



**PCA Case No. AA761**

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 15 DECEMBER  
1976 PURSUANT TO THE ENERGY CHARTER TREATY**

**-between-**

**NORD STREAM 2 AG**

**The Claimant**

**- and -**

**THE EUROPEAN UNION**

**The Respondent**

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**DECISION ON CHALLENGE TO MR. PETER REES QC**

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9 December 2019

## I. INTRODUCTION

1. This challenge arises in an arbitration between Nord Stream 2 AG (the “**Claimant**”, or “**NSP2AG**”) and the European Union (the “**Respondent**”, and together with the Claimant, the “**Parties**”) under the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 (the “**UNCITRAL Rules**”) pursuant to Article 26 of the Energy Charter Treaty (the “**ECT**”). The dispute relates to, among other matters, the Respondent’s enactment of Directive (EU) 2019/692, amending Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas. According to the Claimant, the new directive adversely affected its investments in the Nord Stream 2 pipeline, an offshore import pipeline that will transmit natural gas from Ust-Luga, Russia to Lubmin, Germany. The Claimant contends that the new directive and the Respondent’s actions in connection with the new directive amount to a breach of Articles 10(1), 10(7), and 13 of the ECT.
2. This decision concerns a challenge brought by the Respondent against Mr. Peter Rees QC who was appointed as arbitrator by the Claimant. The Respondent claims that, although Mr. Rees has no direct financial interest in the Claimant, he has a financial interest in Royal Dutch Shell Plc (“**Shell**”), a financing partner of the Claimant on the project that forms part of the subject matter of this arbitration. Further, the Respondent cites Mr. Rees’ former employment as Shell’s Legal Director and member of its Executive Committee. For the Respondent, these circumstances give rise to justifiable doubts as to Mr. Rees’ impartiality or independence to act as an arbitrator in this arbitration.

## II. PROCEDURAL HISTORY

3. By Notice of Arbitration dated 26 September 2019 (the “**Notice of Arbitration**”), the Claimant commenced arbitration proceedings against the Respondent pursuant to Article 26(4)(b) of the ECT. In its Notice of Arbitration, the Claimant appointed Mr. Rees as arbitrator.<sup>1</sup>
4. By letter dated 4 October 2019 addressed to Mr. Rees (the “**Request for Disclosure**”), the Respondent acknowledged receipt of the Notice of Arbitration and requested that Mr. Rees disclose certain specific information as well as “any other circumstances likely to give rise to doubts as to [his] impartiality or independence.”<sup>2</sup> The Request for Disclosure reads in relevant part:

The European Union is concerned that, according to information publicly available, there are circumstances that may be a source of a conflict of interests and give rise to doubts as to your impartiality or independence. In particular, it appears that, between 2011 and 2014 you were both legal director and member of the executive committee of Royal Dutch Shell plc and that, both before and after that period, you have provided legal advice to entities in the gas sector.

Therefore, the European Union sends to you this request for disclosure. In particular, but not exhaustively, the European Union would like to know:

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<sup>1</sup> Notice of Arbitration, para. 64.

<sup>2</sup> Request for Disclosure, p. 2.

1. Whether you have, at present, any links – institutional, financial or other – Royal Dutch Shell plc or any other entities affiliated thereto;
2. Whether you have, at present, any links – institutional, financial or other – to any other shareholder or financing partner of NSP2AG;
3. Whether you were involved in any discussions or negotiations relating to the Nord Stream 2 project when being legal director and member of the executive committee of Royal Dutch Shell plc, including preparatory discussions prior to the start of the Nord Stream 2 project;
4. Whether you have provided advice, legal or other, to NSP2AG or entities involved in the Nord Stream 2 project;
5. Whether you have provided advice, legal or other, to any of the shareholders or financing partners of NSP2AG, including prior to the start of the Nord [S]tream 2 project;
6. Any other circumstances likely to give rise to doubts as to your impartiality or independence.

