SVEA COURT OF APPEAL	**DECISION**	**CASE no.**
Department 02	19 February 2016	T 5296-14
Division 020102	Stockholm	

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MATTER
Annulment etc. of the arbitration award rendered in Stockholm on 7 March 2014, amended on 27 March 2014

DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claim that the circumstance of the links of arbitrator Albert Jan van den Berg to Tsinghua Law School in China should be disallowed.

2. The Court of Appeal dismisses the action of Cypress Oilfield Holdings Limited.

Doc. ID 1241863

3. Cypress Oilfield Holdings Limited shall pay litigation costs to China Petrochemical International Company Limited of SEK 153,849 and USD 1,036,101.38, of which USD 715,588 relates to fees for counsel, plus interest on the two first-mentioned amounts under section 6 of the Interest Act from the date of the Court of Appeal's decision until payment is made.

4. Jonas Löttiger shall jointly and severally with Cypress Oilfield Holdings Limited pay litigation costs to China Petrochemical International Company Limited of USD 120,000, plus interest on this amount under section 6 of the Interest Act from the date of the Court of Appeal's decision until payment is made.

5. The Court of Appeal orders that the confidentiality laid down under ch.36 s.2 of the Public Access to Information and Secrecy Act (2009:400) shall continue to apply to data in drawings (Court of Appeal exhibits 208–211) that have been disclosed in the main hearing of the Court of Appeal behind closed doors. This includes data relating to these drawings in the audio recording from the examination of John Slater during the hearing, which was held behind closed doors.

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1. BACKGROUND

On 14 May 2010 Cypress Oilfield Holdings Limited (below COHL) and China Petrochemical International Company Limited (below CPIC) made an agreement (below the Agreement) whereby COHL would purchase from CPIC five oil rigs intended for oil drilling. Under the Agreement CPIC was to manufacture the oil rigs in accordance with the specifications, descriptions and technical requirements defined in an appendix to the Agreement, of which one technical requirement was that the steel used in the manufacture of the oil rigs' masts and substructures should withstand a full load at –20°C.

The agreed purchase price was USD 61,733,810. On 17 June 2011 CPIC had still not delivered any of the rigs to COHL. The latter then cancelled the Agreement with CPIC in accordance with an arbitration clause in it relating to arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration V, 047/2012). The arbitral tribunal finally came to consist of Professors Albert Jan van den Berg (appointed by CPIC) and Alexander Komarov (appointed by COHL), with lawyer Jeffrey M. Herzfeld as chairman.

In the arbitration case CPIC claimed that COHL had committed a breach of contract by cancelling the Agreement without reason and refusing to take delivery of the oil rigs. COHL, for its part, claimed that CPIC was in delay with delivery and that the oil rigs did not meet the technical specifications laid down in the Agreement, and that COHL was therefore obliged neither to take delivery of the rigs nor make any payment to CPIC. CPIC, on the other hand, maintained that the oil rigs had been constructed in accordance with the Agreement and that it was not in delay with delivery. Both parties put forward claims for compensation in the arbitration.

The arbitral tribunal identified two central questions in the arbitration (paragraph 305 of the award). The first of these was whether CPIC was in delay when COHL cancelled the Agreement and whether this delay entitled COHL to cancel the Agreement. The second was whether COHL had been entitled to reject delivery and included, among other things, whether the steel used by CPIC in the masts and substructures conformed to the technical specifications set out in the Agreement.

The arbitral tribunal rendered an award on 7 March 2014. It found, among other things, that CPIC had not been in delay with delivery and that COHL had therefore not been entitled to cancel the Agreement; by not taking delivery of the oil rigs, it had committed a breach of contract. Under the award COHL was obliged, among other things, to pay CPIC a total of just over USD 38 million plus interest. On 27 March 2014 the tribunal announced an amendment to the award.

2. CLAIMS IN THE COURT OF APPEAL

COHL has claimed that the award of 7 March 2014, amended on 27 March 2014, should be declared void or be set aside in full. COHL has left it to the Court of Appeal to examine the claims in the order which the Court finds appropriate.

CPIC has objected to COHL's claim in one respect, claiming that the circumstance referred to by COHL of Albert Jan van den Berg's links to Tsinghua Law School in China should be disallowed.

COHL has opposed the claim for dismissal.

The parties have claimed their litigation costs. CPIC has in this connection claimed that Jonas Löttiger should be obliged, regardless of the outcome of the case, to compensate CPIC jointly and severally with COHL for its costs in the amount of USD 365,000.

Jonas Löttiger has objected to the claim for joint and several payment liability.

3. THE GROUNDS FOR COHL's ACTION

3.1 The actions of the arbitral tribunal during the preparatory proceedings

3.1.1 The arbitral tribunal refused without reasonable justification to approve COHL's request to be allowed to inspect the oil rigs

It was clear right from an early stage (in CPIC's Request for Arbitration, COHL's Answer to the Request for Arbitration and Claimant's Comment on Respondent's Answer etc., as well as in CPIC's Statement of Claim) that the dispute in the first place concerned the question of whether the masts and substructures chosen by CPIC met the performance requirements set out in the technical specifications, namely that of withstanding a full load at minus 20℃, and whether CPIC had appropriately limited its loss. After COHL had requested to be allowed to inspect the rigs in order to produce evidence of the inadequacy of the steel that CPIC had used for the rigs' masts and substructures as well as evidence as to whether CPIC had limited its loss, the arbitral tribunal rejected this demand in its decision of 7 January 2013 (Procedural Order No. 3).

This decision was made without sufficient justification and was comparable to rejecting evidence. The arbitral tribunal had a duty to grant COHL's inspection request and had no discretionary right to refuse it. The request was justified in view of the investigation in the arbitration proceedings since it related to circumstances that were relevant and the matter had not been adequately investigated in evidence previously referred to. It is clear from the tribunal's reasons for its decision that it considered that these circumstances existed. Through its rejection, nevertheless, of COHL's inspection request, the tribunal exceeded its mandate.

An inspection would not have been expensive or burdensome for CPIC in light of the value of the objects in dispute and there was no risk that it would have delayed the arbitration, as the arbitral tribunal maintained.

In its reasons for refusing to allow COHL to inspect the rigs, the arbitral tribunal stated, among other things, that COHL's request was "premature". The tribunal stated that it had to see first what other evidence was referred to before it could decide whether an inspection would add enough to make the new evidence outweigh the costs and inconvenience that an inspection would entail. This was not an acceptable reason for denying an inspection request.

It is true that the arbitral tribunal left it open for COHL to come back with a new request when the situation regarding proof in general would be better known; however, in its decision the tribunal set the bar very high for granting a new inspection request. COHL would then have been compelled to present an argument to the tribunal to convince it that "such further evidence would be likely to have a material impact on the outcome of the arbitration". The tribunal was not entitled to set such a high threshold of proof. It had a duty to grant COHL's inspection request as soon as it could be assumed that an inspection would be relevant as evidence in the arbitration. This requirement had been met.

After COHL protested against the decision in a letter to the arbitral tribunal dated 10 January 2013, the tribunal endorsed this in its decision on 18 January 2013 (Procedural Order No. 4).

The arbitral tribunal never gave COHL an opportunity to come back since, as described below, shortly after CPIC had presented extensive new evidence in the steel issue, it laid down in a decision on 16 July 2013 that neither party would be allowed to refer any new evidence. The tribunal subsequently allowed the bulk of CPIC's new evidence, without giving COHL an adequate opportunity to respond to it.

The question of a new inspection did not arise for COHL until the presentation of CPIC's extensive new evidence in the steel issue and the claim that the burden of proof lay with COHL, since COHL's inspection request was aimed mainly at the hearing of evidence in the steel issue. COHL made up its mind on 15 July 2013 to make a new inspection request after it become aware of CPIC's new evidence and assertion regarding the burden of proof. However, the opportunity for a new inspection passed as a result of the arbitral tribunal's decision on the following day, 16 July 2013, that neither party would subsequently be allowed to submit further evidence.

The decision by the arbitral tribunal, notwithstanding COHL's protests, to refuse to allow COHL to inspect the rigs is clearly in this light a grave procedural error, resulting in COHL being refused an opportunity to acquire important evidence and thereby prepare and prosecute its action. This is all the more serious as the tribunal, later on in the arbitration in the way described below, came to put the burden of proof in the steel issue on COHL (paragraph 447) and laid down a threshold of proof that could only be met through access to detailed information about the steel and the masts and substructures (paragraph 469). As a

result, moreover, of the tribunal, in the manner described below, later in the award placing importance on evidence that CPIC had acquired from its own inspection of the rigs in the course of the arbitration, in which COHL had not been permitted to take part, it is clear that the tribunal's handling of COHL's inspection request is in retrospect contrary to the principle of equal treatment.

It was incumbent on the arbitral tribunal, when it made up its mind to lay the burden of proof on COHL, to reconsider *ex officio* and grant COHL's inspection request, or at any rate give COHL a genuine opportunity to make a fresh inspection request after CPIC on 11 July 2013 had made a submission and put forward new evidence in the steel issue that had previously been withheld and had claimed in writing on 15 July 2013 that the burden of proof lay with COHL in the steel issue.

CPIC objected to COHL's inspection request, arguing that there was no need for an inspection, despite CPIC having previously disputed in its Comment on the Respondent's Answer and Counterclaim that the available investigation in the steel issue was sufficient and having claimed that "the Respondent is put to strict proof" in regard to its assertions in the steel issue. CPIC's opposition to COHL's attempt to bring about an inspection thus amounted to obstruction of the arbitration proceedings. The arbitral tribunal went along with this, thereby contributing to COHL not being given reasonable opportunities to prepare and prosecute its case.

What has happened constitutes such grave errors of procedure or an excess of mandate that the arbitration and the award are manifestly incompatible with the basic principles of Swedish law. The award should therefore be annulled or set aside in full.

3.1.2 The arbitral tribunal amended without reasonable justification its decision about the production of all the dimensional drawings for masts and substructures

COHL set out in writing on 1 February 2013 its disclosure requests, asking, inter alia, in its production request no. 11 for the production of "all dimensional drawings for the Masts and Substructures". As justification for its request, COHL stated that the drawings could be of relevance for evidence of conformity with the requirements of the Agreement that the rigs' masts and substructures should withstand a full load down to –20°C.

In a decision on 8 March 2013 (Procedural Order No. 5), the arbitral tribunal reached a decision on the parties' requests for production. CPIC had acknowledged production request no. 11 "to the extent that the dimensional drawings for the Masts and Substructures exist, are within the Claimant's possession, custody or control, and are not already in Respondent's possession". The tribunal granted production in accordance with this concession.

After CPIC in a written communication on 6 May 2013 had referred to evidence which showed that there were more than 1,000 dimensional drawings for the mast alone and had at that time handed over a total of only 132 drawings for masts and substructures, COHL drew this to the attention to the arbitral tribunal in writing on 13 May 2013. On 15 May 2013 the tribunal confirmed in Procedural Order No. 7 its decision for the production of all the dimensional drawings for masts and substructures. At the same time CPIC was given another week to complete production, which should have been done as early as 15 April 2013.

CPIC then for the first time made written objections on 17 May 2013 to COHL's production request no. 11, asking for the production decision to be reconsidered. It claimed that the decision only covered drawings which referred to temperature and that the production decision had been fulfilled, and that COHL was now requesting documents that it not previously asked for. CPIC further required COHL to agree to a confidentiality undertaking. At the same time CPIC objected to COHL being additional time greater than three days.

On 21 May 2013 the arbitral tribunal made a new decision (Procedural Order No. 8) concerning production request no. 11. In this decision it declared that it confirmed its previous document production decision. In actual fact, however, the tribunal amended its decision in line with CPIC's wish that it should reconsider it, since at the same time (i) in what was termed a "clarification" it limited the extent of the drawings to be produced to those drawings that were "relevant as evidence of the Agreement's temperature requirements" and (ii) in paragraph c) it gave CPIC an opportunity to require a confidentiality agreement for those drawings that it considered to amount to a company secret. This change was made without reasonable justification. At the same time the tribunal allowed COHL only a further six days in which to submit its Statement of Rejoinder, from 14 to 20 June 2013, despite the fact that it had not yet received the drawings. On the other hand, the tribunal allowed CPIC an extension of a week in which to complete document production, i.e. until 28 May 2013,

which was also conditional on the parties reaching agreement about a confidentiality undertaking.

COHL initially interpreted the arbitral tribunal's decision of 21 May 2013 as confirmation of its earlier production decision and wrote to the tribunal on 24 May, protesting only against the inadequate extension of time. However, in the ensuing discussions with CPIC about the matters of confidentiality, it emerged that the parties held different views about the meaning of the decision of 21 May 2013. COHL therefore conveyed its understanding of the content of the production decision to the tribunal on 30 May 2013. It also protested against the interpretation of the decision made by CPIC, whereby it had been left to the latter to decide which drawings were covered by production, since the question of which drawings were relevant became a matter of dispute between the parties when CPIC maintained in writing on 17 May 2013 that only the drawings that referred to temperature were relevant, whereas it was COHL's understanding that all the drawings were relevant.

On 31 May 2013 the arbitral tribunal confirmed in Procedural Order No. 9 its decision to limit disclosure under production request no. 11 to drawings that were relevant to the temperature sensitivity of the masts. The tribunal then also gave instructions for the confidentiality agreement.

By amending its production decision in line with CPIC's wishes, the arbitral tribunal gave CPIC an opportunity to itself decide which drawings should be handed over. The tribunal thereby prevented COHL from producing evidence about the unsuitability of the steel for its purpose, creating an imbalance between the parties in the matter of proof. The decision of the arbitral tribunal in Procedural Order No. 8 to amend and limit the document decision in Procedural Order No. 5 can be compared with rejecting evidence that was necessary for COHL to enable it to prepare and prosecute its case, especially as the tribunal, as it later turned out, in its award came to put the burden of proof on COHL to show that the steel used by CPIC was not fit for purpose (paragraph 447), setting a threshold for proof that could only be met by access to detailed information about the steel and masts and substructures (paragraph 469).

The arbitral tribunal had a duty to approve COHL's request for production and had no discretionary right to limit this. COHL's request was justified in view of the investigation in the arbitration since it related to circumstances that were relevant and the matter had not been adequately investigated through evidence previously referred to. It would not have been difficult for CPIC to produce all the drawings since they could be forwarded electronically and did not need to be converted to a format suitable for printing.

The arbitral tribunal's reconsideration and curtailment of the production decision was also arbitrary and contrary to the principle of equal treatment. When COHL had asked the tribunal to reconsider its decision to deny its inspection request, the tribunal quoted Procedural Order No. 4 of 18 January 2013 to COHL, saying that it had had an opportunity to mention all the reasons in its very first request. When CPIC put forward new objections to the production decision, the attitude of the tribunal was different. The tribunal then ignored COHL's objection that CPIC's opposition to COHL's production request no. 11 had been made too late. The parties were not treated equally in this respect. Instead CPIC was favoured at the expense of COHL. In view of the position of the tribunal on the question of inspection and in general as part of a larger pattern, the amendment to the production decision clearly amounts to favouring CPIC at the expense of COHL and therefore t a breach of the principle of equal treatment.

CPIC obstructed the arbitration by not handing over the proper documents in the production process, by handing over material too late and unsorted and by handing over documents in the arbitration in Chinese without an English translation. The time that was available to COHL as a result of the obstruction by CPIC also became too short to enable its experts to analyse and consider the material. Moreover, the documents that were finally handed over (107 out of approximately 3,000) were not detailed enough to enable COHL to use them for the purpose it intended. COHL therefore came to lack an opportunity via its own experts to product evidence in the steel issue and on the question of limiting loss. As a result of the tribunal in limiting its production order abetting and passively accepting CPIC's obstruction of the production process and, as described in more detail below, successively giving CPIC more time without compensating COHL for this, COHL came to lack sufficient time in which to prepare and prosecute its case.

What has happened amounts to such grave procedural errors that the arbitration and the award have clearly been contrary to the basic principles of Swedish law. The award should therefore be annulled or set aside in full.

3.1.3 The arbitral tribunal allowed extensive and important new evidence from CPIC at a late stage of the arbitration, without giving COHL an opportunity to respond to it

The timetable for the arbitration was decided in the arbitral tribunal's email to the parties on 18 March 2013, against which COHL protested. In this it was decided, among other things, that CPIC should submit its statement of evidence on 6 May 2013 and that the parties should have an opportunity to submit rebuttal evidence by 10 July 2013.

In its Statement of Evidence dated 6 May 2013, CPIC stated, among other things, in the steel issue that "Claimant will respond to these issues at the appropriate time" and that "The Claimant reserves the right to provide expert evidence in rebuttal to any claims made by the Respondent with regards to the material used to build the mast and substructure of the Rigs", in spite of the fact that the steel issue was also relevant to CPIC's own case.

COHL protested against CPIC being allowed to submit comments and evidence at a later date in its Statement of Rejoinder on 20 June 2013 and in writing on 10 July 2013, when it specifically protested at CPIC being allowed to submit an opinion from an expert who had not yet been referred to, namely John Slater. That CPIC had such plans was clear from the details of a draft common hearing bundle drawn up by CPIC and sent to COHL.

On 11 July 2013, i.e. one day late in relation to the timetable, CPIC submitted, in addition to rebuttal evidence, extensive new evidence. This included an opinion from one John Slater, who had not previously been referred to by CPIC. Enclosed with the opinion was an important article containing technical information.

After COHL had received John Slater's opinion, COHL submitted on 14 July 2013 brief opinions from its experts Stephen Graham and John Hadjioannou, commenting on Slater's opinion.

After CPIC had written to the arbitral tribunal on 15 July 2013, commenting on COHL's protest and (incorrectly) claiming that Slater's submission "was filed solely in response to issues and evidence in support of the Respondent's Counterclaims", the tribunal wrote to the parties on 16 July 2013, accepting Slater's opinion as a rebuttal, with no mention of the fact that it had been submitted too late. At the same time it found that the reports of Graham and Hadjioannou should be accepted, despite having been submitted too late, but that no additional evidence would be accepted from either party. At the same time the tribunal rejected comments from John Hadjioannou on a written witness statement from CPIC's witness Roger M. Barnes, saying that the timetable gave no room for "a third round of witness exchanges".

The acceptance by the arbitral tribunal of John Slater's opinion as rebuttal evidence was a procedural error. Slater's opinion related to the steel issue, which was relevant to CPIC's claim, something which is clear not least from the fact that in its award the tribunal takes a view about Slater's opinion, despite the fact that as a result of the outcome in the matter of cancellation it never went into any examination of COHL's counterclaim.

It turned out later that COHL's lack of evidence in the steel issue was of crucial importance for the outcome. As a result of COHL having being prevented in the way described here from producing rebuttal evidence against the evidence that CPIC was allowed to submit as late as 11 July 2013 and later to update, the arbitral tribunal discriminated against COHL, contrary to the requirement of equal treatment. What has happened amounts to a grave procedural error and an excess of mandate, giving rise to the award being set aside in full or annulled, since the award is manifestly incompatible with the basic principles of Swedish law.

3.1.4 The arbitral tribunal disadvantaged COHL in its time planning and did not give it sufficient time to prepare and prosecute its case, particularly in regard to the evidence

After COHL's chief counsel in the arbitration, Patricia Casey, had fallen ill in February 2013 and had had a serious operation in March 2013 with a long period of convalescence, COHL requested an extension of time in view of what had occurred. However, on 18 March 2013 the arbitral tribunal decided to keep to the timetable decided earlier. COHL is critical of this decision, not because the date set for the main hearing was in itself unsuitable, but because

keeping to this timetable meant that it would not have sufficient time and opportunity to prosecute its case during the written preparatory proceedings.

In this decision the arbitral tribunal acted contrary to the principle of equal treatment by setting a timetable for arbitration which to a very large extent increased the time available to CPIC for its procedural documents, while at the same time the timetable limited the time available to COHL for its procedural documents. CPIC had had seven months and two weeks in which to draw of a Statement of Claim, which was submitted on 26 November 2012, while COHL had had less than two months at its disposal in which to draw up its Statement of Defence and Counterclaim, which was submitted on 18 January 2013. In accordance with the decision of the tribunal on 18 March 2013 in an email from Jeffrey Hertzfeld, CPIC would have another three weeks and three days in which to complete its Claimant's Reply and Defence to Counterclaim, thereby being given almost four months in which to complete its Reply and Defence to Counterclaim, i.e. from 18 January 2013 until 6 May 2013. In contrast, the tribunal curtailed COHL's time for its Respondent's Rejoinder from six weeks to five weeks and four days after receiving the Claimant's Reply and Defence to Counterclaim, i.e. from 6 May 2013 to 14 June 2013, and COHL, according to the planning in the preliminary timetable, was to receive CPIC's Statement of Evidence and written testimony as well as written witness statements and export opinions with this submission. In addition, COHL, unlike CPIC, was dependent on receiving documents in the production process to enable it to draw up its Respondent's Rejoinder. According to the decision of 18 March 2013, COHL was also to receive CIPC's witness statements and expert opinions referred to as rebuttal evidence two weeks and five days before the start of the final hearing. The timetable set by the arbitral tribunal ignored its duty to grant the parties in equal amounts a reasonable time in which to prepare and prosecute their actions in the arbitration, favouring CPIC and discriminating against COHL. The tribunal also gave CPIC, which had already obstructed the proceedings, a further opportunity to do this. On 20 March 2013 COHL protested against the decision, in which connection it reserved the right to challenge the award.

On 22 March 2013 the arbitral tribunal updated the timetable in accordance with the decision just mentioned on 18 March 2013 (Procedural Order No. 6).

Through its decision on 18 March the arbitral tribunal favoured CPIC in an unauthorised way. This was one important reason why COHL, as a result of later events, primarily CPIC's obstruction of the production process and the new evidence submitted by CPIV as rebuttal evidence on 11 July 2013, did not receive the necessary time to prepare and prosecute its case. The tribunal had no right to demand as a condition for amending the timetable that the parties should reach agreement about this. It had no discretionary right to reject COHL's request for amendments to the timetable and postponement of the final hearing.

One special circumstance that the arbitral tribunal should have taken account of in this connection was the following. During the parties' discussions about an amendment to the timetable, CPIC declared its willingness in a letter to COHL on 8 March 2013 to change the date of the final hearing so that it was held between 19 August and 27 September 2013 and to "adjust the timetable accordingly" to the date of the final hearing that was agreed. COHL replied on 11 and 12 March 2013, proposing a final hearing between 23 and 27 September 2013 and adjusting the timetable to this. However, CPIC wrote back to COHL on 13 March 2013, rejecting COHL's proposal. The action of CPIC amounted to an obstruction of the arbitration.

It was originally decided that production should be completed by 15 April 2013. In relation to production request no. 11, CPIC had only handed over four drawings by 15 April. Following a complaint from COHL, COHL handed over another 128 drawings to COHL on 30 April 2013. On 15 April 2013, in Procedural Order No. 7, CPIC was given another week in which to complete its production and a further week on 21 May 2013 in Procedural Order No. 8, with the additional condition that the parties had entered into a confidentiality agreement. At the same time COHL was given (only) six day's grace for its Statement of Rejoinder, from 14 to 20 June 2013, despite not yet having had access to the drawings.

On 28 May 2013 handed over to the arbitral tribunal an index of the additional drawings that it intended to produce.

On 31 May 2013 in Procedural Order No. 9 the arbitral tribunal urged the parties to agree as soon as possible to a confidentiality agreement in line with its Procedural Orders No. 8 and 9 and thereby complete their production without delay. This was the reply given to COHL by

the tribunal after COHL had pointed out that CPIC was obstructing production. However, the tribunal did not grant COHL any extra time, despite the fact that at the time CPIC had been in delay for more than six weeks.

However, because of CPIC's confidentiality agreement, COHL did not obtain access to the index mentioned or a link to the drawings until 6 June 2013, and its experts did not receive either of these until one week later. COHL received only six days' compensation for this delay in production by CPIC, since the deadline originally laid down for COHL's Statement of Rejoinder had been moved from 14 June to 20 June 2013. This was quite inadequate to compensate for CPIC's failure to produce documents which, according to the original decision of the arbitral tribunal (and as agreed by CPIC), should already have been produced on 15 April 2013. Once COHL eventually received the drawings that had been produced, it was too late for its experts to have the time to analyse and consider the material.

The arbitral tribunal time and time again extended the time available to CPIC for complying with the production decision in relation to COHL's production request no. 11 and, in general, without giving COHL a similar extension in order to receive the documents and prepare its case. The following decisions by the arbitral tribunal are cited:

- Procedural Order No. 7 on 15 May 2013
- Procedural Order No. 8 on 21 May 2013
- Email from Jeffrey Hertzfeld on 28 May 2013
- Procedural Order No. 9 on 31 May 2013
- A decision during the hearing in the arbitration on 29 July 2013 (transcript 14:23–17:22), 30 July 2013 (transcript 501:5–509:22) and 2 August 2013 (transcript 1431:20–1440:11)
- Paragraphs 486–487, 544 and 557–558 of the award

The documents that COHL were unable as a result to receive in time are the dimensional drawings for masts and substructures that were covered by COHL's production request no. 11 as well as CW106, CW111, CW112, CW118, CW120–CW122, CW124, CW134, CW139–CW145, CW148, CW149, CW150, CW155, CW156, CW157, CW158 and CW163.

On 15 May 2013 (in Procedural Order No. 7, paragraph 3) the arbitral tribunal took a position on COHL's demand that it should instruct CPIC to hand over an English translation of the documents it had produced solely in Chinese. The tribunal's decision meant that CPIC was not obliged to submit an English translation of the document production material in Chinese. COHL was not given an extension of time to respond to this complication.

Apart from the six days mentioned, COHL at no time, despite repeated protests, received an extension of time by reason of delay and obstruction on CPIC's part.

3.1.5 The arbitral tribunal showed spontaneous expressions of bias in favour of CPIC

During the Pre-Hearing Conference Jeffrey Hertzfeld said that his comments about how the action should be prosecuted were aimed more at CPIC than at COHL. Through his comments he helped CPIC to prosecute its case.

This is an assessment made by COHL retrospectively after it had been notified of the award. During the actual proceedings events of this kind stood out mainly as unusual.

