SVEA COURT OF APPEAL	JUDGMENT	Case no
Department 02	2007-12-17	T 3108-06
Division 0204	Stockholm	

APPEALED DECISION
Judgment issued by the District Court of Stockholm on March 17, 2006, Case no T 6750-03, reference appendix A.

APPELLANT
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THE SUBJECT MATTER
Challenge of Arbitral award (declaration of invalidity).

JUDGMENT BY THE SVEA COURT OF APPEAL

1. The Svea Court of Appeal hereby dismisses the main judgment issued by the District Court of Stockholm and declares the arbitration award issued on March 20, 2000, invalid as regards to Respondent no 1 as stated in the arbitration award; The Republic of Ukraine, through the State Property Fund of Ukraine.

2. The District Court judgment is further dismissed in respect of the legal costs and the State of Ukraine is hereby relieved from its obligation to reimburse Norsk Hydro ASA for the legal costs incurred in the District Court. Norsk Hydro ASA is hereby liable to compensate the State of Ukraine for the legal costs incurred in the District Court in the sum of SEK 5,913,047, of which 4,500,000 constitutes counsels fee, plus interest thereon, running from March 17, 2006, until payment has been made, pursuant to Article 6 of the Interest Act..

3. Norsk Hydro ASA shall furthermore compensate the State of Ukraine for the legal costs incurred in the Court of Appeal in the sum of SEK 3,598,543, of which 2,900,000 constitutes counsels fee, plus interest thereon, running from the date of the judgment until payment has been made, pursuant to Article 6 of the Interest Act.

REQUEST FOR RELIEF IN THE COURT OF APPEAL

The State of Ukraine (hereinafter the Ukraine) has claimed that the Court of Appeal shall declare the arbitration award issued in Stockholm on March 20, 2000, invalid as regards Respondent no 1 as stated in the award; The Republic of Ukraine, through the State Property Fund of Ukraine (hereinafter the Fund). The Ukraine has further requested relief from the obligation to compensate Norsk Hydro ASA (hereinafter Norsk Hydro) for the legal costs incurred in the District Court and claims that Norsk Hydro shall be liable to compensate Ukraine for the legal costs incurred in the District Court.

Norsk Hydro has contested a change.

Each party has claimed compensation for the legal costs incurred in the Court of Appeal.

THE COURT OF APPEAL'S REASONING

Norsk Hydro has, including all parts where previously stated, withdrawn its objection that the Court is hindered to adjudicate matters of substance, because the matters have previously been adjudicated in the arbitration. The parties have thereinafter made the same reference to circumstances and generally argued their case, respectively, unchanged from the District Court. The parties have in addition presented the same evidence as in the District Court. All witnesses and experts have been heard a second time.

The main issues of law to be resolved in this dispute are whether the Fund has entered into a valid arbitration agreement, and if so, such agreement has the authority to legally bind Ukraine, if Ukraine has been a party to the arbitration proceedings and has been given notice of such proceedings.

In order to resolve these issues, the Court must also determine matters of applicable law. The Court of Appeal concurs with the District Court's findings on when to exercise Swedish and Ukrainian law respectively (reference to the District Court Judgment page 76 and forward).

The issues of competence

The question whether there is a valid arbitration agreement with the Fund should first be decided based on whether Svetlana Gonchar and Valentyn Kulichenko had the authority to enter into the relevant agreement on behalf of the Fund. Norsk Hydro has argued that the two persons, by way of power of attorney, or at least by apparent authority within the scope of their employment, has had the authority to enter into both the Shareholders' Agreement, dated April 19, 1996 (the

Owners' Agreement, hereinafter the Shareholders' Agreement) including the arbitration agreement , on behalf of the Fund. In addition, Norsk Hydro argues, that it is sufficient that the matter of competence comprised the authority to enter into the arbitration agreement, for such agreement to be valid. The Ukraine has argued that neither Svetlana Gonchar nor Valentyn Kulichenko, jointly or separately, had the authority to enter into the Shareholders' Agreement, or a separate arbitration agreement. Ukraine has further contested a separation of the arbitration agreement from the Shareholders' Agreement, and has argued that a valid arbitration agreement requires the authority to execute the Shareholders' Agreement.