[...] The European Union hereby reserves the right to file a notice of challenge in accordance with the UNCITRAL Rules.<sup>3</sup>

5. By e-mail of 4 October 2019, Mr. Rees replied to the Respondent's Request for Disclosure and declared his impartiality and independence. The full text of Mr. Rees' disclosure is reproduced below.<sup>4</sup>
6. On 10 October 2019, the Respondent served its Notice of Challenge of Mr. Peter Rees as Arbitrator (the "Challenge"), and invited the Claimant to agree to the challenge or agree on the arrangements for deciding the challenge.
7. By e-mail of 11 October 2019, the Claimant indicated that it did not agree to the Respondent's challenge, and proposed "to designate the Secretary-General of the Permanent Court of Arbitration as the appointing authority for the purposes of this arbitration, to decide on the EU's challenge and to fulfil all other roles of the appointing authority under the UNCITRAL Rules as necessary."
8. On 24 October 2019, the Respondent submitted its Response to Nord Stream 2 AG's Notice of Arbitration, in which it designated Professor Philippe Sands as arbitrator and agreed with the Claimant's proposal that the Secretary-General of the Permanent Court of Arbitration (the "PCA") act as appointing authority.
9. On 29 October 2019, the Claimant wrote to the Secretary-General of the PCA to request that he act as appointing authority and decide the Respondent's challenge.
10. On 30 October 2019, the Claimant provided its Response to the Respondent's Notice of Challenge of Mr. Peter Rees QC as Arbitrator (the "Response").

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<sup>3</sup> Request for Disclosure, pp. 1-2.

<sup>4</sup> See para. 25 below.

11. On 4 November 2019, the Claimant submitted a Reply to the EU's Response to the Notice of Arbitration.
12. On 6 November 2019, Mr. Rees submitted his comments on the Respondent's Notice of Challenge ("**Mr. Rees' Comments**").
13. On 18 November 2019, the Respondent submitted its comments on the Claimant's response (the "**Reply**").
14. On 28 November 2019, the Claimant submitted its comments on the Respondent's reply (the "**Rejoinder**").

### III. SUBMISSIONS

15. The Respondent's challenge focuses on Mr. Rees' past and present connections with Shell, and in turn Shell's connections with the Claimant and the Nord Stream 2 project that forms part of the subject matter of the dispute. It contends that these connections amount to circumstances giving rise to justifiable doubts as to Mr. Rees' impartiality or independence as arbitrator in accordance with Article 10(1) of the UNCITRAL Rules.<sup>5</sup> The Claimant maintains that the challenge is without foundation and must therefore be rejected.<sup>6</sup>

#### *The Respondent's Comments*

16. The Respondent submits that any reasonably well-informed person would consider that there are objectively justifiable doubts as to Mr. Rees' impartiality and independence in the present case given his role as Shell's Legal Director and as a member of its Executive Committee between 2011 and 2014.<sup>7</sup>
17. First, the Respondent refers to Mr. Rees' disclosure that he will receive a pension from Shell of [REDACTED] and that he holds [REDACTED] shares in Shell [REDACTED] as a result of compulsory share purchase schemes during his service.<sup>8</sup> It submits that the shareholding would amount to a significant financial interest in the eyes of any objective, reasonably well-informed person, and that the relative size of that shareholding in relation to Shell's entire share capital is irrelevant.<sup>9</sup> It argues that Mr. Rees' financial interest would fall within one of the red lists of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**"), since the outcome of this dispute may have a significant impact on the value of Shell's shares and therefore "Mr. Rees

<sup>5</sup> Challenge, paras 4-5; Reply, paras 3-4.

<sup>6</sup> Response, para. 2.

<sup>7</sup> Challenge, paras 29, 36; Reply, paras 3-4.

<sup>8</sup> Challenge, para. 27; Reply, para. 13.