3.2 The arbitral tribunal's actions during the final hearing

3.2.1 The arbitral tribunal allowed CPIC during the final hearing to refer to extensive new evidence in the steel issue

COHL protested in writing to the arbitral tribunal on 17 July 2013. In its protest it claimed that certain written testimony and written witness statements submitted by CPIC on 11 July 2013 were for the most part not rebuttals, that they should have been produced much earlier, by 15 April 2013, and that this evidence should therefore be rejected.

The arbitral tribunal decided in a letter to the parties on 18 July 2013 that the question of whether the evidence referred to by CPIC should be allowed would be settled on the first day of the final hearing. The result was that on 29 July 2013, against COHL's objections, the tribunal accepted the bulk of this evidence, namely documents CW106, CW108–CW116, CW118–CW121, CW124, CW127, CW129, CW134, CW135, CW138, CW142–144,

CW146, CW147, CW153 and CW154, together with Zhang Xinhua's written witness statement.

On 23 July CPIC submitted in evidence, among other documents, CW 157 and CW158. These later documents consisted of an internal letter from SJ Petroleum Machinery Co., Limited (below SJ) to Zhang Xinhua at Langfang Forpetro Sino-Rig Co., Ltd (below Forpetro), in which he was requested to get in touch with COHL about the choice of steel. These were documents that COHL had previously asked CPIC to produce, but which CPIC now submitted as evidence. COHL protested on 23, 25 and 27 July 2013 against the new evidence, but it was accepted by the arbitral tribunal on 29 July 2013 on the first day of the final hearing.

During COHL's cross-examination of Zhang Xinhua, CPIC submitted and referred to a new document (CW163) as written testimony. This concerned internal correspondence between Zhang Xinhua and Irina She, both from Forpetro, in which Irina She was asked to get in touch with COHL about the steel issue. COHL protested at this document being accepted as written testimony, but the arbitral tribunal ignored the protest and allowed CPIC to refer to the document, despite COHL having requested before the final hearing that all documents relating to contacts or attempts to contact COHL should be handed over directly to it.

The arbitral tribunal accepted this evidence as soon as it was asserted by CPIC to be rebuttal evidence or was considered to be of "relevance and materiality", despite the fact that it should have been handed over to COHL in the production process as early as 15 April 2013 and in any event (in the case of CW 163) before the final hearing.

The arbitral tribunal also allowed CPIC to update Jonathan Prudhoe's expert opinion during the final hearing on 2 August 2013 (transcript 14.31:25–1440:7), in spite of COHL's objections. An additional update was allowed after the final hearing, namely in i CPIC's Post-Hearing Brief on 12 October 2013. COHL protested in its Rebuttal Brief on 22 November 2013 at the acceptance of this update. It is clear from the award (paragraphs 486, 487, 544, 557 and 558) that the arbitral tribunal accepted this update.

This should be compared with the decision by the arbitral tribunal in an email from Jeffrey Hertzfeld on 16 July 2013 that the submission of any additional evidence by either of the

parties would not be allowed; this email was referred during the final hearing to COHL's experts, when they tried to supplement their opinions. It should also be compared with the fact that the tribunal prevented COHL during the cross-examination of John Slater from putting questions to him (transcript 1067:22–1079:20) and during the examination of Stephen Graham prevented him from going beyond his opinion (transcript 1153:15–1154:19). The actions of the tribunal should also be compared with what it stated later on in the award (paragraph 464), when the tribunal considered that some of the evidence referred to by COHL had been introduced too late. It should also be compared with the statement of the tribunal in the award (paragraph 557), where it accepted that new assertions from CPIC did not amount to new evidence or arguments, despite being presented late during the hearings.

This amounted to a procedural error and an excess of mandate which favoured CPIC at the expense of COHL, especially as COHL, which had previously been denied an opportunity to acquire evidence in this matter, was not given time to respond to CPIC's new evidence.

3.2.2 The arbitral tribunal intervened in the witness examinations in several connections in a manner that favoured CPIC

When COHL cross-examined CPIC's witness Zhang Xinhua during the final hearing about the choice of steel, which was discussed in his written witness statement, Zhang said that he had not dealt with precisely "these points" in his written testimony and asked whether he could "look for some references". Jeffrey Hertzfeld then intervened and stressed that it was not necessary for the witness to go beyond his written testimony. COHL made protest explicitly (transcript 474:12–13) as well as by continuing to put questions to Zhang about why and how SJ "selected Q345E for those rigs".

This intervention should be compared with the way in which the arbitral tribunal, through the questions put by Albert Jan van den Berg to the same witness and the comments of Jeffrey Hertzfeld, took the opposite view when this was to the advantage of CPIC (transcript 528:3–542:6).

The arbitral tribunal also took the opposite view during CPIC's cross-examination of COHL's witness Dean Sillerud when it allowed CPIC to cross-examine him on matters that for the most part were not mentioned in his written testimony (transcript 125:11–126:24).

The arbitral tribunal also took an opposite view in its own questions and also by allowing CPIC to go a long way during its cross-examination of COHL's witness Vladimir Alyuskin (transcript 613:24–616:23). When it was CPIC during the cross-examination of COHL's witness that asked the witness to examine a document to which he did not have access when he wrote his witness statement, Jeffrey Hertzfeld took exactly the opposite position to the one he had expressed when it was COHL who wanted Zhang to produce and look at a written document. Hertzfeld then said "So from the standpoint of corroboration of what you have been saying, it might be helpful to present that documentary evidence. ... But you have been asked if you would, and you can answer that question."

In other words, what was involved was the same typical situation that had unfolded during COHL's cross-examination of Zhang. It was only Jeffrey Hertzfeld's handling of the situation that differed, being entirely the opposite.

Jeffrey Hertzfeld also intervened in a similar manner on another occasion during COHL's cross-examination of Zhang. When COHL questioned the veracity in general of his written witness statement, Hertzfeld intervened with the comment that he did not understand how the witness could answer the question put to him. Hertzfeld's reaction points to the fact that the arbitral tribunal did not insist on the same standards of veracity in Zhang's evidence as in that of other witnesses. As a result of the tribunal acting differently in these situations, the parties were not treated equally. This should be compared with the fact that Jeffrey Hertzfeld had omitted prior to the examination of Zhang to confirm his written undertaking to tell the truth, as he was supposed to and also did in the case of other witnesses in accordance with paragraph 10.5 of Procedural Order No. 1.

In other words, the arbitral tribunal treated the parties differently, to the disadvantage of COHL.

The arbitral tribunal was also well-disposed to CPIC in another respect during the examination of Zhang Xinhua. According to Procedural Order No. 1, paragraph 10.5 c), the cross-examination should be "limited to matters that have arisen in cross-examination or in questioning by the Arbitral Tribunal". However, the tribunal allowed CPIC to put questions during its re-examination of this witness about events that had occurred before the contract negotiations, despite these not having been mentioned during COHL's cross-examination. COHL protested at this by having it put on record that it had not put any questions about what had occurred prior to the contract negotiations (transcript 527:13–20).

This was an expression of goodwill towards CPIC, especially in light of the fact that the arbitral tribunal in other contexts intervened against COHL in similar situations. The tribunal thus adopted a strictly inquisitorial attitude towards COHL in order to uphold zealously the wording of paragraph 10.5 of Procedural Order No. 1 when this was to the advantage of CPIC. In contrast, the tribunal did not intervene when CPIC contravened what was stipulated in Procedural Order No. 1, as in the question of CPIC's very extensive disregard of the timetable, and the tribunal also regularly rejected or ignored protests from COHL when COHL pointed this out, as when the tribunal during the final hearing allowed CPIC to refer to written evidence by referring to "relevance and materiality" and when CPIC during the final hearing submitted and referred to important written evidence (transcript 501:5-509:22). The tribunal's different behaviour in these situations shows that in the arbitration it applied different rules to the parties. By acting differently in these situations, the tribunal favoured CPIC at the expense of COHL.

On the day before the final hearing CPIC submitted Table 2, which was an appendix to John Slater's opinion, with the explanation that it had mistakenly been left out when the opinion was submitted. On the first day of the hearing COHL agreed to the submission of the document, provided that its experts were able to respond to it "to the extent they need to", since they had not had an opportunity to do this previously. This was accepted by CPIC and noted by the chairman of the tribunal. Notwithstanding this, the latter intervened later on in the hearing when COHL during its cross-examination of Slater submitted a document, Demonstrative Exhibit RO 3, drawn up by Stephen Graham in relation to questions that were discussed in Table 2. COHL was not allowed to cross-examine Slater using this document, despite it dealing with questions that were mentioned in Table 2 and despite the freedom to

do this that had been promised on the first day of the hearing. This was a procedural error and an excess of mandate that hindered COHL from prosecuting its action.

3.2.3 Special intervention by Albert Jan van den Berg in the examinations to the benefit of CPIC

Albert Jan van den Berg intervened in the cross-examination of CPIC's witness Chen Xinlong, when he helped Chen to answer a question about a conflict between his witness statement and the witness statement made by Roger M. Barnes during a cross-examination about which of Loadmaster and SJ had designed the BE550 Big Easy (transcript 353:4–357:2). COHL protested during the final hearing that the tribunal acted in an inquisitorial manner (transcript 625:3–16). The protest covered all the inquisitorial behaviour.

Albert Jan van den Berg intervened in CPIC's re-examination of its witness Zhang Xinhua, when he opened a new line of questioning about events prior to the contract negotiations, as if he had been a counsel for CPIC (transcript 527:22–542:6). COHL protested during the final hearing that the tribunal acted in an inquisitorial manner (transcript 625:3–16). The protest covered all the inquisitorial behaviour.

Albert Jan van den Berg intervened in CPIC's cross-examination of Vladimir Alyuskin in regard to the contacts he was said to have had with Irina She. Van den Berg took over the cross-examination in an aggressive tone of voice and went beyond what CPIC had asserted about the contacts (transcript 619:10–626:20).

Van den Berg intervened in CPIC's direct examination of John Slater, putting to him a lot of questions that were uncritical and helpful to CPIC, as if he had been CPIC's counsel; these questions were later considered by the tribunal to constitute part of the direct examination of Slater (transcript 955:14–974:20). COHL protested during the examination by trying to interrupt van den Berg during the direct examination of Slater and by correcting the inaccuracies that were introduced into the case by van den Berg's leading questions. COHL then learned that the tribunal was thinking of compelling COHL to cross-examine Slater in relation to van den Berg's questions in the same way as if CPIC's counsel had put questions to Slater (transcript 968:9–974:15). The tribunal thus rejected attempts by COHL's counsel to

clarify the inaccuracies in van den Berg's leading questions to Slater when they were put to the latter during CPIC's direct examination.

Subsequently, when one looks at the arbitral tribunal's reasoning, both of the circumstances last described are a reflection of bias.

Albert Jan van den Berg and Jeffrey Hertzfeld intervened in CPIC's cross-examination of COHL's damages expert R. Dean Graves (transcripts 1620:16–1630:8 and 1651:9–1661:22). They attacked him with polemical questions as if they had been CPIC's counsel in the arbitration and put legal questions to him. This should be compared with the explicit declaration made by Jeffrey Hertzfeld during the examination of John Slater that he was not seeking a legal interpretation in reply to his questions.

COHL intervened right from the final hearing on 31 July against Albert Jan van den Berg's behaviour (transcript 625:3–626:20).

3.2.4 The arbitral tribunal used its own time during the final hearing to help CPIC

The time at the disposal of the parties during the final hearing was strictly regulated by the arbitral tribunal through a decision at the Pre-Hearing Conference on 19 July 2013. The tribunal gave CPIC more time through Albert Jan van den Berg using the tribunal's time in its favour. COHL protested at this by arguing that the tribunal acted in an inquisitorial manner.

3.3 The arbitral tribunal's behaviour after the final hearing

3.3.1 The arbitral tribunal in Procedural Order No. 11 accepted without justifiable reasons new evidence from CPIC

After CPIC had submitted evidence on 11 July 2013 which COHL claimed was new evidence and not rebuttal evidence, the arbitral tribunal decided on the first day of the final hearing (transcript 14:23–15:17) to reject part of this evidence. After CPIC wrote to the tribunal after the final hearing, claiming that the rejected evidence was rebuttal evidence, the tribunal decided in Procedural Order No. 11 on 2 September 2013 to amend its decision and accept as

evidence certain appendices, designated CW140, CW141, CW148, CW149A, CW150A, CW155 and CW156, since CPIC now claimed that they involved rebuttal evidence.

COHL protested at this decision on 5 September 2013, reserving the right to challenge the award.

The decision on 2 September 2013 was contrary to the principle of equal treatment and favourable to CPIC since in the final hearing the arbitral tribunal was willing without further ado to amend an earlier decision, despite CPIC having had an opportunity to put forward its objections prior to the tribunal's decision on 29 July 2013. This should be compared with the tribunal's decision in Procedural Order No. 4 on 18 January 2013, when the tribunal refused to reconsider its decision to reject COHL's inspection request, referring to the fact that COHL had had an opportunity to put forward all its reasons as early as before the first decision that was taken.

In addition, the reasons stated by the arbitral tribunal for amending the decision during the final hearing were in conflict with the actual circumstances. In its decision the tribunal stated as its reason for amending its decision and admitting CPIC's evidence that COHL in the Joint Expert Report as late as 26 July 2013 had referred to new evidence and CPIC had not protested at this. The actual circumstances were entirely different, as documented by the tribunal before and during the hearing in Jeffrey Hertzfeld's email of 27 July 2013, in which he confirms that it was CPIC who submitted the documents, on the first day of the final hearing, when Hertzfeld confirmed the same thing, and when the tribunal rejected an objection from CPIC requesting dismissal (transcript 1279:16–1291:15). It is difficult to see this other than a violation of the requirement for equal treatment.

3.4 The arbitral tribunal's views in the award

3.4.1 In the award the arbitral tribunal allowed new evidence from CPIC, but not from COHL

In the award (paragraphs 174, 418– 420, 447, 449, 454, 456, 459, 460, 463, 467, 468, 469, 470, 486, 521, 544 and 557) the arbitral tribunal placed particular and considerable emphasis on evidence which CPIC referred to on 11 July 2013 or later during the final hearing and

which it allowed CPIC to refer to on 2 September 2013 in Procedural Order No. 11 to the advantage of CPIC and to the disadvantage of COHL. The fact that COHL had not been given sufficient opportunity to respond to this evidence thereby took on major significance. This was contrary to the requirement of equal treatment of the parties.

In the award (paragraphs 486, 487, 544, 557 and 558) the arbitral tribunal accepted new evidence referred to by CPIC that COHL had not been given the necessary and appropriate opportunity to respond to.

The arbitral tribunal stated the following in the award (paragraph 464):

> Although not mentioned in his Expert Reports, Mr. Hadjioannou testified on direct examination at the hearings that a third batch of steel (X100617) had also failed the impact standard. Aside from raising this point too late to give Claimant a fair opportunity to respond to it, Mr. Hadjioannou stated that he was unable to determine exactly where this batch was to be used in the Rigs and whether or not it involved a critical component. Claimant noted that this information would have been available to Respondent in its Exhibit R-207 since April 2011. Under the circumstances, the Tribunal has decided that no finding can be fairly made with respect to this additional item raised so late in the proceedings.

This comment means that the arbitral tribunal took a procedural decision that was tantamount to rejecting evidence that was offered in view of the date on which the evidence was referred to. It should be seen in light of the fact that it had allowed CPIC to refer to new evidence during the final hearing with regard to its "relevance and materiality" (transcript 15:23–16:22), although this involved documents which CPIC, according to the decision of the tribunal, should have handed over to COHL in the course of the document production.

The comment should also be seen in light of the fact that on 2 September 2013 after the final hearing the arbitral tribunal had in Procedural Order No. 11 amended a decision to reject evidence from CPIC that had been announced on 29 July 2013. After COHL had protested on 5 September 2013 that the evidence had been accepted without it having had an opportunity to cross-examine CPIC's witnesses about these documents during the final hearing, the tribunal gave both parties an opportunity to comment on the evidence that had been accepted in their Post-Hearing Memorials and Reply Memorials. This should be compared with the fact that in paragraph 464 of the award the tribunal had refused to take account of John

Hadjioannou's revised opinion during the final hearing, i.e. at an earlier date, on the basis of it having been put forward too late.

The comment should also be seen in light of the fact that during the final hearing (transcript 1431:20–1440:7) the tribunal allowed Jonathan Prudhoe to make changes to his expert opinion and that the tribunal in its award (paragraph 557) allowed CPIC to change its statements in the arbitration and also change Jonathan Prudhoe's expert opinion after the main hearing in CPIC's Post-Hearing Brief on 12 October 2013.

The comment in the award (paragraph 464) also means that the arbitral tribunal ignored the fact that during the arbitration CPIC for the first time on 11 July 2013 had asserted and referred to evidence in corroboration of this that CPIC had replaced defective steel in the oil rigs.

3.4.2 The arbitral tribunal acted contrary to the principle of equal treatment in its evaluation of evidence

In paragraph 96 of the award the arbitral tribunal stated the following:

> On 25 July 2013, Claimant objected to Respondent's earlier submission of the GL Noble Denton weekly progress reports, in light of the withdrawal of the GL Noble Denton witnesses, to which Respondent responded. The Tribunal provided directions to the Parties thereon on the same date, confirming that the progress reports would remain on the record as independent contemporaneous evidence, which was submitted by Respondent, and not by the excluded witnesses.

It also stated in paragraph 400:

> Towards the end of May 2011, Respondent's on-site inspector, GL Noble Denton, in one of its weekly reports sent to Respondent (but not to Claimant), identified 20 new items (distinct from the 19 items referred to earlier in the Third Inspection Protocol) which it considered should still be modified in Rig No. 1. Claimant's expert, Mr. Stansfield, has reviewed this list as well and has once again opined that the items listed are trivial in character and would not prevent the Rig from being considered complete and ready for delivery. Be that as it may, the Tribunal has not given any significant evidentiary weight ta GL Noble Denton's reports bearing in mind that the refusal of the three GL Noble Denton witnesses to testify, after having submitted witness statements (see Paragraph 96 above), deprived Claimant of the opportunity of questioning them on their reports and testing their credibility.

In paragraph 402 the arbitral tribunal stated the following:

> The allegation of cracks on the H-beams of the mast was based on photographs taken by GL Noble Denton, which were included in its Weekly Report IR-1011-291-299 logged on 1 May 2011. After studying the photographs, Mr. Stansfield concluded that they showed rust and scale which had been painted over but did not establish the existence of cracks. He noted that there is a very quick, inexpensive and sure method for determining whether or not a crack exists, known as dye-penetrant testing, which GL Noble Denton failed to use. Without removing the scale, it is impossible to tell if there is a crack. Mr. Sillerud acknowledged the existence of such a test but testified that, to his knowledge, no such test was conducted.

The arbitral tribunal thus placed no importance on GL Noble Denton's inspection reports referred to by COHL, on the basis that CPIC did not have an opportunity to cross-examine those who had carried out the inspections. Given that the tribunal in other contexts accepted evidence without similar requirements that had been put forward by CPIC, this was contrary to the principle of equal treatment, to the advantage of CPIC. This should be compared with the following.

In paragraph 418 of the award the arbitral tribunal stated as follows:

> Claimant selected one of the above-mentioned four types of steel, namely Q345B, to use in the construction of the masts and substructures of the Rigs. These are the parts of the Rigs which undergo the greatest stress and must therefore have the required toughness to operate at the intended temperature conditions. This selection was made following a meeting of 20 May 2010 at the SJ Technology Institute, shortly after the conclusion of the Contract, as it was necessary to order the steel and commence the design and manufacture of the Rigs. Respondent has questioned the veracity of the minutes of that meeting because of discrepancies between it and a subsequent email from SJ to Forpetro dated 28 May 2010 attaching an opinion of the SJ Department of Materials and Technology. The Department referred to an API 6A standard whereas the 20 May 2010 minutes relied on the ASME Boiler and Pressure Vessel code. However, both referred to the Nabors rig experience (which used steel Q345B) and both concluded that 20 joules at -20 degrees centigrade was an appropriate impact standard for testing the steel. The Tribunal therefore sees no ground for attacking the veracity of the 20 May 2010 minutes.

In paragraph 418 the arbitral tribunal thus accepted without more ado details given by CPIC about how the choice of steel had proceeded, without COHL, which had disputed the details, having had an opportunity to put questions to the individuals who had taken part in the course

of events. CPIC's evidence was not downgraded with reference to the fact that COHL had not had an opportunity to cross-examine anyone who had written the documents.

Furthermore, in the award the arbitral tribunal accepted written testimony referred to by CPIC without COHL having had an opportunity to examine the individuals who had written the documents in question. The evidence concerned is CPIC's written testimony in documents C25, CW1, CW8, CW15, CW16, CW18–CW20, CW22–CW25, CW27, CW30, CW32–39, CW44, CW56, CW66, CW74, CW76, CW77, CW79–CW100, CW106–CW108, CWl10–CW113, CW l19–CW121, CW125, CW129, CW135, CW138–CW141, CW144–CW146, CW149 and CW155–CW157.

In paragraphs 449, 454, 467, 494, 500, 501, 504 and 505 of the award, the arbitral tribunal also reached its decision on the basis of evidence that had been referred to by CPIC without giving COHL an opportunity to cross-examine any of the authors.

In paragraphs 500, 501, 505, 533 and 534 of the award, the arbitral tribunal placed emphasis on evidence that CPIC had acquired in the course of the arbitration from its own inspection of the rigs, in which COHL had been given no opportunity to take part. While paragraphs 500, 501 and 505 of the award concerned the steel issue, the corresponding question of the matter of loss limitation was discussed in paragraphs 533 and 534.

CPIC had engaged a consultancy firm, Bureau Veritas, to make an inspection of the rigs in October 2011. Jonathan Prudhoe inspected the rigs in March 2013, i.e. in the course of the arbitration, and presented his observations in the arbitration, based on the material in the Bureau Veritas inspection report. In paragraphs 501 and 505 of the award, the arbitral tribunal stated the following:

> 501. Furthermore, when Mr. Prudhoe witnessed BV's Second Inventory Audit of March 2013, he was satisfied that the unchecked items were in good condition.
>
> 505. Furthermore, the Tribunal notes that the Kemble and BOAO weekly reports provide an independent reflection of all work carried out following termination. Mr. Prudhoe himself visited SJ's and Forpetro's rig yards and witnessed and verified the First BV Report confirming that it was an accurate independent check of the remaining rig components as well as the work assessment of the

> weekly reports. (Prudhoe Quantum Report, 6 May 2013, paras. 3.9 and 4.5).The Tribunal finds no reason or evidence not to accept Mr. Prudhoe's statements in this respect.

Here the arbitral tribunal accepted comments of Jonathan Prudhoe that were based on what he had experienced at an inspection in the course of the arbitration. The tribunal's acceptance in the award of Jonathan Prudhoe's comments and the material underlying them, based on his own inspection of the rigs in the course of the arbitration, given that COHL had been denied its own inspection and had not been allowed by take part in the inspection carried out by Prudhoe, is contrary to the principle of equal treatment, to the advantage of CPIC and to the disadvantage of COHL.

3.4.3 The arbitral tribunal made judgments in its award contrary to instructions it had given the parties at the Pre-Hearing Conference on 19 July 2013

At the Pre-Hearing Conference the arbitral tribunal decide that the parties should have the same amount of time at their disposal during the final hearing. Since the hearing was only to last for five days, the parties could not count on having time to cross-examine all the witnesses of the opposite party. According to the tribunal's instructions at the Conference, there was no need for a cross-examination of all the opposite party's witnesses and experts. This meant that statements from witnesses and experts who had not been cross-examined would be assessed in light of the other evidence, but not be considered to be accepted without more ado by the other party. COHL declared on 23 July 2013, in accordance with this, that it was refraining from cross-examining Kong Xiaoqiang, Zhang Zhong, Ma Donglan, Bu Weiling and Peter Stansfield.

In a letter to the arbitral tribunal dated 25 July 2013, CPIC claimed that witnesses of the opposite party that the other party had in no way cross-examined must be accepted by the tribunal as "unchallenged" and that their witness statements should without more ado form the basis of the decision.

On the same date, 25 July 2013, COHL made clear that it was acting in accordance with the instructions of the arbitral tribunal and that these instructions meant that "a party is not bound by evidence which it does not challenge".

Contrary to its own instructions, the arbitral tribunal in the award (paragraphs 162, 338, 341, 389, 395, 403, 404, 572 and 573) accepted without reference to other evidence assertions from CPIC's witnesses and experts that COHL, for reasons of time and in accordance with the instructions, had chosen not to cross-examine.

It should be noted here that it is clear from other evidence to which CPIC referred and to which the arbitral tribunal made reference in paragraphs 184 and 341 of the award that the assertions made by Peter Stansfield and Ma Donglan were incorrect. COHL is referring here to the following:

The fact that Peter Stansfield's comments about which items in the third inspection protocol were no obstacle to delivery were no relevance in the dispute was shown by the reasoning of the arbitral tribunal (paragraph 341), where the tribunal commented as follows:

> By letter of 24 February, 2011 ... Claimant indicated that 24 items would be completed before dispatch from the yard and the remaining 11 items, which the Claimant considered minor, would be completed in Iraq during installation and commissioning.

A comparison between Peter Stansfield's opinion and CPIC's admission in a letter dated 24 February 2011 shows that at that time CPIC acknowledged that several of the 19 items were ones that would be put right prior to delivery (paragraphs 9, 32, 36, 58 and 105) and that CPIC also had incorrectly stated that several of the 19 items had been put right on 24 February 2011 (paragraphs 4, 18, 27, 38, 43, 52, 56, 63, 98 and 99).

The above letter thus shows that Peter Stansfield's assertions were incompatible with CPIC's own view, as described in the letter. The same was true of the details given by Ma Donglan, which are described in paragraph 184 of the award.

If the arbitral tribunal had applied the same rules for CPIC for COHL, it would have come to the conclusion that the details in Stansfield's opinion and those given by Ma Donglan were irrelevant in light of CPIC's admission on 24 February 2011 (see paragraph 458 of the award).

Peter Stansfield's comments about what was part of the Agreement and what comprised an additional order, such as his comment that "The BOP Platform was not included in the

Contract", were of no relevance to the dispute. This was clear from Ma Donglan's written witness statement, in which she identified the BOP platform as part of the Agreement, and from Jonathan Prudhoe's expert opinion, which identified the platform as one of the "main components" of the technical specifications in Appendix 1 of the Agreement.