The Court of Appeal will start by determining what authority Svetlana Gonchar and Valentyn Kulichenko, de facto held, respectively, as regards to the possibility to enter into the Shareholders' Agreement, including a separate arbitration agreement . The Court will thereafter verify the legal findings in relation to the appeal at hand.

Ukraine has argued that only the Chairman of the Fund, or his Deputy, has the authority to represent the Fund, and that a power of attorney does not give the legal competence to act on behalf of the Fund. According to the Court of Appeal, the case presented by Ukraine does not exclude the opportunity for a legal representative of the Fund to execute a power of attorney and thereby give the legal competence to another person, to act on behalf of the Fund. The position taken by Ukraine is therefore incorrect. It is confirmed inaccurate by the stipulated fact, that the Chairman of the fund gave Valentyn Kulichenko a power of attorney to represent the Fund in matters related to the establishment of TIS.

Ukraine has further argued that both the Shareholders' Agreement and the arbitration agreement are considered Foreign Economic Agreements according to Ukrainian law, and as a result thereof the agreement must be signed both by the Chairman of the Fund, and by a person given legal competence by him. Norsk Hydro has argued that this is a matter of form, which suggests that the Ukrainian law provisions of double signatures are not applicable. Norsk Hydro has further argued that the arbitration agreement is not a Foreign Economic Agreement, according to Ukrainian law, and that, in any event, a Foreign Economic Agreement, which has not been duly executed, only turns invalid upon a separate judgment of a court.

The Court of Appeal concurs with the District Court's view on the special formal requirements, prescribed by law, when concluding a Foreign Economic Agreement. In view of the relevant question of who has the authority to enter into such agreement, the matter is in part a question of competence. Hence, Ukrainian law is applicable on the matter. The Court of Appeal concurs with the District Court's opinion, that the arbitration agreement, separated from the main agreement, is not considered a Foreign Economic Agreement. As far as presented to the Court, according to Ukrainian law, international arbitral agreements require an agreement in writing as a matter of formal requirement prescribed by law. The Shareholders' Agreement, on the other hand, is considered a Foreign Economic Agreement, thus with provisions of special formal execution, as prescribed by law.

It is not in dispute between the parties, that Valentyn Kulichenko, during the relevant period, held a written power of attorney to act on behalf of the Fund in matters relating to TIS. The parties disagreed, however, whether the power of attorney includes the authority for Valentyn Kulichenko to enter into the Shareholders' Agreement and the arbitration agreement, respectively. It is the Court of Appeal's opinion, that the introduction of the power of attorney, grants Valentyn Kulichenko an extensive authority to represent the Fund in matters relating to TIS, and without additional context, provides the authority to enter into the agreements in question. However, the power of attorney further stipulates a number of limitations, requiring the approval of the Fund, such as "Introducing amendments to the Statue and Agreement". In the

event of a difference of opinion, the other shareholders /investors of TIS are under the obligation in the Shareholders' Agreement to vote in accordance with the opinion of Norsk Hydro. It appears that the Shareholders' Agreement, thus would have been followed by a change to the articles of association of TIS. In view hereof, the Court of Appeal finds that the given limitation in the power of attorney, applies to the authority to enter into the Shareholders' Agreement. Even though it is not explicitly stipulated in the power of attorney, the Shareholders' Agreement is at least an introduction to such change limited by the power of attorney. The limitation in question does, however, not apply to the authority to enter into the arbitration agreement. Hence, the written power of attorney gives Valentyn Kulichenko the authority to enter into the arbitration agreement, but not the Shareholders' Agreement.

