SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	10 April 2013	T 2484-11
Division 0209	Stockholm	

CLAIMANT

China State Construction Engineering Corporation
Baivangzhuan Road
Haidian District
Beijing
China

Counsel: Advokat Jonas Benedictsson and jur. kand. Magnus Stålmarker
Baker & McKenzie Advokatbyrå KB
P.O. Box 180
101 23 Stockholm

RESPONDENT

1. CJSC INTEKO
Nikitsky Pereulok 5, podyezd 2
125009 Moscow
Russia

2. MISK Ltd
Prospekt Pobedy 3
Rayon Saryarka
Astana
Kazakhstan

Counsel to 1 and 2: Advokaten H and jur. kand. D and jur. kand. L
Mannheimer Swartling Advokatbyrå AB
P.O. Box 1711
111 87 Stockholm

MATTER

Challenge of arbitral award etc.

CHALLENGED ARBITRAL AWARD

Arbitral award rendered in Stockholm on 24 December 2010, under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce case No. No V (070/2008), see appendix A

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Postal Address	Visiting address	Telephone	Telefax	Opening Hours
Box 2290	Birger Jarls Torg 16	08-561 670 00	08-561 675 09	Monday – Friday
103 17 Stockholm		08-561 675 00		9:00 am – 3:00 pm
		e-mail: svea.avd2@dom.se		
		www.svea.se		

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claims of the claimant.

2. China State Construction Engineering Company [*sic!*] is ordered to compensate CJSC INTEKO and MISK Ltd for their litigation costs in the amount of EUR 323,239 and SEK 535,342 plus interest thereon pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment. Out of the first amount EUR 320,000 comprises costs for legal counsel.

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BACKGROUND

On 3 March 2006 CJSC INTEKO (INTEKO) as investor, MISK Ltd (MISK) as client and China State Construction Engineering Corporation (CSCEC) as contractor entered into a contracting agreement for the construction of the shopping center Moscow in Astana, the capital of the Kazak Republic (the Agreement). According to the time plan attached to the Agreement the works were to commence no later than 1 April 2006 and be completed by 15 January 2008. On 12 December 2007 INTEKO and MISK terminated the Agreement in advance and with effect as from 6 January 2008. The grounds given for the termination were that CSCEC had caused delays and that it would have been impossible to complete the works by 15 January 2008. On 6 June 2008 INTEKO and MISK requested arbitration against CSCEC before the Arbitration Institute of the Stockholm Chamber of Commerce (the Institute). INTEKO and MISK appointed Prof. K as arbitrator. CSCEC appointed Ms. B as arbitrator. Advokat R was appointed as Chairman. In the arbitration proceedings INTEKO and MISK were represented by its counsel advokat H from Mannheimer Swartling Advokatbyrå. In the arbitration proceedings INTEKO and MISK each claimed compensation for damages plus interest thereon incurred, in their opinion, as a result of CSCEC's breaches of agreement causing delays in the works. In the arbitral award rendered on 24 December 2010 INTEKO was awarded damages in the amount of USD 22,000,000 plus interest. MISK's claim for compensation for damages was rejected. CSCEC's counterclaim for compensation for costs and losses was granted to a lesser extent.

MOTIONS BEFORE THE COURT OF APPEAL

CSCEC has moved that the Court of Appeal shall annul both the operative part of the arbitral award as well as the decision on compensation for litigation costs.

INTEKO and MISK have objected to the annulment of the arbitral award.

The parties have claimed compensation for their respective litigation costs before the Court of Appeal.

THE PARTIES' GROUNDS

CSCEC

There were circumstances that could have raised doubts as to the impartiality of the arbitrator Prof. K. Therefore, he was ineligible to be arbitrator under Section 8 of the Swedish Arbitration Act (SFS 1999:116). Thus, the arbitral award shall be annulled under item 5 of the first paragraph of Section 34 of the said Act.

The arbitrators have exceeded their mandate when determining the extent of the damage, or in the alternative, without them being caused by CSCEC, procedural errors occurred that likely affected the outcome of the case. Therefore, the arbitral award shall be annulled under item 2, or alternatively item 6, of the first paragraph of Section 34 of the Swedish Arbitration Act.

INTEKO and MISK

Prof. K was not ineligible to be arbitrator. Prof. K was during the arbitration proceedings in an impartial and independent position as towards INTEKO, MISK and advokat H.

The arbitral tribunal has not exceeded its mandate nor has it committed procedural errors while determining the extent of the damages.

THE PARTIES' FURTHER DETAILS ON THEIR RESPECTIVE CASES

CSCEC

Prof. K was not eligible to be arbitrator

Article 14(1) of the Institute's arbitrator rules provides that an arbitrator shall be impartial and independent. Further, Article 14(2) provides that prior to the appointment of an arbitrator, the candidate shall inform on circumstances that may affect the confidence in his impartiality and independence. In addition,

Article 14(3) provides that an arbitrator shall immediately inform the parties and the other arbitrators if such circumstances should arise during the arbitration proceedings. The meaning of the aforementioned rules of the Institute in all material aspects coincide with the provisions of Section 8 of the Swedish Arbitration Act. From Supreme Court case law (see, for example, NJA 2007 p. 841 and NJA 2010 p. 317) it further follows that when applying the main rule in challenge proceedings of arbitral awards on grounds of conflicts of interests, the guidelines on conflicts of interest issued by The International Bar Association (the IBA) can be considered. These guidelines are found in the IBA Guidelines on Conflicts of Interest in International Arbitration. Section 3.1.3 of the IBA Guidelines “Orange List” provides that an arbitrator is obliged to inform if he during the preceding three years has been appointed as arbitrator by any of the parties or by any affiliate of a party on two or more occasions. Section 3.3.7 further provides that an arbitrator is obliged to inform if he, during the preceding three years, has been appointed as arbitrator by the same counsel or the same law firm on more than three occasions.

