MADIRAZZA & PARTNERI
ODVJETNIČKO DRUŠTVO

MADIRAZZA & PARTNERI D.O.O. MASARYKOVA 21, 10000 ZAGREB
TEL: 01/48 77 280 FAX: 01/49 20 801 EMAIL: MADIRAZZA@MADIRAZZA.HR

7. svibanj 2019.

Financijska agencija
Mažuranićevo šetalište 24b
21000 Split

FINANCIJSKA AGENCIJA
RC SPLIT
08 -05- 2019
PREDSTEČAJNE NAGODBE
PRIMANJE I OTPREMA POŠTE
KLASA: 120-11/19-2C/32
UR. BROJ: 07-2279-99

n/r gđe. Ines Županović

Predmet: Prijava tražbine u predstečajnom postupku St-115/2019

Poštovana gđo. Županović,

Ovim putem Vam dostavljamo dva primjerka preslike Konačnog arbitražnog pravorijeka donesenog prema TAMARA arbitražnim pravilima 7. ožujka 2019. (dalje u tekstu: **"Pravorijek"**).

Napominjemo da smo Vam jedan primjerak Ovjerenog prijevoda izreke Pravorijeka dostavili s Prijavom tražbine 24. travnja 2019., a u prilogu Vam dostavljamo dodatni primjerak Ovjerenog prijevoda izreke Pravorijeka.

U slučaju da je potrebno dostaviti izvornik Pravorijeka, molimo Vas da nas o tome obavijestite.

Ako su Vam potrebne dodatne informacije, slobodno nam se obratite na broj telefona 01/4877 280 ili na e-mail:ltafra@madirazza.hr

Centraalstaal B.V.
eL-Tec Elektrotechnologie B.V.
Barkmeijer Stroobos B.V.
Coops & Nieborg Projects B.V.

po punomoćniku

ODVJETNIK
JOSIP MADIRAZZA
MASARYKOVA 21, 10000 ZAGREB

MADIRAZZA & PARTNERI
ODVJETNIČKO DRUŠTVO
MASARYKOVA 21, 10000 ZAGREB

Ovaj prijevod sastoji se od
Stranica: 6 / listova 7
Br.: Ov-5/2019
Datum: 24. travanj 2019.

Ovjereni prijevod s engleskog jezika

Konačni pravorijek

SUDSKI TUMAČ ZA ENGLESKI JEZIK
COURT INTERPRETER FOR ENGLISH LANGUAGE
LEA TAFRA
HR-10000 ZAGREB
Jurkovićeva ulica 22

FINAL AWARD

in the arbitration

between

Claimants:

1. Centraalstaal B.V.
Osloweg 110
9723 BX Groningen

NETHERLANDS

2. eL-Tec Elektrotechnologie B.V.
Hoopjesweg 2
8051 DB Hattem

NETHERLANDS

3. Konstructiebedrijf Coops & Nieborg B.V.
Industrieweg 11
9601 LJ Hoogezand

NETHERLANDS

4. Marco Kalmijn
Van der Sluis, Van der Zee & Kalmijn
Advocaten
Postbus 2610
8901 AC Leeuwarden
as Liquidator of Barkmeijer Stroobos B.V.
Heilingstraat 10
9872 PT Stroobos

NETHERLANDS

Represented by:

Jan Leo de Hoop
PLAS BOSSINADE ADVOCATEN N.V.
Postbus 1100
9701 BC Groningen
Paterswoldseweg 804

NETHERLANDS

Respondent:

Brodotrogir d.d.
Put brodograditelja 16
21220 Trogir

CROATIA

Represented by:

Tonci Bezmalinovic
BEZMALINOVIC LEGAL WAYS B.V.
Heemraadssingel 105
3022 CB Rotterdam
Postbus 25339
3001HH Rotterdam
NETHERLANDS

under the TAMARA Arbitration Rules
(applicable as from 1 January 2015)

by the Arbitral Tribunal composed as follows

Sjoerd Rutten	**Andreas Reiner**	**Neven Bahun**
HABRAKEN RUTTEN	ARP	ODVJETNICKO DRUSTVO - LAW OFFICE MIKULICIC-LONCARIC-BAHUN-TOPIC
Weena 690	Freyung 6/12	Medvescak 54
3012 CN Rotterdam	1010 Vienna	10000 Zagreb
NETHERLANDS	AUSTRIA	CROATIA
Co-Arbitrator	Third Arbitrator	Co-Arbitrator

VI.DISPOSITIVE SECTION

1. Respondent is ordered to pay to Claimants

   - the amount of EUR 8.047.000,00 (in words: eight million forty-seven thousand euros)

   and

   - compound interest at the rate of 2,243% p.a. on EUR 8.047.000,00 as from 17 March 2017 until the date on which payment is made in full. At the end of each year, i.e. on 17 March 2018, 17 March 2019 etc. the interest accrued in the preceding year is to be added to the last unpaid capital amount and the so increased capital amount will then bear interest for the following year as long as payment is not made in full.

