SCC ARBITRATION (V 183/2009)

In the matter of arbitration between:

ROSUKRENERGO AG

Claimant

and

EMFESZ Elsö Magyar Földgáz-és Energiakereskedelmi Kft.

Respondent

FINAL AWARD

17 March 2011

Table of Contents

1. INTRODUCTION

1.1 Overview

1.1.1 This arbitration concerns a dispute over whether, and if so, the extent to which EMFESZ Elsö Magyar Földgáz-és Energiakereskedelmi Kft. ("**Respondent**" or "**Emfesz**") is required to pay ROSUKRENERGO AG ("**Claimant**" or "**RUE**") US $ 415,853,172.24 for natural gas delivered and US $111,451,800.13 for interest on a so-called commodity credit ("**Commodity Credit**" and "**Commodity Credit Interest**") allegedly provided and owing pursuant to a Natural Gas Supply Agreement, dated 23 December 2004 ("**Agreement**"), and Additional Agreements 1 to 19 ("**AA 1, AA 2, etc.**", together with the Agreement, the "**Agreements**").

1.1.2 The arbitration also concerns Emfesz's Counterclaims for US 820,480,000 in damages arising out of RUE's allegedly material breach and anticipatory material breach of the Agreements.

1.2 The Arbitration Agreement

1.2.1 Clause 11.2 of the Agreement provides as follows:

> *"should the parties be not able to settle their disputes arising out of the present agreement or in connection with its breach, termination, validity or interpretation, they agree to subject themselves to the decision of the Court of Arbitration operating at the Swedish Chamber of Commerce provided that the Court of Arbitration proceeds according to its own Rules of Procedure".*

1.2.2 The English wording of Clause 11 of the Agreement is said not to correspond fully to the Russian wording. Clause 12.3 of the Agreement provides that "in the case of discrepancy between the two versions, the Russian language version shall be governing".

1.2.3 For the sake of good order, Claimant offered what it felt to be a more accurate English translation of Clause 11, and which Respondent did not take issue:

> *"11.1 the Parties agree that they will endeavour to resolve all disputes in connection with this agreement amicably by negotiations.*
>
> *11.2 In the event that any dispute between the Parties cannot be resolved through negotiations, then for the resolution of disputes arising out of this agreement or in connection with it, its breach, termination, duration or interpretation the Parties submit to the exclusive decision of the Arbitration Institute of the Chamber of Commerce, City of Stockholm. The Arbitration Institute shall apply its own rules.*
>
> *The arbitration shall be conducted by three arbitrators.*
>
> *The arbitration proceedings shall be conducted in English".*

1.2.4 In accordance with Clause 12.1 of the Agreement, the Agreement shall be governed by the laws of Sweden without regard to the provisions on the conflicts of laws.

1.3 The Parties

Claimant

1.3.1 RUE is a natural gas purchaser and trading company organised under the laws of the Canton of Zug, Switzerland, whose principal place of business is:

ROSUKRENERGO AG
7 Bahnhofstrasse
CH-6300
Zug, Switzerland
Tel: + 41 41 560 7530
Fax: + 41 41 560 7535

Respondent

1.3.2 Emfesz is a natural gas purchaser and trading company organised under the laws of Hungary, whose principal place of business is:

EMFESZ Elsö Magyar Földgáz-és Energiakereskedelmi Kfg.
Szabadságtér 7
Budapest, 1054, Hungary

Tel: + 36 1 374 90 18
Fax: + 36 1 354 19 57

The Parties' Representatives

1.3.3 Claimant was represented in these proceedings by:

Matthew Saunders
Philip A. Chong
DLA Piper UK LLP
3 Noble Street
London EC2V 7EE
United Kingdom

Tel: + 44 (0)20 7796 6314
Fax: + 44 (0)20 7796 6994
Email:
Matthew.Saunderse@dlapiper.com
Email: Philip.Chong@dlapiper.com

Pavel Bakoulev[1]
DLA Piper Rus Limited
Leontievsky per., 25
Moscow, 125009, Russia

Tel: + 7 495 221 44 00
Fax: + 7 495 221 44 01
Email: Pavel.Bakoulev@dlapiper.com

Alan Gourgey QC
11 Stone Buildings
Lincoln's Inn
London WC2A 3TG
United Kingdom

Tel: + 44 (0)20 7832 6381
Fax: + 44 (0)20 7831 2574
Email: gourgey@11sb.com

Jörgen Almelöv
Setterwells Advokatbyrå AB
Arsenalsgatan 6
P.O. Box 1050
Stockholm, SE-101 39 Sweden

Tel: + 46 8 598 890 00
Fax: + 46 8 598 890 90
Email: Joergen.Almelov@setterwalls.se

1.3.4 Respondent was represented in these proceedings by:

Hans Bagner
Marcus Axelryd
Ida Häggström
Kristoffer Persson
Frank Advokatbyra AB
Box 7099
SE-10387 Stockholm
Sweden

Tel: + 46 8 5224 5800
Fax: + 46 8 5224 5819
Email: hans.bagner@frank.se
Email: marcus.axelryd@frank.se

[1] Mr Bakoulev died tragically between phases 1 and 2 of the hearing as the result of a skiing accident in France. The Tribunal expresses its sympathy to Mr Bakoulev's family, friends and colleagues.

Email: ida.haggstrom@frank.se
Email : kristopher.persson@frank.se

1.4 The Arbitral Tribunal

1.4.1 The Arbitral Tribunal comprised Mr Per Runeland, co-arbitrator (on the appointment of Claimant), Ms Carita Wallgren-Lindhom, co-arbitrator (on the appointment of Respondent) and Mr J. William Rowley QC, Chairman, (on the joint appointment of the parties). Mr Rowley's appointment as Chairman of the Arbitral Tribunal was confirmed by the SCC on 21 December 2009.

1.4.2 Mr Runeland's contact details are:

S J Berwin LLP
10 Queen Street Place
London EC4R 1BE
United Kingdom

Tel: + 44 (0)20 7111 2236
Fax: + 44 (0)20 7111 2000
Email: per.runeland@sjberwin.com

1.4.3 Ms Wallgren-Lindholm's contact details are:

Lindholm Wallgren Attorneys Ltd.
Aleksanterinkatu 48A
FIN-00100 Helsingfors (Helsinki)
Finland

Tel: + 358 (0)20 787 1770
Fax: + 358 (0)20 787 1771
Email: carita@lindholmwallgren.com

1.4.4 Mr Rowley's contact details are:

20 Essex Street Chambers
20 Essex Street
London WC2R 3AL
United Kingdom

Tel: + 44 (0) 20 7842 1200
Fax: + 44 (0)20 7842 1270
Email: wrowley@20essexst.com

Suite 4400, 181 Bay Street
Brookfield Place
Toronto, Ontario M5J 2T3
Canada

Tel: + 1 416 865 7008
Fax: + 1 416 865 5519

2. BACKGROUND DETAILS

2.1 Initial Pleadings

2.1.1 Prior to the constitution of the Tribunal pursuant to Articles 2 and 5 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules"), the parties had exchanged the following pleadings:

(a) Claimant's Request for Arbitration: 22 October 2009

(b) Respondent's Answer: 16 November 2009

(c) Comments on Respondent's Answer: 23 November 2009

2.2 Initial Meeting, Provisional Timetable and Initial Directions

2.2.1 On 10 March 2010, the Tribunal met with the parties in London to seek agreement on and to fix questions of timetabling and the procedures to be followed in the arbitration. Thereafter, the Tribunal issued Procedural Order No. 1 (effective as at 10 March 2010), which dealt with the sequence of proceedings, the nature and content of written submissions, production of documents and other procedural matters. It also scheduled a five-day oral hearing on the merits in Stockholm (the arbitral seat) to begin on Monday, 6 December 2010.

2.3 Subsequent Pleadings and Procedures

2.3.1 On 26 February 2010, Claimant filed its Statement of Claim.

2.3.2 On 30 April 2010, Respondent filed its Statement of Defence and Counterclaim.

2.3.3 On 18 June 2010, Claimant filed its Reply and Defence to Respondent's Counterclaim.

2.3.4 On 2 August 2010, each of the disputing parties applied for the production of further documents.

2.3.5 On 9 August 2010, each of the parties commented on the other's application for production.

2.3.6 On 11 August 2010, the Tribunal issued its reasoned order with reference to the parties' respective applications for production.

2.3.7 On 15 October 2010, Respondent applied for an Amendment to the timetable for the filing of Rebuttal Pleadings and Reply Witness Statements / Expert Reports.

2.3.8 On the same date, Claimant gave notice that it would seek an order, *inter alia*, for Respondent to provide certain documents that it and its experts relied upon which, Claimant contended, had not been properly or timely produced, should Respondent not provide all missing documents within three working days.

2.3.9 On 17 October 2010, Claimant filed its Amended Reply and Defence to Counterclaim.

2.3.10 On 19 October 2010, Claimant sought leave from the Tribunal for its previously filed Amended Reply and Defence to Counterclaim (**"ARDC"**) and applied for the bifurcation of the proceedings as between liability and quantum, on the basis that it had become clear that the five days allotted in December 2010 would be insufficient to dispose of the case and that is experts would not be able to deal adequately with Respondent's late filed experts' reports.

2.3.11 On 21 October 2010, Respondent applied for an order from the Tribunal for the dismissal of Claimant's Amended Reply and Defence to Counterclaim.

2.3.12 On 24 October 2010, the Tribunal, in a reasoned decision, denied Claimant's application to bifurcate and Respondent's application to dismiss the ARDC. With respect to the former, and having regard to the nature of Respondent's expert reports

at issue, the Tribunal did not accept that it would be impossible for Claimant's experts to deal adequately with Respondent's expert testimony in time to permit the hearing to continue as scheduled. With respect to Respondent's application to dismiss the ARDC, the Tribunal saw no basis upon which Respondent could reasonably assert that it would be prejudiced seriously by the proposed amendment.

2.3.13 Having regard to these decisions, the Tribunal, *inter alia*, extended the date for the filing of rebuttal pleadings and rebuttal evidence from 22 October 2010 to 22 November 2010. The Tribunal concluded that in view of such an extension to the date for the filing of rebuttal pleadings, evidence / reports, the parties would be provided with a reasonable opportunity to present their respective cases in accordance with Article 19 (2) SCC Rules. The Tribunal indicated that, in the event it became evident at the hearing that either of the parties had not been given a reasonable opportunity to present its case, the Tribunal would ensure that it be given the chance to do so.

2.3.14 On 22 November 2010, Respondent filed its Rebuttal Pleading which developed its defences to Claimant's claims and replied to Claimant's defences to its counterclaims. Respondent also replaced the counterclaim found in its Statement of Defence and Counterclaim with new counterclaims. On the same date, both parties filed reply witness statements and expert reports. Claimant's filings included a second expert report of Chris Osborne of FTI (relating to Respondent's claimed damages) which introduced into the record for the first time a natural gas supply agreement between RosGas AG (acting as seller) and Emfesz (acting as buyer), dated 31 March 2009, which was stated to be effective from January 2009 (**"RosGas Supply Agreement"**).

2.3.15 On 24 November 2010, Respondent applied to reschedule the hearing from 6 December 2010 until a date in the first quarter of 2011, to exclude certain parts of Professor Christina Ramberg's expert report (filed by Claimant on 22 November 2010) and to be permitted to file a further witness statement from Mr Góczi dealing with the RosGas Supply Agreement.

2.3.16 On 26 November 2010, the Chairman of the Tribunal held a pre-hearing teleconference with the parties during which the parties made further submissions with respect of Respondent's applications.

2.3.17 On 27 November 2010, in a reasoned order, the Tribunal denied Respondent's application to reschedule the hearing and confirmed that the hearing would commence and continue as planned on 6 December 2010, to be followed by a further five-day hearing in Stockholm, commencing on 17 January 2011. To the extent possible, the Tribunal directed that the December hearing should cover those issues and witnesses that had previously been scheduled and that the January hearing should cover the remaining issues and evidence. However, given Respondent's counsel's advice of 27 November 2010, that some of Respondent's experts might not be available in January, the parties were directed to converse immediately to adjust the December timetable to accommodate those witnesses, as all experts had long since been aware of their need to available in Stockholm for the December dates.

2.3.18 The Tribunal was convinced that neither party would be prejudiced by its decision not to exclude any part of Professor Ramberg's report, and to proceed with the hearing on 6 December 2010 on the basis that: (a) Respondent be permitted to file a further expert report (in response to Professor Ramberg's report) by 6:00 p.m., on Wednesday, 8 December 2010; or to adduce rebuttal oral evidence on the questions

at issue from its expert Professor Lehrberg, through examination-in-chief, when the latter testified on Thursday afternoon, 9 December 2010; or to deal with the relevant questions of law through its counsels' closing speech or post-hearing submission; and, (b) Respondent be permitted either to file a further witness statement from Mr István Góczi by 6:00 p.m. on Monday, 6 December 2010, dealing with the RosGas Supply Agreement, or to adduce rebuttal oral evidence on this question from Mr Góczi.

2.3.19 With respect to Respondent's assertions, made in support of its application, that "no part of the case - neither the question of liability nor the quantum question, has been properly prepared and is ready for a merits hearing", the Tribunal concluded that, if accurate, such a contention provided no basis upon which to cancel and reschedule a long-planned hearing if Respondent's state of readiness was of its own making and when the costs thrown away in doing so would be so high. As to this question, the Tribunal noted that the 6 December 2010 date had been in place since the issue of Procedural Order No. 1, rebuttal evidence (statements, reports) was always to be filed as the last substantive step in the pre-hearing procedures, and the fact that such evidence was delayed was largely due to Respondent's delay in the production of the exhibits to the reports of its own experts.

2.3.20 On 30 November 2010, Respondent acknowledged receipt of the Tribunal's procedural decisions of 27 November 2010, indicated that it had noted their contents and rationale and that it wished to lodge its reservations by reference to Article 31 of the SCC Rules.

2.3.21 On the same date, in response to the Tribunal's request for clarification as to whether Respondent's reservations were additional to those submitted on 24 and 25 November 2010 in support of its application to reschedule the 6 December 2010

hearing, Respondent replied that "the reservations are based on the circumstances stated in Respondent's letters of 24 and 25 November 2010 to the Tribunal".

2.3.22 On 30 November 2010, Claimant forwarded a timetable jointly proposed by the parties for the December hearing.

2.3.23 On 1 December 2010, the Tribunal noted that the jointly proposed schedule was much as had earlier been proposed and reminded the parties of its direction that the parties should converse immediately to adjust the December timetable as might be necessary to accommodate the possible unavailability of Respondent's quantum experts during the dates scheduled for the continuance of the hearing in January 2011.

2.3.24 On 1 December 2010, Respondent replied to the Tribunal's reminder, indicating that its quantum experts would be available during the week of 17 January 2011 for the continued hearing.

2.4 Oral Hearing

2.4.1 A two-phase oral hearing was held on 6 - 9 December 2010 and 17 - 19 January 2011 at Strandvägen 7A, Stockholm, SE-114 56, Sweden. The hearing was recorded and transcribed. The transcripts were corrected, to the extent required, by the parties following the hearing.

