Commitments with regard to Central and Eastern Europe, Gazprom PJSC and GPE undertook, *inter alia:*

- To refrain from applying or introducing any clauses restricting the resale or the reexport by a customer of quantities taken from Gazprom [870];

- To approach customers with a proposal to introduce the possibility to request a change of the original delivery point in their gas supply contracts; Gazprom reserved the right to reasonably refuse such request for change, in case of lack of free firm transmission capacities; Gazprom also reserved the right to charge a fee for a change of delivery point [871]; and

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[866] Doc. CL-33/RBB-8, para. 2.
[867] Doc. CL-33/RBB-8, paras. 4 and 96 *et seq*.
[868] Doc. CL-33/RBB-8, para. 182.
[869] Doc. CL-33/RBB-8, para. 185.

[870] Doc. CL-63, para. 5.
[871] Doc. CL-63, paras. 9-15.

- To approach customers with a proposal to introduce a price review mechanism in long-term gas supply contracts [872].

804. Gazprom also accepted to appoint a monitoring trustee (approved by the Commission) who is in charge of monitoring Gazprom's compliance with its Commitments and settling any potential disagreements between the customers and Gazprom [873].

805. Gazprom accepted these Commitments for eight consecutive years (*i.e.*, until 2026) but retained the right to request the Commission to reopen the proceedings to modify the Commitments in "case of an important change of facts" on which the Commission's decision was based [874].

B. Application to the present case

806. Even though the Commission's analysis focused on Central and Eastern Europe, including the three Baltic Member States (Estonia, Latvia and Lithuania), it did not encompass Finland. Therefore, the consequences of the Commission's decision and Gazprom's Commitments cannot be directly applied to the Finnish market.

807. That said, since this seems to be the nearest point of comparison, the Tribunal will assume, *arguendo,* that the facts of the present case can be analyzed in light of the Commission Gazprom Decision and the Commitments undertaken by Gazprom.

808. Did GPE breach Gazprom's Commitments in its contractual relationship with Gasum?

809. After a careful analysis of the facts, the Tribunal finds that GPE has not breached these Commitments.

a. Re-sale

810. First, the Tribunal notes that the Contract contains no clause restricting Gasum's right to resell the gas purchased from GPE under the Contract to any other customers, either inside or outside of Finland.

b. Change in delivery point

811. Furthermore, the Contract also does not contain a clause that prevents Gasum from requesting a

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[872] Doc. CL-63, paras. 18-19.
[873] Doc. CL-63, para. 23 *et seq*.
[874] Doc. CL-63, paras. 22 and 45.

change in delivery point.

812. Gasum argues that, throughout the negotiations in 2021, [REDACTED] According to Gasum, this constitutes an abusive partitioning of the internal market [875].

813. The Tribunal is unconvinced.

814. From the evidence available on the record, Gasum requested a change of delivery point in two e- mails of 6 and 8 October 2021. In the first one, Gasum noted that it was "interested to explore possibilities" to have a swap of the delivery point [876]:

[REDACTED]

815. In the second, Gasum once again required "initial information" as to whether this change would be possible [877]:

[REDACTED]

816. Thereafter the Parties held a call [878], after which GPE sent an email, saying that it *prima facie* saw "no contractual reasons for Gasum to request the change of the volume commitments", but adding that "being a long-term partner we are ready to consider your detailed proposal" [879]:

[REDACTED]

817. There is no evidence in the record, showing that Gasum followed-up GPE's lead and actually submitted a "detailed proposal" - a fact which confirms that Gasum was simply exploring the possibility of a change of delivery point.

818. The available evidence thus seems to indicate that Gasum simply enquired about the change of delivery point, that GPE was not enthusiastic with the proposal, and that Gasum never followed-up.

819. What is clear is that GPE's conduct in no case can constitute a breach of the Gazprom Commitments.

820. Gazprom's Commitments make it clear that GPE is entitled to reasonably reject a change of delivery point and, more importantly, that any change of delivery point should be accompanied by the payment of a service fee. In the present case, Gasum's request to change the delivery point was never accompanied by an offer to compensate GPE.

821. As noted by Respondent's witness, Mr. Telenchak [880]:

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[875] C-I, para. 420 *et seq*.
[876] Doc. R-81/RBB-22.
[877] Doc. R-82/RBB-22.
[878] Doc. R-74.
[879] Doc. R-75.
[880] RWS-1, para. 55.

[REDACTED]

c. Price review mechanism

822. Finally, under the Gazprom Commitments, GPE accepted to include a price review mechanism in its long-term contracts.

823. The Contract meets this requirement [881]. After 1 January 2020, Gasum twice requested, and GPE twice accepted to modify the pricing formula to satisfy Gasum's needs [882]:

- In Addendum 18, [REDACTED] and

- In Addendum 19 [REDACTED].

824. In view of the above, the Tribunal is convinced that the Contract, with its subsequent Addenda, fully complies with Gazprom's Commitments.