In arbitration proceedings under UNCITRAL’s arbitrator rules initiated in April of 2006 between Joy-Lud Distributors International Inc. (Joy-Lud) and Moscow Oil Refinery (MOR), MOR was represented by advokat H from Mannheimer Swartling Advokatbyrå. MOR and INTEKO are affiliates. Ms. B is a large owner in both companies. In the said arbitration proceedings MOR appointed Prof. K as arbitrator. Prof. K was aware that MOR and INTEKO are affiliates. In any event, he was during the now relevant arbitration proceedings informed explicitly on this relation.

CSCEC was aware of the arbitration proceedings to which MOR was a party, but not that Prof. K had been appointed as arbitrator by MOR. Instead, CSCEC attempted, by referencing those arbitration proceedings, to establish that an expert witness retained by INTEKO and MISK, Prof. S, was working for and a senior partner of a Russian law firm, Legal Intelligence Group, and that that law firm has close ties to MOR and its owner, Ms. B, and thereby also to INTEKO and MISK. CSCEC attempted to disqualify Prof. S as expert

witness because he was not independent. However, the arbitrators failed to consider the objection and also failed to mention CSCEC's objection with respect to Prof. S in the arbitral award. In any event, Prof. K has thereby received detailed information, if he in fact was not aware of MOR's affiliation to INTEKO and MISK, establishing the close affiliation between the companies. Through the reference to Legal Intelligence Group the arbitration proceedings in which he had been appointed as arbitrator by MOR must reasonably have been brought to his attention, since Legal Intelligence Group in those arbitration proceedings was co-counsel to MOR with advokat H and Mannheimer Swartling Advokatbyrå. Nevertheless, Prof. K persisted in not informing on those arbitration proceedings.

Prof. K has for several years been chairman of the International Commercial Arbitration Court (the ICAC), run by the Russian Chamber of Commerce. The Russian Chamber of Commerce also runs a corresponding arbitration institute for domestic disputes. Prof. S has been chairman of the latter institute. Thus, Prof. K and Prof. S have each been chairman of an arbitration institute run by the Russian Chamber of Commerce, and have thereby been colleagues. In addition, Prof. K is an accredited arbitrator at the domestic arbitration institute, which is chaired by Prof. S, whereas Prof. S is an accredited arbitrator at the ICAC, which until June of 2010 was chaired by Prof. K. Further, they are both leading members of the Russian President's "Council on Codification and Improvement of Civil Law" and "Research Centre of Private Law". In July of 2010, Prof. K was replaced as chairman of the ICAC. However, he remains a member of its presidium. Prof. S was elected as new vice president. Thus, they remain colleagues. Prof. K is still an accredited arbitrator at the ICAC. This entails that he to the same extent as other accredited arbitrators is dependent on the good will of the board to, for example, be appointed as chairman of arbitration proceedings or as sole arbitrator.

Thus, when Prof. S

(i) by CSCEC was reminded that Prof. S is a senior partner at Legal Intelligence Group,

(ii) became aware that CSCEC was aware of the affiliation between MOR and INTEKO and MISK and that CSCEC considered and maintained that they were affiliates,

(iii) knew that he had already been appointed as arbitrator by MOR, which inter alia was represented by Prof. S's law firm Legal Intelligence Group and Mannheimer Swartling Advokatbyrå,

he must have realized that his ties also to Prof. S – not mainly as alleged expert, but rather due to Prof. S's and thereby his own ties to one of the parties and its counsel – were of such nature that CSCEC had not accepted them.

This means that when Prof. K in the early summer of 2008 was nominated as arbitrator in the arbitration proceedings between INTEKO and MISK on the one side and CSCEC on the other, he was already appointed as arbitrator in ongoing arbitration proceedings involving an affiliate of INTEKO. Under Section 3.1.3 of the IBA Guidelines "Orange List" he was obliged to inform thereon. He did not, not then and not later. In addition, in the arbitration proceedings between Joy-Lud and MOR, Prof. K was directly requested by Joy-Lud's counsel to inform on all arbitration proceedings in which he and advokat H had been either counsel, chairman or arbitrator appointed by a party, upon which he stated that there was nothing on which to inform, despite the fact that they in July of 2009 were both involved in the arbitration proceedings between INTEKO and MISK on the one side and CSCEC on the other. Joy-Lud also lodged an objection on conflict of interest with respect to Prof. K and referenced several ties between him and advokat H as grounds. However, the objection was rejected.

In other arbitration proceedings under the Institute's rules between Odfjel and Sevmash, in which an arbitral award was rendered in early 2010 Odfjel was represented by counsel from Mannheimer Swartling Advokatbyrå. Prof. K was arbitrator also in those proceedings, appointed by the Institute's board, of

which he apparently at the time was a member. Those arbitration proceedings thus ran concurrently with the arbitration proceedings between INTEKO and MISK on the one side and CSCEC on the other. Thereby, the limits set out in Section 3.3.7 of the IBA Guidelines "Orange List" had been reached.

Furthermore, Prof. K has, now and in the past, substantial ties with advokat H at Mannheimer Swartling Advokatbyrå as evidenced by the following.

Prof. K has until recently been the chairman of the presidium (High Council) and chairman of the ICAC, positions he held for many years. The ICAC's rules provide that Prof. K, in his position as chairman of the presidium, has influence over the appointment of arbitrators. Advokat H is an arbitrator accredited by the ICAC and is also appointed as arbitrator in such proceedings.

Advokat H has been arbitrator in, amongst others, two arbitration proceedings under ICAC's rules initiated in 2007 and in which he was appointed by the company Kalinka-Stockmann and in which proceedings objections on conflict of interests were raised. In both these proceedings the presidium of the ICAC has, with Prof. K as chairman, tried and rejected the objections with respect to conflict of interest concerning advokat H.