   Payment of the capital amount and of interest is to be made by transferring the amounts due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410.

2. Respondent is ordered to pay to Claimants

   - the amount of EUR 187.466,41 (in words: one hundred eighty-seven thousand four hundred sixty-six euros and forty-one cents)

   - interest in the amount of EUR 3.760,57 (in words: three thousand seven hundred sixty euros and fifty-seven cents) and

- interest in the amount of EUR 10,37 (in words: ten euros and thirty-seven cents) per day starting on 1 December 2018 until the date of payment of the full amount of EUR 187.466,41.

3. Respondent is ordered to pay to Centraalstaal

- the amount of EUR 2.222.500,00 (in words: two million two hundred twenty-two thousand five hundred euros), i.e. EUR 550.000,00 plus EUR 1.672.500,00

- interest on EUR 550.000,00 for the period up to 30 November 2018 in the amount of EUR 136.806,62 (in words: one hundred thirty-six thousand eight hundred six euros and sixty-two cents)

- interest on EUR 1.672.500,00 for the period up to 30 November 2018 in the amount of EUR 232.379,44 (in words: two hundred thirty-two thousand three hundred seventy-nine euros and forty-four cents)

and

- daily interest in the amount of EUR 536,54 from 1 December 2018 until the date of payment of the full amount of EUR 2.222.500,00.

Payment of the capital amount and of interest is to be made by transferring the amounts due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410.

4. Respondent is ordered to pay to Centraalstaal

- the amount of EUR 54.807,21 (in words: fifty-four thousand eight hundred seven euros and twenty-one cents)

- interest in the amount of EUR 2.342,34 (in words: two thousand three hundred forty-two euros and thirty-four cents) for the period up to and including 30 November 2018

and

- interest in the amount of EUR 3,13 (in words: three euros and thirteen cents) per day starting on 1 December 2018 until the date of payment of the full amount of EUR 54.807,21.

5. Respondent is ordered to pay to Claimants

- Arbitration costs in the amount of EUR 165.000,00 (in words: one hundred sixty-five thousand euros)

and

- Costs of Claimants in the amount of EUR 83.000,00 (in words: eighty-three thousand euros).

6. Any and all further claims are dismissed.

Place of arbitration: Rotterdam, Netherlands

Date: 7-3-2019

Andreas Reiner
Third Arbitrator

Sjoerd Rutten
Co-Arbitrator

Neven Bahun
Co-Arbitrator

KONAČNI PRAVORIJEK

u arbitraži

između

Tužitelja:

1. Centraalstaal B.V.
Osloweg 110
9723 BX Groningen

NIZOZEMSKA

2. eL-Tec Elektrotechnologie B.V.
Hoopjesweg 2
8051 DB Hattem

NIZOZEMSKA

3. Konstructiebedrijf Coops & Nieborg B.V.
Industrieweg 11
9601 LJ Hoogezand

NIZOZEMSKA

4. Marco Kalmijn
Van der Sluis, Van der Zee & Kalmijn
Advocaten
Postbus 2610
8901 AC Leeuwarden
kao Likvidator Barkmeijer Stroobos B.V.
Heilingstraat 10
9872 PT Stroobos

NIZOZEMSKA

Koje zastupa:

Jan Leo de Hoop
PLAS BOSSINADE ADVOCATEN N.V.
Postbus 1100
9701 BC Groningen
Paterswoldseweg 804

NIZOZEMSKA

Tuženika:
Brodotrogir d.d.
Put brodograditelja 16
21220 Trogir

HRVATSKA

Kojeg zastupa:
Tonci Bezmâlinovic
BEZMALINOVIC LEGAL WAYS B.V.
Heemraadssingel 105
3022 CB Rotterdam
Postbus 25339
3001HH Rotterdam
NIZOZEMSKA

prema TAMARA arbitražnim pravilima
primjenjivim od 1. siječnja 2015.