2.4.2 On 5 January 2011, before the second phase of the scheduled hearing, Respondent advised the Tribunal that, as a result of RUE's non-supply of gas pursuant to the Agreement, Emfesz was no longer able to finance the purchase of gas from alternative suppliers. In these circumstances, in the absence of a long-term supply agreement and because of the increased cost for the purchase of gas, Emfesz's banks had determined not to increase its necessary credit line. In the result, Emfesz's trading license with the Hungarian energy Office ("**HEO**") had that day

been temporarily suspended for a 90-day period from 13 January 2011. Emfesz stated that, as a consequence of this event, it would be necessary for it to recalculate its damages, which would be increased. The next day, Respondent advised that it would provide further materials on its damages claims on or before Sunday, 9 January 2011.

2.4.3 On 7 January 2011, Claimant filed an application for an order that Respondent be required to provide security for costs in the arbitration, referable to Emfesz's counterclaims, in the form of an irrevocable bank guarantee, such guarantee to be in place by 5:00 p.m., London time, on Wednesday, 12 January 2011, for the sum of GBP 2.2 million.

2.4.4 On 8 January 2011, the Tribunal directed Claimant to provide Respondent and the Tribunal with any legal grounds and authorities upon which it wished to rely in support of its Security for Costs application by 1:00 p.m., GMT, on Monday 10 January 2011. On the same date Respondent was directed to provide its response to Claimant's application for Security for Costs by 1:00 p.m., Stockholm time, on Tuesday, 11 January 2011.

2.4.5 On 9 January 2011, Respondent filed a third expert report from Michael Peer (KPMG) in support of its counterclaim for damages. That report adjusted KPMG's estimate for damages to take into account corrections suggested by Claimants' expert on damages as well as the temporary suspension of Respondent's trading licence.

2.4.6 On 13 January 2011, in a reasoned decision, the Tribunal denied Claimant's application for security for costs.

2.4.7 At the hearing, the Tribunal heard oral testimony from the following witnesses presented by Claimant:

Mr Dmitry Glebko	Professor Christina Ramberg
Mr Atilla Marczy	Mr Konstantin Shmelev
Mr Colin Mason	Professor Jonathan Stern
Professor Peter Nobel	Mr Colin Weinberg
Mr Chris Osborne	

2.4.8 The Tribunal also heard testimony from the following witnesses presented by Respondent:

Dr Judit Barta	Dr Gino Koenig
Mr Zoltán Eperjesi	Professor Bert Lehrberg
Mr István Góczi	Mr Michael Peer
Mr Károly Grébecz	Mr István Windisch
Mr Brent Kaczmarek	

2.4.9 In the light of the parties' prior agreement, the available time at the hearing was divided equally.

2.4.10 On 28 January 2011, each of the parties filed a bill of costs together with its submissions as to the allocation of the costs in the proceedings.

2.4.11 On 4 February 2011, each of the parties commented on each other's bill of costs and proposed allocation of costs.

2.4.12 On 14 February 2011, each of the parties filed a Post-Hearing Brief.

2.4.13 Following the hearing, the members of the Tribunal deliberated by various means of communications. In reaching its conclusions in this Award, the Tribunal has taken into account all of the pleadings, documents and oral submissions filed and / or made in this case.

2.4.14 On 16 February 2011, the Tribunal notified the parties that it had that date declared the proceedings closed as regards the filing by the parties of further evidence or submissions.

2.4.15 Throughout the course of these proceedings, the Tribunal has been greatly assisted by the submissions of counsel, who, in turn, were helped by many others whose names do not appear in the transcription of the hearings. It is, therefore, appropriate at the beginning of this Award to record our appreciation of the excellent efforts which counsel for the disputing parties have brought to bear during these proceedings, together with their respective experts, assistants and other advisors.

3. THE FACTS

3.1 The Tribunal's Approach to the Facts

3.1.1 A review of disputing parties' submissions, witness statements and the oral testimony given at the hearing indicates that, with few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed.[2] Put another way, most of the differences between the parties have to do with the causes of, the implications arising from, or the interpretation to be given to, the events which unfolded and the parties' competing visions as to the proper construction of the Agreements and whether they had been subsequently amended by the parties.

---

[2] The principal exception to this concerns the disputed recollections of what was understood by those who attended the 19 May 2008 meeting in Zug and what was said to Emfesz by RUE on 27April 2009 about no more gas being available to Emfesz.

3.1.2 We set out in detail below a summary of the facts most relevant to the dispute - either as agreed, not disputed or determined by the Tribunal.

3.2 Eural Trans Gas and RUE

3.2.1 When the Hungarian gas market started to become deregulated, Eural Trans Gas Kft. ("**ETG**") was set up for the purpose of transporting and supplying natural gas from Central Asia to Ukraine, Hungary, Poland and Czechoslovakia.

3.2.2 Based in Hungary, ETG purchased gas from suppliers in Kazakhstan, Uzbekistan, Turkmenistan and Russia, arranged for its transportation across Russia and Ukraine and then sold the gas for import into Hungary via Mabofi-Trade AG.

3.2.3 RUE was incorporated on 22 July 2004 in Zug, Switzerland, as a joint-stock company (*Aktiengesellschaft* or AG) and began operations on 1 January 2005. RUE was set up to replace ETG and to assume the role of supplying gas of Central Asian origins to off-takers in Eastern Europe. RUE is a 50/50 joint venture between Centragas Holding AG ("**Centragas**") and Open Joint Stock Company Gazprom ("**Gazprom**").

3.2.4 Centragas is a company incorporated in Austria and is beneficially owned by two Ukrainian nationals - 90% by Mr Dmitry Firtash and 10% by Mr Ivan Fursin. Both individual shareholders are well-known businessmen in Russia and Ukraine and Mr Firtash has considerable experience in the gas industry.

3.2.5 By reason of the 50% shareholding of Centragas, RUE is part of a group of companies forming Group DF Limited ("**Group DF**"). Group DF is ultimately controlled by Dimitry Firtash.

3.2.6 Gazprom is a Russian company engaged in geological exploration, production, transportation, storage, processing and the marketing of natural gas. A majority

shareholding in Gazprom is controlled by the Russian Government. Natural gas is exported from Russia to Europe by Gazprom Export Limited Company ("**Gazprom Export**"), a wholly-owned subsidiary of Gazprom.

3.2.7 For Mr Firtash, having Gazprom as a 50% joint venture partner in RUE meant ensuring access to a steady source of gas supply for Mr Firtash's businesses in Ukraine and Hungary including Emfesz. A good relationship with Gazprom was essential to the Central Asian gas trade, as natural gas from such countries requires to be transported by pipeline via Russia - and Gazprom is a monopoly owner of the Russian gas pipeline system.

3.2.8 RUE could sell gas of Central Asian origin, *i.e.*, from Kazakhstan, Uzbekistan and Turkmenistan, outside the borders of the Russian Federation, as an alternative to, and at prices lower than, Russian gas.

3.2.9 Through its participation in RUE, Gazprom took a share of the profits from the direct sale of Central Asian gas to businesses in Eastern Europe, particularly Hungary, a market from which Gazprom had previously been excluded.

3.2.10 RUE is structured as a genuine 50/50 joint venture company in the sense that each shareholder is represented by two directors - one Board Director and one Managing Director. RUE can be bound by the joint signature of either both of its Board Directors or both of its Managing Directors (or duly authorised Deputy Managing Directors).

3.2.11 At all relevant times Centragas's nominee was Dmitry Glebko (appointed in April 2007 in succession to Mr Palchikov) and Gazprom's nominee was Nikolay Dubik (appointed in April 2008 in succession to Mr Chuychenko). RUE also had two members of its Board (Mr Lars Haussmann and Mr Slawa Margulis, the latter having succeeded Mr Hans Baumgartner in 2010).

3.2.12 According to the Commercial Register of Zug for RUE, the signature of two Managing Directors or two members of the Board is required in order for RUE to be bound.

3.2.13 At the relevant time, Mr Konstantin Shmelev was (and remains) the CFO of RUE. He is not a Board Director but reports to the joint Managing Directors.

3.2.14 Upon RUE's incorporation, Mr Pelchikov as Managing Director appointed by Centragas took instructions directly from Mr Firtash. His Co-Managing Director at the time, Mr Chuychenko took instructions directly from Gazprom.

3.3 The Hungarian Gas Market

3.3.1 Roughly 40% of Hungary's energy consumption is fuelled by natural gas. Of that 40%, approximately 80% is imported. Since 2005, production, consumption and imports of natural gas in Hungary have been in decline and are illustrated by the following table:

Year	Production in BCM	Imports in BCM	Consumption in BCM
2005	3.03	12.01	14.98
2006	3.09	11.52	14.22
2007	2.61	10.51	13.25
2008	2.63	11.47	13.17
2009	2.61	9.71	11.32

3.3.2 Approximately 80% of the gas imported into Hungary arrives from Ukraine via the pipeline passing through Beregovo. The other 20% of import gas enters Hungary from Austria through a pipeline passing through Baumgarten.

3.3.3 As a trader of natural gas, RUE has no production capacity of its own and must buy the gas it sells. It is bound by the terms and conditions of its suppliers. RUE must

also transport the gas it supplies and sells from its point of origin to its delivery destination. It is similarly bound by the terms and conditions of the operators of the natural gas pipeline system through which such gas is transported.

3.3.4 At all times relevant to this case, under arrangements with Gazprom Export, RUE purchased gas of Central Asian origin from the borders of Turkmenistan, Kazakhstan and Uzbekistan. Such gas was then transported across Russia through that country's natural gas pipeline network from the borders of these Central Asian countries to the Russian-Ukrainian border according to RUE's arrangements with Gazprom, Russia's pipeline operator.

3.3.5 The gas was then transported by Ukraine's natural gas pipeline network from the Russian-Ukrainian border through the territory of Ukraine to the Ukrainian-Hungarian border according to RUE's arrangements with Naftogas of Ukraine NJSZ ("**Naftogas**"), Ukraine's state-owned pipeline operator.

3.3.6 RUE had no arrangements - contractual or otherwise with FGSZ, the pipeline operator in Hungary. Gas deliveries from RUE to EMFESZ were measured at a pipeline metering station located in Beregovo, Ukraine, a town on the Ukrainian-Hungarian border. The volume of gas passing through the pipeline at Beregovo is and was measured periodically by reference to the pressure and temperature in the pipeline at the time. The measurements are and were physically taken by Ukrtransgas, a subsidiary of Naftogas and recorded at the end of each month in technical protocols and delivery acceptance protocols.

3.3.7 Following the taking of measurements, the natural gas crossed the Ukrainian-Hungarian border and was subject to customs clearance by the importers of such gas.

3.3.8 During the period from November 2008 to the end of April 2009, Ukraine did not generally export gas. This was because: (a) Ukraine is a net importer of gas (*i.e.*, it consumes more gas than it produces); (b) an intergovernmental agreement between Russia and Ukraine prohibits Ukraine from re-exporting the gas it imports from Russia; and (c) Ukrainian producers are restricted by Ukrainian legislation from exporting the gas they produce (no Ukrainian producers had export permits during this period).[3]

3.3.9 Consequently, all of the natural gas passing through the Beregovo metering station during the period from November 2008 through the end of April 2009 was either: (a) Gazprom gas transited by Gazprom Export from Russia through Ukraine for export to European off-takers; or (b) RUE's gas.

3.4 Emfesz

3.4.1 Emfesz was incorporated in Hungary at the direction of Mr Firtash in 2003 for the purposes of taking advantage of the Hungarian gas trade.

3.4.2 Emfesz was acquired by Mabofi Holdings Limited ("**Mabofi**") in 2004 from its then owner Csabdi Kereskedelmi Kft ("**Csabdi**"). Mabofi is a company incorporated in Cyprus and is indirectly owned (as to 90%) by Group DF. The contract for the purchase of the shares by Mabofi (dated 29 October 2004) was executed on behalf of Mabofi by István Góczi by power of attorney ("**2004 PoA**") granted for the purpose in 2004.

3.4.3 On 31 December 2004, Mr Góczi was appointed as General Director of Emfesz, jointly with Dr Zuzsa Hunyadi-Zoltán.

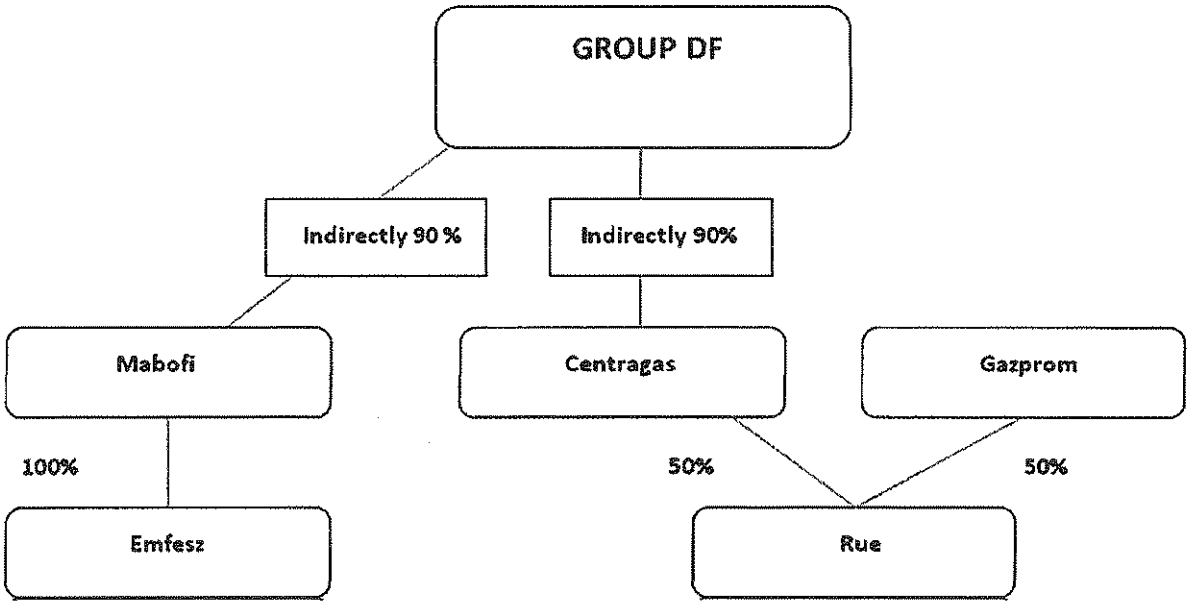
---

[3] Transcript, Day One, 60/4, Shmelev.

3.4.4 The growth of the gas distribution business within Hungary depended on having access to a stable supply of gas at a price which would permit Emfesz to offer customers a price incentive to switch from their existing suppliers. Having been involved in the Central Asian gas trade in Ukraine for many years, Mr Firtash had built a working relationship with Gazprom.

3.5 Emfesz/RUE Organogram

3.5.1 The organogram below shows the direct and indirect ownership of RUE and Emfesz up to April 2009.



3.6 The RUE / Emfesz Gas Supply Agreement

3.6.1 On 23 December 2004, RUE and Emfesz entered into an agreement for the supply of natural gas by RUE to Emfesz during the period 2005 to 2015. The Agreement was signed in Gazprom's offices on behalf of RUE by its two Managing Directors at that time - Mr Paul Chekoff and Mr Chuychenko and on behalf of Emfesz by its CEO, Dr Zsuza Hunyadi-Zoltan (who likely executed the Agreement by fax from Hungary).

3.6.2 In comparison with long-term gas supply agreements between unrelated parties, which have a reasonably standard form across the gas supply industry in Europe, the Agreement has a number of unusual features.