<sup>9</sup> Challenge, para. 6; Reply, paras 13, 16-18.

would stand to make a significant financial win or loss depending on how this dispute is decided by a Tribunal of which he would be a member.”<sup>10</sup>

18. Second, the Respondent refers to Mr. Rees’ role as Shell’s Legal Director and a member of its Executive Committee between 2011 and 2014, and submits that such period coincided with: (i) increased cooperation between Shell and Gazprom in relation to hydrocarbons; and (ii) Gazprom’s planning and feasibility studies for Nord Stream 2.<sup>11</sup> It refers to the 2015 Shareholders Agreement concluded between Shell and Gazprom in relation to Nord Stream 2 and contends that, while this occurred after Mr. Rees left Shell, no reasonably well-informed objective observer would consider it credible that an agreement on such an important and high value strategic project would not be planned and discussed well ahead of the actual signing date.<sup>12</sup> On this basis, the Respondent submits that there is at least an appearance that Mr. Rees advised Shell with regard to matters relating to Nord Stream 2, especially in light of his comment that in his role he had “ultimate responsibility for the Shell global legal function and advise[d] the Shell group management of all legal matters of group-wide importance”, and was “right in the middle of the business-making decisions which will be shaping the future of the company”.<sup>13</sup> It further contends that, in light of the Claimant’s legitimate expectations claim, there is a risk that Mr. Rees’ actions (or inaction) during his time at Shell could influence how he might be inclined to decide the dispute given his connection to the company during a key period.<sup>14</sup>
19. Finally, the Respondent seeks to distinguish the challenge decision in *Suez v. Argentina* on the basis that: (i) that decision applies a higher standard than that set out in Article 10(1) of the UNCITRAL Rules; (ii) the connections between Mr. Rees and Shell are more direct than those in the *Suez* case; and (iii) Shell has a strategic interest in Nord Stream 2, which is more than a simple financial interest in the outcome of the dispute.<sup>15</sup>

#### *The Claimant’s Comments*

20. In maintaining that the challenge is without foundation, the Claimant contends that none of the circumstances alleged by the Respondent give rise to justifiable doubts as to Mr. Rees’ impartiality or independence as an arbitrator and that the Respondent misrepresents or overstates the importance of relevant facts.<sup>16</sup>

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<sup>10</sup> Challenge, paras 31-35.

<sup>11</sup> Challenge, paras 6-20, 36-38; Reply, paras 30-44. See “Chronology of cooperation between Shell/Gazprom, the Nord Stream 2 project and Mr. Rees’ employment”, Reply, p. 8. See also Reply, paras 19-26.

<sup>12</sup> Challenge, paras 8-16, 37; Reply, para. 34. See also Challenge, paras 19, 34; Reply, para. 26.

<sup>13</sup> Reply, para. 28; Challenge, para. 25; Exhibit R-20. See also Reply, paras 42-44.

<sup>14</sup> Challenge, para. 39.

<sup>15</sup> Reply, paras 47-53, referring to Exhibit CL-10, *Suez and Others v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008 (“*Suez v. Argentina*”).

<sup>16</sup> Response, paras 3-4, 6; Rejoinder, paras 1.3-1.5.