C. GPE's alleged dominant position

825. The conclusion reached in the preceding section is relevant: assuming *arguendo* that GPE does indeed hold a dominant position in the Finnish gas market, *prima facie* its contractual conduct vis- à-vis Gasum does not seem abusive: the European Commission, in a similar market situation, has already found that, provided that Gazprom complies with the Gazprom Commitments, its conduct does not run afoul of Art. 102 of the TFEU.

826. An analysis of the specific circumstances of this case leads to a confirmation of the *prima facie* conclusion.

a. Relevant market

827. The first question that the Tribunal needs to address is the definition of the relevant market.

828. This issue requires the Tribunal to define a *product* and a *geographic* market, which are both highly technical and fact-driven issues - a complicated task for an arbitral tribunal that lacks the expertise and investigative powers of a competition authority.

829. The Tribunal thus decides to take a conservative approach and to adopt the Commission's definition

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[881] Doc. C-1, Art. 5.6.

[882] See sections V.3.1.3B.b and V.3.2.3A.a *supra*.

of the relevant market, as set forth in the Commission Gazprom Decision:

- The relevant *product* market is the market for the upstream wholesale supply of natural gas by producers and exporters to importers and wholesalers [883]; and

- The relevant *geographic* market is the national market for the upstream wholesale supply of natural gas [884].

830. This would support Gasum's argument that the relevant market is the upstream wholesale supply of gas in Finland.

b. Dominance

831. The Tribunal must now turn to the issue of dominance.

832. Gasum does not plead that GPE abused its dominant position in the timespan from 1994 until 1 January 2020. With good grounds: during that period both Gasum and GPE were State-owned monopolies, and the supply of gas between Russia and Finland was a matter of State commerce.

833. Gasum says that the abuse of dominant position only started on 1 January 2020, when the Finnish market was liberalized and Gasum lost its monopolistic position. Gasum argues that, despite the liberalization, GPE maintained its dominant position, and that in 2021 it controlled approximately [REDACTED] of the relevant market -a share sufficient to presume dominance [885].

834. The Tribunal is unconvinced.

835. First, there was countervailing buyer power, which off-set GPE's market participation. Throughout 2020 and 2021 Gasum held a share of more than 50% of the market [886], and consequently enjoyed a strong bargaining position vis-à-vis GPE. In 2009 the Commission recognized that [887]:

> "Competitive constraints may be exerted not only by actual or potential competitors but also by customers. Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength. Such countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices." [Emphasis added]

836. Second, the very development of the market belies Gasum's argument that in 2020 and 2021 GPE

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[883] Doc. CL-33/RBB-8, para. 30.
[884] Doc. CL-33/RBB-8, para. 33.

[885] C-I, paras. 313-318.
[886] CER-2, para. 154 and figure 5.5; RER-3, para. 5.38.
[887] Doc. RL-65, para. 18.

held a dominant position in the Finnish gas market.

837. In May 2022 Gasum adopted a decision which differed from that of other wholesale gas buyers in Europe: it decided not to submit to the requirements of Decree No. 172, abruptly bringing the Russian supply of natural gas to Finland to a standstill and forcing a situation of *force majeure*. Since May 2022 GPE has not sold any gas at all to Gasum [888] and Gasum in the present arbitration is requesting that the Tribunal declare the termination of the Contract - proving that Gasum does not need the supply of Russian gas to satisfy the Finnish demand.

838. Seen from the other side of the bargain, GPE is an undertaking which, against its wishes, has seen its market participation in the Finnish gas market shrink [REDACTED].

839. To say that this undertaking held a dominant position in the market during these two years is, to use an understatement, counterintuitive.

840. Summing up, the Tribunal finds that, adopting the most conservative definition of the relevant market, Gasum has failed to prove that GPE held a dominant position in that market between 1 January 2020 and May 2022. And even if it is assumed, *arguendo,* that GPE was the dominant player in the relevant market at the relevant time, there is no indication that its conduct vis-à-vis Gasum, which respected the Gazprom Commitments, was abusive.

* * *

841. There is a final, unrelated argument. Gasum itself seems to be aware that the abuse of dominant position argument is only being put forward in an effort to escape from the commitments it voluntarily (and with full knowledge of the facts) assumed in Addenda 18 and 19. Under oath, Mr. Dan Sandin testified as much [889]:

"Q. [Mr. Khvalei] [...] So in other words, when you agreed to Gazprom to waive all the claims you had a joker, you believed, in your pocket that despite of the way, we will play the joker at the time and this joker was competition law claim, right?

A. [Mr. Sandin] It was not the joker. We only had bad alternatives and this was the less bad."

D. *Naftogaz* is inapposite

842. Finally, Gasum puts emphasis on the *Naftogaz* decision [890], arguing that breaches of competition law may also warrant modification or setting aside of provisions under Section 36 of the Contracts Act.

843. The Tribunal, however, finds *Naftogaz* inapposite for several reasons.

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[888] Doc. C-104, pp. 3-4; C-I, para. 21; R-I, para. 1143; C-PHB, para. 2.