3.6.3 First, it is what might be called a unilateral agreement, as opposed to a bilateral agreement, in the sense that whilst RUE has an obligation to sell to Emfesz the quantity of gas nominated by Emfesz, there is no obligation on Emfesz to nominate any minimum quantity of gas. Thus, it was open to Emfesz to refrain from purchasing any gas, whilst RUE carried an obligation to deliver in accordance with Emfesz's nominations up to 3 billion cubic metres of gas ("**bcm**") of gas a year. The one-sided nature of the supply and purchase obligations is unusual for a long-term supply contract (where the purchaser usually assumes minimum take or pay obligations) and requires the seller (RUE) to undertake the commercial risk of incurring the cost of ensuring that it can supply up to 3 bcm per annum without any guarantee that the buyer (Emfesz) will take all or any of that supply.

3.6.4 Second, the gas was sold by RUE to Emfesz at a discount to market price. The amount of that discount was not fixed in the Agreement in its original form: the formula for the price under Appendix One referred to the provision of a discount, but left the amount of the discount to be agreed by the parties. The discount was agreed from time to time retrospectively in relation to past deliveries. Under the terms of AA 14, made on 13 June 2006, the amount of the discount was agreed going forward and was effectively around 15% of the usual base price (not necessarily the same as the price available to traders in the market).

3.6.5 Third, the Agreement does not provide for any periodic review of prices to allow for changed circumstances in the market - in contrast with the usual arrangements in a long-term gas supply agreement that allows for price renegotiation and binding

arbitration where that fails, in order to set a price that fairly reflects change of economic circumstances.

3.6.6 These unusual features of the Agreement reflect the fact that it was an agreement between related parties and was negotiated by the owners or ultimate owners of RUE (Mr Firtash) and Gazprom.

3.6.7 Mr Firtash stood to gain from the one-sided terms favouring Emfesz through his indirect ownership of Mabofi. Gazprom stood to benefit both by building up, through supplies to Emfesz, Gazprom's position as the major source of supply for the Hungarian gas market and, by reason of Gazprom's long-term strategy to acquire Emfesz, either partially or wholly.

3.6.8 Under its terms, the Agreement gave Emfesz the option to require RUE to sell it gas. The means by which the option was to be exercised was by way of the nomination procedure contained in Clause 2.2 of the Agreement and Appendix 2.

3.6.9 Clause 2.2 provides as follows:

> *"Buyer shall give a notice to the Seller of the actual requested quantity for each month until the 25th day of the previous month for the next month. Buyer will inform the Seller by sending daily schedule for the next calendar week until 12 o'clock of the previous Thursday. Buyer will nominate the actual daily demand for the contractual acceptance for each day till 12 o'clock of the previous day. Buyer has the right to change the actual daily demand by +/- 50% till 12:00 a.m. of the actual day."*

3.6.10 Subject to the Mabofi Defence (summarised in 5.2 below), it is undisputed that, under Clause 7.2 of the Agreement, Emfesz was obliged to pay for deliveries on a

monthly basis by the 30th calendar day immediately following the month of delivery.

3.7 Emfesz's Nominations under the Agreement

3.7.1 Clause 2.2 of the Supply Agreement provides a mechanism by which Emfesz could nominate quantities of gas that it forecast it would require on a monthly, weekly and daily basis. By such nominations, RUE was given notice of the amounts of gas Emfesz wanted to receive in any given month. The monthly nominations could be and were adjusted to reflect more accurately the volumes of gas that Emfesz actually wanted by means of a weekly and then daily nomination.

3.7.2 Until April 2009, Emfesz utilised the monthly nominations mechanism under Clause 2.2. With few exceptions, it over-nominated the volumes of gas that it eventually took from RUE, presumably to give itself a degree of flexibility. A comparison of its nominations and the gas actually taken indicates that significantly less gas was taken than that included in its monthly nominations.

3.7.3 The volume of gas actually taken by Emfesz was confirmed retrospectively by means of a fax confirmation from Emfesz to RUE, indicating the volume of gas that had passed through the system at Beregovo and had been off-taken by Emfesz. It was these faxed delivery confirmations from Emfesz which then formed the basis of delivery acceptance acts, issued by RUE, and countersigned by Emfesz, formalising, after the event, the volumes of gas supplied to Emfesz.

3.7.4 The invoicing and payment regime under the Agreement is set out in Clauses 6 and 7. Under Clause 6.2, RUE was to invoice Emfesz on a monthly basis for the volumes supplied during the previous month. Under Clause 7.1, RUE was to issue invoices to Emfesz by the 10th day of the month following the month's supply,

attaching the applicable protocol or delivery/acceptance and the relevant certificate of quality. According to Clause 7.2, Emfesz was to make payment of such invoices by the 30th calendar day following the month of delivery.

3.8 Emfesz's Late Payments Lead to Commodity Credit Agreements

3.8.1 Emfesz had a poor record of making payments to RUE for gas supplied under the Agreement. From early 2005 (almost the beginning of the Agreement) Emfesz failed to meet its payment obligations, and its debts to RUE in respect of gas supplied under the agreement started to mount.

3.8.2 RUE issued invoices for gas supplied during 2005 totalling approximately US $330 million. However, by 30 January 2006 (the due date for the payment of the last of these invoices) RUE had received only approximately US $181 million from Emfesz, leaving a shortfall for 2005 of approximately US $150 million, excluding interest.

3.8.3 Emfesz's failure to make payments on a timely basis on RUE's invoices continued in 2006. Combined with the shortfall in payments from 2005 by the end of 2006 Emfesz had outstanding debts to RUE for gas supplied of approximately US $444 million, excluding interest.

3.8.4 As a means of redressing the negative impact that Emfesz's poor payment record was having on RUE, Commodity Credit arrangements were put in place by RUE and Emfesz by means of Additional Agreements. The arrangements typically had retrospective effect and applied an interest penalty on sums outstanding by reference to the periods in which the relevant gas was supplied.

3.8.5 By way of example, the first such agreement was signed on 22 September 2005 and provided for a Commodity Credit in respect of volumes of gas delivered during the

period from 1 March 2005 to 31 July 2005 (AA 6). The Commodity Credit took the form of an annual interest rate of 5.5% on the cost of the volume of gas delivered during the period, to be charged on a monthly basis. Emfesz was to pay no later than 15 October 2005, failing which it will be liable to pay a daily penalty rate of 0.10% of the total outstanding (including interest) for that period.

3.8.6 On 17 October 2005, a second Commodity Credit arrangement (on similar terms and conditions) was put in place to cover Emfesz's non-payments for deliveries during the period 1 August 2005 to 31 December 2005 (AA 7).

3.8.7 Emfesz's payment failures continued and on 24 March 2006, a third Commodity Credit arrangement was put in place to cover non-payment for deliveries during the period 1 March 2005 to 1 February 2006 (AA 10).

3.8.8 On 19 December 2006, a fourth arrangement was put in place to cover the delivery period from 1 March 2005 to 31 March 2006 (AA 15).

3.8.9 Emfesz's non-payments persisted, despite the Commodity Credit arrangements, and eventually became an issue between RUE's two shareholders. Gazprom, in particular, had repeatedly complained about Emfesz's poor payment record. It was finally decided to adjust the Commodity Credit interest rate to 30% per annum and on 29 December 2007, RUE and Emfesz entered into AA 19 which provided for: (a) a Commodity Credit rate of 5.5% per annum to cover deliveries made during the period from 1 January 2007 to 31 March 2007; (b) a Commodity Credit rate of 30% per annum to cover the deliveries made during the period from 1 April 2007 to 31 July 2007, and (c) for deliveries made during the period from 1 March 2005 to 31 March 2006, a Commodity Credit of 5.5% for amounts still outstanding but paid by

21 June 2007, rising to 30% in respect of amounts remaining unpaid after 21 June 2007.

3.9 Negotiations to Amend Additional Agreement 19

3.9.1 After learning of the execution of AA 19, Mr Eperjesi, Emfesz's CFO, expressed concern to Mr Góczi about its level of Commodity Credit Interest. Mr Eperjesi's concern was shared by Mr Windisch, Emfesz's tax advisor at the time, who had advised Mr Góczi during the 2007 Christmas holiday not to sign the agreement because of the high interest level.

3.9.2 In early 2008, when Emfesz was closing its books to prepare its annual report for 2007, Messrs Eperjesi and Windisch initiated discussions with RUE regarding a possible decrease in the 30% Commodity Credit Interest rate having regard to their view that there would be negative tax consequences for Emfesz if it had to pay such a rate.[4]

3.9.3 After some additional discussions in Budapest in early May, Messrs Shmelev, Weinberg, Eperjesi and Windisch agreed to meet again later that month in RUE's office in Zug, Switzerland to discuss the matter. Whilst in Budapest, the possibility that the 30% Commodity Credit Interest would be split between two different parties was raised. The proposed meeting in Zug was to see whether this concept could be developed.

3.9.4 The Zug meeting took place on 19 May 2008. During the meeting it seemed clear that those present agreed in principle that payment of the Commodity Credit Interest

---

[4] It was felt that Emfesz would not be able to treat the interest as a cost item in its books and thus its tax base would increase with the amount corresponding to the 30% interest rate, leading to an additional tax for Emfesz of approximately US $4 million.

of 30% could be split between Emfesz and another party: that Emfesz should pay the 5.5% Commodity Credit Interest and the balance should be borne by another Group DF company, likely Centragas.

3.9.5 However, the evidence of Messrs Eperjesi and Windisch conflicts with that of Messrs Shmelev and Weinberg as to whether the discussions in Zug amounted to the agreement of a concept, or whether an agreement binding on RUE had been made.

3.9.6 Following the meeting, on 27 May 2008, Mr Eperjesi wrote to Mr Shmelev to summarise the outcome of the meeting. Mr Eperjesi's letter provided, in part, as follows:

> *"Referring to our meeting held on 19th May 2008 I would like to sum up the concept we agreed upon how the commodity credit granted by Rosukrenergo AG to EMFESZ Kft. will be settled.*
>
> *As agreed, Rosukrenergo AG will apply an interest rate of 5,5% on the commodity credit granted to EMFESZ Kft. despite the additional agreement 19.*
>
> *The confirmation on balance to be confirmed by EMFESZ Kft. will have to be modified according to the calculation below.*
>
> *EMFESZ Kft. owes 385.411.508,71 USD to Rosukrenergo AG at 31st December 2007. The take or pay penalty of 24.654.822,10 USD that is the difference of the interests (5,5%, 30%) stipulated in the additional agreement 19 concluded between Rosukrenergo AG and EMFESZ Kft. will be paid by Centragas Holding AG.*
>
> ...
>
> *Hereby we kindly ask you to confirm that the take or pay penalty will be taken over by Centragas Holding AG and the balance of EMFESZ Kft. to Rosukrenergo AG made up of 385.411.508,71 USD at 31 December 2007.*

Please sign the enclosed confirmation of balance."[5]
(Tribunal's emphasis added)

3.9.7 The following day, on 28 May 2008, Mr Eperjesi sent an email to Mr Glebko, copied to Mr Shmelev and others, requesting the execution of formal modification to AA 19, which he enclosed. The pertinent part of the email was in the following terms:

> *"Please find attached the modified additional agreement 19 concerning the extension of the commodity credit where an interest rate of 5,5% is used.*
>
> *This additional agreement should be signed parallel to the enclosed confirmation of balance as soon as possible".*[6]

3.9.8 The draft modification to AA 19 that had been included with Mr Eperjesi's email provided for the signature of both of RUE's then joint Managing Directors, Messrs Glebko and Chuychenko.

3.9.9 Based on his belief that the concept for an agreement that had been discussed in Zug would be put in place, Mr Shmelev signed the balance confirmation requested by Emfesz for its auditors by which he confirmed that Emfesz's debt at the end of 2007 would be reduced as set out in the 28 May 2009 email.

3.9.10 However, the draft formal modification to AA 19 was never signed by RUE.

3.9.11 Thereafter, on 18 June 2008, RUE wrote to Emfesz seeking payment of US $553,570,616.36. The demand letter was signed jointly by Messrs Glebko and Dubik (the latter having by then succeeded Mr Chuychenko.). The sum demanded

---

[5] Exhibit R-3.

[6] Exhibit C-KS10.

included the full amount due under AA 19 (*i.e.*, it included the full 30% Commodity Credit Interest) rather than any discounted sum.

3.9.12 In pertinent part that letter provided as follows:

> "*Dear Mr Góczi*
>
> *As of 17 June 2008, the current debt of Emfesz Kft. to* ROSUKRENERGO AG *is 553,570,616.36 (Five hundred and fifty-three million, five hundred and seventy thousand, six hundred and sixteen and 36/100)* USD, including:
>
> ...
>
> - *Interest for a commodity loan use in the amount of 92,380,162.02 (Ninety-two million, three hundred and eighty thousand, one hundred and sixty-two and 02/100 USD).*
>
> *We ask you to promptly settle the accrued debt, giving ROSUKRENERGO AG an appropriate notice. Otherwise we will have to consider the issue of taking legal action in accordance with the contracts executed between our companies."*[7]

3.10 January 2009 Gas Crisis

3.10.1 During the first three weeks of January 2009, gas supplies flowing from Russia through Ukraine were interrupted due to a dispute between the Russian and Ukrainian leaderships and the respective state owned gas companies, Gazprom and Naftogas. The dispute centered around unpaid debts for the supply of gas to Ukraine, the price at which gas was supplied to and transmitted through Ukraine and the manner in which gas was supplied (*i.e.*, via RUE).

3.10.2 The contract in place between RUE and Naftogaz for the supply of gas to Ukraine expired on 31 December 2008 and negotiations to agree the terms of a new contract

---

[7] Exhibit C-KS11.

were unsuccessful, in large part due to the demands of the Ukrainian leadership at that time that a direct supply contract be entered into between Gazprom and Naftogaz. The failure of the initial negotiations between Gazprom (Russia) and Naftogaz (Ukraine) meant that there was no contract to supply gas to Ukraine from Russia. Without a signed gas supply contract in place, it would not have been possible to obtain Ukrainian customs clearance and any attempt to supply gas into Ukraine would have been treated by the authorities as smuggling.

3.10.3 Naftogaz exercises exclusive control over the Ukrainian pipeline system and gas delivered to Emfesz at Beregovo necessarily passes through that system under the control of Naftogaz. As a consequence of the delivery interruptions experienced in Ukraine, and the measures taken in Ukraine to address its own supply needs, several European countries also experienced supply disruptions.