Also on the question of whether "the position of the ST-80 socket" was incorrect or a change to the Agreement, the arbitral tribunal made the comments of Stansfield and Ma the basis for an assessment as "unchallenged", especially as the tribunal ignored CPIC's admission in the fourth inspection protocol that the "ST-80 is not located in the correct position" and that CPIC had accepted that "Move ST-80 socket is to be moved forward in accordance with NOV installation recommendations ….".

It is also shown by the fact that the arbitral tribunal did not take into account either that CPIC's failure to request additional compensation for the work showed that the parties' Agreement meant that the ST-80 was to be installed according to NOV installation recommendations. The tribunal must therefore have made the views expressed by Stansfield and Ma the basis of the award as unchallenged or the truth in accordance with CPIC's request for this, without taking account of other evidence in the proceedings.

One question disputed by the parties was which of the remaining measures amounted to an error and which were based on additional orders. In this question the tribunal relied in the award (paragraph 338) on the comments by CPIC's witness Peter Stansfield, whose comments according to the tribunal were "unchallenged". The tribunal, however, ignore the acknowledgement at the time from CPIC itself in the third inspection protocol that errors were to a greater extent involved. The tribunal thus in this question disregarded what CPIC had itself acknowledged in the documentation and relied more on what CPIC's witness thought in the matter.

The arbitral tribunal's incorrect behaviour has influenced the outcome of the arbitration since it accepted without more ado what was stated by Peter Stansfield and Ma Donglan.

3.4.4 On the question of delay the arbitral tribunal ignored important provisions in the Agreement

In the award (paragraphs 323–370) the arbitral tribunal took a view on the question of delay. Paragraph 367 contains the conclusion that CIC had not been in delay when COHL cancelled the Agreement and that consequently COHL was not entitled to damages. In order to arrive at this conclusion, the tribunal was forced to disregard important provisions in the Agreement and FCA Incoterms.

According to Article 19.1 of the Agreement, COHL was entitled at any time to make a written request for amendments to the Agreement in respect, among other things, "drawings, designs or specifications when the Equipment supplied under the Contract must be manufactured specially for the Customer". All amendments of this kind were to take place by written agreement. If such a request resulted in a demand by CPIC for an extension to the date of delivery, such demands were to be made within 28 days after CPIC receiving COHL's instructions regarding the amendment.

The requirement in Article 19.1 for agreements about changes to the date of delivery etc. to be in writing was further emphasised in Article 20 of the Agreement, which prohibited all amendments to the Agreement, apart from those discussed in Article 19.1, unless they were documented in writing and signed by both parties.

According to Article 23.2 of the Agreement, it was incumbent on CPIC to immediately notify COHL in writing if CPIC or any of its subcontractors envisaged any circumstance that could prevent the delivery of the equipment on time. In such a case COHL was entitled to decide whether the agreed date of delivery should be extended, with or without a penalty. An amendment to the Agreement which this circumstance could potentially cause was to be documented in writing.

The requirement for amendments to the Agreement to be made in writing was also documented in Article 34.3.

When assessing the question of delay, the arbitral tribunal disregarded these provisions and drew the conclusion that the parties took for granted an extension to the date of delivery on various occasions as a result of COHL making demands for changes to construction. In the award (paragraph 337 b) the tribunal noted that in the third inspection protocol (on 26 January 2011) the parties had extended the date of delivery for rig no. 1 to 2 March 2011. Subsequently, however, the arbitral tribunal observed in paragraph 339 – without reference to the requirement for changes to the Agreement to be made in writing, but with the application of the principle for interpreting agreements expressed in articles 7 and 8 of the CISG, which the tribunal had previously found appropriate (paragraph 322) – that COHL, by signing the third inspection protocol, "created a reasonable expectation that Respondent was also granting a reasonable period of time to complete the requested additional work".

The same unwillingness to assess the legal relationships of the parties on the basis of the Agreement was shown by the arbitral tribunal in paragraph 337 c) of the award. Here the tribunal, after noting that the parties in the third inspection protocol had agreed (in writing) that CPIC should not be liable for a delay caused by the additional orders made, observed that this was in accordance with Article 19 of the Agreement, "which provides that the additional time required in order to implement amendment items is not to be considered to be delay attributable to Claimant".

However, Article 19 of the Agreement contains no such rule. On the contrary, it lays down that CPIC should give notice of its desire for an extension of time within 28 days after COHL had ordered the additional work and that this should be documented in writing. The paragraph quoted from the third inspection protocol does not relate to an extension to the date of delivery, but regulates the right to demand sanctions for delay (cf. Article 24.2 of the Agreement). Account should also be taken here of the fact that in the award (paragraph 351) the tribunal discussed the time needed for additional orders as time which is "contractually attributable to Customer", an unknown concept in the Agreement.

The arbitral tribunal's conclusion in paragraph 339 of the award that a "reasonable period of time to complete the requested additional work" was at CPIC's disposal was not based on an interpretation of the Agreement. The tribunal simply disregarded the requirements of the

Agreement that a wish for an extension should be notified by CPIC within 28 days and be documented in writing.

In paragraph 367 of the award the arbitral tribunal held it against COHL – after having accepted by a concludent act an extension of the delivery date for an indefinite period – for never having imposed on CPIC a deadline for the delivery of rig no. 1. In this way, too, the tribunal disregarded the fact that the Agreement provided no scope for making such a demand of COHL. The same applies to the tribunal's comments in paragraphs 340, 345, 350, 351, 360 and 361 of the award.

By disregarding in this way the Agreement's regulation of the questions of delay, the arbitral tribunal exceeded its mandate, which relates to an interpretation and application of the Agreement.

3.4.5 The arbitral tribunal ignored Incoterms and speculated that COHL had had other reasons for the cancellation than the ones it gave

According to Articles 2.1 and 5.2.1 of the Agreement, the goods were to be delivered FCAS (Free Carrier), Langfang/Jingzhau, Incoterms 2000. This means that the supplier has a duty to hand the goods over to the first carrier at the appointed place once it has become ready for export. If the buyer designates someone else as a carrier, the seller fulfils his obligations to deliver the goods by handing them over to this person. In other words, Incoterms distinguishes between fulfilment of the seller's obligations (i.e. delivery) and the actual transport.

In paragraph 344 of the award, however, the arbitral tribunal does not distinguish between *delivery* and *shipment* in Incoterms. They are not the same thing, however.

In paragraph 351 of the award the arbitral tribunal observed that COHL, instead of setting a deadline for the delivery of rig no. 1, had as a result of additional orders extended the date of delivery since it had not yet had news of whether it would obtain the assignment in Iraq for which the rigs ordered by it were intended. The tribunal could only make this comment by disregarding the rules of Incoterms.

By confusing the terms, the arbitral tribunal – in an entirely unfounded way – was able to engage in speculation that the reason stated by COHL for the cancellation, namely delay, was in actual fact a pretext and that the real reason for the cancellation was that COHL wanted to come up with a legal reason for getting out of an order for which it no longer had any use. The tribunal expanded further on this speculation in paragraph 407 of the award. Account should also be taken of paragraphs 368, 370 and 583 of the award.

In paragraph 368 of the award, the tribunal commented as follows:

> Having carefully considered all of the evidence, the Tribunal is persuaded that Respondent's decision to terminate was motivated by its growing belief that it had lost the contract in Iraq, and would have no need for the Rigs that it had committed to purchase. This belief became a certainty not long after the termination letter when the results of the Iraq bid were announced and Respondent had in fact not been awarded the contract.

The arbitral tribunal ignored Incoterms and was therefore able to speculate without good reason that COHL had in bad faith given reasons for its cancellation that were completely different from the real reason. In this way the tribunal, before it had even had time to make a decision on the steel issue, branded COHL's cancellation as based on a pretext, namely the loss of the customer in Iraq, and not on CPIC's delay in delivery.

The circumstances just mentioned have been crucial for the arbitral tribunal's assessment of the question of delay. By ignoring the provisions in the Agreement for changes to be made in writing and by disregarding Incoterms, the tribunal has exceeded its mandate and disadvantaged COHL to the advantage of CPIC, contrary to the obligation to treat the parties equally.

3.4.6 In the award the arbitral tribunal laid the burden of proof on COHL in the steel issue and in regard to the limitation of loss

In its Post-Hearing Brief on 11 October 2013 COHL stated that it would not have a fair hearing unless the burden of proof in the steel issue and the question of limitation of loss was laid on CPIC, which had sole access to information and documents that were necessary to satisfy the burden of proof, especially as COHL had been denied access during the arbitration

to this information and these documents. The tribunal understood this and examined it in the award (paragraph 469) as the procedural objection it was.

However, after dismissing COHL's procedural objection, the arbitral tribunal in the award laid the burden of proof on COHL in both the steel issue (paragraph 447) and in the question of whether CPIC had limited its loss appropriately (paragraphs 524 and 534). The views taken by the tribunal in the award amounted to independent procedural decisions. In view of the fact that the tribunal had previously prevented COHL from producing evidence in these questions, by denying COHL the opportunity to inspect the rigs, by allowing CPIC to limit its production of drawings of masts and substructures and by not giving COHL sufficient time for preparing and prosecuting its action, laying the burden of proof on COHL without previously giving it an opportunity and time to supplement its evidence through an inspection and the production of the necessary drawings amounts to a grave procedural error.

Through its decision to lay on COHL the burden of proof in these questions in its decision, the arbitral tribunal ignored the fact that it was only CPIC that had available to it the material needed to investigate them and that in the arbitration COHL, as a result of both CPIC's actions and the tribunal's own handling of the case, had to a large extent been denied access to this material. This is reflected in many places in the award, of which paragraphs 400– 403, 405, 418– 420, 435, 442-447, 449, 454–460, 463, 467, 469, 470, 486, 501, 505, 525, 534, 544 and 555–559 may be mentioned.

In this way the arbitration and the award have manifestly come into conflict with the basic principles of Swedish law. The award is therefore invalid. What has occurred also amounts to an excess of mandate and a procedural error.

3.4.7 The arbitral tribunal prevented COHL from fulfilling the threshold of proof laid down

The arbitral tribunal noted in paragraph 469 of the award that COHL had not met its burden of proof, stating the following:

> In the absence of evidence of actual failure, the Tribunal is in effect being asked to draw the speculative conclusion that the Rigs would have failed if Respondent had taken delivery and put them in operation. In the face of the contradictory opinions of the Parties' eminently qualified experts and

> bearing in mind that Claimant's subcontractor, SJ, who selected the steel and the impact test criteria, was an API certified manufacturer with considerable experience in the manufacture of rigs, the Tribunal is unable to reach the conclusion that it is more probable than not that the Rigs would have failed in operations at –20 degrees centigrade. Respondent has therefore not carried its burden of proof.

The arbitral tribunal thus required COHL to demonstrate that the balance of probability was that the rigs would have failed for it to be considered to have shown that the steel was not fit for purpose. This is an unreasonable requirement since it makes considerable demands on detailed evidence, which the tribunal had prevented COHL from gaining access to by not allowing it an opportunity for an inspection, access to all the dimensional drawings and sufficient time to take all the material into account.

3.4.8 The arbitral tribunal apportioned the responsibility between CPIC and COHL in an unreasonable manner

The threshold of proof laid down by the arbitral tribunal in paragraph 469, i.e. the failure of a rig on the balance of probability, is unreasonable when combined with the burden of proof being laid on COHL. It meant that CPIC did not need to accept any liability for ensuring that the rigs' masts and substructures would withstand a full load at a temperature of –20°C. In the award (paragraphs 422, 423, 449 and 469) the tribunal put forward the fact that SJ was a certified professional manufacturer mainly as a reason to be relied on and as a limitation of liability, whereas this fact should instead have led to increased requirements.

In paragraphs 147, 148, 396, 414, 418, 419, 421–423, 432, 441, 449, 454, 456, 458, 460, 461, 466, 469 and 470 of the award, the arbitral tribunal, contrary to accepted standards of professionalism on the part of a certified professional manufacturer, considered that CPIC had been entitled to choose whatever steel it wanted, as long as no accidents occurred. COHL cannot, as the tribunal considered, be held liable for the choice of steel for the bearing structures of the oil rigs for the reason alone that COHL, which does not itself manufacture rigs, had not made use of an opportunity to specify detailed technical requirements for the steel, but had instead relied on CPIC's technical knowledge. CPIC's liability for the choice of steel cannot reasonably be limited to liability under guarantee for any accidents, since it would be negligent for a professional engineering company such as CPIC/SJ to design a bearing structure and then allow accidents to decide whether the design was acceptable.

The arbitral tribunal's reference to CPIC's guarantee liability in paragraphs 396, 414, 418, 419, 421–423, 432, 441, 449, 454, 456, 458, 460, 461, 466, 469 and 470 reflects lack of respect for human life, since the tribunal implied that COHL should have risked its employees' lives and health in order to find out whether CPIC/SJ had fulfilled its obligations, instead of requiring them to show prior to delivery that they had fulfilled their obligations as far as the design and choice of steel were concerned.

The views taken by the arbitral tribunal in these questions reflect the fact that it did not treat the parties equally, to the advantage of CPIC. They are so remarkable that the content of the award is manifestly incompatible with the basic principles of Swedish law.

3.4.9 The arbitral tribunal applied different principles of interpretation, to the disadvantage of COHL

The arbitral tribunal stated the following in paragraph 330 of the award:

> Under Article 8 of the CISG, a Party's statements and conduct will be interpreted, first of all, according to its intent (where the other party knew or should have known what the intent was), or else, according to the understanding that a reasonable person of the same kind as the other Party would have had in the same circumstances. In this connection, due consideration is to be given to all relevant circumstances including the negotiations, practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

With the help of such an interpretation of the circumstances, the arbitral tribunal found in paragraphs 323–370 that COHL had extended the date of delivery and that CPIC had not been in delay.

The tribunal employed a different principle of interpretation when assessing the steel issue and in the question of what constituted additional orders or errors, when this favoured CPIC. In assessing liability for the choice of steel, it thus refrained entirely from applying article 8 of the CISG and taking account of "the understanding that a reasonable person... would have had ...".

Instead, the tribunal invoked the Agreement strictly against COHL and blamed COHL for not having itself specified any wishes (paragraph 461 of the award). The same applies to the tribunal's comment in paragraph regarding the positioning of the ST80, where COHL's criticism of its position was dismissed with the assertion that the Agreement said nothing about this. The tribunal here ignored the fact that the person mentioned in article 8 of the CISG must assume that the ST80 is positioned in a location where it can be used.

Here there were two contradictory applications of principles of interpretation, resulting in both cases that CIPC was favoured and COHL was disadvantaged. This is a violation of the principle of equal treatment.

3.5 For the following reasons COHL cannot be considered to have lost its right to challenge the award

COHL wrote to the arbitral tribunal on 10 January 2013, protesting at its decision to refuse it permission to inspect the rigs. In its letter COHL reserved the right to challenge the award.

COHL wrote to the arbitral tribunal on 20 March 2013, protesting at its decision on 18 March 2013 in which the tribunal decided, in the absence of an agreement between the parties, to keep to the earlier preliminary timetable with only internal adjustments. In the letter COHL reserved the right to challenge the coming award.

COHL wrote to the arbitral tribunal on 24 May 2013, protesting at its decision in Procedural Order No. 8 not to grant COHL an extension of more than six days, from 14 to 20 June 2013, for its Statement of Rejoinder. This protest was linked to COHL's earlier protest of 20 March 2013.

COHL wrote to the arbitral tribunal on 30 May 2013, protesting against it curtailing its earlier document production decision in relation to COHL's production request no. 11 and accepting that CPIC could made its own decision about which documents should be handed over, and also protesting at CPIC's demand for a confidentiality agreement as a condition for producing documents. This protest was linked to the earlier protest of 10 January 2013, when COHL protested against the tribunal's refusal to grant permission for an inspection.

COHL protested in its Statement of Rejoinder on 20 June 2013 against the curtailment of production and against CPIC withholding its submission and its evidence and information needed for COHL to be able to produce evidence in the steel issue and the question of limitation of loss. This protest was a continuation of COHL's earlier protests against the curtailment of production and the fact that it was not given the extension of time that it needed.

COHL wrote to the arbitral tribunal on 10 July 2013, protesting that CPIC was to be allowed to call a new expert to give rebuttal evidence.

COHL wrote to the arbitral tribunal on 17 July 2013, protesting at CPIC being allowed to refer to new evidence as late as 11 July 2013. This protest was linked to COHL's earlier protests on 20 March, 20 June and 10 July 2013.

At the Pre-Hearing Conference on 19 July 2013 COHL made clear that the arbitral tribunal's handling of the case had in very large measure discriminated against it to the advantage of CPIC and that it stood by its previous protests.

COHL wrote to the arbitral tribunal on 23 July 2013, protesting that CPIC had on this date submitted and referred to new evidence which it should have submitted with its Statement of Reply and Defence to Counterclaim, dated 6 May 2013. This related to appendices CW157 and CW158. The protest was linked to COHL's earlier protests.

COHL wrote to the tribunal on 25 July 2013, protesting that CPIC on this date referred to new written testimony, contrary to the timetable and the decision of the tribunal. The protest was linked to COHL's earlier protests on 20 March, 20 June, 10 July, 17 July and 23 July 2013.

COHL wrote to the tribunal on 27 July 2013, protesting that CPIC referred to written testimony, contrary to the timetable and the decision of the tribunal, while at the same time withholding and not handing over to COHL important documents and information relating to

the steel issue. The protest was linked to COHL's earlier protests on 20 March, 20 June, 10 July, 17 July, 23 July and 25 July 2013.

COHL maintained its protest during the final hearing at CPIC being allowed to refer to an expert opinion and expert cross-examination of John Slater in the steel issue. The protest was linked to COHL's earlier protests on 20 March, 20 June, 10 July, 17 July, 23 July, 25 July and 27 July 2013.

COHL protested during the final hearing on 30 July 2013 when CPIC during COHL's cross-examination of CPIC's witness Zhang Xinhua submitted and referred to as new written testimony a new document, CW163. This was a letter which CPIC alleged had been sent to COHL to enquire about its views regarding the choice of steel. CPIC had previously failed to produce this document in response to COHL's request on 17 July 2013. The protest was linked to COHL's earlier protests on 20 March, 20 June, 10 July, 17 July, 23 July, 25 July, 27 July and 29 July 2013.

COHL protested during the final hearing on 2 August 2013 at an update to Jonathan Prudhoe's expert opinion. The protest was linked to COHL's earlier protests on 20 March, 20 June, 10 July, 17 July, 23 July, 25 July and 27 July 2013.

COHL protested during the final hearing that the arbitral tribunal had acted in an inquisitorial manner in the witness examinations (transcript 625:3–16).

COHL also protested in writing to the tribunal on 5 September 2013, reserving all its rights to challenge the award, which meant that it also maintained all of its earlier protests.

At the Post-Hearing Brief on 11 October 2013 COHL maintained all the protests it had previously made.

In its Rebuttal Brief on 22 November 2013 COHL maintained all of the protests it had previously made and also protested that CPIC in its Post-Hearing Brief had referred to new written testimony and had updated Jonathan Prudhoe's expert opinion.

It also drew attention as late as 20 December 2013 that in the arbitration it had repeatedly been discriminated against as a result of CPIC's obstruction of the proceedings and its failure to follow the tribunal's instructions regarding document production.

Much of the criticism that COHL directs against the behaviour of the arbitral tribunal, while it is based on events during the preparatory proceedings and the final hearing and also after this, has turned out to be particularly serious as a result of the views of the tribunal in the award, which for natural reasons COHL was not able to protest against other than by challenging the award, which it did.

In this connection the following should also be noted. Originally CPIC nominated Teresa Cheng as an arbitrator in the proceedings. However, she was forced to decline this assignment after COHL had alleged that in her case there was a conflict of interest on the grounds that in another dispute she had acted as counsel together with CPIC's counsel in the arbitration proceedings, Justin D'Agostino. CPIC then nominated Albert Jan van den Berg as arbitrator.

However, neither van den Berg nor CPIC mentioned that both van den Berg and D'Agostino are members of the Law Faculty of the Tsinghua University School of Law in China, or that Teresa Cheng is a member as well as a Course Director of this faculty. These facts undermine confidence since COHL was unaware of them during the arbitration and they could be one explanation of the actions of the arbitral tribunal during the proceedings. In contrast to what CPIC claims, COHL can thus not have lost the right to rely on s.34(5) of the Arbitration Act.

3.6 CPIC acted contrary to bona fides

CPIC contested COHL's inspection request, despite previously maintaining that the steel issue and the matter in general had not been adequately investigated and claiming that COHL "is put to strict proof" in the steel issue. This amounted to obstruction.

In a letter to COHL dated 8 March 2013, CPIC declared that the time of the final hearing could be changed at any time in the period from 19 August to 27 September 2013 and that

other items in the timetable would be adjusted accordingly. COHL replied on 11 and 12 March 2013, proposing a final hearing between 23 and 27 September 2013, and made adjustments to the timetable generally in accordance with CPIC's proposal. CPIC replied, however, in a letter to COHL on 13 March, objecting to COHL's proposal, despite it being entirely in accordance with CPIC's communication on 8 March. In a letter to the tribunal dated 15 March 2013, CPIC also contested COHL's request for a change to the timetable. The outcome of this was that the arbitral tribunal, in the absence of agreement between the parties, upheld the earlier preliminary timetable, which set the final hearing in the period 29 July to 2 August 2013. CPIC's behaviour amounted to obstruction of the arbitration.

In its Statement of Reply and Defence to Counterclaim on 6 May 2013, CPIC wrote that it intended to reply to questions about the steel "at a suitable point in time". It subsequently did not submit extensive new evidence (John Slater's opinion) as well as rebuttal evidence until 11 July 2013, i.e. one day late. This was done intentionally in order to make things difficult for COHL. Although the evidence did not amount to rebuttal evidence, the arbitral tribunal still accepted it, referring to the fact that it related to essential and relevant questions. As a result of CPIC's obstructive behaviour and the fact that the tribunal did not intervene, COHL was denied a reasonable opportunity to produce evidence.

CPIC's justification for its request to change the arbitral tribunal's production decision relating to production request no. 11, namely that only those drawings that contained details of temperature were relevant, cannot have been made in good faith, especially as CPIC had originally gone along with the request for the production of all the dimensional drawings for masts and substructures.

In a letter to the arbitral tribunal dated 17 May 2013, CPIC contested COHL's request for more time by reason of CPIC's delay in document production. This was unfair, particularly in light of the fact that CPIC, earlier in the production process, had submitted comprehensive documents in Chinese and had still not satisfied the production decision.

CPIC in its production of documents unloaded a great deal of irrelevant material, evidently with the aim of impeding COHL's work on the dispute.

On 28 May 2013 CPIC gave the arbitral tribunal access to the link through which future production material could be obtained. However, it did not give COHL access to this link until 6 June 2013.

CPIC made unreasonable demands regarding secrecy in relation to the production material by demanding, among other things, that COHL's counsel in the arbitration dispute should sign a special confidentiality agreement directly with CPIC.

In a letter to the arbitral tribunal dated 25 July 2013, CPIC – contrary to the decision of the tribunal at the Pre-Hearing Conference on 19 July 2013 – claimed that statements made by the witnesses not cross-examined by the opposite party should be accepted by the tribunal as unchallenged. This amounted to unfair obstruction of the proceedings.

During the final hearing CPIC criticised COHL's experts, Stephen Graham and John Hadjioannou, for not having made more detailed calculations and assessments of the suitability of the steel for its intended purpose (transcripts 1236:13–1237:10, 1334:23–1335:19 and 1419:2–1423:9). This criticism was made despite the fact that it was because of CPIC, which had opposed an inspection by COHL of the rigs and had obstructed the production process, that the experts had not had access to the material that would have been needed for such calculations, despite CPIC not having itself performed these calculations prior to manufacture and despite CIPC having been opposed to COHL being given more time at its disposal.

3.7 COHL's legal clarifications

The above circumstances – individually and taken together – are cause for the award to be declared invalid according to s.33(2) of the Arbitration Act (1999:116), referred to below as LSF, or be set aside by reason of the arbitral tribunal's excess of mandate under s.34(2) LSF or, secondly, its procedural errors, which have influenced the outcome of the case, according to s.34(6) LSF compared with ss.21, 24 and 25 LSF and Articles 19 and 26 of the Arbitration Institute of the Stockholm Chamber of Commerce (below referred to as the Rules).

Circumstances referred to in support of the view that the arbitral tribunal has not been impartial mean – individually and taken together – that the award should be annulled under s.33(2) LSF or be set aside under s.34(2 or 5 or 6) LSF.

In accordance with the Latin maxim *venire contra factum proprium*,[1] CPIC has thereby lost the right to invoke the arbitration award since in several contexts and on repeated occasions it has acted unfairly and contrary to bona fides under Swedish law with the aim of making it impossible or difficult for COHL to prosecute its action. The award should therefore be annulled or set aside.

COHL has not lost its right by reason of its passivity to challenge the award since on repeated occasions it protested at the arbitral tribunal's handling of the proceedings. There was no opportunity to protest other than afterwards at the views taken by the tribunal in the award.

What COHL has said about Albert Jan van den Berg's links to Tsinghua Law School in China does not constitute one of the grounds for challenge mentioned in s.34 para. 3 LSF. This reference is only made in support of why COHL's objections to Albert Jan van den Berg's behaviour are not precluded by the second paragraph of this section.

4. THE GROUNDS FOR CPIC's ACTION

4.1 General objection to all of the grounds invoked by COHL

The arbitral tribunal acted during the arbitration entirely in accordance with the Agreement, the Rules (which form part of the Agreement) and the applicable law, i.e. LSF, and also in an efficient and expeditious manner within the scope of the discretion open to an arbitral tribunal, which is extensive.