koji je donio arbitražni sud u sljedećem sastavu

Sjoerd Rutten	Andreas Reiner	Neven Bahun
HABRAKEN RUTTEN Weena 690 3012 CN Rotterdam NIZOZEMSKA	ARP Freyung 6/12 1010 Beč AUSTRIJA	ODVJETNIČKO DRUŠTVO - LAW OFFICE MIKULIČIĆ-LONČARIĆ-BAHUN-TOPIĆ Medveščak 54 10000 Zagreb HRVATSKA
Član vijeća arbitražnog suda	Predsjednik vijeća arbitražnog suda	Član vijeća arbitražnog suda

/ostatak teksta izostavljen kao nepotreban/

VI. IZREKA

1. Tuženiku se nalaže platiti Tužiteljima

- iznos od 8.047.000,00 EUR (riječima: osam milijuna četrdeset sedam tisuća eura)

i

- zbrojene kamate po stopi od 2,243% godišnje na iznos od 8.047.000,00 EUR od 17. ožujka 2017. do datuma plaćanja cjelokupnog iznosa. Na kraju svake godine, drugim riječima, 17. ožujka 2018., 17. ožujka 2019. itd., obračunate kamate iz prethodne godine dodat će se zadnjoj neplaćenoj glavnici i na tako uvećani iznos glavnice obračunat će se kamate za sljedeću godinu dok iznos ne bude plaćen u cijelosti.

Plaćanje glavnice i kamata izvršit će se prijenosom predmetnog iznosa na račun klijenata ((iz Odjeljka 25. nizozemskog Zakona o javnom bilježništvu (na nizozemskom: *Noteriswet*)) kod javnog bilježnika g. dr. F.A. Keuninga (građanskog javnog bilježnika u općini Groningen, povezanog s društvom De Haan Notarisse) u Rabobank, na ime De Haan Advocaten en Notarissen Groningen broj bankovnog računa (IBAN) NL14RAB00329437410.

2. Tuženiku se nalaže platiti Tužiteljima

- iznos od 187.466,41 EUR (riječima: sto osamdeset sedam tisuća četiristo šezdeset šest eura i četrdeset jedan eurocent)

- kamate u iznosu od 3.760,57 EUR (riječima: tri tisuće sedamsto šezdeset eura i pedeset sedam eurocenti) i

- kamate u iznosu od 10,37 EUR (deset eura i trideset sedam eurocenti) po danu, počevši od 1. prosinca 2018. do datuma plaćanje cjelokupnog iznosa od 187.466,41 EUR.

3. Tuženiku se nalaže platiti Centraalstaal-u

- iznos od 2.222.500,00 EUR (riječima: dva milijuna dvjesto dvadeset dvije tisuće petsto eura), drugim riječima, 550.000,00 EUR plus 1.672.500,00 EUR

- kamate na iznos od 550.000,00 EUR za razdoblje do 30. studenog 2018. u iznosu od 136.806,62 EUR (riječima: sto trideset šest tisuća osamsto šest eura i šezdeset dva eurocenta)

- kamate na iznos od 1.672.500,00 EUR za razdoblje do 30. studenog 2018. u iznosu od 232.379,44 EUR (riječima: dvjesto trideset dvije tisuće tristo sedamdeset devet eura i četrdeset četiri eurocenta)

i

- dnevne kamate u iznosu od 536,54 EUR od 1. prosinca 2018. do datuma plaćanja cjelokupnog iznosa od 2.222.500,00 EUR

Plaćanje glavnice i kamata izvršit će se prijenosom predmetnog iznosa na račun klijenata ((iz Odjeljka 25. nizozemskog Zakona o javnom bilježništvu (na nizozemskom: *Noteriswet*)) kod javnog bilježnika g. dr. F.A. Keuninga (građanskog javnog bilježnika u općini Groningen, povezanog s društvom De Haan Notarisse) u Rabobank, na ime De Haan Advocaten en Notarissen Groningen broj bankovnog računa (IBAN) NL14RAB00329437410.