3.10.4 RUE did not participate in the negotiations that took place between Gazprom and Naftogaz. As soon as RUE became aware of the possibility that supply disruptions would take place, it notified Emfesz and kept Emfesz informed throughout the period of, and following, the January 2009 gas crisis. For example:

(a) by letter dated 31 December 2008, RUE notified Emfesz that a new supply contract for the sale of gas to Ukraine had not yet been signed and that "from 10:00 a.m. (Moscow time) on 1 January 2009 no natural gas will be supplied to [Naftogaz]". RUE alerted Emfesz to the risk that Naftogaz would not meet its contractual obligation to RUE to transit gas to third countries and that "unauthorized siphoning of natural gas from the transit gas flow by [Naftogaz] ... may result in the schedule of gas transit to European customers being changed" (Exhibit C-5);

(b) by letter dated 3 January 2009, RUE informed Emfesz that "[Naftogaz] has notified us that it is not able to satisfy [RUE's] demands to ensure

the gas supply on the Ukrainian Western border for its further supply to European consumers" and that "[Naftogaz] is carrying out unauthorised siphoning of the gas intended for [Emfesz]" (Exhibit C-6);

(c) by letter dated 4 January 2009, RUE further informed Emfesz that "[Gazprom] had notified [RUE] that [Naftogaz] is not fulfilling orders of [RUE] for lifting natural gas from the Ukrainian underground gas storage facilities for supply to the western border of Ukraine." and that "Naftogaz notified [RUE] earlier that it was not able to satisfy [RUE's] demands to ensure the gas supply to the Ukrainian western border for the further supply thereof to European consumers." (Exhibit C-7);

(d) by letter dated 5 January 2009, RUE again wrote to Emfesz, explaining that "since 01 January the natural gas has not been supplied for Emfesz due to the fault of [Naftogaz]" and that Naftogaz had notified it that "it was not able to satisfy [RUE's] demands to ensure the gas supply to the Ukrainian western border for the further supply thereof to European consumers." (Exhibit C-8); and

(e) on 8 January 2009, RUE wrote to Naftogaz to explain the difficulties it was experiencing in relation to its transit agreement with Ukraine and the measures it had taken to supply Emfesz with the volumes it had requested (Exhibit C-9).

3.10.5 Negotiations between the Russian and Ukrainian leaderships (in which RUE played no role) eventually culminated in the signing on 19 January 2009 of a long term supply contract between Gazprom and Naftogaz (the "**Gazprom-Naftogaz Supply Contract**"). This event was widely reported on in the Russian, Ukrainian and international press, and a copy of the contract was posted on the internet by the Ukrainian newspaper Ukrainskays Pravda. The contract provided for the direct supply of natural gas from Gazprom to Naftogaz, and also prohibited Naftogaz from reselling this gas outside Ukraine. This arrangement, combined with the fact that

RUE's supply contract with Naftogaz had expired on 31 December 2008, effectively ended RUE's role as an intermediary supplier of gas to Ukraine. This event did not, however, affect RUE's other contractual arrangements for the supply of gas to its western off-takers.

3.10.6 Despite the supply disruptions experienced in January 2009, and the expiration of the RUE-Naftogaz supply agreement, natural gas continued to be delivered to Beregovo and off-taken by Emfesz until 27 April 2009.

3.10.7 Because RUE was not a party to the negotiations which led to the signing of the Gazprom-Naftogaz Supply Contract, it was unclear in the weeks immediately following 19 January 2009, what impact (if any) the new supply relationship between Gazprom and Naftogaz would have on RUE's export business. By this time, however, business relations between RUE and Gazprom were evidently experiencing some strain.

3.10.8 On 30 January 2009, Gazprom Export wrote to FGSZ, the Hungarian Natural Gas Transmission Company, to object to the fact that the quantities of gas being off-taken at Beregovo exceeded the quantities that had been requested by Gazprom's off-takers in Hungary - ZAO Panrusgaz and ZAO Centrex Hungaria, noting that:

> *"According to the information available to us, United Dispatch Department Ukrtansgaz fails to confirm on a daily basis requests for gas delivery to Hungary to EMFESZ, and ROSUKRENERGO AG has officially informed us that it has sent letters to this company [Emfesz] notifying that from 1 January 2009 it has failed to supply gas to Hungary."* (Exhibit C-15).

3.10.9 On 16 February 2009, the General Director of Gazprom, Mr Alexander Medvedev, wrote to the Hungarian Energy Office and FGSZ:

> *"Despite our letters sent on several occasions to [FGSZ] notifying that beginning on 1 January 2009, gas delivered to Hungary, Serbia and Bosnia through the Beregovo GMS are effected only under contracts with [Gazprom Export], part of the gas received for Hungary continued to be transferred to customers of Emfesz.*
>
> *Please note that this company does not have any sources of gas supply, as no gas deliveries have been effected under the contract between [Emfesz] and [RUE] since 1 January 2009 ... Moreover, according to the information received from [Naftogaz], [Naftogaz] does not transport any gas intended for Emfesz through the territory of Ukraine.*
>
> *This means that the gas owned by [Gazprom] is being taken without authorisation. In January 2009, the volume of such gas amounted to 76.4 million cubic meters, and in February, to approximately 62.4 million cubic metres (as of 15 February 2009).*
>
> *We shall point out that the transfer of gas of [Gazprom] to offtakers which do not have resources for its receipt must not be allowed and we demand that the current situation be resolved."* (Exhibit C-16)

3.10.10 Throughout the period from 1 January until 27 April 2009, Mr Góczi wrote to RUE requesting confirmation and delivery of volumes of gas to Emfesz on at least nine occasions.[8]

3.10.11 RUE duly responded to Emfesz's requests, confirming the volumes of gas being delivered at Beregovo in the months in question.[9]

3.10.12 Mr Góczi also confirmed to RUE in writing the volume of gas that was delivered to Emfesz through Beregovo.[10]

3.10.13 On 15 April 2009, Emfesz wrote a letter to RUE setting out Emfesz's needs for gas during the second half of the year 2009 (*i.e.*, for a period of six months). This approach was a marked departure from Emfesz's normal (contractually based) monthly nomination of gas for delivery during the next month.

3.10.14 On 27 April 2009, HEO wrote to Emfesz indicating that as from 1.05 p.m. that day, Naftogas had started to regulate the provision of gas to Hungary and that only gas confirmed by it would be forwarded to Hungary. Faced with this letter, Mr Góczi asked Mr Glebko (of RUE) to confirm that RUE had gas available for Emfesz in April. RUE provided such a confirmation.[11]

3.11 Change of Control of Emfesz

3.11.1 Mr Góczi testified that when he received this notification from HEO and because of certain statements said to have been made on behalf of RUE, it became clear to him that no further gas would be available from RUE. He therefore turned to RosGas

---

[8] See Emfesz's letters dated 10 February 2009, 19 February 2009, 19 March 2009, 9 April 2009, 15 April 2009, 16 April 2009, 23 April 2009, 27 April 2009 at Exhibit C-17.

[9] See RUE's letters dated 22 January 2009, 11 February 2009 and 27 April 2009 Exhibit C-18

[10] Exhibits C-19, C-20, C21 and C22.

[11] Exhibits C-17 and C-18.

A.G. ("**RosGas**"), a Swiss company which, he stated, had previously been in negotiations regarding a possible purchase of Emfesz, to help to find an alternative source of gas supply for Emfesz.

3.11.2 The next day, on 28 April 2009, and admittedly without Mabofi's prior knowledge or authority, Mr Góczi entered into a written agreement, purportedly on behalf of Mabofi, for the sale of Mabofi's shares in Emfesz to RosGas for US$1 ("**Share Transfer Agreement**").[12] The Share Transfer Agreement was signed on behalf of Mabofi by Mr Góczi, and on behalf of RosGas by Dr Gazda, a member of Emfesz's senior management and also a director of RosGas. Under the terms of the Share Transfer Agreement, RosGas agreed that it would deliver gas to Emfesz until December 2008 in the amount as determined by the agreement.

3.11.3 Mabofi effectively received no consideration for the sale of Emfesz. According to the Share Transfer Agreement, Mabofi's 100% holdings in Emfesz were sold for the nominal sum of US $1.[13] The purchase price stands out as quite extraordinary for a company which had at the time a 20% Hungarian market share and a turnover in the preceding calendar year of almost HUF 220 billion (approximately US$ 1.1 billion) with after tax profits exceeding HUF 6 billion (approximately US$ 30.4 million).

3.11.4 In executing the Share Transfer Agreement, Mr Gózci relied upon the PoA, referred to at 3.4.2 above, provided to him by Mabofi in October 2004. As previously noted,

---

[12] Exhibit C-36.

[13] By contrast, when Mabofi bought Emfesz from in 2004, the consideration was EUR 1.1 million for what was then a loss-making company which had yet to establish its market position.

this power of attorney had been given to Mr Gózci in order to authorise him to act on behalf of Mabofi when it acquired Emfesz from Csabdi in 2004.[14]

3.11.5 On 29 April 2009, RosGas informed the HEO that it had acquired full ownership of Emfesz and requested the HEO formally to approve the share transfer.[15]

3.11.6 The HEO approved the share transfer from Mabofi to RosGas on the same day, *i.e.*, on 29 April 2009 (an unprecedentedly swift approval process - a more normal approval timeline would run into several weeks). It apparently did so without detailed scrutiny of the Share Transfer Agreement between Mabofi and RosGas, or of the beneficial ownership of RosGas. It did, however, order RosGas to disclose its beneficial owners within 45 days. RosGas has apparently not complied with this request to date.

3.11.7 It is common ground that Emfesz made no further nominations of gas under the Agreement after 27 April 2009 and thereafter started to nominate and purchase gas from sources other than RUE. As noted above (at 2.3.14), at or about this time, Emfesz entered into a long term natural gas supply agreement with RosGas (as supplier) which was stated to be effective from January 2009 and was dated 31 March 2009.[16] The terms of the RosGas Supply Agreement were for all intents and purposes virtually identical to those of the Agreement.

---

[14] The power of attorney states that Mr Gózci is authorised to (a) conclude a purchase contract or any other quota transfer agreement concerning the quota with Csabdi, (b) determine the conditions thereof, (c) sign the contract on behalf of Mabofi and (d) make and sign any other legal declaration necessary for Mabofi to acquire ownership of the quota. It makes no reference to the sale of shares in Emfesz.

[15] The HEO approval process is required under Hungarian law for the change of ownership of a Hungarian energy company, without which the energy company cannot be registered.

[16] Mr Gózci stated in his 3rd witness statement that the RosGas Supply Agreement was actually signed on 12 May 2009, and, indeed, never came into effect.

3.11.8 On 4 May 2009, RosGas filed an application with the Hungarian Court of Registry with a view to registering its alleged 100% shareholding in Emfesz. On the same day, the Court of Registry registered RosGas as the new owner of Emfesz.[17]

3.11.9 On 6 May 2009, Mabofi was made aware for the first time that its shares in Emfesz had purportedly been transferred to RosGas, that the HEO had approved the transfer and that such transfer had been registered by the Hungarian Court of Registry.

3.11.10 On 9 May 2009, the sole shareholder of Group DF passed a resolution whereby Mr Gózci was removed from his position as director of Group DF with immediate effect.

3.11.11 After the discovery of the above purported transaction, Mabofi took immediate action to challenge the sale of Emfesz in several jurisdictions, including Hungary and Switzerland.

3.12 RUE - Gazprom Agreement on Ownership of 2009 Gas

3.12.1 Despite the initial position taken by Gazprom with the HEO on 30 January and 16 February 2009 (that RUE had no gas to deliver to Emfesz in early 2009), on 2 July 2009, RUE and Gazprom Export agreed that the gas volumes delivered to Emfesz at Beregovo during the period from 1 January to 27 April 2009 were to be treated as having been delivered by RUE ("**Gazprom Contract**").

3.12.2 Gazprom informed RUE that it would communicate these agreed allocations to Emfesz, so as to allow RUE and Emfesz properly to document the delivery and sale of these amounts.

---

[17] Order of Metropolitan Court as Court of Registration dated 4 May 2009. Exhibit C-35.

3.12.3 Notwithstanding this agreed allocation, and Emfesz's earlier correspondence with RUE confirming volumes of gas delivered, Emfesz wrote to RUE on 27 July 2009 stating that it had not received the daily quantity protocols in accordance with Clause 4.3 of the Agreement between 1 January and 26 April 2009. Emfesz requested that RUE deliver the missing daily quantity protocols to allow Emfesz to countersign them. Emfesz also stated that it:

> *"had no other choice but to turn to other suppliers of natural gas so that EMFESZ could fulfil its contractual obligations arising from the natural gas supply agreements. EMFESZ's reputation has been severely hit by the insecure natural gas supply causing continuous damages".*

3.12.4 On 17 August 2009, RUE wrote to Mr Gózci explaining the allocation of gas that had been agreed upon by RUE and Gazprom Export, and noting that the volumes of natural gas supplied during the period January to April 2009 needed to be documented as soon as possible. RUE enclosed delivery acceptance acts (signed on its behalf) which confirmed delivery of gas as set out below:[18]

January	February	March	April
76,437,251	152,468,181	70,072,150	102,976,184

3.12.5 Emfesz replied to this letter the next day, denying that RUE had supplied it with any gas since 1 January 2009. Emfesz noted that an official investigation had been launched by the HEO and the Hungarian customs authorities as to who supplied natural gas to Emfesz in the period January to April 2009 and how. As such, it

[18] Exhibit C-3.

contended that the issue of the natural gas delivered to Emfesz still required resolution.

3.13 Emfesz Payments / Non-Payments to Rue

3.13.1 Whilst the principal amounts due for gas supplied in 2005 to 2007 and the first eight months of 2008 were eventually paid, Emfesz made no payments in respect of RUE's invoices for gas supplied in October, November and December 2008, and only partial payment of RUE's invoice for September 2008.[19] Consequently, a principal sum of US $264,274,204.52 remains outstanding in respect of gas supplied under the Agreement in 2008.[20]

3.13.2 Emfesz has made no payment in respect of gas supplied under the Agreement in 2009. Whilst there was initially some uncertainty regarding the supply of gas into Hungary in the early part of 2009 arising from the Russia-Ukraine gas crisis, as explained above, Emfesz continued to send monthly nominations to RUE during the first quarter of 2009 requesting volumes under the Agreement. The volumes of gas supplied to Emfesz at Beregovo from January to April 2009 were subsequently confirmed as having been supplied by RUE by agreement between Gazprom Export and RUE. This fact was communicated to Emfesz in mid-August 2009.[21] RUE issued invoices in respect of the gas supplied in January to April 2009, totalling US $151,578,967.72 (excluding interest). These invoices also remain unpaid.[22]

---

[19] This partial payment was of US $496,075.07 on an invoice of US $102,063,850.44, resulting from an overpayment which was applied against this outstanding item.

[20] ARDC, para 4.1.

[21] Letter from RUE to Emfesz dated 19 August 2009. Exhibit C-3.

[22] ARDC, para 4.2.

3.13.3 With regard to the final element of RUE's claim, it is common ground that Emfesz made no payments to RUE by way of interest on the Commodity Credit granted by AA 19 (either as required by its terms or as it was said by Emfesz to have been amended).

4. RUE'S CASE

4.1 RUE's Pleaded Case

4.1.1 RUE's claims in these proceedings are for payment of sums totalling US $421,109,479.88 in respect of the supply of gas to Emfesz between September 2008 and April 2009 pursuant to the Agreement, plus the sum of US $106,195,492.49 due under the terms of the relevant Commodity Credit agreements (AA 6, AA 7, AA 10, AA 15, and AA 19), plus interest at LIBOR + 1% from relevant dates until the date of full payment.

4.1.2 RUE's contractual claims are broken down as follows:

(a) for gas delivered in 2008, RUE claims US $269,530,512.16 (inclusive of contractual interest as of 31 December 2009) ("**2008 Gas Claim**")[23];

(b) for gas delivered between January and April 2009, RUE claims US $151,578,967.72 ("**2009 Gas Claim**"); and

(c) for Commodity Credit Interest due under AA 19, RUE claims US $106,195,492.49 ("**Commodity Credit Claim**").