With regard to the question whether Svetlana Gonchar held a written power of attorney to act on behalf of the Fund, the Court states the following. Minutes of a Meeting in Oslo on August 26, 1995, between the shareholders/investors of TIS, states that Svetlana Gonchar – as well as Valentyn Kulichenko – according to a power of attorney attached to the minutes, acted on behalf of the Fund at the relevant meeting. This power of attorney, or any other written power of attorney given to Mrs. Gonchar, has not been presented, nor has any further information regarding the substance of the power of attorney in question or matters of period of validity regarding the same been provided. It has, furthermore, not in any other way been established that Svetlana Gonchar, at the relevant time in April 1996, held a written power of attorney to enter into the agreements in question on behalf of the Fund.

Norsk Hydro has argued that Valentyn Kulichenko and Svetlana Gonchar, within the scope or their respective employment, and in the position as negotiators of the Shareholders' Agreement, held the apparent authority to enter into the Shareholders' Agreement (including the arbitration agreement), on behalf of the Fund. In view of the fact that this is a matter of competence, the Court finds that Ukrainian law is applicable on the matter. The initial finding of the Court is that the Ukrainian Civil Act from the year 1963 and its provisions on apparent authority, appears to govern considerable less difficult situations than the matter at hand. As presented by the evidence referred to by Ukraine, Svetlana Gonchar had not the kind of position within the Fund to authorize the kind of agreements now in question. Valentyn Kulichenko was at the time Deputy Minister of Industry of the State of Ukraine and did not hold a position within the Fund.

As Norsk Hydro has argued, Svetlana Gonchar and Valentyn Kulichenko represented the Fund at the shareholders' meetings in TIS and in the negotiations of the agreement in dispute. Svetlana Gonchar and Valentyn Kulichenko have not, at least not in any other context than in the matter at hand, entered into agreements on behalf of the Fund. They have previously simply signed and confirmed minutes from shareholder meetings in TIS. The so called August Agreements were executed in connection with the shareholder meeting on August 26, 1995. The Fund was not a party to any of these agreements. Instead, the meeting in August resulted in an "order" for the Fund to accept changes to TIS' constitutional documents executed by the Chairman of the Fund, Yuri Yekhanurov, which appears to confirm the lack of authority for Svetlana Gonchar and Valentyn Kulichenko to act on behalf of the Fund. The mere fact the Svetlana Gonchar and Valentyn Kulichenko represented the Fund in the negotiations of the agreement in question, shall not constitute apparent authority to duly execute the Shareholders' Agreement. As declared below, it is the opinion of the Court of Appeal, that it is not established that Svetlana Gonchar and Valentyn Kulichenko claimed to have such authority at the meeting on April 19, 1996.

It has not been established that Svetlana Gonchar had the apparent authority to execute the Shareholders' Agreement or the arbitration agreement. Nor has it been established that Valentyn Kulichenko, by reason of apparent authority, held further authority to act on behalf of the Fund, than provided to him by the written power of attorney.

Given these findings, Valentyn Kulichenko, single-handedly, had the authority to execute the arbitration agreement on behalf of the Fund. Mr. Kulichenko had, however, not the legal authority to enter into the Shareholders' Agreement. Svetlana Gonchar did not have the authority to execute any of those agreements. According to the doctrine of separability, the validity of an arbitration clause, incorporated in an agreement, shall be determined separately from the main agreement. Thus, it is sufficient that Valentyn Kulichenko had the authority to enter into the arbitration agreement, for such agreement to be valid. In other words, if Valentyn Kulichenko has entered into an arbitration agreement, the agreement is regarded to be valid, even if Kulichenko did not have authority to execute the Shareholders' Agreement.

Did the meeting on April 19, 1996, result in a valid arbitration agreement?

The Court of Appeal will now proceed to determine if Valentyn Kulichenko – being the negotiator authorized to enter into an arbitration agreement on behalf of the Fund – by way of signing the Shareholders' Agreement, in the manner here in question, has entered into the arbitration agreement therein, on behalf of the Fund. Ukraine has argued that the Fund has never expressed an intention to become a party to the arbitration agreement. Valentyn Kulichenko and Svetlana Gonchar, have according to Ukraine, merely "put their visas" with their signatures on the Shareholders' Agreement and not executed the agreement on behalf of the Fund. This fact has been made clear to Norsk Hydro. Norsk Hydro, on its part, has argued that Valentyn Kulichenko and Svetlana Gonchar have executed the Shareholders' Agreement and not merely "put their visas" on the agreement. In addition Norsk Hydro has argued that limitations as regards the persons authority to execute the agreement, has not been put forward.