4. Tuženiku se nalaže platiti Centraalstaal-u

- iznos od 54.807,21 EUR (riječima: pedeset četiri tisuće osamsto sedam eura i dvadeset jedan eurocent)

- kamate u iznosu od 2.342,34 EUR (riječima: dvije tisuće tristo četrdeset dva eura i trideset četiri eurocenta) za razdoblje do i uključujući 30. studeni 2018.

i

- kamate u iznosu od 3,13 EUR (riječima: tri eura i trinaest eurocenti) po danu počevši od 1. prosinca 2018. do datuma plaćanja cjelokupnog iznosa od 54.807,21 EUR.

5. Tuženiku se nalaže platiti Tužiteljima

- troškove arbitražnog postupka u iznosu od 165.000,00 EUR (riječima: sto šezdeset pet tisuća eura)

i

- tužiteljeve troškove u iznosu of 83.000,00 EUR (riječima: osamdeset tri tisuće eura).

6. Svi drugi tužbeni zahtjevi se odbacuju.

Mjesto arbitraže: Rotterdam, Nizozemska

Datum: /7. ožujak 2019./

/potpis nečitak/

Andreas Reiner
Predsjednik vijeća arbitražnog suda

/potpis nečitak/

Sjoerd Rutten
Član vijeća arbitražnog suda

/potpis nečitak/

Neven Bahun
Član vijeća arbitražnog suda

/ 115 stranica /

/završetak prijevoda/

Ja, Lea Tafra, stalni sudski tumač za engleski jezik, imenovana rješenjem predsjednika Županijskog suda u Zagrebu br. 4 Su-148/16 od 10.03.2016. potvrđujem da gornji prijevod potpuno odgovara izvorniku sastavljenom na engleskom jeziku.

Br.: Ov-5/2019

U Zagrebu, 24. travnja 2019.

NI SUDSKI TUMAČ ZA ENGLESKI JEZIK
INTERPRETER FOR ENGLISH LANGUAGE
LEA
TAFRA
HR-10000 ZAGREB
Jurkovićeva ulica 22

STALNI SUDSKI TUMAČ ZA ENGLESKI JEZIK
COURT INTERPRETER FOR ENGLISH LANGUAGE
LEA
TAFRA
HR-10000 ZAGREB
Jurkovićeva ulica 22

FINAL AWARD

in the arbitration

between

Claimants:

1. Centraalstaal B.V.
Osloweg 110
9723 BX Groningen

NETHERLANDS

2. eL-Tec Elektrotechnologie B.V.
Hoopjesweg 2
8051 DB Hattem

NETHERLANDS

3. Konstructiebedrijf Coops & Nieborg B.V.
Industrieweg 11
9601 LJ Hoogezand

NETHERLANDS

4. Marco Kalmijn
Van der Sluis, Van der Zee & Kalmijn
Advocaten
Postbus 2610
8901 AC Leeuwarden
as Liquidator of Barkmeijer Stroobos B.V.
Heilingstraat 10
9872 PT Stroobos

NETHERLANDS

Represented by:

Jan Leo de Hoop
PLAS BOSSINADE ADVOCATEN N.V.
Postbus 1100
9701 BC Groningen
Paterswoldseweg 804

NETHERLANDS

Respondent:

Brodotrogir d.d.
Put brodograditelja 16
21220 Trogir

CROATIA

Represented by:

Tonci Bezmalinovic
BEZMALINOVIC LEGAL WAYS B.V.
Heemraadssingel 105
3022 CB Rotterdam
Postbus 25339
3001HH Rotterdam
NETHERLANDS

under the TAMARA Arbitration Rules
(applicable as from 1 January 2015)

by the Arbitral Tribunal composed as follows

Sjoerd Rutten HABRAKEN RUTTEN Weena 690 3012 CN Rotterdam NETHERLANDS	**Andreas Reiner** ARP Freyung 6/12 1010 Vienna AUSTRIA	**Neven Bahun** ODVJETNICKO DRUSTVO - LAW OFFICE MIKULICIC-LONCARIC- BAHUN-TOPIC Medvescak 54 10000 Zagreb CROATIA
Co-Arbitrator	Third Arbitrator	Co-Arbitrator