Prof. K and advokat H were during 2007-2009 members of the Institute's board of directors and jointly dealt with relevant issues. Prof. K was obliged to inform thereon under Section 3.5.3 of the IBA Guidelines "Orange List" ("*The arbitrator holds one position in an arbitration institution with appointing authority over the dispute*"). Even if neither of them partook in the appointment of Prof. K as arbitrator in the aforementioned arbitration proceedings between Odfjel and Sevmash, this clearly indicates the narrow circles that are now relevant.

Prof. K and advokat H are also both accredited arbitrators at the International Arbitration Court in the Kyrgyz Republic, at the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce, and at the Permanent Arbitration Court at the Croatian Chamber of Economy, which

presumably means that their paths have crossed even more frequently. The connection to these three institutes in addition to the ICAC is, with only a few exceptions, unique to Prof. K and advokat H.

Separately, the aforementioned instances do not call into question Prof. K's impartiality and independence. However, it should be noted that Prof. K during the preceding three years has been arbitrator in at least three arbitration proceedings in which Mannheimer Swartling has acted as counsel, all according to the limited information that is available in these contexts. CSCEC does not claim that Prof. K has been appointed as arbitrator in other arbitration proceedings by Mannheimer Swartling, but it does not know and has no way of finding out unless Prof. K himself provides the information. Prof. K had every reason to be very attentive and prudent as well as to provide CSCEC with all information so that CSCEC could see the "entire picture" and form its own opinion as to whether it was reasonable to question his impartiality and raise objections. Prof. K failed to do so by not providing the aforementioned information. In the "Affidavit of independence and impartiality", which Prof. K signed prior to the arbitration proceedings in which the arbitral award that is now subject to these challenge proceedings was rendered, he has completed and signed the options confirming that he is impartial and independent and that he is not aware of any circumstances that could call into question the confidence in his impartiality and trust. In a personal CV enclosed with the affidavit he has, however, as one of fifteen assignments, mentioned his membership of the Institute's board. Thus, he has not separately informed on this. Under Swedish law and the Institute's rules, Prof. K was under an objective obligation to inform. He is aware of the IBA's Guidelines and has extensive experience as arbitrator. He must therefore be considered to have willingly attempted to keep secret at least substantial parts of the abovementioned information.

In sum, CSCEC maintains that Prof. K, at the very least, has been obliged to prior to or during the arbitration proceedings separately inform on the following:

(i) that he was arbitrator in other arbitration proceedings in which he had been appointed by MOR – since at least CSCEC was under the impression that MOR and INTEKO and MISK were affiliates and that this is provided by or is at least touched upon in Section 3.1.3 of the IBA Guidelines "Orange List";

(ii) that advokat H was appointed as arbitrator by MOR in those proceedings and that he was also arbitrator in other arbitration proceedings (Odfjel vs. Sevmash) in which a colleague of advokat H at the same law firm represented one of the parties – since three arbitration proceedings within such a short time span reaches the limits set out by Section 3.3.7 of the IBA Guidelines "Orange List", while Prof. K had several other reasonably substantial ties to advokat H.

(iii) that he was on the Institute's board together with advokat H since this is explicitly provided in Section 3.5.3 of the IBA Guidelines "Orange List";

(iv) that he has had additional professional dealings with advokat H within the Institute, the ICAC and at least three other arbitration institutes in the Ukraine, Croatia and Kyrgyzstan – since this has entailed ties and professional relations which appear more extensive than could generally be expected;

(v) that Prof. K was a colleague of Prof. S at the Russian Chamber of Commerce, where they both held managerial positions, that they had other common ties as set out above, that Prof. S was a senior partner at Legal Intelligence Group which acted as co-counsel to MOR in the aforementioned arbitration proceedings – since this indirectly implied a tie between Prof. K to INTEKO and MISK and since Prof. S was also called as an expert witness by INTEKO and MOR in the arbitration proceedings against CSCEC.

More on the relations between INTEKO and MOR

Ms. B, which is the main shareholder in INTEKO, also has, or at least has previously had, a strong influence in the affairs of MOR, amongst other things through her husband, the former mayor of Moscow, Mr. L. According to some information Mr. L controls 38 percent of MOR. In MOR's quarterly report for the third quarter of 2009 it is established that more than 50 percent of the shares in MOR are held by Moscow Oil and Gas Company (MOGC). MOCG's official web page informs that in September of 2007, the company Sibir Energy became the owner of 100 percent of the shares in MOGC. The chairman of MOGC was Mr. L. MOGC's financial reporting of June of 2008 provides that there are close ties between, amongst others, MOR and MOCG and the main owner of Sibir Energy, the oligarch C, and Mr. L. Mr. C and Ms. B have as business partners entered into corporate agreements in the oil and property sectors. There are also several ties between INTEKO and MOR. It should be stressed that during the arbitration proceedings INTEKO did not object to the fact that INTEKO and MOR are affiliates.

The concrete circumstances referenced above at least when seen as a whole and in conjunction with a willing failure to comply with the obligation to inform, entail that there were circumstances that raised doubts in the confidence in Prof. K's impartiality.

The arbitral tribunal's application of Swedish procedural principles to determine the extent of the damages

During the arbitration proceedings the parties assumed that Russian law was applicable to the arbitral tribunal's determination of the extent of the damages. Through the exchange of submissions during the arbitration proceedings, in which submissions the parties agreed that the arbitral tribunal should apply Russian law and principles established in Russian case law with respect to evidence for the extent of the damages, the parties have reached an agreement which was binding upon the arbitral tribunal. Thus, the arbitral

tribunal was bound by the parties' choice of law in this respect. Therefore, it was very surprising to CSCEC when the arbitral tribunal did not apply Russian law, but instead chose to reference and apply principles of Swedish procedural law. The arbitral tribunal has in the arbitral award stated that in Swedish arbitration proceedings the arbitral tribunal is fully entitled, in accordance with its own values, determine a reasonable amount of losses to be compensated.

By applying principles of Swedish procedural law when determining the extent of the damages, the arbitral tribunal has in four different manners exceeded its mandate, or in the alternative, without CSCEC contributing to them, committed procedural errors that likely affected the outcome of the case.