4.1.3 Because Emfesz neither denies receipt of the volume of gas for which RUE claims payment has not been made, nor the amount claimed for interest under the parties Commodity Credit arrangements (assuming that AA 19 had not been modified), it is sensible to summarise Emfesz's defences and counterclaims and then to set out RUE's responses to those defences and claims.

---

[23] The 2008 Gas Claim breaks down to US $264,274,204.52 (invoiced amounts) plus US $5,256,307.64 (contractual interest for delay in payment for the period ending 31 December 2009).

5. EMFESZ'S CASE

5.1 Emfesz's Pleaded Defence

5.1.1 Emfesz asserts four principal defences to RUE's claims in its Defence and Counterclaim and its Rebuttal Pleading.

5.1.2 First, it argues that each of RUE's claims has been paid by way of set-off of its own claims for damages against RUE. These latter claims are described in Section 5.6 below.

5.1.3 Second, Emfesz contends that it had "an understanding" with Mabofi, as a result of which it was relieved of liability to pay for the gas that it nominated and received from RUE until it received certain payments from Mabofi ("**Mabofi Defence**"). The Mabofi Defence is advanced as a defence to the three contractual claims described at 4.1.2 above.

5.1.4 Third, Emfesz relies on the alleged existence of an additional and subsequent agreement to argue that it was not obliged to make interest payments at the rate of 30% for gas delivered but not timely paid for, as required under AA 19. Rather, it says it was entitled to pay a reduced rate of 5.5% interest with the difference being paid by another party, Centragas ("**Centragas Defence**"). The Centragas Defence is relied on as a defence only to the Commodity Credit claim described at 4.1.2 (c) above.

5.1.5 Fourth, in relation to gas nominated and taken by Emfesz in the period from 1 January 2009 to 27 April 2009, Emfesz argues that the supplier of that gas was unknown ("**Undisclosed Supplier Defence**"[24]) and, hence, that no amount is

---

[24] The so-called Mabofi, Centragas and Undisclosed Supplier Defences are terms of convenience coined by Claimant in its pleadings and are adopted here by the Tribunal for ease of reference.

payable to RUE. The Undisclosed Supplier Defence is relied on as a defence only to the 2009 Gas Claim as described at 4.1.2 (b) above.

5.1.6 In addition to its defences, Emfesz counterclaims, arguing that after 27 April 2009 RUE was in material breach of its obligations to deliver gas under the Agreement and wrongly terminated the Agreement. Emfesz claims damages for losses arising from this alleged breach and wrongful termination. Emfesz's total counterclaim was for US $820,480,000.00. This claim was adjusted to approximately US $770 million based on further calculations set out in the third expert report of Michael Peer (KPMG), filed on 9 January 2009.[25]

5.1.7 Emfesz's principal defences and its counterclaims are summarised under descriptive sub-headings below.

5.2 The Mabofi Defence

5.2.1 Emfesz says that Mabofi, as its sole shareholder, regularly withdrew funds from Emfesz ("**Mabofi Funds**") which were used to finance other companies wholly or partly owned by Mr Firtash. Such funds were repaid to Emfesz once a year in connection with the payments of dividends by RUE to its shareholders. When such Mabofi Funds were repaid to Emfesz, they were then used by Emfesz to pay for the natural gas that had been nominated and received by it under the Agreements.

5.2.2 Emfesz says that it and RUE had an understanding to the effect that the payments for natural gas supplied under the Agreements and the payment of the Commodity Credit would not fall due until the outstanding Mabofi Funds had been repaid.

---

[25] Having corrected his calculations for errors identified by Mr Osborne, he reduced his estimate of Emfesz's damages to approximately US $750 million. However, in the light of the suspension of Emfesz's license by the HEO, he also increased his damage estimate by approximately US $20 million to approximately US $770 million.

5.2.3 In its Rebuttal Pleading, Emfesz argued that Gazprom agreed with Mr Firtash (when RUE replaced ETG) that he could temporarily use Gazprom's share of the accrued profits in RUE through this deferred gas payments structure.

5.2.4 Emfesz says it was the established practice of the parties that when RUE paid its dividends to Mr Firtash (through Centragas), the Mabofi loan was repaid to Emfesz. Only when the Mabofi loan was repaid would Emfesz pay RUE for the gas delivered.

5.2.5 Emfesz further contends that this deferred payment or credit arrangement was regulated by AA's 6, 7, 10, 11 and 15 (which replaced AA's 6, 10 and 11) and 19.

5.3 The Centragas Defence

5.3.1 The Centragas Defence is based on Emfesz's claim that on 19 May 2008 RUE and Emfesz agreed, notwithstanding what was stipulated in AA 19, that Emfesz was only obliged to pay interest at an interest rate of 5.5% on the Commodity Credit (**"Rate Reduction Agreement"**). In the alternative, it is said that later that month it was agreed that Emfesz's indebtedness under AA 19 would be reduced by US $24,654,822.10 as at 28 May 2008 (**"Reduced Debt Agreement"**).

5.3.2 Emfesz argues that the issue of the 30% interest rate provided in AA 19 was raised as a concern when it was making its annual report for 2007. The interest rate was thought to be excessive and likely to cause a tax problem for Emfesz.

5.3.3 Thereafter, Emfesz's CFO, Mr Eperjesi held discussions with RUE regarding the interest rate and in May 2008, RUE (represented by Messrs Shmelev and Weinberg) and Emfesz (represented by Messrs Eperjesi and Windisch) met to discuss the interest rate.

5.3.4 At that meeting, which took place on 19 May 2008, in Zug, RUE and Emfesz are said to have agreed that only a 5.5% annual interest rate would be applied on the Commodity Credit instead of the 30% rate provided for in AA 19.

5.3.5 Emfesz relies on its letter to Rue of 27 May 2008 as confirmation of the Rate Reduction Agreement. Emfesz further says that Mr Shmelev confirmed the Reduced Debt Agreement between the parties when he signed a confirmation of balance due from Emfesz on 28 May 2008 (Exhibit R-3). Mr Shmelev also countersigned the cover letter that was attached to the confirmation of balance where the agreement of 5.5% interest rate was described.

5.3.6 Emfesz contends that after Mr Shmelev signed the confirmation of balance, the parties had no further contact regarding this matter until 4 March 2009 when Mr Eperjesi contacted RUE regarding the balance for 2008.

5.4 The Undisclosed Supplier Defence

5.4.1 As regards gas received by Emfesz for the period 1 January 2009 - 27 April 2009, Emfesz argues that RUE did not deliver the gas Emfesz received. Rather, the gas that RUE claims it delivered was delivered by someone else.

5.4.2 Emfesz argues that if Gazprom delivered the gas in 2009, which it disputes, any claim by RUE in relation to such deliveries must be derived from Gazprom. However, Gazprom not being a party to the Agreements, any such sales have not been made under the Agreements and RUE's claims should therefore be dismissed based on an absence of jurisdiction.

5.4.3 Further, if it can be said that the gas it received in 2009 was Gazprom gas, Emfesz says that it is most uncertain that RUE had title to that gas, so as to sell it to Emfesz. This is because title to the gas referred to in the Gazprom Contract only passed to

RUE once Gazprom had received payment for the gas, and RUE has not provided any evidence to show that it paid for or received title to the gas. Hence, it is most unlikely that RUE acquired the gas under the Gazprom Contract so as to be able to sell it.

5.4.4 Emfesz also disputes that Gazprom delivered the gas Emfesz received during the relevant period in 2009 and says there are strong indications that the gas was delivered by someone else. This is because Gazprom itself repeatedly stated that it did not deliver the gas to Emfesz during the period January - 26 April 2009. Emfesz also claims that Gazprom did not feed any gas into the Ukrainian pipeline system for RUE/Emfesz in the relevant period.

5.4.5 Finally, Emfesz argues that its receipt of gas in the relevant period in 2009 was the result of unauthorised withdrawals from the Ukrainian pipeline system due to RUE's misrepresentations and not the result of anyone exporting gas to Emfesz. Thus, the relevant question is to whom the gas it received belonged. Because this information is not available and the stipulated procedures for gas deliveries have not been fulfilled, a very high standard of proof must be required of RUE to demonstrate it delivered the gas received by Emfesz during this period.

5.5 Set-Off Defence

5.5.1 As described in 5.6 below, Emfesz advances a claim for damages for wrongful breach and/or termination of the Agreements by RUE in the amount of US $768,499,000.

5.5.2 Based on the quantum of its Counterclaim, Emfesz therefore claims entitlement to set-off the sum of US $268,828,886. to pay for RUE's 2008 Gas Claim and the sum of US $47,101.212. against RUE's 5.5% Commodity Credit Interest claim.[26]

5.6 Emfesz's Counterclaims

5.6.1 By its Rebuttal Pleading of 22 November 2010, Emfesz replaced its original counterclaim by a new claim for damages in the amount of US $820,480,000. (later adjusted to US $768,499.00) to the extent that such a claim has not already been used as a set-off by way of defence to RUE's claims. In addition, Emfesz seeks interest from 30 April 2010 until the date of payment under the Swedish Interest Act at an annual rate calculated in accordance with Section 6.

5.6.2 Emfesz's Counterclaim is founded upon RUE's material breach of the Agreements: (a) by wrongful termination; (b) by RUE having withdrawn its irrevocable offer to supply; (c) by anticipatory material breach of the Agreements; and (d) by RUE not supplying nominated quantities.

Wrongful Termination of Agreements

5.6.3 Emfesz says that RUE informed it on 27 April 2009 that it would not supply it with any more gas ("**Non-Performance Notification**"). This Non-Performance Notification was said to be confirmed by messages from other market players - Gazprom, Naftogas, FGSZ and HEO. Emfesz claims that it was thus clear, both to it and RUE, that RUE would not deliver any more gas under the Agreements.

5.6.4 Emfesz argues that the Non-Performance Notification thus constituted a wrongful termination of the agreements by RUE.

---

[26] Rebuttal Pleading, para 144.

5.6.5 The termination was alleged to be wrongful for two reasons: First, because Emfesz had not itself materially breached its obligations under the Agreements, and second; because Emfesz had not been given the opportunity to cure any breach that may have occurred. As regards RUE's suggestion that Emfesz had materially breached the Agreements by not paying for certain amounts of gas delivered in accordance with the provisions of the Agreements, Emfesz argues that such amounts were not due, but even if they had been due, Emfesz should have been given the chance to cure any breach resulting from late payment.

5.6.6 To the extent that the Agreements were not terminated at the time of the Non-Performance Notification, they should be deemed terminated sometime thereafter, and at the latest when Emfesz explicitly terminated the Agreement in its Statement of Defence and Counterclaim.

Breach by Withdrawal of RUE's Irrevocable Offer

5.6.7 To the extent that the Non-Performance Notification is not found to have terminated the Agreements, Emfesz contends that such notification constituted a material breach of RUE's obligations under the Agreements. This is because the Agreements comprise a binding and irrevocable offer by RUE to Emfesz to sell and deliver gas and this offer was unilaterally and wrongfully withdrawn on 27 April 2009.

RUE's Anticipatory Material Breach of the Agreements

5.6.8 Emfesz further contends that RUE's Non-Performance Notification made it clear that RUE would not perform its obligations under the Agreements. This is said to have constituted an anticipatory material breach of the Agreements which entitled Emfesz immediately to terminate the Agreements and claim damages.

Agreements Breached by RUE not Supplying Nominated Quantities

5.6.9 Finally, Emfesz argues that, despite its nomination, RUE has not supplied any gas to it pursuant to the Agreements since 1 January 2009.

5.6.10 Emfesz contends that during the period January - 26 April 2009, it continued to nominate gas from RUE, but RUE did not deliver any gas. Moreover, in the face of RUE's failure to deliver gas it was natural that Emfesz stopped nominating gas following RUE's Non-Performance Notification.

5.6.11 However, RUE was nevertheless obliged to supply gas under the Agreement based on Emfesz's last weekly nomination, made on 23 April 2009.

5.6.12 In this regard, Emfesz relies on Clause 6.4 of Appendix 2 to the Agreement which, it claims, places RUE under an obligation, where no nomination for a given period is received, to call Emfesz's attention to the situation and to request it to provide a nomination. RUE is said to have failed to fulfil this obligation. Clause 6.4 further provides that until the nomination is sent, the values of the last weekly forecast shall replace the nomination. Thus, after Emfesz's last weekly nomination of 23 April 2009, Emfesz says that RUE was continuously obliged to supply it with gas in accordance with that nomination until the termination of the Agreements. By failing to do so, RUE is said to have materially breached the Agreements.

5.6.13 Emfesz also asserts that if RUE had not given the Non-Performance Notification, it would have continued to make new nominations under the Agreements.

Emfesz's Claim for Damages

5.6.14 Emfesz states that, in the absence of applicable legislation, the general principle under Swedish law is that a party to a contract is liable to pay all damages that flow as a result of its material breach and/or any anticipatory material breach.

5.6.15 Here, RUE deliberately and wrongfully terminated the Agreements, withdrew its irrevocable offer and suspended its performance. This clearly constitutes a "culpable" breach of contract which entitles Emfesz to claim damages for both its direct as well as its indirect losses.

5.6.16 Emfesz claims damages under two categories: the first being historical damages, amounting to US $127,041,000. ("**Historical Damages Claim**"); the second being damages relating to the future, amounting to US $641,458,000., ("**Future Damages Claim**").[27]

Historical Damages Claim

5.6.17 Emfesz's Historical Damage Claim is made up of three parts: (a) losses resulting from cover purchases; (b) loss of profits for nominated but not delivered quantities; and (c) loss of profits for quantities that would have been nominated and should have been delivered in a but-for scenario.

5.6.18 Emfesz claims cover purchase losses of approximately US $95 million, based on Emfesz's purchases of gas from suppliers other than RUE in the period May 2009 - July 2010 - such gas having been more expensive than would have been the case under the Agreements.

5.6.19 For losses arising from its inability to deliver gas in the quantities nominated by its customers during the period May - September 2009, Emfesz claims damages of approximately US $14 million (being the difference between the lost revenues for

---

[27] As previously noted, in his third expert report dated 9 January 2011, Mr Peer adjusted his original calculations of Emfesz's damages. Having corrected for errors in his calculations identified by Mr Osborne, he reduced his estimate of Emfesz's damages to approximately US $750 million. However, in the light of the suspension of Emfesz's licence by the HEO, he increased his estimate of damages by approximately US $20 million, resulting in a total damages estimate of approximately US $770 million. These corrections are reflected in the sums claimed above.

the nominated gas and the cost that Emfesz would have had to bear in delivery such quantities).

5.6.20 In addition, Emfesz claims a further amount of approximately US $19 million for loss of profits for quantities that would have been nominated and delivered in the period May 2009 - July 2010, had RUE supplied gas in accordance with the Agreements. These losses are calculated based on the assumption that Emfesz's full sale customers would have nominated the same volumes in that period, as in the past, as modified by the overall trend in the market.

Future Damages Claims

5.6.21 Emfesz founds its claim for Future Damages on the assertion that it was in an enviable competitive position in the Hungarian market because the price it paid under the Agreement was more than 15% lower than its principal competitors.

5.6.22 Thus, at the beginning of 2009, Emfesz had a strong market presence, with access to gas at the lowest prices on the market and with a steadily increasing market for its gas.