Witness statements regarding the events that took place at the meeting on April 19, 1996, differ. It is clear, however, that the meeting was held at Mr. Oleg Batyuks office in Kiev and that the following persons were present at the meeting; Oleg Batyuk, Svetlana Gonchar, Per Brunsvig, Odd Grønlie, Oleg Kutateladze, Alezej Stavnitser and Elena Kozmina. The witnesses have made different statements in the Court of Appeal as to the presence of Valentyn Kulichenko. According to Valentyn Kulichenko himself, Svetlana Gonchar, Oleg Kutateladze, Alezej Stavnitser and Elena Kozmina, Valentyn Kulichenko was present at the meeting at Oleg Batyuk's office. Per Brunsvig has stated in the Court of Appeal, that Valentyn Kulichenko possibly was at a different location at the time of the meeting, but that he has not a decisive recollection of the matter. According to Oleg Batyuk, Valentyn Kulichenko was not present at the meeting on April 19 1996. Oleg Batyuk has further stated that the agreement, after being duly executed at the meeting, was sent to Valentyn Kulichenko for his signature. It is Oleg Batyuk's recollection that the agreement was sent back to him, signed by Valentyn Kulichenko, within one or two days.

The witnesses have in general presented testimonies without changes in the Court of Appeal compared to their statements in the District Court in matters concerning the communication at the meeting regarding signatures by way of "visas", Svetlana Gonchar's and Valentyn Kulichenko's legal competence to enter into the agreement on behalf of the Fund, and the execution by the Chairman of the Fund. The circumstances in the Court of Appeal are in summary as follows.

Valentyn Kulichenko, Svetlana Gonchar, Oleg Kutateladze, Alezej Stavnitser and Elena Kozmina have, in general, stated that Svetlana Gonchar and Valentyn Kulichenko expressed to Norsk Hydro at the meeting, the lack of authority to act on behalf of the Fund, that they further expressed to Norsk Hydro that they simply "put their visas" on the agreement and that the Chairman of the Fund must execute the agreement.

Oleg Batyuk has, inter alia, stated the following. He has no recollection of the facts that a formal authority and signature by way of visas were discussed at the meeting. He does not wish to speculate whether he would have recalled such discussion if it had occurred. He was in charge of the administrative part of the meeting and thus, was not present at the meeting at all times. He recalls that the agreement had a place for the Chairman of the Fund to sign and that the matter was up for discussion at the meeting. It was decided that the agreement was to be sent to Valentyn Kulichenko at first for his signature, secondly to be sent to the EBRD, and thereafter to the Chairman of the Fund. It was his understanding that the execution by the Chairman of the Fund was a mere technicality.

Per Brunsvig has, inter alia, stated the following. He does not recall very well what was said during the meeting . He does not recall anyone mentioning that Svetlana Gonchar or Valentyn Kulichenko were not authorized to execute the agreement. If such facts had been presented, Norsk Hydro would never had proceeded with the project, since a duly executed Shareholders' Agreement, was a condition before starting the work on the terminal. He has a vague recollection of Svetlana Gonchar mentioning something about the agreement to be sent to the Chairman of the Fund for signature, but that this merely was a formal matter without importance to the validity of the agreement. He recalls that they had duly executed signatures by all the Ukrainian parties and subsequently was able to "press the button", i.e. make sure that the work on the terminal immediately was commenced.

The Court of Appeal makes the following analysis.