[889] HT, Day 2, p. 124, ll. 16-23 (Mr. Dan Sandin).

[890] C-I, paras. 258, 288; H-1, slide 103.

844. First, the *Naftogaz* arbitral tribunal never applied European competition law, because the case fell outside its territorial scope [891]: it concerned an Ukrainian (Naftogaz) and a Russian (Gazprom PJSC) company and there were no links to the European Union. Precisely because European competition law was not applicable, the Tribunal decided to apply Section 36 of the Contracts Act [892].

845. Second, the reason why the *Naftogaz* tribunal found that there could have been a breach of European competition law (if it had been applicable), is because the volume, destination and take or pay clauses were "exceptional and clearly deviated from industry practice" [893].

846. However, the present case is significantly different:

- The MinAQ Obligation is a typical take-or-pay clause, agreed between two State-controlled companies, in a situation where the seller agreed to build a dedicated pipeline, with the exclusive purpose of serving the buyer;

- Claimant itself recognizes that take-or-pay provisions and large volume commitments in long-term gas contracts are not, by definition, abusive and often fulfill a legitimate purpose [894] - as in this case;

- Without take-or-pay clauses sunk investments in gas infrastructure would become difficult to finance;

- In the present case, Gasum is entitled to use the Make-Up Gas that it has failed to off-take and for which it has made a Down Payment; and

- There is also no prohibition for Gasum to resell gas outside Finland;

847. Therefore, the *Naftogaz* award is not useful for this Tribunal's analysis.

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848. In view of the above, the Tribunal does not find a breach of Art. 102 of the TFEU and rejects Gasum's request for a declaration that the MinAQ and MinDQ Obligations are invalid.

V.6. Decision on outstanding payment obligations

849. The Parties make several requests for payment.

Gasum

850. Gasum asks that the Tribunal order GPE to repay the amounts which Gasum has already paid to

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[891] Doc. CL-17, para. 3858.
[892] Doc. CL-17, para. 3860.
[893] Doc. CL-17, para. 3857.
[894] C-I, para. 302.

GPE:
- In relation to the 2020 MinAQ Obligation, and

- In relation to the MinDQ Obligation [895].

851. Furthermore, Gasum requests the Tribunal to declare that none of the unpaid Contested Invoices is due [896].

GPE

852. GPE asks that the Tribunal order Gasum to pay:
- All the unpaid Contested Invoices, and

- The amounts due as purchase price for the natural gas delivered in April and May 2022, in accordance with the procedure set out under Decree No. 172 [897].

853. Furthermore, GPE asks the Tribunal to dismiss Gasum's repayment claims [898].

854. The Tribunal must determine what happens with:
- Payments related to the MinAQ Obligation (1.);

- Payments related to the MinDQ Obligation (2.); and

- Payments related to purchase price of gas delivered in April and May 2022 (3.).

855. Lastly, the Tribunal will establish the final amounts due and the method of payment (4.).

1. MinAQ Obligation

856. With respect to the MinAQ Obligation, Gasum asks the Tribunal to:
- Order GPE to repay to Gasum [REDACTED] [899], this being the amount paid by Gasum to GPE relating to the 2020 MinAQ Obligation, with interest [900]; and

- Declare that Gasum is relieved from the payment of the MinAQ Obligations for 2021 and

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[895] C-I, section XIII, (d).
[896] C-I, section XIII, (a)(2) and (b)(1); C-PHB, para. 105.

[897] R-I, para. 1343(iii) to (vi); R-PHB, para. 238(iii) to (vi).
[898] R-I, para. 1343(i).

[899] Doc. C-37.
[900] C-I, para. 573 and section XIII, (d)(1). See Joint Table of Invoices, row 2.

subsequent years [901].

857. GPE, in turn, asks that the Tribunal dismiss Gasum's claims and order Gasum to pay to GPE [REDACTED], or, alternatively, in the amount of [REDACTED], or, in the further alternative, in any other amount established by the Tribunal, for the 2021 MinAQ Obligation [902].

858. The Tribunal has decided that [903]:

- There are no grounds to set aside or modify the 2020 MinAQ Obligation;

- There are no grounds to set aside or modify the 2021 MinAQ Obligation; and

- The 2022 MinAQ Obligation is unconscionable and must be set aside.

859. In view of this, the Tribunal decides that:

- The amount of [REDACTED] [904], already paid by Gasum in relation to the 2020 MinAQ Obligation has been properly paid; Gasum's claim for repayment is, therefore, dismissed;

- The amount of [REDACTED] [905] relating to the 2021 MinAQ Obligation is due and must be paid by Gasum to GPE;

- The MinAQ Obligation for the year 2022 is not due and Gasum is relieved from any payment.