COHL had every opportunity to prosecute its case to a reasonable extent and was given reasonable time for consideration, including an opportunity to respond to CPIC's evidence

[1] Translator's note: Literally "to come against one's own fact (is not allowed)", i.e. no-one may set himself in contradiction to his own previous conduct.

and refer to rebuttal evidence. The arbitral tribunal handled the proceedings impartially and gave the parties the same opportunities. Consequently it did not disregard the requirement of equal treatment, nor did it act arbitrarily or outside the law in the views it took or contrary to basic legal principles. Nor was COHL misled about the conditions of the final hearing and the arbitration proceedings. There has been no circumstance capable of impairing the confidence in the impartiality of any of the arbitrators. The tribunal throughout did not act in an inquisitorial manner to the advantage of CPIC as a de facto counsel for CPIC. The arbitration proceedings have been fair in every respect in accordance with the basic requirements governing legal proceedings.

CPIC acted throughout within the framework of the parties' Agreement and the applicable law and legal principles, and in general appropriately in order to safeguard its right. CPIC has not been obstructive or acted contrary to bona fides. There was therefore no reason for the arbitral tribunal to intervene against CPIC's behaviour.

The assertion that CPIC has lost its right to invoke the award according to the Latin principle *venire contra factum proprium* is without foundation.

In the award the arbitral tribunal correctly assessed the questions in dispute in the case. It did this in accordance with the Agreement and existing law after an assessment of all the evidence and legal arguments which were put forward by the parties and which had been introduced in the case correctly. The award shows that the tribunal took into account all the arguments and evidence that the parties introduced in the case, even if this is not explicitly made clear in the award. Consequently the tribunal did not disregard importance evidence at the expense of COHL. It did not commit any errors in its placing of the burden of proof or in its evaluation of the evidence and did not make unreasonable demands on the evidence that COHL should produce in order to be considered to have met the threshold of proof. The question of where the burden of proof lay was discussed during the proceedings and it was clear to COHL that the parties held different views regarding this question. It can hardly be surprising that a party who claims the existence of a certain legal fact has to corroborate this. The interpretation and application of rules of substantive law and contractual provisions, the assessment of evidence and where to place the burden of proof are in any event material

questions that fall outside the scope of what can amount to errors on which to base a challenge.

Accordingly, none of the circumstances referred to by COHL amount to circumstances that, individually or taken together, mean that the award or the way in which the award has come about is contrary to procedural public policy (s.33(2) LSF) or that the arbitral tribunal has exceeded its mandate, disregarded provisions of due process (i.e. treatment according to the law or the right to adequately prosecute one's action), acted in contravention of impartiality or committed procedural errors that can probably be assumed to have influenced the outcome of the case (s.34(2, 5 or 6) LSF).

If the Court of Appeal should conclude that procedural errors have occurred, these errors are not serious enough for grounds for a challenge to or invalidation of the award to exist, and neither did they influence the outcome of the case. Any procedural errors should be assessed individually and not taken together. Not even when seen in context have there been any procedural errors of this kind.

Furthermore, COHL has lost the right to refer to the majority of the circumstances that are allegedly grounds for challenge by having taken part in the proceedings without clearly protesting at the existence of these circumstances relating to the arbitral tribunal's actions or decisions in its handling of the arbitration. For a party to retain its right to a challenge because of alleged procedural errors, it is necessary for it to state clearly and unconditionally that the handling of the case is unacceptable in one specific respect. A vaguely expressed dissatisfaction has no effect, since a party must declare that it is protesting at a particular measure or decision or is reserving the right to challenge a future award for this reason. A protest in connection with a particular decision likewise cannot subsequently be extended to cover an earlier decision or a later decision.

4.2 The arbitrators, especially Albert Jan van den Berg, were not disqualified under s.34(5) LSF

None of the circumstances referred to by COHL amount (individually or taken together) to grounds for challenging the award due to a conflict of interest. The circumstances referred to

by COHL do not come under any of the typical situations referred to in s.8 LSF, where a circumstance is always considered to exist that can diminish confidence in the arbitrator's impartiality.

It is disputed that what COHL has now brought up about Albert Jan van den Berg's links to Tsinghua Law School in China on the whole amounts to a circumstance that could affect confidence in him. In any event COHL made no mention of the alleged conflict of interest until 25 September 2015, i.e. almost 19 months after the award was rendered and long after the expiry of the deadline for a challenge. COHL has thereby forfeited its right to refer to these circumstances in support of its case under s.34 para. 3 LSF.

None of the circumstances referred to by COHL regarding the actions of the arbitrators in their handling of the arbitration, such as the way in which the arbitral tribunal treated witnesses and other evidence differently, amount to a circumstances that could be considered to diminish confidence in the impartiality of the arbitrator. The tribunal has handled the dispute impartially, and even if this were not the case, it cannot taken as a reason for saying that there has been a conflict of interest regarding one or more of the arbitrators. Instead any inaccuracies should be judged according to s.34(6) LSF.

None of the arbitral tribunal's decisions in the award amount to a circumstance that could be considered to diminish confidence in the impartiality of the arbitrators. The arbitrators' substantive judgments cannot be taken as a reason for saying that one or more arbitrators should be disqualified because of a conflict of interest.

On no occasion during the arbitration did COHL allege any conflict of interest that affected any of the arbitrators Jeffrey Hertzfeld, Albert Jan van den Berg or Alexander Komarov; it did not put forward objections until the award was challenged.

COHL has entirely lost its right to invoke s.34(5) LSF in support of its claim that the award should be quashed since within fifteen days of becoming aware of the alleged circumstances on which a conflict of interest was based it did not put forward a claim for disqualification (s.10 and s.34 para.2 LSF and Article 15 of the Rules).

4.3 The management by the arbitral tribunal during the preparatory proceedings was correct

4.3.1 The arbitral tribunal's decision to refuse until further notice COHL's request for an inspection of the oil rigs

The arbitral tribunal's decision in Procedural Order No. 3 on 7 January 2013 to refuse until further notice COHL's request to inspect the oil rigs and its decision in Procedural Order No. 4 on 18 January 2013 regarding COHL's request for reconsideration were correct. The decisions should not be equated with rejection of evidence and are not contrary to s.25 LSF or Article 26 of the Rules. At the time of the decisions the parties had not yet referred to any evidence. COHL's request to be allowed its own inspection of the oil rigs with its own experts during the arbitration in order to come up with some helpful evidence finds no support in the Agreement and does not correspond to any mode of proof known in Swedish law. It was nothing more than a fishing expedition.

It was within the arbitral tribunal's discretion to allow or reject an inspection request. The decisions were reasonably balanced in light of the prevailing circumstances. The tribunal's decision that an inspection would have been disproportionate, inconvenient and expensive for CPIC and would cause a delay in the proceedings in relation to the established timetable was correct.

Moreover, the decision by the tribunal that COHL's inspection request was premature was correct. At the time of the request there had been limited correspondence between the parties, especially where the steel issue was concerned, and COHL had not yet submitted a Statement of Reply and Counterclaim. When the decisions were taken, there was no reason to assume that the inspection that was requested would add nothing by way of evidence. The decision did not mean that COHL missed out on data for failure analysis or important evidence. COHL inspected the rigs regularly during their manufacture and was given an opportunity to carry out tests. An inspection designed to show that there were defects in the quality of the steel, long after COHL had cancelled the Agreement and at a time when the rigs had been dismantled and parts of them had been sold, would not have produced the additional evidence or material for a failure analysis that COHL referred to regarding the temperature resistance of the steel.

COHL's letter of 10 January 2013 was a protest against and a request for reconsideration of Procedural Order No. 3. COHL neither protested nor objected to the arbitral tribunal's decision in Procedural Order No. 4. It was also free to come back with a new inspection request at a later stage of the arbitration. Nothing in the tribunal's timetabling or assessment or in CPIC's behaviour prevented COHL from doing this. Both parties could and were allowed to refer to evidence after 16 July 2015. Since COHL neglected for no reason to submit a new inspection request, it has reconciled itself to and accepted the decision of the tribunal. COHL's right to object to the decision is precluded.

The arbitral tribunal was under no obligation to voluntarily take up the question of an inspection at a later stage of the proceedings; a new examination would have required a special request from COHL, even if the burden of proof for the suitability of the steel was put on it in the award. The tribunal made clear to COHL that it could amend its decision in Procedural Order No. 3, since in its decision the tribunal laid the way open for an amendment at a later stage.

4.3.2 The arbitral tribunal's decision regarding COHL's production request no. 11 concerning dimensional drawings

The arbitral tribunal's handling of COHL's production request no. 11 was correct. Procedural Order No. 8 on 21 May 2013 and Procedural Order No. 9 on 31 May 2015 amount to clarifications of COHL's production request no. 11 for the production of drawings. They do not amount to new decisions, restrictions or amendments relating to the tribunal's earlier decision on 8 March 2013 in Procedural Order No. 5. Nor are they decisions to be equated with rejection of evidence or contrary to s.25 LSF or Article 26 of the Rules. The tribunal's clarification was correct and arose because the parties held different views about the interpretation of the production decision regarding which drawings were covered by the decision in Procedural Order No. 5. It was justified by the fact that COHL's production request explicitly intended to give additional evidence about the steel's resistance to temperature and would otherwise have concerned too extensive and imprecise material.

The fact that it had been incumbent on CPIC to determine which of thousands of documents were affected by the production decision, i.e. those documents that were de facto relevant for the question of meeting the requirements in the Agreement governing temperature, lies in the nature of the production process. The arbitral tribunal in this respect did not treat the parties differently. Moreover, the tribunal's clarification regarding confidentiality agreements from COHL in relation to certain of the documents requested was correct. It was justified by the fact that COHL, in a letter to CPIC on 24 April 2013 and when it wrote to the tribunal on 13, 17 and 30 May 2013. had expanded its original production request no. 11 to include drawings which were largely confidential since they contained intellectual property rights belonging to CPIC's subcontractors.

The arbitral tribunal's handling of COHL's production request no. 11 falls within the scope of its room for discretion and was well in line with a rapid and effective implementation of the procedure and the timetable. An unrestricted right to all the drawings would not have resulted in any additional evidence about the temperature resistance of the steel since this question was, nevertheless, identified through the decision about production, as it was explained. It is irrelevant that COHL had the burden of proof laid on it for the suitability of the steel. The decision did not mean that COHL lost out on important evidence or an opportunity to perform a failure analysis or otherwise prosecute its action in the arbitration. On the contrary, COHL received more documents than those covered by its original production request no. 11, together with more than 100 detailed drawings corresponding to the production request. COHL, however, referred to none of these drawings in the arbitration and did not use them for a failure analysis.

The situation is not the same as the arbitral tribunal's decision on 18 January 2013 in Procedural Order No. 4, when it rejected COHL's renewed application for an inspection of the oil rigs because it had not mentioned any new circumstances. This decision should not be confused with the tribunal's clarifications in the production process. The tribunal's clarifications in Procedural Order No. 8 and Procedural Order No. 9 were necessary since the parties held different views about the extent of production and the tribunal did not thereby favour CPIC at the expense of COHL or disregard the principle of equal treatment.

In the arbitration COHL failed to protest clearly at the arbitral tribunal's clarifications in Procedural Order No. 8 and Procedural Order No. 9. In its letter of 24 May 2013 COHL addressed only the tribunal's decision in Procedural Order No. 8 not to allow it an extension beyond 20 June 2013 for the submission of its Statement of Rejoinder. In its letter of 30 May 2013 COHL objected to CPIC's demand for confidentiality agreements, but did not protest against any part of the tribunal's decision. The fact that COHL did not share CPIC's view of which documents were covered by the production request and that in its Post-Hearing Brief on 11 October 2013 and its Rebuttal Brief on 22 November 2013 it asked the tribunal to draw negative conclusions, since it claimed not to have received all the documents in its production request, cannot be equated with a protest. This circumstance is therefore precluded.

4.3.3 The arbitral tribunal's acceptance of CPIC's expert evidence

On 16 July 2013 the arbitral tribunal correctly decided to admit evidence referred to by CPIC from its expert John Slater. This evidence, which CPIC submitted on 11 July 2013, comprised part of CPIC's Rebuttal Witness Statements and Reports. It was submitted in accordance with the revised timetable in Procedural Order No. 6 and was therefore admitted. The tribunal's decision that this did not amount to new evidence, which should have been submitted on 6 May, but to rebuttal evidence was in accordance with existing rules and within the scope of the tribunal's discretion.

The arbitral tribunal took note of COHL's objections to CPIC's new expert John Slater, but observed in a decision on 16 July 2013 that neither Procedural Order No. 1 nor the timetable prevented a party from submitting as rebuttal evidence documents from new experts or witnesses, provided that they in general fell within the framework for the submission of rebuttal evidence.

COHL had an opportunity to respond to John Slater's opinion and other documents submitted as rebuttal evidence and submitted rebuttal evidence of its own on 13 July 2013 in the form of opinions from Stephen Graham and John Hadjioannou. The arbitral tribunal therefore did not discriminate against COHL.

4.3.4 The arbitral tribunal's timetabling and COHL's time for preparing and prosecuting its action

The arbitral tribunal correctly handled the timetabling in relation to COHL's request for revisions in light of Patricia Casey's illness, COHL's production request no. 11, COHL's request with reference to the fact that certain production documents were in Chinese, and also in other respects.

The arbitral tribunal's email containing a proposal for a revised timetable on 18 March 2013 and its decision about this timetable on 22 March 2013 in Procedural Order No. 6 arose because of Patricia Casey's illness. The decision regarding a revised timetable was correct and justified as well as in accordance with the Agreement, the rules that applied and the room for discretion that the tribunal had during the proceedings.

COHL accepted the original timetable in Procedural Order No. 1 for its Statement of Claim and Statement of Defence and Counterclaim, and these documents were handed in before Patricia Casey fell ill. In Procedural Order No. 6 on 22 March 2013, the arbitral tribunal extended the deadlines in the timetable for later submissions, document production and rebuttal evidence to the extent that was required and possible in light of the planned final hearing and prevailing circumstances in general. The tribunal and CPIC were accommodating regarding Patricia Casey's illness. CPIC engaged in frank discussions in order to satisfy COHL's needs, but since COHL was only available in one week during the eight weeks that followed from the scheduled hearing, the parties were unable to reach agreement on postponing the date of the final hearing. Given that there was no common agreement, the tribunal acted correctly. The original timetable in Procedural Order No. 1 was adjusted correspondingly for both parties as a result of the tribunal's revised timetable. The tribunal neither treated the parties differently nor favoured COHL [*sic*] inappropriately. Patricia Casey recovered, moreover, well before the final hearing and had several other counsel to help her throughout the proceedings.

COHL did not protest clearly against the arbitral tribunal's decision in Procedural Order No. 6. It also reconciled itself to the decision and was opposed to extending the final hearing

by several days at a later date, which would have given it extra time in which to prepare and prosecute its case. This circumstance is therefore precluded.

The arbitral tribunal's handling of the production process was also correct. This is true of both Procedural Order No. 8 on 21 May 2013 and Procedural Order No. 9 on 31 May 2013 and in general. The tribunal extended the deadlines for COHL in the timetable through Procedural Order No. 8 with reference to the production process to the extent that was necessary and possible in view of the planned final hearing and the prevailing circumstances in general. The tribunal also later allowed the parties to refer to and submit evidence after the deadlines. COHL therefore had every opportunity to prepare and prosecute its case. The tribunal did not set the deadlines for either CPIC or COHL, contrary to the principle of equal treatment.

There was no obstruction in connection with the handing over by CPIC of documents in the production process. CPIC's objections were well founded. They were motivated by the fact that in the course of the production process COHL requested more documents than it had done originally, that the extent of production was unclear and that documents were covered by secrecy. CPIC handed over requested documents to the best of its ability insofar as they existed, were in its possession or in its control.

The arbitral tribunal's decision on 15 May 2013 in Procedural Order No. 7 not to instruct CPIC to produce translations of documents in Chinese that had been handed over to COHL was correct. The obligation to translate documents into English according to paragraph 5.2 of Procedural Order No. 1 applied only to documents that were referred to and submitted during the arbitration. It did not apply, for example, to documents that were exchanged between the parties. Any further extension in time for COHL for this reason was not justified. In its letter on 4 May 2013, COHL addressed only the tribunal's decision in Procedural Order No. 8 not to allow COHL more time than to 20 June 2013 for submitting its Statement of Rejoinder. COHL did not protest in other respects at the tribunal's decision in the production process. The fact that COHL claimed in writing that CPIC had not fully complied with the tribunal's production decision in Procedural Order No. 5 and requested the tribunal to draw negative conclusions cannot be considered to amount to a clear protest against the tribunal's procedural decision.

COHL also reconciled itself to the tribunal's decision regarding document production and was opposed to extending the final hearing by a few days at a later date, which would have given COHL extra time in which to prepare and prosecute its case.

4.3.5 The arbitral tribunal's behaviour during the Pre-Hearing Conference

The remarks of Jeffrey Hertzfeld during the Pre-Hearing Conference about what the parties should focus on during the final hearing were justified, considering that COHL had already made clear its position regarding the planning of the final hearing, while CPIC had objected to the original timetable for the final hearing. Hertzfeld did not act in a biased way or contrary to the principle of equal treatment.

COHL did not react to these remarks at the meeting. It should have protested at the behaviour of the tribunal here during the arbitration, since it should already have been clear to it how the tribunal acted. This circumstance is therefore precluded.

4.4 The arbitral tribunal's actions during the final hearing

4.4.1 The arbitral tribunal's decision during the final hearing regarding the admission of CPIC's rebuttal evidence

The arbitral tribunal's decision on 29 July 2013, i.e. the first day of the final hearing, to approve most of the documents that CPIC handed in on 11 July 2013 as rebuttal evidence was correct. COHL's claim that the tribunal accepted all the documents as rebuttal evidence merely because CPIC said that this was the case is baseless. The tribunal carefully examined whether the documents submitted by CPIC amounted to rebuttal or to new evidence that should have been submitted earlier in May 2013, and admitted only those documents that were considered to amount to rebuttal evidence, i.e. documents CW106, 108–116, 118–121, 124, 127, 129, 134, 135, 138, 142–144, 146, 147, 153 and 154, together with Zhang Xinhua's written witness statement. The tribunal commented specially that even if it were the case that some of the documents submitted by CPIC had been requested by COHL in the production process, they would be admitted since their contents were relevant and COHL was free to ask the tribunal to draw the negative conclusions it claimed on the grounds that CPIC had

submitted the documents too late. CPIC's submission of the documents was fully in accordance with the revised timetable. According to Procedural Order No. 6, rebuttal evidence was timetabled for both the parties until 10 July 2013. Both the parties were aware that there would then be barely three weeks left until the appointed final hearing.

Both parties submitted and were allowed to refer to documents after the arbitral tribunal had informed them in an email on 16 July 2013 that they could not submit new evidence after this date. The tribunal's decision to approve such documents was correct and within the scope of its room for discretion in this respect. The documents that CPIC handed in on 23 July 2013 (CW 157 and 158) related to Chen Xinlong's second witness statement of 10 July 2013. COHL had written to the tribunal on 17 July 2013, requesting these documents. COHL did not ask that they should be rejected, but pointed out in a letter to CPIC dated 23 July 2013 that it had handed in the wrong document, whereupon CPIC handed in a new document on the same day. In connection with the fact that the arbitral tribunal on the first day of the final hearing, 29 July 2013, was due to make a decision, among other things, about COHL's claims for rejection, the tribunal commented specially that it understood that COHL, in accordance with its enquiry, had been able to examine which documents related to Chen Xinlong's second witness statement, but asked COHL to come back to it if this was not the case (transcript 17:13–22). In reply COHL did not make any protest in this matter.

The decision of the arbitral tribunal on 30 July 2013 to approve during the final hearing the submission of document CW 163, i.e. an email from Zhang Xinhua to Irina She dated 1 June 2010, was correct. The document was handed in after COHL's counsel when cross-examining the witness Zhang Xinhua had asked to see an email which the witness had said during the cross-examination he had sent to Irina She. COHL did not protest against the submission of the document and did not ask for it to be rejected.

The arbitral tribunal's decision to allow some minor clarifications of Jonathan Prudhoe's report during the final hearing and in CPIC's Post-Hearing Brief of 11 October 2013 was correct and not contrary to the tribunal's email to the parties on 16 July 2013. The decision was motivated by the fact that Jonathan Prudhoe's clarifications did not amount to a reference to new evidence or the introduction of new arguments. The decision is not contrary to the principle of equal treatment.

COHL also gained a hearing for many of its claims for rejection, and several items of evidence submitted by CPIC were not approved as rebuttal evidence. There was no adverse discrimination against COHL. COHL also had every opportunity to prosecute its case.

It is not clear in what way COHL thinks that the arbitral tribunal's email of 16 July 2013 was cited to COHL's experts Stephen Graham and John Hadjioannou when they tried to supplement their opinions and in what way they tried to add to these. Both Stephen Graham and John Hadjioannou submitted additions to their earlier opinions on 13 July 2013. During the examination of Stephen Graham he was allowed to give his conclusions about John Slater's report even in that part of it which fell outside the scope of rebuttal evidence, and the tribunal took note of John Hadjioannou's evidence. The tribunal's admission of rebuttal evidence should not be confused with the tribunal's evaluation of evidence.

The arbitral tribunal took well-balanced decisions within the framework of the parties' Agreement and the room for discretion that it had in this respect, and also treated the parties in the same way.

4.4.2 The arbitral tribunal's behaviour during the examinations

The arbitral tribunal acted correctly in accordance with the parties' Agreement and the existing rules during the examinations of the witnesses Zhang Xinhua, Dean Sillerud, Vladimir Alyuskin and John Slater. The tribunal was entitled under Procedural Order No. 1 at any time during the examinations to put questions to the witnesses. The tribunal did not act contrary to the principle of equal treatment, to the disadvantage of COHL.

Jeffrey Hertzfeld's remarks during COHL's cross-examination of Zhang Xinhua that it was not necessary for the witness to go beyond his written testimony were justified. This comment was made after the witness had asked to look at certain references in order to answer a question about the choice of steel in a completely different project that was not covered by his witness statement. COHL failed to protest clearly at the tribunal's comment, but continued to put questions to Zhang on the same topic, without any intervention from the tribunal.

The tribunal did not take the opposite view in favour of CPIC later on in the examination of Zhang. After Albert Jan van den Berg's to him, the tribunal gave both parties an opportunity to put additional questions to the witness, but COHL chose not to do this. Nor are the situations with COHL's witnesses Dean Sillerud and Vladimir Alyuskin comparable. CPIC's questions to Dean Sillerud concerned his earlier position at Lukoil, the company responsible for the project in Iraq to which COHL had tendered, as well as his participation in a case between Lukoil and Archangel Diamond Corp. (ADC). CPIC's questions to Vladimir Alyuskin were aimed at clarifying about where he had been in the period 31 May to3 June 2010, in which connection Jeffrey Hertzfeld explained that the witness could look at the company's notes to jog his memory, although he remarked at the same time that there was no need to do this. COHL failed to protest at the tribunal's actions here during the examinations of Dean Sillerud and Vladimir Alyuskin. This circumstance is therefore precluded.

Jeffrey Herzfeld's question to COHL's counsel during the cross-examination of Zhang Xinhua about how the witness could reply to the question about the truth of his written testimony was justified since COHL's counsel had put an altogether too broad a question to him. Herzfeld's question does not reflect the fact that he treated the parties' witnesses differently. Nor does any other part of the arbitral tribunal's behaviour during the cross-examination of Zhang reflect the fact that the tribunal did not make the same demands on the truth in Zhang's witness statements as for the other witnesses. COHL neglected to protest clearly at the tribunal's behaviour in this respect during the proceedings. This circumstance is therefore precluded.

The arbitral tribunal's action in allowing CPIC's questions during the cross-examination of Zhang Xinhua about events that had occurred prior to the contract negotiations was correct and consistent with Procedural Order No. 1. The tribunal allowed both parties to put further questions to Zhang about such events after Albert Jan van den Berg had put his own questions to the witness about this. COHL had no further questions, however, and did not protest against van den Berg's questions. The tribunal did not treat the parties differently in these respects.

The arbitral tribunal intervened during the examinations when there was cause for this, allowing written testimony when this was justified. The situations are in any event different and not comparable. The tribunal took well-balanced procedural decisions within the scope of its discretion and did not apply different rules to the parties.

It did not prevent COHL's expert Stephen Graham from responding to John Slater's opinion and Table 2. During COHL's direct examination of Stephen Graham the latter commented on Table 2, referring to a previously unmentioned article. CPIC protested at this, pointing out that the article amounted to new evidence that was not allowed. The arbitral tribunal stated that Graham should stay within the scope of his opinion, but at the same time allowed him to give his conclusion based on the article in question, despite CPIC's protests. Nor did the tribunal hinder COHL in its cross-examination of John Slater or act in a manner that deprived COHL of the opportunity to prosecute its case. In any event COHL failed to protest clearly at the tribunal's behaviour during the final hearing in these respects.

The arbitral tribunal's behaviour during CPIC's examination of COHL's experts Graham and Hadjioannou was correct. CPIC's counsel put questions about documents to which COHL had had access in good time before the final hearing and the tribunal had no reason to intervene against this. In any event COHL failed to protest clearly at the tribunal's behaviour during the final hearing.

4.4.3 Albert Jan van den Berg's behaviour during witness examinations

According to Procedural Order No. 1, the arbitral tribunal was entitled at any time during the examinations to put questions to the witnesses, which is consistent with provisions and principles of the existing law. The questions that were put were due to a wish to clarify uncertainties in the evidential material. The arbitral tribunal, through Albert Jan van den Berg and also in one or two cases Jeffrey Hertzfeld, thus did not act in a biased, inquisitorial or aggressive manner or as de facto counsel for CPIC during the examinations of the witnesses Chen Xinlong, Zhang Xinhua, Vladimir Alyuskin, John Slater and R. Dean Graves. In any event COHL failed to protest clearly at the tribunal's behaviour here during the final hearing.

4.4.4 The arbitral tribunal's use of its own time during the final hearing

According to Procedural Order No. 1, the arbitral tribunal had the right at any time during the examinations to put questions to the witnesses, which is consistent with provisions and principles of existing law, the Rules and international practice. For example, the tribunal put questions in order to clarify uncertainties in the written material and the replies of witnesses and experts. The questions did not favour one party at the expense of the other. The tribunal did not use its own time during the final hearing as counsel time in order to help CPIC. In any event COHL failed to protest clearly at the tribunal's behaviour in this part of the arbitration.