21. First, the Claimant argues that the Respondent overstates the significance of Mr. Rees' shareholding in Shell and the importance of the Nord Stream 2 project to the company.<sup>17</sup> It contends that Mr. Rees' shareholding represents ██████████ of Shell's issued share capital, which renders Mr. Rees' shareholding immaterial.<sup>18</sup> The Claimant adds that Shell's €950 million commitment as lender to the Nord Stream 2 project amounts to only 0.3% of Shell's resources, and therefore the outcome of this arbitration "will not have a material impact on Shell, and certainly not on the value of Mr. Rees' shareholding in Shell."<sup>19</sup>
22. Second, the Claimant submits that the Respondent likewise overstates Shell's involvement in the Nord Stream 2 project during the period of Mr. Rees' employment at the company. According to the Claimant, Shell was not involved, directly or indirectly, in the initial feasibility studies or other preliminary works relating to the Nord Stream 2 project.<sup>20</sup> Rather, the Claimant contends that such preliminary work was being undertaken by Nord Stream AG, the developer and operator of the existing Nord Stream pipeline,<sup>21</sup> and that responsibility for the project was only transferred to NSP2AG following its incorporation in 2015.<sup>22</sup> The Claimant submits that: (i) NSP2AG's involvement began after Mr. Rees had left Shell in February 2014;<sup>23</sup> (ii) that negotiations for the 2015 Shareholders Agreement and Shell's financing agreements with NSP2AG began more than one and three years respectively following his departure from the company;<sup>24</sup> and (iii) that Mr. Rees' recollections in this regard should be taken at face value.<sup>25</sup>
23. With respect to Shell's relationship with the Claimant, the Claimant denies that Shell was ever one of its shareholders given that the Shareholders Agreement never materialized,<sup>26</sup> nor is Shell an affiliate of the Claimant.<sup>27</sup> As regards Shell's relationship with Gazprom, the Claimant points out that a careful perusal of all the press releases from Gazprom's website would reveal that "Shell is just one of a number of major gas companies with which Gazprom has dealings",<sup>28</sup> and that there is no basis to assert that any discussions between Shell and Gazprom unrelated to the Nord Stream 2 project would give rise to justifiable doubts as to Mr. Rees' impartiality or independence.<sup>29</sup> The Claimant adds that "[s]uch negotiations and arms-length cooperation are

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<sup>17</sup> Response, para. 4.

<sup>18</sup> Response, paras 4(i), 10, 38(iv), 50, 65; Rejoinder, para. 3.2. *See* Exhibit C-13.

<sup>19</sup> Response, paras 4(ii), 12, 38(iii), 65; Rejoinder, paras 3.2-3.6. *See* Exhibits C-13, C-14.

<sup>20</sup> Response, paras 17-19, 23, 62; Rejoinder, paras 5.1-5.2.

<sup>21</sup> Response, paras 17, 60.

<sup>22</sup> Response, paras 20, 23. *See* Exhibit C-2.

<sup>23</sup> Response, para. 61; Rejoinder, paras 5.5, 5.10-5.12.

<sup>24</sup> Response, paras 22(i), 24, 38(vi). *See* Exhibit C-17.

<sup>25</sup> Rejoinder, paras 5.6-5.7.

<sup>26</sup> Response, paras 21, 22(ii), 38(ii), 63.

<sup>27</sup> Response, paras 48, 54, 56, 59, 65; Rejoinder, paras 3.7-3.14.

<sup>28</sup> Response, para. 6(iv). *See* paras. 25-30; Exhibit C-16.

<sup>29</sup> Rejoinder, para. 5.13.

common in the energy industry, where the capital intensive nature of the investments often leads to the major companies cooperating in their development.”<sup>30</sup>

24. Finally, the Claimant cites *Suez v. Argentina* as authority in support of its contention that challenges concerning immaterial shareholdings, as it contends Mr. Rees has in Shell, have been previously rejected.<sup>31</sup>

*Mr. Rees' Comments*

25. Mr. Rees refers to his initial disclosure in the present case, which reads, in relevant part:

1. I have no links with Royal Dutch Shell plc (“Shell”), or any entities affiliated thereto, save for the following:
  - (i) [REDACTED] I will receive a small pension from Shell as a result of my 3¼ years’ service [REDACTED]
  - (ii) I have some shares in Shell as a result of compulsory share purchase schemes during my 3¼ years’ service [REDACTED]
2. I have no links with any other shareholder or financing partner of NSP2AG[.]
3. To the best of my recollection I was not involved in any discussions or negotiations (including preparatory discussions) relating to the Nord Stream 2 project when I was at Shell.
4. I have not provided any advice at any time to any of the shareholders or financing partners of NSP2AG or entities involved in the Nord Stream 2 project.
5. I have not provided any advice at any time to any of the shareholders or financing partners of NSP2AG, including prior to the start of the Nord Stream 2 project (save obviously to Shell (not in relation to the Nord Stream 2 project) when I was Legal Director). [...]