2. MinDQ Obligation

860. With respect to the MinDQ Obligation, Gasum's main request is a declaration that Art. 3 of Addendum 19 does not oblige Gasum to make any payments for non-taken MinDQ volumes [906]. The Tribunal has dismissed this claim in V.4.1.3 *supra.*

861. The Tribunal must thus turn to Gasum's alternative request, requesting the Tribunal to:

- Declare Art. 3 of Addendum 19 adjusted as of 1 January 2021 until the end of the Contract;

- Declare that Gasum is relieved from payment of the Contested Invoices relating to the MinDQ Obligation [907]; and

- Order GPE to repay to Gasum [REDACTED] - *i.e.,* the amount paid by Gasum on 9 November 2021

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[901] C-I, para. 561 and section XIII, (a)(2).

[902] R-I, para. 1343(i) and (iii); R-PHB, para. 238(i) and (iii).

[903] See section V.3 *supra*.

[904] Doc. C-37; Joint Table of Invoices, row 2.

[905] Doc. C-11; Joint Table of Invoices, row 10.

[906] C-I, section XIII, (b)(1).

in relation to the MinDQ Obligation accrued from March through June 2021, plus interest [908].

862. The Tribunal has decided that [909]:

- The MinDQ Obligation must be reduced for the year 2021 and for the months of January, February, March and April 2022 to the Adjusted MinDQ Obligation, *i.e.*, [REDACTED] of the Contract Price of the not off-taken gas; and

- While the *force majeure* situation lasts, the MinDQ Obligation is suspended.

863. Each of the Contested Invoices relating to MinDQ corresponds to 100% of the Contract Price for the not off-taken gas. The Tribunal's decision implies that the penalty for failure to off-take the MinDQ Obligation must be reduced to the Adjusted MinDQ Obligation, *i.e.*, [REDACTED] [910]:

Date of invoice	No. of invoice	Exhibit no.	Concept of invoice	Period	Sum (EUR)	Amount corrected by the Tribunal [REDACTED] of Contract Price) (EUR)
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

864. Summing up, Gasum owes GPE a total of EUR [REDACTED] in relation to the Adjusted MinDQ Obligation payments, of which Gasum has already paid [REDACTED] as interest for late payment, *i.e.*, a total of [REDACTED] [911].

865. It is true that Gasum paid late the amounts it owed to GPE in relation to MinDQ, and therefore incurred and paid default interest. But the Tribunal in the present Award has reduced Gasum's MinDQ Obligation [REDACTED]. Bearing in mind that Gasum only owed [REDACTED] of the amounts paid to GPE, the Tribunal decides that the totality of interest pre-paid by Gasum must be deducted from the amounts awarded to GPE in this arbitration.

866. Therefore, Gasum owes [REDACTED] [912] to GPE in relation to the MinDQ Obligation for the period of

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[908] C-I, section XIII, (d)(2).

[909] See section V.4 *supra*.

[910] Joint Table of Invoices, as corrected by the Tribunal.

[911] Invoices of 6 April 2021, 11 May 2021, 7 June 2021 and 5 July 2021 (Doc. C-125).

March 2021 through April 2022.

3. Purchase price of gas delivered in April and May 2022

867. The Parties do not dispute that GPE delivered gas in the months of April and May 2022, after the issuance of Decree No. 172, and that Gasum owes the purchase price for these deliveries. Although Gasum tried to effect payments on 18 May and 30 June 2022, respectively, such payments were returned by GPE [913].

868. Therefore, Gasum owes to GPE the purchase price for gas taken in April and May 2022 as follows:
- [REDACTED] [914];

- [REDACTED] [915].

4. Payments due

869. In view of the above decisions, Gasum owes the following amounts to GPE:

Concept	Sum (EUR)
Payment in relation to 2021 MinAQ Obligation	
[REDACTED]	
Payment in relation to 2021 and 2022 MinDQ Obligation	
[REDACTED]	
Purchase price for gas delivered in April and May 2022	
[REDACTED]	
Total	[REDACTED]

870. The declaration of *force majeure* suspends GPE's obligation to supply gas (and Gasum's reciprocate obligation to take gas). It does not affect the Contract payment terms, which remain unchanged. Therefore, payments by Gasum to GPE must be made in accordance with Art. 6.3 of the Contract, as last amended in Addendum 14.

871. Since GPE has closed its bank account where payments under the Contract were to be made [916], GPE must provide an alternative bank account in Euros for Gasum to be able to make the outstanding payments. Payment to this bank account cannot entail a procedure different from that agreed to by the Parties under the Contract. Should GPE fail to do so, Gasum is entitled to effect payment by

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[912] [REDACTED]

[913] Joint Table of Invoices, rows 15-16.

[914] Doc. C-5.

[915] Doc. C-105.

[916] Doc. C-6.

delivering to GPE a check for the appropriate Euro amount, drawn against a European bank and made payable in favour of GPE.

VI. INTEREST AND COSTS

VI.1. Interest

872. Both Parties have asked for the payment of interest [917]. In Procedural Order No. 3, the Tribunal asked the Parties to specify what the applicable interest is (including interest rate, accrual, *dies a quo, dies ad quem*) [918]. The Parties addressed this issue in detail in their Post-Hearing Briefs.