4.5 The arbitral tribunal's behaviour after the final hearing

4.5.1 The arbitral tribunal's decision in Procedural Order No. 11

The arbitral tribunal did not favour CPIC at the expense of COHL and committed no procedural error by allowing CPIC to refer to evidence through Procedural Order No. 11 on 2 September 2013. Its decision was well justified and based, inter alia, on the introduction by COHL of new evidence on 26 July 2013 in connection with the submission of the parties' Joint Report of the quantum experts. The fact that it was CPIC which in practice sent this report to the tribunal is irrelevant, since the new evidence that was introduced related to COHL's part of the report. The tribunal made a correct and independent assessment of what should be admitted or rejected, in a number of cases rejecting rebuttal evidence which fell outside the scope laid down for submissions. COHL was given an opportunity to respond to this evidence after the final hearing in its Post-Hearing Briefs.

The decision to allow previously rejected rebuttal evidence was not contrary to the principle of equal treatment and cannot be compared with the arbitral tribunal's decision in Procedural Order No. 4. It was correct of the tribunal not to reconsider COHL's application for an inspection of the oil rigs since COHL had not come up with any new circumstances. This decision should not be confused with the tribunal's decision regarding the admission of rebuttal evidence that had been referred to. The tribunal thereby did not act contrary to the principle of equal treatment.

4.6 The views taken by the arbitral tribunal in the award

4.6.1 In the award the arbitral tribunal did not allow new evidence from CPIC but not allow it from COHL

It is unclear what evidence COHL thinks that the arbitral tribunal placed special emphasis on in paragraphs 174, 418–420, 447, 449, 454, 456, 459, 460, 463, 467–470, 486, 521, 544 and 557 of the award. The tribunal's decisions regard the admission of CPIC's submission of documents, rebuttal evidence, on 11 July 2013 during the final hearing and in Procedural Order No. 11 on 2 September 2013 were in any event correct and well-balanced in light of the prevailing circumstances. COHL was given sufficient opportunity to respond to the documents submitted by CPIC, and in those cases where COHL considered that the documents had been submitted too late it had an opportunity to ask the tribunal to draw negative conclusions from the documents because of their late submission. Aside from all this, the tribunal's comments in the above-mentioned paragraphs of the award are part of its substantive examination and cannot be attacked in a protest action.

The arbitral tribunal's decision to accept Jonathan Prudhoe's clarifications of his opinion was correct and motivated by the fact that there was no question of a reference to new evidence or the introduction of new arguments. COHL had an opportunity to respond to his clarification both during the final hearing and in Post-Hearing Briefs. The tribunal thus did not allow any new evidence in the award. In any event the statements of the tribunal in paragraphs 486–487, 544 and 557–558 of the award are part of its substantive examination and do not amount to grounds for a challenge.

The arbitral tribunal's statements in the award, paragraph 464, do not amount to a decision, but are part of its substantive examination and so do not amount to grounds for a challenge. Quite apart from this, the tribunal's assessment of John Hadjioannou's witness statement was correct, given that he himself declared that he could not comment with certainty on whether "the third batch of steel" was intended for use in the oil rigs and, if so, whether it would be used in a critical component. The tribunal's statement cannot be equated with a rejection of evidence that was offered with reference to the time to which the evidence referred. The tribunal took account of John Hadjioannou's witness statement, but concluded that it was not clear, in view of other evidence, that the third batch of steel had been used in the oil rigs.

The arbitral tribunal's admission of evidence in other situations was correct and it did not apply different rules and assessment for similar situations. Both parties were allowed to refer to evidence and to make minor adjustments and additions outside the established timetable, and the tribunal made correct assessments of this evidence, taking account of the opportunities of the opposite party to respond to the evidence, and also other evidence submitted in the arbitration.

4.6.2 The arbitral tribunal's evaluation of the evidence

The arbitral tribunal's evaluation of evidence (paragraphs 96 and 400–402 of the award) from GL Noble Denton's reports and from CPIC's expert Peter Stansfield comprised part of the substantive examination of the case and is not a ground for a challenge. Quit apart from this, the evaluation of GL Noble Denton's reports was correct and influenced by the fact that CPIC had not had an opportunity to cross-examine the inspectors who had written the reports, since shortly before the final hearing they objected to giving evidence in the arbitration without given valid reasons for this. CPIC therefore had no opportunity to cross-examine them about their observations and conclusions in the reports.

COHL's comparison of the arbitral tribunal's comments and reasoning in paragraph 418 of the award about the minutes of a meeting on 20 May 2010 is lame. The lack of opportunity that COHL had to cross-examine certain persons who were present at the meeting was not due to the fact that shortly before the final hearing they objected to give evidence without giving a reason, but was because they were in no way referred to as witnesses in the arbitration. If COHL had wanted to question these individuals, it could have referred to them. In any event the tribunal's evaluation of the minutes, which formed part of its substantive examination, was correct in view of the fact that it was clear from other evidence that there was no reason to call into question the genuineness of the minutes.

It is not clear what written documents COHL thinks form the basis of the arbitral tribunal's assessments in paragraphs 449, 454, 467, 494, 500, 501, 504 and 505 of the award and the way in which the tribunal had not given COHL an opportunity to cross-examine the authors of documents that CPIC had referred to as written testimony. In any event the tribunal's

evaluation of the written documents submitted in the case, which formed part of the tribunal's substantive examination, was correct.

The arbitral tribunal's evaluation of CPIC's evidence acquired from an inspection of the oil rigs in the course of the arbitration was correct and did not affect COHL's opportunities to prosecute and prepare its action (paragraphs 500, 501, 505, 533 and 534 of the award). In its evaluation of evidence the tribunal quite correctly noted that there was no reason to question the credibility of Bureau Veritas and Jonathan Prudhoe. Bureau Veritas is an independent and highly respected company and COHL has not pointed to any facts that give one cause not to believe in the observations made by Bureau Veritas and Jonathan Prudhoe.

The arbitral tribunal's evaluation of evidence, moreover, must not be confused with its procedural decision concerning COHL's inspection request. If COHL considered that CPIC's inspection affected its opportunities to produce evidence of the properties of the rigs in the event of failure or evidence of whether CPIC had taken reasonable measures to limit its loss, it should have made a new inspection request after CPIC had submitted Jonathan Prudhoe's report on 6 May 2013. COHL instead reconciled itself to the arbitral tribunal's decision without protest.

4.6.3 The arbitral tribunal's assessments in the award and its instructions at the Pre-Hearing Conference

In the award the arbitral tribunal did not mislead COHL about the conditions for the evaluation of evidence or otherwise and did not evaluate the evidence contrary to instructions given at the Pre-Hearing Conference on 19 July 2013. Nor did the tribunal favour CPIC and discriminate against COHL contrary to the requirement of impartiality. At the Pre-Hearing Conference the tribunal clearly stated that it was up to the parties how they should prosecute their action. In accordance with Procedural Order No. 1, COHL was entitled to request a cross-examination of those of CPIC's witnesses who had given written testimony and, if a witness failed to appear, to ask for this testimony to be rejected. COHL was also entitled to examine its own witnesses who had given written testimony, regardless of whether the opposite party had asked for them to be heard, and COHL also carried out such examinations.

COHL was responsible for prosecuting its own action and for which of CPIC's witnesses and experts it wished to cross-examine.

In its award the arbitral tribunal made a correct assessment of existing law after an evaluation of the evidence which was referred to by the parties and which had been correctly introduced in the case. The tribunal did not ignore important evidence which unfairly favoured CPIC by reason of the fact that COHL chose not to cross-examine some of CPIC's witnesses and experts. It is clear from paragraphs 381–410 of the award that the tribunal objectively evaluated Peter Stansfield's assessment of what amounted to additional work ordered by COHL and what amounted to faults in the oil rigs in light of the requirements of the Agreement's technical specifications, including questions relating to the BOP Platform and positioning of the ST-80 Socket. Peter Stansfield's information was not inconsistent with the statements of Ma Donglan or of CPIC in a letter dated 24 February 2011. The tribunal accordingly did not disregard the requirement of equal treatment and did not act arbitrarily or outside the rule of law in reaching its views, nor did it in any way ignore any principle of law, as a result of which the outcome of the award was a violation of public policy.

The interpretation and application of rules of substantive law and contractual provisions, the evaluation of evidence and the allocation of the burden of proof are substantive questions which fall outside the scope of what amounts to errors that are grounds for a challenge.

4.6.4 The arbitral tribunal took account of the provisions of the Agreement and evidence referred to by the parties

The arbitral tribunal acted in accordance with the law in its assessment of the questions in dispute in the arbitration and did not ignore the provisions of the Agreement or fail to interpret the Agreement. Nor did it apply methods of interpreting agreements that unfairly favoured CPIC at the expense of COHL. Accordingly the tribunal did not deliberately disregard applicable substantive contractual provisions, which is what is required for the existence of an excess of mandate that potentially amounts to grounds for a challenge.

The arbitral tribunal carried out substantive assessment of the question of delay and the importance of the written provisions of the Agreement on the basis of the given situation. It

did not disregard articles 19.1, 20, 23.2 and 34.3 of the Agreement, but interpreted the provisions of the Agreement under the guidance of articles 7, 8 and 9 of the CISG in light of the rules and principles contained in them. The tribunal did not in any way go beyond its authority. The reasons behind the award, which must be read in context, make clear that the tribunal made a careful assessment of all the circumstances referred to by the parties.

4.6.5 The arbitral tribunal applied the provisions of Incoterms

The arbitral tribunal applied the provisions of Incoterms in the way that it considered to be correct (paragraph 344 of the award). It in no way went beyond its authority. Nor did it act contrary to the principle of equal treatment.

4.6.6 The arbitral tribunal's decision to lay the burden of proof on COHL

Questions about where to place the burden of proof are substantive and cannot be attacked by a challenge. The placing by the arbitral tribunal of the burden of proof on COHL for the claim that the grade of steel that was chosen was not as specified in the Agreement and that CPIC had not fulfilled its obligation to limit its loss is correct and justified by general rules governing the burden of proof and by the fact that COHL had had extensive information about the choice of steel before it cancelled the agreement and as a result of the production process (paragraphs 447, 524 and 534 of the award). None of the tribunal's procedural decisions arising from COHL's inspection request, the tribunal's timetabling and handling of requests for an extension of time, its handling of questions about document production, the tribunal's behaviour at the Pre-Hearing Conference and during the final hearing and in its Procedural Order No. 11 prevented COHL from producing evidence about the suitability of the steel that was chosen.

Both parties argued about the question of the placing of the burden of proof and submitted doctrine and precedents for their respective points of view. The fact that the arbitral tribunal chose to go by the opinion put forward by CPIC in this matter should therefore not have come as a surprise to COHL.

4.6.7 The arbitral tribunal did not prevent COHL from meeting the threshold of proof laid down

The action of the arbitral tribunal in paragraph 469 of the award of taking heed of the absence of evidence of "actual failure" was correct and formed part of its overall assessment of whether COHL had met its burden of proof regarding the quality of the steel. Neither the tribunal's decision regarding COHL's inspection request nor its decision or clarifications in the document production process prevented COHL from obtaining access to evidence that was relevant to the steel issue. Regardless of this, an inspection or the submission of all the dimensional drawings for masts and substructures could under no circumstances have amounted to or be used as evidence of "actual failure".

4.6.8 The arbitral tribunal's apportionment of responsibility between CPIC and COHL

In the award the arbitral tribunal made correct assessments of the threshold of proof and the burden of proof, the responsibility for the choice of steel, the guarantee liability and other questions in dispute in the case, in accordance with the Agreement and existing law and after an evaluation of all the evidence and legal arguments which were referred to by the parties and brought up in the case. All these questions are substantive ones and not of such a kind that any incorrect assessments amount to material public policy.

4.6.9 The arbitral tribunal applied the same principles of interpretation to CPIC and COHL

It is disputed that the arbitral tribunal acted in a biased manner and contrary to the principle of equal treatment by taking account of the provision in the Agreement that anything that was agreed should be in writing and of articles 7 and 8 of the CISG only when this was to the benefit of CPIC, but not when it was to its disadvantage. It is clear from the reasons behind the award, which must be read in context, that the tribunal made a careful assessment of all the circumstances referred to by the parties.

5. THE PRESENTATION OF THE PARTIES' ACTIONS AND THE INVESTIGATION

The presentation by both parties of their action has been very extensive. The Court of Appeal has not found it necessary in its decision to reproduce the parties' presentation of their actions.

The investigation in the case has also been particularly extensive. The written evidence has consisted mainly of documents from the arbitration. However, both parties have also put forward new and additional expert opinions regarding assessments of the steel in the masts and substructures of the oil rigs and have referred to examinations of the experts in the case. The experts Stephen Graham and John Hadjioannou have been questioned at the request of COHL and John Slater at the request of CPIC. At the latter's request, witness examinations have also been held with one of CPIC's counsel in the arbitration, Jessica Fei.

6. THE FINDINGS OF THE COURT OF APPEAL

6.1 The layout of the Court of Appeal's findings

To start with, the Court of Appeal will describe what has occurred during the handling of the case, which is relevant to its interpretation of COHL's claim. There then follows an account of the legal starting points that the Court has for its decision and view on CPIC's claim for rejection of a new circumstance referred to after the expiry of the time for a challenge.

The Court than takes a view concerning COHL's action on the basis of the grounds which CPIC has referred to and which the Court has described above. The Court for the most part follows the layout adopted by COHL. In conclusion, the Court also describes its summary conclusions of the views taken and its summary assessment of the grounds referred to by CPIC.

In the last part of its findings the Court examines the parties' claims for costs.

6.2 The handling of the case

In June 2014 COHL brought its claim against CPIC with an application for summons that covered approximately 350 pages, with the explanation that all the circumstances mentioned in the application, individually and taken together, supported the view that the award should be annulled or alternatively set aside. After COHL had been instructed to set out in detail the facts in issue to which it referred in support of its claim and what legal consequence was claimed for these facts, COHL made a new submission, this time approximately 50 pages in length, in which the grounds for its claim were clarified.

The Court then issued a summons in the case and CPIC submitted its Statement of Defence. After it had been given an opportunity to comment on this statement, COHL submitted a further clarification of the grounds for its action, whereupon CPIC adjusted its position in relation to the clarification. This then formed the basis for a summary of each action of the parties, which the Court drew up before the oral preparatory proceedings in the case. During these preparations the Court pointed to the need for certain additional clarifications, mainly from COHL, in order for the case to be regarded as ready for a main hearing. The Court drew up a preliminary timetable in the case as soon as the Statement of Defence was received. The timetable then came to be revised on several occasions. At the start of 2015 it was clear from the then revised timetable when the oral preparatory proceedings and main hearing should be held.

Instead of complying with the request for clarification, COHL submitted a radical revision of the grounds for its claim, declaring that this was how it now wished to bring its action. At the time just over a month remained for the planned start of the main hearing on 9 November 2015. Both parties declared that they had a strong interest in going through with the main hearing as planned, and accepted a very tight future timetable for, among other things, CPIC's position regarding the revised grounds and the submission of evidence. This timetable was also followed by the parties. The preparatory proceedings for the case thus went on right until the start of the main hearing.

At the start of the main hearing COHL and CPIC declared, in reply to a question from the Court, that they had finalised their grounds – namely the facts in issue (or, in other words, the

circumstances of immediate relevance for the legal consequence) that were referred to – in the manner that is clear from this decision. In reply to a question from the Court, both parties also declared that they considered that they had been given sufficient time in which to prepare for the main hearing and that they did not think that there was any obstacle to this.

The Court can say that the grounds referred to by COHL in support of its claim also clearly cover circumstances other than facts in issue. Based on how COHL repeatedly made adjustments to its claim and, as late as after the summary had been made by the Court, throughout revised its grounds and declared explicitly that this was how it wanted instead to bring its claim, and as CPIC declared itself willing to accept this, the Court judged that there were no opportunities for clarifying COHL's claim through additional material direction of proceedings.

The Court thus examines COHL's claim as it has finally been decided and the examination therefore necessarily includes an interpretation of the grounds. In that part of the findings that relate to the annulment or setting aside of the award and in each section, the Court assesses the facts in issue which it understands COHL has referred to.

6.3 Legal starting points

An award is invalid if, inter alia, it or the way in which it has arisen is clearly incompatible with the basic principles of Swedish law (s.33(2) LSF). Swedish law adopts a restrictive approach to the possibility of having an award declared invalid on public policy grounds. It is clear from the legislative history of this provision that it is only intended to cover highly objectionable cases and that its application in practice is thus extremely rare. Awards have been considered to fall under the concept of public policy in which the basic legal principles of a substantive or procedural nature have been ignored. For example, the legislative history quotes a case where someone was compelled by the award to act in a manner forbidden by the law or where an arbitral tribunal ruled on a dispute without taking account of a rule of law which is mandatory, to the benefit of a third party or a public interest, and which is an expression of a particularly important legal norm (see Bill 1998/99:35, s.140 f.).

Furthermore, an award shall be set aside if the arbitrators have exceeded their mandate or if a procedural error not caused by the party has occurred which has probably influenced the outcome (s.34(2 and 6 LSF).

According to s.21 LSF, the arbitrators shall handle the dispute in an impartial, practical and speedy manner and in this connection act in accordance with the decisions of the parties insofar as there is no impediment to so doing. Article 19 of the Rules states that the arbitral tribunal, while having regard to these rules and the agreements of the parties, may handle the arbitration in way that it considers appropriate and that it shall always conduct the arbitration in an impartial, practical and expeditious manner that gives the parties the same opportunities to prosecute their actions to a reasonable degree. In other words, when handling the case, the tribunal shall, among other things, observe the principle of equal treatment, i.e. the parties from a procedural standpoint shall be treated equally. The tribunal's direction of proceedings may thus not be controlled by bias towards the position held by a party.

The arbitral tribunal's task is guided by the arbitration agreement, by any agreements between the parties regarding the proceedings and by each of the parties' actions in the arbitration. This task may also be determined by the Rules, a decision by the tribunal and – as has been made clear – ultimately by LSF.

To the extent that there are no specific binding agreements between the parties or provisions governing how the arbitration should be handled, it is therefore part of the arbitral tribunal's task to take the decisions that are required to enable the dispute to be decided practically and expeditiously. This means then that in the absence of such an agreements between the parties and provisions there is scope for the tribunal to exercise discretion when deciding on various procedural matters and to adjust its handling of the case to the nature of the matter as long as the case is handled in an impartial, practical and expeditious manner that gives the parties an equal and reasonable opportunity to present their case (cf. s.21 LSF and Article 19 of the Rules). Besides the duty to give the parties an opportunity to prosecute their case as well as to have access to all the material, the scope of the tribunal's discretion is limited, as has been made clear by, inter alia, the principle of equal treatment and the so-called right of disposition, i.e. that the tribunal is bound by the parties' claims and grounds (see Heuman, L., Skiljemannarätt *[Arbitration Law]*, 1999, p.266 f. and 279. f.).

It is usual for an arbitral tribunal to decide in a procedural order on different procedural matters and on the detailed forms of the arbitration, such as a timetable for making various submissions. In many cases a procedural order does not reflect an agreement between the parties, but is instead an administrative decision taken by the tribunal in accordance with s.21 LSF and Article 19 of the Rules (cf. Born, International Commercial Arbitration, vol. 2, 2014, p. 2230). It is clear, according to the Court, that a procedural order made after the parties have expressed unanimity in the matter does not necessarily amount to a determination of the arbitral tribunal's "mandate" in the sense of s.34(2) LSF. A procedural order is instead often taken within the scope of the mandate.

In other words, the starting point for the arbitral tribunal's mandate is that it includes a discretionary right of decision as to how the arbitration should proceed. The way in which events unfold, however, may place obstacles to the handling of the case that has been agreed and decided on. It is then also part of the tribunal's mandate to take new decisions and also, where there are reasons to do this and under the same conditions just mentioned, to change decisions that have previously been made (see Heuman, op. cit., p.269). This does not usually mean that the tribunal is guilty of an error that can be challenged (see Heuman, op. cit., 1999, p.268 f. and Lindskog, S., Skiljeförfarande *[Arbitration]*, Zeteo, version of 1 May 2014, the commentary on s.34, paras. 4.2.2 and 5.2.6).

Once the deadline for a challenge has expired, a party may not invoke a new ground for challenge – i.e. a fact at issue which, if it exists, means that the award shall be set side – in support of its action (s.34 para. 3 LSF). However, there is nothing to prevent the party from making adjustments to its action within a certain factual context (Bill 1998/99:35, s.149 f.).

6.4 A new circumstance after expiry of the deadline for a challenge

Following expiry of the deadline for a protest action, COHL referred to the fact that Albert Jan van den Berg had links to Tsinghua Law School in China. CPIC has claimed that COHL has in this way invoked a new ground for challenge, which should be rejected as having been invoked too late.

COHL has explicitly declared that the circumstance raised is only invoked in support of its view that its objections to Albert Jan van den Berg's behaviour during the arbitration were not made too late. COHL has therefore not explicitly invoked the links as a ground for disqualification per se in relation to Albert Jan van den Berg or, in other words, as a ground for challenge in respect of his having been biased in the arbitration. Moreover, what COHL has stated about Albert Jan van den Berg's links does not therefore amount to a new ground for challenge after the expiry of the deadline for a challenge. CPIC's request for this to be rejected shall therefore be dismissed.

6.5 The question of annulment or setting aside of the award

6.5.1 COHL's request to be allowed to inspect the oil rigs

(For COHL's grounds, see section 3.1.1)

Introduction

COHL has claimed here that the arbitral tribunal for no good reason refused to approve its request to be allowed to inspect the oil rigs and that what has occurred amounts to grave procedural errors or an excess of mandate and also that the manifest incompatibility of the arbitration and the award with the basic principles of Swedish law are so serious that the award should be annulled or set aside in its entirety.

COHL has claimed several different errors on the part of the arbitral tribunal. In what follows the Court deals with each of the alleged errors and then makes an overall assessment of COHL's grounds according to section 3.1.1.

COHL has also claimed here that the arbitral tribunal's behaviour is contrary to the principle of equal treatment since it laid weight on evidence that CPIC had acquired from its own inspection, in which COHL was not allowed to take part. This circumstance is assessed later by the Court in section 6.5.9.

The obligation for the arbitral tribunal to grant an inspection request and the tribunal's threshold of proof for granting a new request

COHL has objected to the arbitral tribunal's decision on 7 January 2013 in Procedural Order No. 3 to reject its request to inspect the oil rigs. COHL has claimed in brief that the tribunal was obliged to grant its inspection request and so did not have a discretionary right to reject it. Furthermore, COHL has claimed that the tribunal was not entitled to set such a high threshold of proof for a new request from COHL to be granted.

From the investigation in the case, the following is clear, according to the Court. In December 2012 COHL asked to be allowed to inspect the oil rigs for the purpose of producing evidence, among other things, in the disputed question of whether the rigs had been manufactured as specified in the Agreement. The intention, therefore, was not that the arbitral tribunal should hold an inspection of the rigs. CPIC opposed this request. In Procedural Order No. 3 the tribunal judged for detailed reasons COHL's request to be premature and rejected it, while at the same time emphasising that this decision would not have any effect on a later request: "The Request is therefore DENIED, without prejudice to a future application." COHL's protest at this rejection gave rise to the tribunal's decision on 18 January 2013 in Procedural Order No. 4 not to reconsider its earlier decision.

The Court makes the following assessment:

The investigation in the case shows that there was no joint instruction by the parties regarding an inspection such as the one requested that was binding on the arbitral tribunal. Nor is there any provision in the Rules or LSF that focuses directly on such a request. It is true that there are provisions there relating to the jurisdiction of the tribunal to decide on matters concerning the admissibility, relevance and evidential value of the evidence and of different types of evidence (see Articles 26, 28 and 29 of the Rules and ss.25 and 26 LSF. COHL's inspection request, however, cannot be considered to relate to a particular type of evidence, but was aimed (as CPIC emphasised) at creating an opportunity for COHL to produce its own proof for the arbitration, i.e. to find something that could amount to or be used as a basis for evidence in the proceedings. While Article 26(3) of the Rules states that the arbitral tribunal "may order a party to produce any documents or other evidence …", this must be understood, according to the Court, in the manner that follows from the Swedish translation, i.e. that the

tribunal may order a party to hand over the written documents or other evidence … In other words, none of the provisions mentioned were applicable to COHL's inspection request. In the absence of an agreement between the parties and applicable provisions, the tribunal, as described initially by the Court, had to reach a view on COHL's inspection request within the scope of its discretionary power of decision. A tribunal should not abet document production for a so-called fishing expedition, where one party requests access to large amounts of information when it does not know in what way this information may be of relevance (see Heuman, op. cit., p.466). There should then be no obligation either for the tribunal to take part in such a search for evidence in another way. The tribunal was thus under no obligation to grant COHL's request. Nor was there any obstacle to the tribunal setting a threshold of proof for the granting of a new request in the way that it did.

The reasons for the arbitral tribunal's decision

COHL has further argued that the reasons stated by the arbitral tribunal for its decision to refuse its inspection request were not acceptable.

The Court makes the following assessment:

In Procedural Order No. 3 the arbitral tribunal judged, inter alia, that the requested inspection would be expensive, time-consuming and burdensome for CPIC and would lead to delays in relation to the timetable that had been set. The tribunal also referred to the fact that the question of an inspection was premature since at that stage of the arbitration it was not possible to assess the need and the value of the evidence that an inspection could result in. The investigation in the case shows (which was the objection that CPIC also made) that at the time of the tribunal's decision the parties had not submitted replies to the statement of claim or the counterclaim. In this connection the Court finds that it is normally difficult to judge the relevance and need of an item of evidence before the parties' views on the circumstances referred to and their statements of evidence have been recorded. In light of this and since COHL had not shown, in reply to CPIC's objection, that an inspection would not have been expensive, time-consuming and burdensome for CPIC or have caused a delay to the timetable, the Court finds that the investigation does not provide support for a judgment other than that the tribunal was justified in its views in Procedural Order No. 3. The fact that the tribunal set out in its decision what it considered would be required in order to grant an

inspection also lay within the framework of the tribunal's discretionary right of decision, as described by the Court in the legal starting points above.