The end of the Shareholders' Agreement contains spaces for signatures by the parties to the agreement. The parties are specified underneath each other to the left in the agreement. Each party has a printed "Place" underneath the party's printed legal entity; followed by a line below with the printed "Date"; and thereafter a printed "By". The "By" is followed by a signature line. All the other parties at the meeting, i.e., Norsk Hydro, Colorado Financial Incorporated, Concern Primorsky and Alpex, have executed the agreement by signing on the signature line together with a name qualification underneath the line. These parties have also stated the place and the date of the signature, with the exception of Alpex, which has stated the date, but not the place.

There is no signature on the signature line made available for the Fund's signature. The date and place are missing as well. Instead, Svetlana Gonchar and Valentyn Kulichenko have put their signatures – without a qualification of the name – to the right in the agreement, right next to the space given to the Fund to execute the agreement. Thus it appears as if the signatures in question are intended for something else than the execution of the agreement on behalf of the Fund. In addition, it is established that the parties, including Norsk Hydro, were aware of the fact that the agreement was to be signed by the Chairman of the Fund. Given these circumstances, the Court of Appeal finds that it is not Ukraine that carries the burden of proof to establish that Svetlana Gonchar and Valentyn Kulichenko did ascertain Norsk Hydro that by signing the agreement they did not execute the agreement resulting in a legally binding agreement with the Fund. Instead, it is Norsk Hydro that has the burden of proof, to establish that the Fund has entered into an arbitration agreement, and that the Fund – in spite of the signatures in the marginal and in spite the collection of the signature by the Chairman of the Fund – had the intention to duly execute the agreement by the signatures of Svetlana Gonchar and Valentyn Kulichenko.

It has been established, that the procedure of signatures by way of a an officer's visa - where an officer endorses the document and recommends a superior officer to finally execute the document - is practiced in the State of Ukraine. It has further been established that a signature by way of "putting one's visa" could be illustrated in the forms of the matter at hand. Neither

Svetlana Gonchar, nor Valentyn Kulichenko have – in what they have testified to – considered themselves to be in a position to execute the Shareholders' Agreement. The Court of Appeal concurs with this understanding. Each witness called by Ukraine has testified that Svetlana Gonchar and Valentyn Kulichenko specifically informed Norsk Hydro that they did not have the authority to enter into the agreement on behalf of the Fund, and that they instead, merely "put their visas" on the agreement. On the other hand this was challenged by the statements made by Per Brunsvig. His statements in general boil down to the argument that Norsk Hydro never would have commenced the work on the terminal without a duly executed Shareholders' Agreement in place. It is the Court of Appeal's opinion that Norsk Hydro has not successfully established the fact that a binding arbitration agreement was concluded at the meeting on April 19, 1996.

Is there an arbitration agreement affirmed by subsequent conduct by the parties after the meeting on April 19, 1996?

Alternatively, Norsk Hydro has argued that a valid Shareholders' Agreement has been concluded, including the arbitration agreement, by way of subsequent conduct by the parties. Norsk Hydro has argued that the Fund, aware of the condition of a valid Shareholders' Agreement for works on the Terminal, has not reacted to Norsk Hydro's work on the terminal, and passively accepted the work.

Firstly, the Court finds that Norsk Hydro's obligation to perform work on the terminal is governed by the so called August Agreements not by the Shareholders' Agreement. The Shareholders' Agreement ultimately governs a leading role for Norsk Hydro in TIS. This was secured by a provision that other shareholders should vote in accordance with Norsk Hydro's intentions in the event of a difference of opinion in matters relating to TIS. It is stipulated that such situation has not occurred within the relevant time period. The Shareholders' Agreement, or the arbitration agreement, has not come into effect merely because the agreement, in itself, has been applied between the parties.

The Court has nonetheless recognized that Norsk Hydro considered TIS' leading role as essential, before commencing work on the Terminal. This would come to pass through the Shareholders' Agreement and a change to the Articles of Association. That these requirements were of vital importance to Norsk Hydro, has also been communicated to the Fund, at least by a letter dated December 19, 1995, from Odd Grønlie, Norsk Hydro to Svetlana Gonchar. The latter stipulates, inter alia;

As you will appreciate the Owners' Agreement and the amended charter of Transinvestservice are two documents of critical importance to the entire project. Indeed, until and unless these documents have been signed Hydro will be unable to move forward in relation to subcontractors whose work is required for the upgrading of the Terminal. We are therefore very anxious to finalize and sign such documents as quickly as possible. (…) With a view to finalizing and signing the Owners' Agreement and the revised charter of Transinvestservice we propose that we meet in Kiev (…).