Firstly, the arbitral tribunal has failed to observe the applicable law chosen by the parties by applying another legal system. Secondly, it has not been possible to use Swedish procedural law when determining the extent of the damages. Thirdly, the application of the principle of Swedish procedural law set out in Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure was not in compliance with the actual contents thereof, even it if would have been deemed applicable. The extent of the damages was of such nature that it normally would have been entirely possible to present evidence thereon. Further, INTEKO and MOR did present substantial evidence on the extent of the damages. Fourthly, and in any event, the arbitral tribunal was obliged to, by way of guiding the proceedings, inform the parties on the potential application of Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure.

The arbitral tribunal has failed to review some of the grounds for objections referenced by CSCEC

The arbitral tribunal has failed to review CSCEC's grounds for objections with respect to MISK having in writing accepted to amend the Agreement

INTEKO and MISK have as grounds for their alleged right to terminate the Agreement and right to damages referenced, amongst other things, that the original date for completing the works (15 January 2008) remained valid between the parties. This was disputed by CSCEC, referencing several grounds. One of those was that MISK, by signing a new time plan for the completion of the works of 10 September 2006 had agreed with CSCEC to postpone the completion date (item 129 of the arbitral award).

The arbitral tribunal focused only on whether INTEKO had signed the time plan and never analyzed the consequences of MISK for its part having agreed to amend the Agreement (item 607). It would appear as if the arbitral tribunal has treated INTEKO and MISK as one party.

The arbitral tribunal has failed to review CSCEC's grounds for objections with respect to the parties' having amended the Agreement

CSCEC also referenced as grounds for disputing the claims that the Agreement had been amended by the parties implicitly through INTEKO's and MISK's actions and that INTEKO and MISK had waived their right to claim that the Agreement could be amended only in writing (items 105, 148, 158, 172-173 and 176-179, 130-133 as well as 199-200).

These grounds for objections were not dealt with by the arbitral tribunal in its grounds to the arbitral award.

The arbitral tribunal has failed to review CSCEC's grounds for objections concerning the cause of the delays

CSCEC maintained that the company also under the original agreement was entitled to an extension and that the causes of the delays related to INTEKO and MISK. These causes included the delay in handing over to CSCEC the site upon which the shopping center was to be constructed (items 235 and 236

amongst others), delays in the removal of dirt and gravel piles from the construction site (item 236 amongst others), the increase in the amount of reinforced concrete to be used (items 237-242 amongst others) as well as INTEKO's and MISK's delays in handing over blueprints and project documentation (item 243 amongst others).

The arbitral tribunal merely references in item 610 that the parties have discussed the issue of the cause of the delays. However, the arbitral tribunal has failed to analyze and review the concrete causes of the delays referenced by CSCEC that were attributable to INTEKO and MISK. The arbitral tribunal has failed to review CSCEC's reference to Section 12.5 of the Agreement (item 245), which provides that CSCEC is not liable for delays caused by INTEKO.

The arbitral tribunal has failed to review CSCEC's grounds for objections that INTEKO and MISK have abused their termination rights under the Agreement

CSCEC maintained that INTEKO and MISK had abused their right to terminate the Agreement since there were no commercially reasonable grounds for the termination. The purpose of the termination was instead to find a scape goat and to "save face" for Ms. B and Mr. L before the Kazakh authorities. This ground is summed up, amongst other items, in items 403-408.

In the section dealing with the extent of the damages the arbitral tribunal does deal with the issue of abuse of rights (item 612). However, CSCEC's objection was aimed not only at the extent of the damages, but mainly at the right to terminate the Agreement as such. The arbitral tribunal has however failed to review this ground (items 603-611).

The arbitrators have, by not reviewing CSCEC's referenced grounds of objections in the manner set out above, exceeded its mandate, or in the

alternative, have committed a procedural error, without it being caused by CSCEC, that likely affected the outcome of the case. The legal effect of this is that the arbitral award shall be annulled.

INTEKO AND MISK

Prof. K has not been ineligible as arbitrator

The IBA Guidelines are not the rules under which the issue of potential conflicts of interest with respect to Prof. K shall be determined. The issue of whether an arbitrator, in the present case, has had conflicts of interest shall be determined under the applicable rules of the Institute and the Swedish Arbitration Act. CSCEC has not established that a conflict of interest is at hand under these rules. A failure to comply with the obligation to inform on circumstances that allegedly constitute a conflict of interest is not an autonomous ground for ineligibility. In addition, CSCEC's claims are factually incorrect.

INTEKO and MOR are not companies belonging to the same group of companies (i.e. they are not affiliates). INTEKO does not own any part of MOR, and vice versa. Ms. B is the majority shareholder of INTEKO. She does not, however, have any direct or indirect ownership in MOR. Moreover, she does not have any influence in the company, whether in a legal or actual sense.

Even if it would be assumed that MOR and INTEKO are affiliated companies, the present situation would not fall under the scope of the provisions in Section 3.1.3 of the IBA Guidelines Orange list. One previous arbitration does not trigger the applicability of said rule.

Prof. K and Prof. S are both members of, or accredited arbitrators at, the same professional associations or arbitration institutes, such as the ICAC, the Russian institute for domestic arbitration proceedings and the Research

Centre of Private Law. The fact that Prof. K and Prof. S are accredited arbitrators at the same arbitration institutes or members of the same professional associations does not constitute a conflict of interests under the Swedish Arbitration Act or the rules of the Institute, nor does it trigger any obligation to inform thereon. Moreover, these circumstances do not fall within the scope of the obligation to inform set out in the IBA Guidelines orange or red lists. Neither INTEKO nor its majority shareholder Ms. B is affiliated in such a way to MOR as claimed by CSCEC. Thus, Prof. S's position at the law firm Legal Intelligence Group does not constitute a conflict of interest.