The opportunity to come back with a new inspection request and the obligation of the arbitral tribunal to reconsider its decision and grant the inspection

COHL has also argued that the arbitral tribunal never gave it an opportunity to come back with a new inspection request since, shortly after CPIC had presented extensive new evidence in the steel issue, the tribunal decided on 16 July 2013 that neither party would be allowed to present new evidence. COHL has referred here to the fact that the question of a new inspection request did not arise until the new evidence was presented and that on 15 July 2013 it made up its mind to submit a new request, but the opportunity for this passed with the decision that was made on the following day. COHL has also claimed that the tribunal should *ex officio* have reconsidered its decision and granted the inspection when CPIC referred to the new evidence in the steel issue, maintaining that the burden of proof lay with COHL, and when in the award the arbitral tribunal laid the burden of proof on COHL and set up a threshold of proof that required access to detailed information about the rigs' steel, masts and substructures.

CPIC has argued in the Court of Appeal that COHL made no protest against the arbitral tribunal's decision in Procedural Order No. 4 and pointed out that COHL reconciled itself with the decision on 16 July 2013 and did not come back with a new inspection request.

The Court makes the following assessment:

It cannot be denied that COHL did not make another inspection request after the arbitral tribunal's decision on 18 June 2013 in Procedural Order No. 4. It is also clear from the investigation in the case that on 15 July 2013 COHL intended to make a new request, although it has not once claimed that it informed the tribunal at any time of such an intention or stated that, as a result of the tribunal's decision on 16 July 2013, it considered that it had lost the opportunity for a new request. In arbitration it is the case that a party must be active and protest against procedural measures that it is not satisfied with and considers to be wrong, and if the party fails to protest, the right to have an award set aside by referring to the measure in question is lost (see s.34 para. 2 LSD and, inter alia, Heuman, op. cit., p.286 f.).

According to the Court, COHL in light of this has lost its right to claim as an excess of mandate or a procedural error the fact that the arbitral tribunal as a result of its decision on 16 July 2013 had made it impossible for it to submit a new inspection request.

The question of who has the burden of proof is part of the substantive assessment of the arbitration dispute and the allocation by the arbitral tribunal of the burden of proof cannot therefore be attacked within the scope of an annulment or challenge action, other than perhaps in exceptional cases. In arbitration proceedings under Swedish law, it is also the case that the parties, and not the arbitral tribunal, are responsible for putting forward evidence (see s.25 para.1 LSF). Against this background and in light of the absence, as the Court has found above, of any obligation to grant an inspection, the Court judges that the tribunal was not entitled, as claimed by COHL, to reconsider its decision *ex officio* and grant an inspection.

<u>The arbitral tribunal's allocation of the burden of proof and the threshold of proof in relation to the principle of equal treatment</u>

COHL has also referred to the circumstance that the arbitral tribunal laid the burden of proof on COHL with the threshold of proof set by the tribunal and that the tribunal also laid emphasis on evidence that CPIC had obtained from its own inspection of the rigs in the course of the arbitration in support of the view that the tribunal handled the request contrary to the principle of equal treatment.

The Court makes the following assessment:

It follows from the assessment made by the Court above that the arbitral tribunal was under no obligation to ensure that COHL had an opportunity to inspect the oil rigs. The fact that the tribunal later, when ruling on the dispute, forms a view on the question of the allocation of the burden of proof and the evidence put forward in the arbitration proceedings is (as has already been made clear) part of the substantive examination that the tribunal has to make and does not include any action that is contrary to the principle of equal treatment.

<u>Obstruction of the proceedings</u>

Finally, COHL has argued in this section that the arbitral tribunal approved CPIC's obstruction of the arbitration by objecting that the inspection that was requested was

unnecessary. In this way the tribunal, according to COHL, went along with it not receiving a reasonable opportunity to prepare and prosecute its case.

The Court makes the following assessment:

The Court finds that in a legal process a party is free within the framework of the existing system of rules to present a procedural point of view according to what the party considers best favours its case. Since in arbitration the task of the arbitral tribunal is to form a view about which of the parties should be successful, CPIC's objection to COHL's inspection request should be seen, according to the Court, precisely as a procedural point of view of this kind. It cannot be regarded as sabotage or impedance of the handling of the arbitration, and therefore as obstruction on the part of CPIC. Given the assessment made by the Court above of the tribunal's decision, the fact that the tribunal in this case made its decision in accordance with the position of CPIC does not mean that the tribunal's action was wrong.

Summary and overall assessment

What has been stated here means that the Court has not found here in any respect that it has been shown that the arbitral tribunal's behaviour involves a procedural error or an excess of mandate. It also means, moreover, that the Court in an overall assessment of the different circumstances referred to by COHL does not find here that COHL has shown that the tribunal was guilty of a procedural error or an excess of mandate. Furthermore, according to the Court, all support is lacking for the view that the arbitration or the award could be contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.2 The arbitral tribunal's decision regarding the production of all the dimensional drawings of masts and substructures

(For COHL's grounds, see section 3.1.2)

The arbitral tribunal's reconsideration of the decision concerning production request no. 11

COHL has argued here that on 21 May 2013 the arbitral tribunal in Procedural Order No. 8 amended without good reason its earlier decision on 8 March 2013 in Procedural Order No. 5 regarding COHL's production request no. 11. According to COHL, the decision was amended in line with CPIC's wishes as a result of the tribunal limiting the extent of the

drawings to be produced to those drawings that were relevant for showing the Agreement's temperature requirements and also giving CPIC an opportunity to demand a confidentiality agreement for those drawings that CPIC considered to amount to company secrets. COHL has also argued that the tribunal had a duty to approve its production request and thus had no right of discretion when it came to curtailing this request. According to COHL, its request was justified in light of the investigation in the arbitration, since it related to circumstances that were relevant and the matter had not received sufficient investigation through evidence referred to earlier and since compliance with the production decision was not particularly onerous for CPIC. COHL has also claimed that the tribunal, by amending the production decision and giving CPIC an opportunity to decide which drawings should be handed over, prevented COHL from producing evidence of the unsuitability of the steel for its intended purpose and created an imbalance between the parties as far as evidence was concerned. According to COHL, the behaviour of the tribunal can be compared with rejection of evidence that was necessary to enable COHL to prosecute its case.

According to the Court, the investigation in the case shows the following. In a submission on 1 February 3013 COHL put forward, among other things, its production request no. 11. This related to all the dimensional drawings of the oil rigs' masts and substructures. On 8 March 2013 the arbitral tribunal granted this production request in Procedural Order No. 5 to the extent that had been agreed by CPIC, i.e. insofar as dimensional drawings existed and CPIC, and not COHL, had access to them. Following a request from COHL, the tribunal confirmed its earlier decision regarding production request no. 11 in Procedural Order No. 7. At the same time it reminded the parties that failure to comply could, following a special request, result in the ability of the tribunal to draw negative conclusions from this failure. Some exchange of correspondence between the parties then followed concerning the fulfilment of document production. On 21 May, in Procedural Order No. 8, the tribunal confirmed that the production decision according to Procedural Order No. 7 stood. The tribunal also commented for the purpose of clarification that fulfilment of the production decision required the production of all the documents relating to the contractual requirements in respect of temperature. In Procedural Order No. 9 on 31 May 2013, the tribunal made additional clarifications to the production decision and also issued instructions to the parties concerning a confidentiality agreement. At the same time the tribunal observed that the curtailment of

drawings that were relevant to the temperature were consistent with the logical aim of COHL's original request and the tribunal's original production decision.

The Court makes the following assessment:

The Court notes that the arbitral tribunal had to examine COHL's production request in accordance with Article 6 of the Rules mentioned above, which states that the tribunal must instruct a party to produce any documents or other evidence that may be relevant to the outcome of the case. In the original production decision (Procedural Order No. 5) the tribunal also referred to this provision.

As the Court has described, it is clear from the investigation that after the decision in Procedural Order No. 5 a discussion arose between the parties about how this decision should be interpreted, which prompted the arbitral tribunal to take new decisions regarding document production. It is not unusual for a procedural order to need to be amended because of how the dispute develops. This normally does not mean per se, as the Court described by way of introduction, that the tribunal is guilty of an error that can be challenged (see Heuman, op. cit., p.268 f. and Lindskog, S., op. cit., comments on s.34, paras. 4.2.2 and 5.2.6). In Procedural Order No.1 it had also been established that the tribunal was entitled, if it judged this appropriate, to amend an earlier procedural order. The discussion that arose between the parties clearly demonstrated, in the Court's view, a need for the participation of the tribunal through clarification of its view of the decision in Procedural Order No. 5 relating to COHL's production request no. 11.

Such a clarifying view fell within the scope of the arbitral tribunal's discretionary right of decision. It goes without saying that a production decision should relate only to documents that are relevant to the dispute. From the investigation in the Court of Appeal there has emerged no basis for an assessment other than that the clarification which the tribunal made in Procedural Order No. 8, as the tribunal emphasised, corresponded to a limitation that was understood and applied to the very first decision. The conclusion of the Court is, therefore, that no reason has emerged to question whether the tribunal's comment in this respect in Procedural Orders No. 8 and 9 amounted to a clarification. Since the clarification fell within the scope of the tribunal's discretionary right of decision and focused on the fact that the

production decision related only to documents of relevance in the case, COHL's assertion that the tribunal was obliged to approve the production request is unjustified.

Furthermore, an arbitral tribunal should respect the justified wishes of a party to be allowed to keep information that is sought a company secret (cf. Heuman, op. cit., p.463). It is not clear from the investigation in the Court of Appeal that CPIC's desire for secrecy was unjustified. In this light, the comment of the tribunal in Procedural Order No. 8 that CPIC was entitled to demand a confidentiality undertaking for the documents that it judged to contain company secrets cannot in itself be regarded as incorrect. In this connection account should also be taken of the fact that in both its email to the parties on 28 May 2015 and Procedural Order No. 9 the tribunal emphasised the importance of settling these questions quickly and issued guidance on how this could be done.

When a production request does not directly indicate exactly the documents to be produced, but is framed in such a way that it focuses on all the documents relating to a particular circumstance, it goes without saying that it is the task of the party that has to produce the documents to also decide which documents should be handed over. In this light, the fact that CPIC itself had to decide which drawings were relevant to its compliance with the arbitral tribunals' production decision cannot be regarded as wrong or that the tribunal can be considered to have prevented COHL from producing evidence of the unsuitability of the steel for its purpose. It follows instead from Article 30 of the Rules, which the tribunal also reminded the parties of in Procedural Order No. 7, that in the event of failure to comply with a production decision the tribunal can draw negative conclusions from this. There are also provisions in s.26 LSF governing an opportunity for a party, with the permission of the tribunal, to apply to a public court for document production. In a situation where the requesting party is not satisfied with how a production order has been complied with, it is therefore up to this party to consider what potential additional procedural points of view this should give rise to on the part of the dissatisfied party.

By reason of what has been stated, the Court does not find that it has been shown that the arbitral tribunal did not have good reasons for reconsidering its decision.

COHL's extension of time for submitting a reply

COHL has also argued that the arbitral tribunal in Procedural Order No. 8 allowed COHL only six additional days in which to submit a reply, from 14 to 20 June 2013. COHL has pointed out that this deadline was set despite the fact that it had not yet received the drawings and the tribunal had earlier granted CPIC an addition one-week extension for fulfilling production, which was also conditional on the parties reaching agreement about a confidentiality undertaking.

The Court makes the following assessment:

In the situation that arose, the arbitral tribunal, as the Court has observed above, needed to provide additional clarifications in order to resolve the lack of agreement between the parties about production request no. 11 and the action of the tribunal fell within the scope of its discretionary power of decision. One of the purposes of arbitration is to provide an effective and rapid system of resolving disputes and, as the Court pointed out by way of introduction, it is also stated in Article 19 of the Rules and in s.21 LSF that the arbitral tribunal, inter alia, should handle the arbitration expeditiously. At the time of its decision, the tribunal had to manage the dispute so that the final hearing could be held as planned. The investigation in the case has not shown that the tribunal's apportionment of time between the parties was not well balanced on the basis of the prevailing stage of the proceedings. Accordingly, it has not been shown either that the tribunal treated the parties contrary to the principle of equal treatment.

Reconsideration contrary to the principle of equal treatment

COHL has also claimed that the reconsideration and curtailment by the arbitral tribunal of the production order was arbitrary and contrary to the principle of equal treatment. COHL has referred here to the fact that in Procedural Order No. 4 the tribunal denied COHL a reconsideration of the decision regarding an inspection of the oil rigs.

The Court makes the following assessment:

With reference to the judgment made by the Court above, there is no support for stating that the reconsideration of the arbitral tribunal was arbitrary and contrary to the principle of equal treatment.

Obstruction of the proceedings

Finally, COHL has also claimed here that CPIC obstructed the proceedings by not producing the appropriate documents, by handing over material too late and unsorted and by producing documents in Chinese without a translation into English. COHL has argued here that the arbitral tribunal, by curtailing the production order, abetted and passively accepted CPIC's obstruction and that the tribunal successively gave CPIC additional time without compensating COHL for this, circumstances which had the result that COHL came to lack sufficient time in which to prepare and prosecute its action.

The Court makes the following assessment:

The Court notes that an arbitral tribunal has no possibility of sanctioning a production order through coercion. On the other hand, as has been made clear earlier, the tribunal has the option, at the request of a party, of drawing negative conclusions in the evaluation of the evidence regarding the failure by a party for no good reason to comply with an instruction (see Article 30 of the Rules). A party which considers that coercion is required also has an opportunity to request the tribunal's permission to apply to the district court for production (s.26 para.1 LSF). It is thus the duty of the requesting party to ensure the implementation of a production order and to obtain a reaction against the failure of the opposite party.

The investigation in the case shows that a dialogue was conducted both between the parties and between the parties and the arbitral tribunal regarding the fulfilment of production. The Court has also judged above that at the time of Procedural Order No. 8 there was a need for a clarifying point of view from the tribunal in regard to production request no. 11. In light of this, COHL, in the Court's view, has shown no reason for its claim that CPIC obstructed the proceedings by failing to comply with the production order. In connection with its clarification, the tribunal gave CPIC additional time of one week in which to fulfil its obligations under the production order, i.e. until 28 May 2013, and at the same time also extended COHL's time by six days in which to submit its reply, i.e. to 20 June 2013. Even if the extra time that the tribunal allowed COHL was short, it was within its discretionary right of decision, according to the Court, to handle the proceedings expeditiously, especially in view of the timetable for the final hearing. In addition, as CPIC has also pointed out, the

tribunal subsequently, and thus after the deadlines that had been given, allowed the parties to refer to and submit evidence and COHL reconciled itself to the tribunal's decision on the question of production and was opposed to extending the final hearing by a few days, which would have given it extra time in which to prepare and prosecute its case.

Moreover, the Court observes that the undertaking for a party to produce certain documents applies, as a rule, to documents that are in the possession of the party and does not imply an obligation for the party to translate the documents into a language that the opposite party understands. Making arrangements for a translation is, according to the Court, the responsibility of the receiving party.

The Court also notes that the arbitral tribunal, in its decision on 15 May 2013 in Procedural Order No. 7, commented that the obligation for a party in arbitration proceedings to translate documents into English lies with the party which chooses to submit the documents as evidence. In its decision, therefore, the tribunal rejected a request from COHL to instruct CPIC to translate the documents. The investigation in the case does not support the view that the statement of the tribunal was incorrect.

In light of what has been said and the assessment described by the Court above, the Court finds that the arbitral tribunal has not been shown to have abetted any obstruction on the part of CPIC or successively gave CPIC extra time without compensating COHL, with the result that COHL did not have sufficient time in which to prepare and prosecute its case.

Summary and overall assessment

What has been stated means that the Court in this section has not found it proven in any respect that the views of the arbitral tribunal on the production of dimensional drawings amount to procedural errors or an excess of mandate. It also means, moreover, that the Court, following an overall assessment of the various circumstances referred to by COHL, does not find that it proven here that COHL has demonstrated that the tribunal was guilty of a procedural error or an excess of mandate. Furthermore, according to the Court, there is no support for the view that the arbitration or the award could be contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.3 The arbitral tribunal's admission of John Slater's expert report

(For COHL's grounds, see section 3.1.3)

COHL has argued here that the arbitral tribunal approved CPIC's referral to and submission of an expert opinion by John Slater after the time for referring to both new evidence and rebuttal evidence had expired and that the arbitral tribunal incorrectly handled the opinion as rebuttal evidence. COHL has also argued that at the same time the tribunal rejected comments by COHL's expert John Hadjioannou on a written opinion from one of CPIC's witnesses, Roger M. Barnes.

The investigation in the case, according to the Court, shows the following. At the time when CPIC submitted the expert opinion from John Slater, the revised timetable which the arbitral tribunal had referred to in an email dated 17 March and had set on 22 March 3012 in Procedural Order No. 6 was in force. Under this timetable CPIC was to submit its evidence by 6 May 2013 at the latest and its rebuttal evidence by 10 July. On 11 July at 1.22 a.m. CPIC sent in by email and referred to evidence, including Slater's expert opinion. In an email to the parties on 16 July 2013 the tribunal noted that CPIC, as part of its rebuttal evidence, had submitted Slater's opinion and that COHL had protested against this, but had also submitted and referred to opinions from its own experts in response to Slater's opinion. The tribunal also declared that neither Procedural Order No. 1 nor the previous draft of the timetable for the arbitration laid down that there was no need for the expert opinions referred to as rebuttal evidence to have been submitted by someone who had submitted an expert opinion that had earlier been referred to in the arbitration. The tribunal therefore observed that Slater's opinion was allowed. At the same time the tribunal allowed the two expert opinions that COHL had referred in reply to Slater's opinion, despite these two opinions having been referred to too late. The arbitral tribunal also remarked that CPIC had not had any objection to this.

The investigation in the case also shows the following, according to the Court. In the email to the parties above, the arbitral tribunal also rejected rebuttal evidence against the second written witness statement of CPIC's witness Roger M. Barnes since the timetable did not allow a third round of exchanges of evidence that was referred to. At the same time the tribunal reminded the parties that they were naturally free within the scope of their cross-examinations to put questions that had arisen in the second round. The tribunal concluded its

email by noting that no further evidence would now be allowed and declared that it expected to be given a list of the witnesses that the parties wished to cross-examine.

The Court makes the following assessment:

As in regard to the decision about production request no. 11 in Procedural Order No. 5, the Court judges that the arbitral tribunal, within the scope of its discretionary right of decision, could change its original timetable and make the necessary adjustments and deviations according to how events developed in the arbitration. Irrespective of whether John Slater's expert opinion was to be regarded as evidence or rebuttal evidence, the Court judges that the view of the tribunal falls well within the scope of its discretionary powers. The fact that COHL was allowed to refer to expert opinion in rebuttal shows that tribunal also took account of COHL's interests.

With regard to the reasons set out by the arbitral tribunal for its view when it came to the testimony of Roger M. Barnes, reasons which there is no reason to question on the basis of the Court's investigation, the Court judges that the situations were not comparable. What COHL has argued does not therefore support the view that the tribunal did not treat the parties equally.

Because of the above, the Court finds that it has not been shown that the admission by the arbitral tribunal of John Slater's expert opinion involves a procedural error or excess of mandate. Furthermore, there is no support, according to the Court, for the view that the arbitration or the award could be contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.4 The arbitral tribunal's timetabling and COHL's opportunity to prepare and prosecute its case, particularly in relation to the evidence

(For COHL's grounds, see section 3.1.4)

The revised timetable

In brief COHL has argued as follows. By reason of the fact that COHL's main counsel had to undergo urgent surgery followed by a long period of convalescence, COHL requested more

time than allowed by the timetable. The arbitral tribunal decided, however, in an email dated 18 March 2013 to stick to the earlier timetable, which meant that the date of the final hearing stood and that COHL did not have sufficient time and opportunity to prosecute its case during the written preparations. The tribunal's decision also meant that the parties were not treated equally. The timetable considerably increased the time that CPIC had at its disposal for its procedural documents, while at the same time curtailing COHL's time for its documents. Through the revised timetable the tribunal favoured CPIC inappropriately. The tribunal was not entitled as a condition for changing the timetable to require the parties to reach agreement about this and had no discretion when it came to rejecting COHL's request for changes in the timetable and a postponement of the final hearing.

According to the Court, the investigation in the case shows the following. In the award (paragraphs 19–122) a detailed account is given of the handling of the arbitration. On 8 November 2012 in Procedural Order No. 1, the arbitral tribunal, after obtaining the parties' views, set a preliminary timetable for handling the arbitration, with the possibility for the tribunal to adjust it, if this was required. According to the timetable, a final hearing was to be held in the period 29 July to 2 August 2013. In the beginning of March 2013 COHL's main counsel, Patricia Casey, informed the tribunal that she was to have urgent surgery necessitating a stay in hospital followed by about three months of convalescence, after which time she would only be able to work part-time for three to four weeks. As a result, COHL requested additional time under the timetable to compensate for her absence. The tribunal urged the parties to discuss a change to the timetable, whereupon CPIC proposed to COHL that they should try to find a new date for the final hearing; however, no agreement was reached. In an email dated 18 March 2013 the arbitral tribunal proposed to the parties a revised timetable in which the earlier dates set for the parties' various arguments and submissions were put back. At the same time the tribunal observed that the parties had not agreed on a new later date for the final hearing and informed them that it was not available for a hearing in August or September 2013 – i.e. the period discussed by the parties – and declared that without an agreement between the parties no final hearing after then would be possible. It therefore decided that the date of the final hearing stood. Furthermore, a revised timetable would be set in accordance with the proposal unless the parties had agreed to an alternative timetable on 21 March 2013 at the latest. On 20 March 2013 COHL objected to the revised timetable. In Procedural Order No. 6 on 22 March 2013, after considering

COHL's objection, the tribunal set the revised timetable. The tribunal stated that there was a need to allow some extension to the deadlines for submitting documents and arguments, but that it was not clearly necessary or desirable to postpone the final hearing.

The Court makes the following assessment:

In the situation that had arisen, therefore, it was incumbent on the arbitral tribunal to reach a view on the questions raised by COHL regarding an adjustment to the timetable and the date of a final hearing. The tribunal's decisions fell within the scope of its discretionary powers, in which connection it was responsible for ensuring that the arbitration was managed in an expeditious and effective manner. The tribunal was under no obligation to approve COHL's request for the timetable to be adjusted and for a new date for the final hearing. Asking for a potential agreement between the parties about a new date for the final hearing gave the parties scope for influencing the situation. In the Court's judgment, this means that the tribunal in no way imposed an improper condition for its own point of view.

The Court can say that the revised timetable (for the period after the parties' document production) largely only meant putting back the time frames for arguments and submissions that had applied in the original timetable of November 2012. The biggest difference was the shorter period between the Pre-Hearing Conference and the final hearing, to which COHL has not objected to in court. The parties were thus allowed for the most part the same length of time for their submissions (CPIC's Reply and Defence to Counterclaim and COHL's Reply) as in the original timetable.

As a result of the revised timetable, COHL was given additional time in which to produce documents, until 15 April 2013, which was long after the date that Patricia Casey had herself expected to be back at work part-time. The date of COHL's Reply was also moved back to 14 June 2013 instead of 24 May, which meant, according to the Court, that it had extra time at its disposal for this submission. In the Court's opinion, the arbitral tribunal thus ensured through the revised timetable that COHL was given additional time at its disposal to compensate for Patricia Casey's illness. In light of the fact that the revised timetable, as has been described, corresponded to the original one, it has not been shown, in the view of the Court, that COHL was not given sufficient time and opportunity to prosecute its case on the

ground of Patricia Casey's sickness absence. The fact that the time for CPIC's submissions was also increased does not affect this assessment, nor does it amount to a reason to judge that the tribunal treated the parties contrary to the principle of equal treatment. Instead, it is the view of the Court that the revised timetable treated the parties equally since it allowed more time in which to submit written evidence, followed largely by the same time as in the original timetable. Moreover, no inappropriate preferential treatment either has been shown as a result.

The arbitral tribunal's timetabling generally

COHL in this section has, as we understand it, argued that CPIC obstructed the proceedings and that the arbitral tribunal, despite this, repeatedly allowed CPIC more time to comply with the production process and to submit evidence without COHL being compensated for this and receiving more time in which to prepare its action. COHL has argued here that CPIC did not comply with the production order in time, that CPIC laid down a confidentiality undertaking for the production of the drawings and that CPIC handed over documents in Chinese without an English translation. COHL has also claimed that CPIC's rejection of COHL's proposal for a new date for a final hearing amounted to obstruction of the arbitration.

The Court makes the following assessment:

As is clear from above, it has not been shown that there were any irregularities on the part of the arbitral tribunal regarding the revised timetable that was set before the final hearing. The Court has judged above that it has not been shown in the case that the tribunal's behaviour in regard to its decisions about production request no. 11 has been incorrect. The Court can also state that the tribunal to some extent compensated COHL by way of additional time for delays and document production. In such circumstances and as the tribunal had to move the arbitration proceedings forward to the final hearing that was set, the Court judges that what has occurred as a result of the investigation in the case does not show that the tribunal's timetabling was incorrect in any respect or that COHL has been discriminated against in relation to CPIC as far as the timetabling is concerned. The fact that the additional evidence that CPIC was allowed to submit consisted of documents that COHL had asked to be produced is not in itself a reason to question the tribunal's timetabling.

COHL's assertion that CPIC obstructed the proceedings through its unwillingness to help bring about an agreement about a new date for the final hearing and that this therefore amounted to an error in the arbitral tribunal's part lacks justification.

Summary and overall assessment

What is stated here means that the Court in this section has not found that it proven in any respect that the arbitral tribunal's behaviour involves a procedural error or an excess of mandate. It also means that that Court, following an overall assessment of the various circumstances referred to by COHL here, does not find either that COHL has shown that the tribunal was guilty of a procedural error or an excess of mandate. Furthermore, according to the Court, there is no support for the view that the arbitration or the award could be contrary to the basic principle of Swedish law in the way COHL has claimed.

6.5.5 Comment during the Pre-Hearing Conference

(For COHL's grounds, see section 3.1.5)

In this section COHL has referred to a statement by the chairman, Jeffrey Hertzfeld, during the Pre-Hearing Conference that his comments on how the parties' actions should be conducted was directed more at CPIC than at COHL and that in this way he helped CPIC to present its case. COHL, as we understand it, has claimed that Jeffrey Hertzfeld was biased.