26. Mr. Rees asserts that his shareholding is insignificant and does not affect his impartiality or independence in this case,<sup>32</sup> and that he would not have accepted the appointment had he considered that the outcome of this case could have an impact on Shell’s share price.<sup>33</sup>

27. He further acknowledges that in his capacity as an Executive Committee Member he was informed that Shell had signed a cooperation agreement with Gazprom, but states that he was not involved in advising upon or negotiating the agreement and that he never met any officials or lawyers from Gazprom.<sup>34</sup> He further states that he has never provided legal advice to Shell on the Nord Stream 2 project,<sup>35</sup> and that he has no reason to doubt the Claimant’s statement that Shell’s involvement in Nord Stream 2 began only after he left Shell.<sup>36</sup>

<sup>30</sup> Response, para. 6(iv).

<sup>31</sup> Response, paras 40-42; Rejoinder, 4.1-4.4.

<sup>32</sup> Mr. Rees’ Comments, paras 4-5.

<sup>33</sup> Mr. Rees’ Comments, para. 7.

<sup>34</sup> Mr. Rees’ Comments, para. 9.

<sup>35</sup> Mr. Rees’ Comments, para. 8.

<sup>36</sup> Mr. Rees’ Comments, para. 6.

#### IV. ANALYSIS

28. In evaluating this challenge, I have considered all the comments of the Parties and those of Mr. Rees. However, in ruling on the challenge, I address only the issues that I consider necessary to arrive at my decision.
29. The Parties agree that the UNCITRAL Rules 1976 apply to this matter.<sup>37</sup> Accordingly, the standard by which the Respondent's challenge must be assessed is that contained in Article 10(1) of the UNCITRAL Rules:

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

30. The Parties acknowledge that this standard is an objective one.<sup>38</sup> This means that, while the perspective of the challenging party is part of the context of the challenge, it is not decisive. Rather, the doubts as to the arbitrator's impartiality or independence must be justifiable pursuant to an analysis of all relevant circumstances from the perspective of an objective, reasonable, and informed third party.<sup>39</sup> Further, a challenge may succeed on the basis of an appearance of bias without requiring proof of actual bias.<sup>40</sup>
31. The basis of the Respondent's challenge to Mr. Rees is his current and prior connections with Shell, an investor in the Nord Stream 2 project. In order to determine whether such relationship might meet the test in Article 10(1) of the UNCITRAL Rules, it is first necessary to consider the extent of Shell's relationship with the Claimant, NSP2AG, and the Nord Stream 2 project. It is clear from the materials presented by the Parties that Shell has a significant financial interest in the Claimant, having made an investment of €950 million in the Nord Stream 2 project. While such an amount might seem small when considered in light of the totality of Shell's resources, it cannot be said that an investment of almost €1 billion is insignificant when considered from an objective standpoint. It is also clear that Shell itself considers its investment in this project significant, given that it listed the project as one of its "key portfolio events" in its 2017 Annual Report.<sup>41</sup> In this light, a relationship with Shell on the part of an arbitrator could give rise to justifiable doubts as to his or her impartiality or independence in a dispute involving the Nord Stream 2 project in the eyes of an objective, reasonable, and informed third party.

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<sup>37</sup> Challenge, paras. 5, 28; Response, para. 31; Reply, para. 8; Rejoinder, para. 1.2.

<sup>38</sup> Challenge, para. 29; Response, para. 32.

<sup>39</sup> *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2003, para. 19; Challenge Decision of 11 January 1995, XXII Yearbook Commercial Arbitration 227, 234 (1997), para. 24; Exhibit RL-1.