In contrast, it is established that Norsk Hydro directed the work to commence without the execution of the Shareholders' Agreement by all parties. Such measures were taken by Norsk Hydro in connection with the meeting on April 19, 1996, in spite of the missing signature of at least EBRD at that time, a fact of which both representatives of Norsk Hydro and the Fund were aware. In addition, the parties have agreed that the second prerequisite alleged by Norsk Hydro before commencing work on the Terminal, consisting of the change to the articles of association, also had not yet been performed. Such change has never been made. Given these circumstances,

the Court of Appeal finds that the Fund has not been obligated to react to Norsk Hydro's position to commence the work at that given time. Notwithstanding the foregoing, it could be argued that the Fund, by the time the Chairman had decided not to execute the agreement and the Shareholders' Agreement was not to become legally binding between the parties, was obligated to inform Norsk Hydro of the matter. Such notice was also given, in a meeting in early September, 1996. Given that the Shareholders' Agreement was initially sent to the EBRD for signature, which according to the information at hand, supposedly occurred in May 1996, it is likely that the agreement reached the Fund sometime in the beginning of the summer of 1996. The agreement was to be processed through the Fund, inter alia, reviewed by the Legal Department, which, according to the Fund, advised the Chairman not to execute the agreement. Given the circumstances, it is reasonable that the notice that the Fund was not to enter into the agreement, was given at the Shareholders' meeting following the summer. The Fund has therefore not been legally bound by the arbitration agreement by way of passivity in this respect.

Finally, Norsk Hydro has argued that Ukraine, has entered into the arbitration agreement by way of passivity during the arbitration proceedings. This argument by Norsk Hydro appears to be founded on the principal that a party who has participated in an arbitral proceeding without stating an objection, shall have accepted the existence of an arbitration agreement. In this regard, Ukraine can hardly be seen, through the Fund, or in any other way, as a participant in the given arbitration. The only action taken, by the Ukraine or the Fund, in the arbitration proceedings, was a letter submitted by the Fund to the Arbitration Institute of the Stockholm Chamber of Commerce, contesting the jurisdiction of the proceedings, after the Fund received the Request for Arbitration. The Fund contested the proceedings mainly based on the lack of a valid arbitration agreement due to the missing signature by the Chairman of the Fund. Hence, the same arguments presented, and as were of decisive nature in these proceedings. Given these circumstances, the Fund – or Ukraine – is not considered to have accepted the arbitration agreement, by participation in the arbitration.

Summary of findings and legal costs

Thus, the Court of Appeal holds that the Fund has not entered into a valid arbitration agreement. Consequently, there is not an existing arbitration agreement with the Ukraine, in view of the fact that such agreement would require the Fund to execute the agreement on behalf of the Ukraine. The arbitration award is declared invalid pursuant to Section 20, paragraph 1 of the Swedish Act (1929:145) on Arbitration. Thus, Ukraine's request of relief is hereby granted.

Given that outcome, Norsk Hydro shall reimburse Ukraine for the legal costs incurred in the District Court and in the Court of Appeal. Norsk Hydro has submited it to the Court of Appeal to decide if the requested amount in the District Court is reasonable and has acknowledged the sums requested in the Court of Appeal. The requested amount in the District Court, is, given the nature and the size of the matter, reasonable.

In this judgment; Head of Division in the Court of Appeal, Kristina Boutz, Judges, Roland Halvorsen (dissenting opinion) and Ulrika Stenbeck Gustavson, and ad interim Associate, Lisa Grunnfors.

DISSENTING OPINION

Roland Halvorsen is of a dissenting opinion and states.