The Court makes the following assessment:

COHL has referred here to a statement by the chairman of the arbitral tribunal during the Pre-Hearing Conference, which COHL in itself did not take to be biased when it was made. For the Court, the comment, seen in context, is clearly uncontroversial and unproblematic. In the judgment of the Court, COHL's claim of lack of impartiality in this particular respect is without foundation.

6.5.6 Admission of evidence during the final hearing

(For COHL's grounds, see section 3.2.1)

In this section COHL, as we understand it, has argued that the arbitral tribunal allowed CPIC to refer to certain evidence which had been submitted after 10 July 2013 and which did not amount to rebuttal evidence. The evidence referred to by COHL amounts to documents which were referred to as evidence on 11 and 23 July 2013, which documents COHL did not consider to be rebuttal evidence and which COHL had asked for within the scope of its production request, to evidence (CW 163) referred to by CPIC during COHL's cross-examination of a witness and to two updates to Jonathan Prudhoe's expert opinion. By allowing this evidence, the tribunal, according to COHL, acted contrary to the principle of equal treatment and CPIC was favoured at the expense of COHL's since COHL had previously been denied an opportunity to acquire evidence in the steel issue and was not given time to respond to CPIC's new evidence.

From the investigation in the case, the following is clear, according to the Court. Under the revised timetable both parties were to submit their rebuttal evidence by 10 July 2013, and in an email to the parties on 16 July the arbitral tribunal declared that neither party had the right to subsequently hand in other written witness statements or expert opinions. On 11 July 2013 CPIC submitted evidence in the steel issue. COHL protested in a submission on 17 July 2013 at CPIC being allowed to refer to this evidence and demanded that it be rejected. COHL referred to the fact that the evidence did not amount to rebuttal evidence, but should have been handed over as part of document production no later than on 15 April 2013. The tribunal gave CPIC an opportunity to comment on the claim for rejection, stating at the same time that the tribunal should form a view about the evidence on the first day of the final hearing. On 23 July 2013 CPIC commented on COHL's rejection claim, at the same time submitting two new items of evidence, CW 157 and CW 158, the admission of which COHL also objected to. On the first day of the final hearing, 29 July 2013, the arbitral tribunal examined the questions relating to the evidence, finding that some, but not all, of the evidence submitted on 11 July should be rejected since it did not amount to rebuttal evidence. The tribunal also replied to COHL's objection that the documents should have been handed over as part of document production and stated that the evidence was allowed in view of its relevance and materiality, at the same time emphasising that the respondent (COHL) was free to ask the

tribunal to draw a negative conclusion due to certain evidence having been handed in too late. When it came to the evidence CW 157 and CW 158, the tribunal noted that the questions about these documents had been resolved and that COHL's counsel could otherwise come back.

The following is also clear from the investigation in the case. During COHL's cross-examination of Zhang Xinhua on 30 July 2013, COHL's counsel asked to see an email that Zhang had said in the cross-examination that he had sent to Irina She. This email was then handed over by CPIC's counsel without any protest or request for rejection from COHL. The arbitral tribunal took no action against this. During the final hearing the tribunal also allowed CPIC, despite COHL's protests, to make a small addition to Jonathan Prudhoe's expert opinion. After the final hearing CPIC made a further adjustment to the expert opinion. In the award (paragraph 557) the tribunal judged that it amounted to clarifications and not new evidence or arguments, to the disadvantage of COHL.

The Court makes the following assessment:

The Court finds that neither in the revised timetable nor in the decision on 16 July 2013 that neither party had a right to submit additional written witness statements of expert opinions after 16 July was it made clear what would happen if one of the parties, nevertheless, submitted evidence after this date. In such a situation it may be assumed that there is limited scope for a party to put forward evidence after the expiry of the deadline (cf. Bill prop. 1998/99:35, s.228 and Lindskog, op. cit., commentary to s.21, para. 6.2.2, note 80). It may also be noted here that the opportunity under s.25 para. 2 LSF that an arbitral tribunal has to reject evidence if it is justified having regard to the time when the evidence is referred to is a matter for discretion. The provision thus gives a tribunal an opportunity to intervene by exercising its discretion when one party is obstructive in referring to and submitting evidence too late. It has been stated in the doctrine that caution should be exercised in the use of rejection (see Heuman, op. cit., p.419 f.). If a party has referred to evidence after the expiry of a deadline, the tribunal has the possibility of admitting the evidence, but of taking account of the unfair procedure to the disadvantage of the party in the evaluation of the evidence (op. cit., p.420). The opposite party must also have an opportunity to refer to rebuttal evidence (Lindskog op. cit., commentary to s.25, paras. 4.3.3 and 4.3.4).

What has so far been stated means that the arbitral tribunal thus had room for discretion when forming a view regarding the questions of evidence that are relevant in this section.

The arbitral tribunal's decision on the first day of the final hearing, 29 July 2013, makes clear that the tribunal examined whether the evidence questioned by COHL that had been submitted on 11 July 2013 should be admitted as rebuttal evidence. The tribunal's view came out partly in COHL's favour. The investigation in the case does not show that the tribunal's view that the evidence that was admitted amounted to rebuttal evidence was incorrect or that its admission fell outside the scope of the tribunal's discretionary right of decision.

Regarding the documents submitted by CIC on 23 July 2013 (CW 157 and CW 158), CPIC has objected that mention was made of them in Chen Xinlong's second witness statement dated 10 July 2013, that COHL requested to see the documents on 17 July 2013, that CPIC then first handed over the wrong document but, when this was pointed out by COHL, handed over a new document on the same day, and that the chairman at the final hearing took up COHL's request and asked COHL to come back if it had any other requests. CPIC has claimed that COHL did not come back with any objections and that it is therefore not entitled to refer to these circumstances as grounds for challenge. CPIC's objection finds support from the investigation in the case. In this situation COHL is not entitled now to refer to these circumstances as grounds for challenge.

The Court makes a similar judgment regarding document CW 163, which was submitted by CPIC. CPIC has objected that the document was handed in after a request from COHL's counsel during the cross-examination of Zhang Xinhua, with no protest or claim that it should be rejected. Against this COHL has claimed that a protest was made. In the judgment of the Court, what has been stated by CPIC finds support from the investigation in the case. The paragraph referred to in this part of the transcript from the final hearing does not show that COHL's counsel made any protest in connection with the submission of the document during the final hearing; neither is it clear from the investigation in general that COHL protested in connection with the submission of the document. This means that COHL is not now entitled to refer to this circumstances as a ground for challenge.

As the Court has described, the arbitral tribunal in the award (paragraph 557) found that the changes made to Jonathan Prudhoe's expert opinion were clarifications that did not imply that there was a question of new evidence or arguments. What has emerged as a result of the investigation does not show that the assessment made by the tribunal was wrong.

In support of its view that the arbitral tribunal acted contrary to the principle of equal treatment, COHL has referred to the fact that the tribunal prevented its experts from supplementing their opinions, that the tribunal prevented it from putting questions during some examinations and that in the award the tribunal considered that some of the evidence referred to by COHL had been introduced too late. The principle of equal treatment is an important basic principle. It means, as described by the Court in the legal starting points, that the parties in procedural respects should be treated equally and that the tribunal should therefore not be biased. A comparison between the individual views of the tribunal to which COHL has referred and the admission of the above-mentioned evidence cannot be taken as a reason that the tribunal has not treated the parties alike and has therefore been biased to the disadvantage of COHL. It goes without saying that there is scope for the tribunal to engage in direction of proceedings and make judgments in various procedural matters that arise during the proceedings in relation to either party, depending on how each party presents its case, without this being contrary to the principle of equal treatment. In the judgment of the Court, it has not been found that the direction of proceedings in the situations in question in any way meant that the tribunal was biased. In other words, nothing has emerged to indicate that the tribunal acted contrary to the principle of equal treatment.

What has been stated means that the Court has found that it has not been shown in this section either that a procedural error or an excess of mandate has occurred. Furthermore, according to the Court, there is no support for the view that the arbitration or the award is contrary to the basic principles of Swedish law in the manner claimed by COHL here.

6.5.7 The behaviour of the arbitral tribunal and, in particular, Albert Jan van den Berg during examinations

(For COHL's grounds, see section 3.2.2–3.2.4)

In this section COHL has referred to certain actions and views of the arbitral tribunal during examinations. COHL has also argued that the arbitral tribunal made use of its own time during the final hearing to the benefit of CPIC by putting its own questions to a witness

The Court makes the following assessment:

COHL's case in this section relates to the arbitral tribunal's direction of proceedings during the final hearing and, inter alia, the tribunal allowing or not allowing questions during the examination of witnesses and also the tribunal's own questions to the witnesses.

According to the Court, it is necessarily the duty of the arbitral tribunal through its direction of proceedings to create the framework for the examinations that have been decided. This applies as far as content and time are concerned. In the legislative history of LSF it is emphasised that far-reaching direction of proceedings cannot per se be regarded as harmful to trust as long as both parties are treated alike (Bill 1998/99:35, s.121). As the Court has already pointed out, different parties require direction of proceedings to a different degree, without a question thereby arising of different treatment contrary to the principle of equal treatment.

Already from Procedural Order No. 1 the right was laid down for the arbitral tribunal at any time during the examinations to put questions to the witnesses. Even if the main principle in arbitration, as the Court has described above, is that the parties have the responsibility for the evidence, there was therefore scope here for the tribunal to put questions during the examinations. In order for the tribunal not to be seen to be biased, however, the questions it puts should focus primarily on contradictory and incomprehensible information and circumstances that require simplification or summarising (cf. Heuman, op. cit., p.450). In other words, an attempt to correct an ambiguous question falls within the scope of the tribunal's mandate and cannot normally be taken as a cause of bias.

In this section COHL has referred to several situations which, according to it, have been similar, but where the arbitral tribunal, in COHL's view, has acted differently to the disadvantage of COHL. In the judgment of the Court, however, the situations are not sufficiently similar that it can be concluded that the tribunal treated the parties contrary to the principle of equal treatment. Nor has it been shown in the investigation of the case that the views of the tribunal in the individual situations were incorrect and should therefore amount to procedural errors or an excess of mandate.

COHL has also claimed that Albert Jan van den Berg in his questions to the witnesses acted in an inquisitorial manner to the benefit of CPIC. As the Court has described, it is clear from Procedural Order No. 1 that the arbitral tribunal was entitled to put questions during the examinations. The excerpts from the examinations do indeed show that Albert Jan van den Berg put several questions to those who were being examined. In the Court's judgment, however, there is nothing there to indicate that van den Berg acted with the aim of helping CPIC in the arbitration. What has emerged from the hearings does not therefore support the view that he was biased. Even were it to have been the case that his questions went a little further than is normal the case for an arbitral tribunal, it has not been shown that this had any influence on the outcome of the arbitration.

COHL has also objected that the arbitral tribunal made use of its own time during the final hearing in order to help CPIC as a result of Albert Jan van den Berg using the tribunal's time to the benefit of CPIC. It has emerged in the case the parties were allocated a certain time at their disposal, which was limited to 15 hours. The fact that the tribunal chose not to allow the time for some of its questions to the witnesses to handicap either of the parties should be seen, in the judgment of the Court, primarily as an expression of the desire of the tribunal not to shorten the parties' time for questions that the tribunal considered that it needed to put. This action in itself does not support the view that the tribunal was biased or that it implied an error in the handling of the case. As the Court has already noted, there is nothing that shows that Albert Jan van den Berg acted in order to help CPIC, and even if his questions could be considered to have gone somewhat too far, it has not been shown that this had any influence on the outcome of the arbitration.

What has been stated means that the Court has found that in this section it has not been shown that there was a procedural error or an excess of mandate or that the tribunal was biased. Moreover, according to the Court, there is no support for the view that the arbitration or the award is contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.8 Admission of evidence in Procedural Order No. 11

(For COHL's grounds, see section 3.3.1)

In this section COHL has in brief argued as follows. Through its decision in Procedural Order No. 11, the arbitral tribunal considered at CPIC's request its decision on the first day of the final hearing to reject some of the evidence referred to CPIC and instead allowed CPIC to refer to more of the evidence that CPIC had submitted on 11 July 2013. The tribunal acted contrary to the principle of equal treatment since it reconsidered its earlier decision despite CPIC having had an opportunity to state its objections prior to the decision on the first day of the final hearing. The reasons stated by the tribunal – that COHL in the Joint Report of the quantum experts on 26 July 2013 had referred to new evidence – did not correspond to the true facts.

According to the Court, the investigation in the case shows the following. As the Court has described above, the arbitral tribunal decided on the first day of the final hearing that some, but not all, of the evidence submitted by CPIC on 11 July 2013 should be rejected since it did not amount to rebuttal evidence. In a letter to the tribunal dated 23 August 2013, i.e. after the final hearing, CPIC asked the tribunal to reconsider its decision about rejection since COHL had been allowed to submit additional documentation on 26 July 2013. In Procedural Order No. 11 on 2 September 2013, the tribunal reconsidered its earlier decision and allowed some additional evidence. The tribunal stated that it had noted that COHL had introduced new evidence in the Joint Report of the quantum experts as late as on 26 July 2013 as a result of questions raised by CPIC's expert. The tribunal noted that no protest against this had been made, despite the fact that the evidence was not rebuttal evidence. In light of this, the tribunal declared that it was willing to reconsider its earlier decision and allow certain additional evidence submitted by CPIC in order to clarify COHL's new evidence. COHL objected to the decision of the tribunal, referring to the fact that it had had no opportunity to cross-examine

CPIC's witnesses about the new evidence. In an email dated 7 September 2013 the tribunal responded to COHL's objection, given that since the documents had not comprised evidence in the arbitration at the time of the final hearing, they had not been the object of any examination. Both parties were therefore given an opportunity to respond to the new evidence in their written submissions after the final hearing.

The Court makes the following assessment:

As the Court has stated above, it is not unusual that a procedural order may to need to be amended because of how events develop, and re-examination of this kind does not normally mean that the arbitral tribunal is guilty of an error that can be challenged. The opportunity for the tribunal to amend a procedural order that has been issued was also laid down in Procedural Order No. 1. In the Court's judgment, it therefore lay within the tribunal's discretionary powers to also consider anew the admissibility of the evidence.

COHL has claimed that the tribunal's decision rested on the incorrect supposition that COHL had referred to new evidence, to which CPIC had not objected, and the decision, in COHL's view, thus amounted to a violation of the principle of equal treatment. In response to this CPIC has declared that in fact it had indeed itself sent in the Joint Report of the quantum experts men, but that the new evidence that was introduced related to COHL's part of the report. The investigation in the case lends support to CPIC's objection. In addition, the tribunal afforded both parties an opportunity to comment on the evidence that was allowed in their written submissions after the final hearing. According to the Court, therefore, the action of the tribunal in these respects cannot imply any violation of the principle of equal treatment and it has thus not shown that the tribunal's reconsideration of its earlier decision rests on incorrect circumstances.

In support of the view that the tribunal's reconsideration of its decision is contrary to the principle of equal treatment, COHL has also referred to the tribunal's refusal to reconsider its rejection in Procedural Order No. 4 on 18 January 2013 regarding the question of an inspection of the oil rigs. In the judgment of the Court, however, the situations are not the same and cannot be taken as a reason for saying that the tribunal did not observe the principle of equal treatment.

What has been said means that the Court has found that it has not been shown in this section that there has been a procedural error or an excess of mandate. Furthermore, according to the Court, there is no support for the view that the arbitration or the award is contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.9 The arbitral tribunal's views in the award

Admission and non-admission of evidence in the award
(For COHL's grounds, see section 3.4.1)

In this section COHL has argued in brief that the arbitral tribunal in certain points in the award placed a particularly high importance on evidence which CPIC submitted on 11 July 2013 or later and which the tribunal on 2 September 2013 allowed CPIC to refer to and that this was contrary to the principle of equal treatment. As we understand it, COHL has further argued in brief that in the award the tribunal took into account updates referred to by CPIC to Jonathan Prudhoe's expert opinions and also in the award (paragraph 464) made a statement about evidence referred to by COHL in the form of additions made by CHL's expert John Hadjioannou that was tantamount to rejecting evidence offered by COHL, despite the fact that CPIC was allowed to refer to new evidence during the final hearing.

The Court makes the following assessment:

An arbitral tribunal's evaluation of evidence is part of its substantive examination of the arbitration dispute and cannot be attacked in a case about a challenge or annulment of award, other than perhaps in exceptional cases.

The Court has found above that it has not been shown in the case that the tribunal committed any errors in relation to the evidence which was submitted by CPIC on 11 July 2013 and which it was later allowed to refer to. The Court has also found that the tribunal's assessment that the changes to Jonathan Prudhoe's expert opinion amounted to clarifications and not new evidence has not been incorrect.

With regard to the addition made by John Hadjioannou, it is clear from the award (paragraph 464), in the Court's view, that the tribunal, besides noting that the addition had been made late in the proceedings, also assessed his comment but did not find it to be of value since it was not sufficiently concrete in its view. This is a typical example of the kind of evaluation of evidence that forms part of the arbitral tribunal's substantive examination of the arbitration dispute. COHL's assertion that in the award the tribunal should have rejected, and should thus not have assessed, the evidence in the form of Hadjioannou's addition therefore lacks support in the award.

With regard to the assessments described, support is also lacking for COHL's assertion in this section that the tribunal acted contrary to the principle of equal treatment.

The arbitral tribunal's evaluation of evidence
(For COHL's grounds, see section 3.4.2)

COHL has in brief referred to the following. The arbitral tribunal placed no weight on GL Noble Denton's inspection reports, which had been referred to by COHL, referring to the fact that CPIC had not had an opportunity to cross-examine those who carried out the inspections. When it came to the question of the choice of steel, the tribunal accepted CPIC's evidence about how the choice had been made, without downgrading it, despite COHL having contested the information and not having had an opportunity to cross-examine individuals who had been involved in the sequence of events. Furthermore, the tribunal made written evidence that CPIC had referred to the basis of its assessment without COHL having had an opportunity to examine its authors. The tribunal also laid weight on evidence referred to by CPIC which it had acquired from its own inspection of the rigs in the course of the proceedings, despite the fact that COHL had not been afforded an opportunity to be present at the inspection and despite the fact that CPIC [*sic*] had been refused permission to carry out an inspection itself. The arbitral tribunal's behaviour was contrary to the principle of equal treatment, to the advantage of CPIC and the disadvantage of COHL.

The Court makes the following assessment:

As the Court has pointed out above, it is not possible to attack the substantive examination of an arbitral tribunal through a protest or annulment action other than perhaps in exceptional circumstances and the evaluation of evidence, when evidence has been referred to, forms part of the substantive examination. It is in the nature of things that there is then clear and wide scope for the tribunal to also make an evaluation of the evidence. Even if it could later be proved that the tribunal's evaluation of evidence had been incorrect, it cannot be attacked in a subsequent protest action and an award cannot, in other words, be set aside on the grounds of such an incorrect assessment. However, to question the evaluation made of the evidence within the scope of an assertion about different treatment, in the way that COHL has done here, does not imply an examination that can be made in a protest action. It must, however, then be able to be shown that the questioned evaluation of the evidence has been governed by the position of the parties in itself and thus to be biased in the sense that the tribunal acted in favour of one party without reason. The scope for this being able to amount to grounds for setting aside or annulling the award is therefore extremely limited.

With regard to COHL's argument that the evaluation of the evidence is contrary to the principle of equal treatment, COHL has highlighted, in particular, the downgrading by the tribunal of GL Noble Denton's inspection reports because CPIC had not been able to cross-examine the authors of the reports. CPIC has pointed out in this connection that these individuals objected shortly before the final hearing to giving evidence in the arbitration, without stating a valid reason for this. The circumstance highlighted by CPIC is also the justification for the tribunal's evaluation of its evaluation of evidence (paragraph 400 of the award). There was therefore an objective reason for the tribunal's evaluation of evidence from these particular inspection reports. It has not emerged that the situation has been similar in regard to other evidence referred to here by COHL. In the judgment of the Court, it is therefore not possible to draw the conclusion that the tribunal acted contrary to the principle of equal treatment.

COHL has also referred to the fact that the tribunal laid weight on evidence that CPIC had acquired from its own inspection of the oil rigs, despite the fact that COHL had been prevented from the opportunity to carry out an inspection itself. The Court has found above

that it has not been shown by the investigation in the case that there was an error in the tribunal's behaviour in relation to COHL's request for an inspection of the oil rigs. The fact that COHL has not been allowed the right to inspect the oil rigs itself does not mean that CPIC's evidence should not have been allowed. These situations are thus not comparable and cannot have the effect that there has been any behaviour contrary to the principle of equal treatment. Nor does this circumstance in itself mean that the tribunal's evaluation of CPIC's evidence from its inspection can be called into question. It goes without saying that the tribunal had to make a customary assessment of this evidence too. From the investigation that has been referred in this respect the conclusion can therefore not be drawn that the tribunal in its evaluation of evidence did not observe the principle of equal treatment.

The arbitral tribunal's compliance with instructions at the Pre-Hearing Conference on 19 July 2013

(For COHL's grounds, see section 3.4.3)

COHL here has in brief argued as follows. Contrary to its own instructions at the Pre-Hearing Conference on 19 July 2013, the arbitral tribunal put forward evidence referred to by CPIC, which evidence COHL had not requested to be allowed to cross-examine, as grounds for its decision without reference to other evidence.

The investigation in the case shows that the arbitral tribunal at the Pre-Hearing Conference issued an instruction to the parties that statements from witnesses and experts who had not been cross-examined would be assessed in light of the other evidence and not be considered without more ado to be accepted by the opposite party.

The Court makes the following assessment:

As the Court has now described in several places above, the arbitral tribunal's evaluation of evidence is something that is part of the substantive examination of the arbitration dispute and cannot constitute grounds for a challenge or annulment, other than perhaps in exceptional cases.

COHL has referred here to nine paragraphs in the award in which the arbitral tribunal incorrectly made CPIC's evidence the basis for its decision as unchallenged. In connection with these paragraphs, COHL has referred to other evidence referred to by COHL which, in its view, was incompatible with that of CPIC. The Court can note that in some of the paragraphs the tribunal used the words *unchallenged*, *not challenged* and *not contested*. However, the text, especially in paragraphs 389 and 395, supports the view that the tribunal actually made its own evaluation and so treated the evidence in accordance with the instructions at the Pre-Hearing Conference. Given this fact, COHL cannot be considered to have shown that the tribunal incorrectly treated the information from witnesses and experts as unchallenged. It is then irrelevant what can be shown by other evidence in the arbitration since there is no circumstance in this case which entails that evaluation of the evidence in itself could become an object of re-examination by the Court of Appeal.

The arbitral tribunal's application of the Agreement and Incoterms as well as principles of interpretation

(For COHL's grounds, see sections 3.4.4, 3.4.5 and 3.4.9)

COHL here has argued in brief that the arbitral tribunal disregarded certain provisions of the Agreement and FCA Incoterms when it made the assessment that CPIC had not been in delay when COHL cancelled the Agreement and that COHL was therefore not entitled to damages. According to COHL, the tribunal's assessment was therefore not based on an interpretation of the Agreement and FCA Incoterms; instead the tribunal speculated about CPIC's [*sic*] reasons for the cancellation. Furthermore, COHL has argued that the tribunal favoured CPIC and disadvantaged COHL by in various matters applying different principles when interpreting the Agreement. According to COHL, this meant that the tribunal disadvantaged COHL, contrary to the principle of equal treatment.

The Court makes the following assessment:

If an arbitral tribunal goes beyond the framework of applicable contractual provisions as a result of an incorrect interpretation, this involves substantive misjudgments, which are not grounds for challenge or annulment. If there is no support in the contract of the parties for imposing on a respondent certain performance obligations, it is also a substantive error if the

claimant's action is approved. In the latter case there is likewise no question of an error of judgment that can lead to the award being set aside (cf. Heuman, op. cit., p.623 f.).

In the Court's judgment, the argument put forward here is only an attack on the arbitral tribunal's substantive assessments. The investigation in the case does not support the view that the tribunal's application of principles of interpretation has been governed by the position of the parties per se. Nor has anything emerged that shows that the tribunal in this particular respect is guilty of a procedural error or an excess of mandate. Moreover, according to the Court, there is no support for the view that the arbitration or the award is contrary to the basic principles of Swedish law in the manner claimed by COHL.

COHL's burden of proof and threshold of proof
(For COHL's grounds, see sections 3.4.6 and 3.4.7)

COHL here has argued in brief the following. In one of its final communications to the arbitral tribunal it put forward the objection that it would not receive a fair hearing in court unless the burden of proof in the steel issue and the question of limitation of loss was laid on CPIC. CPIC had sole access to information and documents that were needed to meet the burden of proof and COHL had been denied access to this information and to these documents. In the award the tribunal took a view about the questions concerning the burden of proof and laid the burden of proof on COHL without first giving it an opportunity to be allowed to supplement its evidence through an inspection and the production of the necessary drawings. Furthermore, the threshold of proof that the tribunal applied to COHL's burden of proof was unreasonable since through the views it took about an inspection and document production it prevented COHL from being able to meet the threshold of proof.

COHL has claimed that the views taken by the tribunal about the burden of proof were independent procedural decisions. In light of the fact that the tribunal had previously prevented COHL from producing evidence in these matters, it was, according to COHL, a grave procedural error to lay the burden of proof on COHL without first affording it an opportunity to supplement its evidence.

The Court makes the following assessment:

Questions about who has the burden of proof for a particular circumstance, together with the threshold of proof that should apply, are, as the Court has also observed above, part of the arbitral tribunal's substantive assessment of the dispute. In light of this, there is no justification for COHL's position that the view taken by the tribunal about the burden of proof amounted to an independent procedural order and that the tribunal had an obligation to grant COHL an opportunity to supplement its evidence. Furthermore, the views of the tribunal about the burden of proof and the threshold of proof are not in this case clearly such that they can be attacked by means of a protest or annulment action.

The Court has judged above that it has not been shown that any error occurred in the arbitral tribunal's handling of the questions raised about an inspection of the oil rigs and document production. There has been no obstruction therefore on the part of the tribunal in relation to COHL's opportunities to meet the threshold of proof. The fact that in the arbitration COHL had had the burden of proof put on it with the threshold of proof applied by the tribunal cannot constitute grounds for considering that the arbitration and the award are contrary to the basic principles of Swedish law.