In his CV, provided to the parties prior to the arbitration proceedings, Prof. K stated that he was a member of the Institute's board. The Institute's rules provide that an objection based on conflict of interests shall be presented within 15 days of the party having become aware of the circumstance upon which the objection is based. CSCEC has not, within 15 days of 29 July 2008, when the company became aware of Prof. K being a member of the Institute's board, raised an objection with respect to conflict of interests. Thereby, this objection is precluded and CSCEC is, pursuant to the second paragraph of Section 34 of the Swedish Arbitration Act, not permitted to base its challenge of the arbitral award on this circumstance.

The fact that Prof. K and advokat H are accredited as arbitrators at the same institutes in several countries does not entail that Prof. K is obliged to inform thereon under the rules of the Institute, the Swedish Arbitration Act or the IBA Guidelines.

Mannheimer Swartling Advokatbyrå did not appoint Prof. K as arbitrator in the arbitration proceedings between Odfjel and Sevmash. He was appointed by Sevmash. Mannheimer Swartling Advokatbyrå was appointed by the counterparty, Odfjel.

The claim that the arbitral tribunal has applied Swedish procedural law principles to determine the extent of the damages

The arbitration agreement provided that the place of arbitration should be Stockholm. In addition thereto, the parties have in the Agreement determined that the Agreement shall be governed by Russian law. Thus, the parties have, by way of these agreements, established for the arbitral tribunal which legal systems that the arbitral tribunal should consider when reviewing disputes under the Agreement. Issues relating to substantive law, for example the interpretation and application of the provisions of the Agreement, shall be determined under Russian law. Issues relating to the arbitration proceedings, i.e. issues of procedural nature, shall firstly be determined by the Institute's rules, and when they provide no guidance, by the Swedish Arbitration Act.

The arbitral tribunal applied the legal system determined by the parties in the arbitration agreement. The arbitral tribunal has not applied Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure, whether directly or analogously. Consequently, the arbitral tribunal was not obliged to inform that this provision was going to be applied.

The arbitral tribunal's decision with respect to the damages is that INTEKO, based on the referenced evidence, has established a right to damages in the amount of USD 22 million. No damages in excess of what had been established by the evidence were awarded to INTEKO. In its grounds, the arbitral tribunal expresses this as follows:

The arbitral tribunal finds that the Claimant [INTEKO] has not established that there are any losses relating to the present matter exceeding USD 22 million. In accordance therewith, the arbitral tribunal awards the Claimant damages in this amount.

Thus, the arbitral tribunal determines the amount of the damages by applying the principle of free evaluation of presented evidence.

The arbitral tribunal has not failed to review some of the grounds for objections referenced by CSCEC

The arbitral tribunal has not failed to review any of the referenced four grounds of objections. To the contrary, the arbitral tribunal has considered them but reached a different conclusion than that maintained by CSCEC. It is also apparent from the arbitral award's recitals that the arbitral tribunal has considered the grounds for objections referenced by CSCEC. The arbitral tribunal is not obliged to in its grounds extensively discuss each ground for objections presented by a party.

Thus, no excess of mandate or procedural error has occurred in the arbitral tribunal's review of the now relevant grounds.

The issue of MISK's signing the Agreement and whether the Agreement has been amended

CSCEC maintains that the arbitral tribunal has failed to review CSCEC's grounds for objections that MISK has in writing agreed to amend the Agreement. In addition, CSCEC maintains that the arbitral tribunal has failed to review whether the Agreement had been amended by INTEKO's approval *ex post* or by its implicit actions. The arbitral tribunal has in fact considered both these objections, but found that the Agreement, considering the provisions of Russian contract law and the provisions of the Agreement as well as the lack of any joint will of the parties, that the Agreement had not been amended in such a way as claimed by CSCEC. This is abundantly clear in the arbitral award.

The issue of the causes of delays in the construction works

CSCEC further maintains that the arbitral tribunal has failed to review causes of the delays in the construction works alleged by the company, namely that

these delays were caused by INTEKO and MISK. In this context, CSCEC maintains that the arbitral tribunal has failed to analyze the concrete causes of the delays. These allegations are incorrect.

The arbitral tribunal has considered the arguments presented by CSCEC, which is clear from the recitals. There, the arbitral tribunal restates all of the grounds for objections referenced by CSCEC in support of its opinion that INTEKO and MISK are responsible for causing the delays. Thus, the arbitral tribunal is well informed on CSCEC's opinion on what had caused the delays. However, the arbitral tribunal has unequivocally found, when determining the cause of the delays, that CSCEC was responsible for causing the delays:

In the present case, there have been several delays caused by the Respondent [CSCEC]: initially the Respondent could not produce a power of attorney to accept handover of the construction site, receive the proper documentation to carry out the construction works at the construction site or procure the administrative permit to import workers into the country and then failed to complete the construction works at the pace set out in the time plan for the works. CSCEC has failed to reach milestones, and it must be held that a situation was at hand in which it was obviously impossible for CSCEC to complete the works in accordance with the time frames of the Agreement.

There was no reason for the arbitral tribunal to further discuss the grounds for objections presented by CSCEC in this context. Thus, the arbitral tribunal has not failed to consider CSCEC's grounds for objections in this context, but has in its review of the causes of the delays found that other circumstances, all on the part of CSCEC, had caused the delays.

The issue of abuse of rights

Finally, CSCEC maintains that the arbitral tribunal has failed to review CSCEC's grounds for objections that INTEKO and MISK have abused their right to terminate the Agreement. This is directly incorrect, which is apparent

when reading the arbitral award. The arbitral tribunal has considered these grounds and carefully states CSCEC's position on this issue in the arbitral award. The arbitral tribunal goes on to state in the arbitral award that "*the arbitral tribunal has considered each of the Respondent's [CSCEC] objections, including the objections concerning the abuse of rights and rejects all these objections.*"

The arbitral tribunal finds that INTEKO and MISK were entitled to terminate the Agreement due to CSCEC's breaches of contract. The breaches of contract were of such nature that CSCEC, in the opinion of the arbitral tribunal, "*lost the opportunity to restore the confidence in [its] ability to meet its obligations under the Agreement and [the existing time plan]*." In light of this conclusion there was no reason for the arbitral tribunal to in its grounds discuss whether the termination had been carried out through an abuse of rights on the part of INTEKO and MISK; the arbitral tribunal had already concluded that a right to terminate was at hand due to CSCEC's breaches of its obligations under the Agreement.