5.6.23 In this situation, RUE's non-performance and wrongful termination of the Agreements was a disaster. Instead of being able to take advantage of a most attractive business opportunity, Emfesz says it was forced to downsize dramatically. Whilst the economic down-turn made it possible for it to purchase gas at prices below that of its main competitors for a short while, Emfesz contends that the situation will not persist. Thus, when gas prices return to normal in the near future, there will be a severe impact on its business in both the actual scenario and but-for scenarios.

5.6.24 Based on the experts' reports filed by KPMG and Navigant (which need not be summarised here) Emfesz, in its Rebuttal Pleading, advanced a claim for damages for the future period amounting to approximately US $640 million.

5.6.25 As previously noted, on 6 January 2011, prior to the start of the second phase of the oral hearing, Emfesz notified the Tribunal that, as a result of RUE's non-supply of gas pursuant to the Agreement, the point had been reached where Emfesz was no longer able to finance the purchase of gas from alternative suppliers. This lack of a long-term supply agreement and the increased cost of the purchase of gas resulted in a decision by Emfesz's bankers not to increase Emfesz's necessary lines of credit. In the result, on 5 January 2011, Emfesz's trading license with the HEO was suspended for a 90-day period from 13 January 2011.

6. RUE'S RESPONSE TO EMFESZ'S DEFENCES AND COUNTERCLAIMS

6.1 Mabofi Defence

6.1.1 As previously noted, this defence is advanced as an answer to all three of RUE's claims.

6.1.2 In summary, RUE says that the Mabofi defence is unsupported by the evidence, contradicted by the contemporaneous documents, is illogical and should be dismissed.

6.1.3 RUE notes that, as originally pleaded in its Statement of Defence and Counterclaim, Emfesz based this defence on "an understanding to the effect that the payments for natural gas supplied under the Agreements under payment of the commodity credit would not fall due until the outstanding Mabofi Funds were repaid". RUE contends that, not only is there no credible evidence to support such a plea, but as advanced, it is incapable of giving rise to a defence to a payment that is contractually due

under written agreements which specifically provide that any modification shall be in force only if made in writing (Clause 12.2 of the Agreement).

6.1.4 As regards Emfesz's attempt to tie the alleged "arrangement" to the various Commodity Credit agreements, the terms of AA 19, relating to the charging of penalty interest on monies due from Emfesz, are hardly consistent with the latter's contention that those monies are not due.

6.1.5 Moreover, the assertion that the "arrangement" became an "agreement" (see paragraphs 1.3.6 - 1.3.7 of the Rebuttal Pleading) is unsupported by a single piece of documentary evidence. In any event, as noted above, any such agreement, if it was to operate to modify the contractual obligations of Emfesz under the Agreements, was required to be in writing.

6.1.6 RUE points out that the Commodity Credit agreements are also inconsistent with the arrangement/agreement on which the Mabofi Defence rests. The Commodity Credit agreements are the only instances where RUE granted Emfesz credit, and these were on terms for payment of interest and penalty interest. Emfesz's contention that these agreements in some way support its assertion of an agreement between RUE and Emfesz postponing the due date for payment of invoices is simply unsupported.

6.1.7 RUE also points out that its repeated demands for immediate payment of its overdue invoices (e.g. in its letters of 28 June 2007, 2 October 2007, 2 November 2007, 9 January 2008, 16 May 2008, 17 June 2008 and 12 January 2009) are inconsistent with such an agreement or arrangement. Indeed, had such an arrangement or agreement existed, Emfesz would surely have raised it in response to these demands.

6.1.8 RUE argues that the witness evidence does nothing to improve Emfesz's case. Mr Shmelev the CFO of RUE has no knowledge of any agreement of the type now alleged by Emfesz and, prior to these proceedings, had never heard any suggestion that RUE had reached an agreement with Emfesz relating to the movement of money between Emfesz and Mabofi. Had any such agreement existed, Mr Shmelev would certainly have known of it.

6.1.9 Mr Shmelev accepts that on two occasions, RUE received payments from Emfesz for gas, after which, it made a dividend payment to Centragas. However, these dividend payments were unrelated to the day-to-day operations of the Agreements and do not evidence an agreement or arrangement as alleged.

6.1.10 Finally, RUE points out that Mr Góczi does not allege an agreement between Emfesz and RUE in his testimony, but rather an agreement between their owners (which is not the same thing). Not only was the Mabofi Defence not raised once in answer to RUE's various demands for payment, it was not even mentioned in Emfesz's letter of 14 October 2009, in which it first asserted its set-off. The first time that Emfesz advanced the Mabofi Defence was when it served its Defence and Counterclaim on 30 April 2010.

6.2 Centragas Defence

6.2.1 RUE points out that its Commodity Credit Interest claim is a simple, contractually based claim for monies due under AA 19.

6.2.2 RUE notes that Emfesz's two defences to this claim (i.e., (a) that an agreement was reached on 19 May 2008 that interest would be paid only at the rate of 5.5%, or (b) that an agreement was reached subsequent to the meeting that the then indebtedness under AA 19 would be reduced by US $24,654,822.10) effectively advance the

contention that there has been a variation of AA 19, reducing the interest and/or the sums payable there under by Emfesz.

6.2.3 RUE argues that both defences must fail because no agreement was reached on 19 May - there was only a discussion about a possible variation of AA 19 (with Emfesz paying interest at the 5.5% and Centragas paying the difference). In any event, even if an oral agreement had been reached, such an agreement would have been totally ineffective to amend AA 19, which, by virtue of Clause 12.1 of the Agreement, requires any modification to be in writing. RUE points out that any such agreement would also require sign-off by the management of all three companies (namely, RUE, Emfesz and Centragas) and the execution of one or more written agreements.

6.2.4 It is also to be borne in mind that the effect of any such agreement, once reached, would have been to reduce Emfesz's liability by tens of millions of dollars and involve an assumption by Centragas of liability for such an amount. In such circumstances, adhering to RUE's corporate governance requirements would clearly have been important.

6.2.5 RUE also makes the point that following the Zug meeting, Mr Eperjesi sent an email to Mr Glebko attaching a draft modification to AA 19, requesting that it be signed. That email, it is said, crucially recognises the need for a written agreement in order for any agreement to take effect. Further, the attached draft modification provided for the signature of both RUE's joint managing directors in recognition of the fact that Mr Shmelev did not have the authority to bind RUE.

6.2.6 RUE notes that Emfesz omitted any mention of this email and its attachment in its pleadings and in its evidence. The fact that the draft written agreement was not

signed and that thereafter RUE continued to press for payment for the full amount due under AA 19 is supportive only of the fact that no agreement was reached to vary AA 19.

6.2.7 As to RUE being bound based on some form of implied authority in Mr Shmelev to make such an agreement, RUE points out that the documents said to constitute confirmations of such an agreement signed by Mr Shmelev are no such thing. There is a substantial difference between a written confirmation of a balance owing given to auditors and a variation of a contract. Here, there is nothing to imply that Mr Shmelev had the power to do the latter.

6.3 The Undisclosed Supplier Defence

6.3.1 RUE notes that this defence relates solely to its 2009 Gas Claim, which is for payment for deliveries of gas made between January and April 2009 at the delivery point at Beregovo pursuant to nominations received from Emfesz.

6.3.2 Although Emfesz disputes liability to make payment on the grounds that it disputes that RUE supplied the gas in question, RUE points out that Emfesz does not dispute that it took delivery of 401,953,766 bcm at Beregovo during this period and that this amount was in accordance with its daily nominations submitted to RUE. Moreover, Emfesz does not advance a positive case that the supplies were made by another company, nor does it suggest that it had a contract with anyone else other than RUE to purchase the gas in question. Nor does it claim to have paid anyone for the gas or that it has received a claim for payment from anyone other than RUE. Notwithstanding this, Emfesz contends that it should not have to pay for the gas.

6.3.3 RUE says that Emfesz's speculations in its Rebuttal Pleading as to the identity of the owner of the gas supplied are tantamount to surreal. This is because, at all

material times, all of the natural gas passing through the Beregovo metering station was owned either by Gazprom or RUE.

6.3.4 In these circumstances, the Gazprom Agreement of 2 July 2009, which provided, with retrospective effect, that the quantities of gas delivered to Emfesz at Beregovo from January to April 2009 (and corresponding to the volumes nominated by Emfesz during those months) had been purchased by RUE from Gazprom, makes it clear that the gas taken by Emfesz during this period was RUE's gas.

6.3.5 RUE points out that Emfesz also made repeated statements during the period acknowledging that it was taking gas from RUE and that it was to RUE that payment for the gas was due. It was not until 27 July 2009 that Emfesz sought to advance the argument that it did not know who had supplied the gas. RUE points, amongst other documents, to a series of custom's clearance requests to the Hungarian Customs, made in the form of statutory declarations by Mr Góczi, all of which explicitly state that the gas taken by Emfesz in the months of January to April 2009 had been supplied by RUE.

6.3.6 RUE also notes that in the Share Transfer Agreement entered into between Mabofi and RosGas, Emfesz's liabilities as at 31 March 2009 and as at 1 February 2009, are stated to include liability to make payment for deliveries of gas in January and February and March, the very liabilities that Emfesz is now seeking to dispute.

6.3.7 Finally, with respect to Emfesz's argument that the 2009 Gas Claim should be dismissed for lack of jurisdiction, arguing that such claims "must be derived from Gazprom" and "have not arisen out of these agreements", RUE says that this jurisdictional objection is based on a misunderstanding of Swedish law. RUE argues, based on the well-established doctrine of assertion, that jurisdictional

aspects of its claims are to be determined based on the grounds and facts it asserts. Since RUE's claim is based on the assertion that it has supplied the gas under the Agreement, there is clearly no jurisdictional problem. Emfesz's objection that the gas was not supplied by RUE should thus be determined as an objection on the merits and disposed of for the reasons stated above.

6.4 Emfesz's Counterclaims

6.4.1 Having regard to the fact that any right to set-off is dependent on Emfesz establishing a valid counterclaim, it is sensible to deal with its counterclaim first.

6.4.2 RUE notes that Emfesz's counterclaim alleges that RUE was in material breach of its obligations under the Agreement and wrongfully terminated the Agreement.

6.4.3 As regards Emfesz's allegation that the Agreement was terminated by RUE's Non-Performance Notification, given that the alleged termination is said to have been wrongful, it cannot have brought the Agreement to an end. For Emfesz to sue for damages as a result of wrongful termination, Emfesz must establish not only that there was a breach of the Agreement, entitling it to terminate, but that as a result it did terminate. However, there was no notice of termination served by Emfesz prior to the commencement of this arbitration. If, which is denied, Emfesz was entitled to terminate the Agreement, the earliest date that it exercised that right was by service upon Emfesz of its Defence and Counterclaim.

6.4.4 In any event, RUE argues that the counterclaim is substantively bad for a number of reasons.

6.4.5 First, RUE was not in breach of its obligations to supply and deliver gas in the so-called historic period or thereafter. The obligation to sell and deliver gas is dependent on Emfesz exercising its right under the Agreement to nominate a

quantity of gas for delivery on a particular day. It is only when a daily nomination is made by Emfesz that an obligation arises on RUE to sell the gas and on Emfesz to purchase it. Here, however, no such obligation arose because Emfesz refrained from making nominations (no doubt because it had alternative sources of supply) and indeed from maintaining any contact with RUE (the "**Nominations Defence**"). In these circumstances there was no breach by RUE of the Agreement.

6.4.6 In addition, RUE was not in breach of the Agreement, because it had no obligation to supply gas under the Agreement because of Emfesz's non-payment in respect of previous supplies of gas. Until payment was made on the very substantial outstanding sums, RUE had a right, as a matter of Swedish law (which governs the Agreement), to suspend its performance (the "**Suspension Defence**"). In this connection RUE relies on the opinion of Professor Ramberg in relation to the principles of suspension under Swedish law.

6.4.7 Finally, and in any event, RUE argues that, by operation of Section 36 of the Swedish Contract Act, it falls to be relieved of any obligation to supply gas under the Agreement after 28 April 2009, as a result of changed circumstances. The changed circumstances relied upon are the illegitimate seizure of Emfesz by RosGas with the assistance of Emfesz but without the consent of Emfesz's owner, Mabofi. In this connection, RUE relies on the opinion of Professor Ramberg in relation to the application of Section 36 with respect to changed circumstances.

6.5 RUE's Response to Emfesz's Set-off Claim

6.5.1 RUE points out that Emfesz purports to use the claims upon which it bases its set-off to form the basis of its Counterclaim. This approach is said to be incorrect as a matter of law.

6.5.2 As a matter of Swedish law, if a Respondent is actively pursuing a counterclaim, the court or arbitral tribunal should pay no regard to the assertion of a set-off using the same claim.

6.5.3 In any event, even if the Tribunal were to accept the possibility that amounts claimed by Emfesz by way of its counterclaim can properly be used as a set-off defence, the absence of merit of the counterclaims results in there being no debt due to Emfesz which may be used as a set-off against RUE's claims.

6.6 Emfesz's Claim for Damages

6.6.1 If, contrary to the defences asserted, it is found that RUE was in breach of the Agreements, then RUE disputes that Emfesz is entitled to any damages, alternatively to damages in the amounts claimed.

6.6.2 RUE says that for the period prior to alleged termination of the Agreement by Emfesz, damages can only be claimed in relation to quantities of gas that RUE failed to deliver and which it was contractually obliged to deliver. However, in the light of the Nominations Defence and the Suspension Defence, there was no contractual obligation to deliver any gas in the pre-termination period.

6.6.3 With respect to both the historic period and the future period, RUE points out that Emfesz appears to have had an available supply under the RosGas contract at the same rates as those applicable under the Agreement. In those circumstances, it is apparent Emfesz has suffered no loss, alternatively it has failed to mitigate its loss by taking supplies under that contract.

6.6.4 Further, and alternatively (subject to the requirement for Emfesz to establish negligence for the purpose of its loss of profits claim), the claim for the future period is vastly inflated. RUE says that Mr Peer's calculations and those of his

fellow accountant, Mr Kaczmarek of Navigant (neither of whom appear to have genuine expertise in the European gas industry, let alone the Hungarian one) ignore the fundamental changes that have been taken place - and which are anticipated - in the gas market in Europe and in Hungary in particular.

6.6.5 Those changes and future developments are addressed in detail by RUE's gas experts, Professor Stern and Attila Marczy. Mr Marczy has decades of experience in the Hungarian gas industry and Professor Stern is one of Europe's leading academics covering the gas industry as head of the Oxford Institute of Energy Studies. In light of their expert evidence, RUE's forensic accounting expert assesses the loss for the future period to be US $60 million (less than a tenth of Mr Peer's figures). The damages for the historic period (in the event that RUE submissions above are not accepted) are assessed by Mr Osborne on a preliminary basis in the sum of approximately US $121 million.

7. TRIBUNAL'S APPROACH TO THE CASE ON THE MERITS

7.1 Approach to be Followed

7.1.1 The Tribunal deals separately, in Section 8, with the principal questions that require to be answered in order to establish liability under the claims and counterclaims. To the extent required, damages are dealt with thereafter.

7.2 Questions Pertaining to Liability

7.2.1 In order to establish liability in respect of the claims and counterclaims, the Tribunal requires to address the six principal questions set out below. The first five relate to Claimant's claims; the sixth relates to Respondent's counterclaims.