TABLE OF CONTENTS

DEFINED TERMS

BC	"Building Contract 1.D" dated 19 May 2015 between Claimant No. 4/Barkmeijer (as builder) and Respondent/Brodotrogir (as buyer) "for the completion of the Hull of the m.v. CARANX ("the Hull")" dated "19th May 2015
Caranx I	Ship 1601 or Joint Runner I
Caranx II	Ship 1602 or Joint Runner II
CFL c.s.	Term introduced by Respondent to mean and defined as "[t]he companies related to CFL and CFL itself" (para. 12 of Respondent's SoD). Thereafter Claimants used this term, "for the sake of unity of terms used", to include Newbuilding Investments B.V., CFL Caranx I Beheer B.V. and CFL Caranx II Beheer B.V. (Reply, para. 1.3.)
CFL	Term used by the Arbitral Tribunal for Newbuilding Investments B.V. or for Newbuilding Investments B.V. together with one, some or all of the CFL-related other entities that are mentioned in the TPA as "Sellers / Releasing Parties" and which were under the control and /. or under the management of Mr Koolhof
Claimants' Cost Submission	Claimants' Cost Submission dated 17 December 2018
Claimants' Post Hearing Brief	Claimants' Post Hearing Brief dated 23 November 2018
Consortium	Centraalstaal B.V., eL-Tec Electrotechnologie B.V., Konstructiebedrijf Coops & Nieborg B.V., Barkmeijer Stroobos B.V.
DCC	Dutch Civil Code
DCCP	Dutch Code of Civil Procedure
FA	"Framework Agreement" (FA) dated 19 May 2015 between Claimants (together with four other parties) and Respondent (Exh. C-1)
Joint Runner I	Ship 1601 or Caranx I
Joint Runner II	Ship 1602 or Caranx II
Rejoinder	Respondent's Rejoinder to Claimants' Statement of Reply dated 11 September 2018
Reply	Claimants' Statement of Reply dated 28 June 2018

Respondent's Cost Submission	Respondent's Cost Submission dated 23 November 2018
Respondent's Post Hearing Brief	Respondent's Post Hearing Brief dated 23 November 2018
Ship 1601	Caranx I or Joint Runner I
Ship 1602	Caranx II or Joint Runner II
SoC	Claimants' Statement of Claim dated 8 March 2018
SoD	Respondent's Statement of Defence dated 3 May 2018
TAMARA	Former name of the arbitral institution under which these arbitration proceedings are conducted (now "UNUM")
Transcript I	Transcript of the first day of the evidentiary Hearing (6 November 2018)
Transcript II	Transcript of the second day of the evidentiary Hearing (7 November 2018)
Transcript III	Transcript of the third day of the evidentiary Hearing (8 November 2018)
TPA	Tri-Partite Sale & Purchase and Release Agreement dated 6 October 2015 [Exh. R-3]
UNUM	UNUM Transport Arbitration & Mediation Current name of the arbitral institution under which these arbitration proceedings took place (formerly "TAMARA")
Secretariat	Secretariat of UNUM Transport Arbitration & Mediation, formerly Secretariat of TAMARA Transport And Maritime Arbitration Rotterdam-Amsterdam

I. INTRODUCTORY PART

A. The Parties

1. The Parties to this arbitration are:

1. Centraalstaal B.V.
Osloweg 110
9723 BX Groningen
Netherlands
referred to as Claimant 1 or Centraalstaal

2. eL-Tec Elektrotechnologie B.V.
Hoopjesweg 2
8051 DB Hattem
Netherlands
referred to as Claimant 2 or el-Tec

3. Konstructiebedrijf Coops & Nieborg B.V.
Industrieweg 11
9601 LJ Hoogezand
Netherlands
referred to as Claimant 3 or Coops & Nieborg

4. Mr Marco Kalmijn
Van der Sluis, Van der Zee & Kalmijn Advocaten
Postbus 2610
8901 AC Leeuwarden
as Liquidator of Barkmeijer Stroobos B.V.[1]
Heilingstraat 10
9872 PT Stroobos
referred to as Claimant 4 or Barkmeijer[2]

together referred to as "Claimants"

represented in this arbitration from 10 April 2017 to 31 December 2017 by:

Kees de Vries
PLAS BOSSINADE ADVOCATEN N.V.
Postbus 1100
9701 BC Groningen
Paterswoldseweg 804
Netherlands
+31 (0)50 - 521 43 33

[1] On 31 October 2018, Counsel for Claimants gave notice that Barkmeijer Stroobos B.V. had been declared bankrupt on 30 October 2018 by the Court of the Northern-Netherlands. On 2 November 2018, the liquidator of Barkmeijer Stroobos B.V., Mr Marco Kalmijn, declared that he would continue the arbitral proceedings and that he would be using the services of the same counsel as the other Claimants, i.e. of Mr de Hoop.