Thus, the arbitral tribunal has not failed to consider any of the four referenced grounds for objections. To the contrary, the arbitral tribunal has considered them, but come to a conclusion deviating from that maintained by CSCEC. No excess of mandate or procedural error has occurred in the arbitral tribunal's review of the now relevant grounds.

In addition to the above, CSCEC has not established any causality between the alleged procedural errors, or excess in mandate, and the outcome of the case. Mere statements to this effect are insufficient.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The parties have referenced extensive documentary evidence. Upon CSCEC's request Messrs. V, K, S and C have been heard as witnesses.

GROUNDS OF THE COURT OF APPEAL

Has Prof. K been ineligible as arbitrator?

The first paragraph of Section 8 of the Swedish Arbitration Act provides that an arbitrator shall be impartial. The second paragraph provides that an arbitrator shall be dismissed if there is any circumstance that could raise doubts as to his impartiality. Items 1-4 of the provision provide circumstances that shall always be deemed to raise doubts as to an arbitrator's impartiality. The list is exemplifying but not exhaustive (Government Bill 1998/99:35 p. 218). Section 9 obliges an arbitrator to inform the parties on circumstances that could under Section 8 prevent him or her from being arbitrator.

The Supreme Court has in the cases NJA 1981 p. 1205 and NJA 2007 p. 841 held that the provisions on conflict of interest take aim at safeguarding that justice is objective and that it is imperative that the rules are applied in such a manner that an arbitrator falling within the scope of these provisions cannot partake in arbitration proceedings even if there in the individual case is no reason to assume that he or she when dealing with the case or deciding its outcome would be affected by his or her relationship to one of the parties. Thus, the determination of whether there are circumstances that could raise doubts as to the impartiality of an arbitrator shall be determined on objective grounds. In the aforementioned cases, it is maintained that particularly high standards with respect to objectivity and impartiality must be met for arbitrators, since errors in the evaluation of evidence and in the application of the law cannot lead to the annulment of an arbitral award.

Item 5 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award shall be wholly or partially annulled following challenge proceedings if an arbitrator due to any of the circumstances listed in Section 7 (not relevant here) or Section 8 was ineligible. However, a party may lose the right to challenge the arbitral award if he can be deemed to have waived that right, for example by participating in the arbitration proceedings without raising objections or if more than fifteen days have passed from the

party becoming aware of the circumstance (the second paragraph of Section 34 and the first paragraph of Section 10).

Also the Institute's rules were applicable to the arbitration proceedings. Article 14(1) thereof provides that each arbitrator shall be impartial and independent. Further, Article 14(2) provides that prior to an arbitrator being appointed he shall inform on the circumstances that raise doubts as to his or her impartiality or independence. Article 14(3) provides that an arbitrator shall immediately inform the parties and the other arbitrators if during the arbitration proceedings a circumstance arises that could raise doubts as to his or her impartiality or independence. The effects of these provisions are in all material aspects the same as those set out in the Swedish Arbitration Act.

In the present case, CSCEC has to a large extent relied on the guidelines issued by The International Bar Association (the IBA). Even if these guidelines are not directly applicable they can, considering that the present case relates to international arbitration, be of some interest (NJA 2007 p. 841).

CSCEC has referenced several circumstances that could raise doubts as to the impartiality or independence of Prof. K in the arbitration proceedings.

The previous arbitration proceedings between Joy-Lud and MOR

The first circumstance referenced is other arbitration proceedings between Joy-Lud and MOR, in which Prof. K is an arbitrator, and that MOR is an affiliate to INTEKO and MISK. In this context, CSCEC has referenced Section 3.1.3 of the IBA Guidelines orange list, i.e. that the arbitrator during the preceding three years has been appointed arbitrator two or more times by the same party or by a party in the same group of companies as that party.

The Court of Appeal cannot reach any other conclusion than that the said Section provides that it is only when an arbitrator during a three year period for the third time is appointed as arbitrator by the same party or by an affiliate of that party that the arbitrator is obliged to inform thereon. In the present case, CSCEC has only referenced one prior arbitration.

CSCEC has in the present case attempted to establish, through documentary evidence as well as through witnesses, how INTEKO and MOR, even if not formally members of the same group of companies nevertheless formed part of Ms. B's and her husband Mr. L's companies and sphere of interest. In light of the conclusion reached by the Court of Appeal, the relationship between the companies is however irrelevant.

There is no example in Swedish case law that an arbitrator has been deemed ineligible because he has once earlier been appointed as arbitrator by the same party or by a member of the same group of companies (cf. Svea Court of Appeal's judgment of 7 December 2006 in T 5044-04).

Thus, the prior arbitration proceedings between Joy-Lud and MOR do not amount to a circumstance that could render Prof. K ineligible as arbitrator. What CSCEC has referenced on the ties between Prof. S and Prof. K does not lead to any other conclusion.

Earlier arbitration proceedings with Prof. K in which Mannheimer Swartling Advokatbyrå has acted as counsel

In addition to advokat H having been counsel to MOR in the arbitration proceedings between Joy-Lud and MOR, CSCEC has referenced to other arbitration proceedings in which Prof K. has been arbitrator and Mannheimer Swartling Advokatbyrå has acted as counsel to one party, namely arbitration proceedings between Odfjel and Sevmash. In this context, CSCEC has referenced to Section 3.3.7 of the IBA Guidelines.