873. The Tribunal will summarize the Parties' positions (1. and 2.) and adopt its decision (3.).

1. Claimant's position

1.1 Applicable interest on repayments from GPE to Gasum

874. Gasum states that, considering that the Contract does not anticipate payments from seller to buyer, it is equally silent on the matter of the interest rate applicable for late payments to be made by GPE to Gasum. Therefore, Gasum asserts that the interest applicable to its requests for repayment should be calculated in accordance with Sections 3 and 6 of the Swedish Interest Act [919].

875. Section 6 of the Swedish Interest Act establishes an annual interest rate amounting to the Swedish reference rate plus 8 percentage points. The reference rate is set by the Swedish Central Bank twice a year (*i.e.*, 1 January and 1 July). On 1 July 2022 the reference rate was set at 0.5% [920].

876. Therefore, Gasum claims that the applicable interest rate to Gasum's claims for repayment would amount to 8.5% per annum [921].

877. As to the *dies a quo* and *dies ad quem,* Gasum considers that, pursuant to Section 3 of the Swedish Interest Act, interest accrues from the date of Gasum's Statement of Claim (*i.e.*, 18 July 2022) until the day of payment by GPE [922].

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[917] C-I, para. 573 and section XIII, (d)(1)-(2) and (e); R-I, para. 1343(iii) to (vi); R-PHB, para. 238(iii) to (vi).
[918] Procedural Order No. 3, para. 5.

[919] C-PHB, para. 55.
[920] C-PHB, para. 56.
[921] C-PHB, para. 56.
[922] C-PHB, para. 56.

1.2 Applicable interest on payments from Gasum to GPE

878. Gasum avers that the applicable interest rate for payments by Gasum to GPE should be determined according to Art. 6.1 of the Contract which provides that [923]:

[REDACTED]"

879. The referred table is, however, no longer published by the Bank of Finland. Consequently, in 2021 GPE proposed to use the table "Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate" published by the Bank of Finland. Gasum agreed to use this table in relation to a previous payment made on a without prejudice basis and contested in this arbitration [924].

880. Therefore, Gasum believes that, if the Tribunal were to find that Gasum is obliged to pay any of the Contested Invoices, the applicable interest rates would be those included in the table below [925]:

[REDACTED]

881. This would lead to the following accrual for each invoice:
[REDACTED]

1.3 Payments for gas delivered in April and May 2022

882. Gasum argues that since it timely paid for the gas delivered in April and May 2022 (even though GPE rejected the payment and returned the money), GPE is not entitled to receive any default interest on these payments [926].

2. Respondent's position

2.1 Applicable interest rate

883. GPE considers that its monetary claims are subject to the accrual of both contractual and statutory interest [927].

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[923] C-PHB, para. 57; Doc. C-1, Art. 6.1.
[924] C-PHB, para. 58.
[925] C-PHB, pp. 20 and 21.

[926] C-PHB, para. 108 and item 199.

[927] R-PHB, para. 221.

Contractual interest

884. GPE claims that, pursuant to Art. 6.1 of the Contract, the contractual interest rate should be applied only to payments for natural gas "delivered by the Seller and accepted by the Buyer" [928]. Accordingly, the contractual interest is applicable exclusively to GPE's claims for payment of gas delivered in the months of April and May 2022, which amount to [REDACTED] [929].

Statutory interest

885. As the Parties did not agree on the interest rate applicable to other payments, GPE considers that for payments related to the not off-taken MinAQ in 2021 and not off-taken MinDQ [930] the applicable interest rate should be determined by the Swedish Interest Act [931].

886. GPE agrees with Gasum's calculation of the statutory interest rate established in the Swedish Interest Act. However, GPE distinguishes the interest rate applicable in the following two periods [932]:

- From 1 January to 30 June 2022: as the reference rate was 0%, the interest rate is 8%; and

- From 1 July 2022 to the end of 2022: as the reference rate was 0.5%, the interest rate is 8.5%.

2.2 Period for calculating interest

887. GPE notes that, pursuant to Section 2 of the Swedish Interest Act, interest shall accrue from the day following the date when payment was owed by Gasum until the date when payment is made [933].

888. Furthermore, GPE observes that, pursuant to [REDACTED], the payment for deliveries of natural gas is due [REDACTED] [934].

889. Accordingly, GPE considers that:

- The interest regarding payments for deliveries of gas in April and May 2022 should be calculated from the date following the last due date of the period specified in Art. 6.1 of the Contract [935];

- The payment date for the MinDQ Obligation should be determined by analogy with Art. 6.1 of the

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[928] R-PHB, paras. 222-224; Doc. C-1, Art. 6.1.
[929] R-PHB, para. 224.

[930] See R-PHB, para. 238, (iii) – (v). The claims for payment to which the statutory interest would apply are detailed therein.
[931] R-PHB, para. 225.
[932] R-PHB, paras. 226-228.