The majority has on adduced reasons regarded Valentyn Kulichenko to be authorized to enter into the arbitration agreement but not the shareholders agreement. The shareholders agreement admittedly requires an amendment in the charter for TIS, but my opinion is that this is irrelevant as regards the question if Valentyn Kulichenko, supported by the power of attorney, is authorized to enter into the shareholders agreement. This is instead an issue between Valentyn Kulichenko and his employer, i.e. the Fund. My conclusion is thus that Valentyn Kulichenko was authorized to enter into the arbitration agreement as well.

Without making any more precise reasoning the District Court established in its judgment that it is Ukraine that has to prove that Svetlana Gonchar and Valentyn Kulichenko at the meeting made it clear that they did not intend to bind the Fund by the agreement. Based on the following reasons I have the same opinion as the District Court. The overshadowed purpose with the meeting was to enter into a binding agreement, the shareholders agreement, and all of the participants were aware of this purpose. Everyone were also aware of the fact that Valentyn Kulichenko had a power of attorney that provided him with authority to enter into the agreement. It must be up to Ukraine to prove the allegation that Valentyn Kulichenko made it clear to the other participants that he, regardless of his authority, was not qualified and, in addition, didn't have the intension to bind the Fund.

The witnesses who Ukraine have examined in order to prove the aforesaid have a surprisingly good memory taking into consideration that the actual situation occurred for more than eleven years ago. This creates the suspicion that it is not a questions of recollections but stories made up afterwards. Per Brunsvig has, however, admitted that he doesn't remember the details from the meeting on April 19, 1996. He has alleged that if someone had made it clear to him that Svetlana Gonchar and Valentyn Kulichenko didn't sign the agreement with an intention to bind the Fund he would have reacted and requested that someone with such authority signed the agreement with binding effect since this was the purpose of the meeting.

The credibility of Ukraine's witnesses is also disparaged by the fact that some of the witnesses have made undisputable incorrect statements regarding other issues in the case, for example Svetlana Gonchar and Yuri Yekhanurov. They have alleged that the Chairman of the Fund only could issue a power of attorney to the Vice Chairman to act on behalf of the Fund. Nevertheless, Valentyn Kulichenko has, regardless of the fact that he was not the Vice Chairman of the Fund, been authorized by a power of attorney issued by the Chairman. Another condition that makes me question the credibility of Ukraine's witnesses is that many of them have close connections to the state of Ukraine by possessing, or have possessed, very high governmental positions. The act of the Fund in order to have the so called August Agreements nullified at the Court of Odessa, the minutes and the circumstances that Charles Grey has accounted for from the meeting on February 19, 1997 in Kiev as well as the Fedcominvest Agreement that was entered into as early as August 29, 1996, illustrates, in my opinion, that Ukraine has acted systematical by using all necessary means in order to have Norsk Hydro excluded from TIS.

My opinion is that Per Brunsvig's witness statement where he explained what happened during the meeting on April 19, 1996 in combination with the fact that Norsk Hydro immediately following the meeting ordered the sub-contractors to commence the work at the terminal etc. illustrates that such information, as Ukraine alleges, was not provided at the meeting.

Ukraine has focused on the difference between an actual signing of an agreement and putting a visa on an agreement with reference to Ukrainian law or praxis. It is not in dispute that the Chairman of the Fund also had to sign the document and as a consequence hereof it is natural that a certain space was reserved for the Chairman's signature. It is not possible to draw any

legal conclusion by the fact that Svetlana Gonchar and Valentyn Kulichenko did not put their signatures in the place that was intended for their signatures.

The above leads to the conclusion that an arbitration agreement was entered into by inter alia the Fund and Norsk Hydro when Valentyn Kulichenko signed the shareholders agreement. Furthermore, my opinion corresponds with the District Court – by entering into the agreement Ukraine has also been notified of the arbitration procedures and has been provided with an opportunity to participate in the procedures. My opinion is that the arbitration award in question is not invalid. Outvoted in this question, I am in other respects in agreement with the majority of the Court of Appeal.