<u>The arbitral tribunal's allocation of responsibility between CPIC and COHL</u>
(For COHL's grounds, see 3.4.8)

COHL, as we understand it, has argued in this section that the views taken by the arbitral tribunal meant that CPIC did not need to take any responsibility for the oil rigs' masts and substructures needing to withstand a full load at a temperature of –20°C when the tribunal, contrary to accepted requirements of professionalism, judged that CPIC had been entitled to choose any type of steel, as long as no accidents occurred. Furthermore, COHL has argued that the reference by the tribunal in certain parts of the award to CPIC's liability under guarantee is a reflection of insufficient respect for human life since the tribunal considered that COHL would have put at risk its employees' lives and health in order to find out whether CPIC/SJ had fulfilled their obligations instead of being required, before delivery took place, to show that their obligations in regard to design and the steel had been met. According to COHL, the views taken by the tribunal are also contrary to the principle of equal treatment.

The Court makes the following assessment:

COHL's action in this section means that COHL is claiming that the views taken by the arbitral tribunal in the questions in dispute are incompatible with the basic principles of Swedish law, i.e. the tribunal's substantive assessment of the dispute is a violation of public policy.

As the Court has described by way of introduction, Swedish law adopts a restrictive approach to the opportunity of having an award declared invalid on public policy grounds. In the literature it has been questioned whether or not an award may in certain exceptional cases be a violation of public policy if it contains an application of the law that has unreasonable consequences (see Lindskog, op. cit., commentary on s.33, para. 4.2.2).

In summary, the arbitration concerned whether COHL has been entitled to cancel the parties' Agreement or whether it was obliged to pay damages on the grounds of unjustified cancellation. The arbitral tribunal therefore also had to form a view subsequently about what had occurred between the parties in the customary manner for disputes involving sale of goods legislation, which the tribunal also did, according to the Court. Justification is lacking for the assertion that the views taken by the tribunal lack respect for human life and the views taken cannot be used as a reason justifying putting at risk anyone's life or health. There is clearly no exceptional case, according to the Court, that would cause the award to be annulled on the grounds of substantive public policy.

Summary and overall assessment

What has been stated means that the Court in this section has not found in any respect that it has been shown that the views taken by the arbitral tribunal in the award involve a procedural error or an excess of mandate. It also means that the Court, after making an overall assessment of the various circumstances referred to here by COHL, likewise does not find that COHL has shown that the tribunal was guilty of a procedural error or an excess of mandate. Furthermore, according to the Court, there is no support for the view that the arbitration or the award can be contrary to the basic principles of Swedish law in the manner claimed by COHL.

6.5.10 COHL's protests etc. during the arbitration proceedings

(For COHL's grounds, see section 3.5)

COHL in this part of its grounds has described the circumstances that it adduces in order for it not to be considered to have lost its right to challenge the award.

The Court makes the following assessment:

In the judgment of the Court, what COHL has argued here is not of independent importance in relation to factual circumstances previously referred to. The Court has taken note of the arguments that COHL has put forward to the extent that they have been brought up in connection with the Court's examination above.

6.5.11 Behaviour contrary to bona fides

(For COHL's grounds, see section 3.6)

COHL has referred here to the circumstances which, according to it, mean that CPIC acted contrary to bona fides during the arbitration.

The Court makes the following assessment:

The majority of these circumstances are covered by the assessment so far made by the Court. The Court has found in this connection that it has not been shown in any respect that CPIC obstructed the arbitration, nor that there is any acceptance or passivity on the part of the arbitral tribunal that could constitute grounds for annulling or setting aside the award.

Furthermore, the Court judges that none of the measures that COHL has claimed were taken by CPIC are of such a nature that they can in themselves be contrary to bona fides. This judgment applies even if the measure was contrary to any of the arbitral tribunal's decisions. What COHL has asserted in this respect, moreover, cannot lead to annulment or setting aside, in the judgment of the Court.

6.5.12 The Court's summary conclusions and overall assessment

The assessment presented by the Court of the grounds referred to by COHL means that the Court has not found in any respect that the arbitral tribunal took measures or applied provisions or rules contrary to the requirement of equal treatment of the parties, i.e. that the tribunal has been biased or has misled COHL on the conditions for the final hearing by not following its own instructions to the parties regarding the consequences of cross-examinations not being requested from experts and witnesses.

Neither has the Court found it proven that the arbitral tribunal during the arbitration prevented and made it difficult for COHL to prosecute its action or that COHL was not given reasonable time for consideration and a reasonable opportunity to prepare and prosecute its action and also refer to evidence in the arbitration.

The assessment made by the Court further mean that the Court has not found it proven in any respect that there has been a procedural error or an excess of mandate in the manner claimed by COHL. Nor has the Court found that the arbitration or the award is in any respect incompatible with the basic principles of Swedish law. The investigation in the case thus does not support the view that COHL was not granted a fair arbitration.

COHL has also argued that all of the circumstances described and assessed above taken together mean that the award should be set aside or annulled. With regard to the assessments above made by the Court, it is not the case either that the circumstances referred to by COHL, when taken together, result in an assessment that there has been a procedural error or an excess of mandate or that the award could be a violation of public policy in Sweden. What COHL has asserted about CPIC not being entitled with the help of a principle *venire contra factum proprium* to invoke the award cannot likewise lead to the award being set aside or annulled.

By reason of what has been stated above, COHL's claim shall be disallowed in its entirety.

6.6 Litigation costs

6.6.1 The party that is liable

Under ch.18 s.1 of the Procedural Code, the main rule governing the allocation of litigation costs in a civil action is that the losing party shall reimburse the opposite party for the latter's costs.

COHL is the losing party and, according to this rule, shall reimburse CPIC for the litigation costs in the case.

6.6.2 CPIC's claims

CPIC has claimed compensation for its costs of USD 1,036,101.38 and SEK 153,849. Of these amounts, USD 715,588 relates to fees to counsel in the case, USD 215,046.10 to the Chinese counsel engaged by CPIC, Jessica Fei and Stella Hu, and SEK 153,849 for the expenses of Advokatfirman Lindahl KB and USD 105,467.28 for expenses for the Chinese law office and CPIC. The last amount also includes a payment to CPIC's expert John Slater and his costs for travel and accommodation.

CPIC has also requested that the lawyer Jonas Löttiger should be ordered to pay jointly and severally with COHL CPIC's litigation costs of USD 365,000.

COHL has left the assessment of the reasonableness of CPIC's claim for costs to the Court of Appeal.

Jonas Löttiger, as described above, has opposed CPIC's request that he should be ordered jointly and severally with COHL to pay part of CPIC's costs. He, too, has left the assessment of the reasonableness of the amount claimed to the Court of Appeal.

6.6.3 CPIC's reasons for its claims for litigation costs

In support of its claim for costs, CPIC has argued mainly the following:

The case has been extensive and has required significant work. COHL has conducted a protracted and comprehensive action and has repeatedly restructured its grounds and also departed completely from the summary drawn up by the Court. Moreover, COHL has referred to extensive evidence without clearly identified documents and detailed themes of proof. The final item of evidence was not presented by COHL until shortly before the main hearing and it only submitted detailed themes of proof for the written evidence after the hearing had begun.

The manner in which COHL has prosecuted its case, in regard to both the protracted and comprehensive action and the submission of a host of comprehensive submissions and evidence shortly before the main hearing, was the reason why CPIC was represented by more counsel than would otherwise have been necessary. CPIC had no time to conduct its defence before the main hearing without setting aside considerable resources in terms of counsel. Since the work done by the counsel has been very extensive, CPIC has made up its mind to reduce its claim for compensation by the fee earned by the lawyer Bo G H Nilsson, corresponding to just over 170 hours.

The Chinese counsel (Jessica Fei and Stella Hu) have continuously assisted the Swedish counsel throughout the proceedings in the Court of Appeal and also in the necessary contacts with the principal. The attendance of representatives of CPIC in the main hearing has been justified by the values at stake for CPIC, the extent of the case, the comprehensive evidence to which CHOL referred and by their familiarity with the arbitration proceedings.

The case has entailed an unusual amount of work due to the grounds and development of the action, in which COHL presented lengthy arguments and repeatedly changed its claim. The Court of Appeal’s summary prior to the oral preparatory proceedings was based on the structure of the grounds and the development of the action that COHL had presented in its submission in the case in February 2015, and COHL kept to this structure in its comments on the summary in August 2015. Prior to the oral preparatory proceedings, CPIC restructured its grounds in order to better reflect the structure of COHL’s grounds and requested that COHL by the time of the preparatory proceedings should describe, inter alia, which circumstances were claimed in relation to the assertions of procedural errors and excesses of mandate.

The oral preparatory proceedings came to be devoted mainly to reviewing the parties' grounds and, in particular, COHL received a large number of questions about clarifications of its grounds in relation to which of the arbitral tribunal's decisions/measures were attacked and what part of the decisions it considered to amount to errors that were grounds for challenge. The Court pointed out that these questions involved very brief clarifications. Following the request from the Court, COHL undertook to submit the clarifications requested.

In the oral preparatory proceedings a tight timetable was set for the future exchange of correspondence. On account of the fact that COHL did not keep to this timetable during the preparatory proceedings and once more restructured its grounds, this timetable could not be followed. On 6 October 2015 CHOL modified its grounds, which departed completely from the Court's summary and was not just a rearrangement of text, and on 13 October 2015 adjusted the presentation of its claim. CPIC was forced once again to revise its grounds, which it did in its submission of 21 October 2015. This extra work, which was caused by COHL's inadequate prosecution of its case, would not have been needed if COHL had stuck to its claim according to its August submission with the explanations that were required in the oral preparatory proceedings.

The work on the written evidence and the expert evidence to which COHL referred also became very extensive and the way in which COHL referred to and submitted evidence has given rise to unnecessary extra work. The evidence to which COHL originally referred and mainly submitted electronically consisted of an entire common hearing bundle, i.e. around 10,000 pages plus additional documents. COHL's Statement of Evidence did not correspond to the requirements laid down in the Procedural Code. COHL did not clearly identify all the documents that were referred to and did not state clear themes of proof. On several occasions COHL submitted revised statements of evidence and was also instructed to explain the evidence. As late as halfway through the main hearing, on 14 November 2015, COHL finally gave details of the themes of proof for the written evidence.

COHL's claim has in several respects concerned matters of fact, not least in regard to the so-called steel issue, and rather unnecessarily referred to circumstances and evidence in the issues in fact of the arbitration proceedings in a manner that is not justified in a protest action.

Moreover, it has stated grounds for its claim that have clearly been unsustainable, which has caused CPIC extra work when it came to the assertions that the arbitral tribunal had acted with bias and contrary to the principle of equal treatment.

The main hearing in the Court of Appeal came to be more comprehensive than normal for a protest action and a need arose for additional days for the proceedings. This was due, above all, to the fact that COHL took three days for the presentation of its case and held extensive examinations of the parties' experts. CPIC had to respond to this, which created additional costs that were due to the way in which COHL prosecuted its case.

The compensation claimed for the expenses of Advokatfirman Lindahl KB relates mainly to costs for translation, travel in connection with the hearings in the Court of Appeal and costs for sending and coping documents and other material. The expenses of the Chinese counsel and CPIC's representatives relate main to travel and accommodation in connection with the main hearing.

The costs for expert evidence have been necessary in order to respond to COHL's expert evidence.

COHL's counsel, Jonas Löttiger, due to the reckless way in which he presented the case, is ordered jointly and severally with COHL to reimburse some of CPIC's litigation costs. The proceedings in the Court of Appeal have in large parts been unnecessary. Several of the grounds referred to by COHL have been manifestly unsustainable and the proceedings have reflected an unreasonably protracted approach on the part of COHL, with the result that CPIC's costs have become disproportionate and at least double what the case should reasonably have required. The amount claimed here of USD 365,000 relates at a conservative estimate to the extra costs that CPIC has had as a result of the way in which COHL prosecuted its case and the work alone put in by its Swedish counsel, even though costs for additional work have also arisen for the Chinese counsel. The amount is split up as follows:

- USD 80,000 relates in total to fees for work after the oral preparatory proceedings until the main proceedings as a result of COHL's modifications to its grounds, the development of its case and evidence.
- USD 50,000 relates in total to fees for work resulting in at any rate two extra days of proceedings and the preparations for these.
- USD 60,000 relates in total to fees for work on expert evidence.
- USD 15,000 relates in total to fees for work on internal translation at Advokatfirman Lindahl KB.
- USD 160,000 relates in total to fees for work generally as a consequence of COHL's protracted action throughout the proceedings in court.

A small part of the amount that COHL paid to CPIC on 3 October 2014 related to costs in this case. These costs have been deducted from the litigation costs claimed by CPIC.

6.6.4 The reason for COHL's and Jonas Löttiger's objections to the court costs

COHL and Jonas Löttiger have argued mainly as follows:

COHL's conduct of its case has not been reckless, unnecessarily protracted or inadequate. An arbitration that is a show trial because the claimant in the proceedings has acted contrary to bona fides must necessarily contain numerous procedural irregularities in how it is handled, each one of which by itself or two or more together and in coordination influence the outcome of the proceedings. In such a case the challenge and annulment process becomes very extensive, which is the explanation why this case has become so extensive. Its extent is a direct consequence of the way in which CPIC and the arbitrators behaved and conducted the arbitration proceedings and of the content of the award.

A part which claims that the arbitral tribunal has been biased and that the arbitration is a violation of public policy has reason also to go into substantive questions. COHL has therefore referred to evidence in corroboration of the tribunal's bias in disregarding in various respects the evidence in the proceedings and also making remarkable procedural and substantive assessments. In this connection is important that CPIC, as a result of the

arbitration, was awarded a very large amount of money, which it has acquired unfairly as a result of deceit in the proceedings.

Another reason why the protest and annulment action has been so extensive is that CPIC's prosecution of its case has been irresponsible and it has acted mala fide. CPIC has chosen as its strategy not to make any admissions, to put forward groundless assertions of what occurred during the arbitration and to refer to extensive evidence in corroboration of assertions that it undoubtedly knows to be incorrect. In its Statement of Defence CPIC put forward many groundless objections or incorrect assertions about what occurred during the arbitration.

The reworking by COHL of its grounds in January 2015 by revising the clarification of its grounds made in August 2014 took place following a complaint by CPIC of lack of precision, which was in line with CPIC's strategy for its conduct of the case. COHL or its counsel cannot be blamed for this. Furthermore, COHL commented on the summary drawn up by the Court of Appeal prior to the oral preparatory proceedings and then replied to all the questions put by the Court in this summary. COHL or its counsel cannot be blamed for this either. Their behaviour has throughout been characterised by an endeavour for the purpose of clarifying their position to comply with the wishes of the Court regarding the proceedings.

During the oral preparatory proceedings the Court laid down that all the circumstances, i.e. the facts in issue, to which the parties referred should be introduced under the heading Grounds in the summary. The Court also put a large number of questions at a detailed level, which did not relate to facts in issue, but which the Court, nevertheless, thought should be deal with there. In this way some uncertainty arose on the part of COHL's counsel about what the Court considered must be included in the grounds. It was not possible to reconcile the demands of the Court with the way in which COHL had so far set out its grounds, although COHL did its best, nevertheless, to meet these demands. The result was that COHL was forced to expand that part of its submission dealing with its grounds to around 100 pages and then, at the request of the Court, revise this down to approximately 30 pages. The lack of clarity about what had to be included under the heading Grounds appears to have been caused by various requests made by CPIC to the Court. Another reason why this part of its submission became so extensive was that CPIC had asserted entirely without foundation that

COHL had lost its opportunity to challenge the award due to the alleged absence of protests during the arbitration against the attacked procedural errors.

The fact that COHL's presentation of circumstances evidence in the case has been extensive is due, in other words, to the nature of the dispute and is nothing unique.

In the case CPIC referred to very extensive evidence in corroboration of assertions which it undoubtedly knew to be wrong or in order to create a distraction from the true facts. This was the case in the examination of Jessica Fei and the cross-examination of the expert John Slater.

CPIC's assertion that COHL's reference during the preparatory proceedings to the documents in a common hearing bundle as written evidence, without specifying which documents, had caused COHL extra work is baseless. CPIC's counsel in the arbitration proceedings has assisted the counsel in this case and they have therefore been fully aware of the documents.

Furthermore, the documents that COHL has referred to as written evidence in the case consist to a large extent of documents that do not need to be referred to as written evidence since their contents are not in dispute. The parties have only made different interpretations of their meaning for the questions in dispute in the case. COHL was obliged to refer to the documents since in the oral preparatory proceedings the Court laid down as a requirement that COHL should be allowed to refer to a particular document in the main hearing that COHL had referred to this document as written evidence in the case. This created difficulty in stating a theme of proof for the document, which is also the explanation of the difficulties that COHL has had in stating themes of proof in line with the provisions of the Procedural Code.

As a result of CPIC's strategy not to make any admissions or concessions in the case, regardless of the contents of different documents, COHL was forced in the main hearing to submit in principle the same procedural documents as in the arbitration and the documents that were exchanged by the parties before COHL's cancellation of the Agreement.

In September 2014 CPIC requested payment from COHL according to the award. This included, inter alia, costs relating to the protest and annulment action. COHL paid this demand under protest.

6.6.5 The Court's assessment of COHL's payment liability

Under ch.18 s.8 of the Procedural Code, payment for litigation costs shall correspond fully with the cost of preparation for the proceedings and the conduct of the case as well as fees to counsel or assistants, provided that the cost has been reasonably called for in order to safeguard the party's rights.

The Court notes that CPIC claimed costs in a very high amount. The question that the Court has first to decide is whether the costs have been reasonably claimed in order to safeguard CPIC's rights.

It is clear from the award that the arbitration was very comprehensive and went on for just under two years from when CPIC requested arbitration until the award was rendered. As a result of the award, COHL was ordered to pay a very large sum of money to CPIC and COHL's counterclaim was disallowed. It is evident that CPIC has considerable interest in the award standing and, in light of this, CPIC should also be considered to have justified cause to devote large resources to preparing and conducting its action in the challenge and annulment case.

The challenge and annulment case, too, has been relatively very extensive. COHL has conducted its case in a particularly protracted manner, despite comprehensive direction of proceedings on the part of the Court. The extent of the grounds referred to by COHL and the development of its action as well as evidence referred to has been very great. COHL has also argued specifically in favour of the need in this case to conduct such an extensive action. The consequence of this is also that CPIC's action has of necessity become voluminous and considerable resources have also been required to conduct it.

As shown in section 6.2 as well as by the parties' accounts in sections 6.6.3 and 6.6.4, the manner in which COHL's action has been conducted has also led to the need by CPIC, as respondent, to revise its grounds for objection in line with this.

As early as in January 2015 a timetable was set in consultation with the parties in which the time for the oral preparatory proceedings and a main hearing were fixed. The time frames that both parties had to observe in order that the oral preparatory proceedings and the main hearing could be held according to plan were thus clear at a relatively early stage of handling the case. Before the oral preparatory proceedings the Court drew up a summary of the parties' grounds and development of their actions. The parties' grounds were reproduced in the way that the parties themselves formulated them. Both in the summary and in the correspondence prior to the preparatory proceedings, the need was emphasised by the Court and by CPIC for clarifications to COHL's grounds in certain respects. During the preparatory proceedings it was made perfectly clear by the Court that what should be set out under the heading of Grounds was precisely the factual circumstances of immediate relevance (i.e. the facts in issue) that the parties had referred to in the case, and COHL's counsel undertook to submit clarifications in respect of what was described by the Court in the minutes. There was no question here of anything but brief additions to what had already been set out in the summary. Before the oral preparatory proceedings had finished, a timetable was set for the remaining exchange of correspondence in the case before the Court decided whether the preparatory proceedings were complete, a so-called soft deadline.

The clarification then submitted by COHL after the oral preparatory proceedings was not in line with the instructions given before the preparatory proceedings. After the Court pointed out to COHL that its action as it had been clarified could not be examined without extensive additional material direction of proceedings, COHL submitted, in accordance with the description in section 6.2, a radical revision of the grounds of its claim and declared that this was the way in which it now wished to prosecute its action. The ensuing correspondence to enable the main hearing to take place as planned had to take place under time pressure. This justified CPIC's need to engage more counsel that would otherwise have been necessary.

As the Court has already described in section 6.2, the grounds finally referred to by COHL in support of its action also cover circumstances other than facts in issue, and CPIC naturally has required an interpretation of what has been claimed before reaching a view. In this respect, too, greater work has been required of CPIC's counsel.

Furthermore, COHL, in the manner that CPIC has stated, initially referred to as written evidence a very large number of documents from the arbitration without detailed explanation and with inadequate or no themes of proof. Under ch.35 s.3 para.1 of the Procedural Code, if a party in court admits a particular circumstance when an out-of-court settlement of the matter is allowed, his admission constitutes full proof against him and consequently no evidence of this circumstance is then required. The fact, however, that the contents of a particular document in itself is not in dispute does not mean that a party who wishes the Court in its examination to make an evaluation based on the document in relation to disputed facts in issue can neglect to refer to the document as evidence. It is clear to the Court that COHL's failure in time before the main hearing to present a precise and final Statement of Evidence has also caused increased work for CPIC's counsel.

When it then comes to the evidence that CPIC has referred to, the Court judges that COHL's objection that CPIC had referred to evidence in corroboration of assertions that it should have known to be incorrect is without foundation. Nor, in the judgment of the Court, is there any justification at all for the view that CPIC has otherwise acted mala fide or adopted a strategy, irrespective of the actual circumstances, of not making any concessions or admissions in the case.

What has so far been stated means, in other words, that CPIC's counsel have had justified cause to put in significantly more work than is normally required in a challenge and annulment case. The Court also notes that COHL's fees to counsel to a large extent correspond to those of CPIC. All in all, the Court finds that the costs claimed by CPIC for fees to counsel may be accepted as reasonable.

Also, in regard to CPIC's claim for compensation in general, the Court judges that the amount claimed may be accepted as reasonable and called for in order to safeguard CPIC's rights in the case.

What has been said means that CPIC's claim against COHL for costs should meet with full approval.

6.6.5 The Court's assessment of the question of joint and several payment responsibility of Jonas Löttiger

Under ch.18 s.7 of the Procedural Code, if a party shall pay the opposite party's litigation costs in whole or in part and the party's counsel has caused this cost by careless or oversight, the court can order counsel to pay the cost together with the party. An example of such a situation when this provision may arise is when a party or counsel fails to give his views in the case at the right time or fails in good time before the main hearing to declare the evidence that he wishes to refer to. Another example is when a party or counsel makes an assertion or objections that he realises or should realise are unjustified and has thereby made it necessary for the opposite party to put forward rebuttal evidence. The liability for payment should cover any additional cost caused to the opposite party through the negligence of the party or counsel, such as the opposite party's costs for putting forward an investigation which in correct proceedings has been unnecessary (see Fitger, Rättegångsbalken *[Procedural Code]*, Zeteo, version October 2015, commentary on s.6, paras. 6 and 7).

CPIC has in brief pointed out that Jonas Löttiger, by reckless prosecution of the case, by a protracted and unclear prosecution of the case and by referring to clearly untenable grounds, has caused through recklessness court proceedings that have in large measure been unnecessary. CPIC has also pointed out that this has caused CPIC additional costs.

As is clear above, the Court on a number of occasions during the preparatory proceedings has had to engage in extensive material direction of proceedings with a view to making the grounds referred to by COHL capable of examination. In addition, as the Court has emphasised above, COHL at a late stage of preparation of the case – after the Court had drawn up a summary of the grounds referred to by the parties and after the oral preparatory proceedings – has made a radical revision of its grounds instead of submitting the required brief clarifications. This revision also gave rise to extensive amendments to CPIC's grounds for objecting. Nothing has emerged that amounts to an acceptable reason for why the revision was made at such a late stage of the handling of the case. Furthermore, the way in which COHL has conducted its action during the main hearing has also created a need for continued direction of proceedings by the Court, in regard to both COHL's presentation of facts and the production of written and oral evidence. In addition to this, COHL did not provide a final,

complete and adequately specified Statement of Evidence until after the main hearing in the case had begun. With regard to COHL's grounds, the Court, when assessing them, has found COHL's assertions to be groundless to an extent that is not entirely insignificant. This applies mainly to the assertions that the arbitration and the award are a violation of Swedish public policy. The grounds referred to should clearly from this perspective thus have been limited, at any rate in certain parts. In all the respects mentioned, the direction of proceedings on the part of COHL cannot be regarded as other than negligent, which has brought CPIC a cost. Jonas in these respects has thus caused CPIC costs through reckless prosecution of the case.

With regard to the other criticisms made by CPIC against Jonas Löttiger's prosecution of the case, the Court finds that there is no basis for concluding in these respects that he has been reckless.

In accordance with ch.18 s.7 of the Procedural Code, Jonas Löttiger shall be ordered to pay the costs of additional work that has arisen by reason of the recklessness for which the Court has found he can be blamed. CPIC has stated that the costs incurred by counsel in the case relate to USD 80,000 for the extra work that has been caused by COHL's extensive revision of the grounds and the submission of a final Statement of Defence at a late stage of the proceedings. On top of this, these measures have clearly been caused CIPC increased costs for translation. The amount claimed here is accepted by the Court as reasonable for the additional cost that has arisen. With regard to the recklessness found by the Court in other respects, the Court judges that CPIC's additional costs may reasonably be put at USD 25,000.

Due to the above, the Court finds that Jonas Löttiger as a result of his actions is guilty of recklessness as ground for his obligation jointly and severally with COHL to reimburse CPIC's costs in an amount of USD 120,000.

6.8 Appeal

Under s.43 para.2 LSF, the decision of the Court of Appeal may only be appealed against if the court considers it important for the administration of the application of the law that the appeal is heard by the Supreme Court. The Court of Appeal considers that there is no reason to grant leave of appeal.

No appeal may be made against the Court of Appeal's decision.

Participating in this decision have been Senior Judge of Appeal and Head of Division Christine Lager, Judge of Appeal Ulrika Beergrehn, Rapporteur, and Deputy Associate Judge Cecilia Johansson.