[933] R-PHB, para. 229.
[934] R-PHB, para. 230; Doc. C-1, Art. 6.1.
[935] R-PHB, para. 231; Doc. C-1, Art. 6.1.

Contract [936].

890. As for the MinAQ Obligation, as per [REDACTED] of the Contract, [REDACTED] [937].

891. Based on the foregoing, GPE summarizes its different claims for payment, the applicable interest rate, and the *dies a quo* as follows [938].

Exhibit	Concept of invoice	Amount (EUR)	*Dies a quo*	Interest rate (%)
C-11	Payment for failure to offtake MinAQ in 2021	[REDACTED]	21.01.2022	[REDACTED] (from 21.01.2022 to 30.06.2022) / 8.5% (from 01.07.2022 to the end of 2022)
R-136	Alternative calculation of the MinAQ payment in 2021	[REDACTED]	21.01.2022	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	

3. Decision of the Tribunal

892. The Tribunal has found that Gasum owes GPE [939]:

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[936] R-PHB, para. 232.
[937] R-PHB, para. 233; Doc. C-1, Art. 6.4.
[938] R-PHB, para 237.

[939] See section V.6.4 *supra*.

- [REDACTED] as payment for not off-taken 2021 MinAQ;

- [REDACTED]; and

- [REDACTED]

893. The Tribunal must determine the interest rate (A.) and the *dies a quo* and the *dies ad quem* (B.) applicable to these amounts.

A. Interest rate

894. Given that the present case concerns only payments by the buyer (Gasum) to the seller (GPE), the applicable interest rate is that of Art. 6.1 of the Contract, which provides that [940]:

"For each day of delay the Buyer shall pay interest equal to the latest available monthly average lending rate of the commercial banks in Finland (table 3.2.9), monthly published by the Bank of Finland, on the amount of the invoice. Interest shall be calculated on the basis of a 360-day year and a 30-day month."

895. The Bank of Finland, however, no longer publishes the "Table 3.2.9" referred to in Art. 6.1 [941]. Consequently, in 2021 GPE proposed to use the table "Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate" published by the Bank of Finland [the "New Table"]. Gasum agreed to use this New Table in relation to the without prejudice payment of MinDQ volumes [942]. Given the Parties' agreement, the Tribunal finds that, given that Table 3.2.9 is no longer published by the Bank of Finland, the New Table is an appropriate substitute.

896. Therefore, the Tribunal finds that the applicable interest rate is that established in Art. 6.1 of the Contract, where "Table 3.2.9" is replaced by the New Table ("Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate" [943]), a solution consistent with the Parties' agreement and practice.

B. Dies a quo and dies ad quem

897. Art. 6.1 of the Contract is silent regarding the *dies a quo.* Nevertheless, the Swedish Interest Act provides, in its Section 2, that [944]:

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[940] Doc. C-1, Art. 6.1.

[941] See C-PHB, para. 58.

[942] C-PHB, para. 58. See also R-PHB, fn. 156, which directs the Tribunal to the same table (Doc. R-138).

[943] Available at: https://www.suomenpankki.fi/en/Statistics/mfi-balance-sheet/tables/rati-taulukot-en/rl_yleison_lainat_ja_talletukset_en/. See also Doc. R-138.

[944] Doc. CL-134.

"Interest shall not accrue on a debt for the period prior to which the debt became due and payable."

898. Interest can only be charged on a debt which has become due and payable [945].

899. The Tribunal finds that the *dies a quo* is the date of the present Award, since it is when the debt became due and payable; prior to this Award, the Parties legitimately discussed the amounts reciprocally owed. This Award has settled this dispute and has given rise to a debt which is due and payable.

900. Both Parties agree that the *dies ad quem* will be the date of payment by Gasum [946], which is also consistent with Art. 6.1 of the Contract.

* * *

901. In view of the above, the Tribunal orders Gasum to pay interest on the amount of [REDACTED] at the interest rate set out in Art. 6.1 of the Contract, replacing the reference to Table 3.2.9 by a reference to the New Table (*i.e.*, "Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate"). Interest shall be due for each day of delayed payment from the date of the present Award until the amount is paid in full.

VI.2. Costs

902. Gasum requests compensation for its own costs from GPE and for GPE to be ordered to bear the costs incurred by the Tribunal [947]. Likewise, GPE asks that Gasum be ordered to reimburse all costs incurred by GPE with this arbitration, including compensation and fees of the Tribunal, the PCA and GPE's legal costs [948]. The Parties have also responded to each other's submissions on costs.

903. The Tribunal will summarize the Parties' respective cost claims (1. and 2.) and will then make its decision (3.).

1. Claimant's costs

904. Gasum requests the Tribunal to order GPE to compensate for Gasum's costs incurred in this arbitration, plus interest, and to order Respondent to bear alone the costs of the Arbitral Tribunal [949]. Claimant's costs include [950]:

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[945] C-PHB, para. 56; R-PHB, para. 229.
[946] C-PHB, para. 56; R-PHB, para. 237.