The fact that a law firm is involved in having a specific arbitrator often appointed as arbitrator is something that could give the impression that the arbitrator has ties to the law firm and thereby raise doubts as to the arbitrator's impartiality. The number of previous appointments and their scope is then relevant, but an assessment of the entire situation must be undertaken (NJA 2010 p. 317).

It has been established that Prof. K was not appointed by Odfjel, which was represented by counsel at Mannheimer Swartling Advokatbyrå, but by the

counterparty. Not even having regard to the provision of the IBA Guidelines, i.e. that an arbitrator has been appointed by the same counsel or law firm more than three times during the preceding three years, has Prof. K been under any obligation to inform on what occasions has been appointed as arbitrator by Mannheimer Swartling Advokatbyrå as party-appointed arbitrator. What has been referenced can thus not render Prof. K ineligible as arbitrator.

Prof. K's membership of the Institute's board

CSCEC has maintained that Prof. K was a member of the Institute's board during 2007-2009, on which he under Section 3.5.3 of the IBA Guidelines was obliged to inform.

It is stated in Prof. K's CV, provided to the parties prior to the commencement of the arbitration proceedings, that he was a member of the Institute's board. Thus, the information was available to CSCEC, which was entitled to object that he was ineligible. CSCEC did not. Therefore, the Court of Appeal finds that CSCEC has participated in the arbitration proceedings without raising any objections and CSCEC must therefore be deemed to have waived its right to rely on the circumstance in the meaning set out in the second paragraph of Section 34 of the Swedish Arbitration Act. Thereby, the circumstance must be held precluded.

Professional ties between Prof. K and advokat H

In this context, CSCEC has referenced that Prof. K and advokat H have or have had professional relations by their simultaneously being board members of the Institute and of other foreign arbitration institutes or accredited by these.

Even if there are several professional ties between Prof. K and advokat H, it has not been established that they are due to any other fact than that they have cared for their respective interests and developed their respective professional careers within arbitration law. This has not amounted to relations between Prof. K and advokat H, which could damage their trustworthiness.

Summary and overall conclusion

As evident from the above, the Court of Appeal has found that it has not been established that any of the circumstances referenced by CSCEC individually have amounted to rendering Prof. K ineligible as arbitrator. Further, the Court of Appeal does not find that Prof. K has been obliged to inform on any of these circumstances when he was appointed as arbitrator.

Even if an individual circumstance does not render an arbitrator ineligible, several circumstances taken as a whole might. Since not any of the circumstances referenced by CSCEC has appeared dubious or particularly suspicious, a review of all circumstances seen as a whole does not lead to the conclusion that Prof. K shall be deemed to have been ineligible as arbitrator in the arbitration proceedings.

The claim that the arbitral tribunal has applied principles of Swedish procedural law to determine the extent of the damages

Items 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provide that an arbitral award shall be annulled following challenge proceedings if the arbitrators have rendered an arbitral award later than the deadline set by the parties or if they have otherwise exceeded their mandate (2), or if it otherwise, without them being caused by a party, procedural errors occurred which likely affected the outcome of the case (6).

CSCEC has maintained that the arbitral tribunal in its award, disregarding the provisions of Russian law which the parties had agreed as governing law, has applied the provision set out in Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure. CSCEC further maintains that the arbitral tribunal has applied the provision set out in Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure incorrectly and that the arbitrators at least should have informed the parties that Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure might be applied.

It is evident from the arbitral award (item 612) that the arbitral tribunal could not find that INTEKO’s losses amounted to the claimed amount of USD 39

million. Thereafter, the arbitral tribunal discusses CSCEC's objection (item 613) that when there is insufficient evidence to establish the exact loss, INTEKO has no right to compensation under Russian law. The arbitral tribunal's conclusion was that this position is obsolete and reflects agreement relations under the days of a centrally planned economy. According to the arbitral tribunal the Russian Civil Code accepts a determination of losses without exact evidence. Thereafter, the arbitral tribunal discusses what evidence that is required in Swedish arbitration proceedings to award damages and establishes that the arbitral tribunal is entitled to freely determine, following its own values, what is a reasonable amount to be awarded as damages as compensation for losses. Hereafter follows the arbitral tribunal's conclusion that INTEKO had not established any losses exceeding an amount of USD 22 million.

It is undisputed between the parties that Russian law should govern the Agreement. CSCEC appears to maintain that entailed that the arbitral tribunal should also be bound by Russian law in determining the amount of the damages. The Court of Appeal finds that CSCEC has not established this to be the case. In other aspects the Institute's rules should apply, and when no guidance was provided therein, the Swedish Arbitration Act. Article 26(1) of the Institute's rules provides that the permissibility of evidence, its relevance, and importance shall be determined by the arbitral tribunal.

It can be noted that the arbitral tribunal in its grounds does not mention Section 5 of Chapter 35 of the Swedish Code of Judicial Procedure. Its starting point appears to be that an assessment as to what is reasonable is not contrary to Russian law, and that it would comply in general with what is generally applicable in international arbitration proceedings and in particular in Swedish arbitration proceedings.

The conclusion of the Court of Appeal is that the arbitral tribunal was not bound by Russian law when determining the amount of the damages and that it has not been established that the arbitral tribunal in fact applied Section 5 of

Chapter 35 of the Swedish Code of Judicial Procedure. Thus, the arbitral tribunal was under no obligation to inform thereon.

Thus, the Court of Appeal does not find that the arbitral tribunal, based on the now relevant grounds for objections, has exceeded its mandate or that a procedural error occurred that likely affected the outcome of the arbitration case.

The claim that the arbitral tribunal has failed to consider certain grounds for objections referenced by CSCEC

Section 31 of the Swedish Arbitration Act contains provisions on the drafting and contents of an arbitral award. It is provided that the arbitral award shall be in writing and be signed by the arbitrators. NJA 2009 p. 128 provides that the arbitral award shall contain grounds but that only completely non-existent grounds or grounds, having regard to the circumstances, that can be equated to non-existent entail that a procedural error has occurred.