<sup>40</sup> *Country X v. Company Q*, Challenge Decision, UNCITRAL, 11 January 1995, (1997) 22 YCA 234, paras 23-24; *National Grid Plc. v. Republic of Argentina*, Decision on the Challenge to Mr. Judd L. Kessler, LCIA Case No. UN 7949, 3 December 2007, paras 80-87; *Merck Sharp & Dohme (I.A.) Corporation v. The Republic of Ecuador*, PCA Case No. 2012-10, Decision on Challenge to Arbitrator Judge Stephen M. Schwebel, 12 April 2012, para. 53.

<sup>41</sup> Exhibit R-28.



32. The question that follows is whether Mr. Rees' connections with Shell are sufficient to give rise to such doubts. First, Mr. Rees was the Legal Director of Shell and a member of its Executive Committee between January 2011 and February 2014, and in his own words was "right in the middle of the business-making decisions which will be shaping the future of the company".<sup>42</sup> Even if I accept that Mr. Rees did not provide legal advice regarding the Nord Stream 2 project, in my view it would be reasonable to consider that the Nord Stream 2 project was a matter being discussed at Shell and considered by its Executive Committee at that time. In this regard, it is significant that: (i) Shell and Gazprom were actively discussing joint opportunities for further hydrocarbons distribution in Russia and Europe; (ii) this was occurring at the same time that the feasibility assessments and initial studies for Nord Stream 2 were being carried out; (iii) Gazprom furthered its relationships vis-à-vis the Nord Stream 2 project with two other future investors, BASF and GDF SUEZ (later ENGIE), at the St Petersburg International Economic Forum in 2013;<sup>43</sup> and (iv) at that same event, Shell and Gazprom met to discuss further strategic cooperation. While Shell's formal involvement in Nord Stream 2 began with the 2015 Shareholders Agreement, a shareholders agreement for such an important project would necessarily be planned and discussed well ahead of the signing of the agreement.<sup>44</sup> I therefore find that justifiable doubts for an objective, reasonable, and informed third party would arise from the proximity in time of Mr. Rees' tenure on Shell's Executive Committee and the Nord Stream 2 project.
33. Second, Mr. Rees has ongoing financial connections with Shell by way of his pension and shareholding, [REDACTED]. The Parties have commented at length regarding the size of the shareholding relative to the company's entire share capital, and whether the outcome of the present dispute will impact Shell's share price so as to alter its value. However, in my view it is not necessary to establish a direct connection between the outcome of the dispute and Shell's share price. Rather, what is relevant is that Mr. Rees has a valuable shareholding in Shell, and that an objective, reasonable, and informed third party would consider that significant in a dispute involving Shell's strategic interests such as those in the present case. In any event, the doubts as to Mr. Rees' impartiality and independence in the present case are not limited to his financial connection, but are to be considered together with his previous role at Shell as discussed above.
34. I wish to emphasise that I have found no reason to impugn Mr. Rees' professional integrity, nor have I found any proof of an actual lack of independence or impartiality on his part. Nevertheless, I consider that, from the perspective of an objective, reasonable, and informed third party, Mr. Rees' previous and present connections with Shell, taken together, give rise to justifiable doubts as to his impartiality and independence in the present arbitration under Article 10(1) of the UNCITRAL Rules. Therefore, the Respondent's challenge should be upheld.

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<sup>42</sup> Exhibit R-20.

<sup>43</sup> Rejoinder, Appendix 1, p. 19; Exhibit R-13.

<sup>44</sup> Reply, para. 34.

**V. DECISION**

[35] **NOW THEREFORE**, I, Hugo H. Siblesz, Secretary General of the PCA, after having established to my satisfaction my competence to decide this challenge in accordance with the UNCITRAL Rules, and having considered the comments of the Parties and of Mr. Rees;

**HEREBY UPHOLD** the challenge brought by the Respondent against Mr. Peter Rees QC.

Done in The Hague on 9 December 2019,

Hugo H. Siblesz