[947] C-I, para. 574 and section XIII, (e).
[948] R-I, para. 1343(x); R-PHB, para. 238(xi).

[949] C-SC, section III.
[950] C-SC, para. 6. These costs are exclusive of VAT.

- Costs incurred with the preparation of submissions and Hearing (including costs for counsel fees, counsel disbursements, expert witnesses, and other costs): EUR 2,394,323 plus SEK 28,340,693

- Costs incurred with Hearing and post-Hearing work (including costs for counsel fees, disbursements, expert witnesses, organization of Hearing and other costs): EUR 450,656 plus SEK 3,936,743

- Costs of the arbitration (deposit and charges of the PCA for holding the deposit): [REDACTED]

905. Gasum argues that all the measures it has taken have been necessary considering the size and complexity of the dispute's subject-matter, and the required extensive factual, legal, and financial research [951]. Claimant submits that it had to engage counsel from both Sweden and Finland because Swedish law governs the Contract and the arbitration, whereas the Finnish counsel possesses knowledge on the relevant Finnish market, the client, the relevant facts, EU competition law and CISG [952]. Gasum adds that the complexity of the subject-matter together with the expedited timetable necessitated the engagement of experts with knowledge in various fields of law as well as in-depth market knowledge [953]. According to Gasum, its costs are reasonable considering the financial magnitude and importance of the outcome of this dispute for the future of its business [954].

Respondent's comments to Claimant's costs

906. GPE considers the amount of costs incurred by Claimant to be "extremely excessive and unreasonable" [955]. GPE submits that it managed to deal with the same legal issues as Gasum by engaging only one counsel and legal expert. GPE submits that Gasum's high legal fees are the result of duplication of work by counsel [956].

907. Therefore, GPE requests the Tribunal to adjust the costs requested by Gasum in case it decides in favor of Gasum [957]. GPE also asks the Tribunal to reject Claimant's request for reimbursement [958].

2. Respondent’s costs

908. GPE requests the Tribunal to order Gasum (i) to reimburse GPE for its costs in this arbitration either in Euro equivalent or in the respective currencies the costs were incurred in [959], and (ii) to bear all

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[951] C-SC, para. 3.
[952] C-SC, para. 4.
[953] C-SC, para. 4.
[954] C-SC, para. 5.

[955] R-SCII, para. 5.
[956] R-SCII, para. 7.
[957] R-SCII, para. 10.
[958] R-SCII, para. 11.

[959] R-SC, para. 6.

costs of the Tribunal, plus interest [960]. These costs include:

- Costs incurred with preparation of submissions and expert reports (including costs for counsel fees, disbursements, and expert witnesses): USD 477,469 plus EUR 414,753 plus RUB 25,800,000

- Costs incurred with Hearing (including costs for counsel fees, disbursements, and expert witnesses): USD 329,826 plus EUR 70,218 plus RUB 13,330,769

- Cost of the arbitration (deposit): [REDACTED]

Claimant's comments to Respondent's costs

909. Gasum requests the Tribunal to reject GPE's request for reimbursement of costs due to the lack of merit of GPE's claims in this arbitration [961].

3. Decision of the Tribunal

A. Allocation of costs

910. The Arbitration Agreement contains a single provision related to the costs of arbitration [962]: "10.5 The arbitration costs shall be assessed by the Arbitration."

911. The Arbitral Tribunal understands this provision to mean that it has discretion to assess and decide on the apportionment of the arbitration costs.

912. In the absence of further guidance from the Parties, the Tribunal turns to Section 42 of the Swedish Arbitration Act, which provides that:
"Unless otherwise agreed by the parties, the arbitrators may, upon the request of a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The arbitrators' order may also include interest, if a party has so requested."

913. This provision also confers broad discretion on the Tribunal to decide how to allocate the costs of the arbitration.

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[960] R-SC, para. 11.

[961] C-SCII.

[962] Doc. C-1, Art. 10.5.

914. The Tribunal finds that the Parties had a genuine dispute, caused mainly by the *force majeure* circumstances - which, the Tribunal has found, are not attributable to any of the Parties. The Tribunal is persuaded that, were it not for the *force majeure*, the Parties would have been able to solve their other disagreements through negotiations, as they had done multiple times in the past.

915. Furthermore, the Tribunal considers that none of the Parties has been particularly successful in its claims. Both Parties had winning and losing arguments, and were more or less victorious depending on the issue at stake. Therefore, it would not be appropriate to apply the criterion of "costs follow the event".

916. This Award now puts an end to the dispute on the future of the Contract. [REDACTED] [963]. [REDACTED]

917. Thus, exercising the broad discretion granted by the Arbitration Agreement and the Swedish Arbitration Act, the Tribunal decides that costs should stay where they fell. The compensation to the arbitrators and the PCA shall be split equally between the Parties and each Party shall assume its own costs.

B. Compensation to the arbitrators and the PCA

918. The Tribunal must define the compensation owed to each arbitrator for work and expenses, in accordance with Section 37 of the Swedish Arbitration Act [964].