(a) Has Claimant delivered gas to Respondent under the Agreement in the amount that it claims;

(b) Has Respondent paid Claimant for all gas delivered pursuant to the Agreement;

(c) If not, has Respondent been relieved of its obligation to pay for gas delivered by Claimant;

(d) Has Respondent paid interest as required under the Commodity Credit agreements;

(e) If not, has Respondent's obligation to pay interest under the Commodity Credit agreements been modified.

(f) Has Claimant materially breached the Agreements by wrongful termination, withdrawal of its offer to supply or by reason of failure to supply nominated quantities.

8. QUESTIONS PERTAINING TO LIABILITY

8.1 Gas Delivered by Emfesz Pursuant to the Agreements

8.1.1 The only live issue here concerns the amount of gas off-taken by Emfesz at Beregovo during the period 1 January 2009 - 27 April 2009. This is because Emfesz does not dispute that it received all of the gas RUE claims it delivered pursuant to the Agreements prior to 1 January 2009. As to the period between January and April 2009, Emfesz does not dispute that it took delivery of 401,953,766 bcm of gas from the delivery point at Beregovo. Therefore, the only question for the Tribunal is whether there is merit in the Undisclosed Supplier Defence, i.e. that the gas taken by Emfesz was not RUE's gas.[28]

8.1.2 As to this, the Tribunal concludes that the defence is without merit.

8.1.3 The Tribunal agrees with RUE that there is no basis for Emfesz to deny that the seller of the gas it took during this period was RUE. Emfesz's "strong indications" that the gas was delivered by someone other than RUE are also groundless. Based

---

[28] The Tribunal limits its analysis to the merits of this question as it has concluded that Respondent's jurisdiction objection as to the 2009 Gas Claim is misconceived. RUE having asserted that it supplied the gas delivered to Emfesz in 2009 pursuant to the Agreement, there is no true jurisdictional issue. Respondent's argument that the gas was no so supplied by UE is thus a question for the merits.

on the evidence before us, we have found that all of the natural gas passing through Beregovo metering station at Ukraine/Hungary border during this period was owned either by Gazprom or RUE.

8.1.4 As Mr Shmelev explained in the December hearing, in response to questions from the Tribunal (and his evidence was not contradicted), the only gas in the pipeline at the Beregovo metering station at this time was:

> *"... gas of Gazprom Group of Companies, Gazexport and Gazprom, and us, either taken from the underground storage or transited through Ukraine. So there were no other suppliers. Ukrainians were not allowed to do that and simply there are no others, no other people have contracts with ... to do that"*

8.1.5 Emfesz's present plea of ignorance as to the identity of the supplier of its gas between January and April 2009 is also disingenuous, having regard to the repeated statements it made acknowledging that it was taking gas from RUE and that it was to RUE that payment for the gas was due. Indeed, it was not until 27 July 2009, after Mr Góczi had caused Mabofi to dispose of Emfesz to RosGas, that Emfesz advanced the argument that it did not know who had supplied it with gas.

8.1.6 The correspondence and communications between the parties and with third parties during this period, the fact that the gas taken by Emfesz could only have belonged to Gazprom or RUE, and the subsequent gas allocation agreement between Gazprom and RUE (whereby RUE and Gazprom Export agreed that the gas volumes delivered to Emfesz during the relevant period were to be treated as having

been delivered by RUE), all show that the gas off-taken at Beregovo by Emfesz at this time was supplied by RUE.[29]

8.1.7 Any uncertainty in this regard that Emfesz may have had during this period was resolved by RUE's letter to Emfesz of 17 August 2009, with which RUE enclosed delivery acceptances for the relevant period. This letter was written based on the 2 July 2009 Gazprom Contract.

8.1.8 In these circumstances, the Tribunal finds that Claimant delivered to Respondent pursuant to the Agreement all of the gas that it claims it delivered between January and 27 April 2009 and for which it now seeks payment.

8.2 Payments Made / Not-Made by Emfesz for Gas Delivered

8.2.1 It is common ground that RUE's invoices to Emfesz in the amount of (a) US $264,274,204.52 (plus contractual interest of US $5,256,307.64 due as of 31 December 2009) for gas delivered in 2008; and for (b) US $151,578,967.72 for gas delivered in 2009, have not been paid.

8.2.2 It is also not disputed that these invoices cover all of the gas nominated by Emfesz and delivered by RUE during 2008 and 2009 for which no payment has been made, and that the amounts claimed for gas delivered and for contractual interest have been correctly calculated pursuant to the terms of the Agreement.

8.2.3 Emfesz's liability to pay these amounts thus turns only on whether it has been relieved of its obligation to do so by reason of the, so-called, Mabofi Defence.

---

[29] It is also telling that Emfesz recorded in its books a liability for this gas which liability had been calculated on the basis of the price under the Agreement. The liability to pay RUE for the January to March 2009 installments was also included as part of the declared debt owed to RUE under Clause 4 of the Share Transfer Agreement dated 28 April 2009.

8.2.4 Subject to Emfesz succeeding on the Mabofi Defence, and to any right it may have to set-off sums due to it from RUE against RUE's gas claims, the following amounts are due to be paid to RUE by Emfesz:

(a) US $264,274,204.52, for gas delivered in the period September through December 2008;

(b) US $5,256,307.64, for contractual interest for delay in payment for gas delivered throughout 2008, as at 31 December 2009; and

(c) US $151,578,967.72, for gas delivered in the period January through April 2009.

8.3 Emfesz's Obligation to Pay for Gas Delivered in 2008 and 2009

8.3.1 The Mabofi Defence is advanced by Emfesz as an answer to all three of RUE's claims - *i.e.*, for payment for 2008 Gas, for payment for 2009 Gas and for payment of Commodity Credit Interest said to be outstanding under AA 19.

8.3.2 The essence of this defence is that RUE and Emfesz had an understanding or agreement to the effect that the payments for natural gas supplied under the Agreements and the payment of the Commodity Credit would not fall due until the outstanding Mabofi funds had been repaid. However, for such an understanding or agreement to be effective it would be necessary for the Tribunal to conclude that the parties had agreed different terms of payment than those provided for in the Agreement.

8.3.3 The relevant provisions of the Agreement are found in Clauses 7 (Terms of Payment) and 12 (Other Conditions).

8.3.4 Clause 7.2 deals with the due date for the payment of gas. It provides as follows:

> "*Date of payment for the monthly deliveries: the 30th calendar day immediately following the month of delivery*"

8.3.5 Clause 12.2, which sets out the basis for modification of the Agreement, provides:

> "*Modification of the present agreement shall be in force only if it is made in written form*"

8.3.6 The difficulty with the Mabofi Defence is that there is simply no credible evidence to support its existence. The fact that RUE may not initially have insisted on payment being made for gas it delivered as was required under the terms of the Agreement, perhaps reflecting an agreement amongst RUE's shareholders not to enforce RUE's rights strictly, is unavailing. Any such agreement amongst RUE's shareholders does not constitute an amendment to the Agreement.

8.3.7 Moreover, the fact that the Mabofi Defence was never raised in answer to RUE's repeated demands for payment, nor even mentioned in Emfesz's letter of 14 October 2009, in which it first asserted a set-off, is inconsistent with any such understanding, and consistent with the fact that Emfesz did not see RUE's forbearance in enforcing its contractual rights as constituting a modification to the Agreement's terms of payment.

8.3.8 In addition, the Commodity Credit agreements (which document the instances and the terms and conditions on which RUE granted Emfesz credit) are entirely inconsistent with any such agreement. These are the only instances where RUE formally granted Emfesz credit and such credit was on terms for payment of interest and penalty interest. Absent other credible evidence, these documented credit arrangements must be presumed to be exhaustive. There is certainly no basis for applying a reverse presumption, as Emfesz contends, that these agreements in some way support its assertion of a further agreement between RUE and Emfesz postponing the due date for payment of invoices. In fact, they make plain that payment for gas delivered and invoiced was due in accordance with the terms of

payment of the Agreement, but, if payment was not timely made, interest would accrue pursuant to the Commodity Credit arrangements. In these circumstances, the Commodity Credit arrangements are binding in accordance with their terms.

8.3.9 In the absence of a clear written modification of the Agreement relieving Emfesz of its contractual obligations thereunder, the Mabofi Defence must fail. And on the evidentiary record, we find that the Mabofi Defence is unsupported by credible evidence and is contradicted by the contemporaneous documents. Accordingly, it is dismissed.

8.4 Payments of Amounts Due Under AA 19

8.4.1 Again, it is not in dispute that, applying the terms of the relevant Commodity Credit agreement (being AA 19, dated 29 December 2007), the sum of US$106,195,492.49 is due to RUE. The question of Emfesz's liability for unpaid Commodity Credit Interest therefore turns on whether its obligation to make such payment has been modified.

8.5 Have Emfesz's Obligations Under AA 19 Been Modified

8.5.1 The answer to this question turns on the validity of the so-called Centragas Defence.

8.5.2 RUE's claim for Commodity Credit Interest is a straight forward contractual claim for monies due under AA 19, the calculation of which is not contested.

8.5.3 Emfesz's primary defence (which is only a partial defence) is that an agreement was reached orally at the 19 May 2008 meeting in Zug under which the interest due under AA 19 would be paid by Emfesz at the rate of only 5.5%, and that this agreement was continued by subsequent written exchanges described below. On the basis of this variation of AA 19, the sum payable would be US $47,101,209.73 instead of US $106,195,492.49.

8.5.4 Emfesz's alternative case is that an agreement was reached subsequent to the 19 May meeting that the then due indebtedness under AA 19 (*i.e.*, US $106,195,492.49), would be reduced by US $24,654,822.10. This is said to have been the result of Mr Shmelev's signature/initialling of the 28 May 2008 confirmation of balance. Such an agreement would have reduced the balance at that date, but not the interest rates going forward.

8.5.5 For either of these alternative defences to be effective, the Tribunal would be required to find that there had been a variation of AA 19 so as to reduce the interest and/or sums payable thereunder by Emfesz. And as to these two defences, we conclude that no such variation (contractual amendment) was agreed.

8.5.6 As previously noted, for a modification of the Agreement to be effective (the Additional Agreements are by definition part of the Agreement), such modification must be in written form. This means that any oral agreement reached at the 19 May 2008 meeting in Zug would have had to be converted into writing. However, this was never done, even though it is clear from the record that Emfesz understood that this step was required.

8.5.7 Emfesz's understanding and acceptance of the requirement for any modification of the Agreements to be in writing is evident from its letter, sent by Mr Eperjesi's to Mr Glebko 10 days after the meeting, on 28 May 2008, (copied to Mr Shmelev and others) in which he requested the execution of a formal written modification to AA 19. The draft amendment to AA 19 which he enclosed provided, in conformity with RUE's signatory requirements, for the signature of both of its managing directors.

8.5.8 To our minds, the fact that the 28 May 2008 letter was sent confirms that Emfesz did not itself feel a definitive agreement had been reached in Zug. This conclusion

is further evidenced by Mr Eperjesi 's letter to Mr Shmelev of 27 May 2008 (the day before the formal modifying agreement was sent) in which he stated that he would like to sum up "... the concept we agreed upon ..." (emphasis added). The letter is also consistent with Mr Weinberg's evidence that, following the meeting, he, Mr Eperjesi and Mr Windisch discussed the need for RUE to approve the proposed amendment to AA 19, and that approval was not guaranteed. Mr Weinberg was not cross-examined on this recollection of events. The fact that the requested formal modification of AA 19 was not made would also have made it clear to Mr Eperjesi that the proposed modification had not been approved by RUE, which undermines the good faith of any understanding that AA 19 had been amended.

8.5.9 The fact that the proposed formal modification to AA 19 was never executed thus disposes of this defence.

8.5.10 As to Emfesz's alternative case, based on an agreement having being reached subsequent to the Zug meeting, which reduced Emfesz's then indebtedness under AA 19 by US $24,654,822.10, this too must be rejected.

8.5.11 Quite apart from the fact that it is agreed that Mr Shmelev had no express authority to bind RUE in relation to a variation of AA 19, it is important to bear in mind the distinction between a "confirmation of balance", made to a third party for purposes of the annual audit, and a variation of the Agreement, made by the parties to the Agreement. The fact that his confirmation proved incorrect, and that the balance stated actually understated Emfesz's liability by US $24,654,822.10 (the difference between 5.5% and 30% interest) does not amount to a written agreement between the parties to vary the amount of the then outstanding debt. Statements made to a company's auditors with respect to sums due or owing may subsequently require

correction. Such statements to auditors do not, by themselves, vary the underlying amount that is actually due or owing to its respective creditors or debtors.

8.5.12 We accept Mr Shmelev's evidence in his statement and on cross-examination that he confirmed this balance because he assumed that the agreement "in principle" that had been reached in Zug would be formally approved by RUE (i.e. in anticipation of agreement being reached between RUE, Emfesz and Centragas along the lines that had been discussed in Zug).

8.5.13 Emfesz's allegation that the parties had no further contact regarding this matter after Mr Shmelev signed the confirmation on 28 May 2008 until 4 March 2009, (implying that RUE's rejection of the alleged modification is a later day invention and/or that Emfesz had the right to rely on the confirmation that had been given) is inaccurate. In fact, RUE wrote to Emfesz on 18 June 2008 demanding payment of US $553,570,616.36. This sum was the full amount due under AA 19 (*i.e.* as originally agreed) rather than the discounted sum invoked by Emfesz. This letter, to which Emfesz made no reference in its pleadings, is further contemporaneous documentation of the absence of any modification in AA 19 (or, alternatively, of an agreed reduction of the amount then owing thereunder) as alleged.

8.5.14 Accordingly, we conclude that Emfesz's obligation to make payment of Commodity Credit Interest under the terms of AA 19 has not been modified.

8.5.15 Subject therefore to any right of set-off, the amount owing by Emfesz to RUE on the Commodities Credit claim is US $106,195,492.49.

8.6 Has Rue Materially Breached the Agreements

8.6.1 Emfesz puts its allegations of breach of the Agreement in a variety of ways: wrongful termination by RUE's delivery of the Non-Performance Notification;

RUE's withdrawal of its "irrevocable offer" to sell gas; RUE's failure to supply gas from 1 January 2009; and, RUE's failure to supply gas in accordance with nominations from 1 January 2009 (this last defence includes the second last defence).

Non-Performance Notification

8.6.2 According to Mr Góczi, he was told by three persons on behalf of RUE (Messrs Glebko, Sorokin and Voronin) on 27 April 2009 that it would no longer be supplying Emfesz with any gas.

8.6.3 Messrs Góczi's and Glebko's testimony on this point conflicts (Mr Glebko denied making any such statement to Mr Góczi). With respect to this conflict, the Tribunal prefers the evidence of Mr Glebko.[30] As to Mr Góczi's evidence concerning Messrs Sorokin and Voronin, Mr Sorokin who was based in Kiev, had low level responsibilities and was unlikely to have had any knowledge of RUE's future gas supply capability at this time and Mr Voronin was not even a representative of RUE. Thus, neither were in a position to speak (express corporate intentions) on behalf of RUE.

8.6.4 It is also relevant that, despite the significance of the alleged statements made on behalf of RUE to Emfesz at this time, the latter made no record of the information it was alleged to have received, nor did it write to RUE confirming that RUE was, in effect, unable to perform the Agreement.