The arbitrators should verify that the arbitral award sufficiently discusses all motions and all grounds and objections thereto to the extent required. However, the requirement that the arbitrators shall discuss all issues in the grounds does not entail that each presented statement shall be dealt with (Heuman, Lars, Skiljemannarätt, p. 511).

Initially it could be noted that the arbitral tribunal in its recitals has described CSCEC's now relevant grounds for objections, which in itself supports that they were also considered.

The grounds for objections that MISK in writing has accepted to amend the Agreement and that the Agreement has been otherwise amended

One key issue in the arbitration proceedings was whether the original time plan had been amended or not. INTEKO and MISK based their right to terminate the Agreement on the fact that CSCEC was in delay. CSCEC's position was that the time plan had been amended by, amongst other things, MISK in writing having accepted an amendment, that an amendment had been implemented by implicit actions and that an amendment had been

accepted *ex post* by INTEKO and MISK or that they by their actions no longer could maintain that any amendments should be in writing.

The arbitral award (item 610) contains summary conclusions on the issue of whether the time plan had been amended. The arbitral tribunal holds that the events, motions and actions upon which CSCEC based its claims, did not establish that the time plan had been amended so that the completion dates of the works had been postponed to later dates than the original dates. This is noted following the arbitral tribunal's having in more detail discussed what had transpired and what is legally required for an amendment of the Agreement and the time plan to be deemed to have taken place. Thus, in the Court of Appeal's view the claim that the arbitral tribunal has failed to consider the now relevant grounds for objections is unfounded.

The grounds for objections concerning the cause of the delays

In the arbitration proceedings CSCEC maintained that INTEKO and MISK had caused some of the delays in the works. As a result thereof, CSCEC ought to have been entitled to an extension of the original time plan. According to CSCEC, these objections have not been considered by the arbitral tribunal whatsoever.

It is correct that the arbitral tribunal does not explicitly state an opinion as to the different delays referenced by CSCEC (items 610-611). In the Court of Appeal's opinion, the grounds must be read so that the arbitral tribunal on the one hand notes that the parties on both sides are responsible for delays, but what determines the right to terminate are the delays caused by CSCEC. Hereby, the arbitral tribunal has in the Court of Appeal's view sufficiently considered also the now relevant grounds for objections.

The grounds for objections that INTEKO and MISK have abused their right to terminate the agreement

In this context CSCEC has maintained that its grounds for objections were not only aimed at the extent of the damages, which was considered by the arbitral tribunal, but mainly at the actual right to terminate the agreement.

The arbitral tribunal has in the section concerning the amount of the damages (item 612) stated that it has considered each of CSCEC's objections, including the objections concerning the alleged abuse of rights and that it rejects all of these objections. Against this background it is in the opinion of the Court of Appeal clear that also these grounds have been sufficiently considered by the arbitral tribunal.

In sum, the Court of Appeal has not found with respect to these grounds that any excess of mandate or procedural errors have occurred in the arbitration proceedings, which in its turn entails that the claimant's motions shall be rejected.

Litigation costs

Upon this outcome, CSCEC shall be ordered to compensate INTEKO and MISK for litigation costs.

CSCEC has not attested the reasonableness of any amount exceeding EUR 150,000 of the claimed amount for compensation for costs for legal counsel having regard to the limited specification of work performed, which does not include information on time spent. For the amounts in excess thereof, CSCEC has left it to the Court of Appeal to determine the reasonableness of the amount.

The provisions of Section 8 of Chapter 18 of the Swedish Code of Judicial Procedure entails that a cost, to the extent not attested by the counterparty, cannot be compensated unless it is considered reasonable with respect to what it purportedly covers. Thus, it is not sufficient that the amount in itself does not appear unreasonable. With respect to compensation for legal counsel it should be noted that the compensation is not – as opposed to compensation to counsel under the Legal Aid Act – mainly determined based on time spent. Such compensation should be determined having regard to, amongst other things, the nature and scope of the case and the care and skill with which the work has been carried out. In this review, such circumstances as the value of

the dispute and other aspects of the importance of the outcome of the case to the party (NJA 1997 p. 854).

INTEKO and MISK have claimed compensation in the amount of EUR 483,937, out of which EUR 480,698 comprises cost for legal counsel, and EUR 3,239 plus SEK 535,342 for expenses. The case has included a main hearing lasting 2.5 days. The case file has been extensive and involved many of the issues that could lead to the annulment of an arbitral award. Already against this background relatively high costs for legal counsel should be accepted. However, CSCEC was the claimant and bore the burden of proof. In proceedings of this nature it is commonplace, and understandable, that the legal costs of the claimant are higher than those of the respondent. In this case, the amount claimed by CSCEC is EUR 6,642 higher than that claimed by INTEKO and MISK.

There are no grounds to object to the manner in which the counsels to the respondent have conducted their assignment. To the contrary, it has been carried out commendably. The specification of the costs submitted to the court is, however, scant. It is not possible from INTEKO's and MISK's invoice to determine time spent, which measures that have been particularly time consuming or otherwise why such a high cost should be accepted. The fact that INTEKO and MISK have chosen to have three counsels present at the main hearing compared to CSCEC's two should – even if there can be a need to divide the work between several people – not lead to CSCEC having to pay for the extra work in which this choice to some extent should reasonably result.

Having regard to all circumstances the Court of Appeal finds that the claimed amount is too high and should consequently be decreased. The Court of Appeal has assessed the scope and complexity of the challenge proceedings and compared this with the work load of the counsel on both sides and the amounts claimed by them. In the Court of Appeal's opinion a reasonable fee for legal counsel is EUR 320,000. The other amounts claimed are reasonable.

The judgment of the Court of Appeal may not be appealed (second paragraph of Section 43 of the Swedish Arbitration Act).

[ILLEGIBLE SIGNATURES]

The decision has been made by: Senior Judge of Appeal KB and Judges of Appeal ME and DÖ (reporting Judge of Appeal).