919. [REDACTED]

920. [REDACTED] [965].

921. [REDACTED] [966] [REDACTED] [967], [REDACTED] [968] [REDACTED]

922. Furthermore, the Parties agreed to:

- Reimburse the members of the Tribunal for all disbursements and charges reasonably incurred in connection with the arbitration, including but not limited to travel expenses [969];

- Reimburse the Administrative Secretary for justified travel expenses and reasonable personal disbursements for attending hearings and meetings [970];

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[963] See section V.2.2.3C.a *supra*.

[964] Doc. CL-1, Section 37: "The parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. […] In a final award, the arbitrators may order the parties to pay compensation to them, together with interest from the date occurring one month following the date of the announcement of the award. The compensation shall be stated separately for each arbitrator."

[965] Terms of Appointment, para. 65.

[966] [REDACTED]

[967] Using the interest rate USD 1 = EUR 0.965860 (available at https://www.oanda.com/currency-converter/en/?from=USD&to=EUR&amount=1247175, last consulted on 14 November 2022).

[968] Terms of Appointment, fn. 13.

[969] Terms of Appointment, para. 70 *et seq*.

- Reimburse the PCA for time spent by its staff on the management of the deposit, any hearing, or on other administrative tasks carried out at the request of the Tribunal [971]; and

- Pay the annual fee for holding the deposit at the PCA [972].

923. The above costs and expenses are as follows:

924. [REDACTED] [974] [REDACTED] [975].

VII. DECISION

925. In view of the above, the Tribunal decides as follows:
Force majeure

1. Declares that the issuance of Decree No. 172 of 31 March 2022 by the President of the Russian Federation and the subsequent order by the Russian Central Energy Customs prohibiting Gazprom export LLC from supplying natural gas to Gasum Oy under the Contract, constitute an event of *force majeure* pursuant to Art. 9.1 of the Contract, which suspended the performance of the Contract as of 21 May 2022;

2. [REDACTED];

3. Applying the powers bestowed on it by Section 36 of the Swedish Contracts Act, declares that Art. 9.4 *in fine* of the Contract is unconscionable and modifies such provision as follows: [REDACTED]

MinAQ Obligation

4. Dismisses Gasum Oy's claim to modify or set aside the MinAQ Obligation for the years 2020 and 2021 on grounds of unconscionability;

5. Orders Gasum Oy to pay to Gazprom export [REDACTED] as payment in relation to the 2021 MinAQ Obligation;

6. Applying the powers bestowed on it by Section 36 of the Swedish Contracts Act, declares that Gasum Oy's MinAQ Obligation for the year 2022 has become unconscionable and must be set aside;

7. In the scenario described in para. 611 *supra,*

(i) Declares that the MinAQ Obligation [REDACTED], reduced proportionally by taking into

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[970] Terms of Appointment, para. 75.
[971] Terms of Appointment, para. 20.
[972] Terms of Appointment, para. 21.
[974] [REDACTED]
[975] Terms of Appointment, para. 80.

consideration the days of the year 2023 when the performance of the Contract is suspended due to *force majeure*; and

(ii) Applying the powers bestowed on it by Section 36 of the Swedish Contracts Act, declares that the MinAQ Obligation [REDACTED], is unconscionable and must be modified by agreement between the Parties, applying the criteria set forth in para. 638 *supra,* or, if reaching such an agreement proves impossible, through a new arbitration under Art. 10 of the Contract.

MinDQ Obligation

8. Applying the powers bestowed on it by Section 36 of the Swedish Contracts Act, declares that the MinDQ Obligation provided for in [REDACTED] is unconscionable, and modifies the Contract, reducing Gasum Oy's MinDQ Obligation under [REDACTED] to [REDACTED] of the average [REDACTED];

9. Orders Gasum Oy to pay to Gazprom export LLC EUR [REDACTED], in payment of the 2021 and 2022 Adjusted MinDQ Obligation;

10. Declares that, while the *force majeure* event lasts, further payments in relation to the MinDQ Obligation are suspended;

Purchase price

11. Orders Gasum Oy to pay to Gazprom export LLC EUR [REDACTED], as purchase price for the natural gas delivered in April and May 2022;

Interest and costs

12. Orders Gasum Oy to pay to Gazprom export LLC interest on the sum of EUR [REDACTED] at the interest rate set out in [REDACTED] replacing the reference to "Table 3.2.9" by a reference to the New Table (*i.e.*, "Finnish MFIs' deposits from and loans to euro area non-MFIs: stock and interest rate"), for each day of delayed payment from the date of the present Award until the amount is paid in full;

13. Orders that the compensation to the arbitrators and the PCA be paid equally by Gasum Oy and Gazprom export LLC;

14. Orders that each Party assumes its own costs incurred with the present arbitration.

* * *

15. Dismisses all other prayers for relief.

Place of arbitration: Stockholm, Sweden

Date: 14 November 2022