8.6.5 The allegation that RUE delivered its so-called Non-Performance Notification on 27 April 2008 is also undermined by the fact that Mr Góczi undertook a sale of

---

[30] Mr Glebko was a reliable witness. As illustrated by testimonial and documentary references set out in paragraphs 15-27 of Claimant's Post Hearing Brief, Mr Góczi was not.

Mabofi's shareholdings in Emfesz to RosGas the very next day. The timing of this transfer, which has been challenged by Mabofi, combined with RosGas's contemporaneous (or earlier) commitment to supply gas to Emfesz, is convincing evidence that Mr Góczi had decided that Emfesz should part company with RUE sometime prior to this date and now seeks to use his version of the events of 27 April 2009 as a basis upon which to pin responsibility on RUE for his decision.[31]

8.6.6 The Tribunal therefore concludes that RUE did not give the alleged Non-Performance Notification on 27 April 2008, or at all. It also concludes that there is no credible evidence to show that it withdrew its "irrevocable offer" to sell gas to Emfesz, an allegation which is based on the same events.

8.6.7 As to this latter question and Emfesz's allegations of RUE's failure to supply gas at all or in accordance with its nominations from 1 January 2009, the Tribunal has concluded above that, as a matter of fact, RUE did supply gas in accordance with Emfesz's nominations from 1 January 2009. This is clear from the evidence referred to at Section 8.1 above, relating to deliveries of gas to Emfesz during the period from January – 28 April 2009.

8.6.8 In addition, RUE did not breach its obligations to supply in the future, Emfesz having made no effective nominations after 23 April 2009.

8.6.9 Clause 2.2 of the Agreement provides for the following steps to be taken by Emfesz:

---

[31] The Tribunal does not accept Mr Góczi's evidence that the RosGas Supply Agreement was only signed on 12 May 2009 and never came into effect. This evidence is contradicted by: (a) the date of the agreement (31 March 2009); (b) RosGas's letter of 30 April 2009 to Mr Góczi and provided to Emfesz's bank (handed up by counsel for RUE on 8 December 2010) which confirmed it had signed a gas supply contract with Emfesz for the period 2009 to 2018; and Emfesz's instructions to its bank of 28 April 2009 (handed up by counsel for RUE on 7 December 2010) directing it to transfer approximately US 33 million to RosGas as an advance payment for gas to be delivered in May 2009 "acc. gas supply agr. 31.03.2009". All of this documentary evidence, and there is more, shows that Mr Góczi had decided to dispense with RUE as a supplier well before 27 April 2009 and destroys any credibility of his testimony concerning the so-called Non-Performance Notification by RUE on 27 April 2009.

(a) Emfesz to give notice of the requested quantity for each month by the 25th day of the previous month (Appendix 2/6.1.2 provides a different time frame, namely that it should be given by the first day of the preceding month and can be modified by the 20th);

(b) Emfesz should send by Thursday a daily schedule for the following week;

(c) Emfesz should "nominate" the actual daily demand for "contractual acceptance" for each day by twelve o'clock the previous day; and

(d) Emfesz had the right to change the actual daily demand by +/- 50% by 12:00 a.m. of the actual day.

8.6.10 The effect of these provisions is that the only "nominations" that trigger "contractual acceptance" under the Agreement are the daily nominations. These are the nominations which commit RUE to deliver and sell and Emfesz to accept and purchase. The contractual significance of the daily nominations is also apparent from Clause 6.3 of Appendix 2, which provides that, if these are given late, supply is not guaranteed.

8.6.11 As noted above, Emfesz made its last daily nomination on 23 April 2009. However, it now seeks damages from RUE, based on its breach of the Agreement by reason of its failure to supply for the period from 1 May 2009 forward. But there were no daily nominations submitted by Emfesz in that period. The consequence of this is that RUE was under no obligation to deliver gas for that period and by not delivering was not in breach of the Agreement.

Rue's Rights to Suspend Deliveries

8.6.12 Even if RUE should be deemed to have continued to nominate gas, as contended by Emfesz, by operation of Clause 6.4 of Appendix 2 of the Agreement, the Tribunal concludes that there can be no suggestion that any failure by RUE to deliver in accordance with such a deemed nomination constitutes a breach of the Agreement. This is because, as a matter of Swedish law, RUE was by then entitled to withhold

its performance unless and until Emfesz paid the very substantial sums due to RUE under the Agreement which were then outstanding.

8.6.13 RUE relies on the expert report of Professor Ramberg, a professor of commercial law and the joint author of one of Sweden's leading works on contract law. In her report she explains that under Swedish law, a seller has the right to withhold deliveries when a buyer is in arrears with its payments under a contract, provided that the exercise of the right to withhold deliveries is not disproportionate to the buyer's breach.

8.6.14 Professor Ramberg explains that the only prerequisite to the exercise of the seller's right is that the buyer is in breach. The right arises as soon as the buyer is in breach and persists, even if the motive for withholding performance by the seller is its own inability to perform. We accept Professor Ramberg's report on a seller's right of suspension as correctly stating the Swedish law on this point. To our minds, in the light of Emfesz having failed to pay over US $500 million under the Agreement, including AA 19, that was owing at this time, there can be no suggestion that any deemed withholding of deliveries by RUE was disproportionate.

8.6.15 The Tribunal also notes that, in a case such as this, there is no duty to provide notice of the exercise of a right to suspend. In any event, it was common ground between Professors Ramberg and Lehrberg that the consequence of any failure to provide such a notice is limited to liability for losses incurred as a direct consequence of the lack of notice. Failure to provide notice does not affect the right to withhold or give the counterparty any right to damages for non-performance.

Section 36 Swedish Contracts Act

8.6.16 Having concluded that RUE did not terminate or purport to terminate the Agreements, that it did not breach the Agreements and, even if it might have been said to be obliged to supply gas pursuant to deemed nominations by Emfesz, that it had the right to suspend its performance under the Agreement, it is not necessary for us to address the question of whether RUE's supply obligation under the Agreement should be set aside pursuant to the provisions of Section 36 of the Swedish Contracts Act based on the changed circumstances which arose from the sale that Mr Góczi undertook of Mabofi's shareholdings in RUE to RosGas on 28 April 2009.

Emfesz's Conduct Inconsistent with Termination

8.6.17 The Agreement contains a specific provision in Clause 10.2 which sets out the circumstances for a party to terminate the Agreement. Furthermore, there is also explicit wording referring to the fact that a breaching party shall be entitled to cure its breach. Emfesz did not act in accordance with this provision and cannot invoke termination outside the scope of the relevant clause of the Agreement.

8.6.18 In its letter of 27 July 2009, Emfesz asked RUE to explain why it had not fulfilled its gas supply obligations and when it would be able to fulfill its obligations. This letter shows that Emfesz cannot have believed that the Agreement had been terminated by the virtue of the Non-Performance Notification and that it could not have been clear to the parties that performance was impossible.

Conclusions as to Respondent's Counterclaims and Set-Off Defence

8.6.19 For these reasons, we conclude that Emfesz's counterclaims must fail, there being no breach (actual or anticipatory) of the Agreements by RUE which can support any claim for damages.

8.6.20 In the light of the Tribunal's denial of Emfesz's counterclaims, it follows that nothing is owing from RUE to Emfesz which the latter may set-off against RUE's claims for payment for gas sold and delivered in 2008 and 2009 or for Commodity Credit Interest due under AA 19. Accordingly, each of Emfesz's set-off defences is denied.

8.6.21 Emfesz having failed to establish the basis for any of its counterclaims, it is not necessary for the Tribunal to rule on the quantum of damages that might have resulted from breaches of the Agreements alleged by Emfesz.

8.7 Conclusions as to Emfesz's Liability

8.7.1 It follows that RUE claims for payment of its 2008 and 2009 Gas Claims and for its Commodity Credit Interest claims, as set out below, should be allowed:

(a) US $269,530,512.16, for the 2008 Gas Claim, together with contractual interest to 31 December 2009;

(b) US $151,578,967.72, for the 2009 Gas Claim;

(c) US $106,195,492.49, for Commodity Credit Interest claim for the period from 2005 to 2007.

8.7.2 Interest in the amount claimed on the first two of these amounts should also be allowed at the following rates and from the following dates:[32]

(a) LIBOR + 1% on the outstanding principal amount of US $264,274,204.51 for each day of delay in payment from 1 January 2010 until full payment has been made; and

(b) LIBOR + 1% on the outstanding principal amount of US $151,578,967.72 for each day of delay in payment from 30 September 2009 until full payment has been made.

9. COSTS

9.1 Parties' Costs Claims

[32] Interest was not claimed on the amount due on the Commodity Credit Interest claim.

9.1.1 In response to the Tribunal's request, each of the parties submitted statements and proposed allocations of costs on 28 January 2011. Each of the parties thereafter commented on the other's statement on 4 February 2011 and (Respondent only) on 8 February 2011.

9.1.2 Claimants sought an award of costs ("Claimant's Legal Costs") as follows:

(a) £2,575,402.13 for legal fees and disbursements;

(b) £705,557.01 for experts' fees;

(c) £131,555.51 for projected legal fees; and

(d) £2,430.61 for projected experts' fees.[33]

Total: £3,414,945.26

9.1.3 Respondent sought an award of costs ("Respondent's Legal Costs") as follows:

(a) US $3,081,613. for legal fees and disbursements[34]; and

(b) US $2,070,071. for experts' fees

Total: US $5,151,684.00

9.1.4 Additionally, each of the parties sought an award of the amount it had contributed towards payment of the Costs of the Arbitration (arbitrators' fees, expenses and SCC fees and expenses) as follows:

(a) RUE has paid a total of €456,500. as its share of the Advance on Costs. Converted to GBP at the rate of EUR/GBP 0.862340 this is equal to £393,658.21.

(b) Emfesz has paid a total of €456,500. as its share of the Advance on Costs. Converted to USD (the rate was not specified) this equals US $626,544.

---

[33] Projected fees and disbursements in Claimant's legal Costs Claim relate principally to the preparation of Claimant's post-hearing brief and its costs' claim.

[34] This amount includes projected fees and disbursements for the preparation of Respondent's post-hearing brief.

9.2 Tribunal's Decision on Costs

9.2.1 Article 43 (5) of the SCC Rules provides that:

> *"Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of the party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances."*

9.2.2 Article 44 of the SCC Rules stipulates that, unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs of legal representation (*i.e.*, the Legal Costs described at 9.1.2 and 9.1.3 above), having regard to the outcome of the case and other relevant circumstances.

9.2.3 In this case the parties have not "otherwise agreed", and each of the parties, in its pleaded case, has sought an award of costs in its favour to cover both the Costs of the Arbitration and its own Legal Costs.

9.2.4 Claimant has prevailed completely in its claim. Respondent has failed in its counterclaims and in all of its defences. Having regard to the substantial claims advanced by Claimant, the number of defences raised by Respondent and the very substantial counterclaims asserted by Respondent, Claimant has had to deal with a considerable number of issues with appropriate care. It is thus not surprising to see it advance a very substantial claim for costs.

9.2.5 For Claimant's costs to be fully recoverable, the Tribunal must be satisfied that such costs are reasonable and have been reasonably incurred. Factors to be considered in this case include, *inter alia*, the amount of the principal claims, the amount of the counterclaims, the complexity of the dispute, the variety of defences raised by

Respondent, the extent of the interlocutory proceedings, as well as the amount that Respondent itself spent pursuing its defences and its counterclaims.

9.2.6 RUE's claim was for approximately US $528,000,000.; Emfesz counterclaimed for approximately US $770,000,000. Having regard to the amounts in issue, the manner in which Respondent developed its case in its pleadings, and the manner in which Respondent produced the documents it relied upon, the Tribunal concludes that the Legal Costs incurred by Claimant appear to have been reasonable and to have been reasonably incurred. Indeed, they were not of a substantially different order than those claimed by Respondent. It is true that Claimant's legal team was staffed by more partner level advisers than Respondent's, but the Tribunal does not consider such staffing to have been inappropriate having regard to the amounts in issue and the multi-jurisdictional nature of the underlying facts.

9.2.7 The Tribunal thus has no hesitation holding that Claimant should be compensated in this award in the full amount of its claimed Legal Costs of £3,414,945.26.

9.2.8 On 10 March 2011, the Institute determined the Costs of the Arbitration to be the amounts stated below:

(a) Mr Rowley, EUR 350,000 as fee, EUR 17,078 as expenses, EUR 57,426 as Interpreter's expenses and EUR 5,500 per diem allowance;

(b) Mr Runeland, EUR 210,000 as fee, GBP 1,974 as expenses and EUR 5,500 per diem allowance;

(c) Ms Wallgren-Lindholm, EUR 210,000 as fee, EUR 1,237 and SEK 2,080 as expenses and EUR 4,500 per diem allowance;

(d) Stockholm Chamber of Commerce, EUR 60,000 as administrative fee and EUR 27,023 as expenses.

9.2.9 For the same reasons as above, these Costs of the Arbitration should ultimately be borne fully by Respondent as the losing party.

10. TRIBUNAL'S OPERATIVE DECISION

10.1 Based on the foregoing, the Tribunal **DECLARES, ORDERS and AWARDS** as follows:

(a) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG US $269,530,512.16 for its 2008 Gas Claim.

(b) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG US $151,578,967.72, for its 2009 Gas Claim.

(c) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG US $106,195,492.49, for its Commodity Credit Interest Claim.

(d) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG interest at a rate of LIBOR + 1% on US $264,274,204.51, from 1 January 2010 until full payment has been made.

(e) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG interest at a rate of LIBOR + 1% on US $151,578,967.72, from 30 September 2009 until full payment has been made.

(f) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay to Rosukrenergo AG £3,414,945.26 for its Legal Costs, plus interest on such sum at a rate equal to the reference rate of the Bank of Sweden, as in force from time to time, increased by 8 percentage points, from the date of this Award until payment.

(g) The parties are jointly and severally liable to pay the Costs of the Arbitration, which have been determined as follows:

(i) Mr Rowley, EUR 350,000 as fee, EUR 17,078 as expenses, EUR 57,426 as Interpreter's expenses and EUR 5,500 per diem allowance;

(ii) Mr Runeland, EUR 210,000 as fee, GBP 1,974 as expenses and EUR 5,500 per diem allowance;

(iii) Ms Wallgren-Lindholm, EUR 210,000 as fee, EUR 1,237 and SEK 2,080 as expenses and EUR 4,500 per diem allowance;

(iv) Stockholm Chamber of Commerce, EUR 60,000 as administrative fee and EUR 27,023 as expenses.

(h) As between the parties, Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft shall pay the whole of the Costs of the Arbitration.

(i) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft's shall pay to Rosukrenergo AG such sum as Rosukrenergo AG has borne/paid for the Costs of the Arbitration from the share it paid (i.e., €456,500) of the Advance on Costs, plus interest on such sum at a rate equal to the reference rate of the Bank of Sweden, as in force from time to time, increased by 8 percentage points, from the date of this Award until payment

(j) Emfesz Elsö Magyar Földgáz-és Energiakereskedelmi Kft's counterclaims are hereby dismissed.

(k) All other claims and requests are denied.

Place of Arbitration: Stockholm, Sweden 17 March 2011

If a party is dissatisfied with this Award insofar as it concerns the compensation to the arbitrators, the matter may be brought before the District Court of Stockholm by initiating action latest three months from receipt of this Award.

Per Runeland

Carita Wallgren-Lindholm

J. William Rowley QC
(Chairperson)