[2] Particularly in the context of events prior to the opening of the insolvency proceedings, the Arbitral Tribunal will refer to Barkmeijer Stroobos B.V. as "Barkmeijer".

Email: k.devries@plasbossinade.nl

and since 1 January 2018 by

Jan Leo de Hoop
PLAS BOSSINADE ADVOCATEN N.V.
Postbus 1100
9701 BC Groningen
Paterswoldseweg 804
Netherlands
Tel: +31(0)50 521 43 93
Fax: +31(0)50 525 56 66
M: +31(0)6 558 768 34
Email: deHoop@plasbossinade.nl

and

Brodotrogir d.d.
Put brodograditelja 16
21220 Trogir
Croatia

referred to as "Brodotrogir" or as "Respondent"

represented in this arbitration from 10 April 2017 to 3 August 2018 by:

Nigel Margetson
MVTZ MARGETSON VAN'T ZELFDE
Willemskade 18-b
3016 DL Rotterdam
The Netherlands
Tel.: + 31 (0)10 21 777 24
Fax: + 31 (0)10 21 777 25
Email: nigel@mvtz.nl

Tonci Bezmalinovic
BEZMALINOVIC LEGAL WAYS B.V.
Heemraadssingel 105
3022 CB Rotterdam
Netherlands
Tel.: + 31 (0)10 476 51 71
Fax : + 31 (0)10 799 95 62
Email : info@legal-ways.com

and since 3 August 2018 by Mr Tonci Bezmalinovic only.

2. Claimants and Respondent are hereinafter also jointly referred to as "the Parties".

B. **The Arbitral Institution and the Arbitration Rules**

3. Art. 8.10 of the Framework Agreement (FA) ("Disputes and arbitration") and Art. XIV.4 of the Building Contract (BC) ("Arbitration") provide that the arbitration

   "*...shall be conducted at Rotterdam, the Netherlands, and shall take place in the English language, under the TAMARA Arbitration Rules ...*"

4. The arbitral institution's former name TAMARA stood for "Transport And Maritime Arbitration Rotterdam-Amsterdam" and was changed to "UNUM Transport Arbitration & Mediation" in the course of these arbitration proceedings. The institution informed the Parties and the Arbitral Tribunal of this change of name on 18 September 2018.

5. The case name TAMARA-17004, under which the case was filed, did not change.

6. Address and contact information of the arbitral institution:

UNUM Transport Arbitration & Mediation
P.O. Box 23158
3001 KD Rotterdam
Netherlands
Tel. +31 10 436 3750
Fax +31 10 436 7850
E-mail: secretary@unum.world

C. **The Arbitral Tribunal**

7. The Arbitral Tribunal was constituted as follows:

Mr Sjoerd Rutten
HABRAKEN RUTTEN
Weena 690
3012 CN Rotterdam
Netherlands

By letter dated 11 May 2017, the institution noted that Mr Sjoerd Rutten had been appointed as arbitrator by Claimants.

Mr Neven Bahun
ODVJETNICKO DRUSTVO - LAW OFFICE
MIKULICIC-LONCARIC-BAHUN-TOPIC
Medvescak 54

10000 Zagreb
Croatia

On 4 January 2018, Mr Neven Bahun accepted his appointment after his nomination by Respondent of 30 December 2017.

Hon.-Prof. Dr. Andreas Reiner
ARP
Freyung 6/12
1010 Vienna
Austria

Tel :	+43 1 532 23 32 0
Fax:	+43 1 532 23 32 10
Email:	andreas.reiner@arb-arp.at;
with copy to:	office@arb-arp.at

On 31 January 2018, the institution informed the Parties that the co-arbitrators had appointed Andreas Reiner as third arbitrator.

D. **Arbitration Agreements**

8. Art. 8.10 of the Framework Agreement dated 19 May 2015 reads as follows:

"*8.10 Disputes and arbitration*
In the event of any dispute or difference between the Parties regarding any matter arising from or related to this Agreement or any stipulation therein, which cannot be settled by the Parties themselves, the Parties shall submit said matter(s) to arbitration under the TAMARA Arbitration Rules.
In such case the dispute will be submitted to three arbitrators, one arbitrator to be chosen by Brodotrogir and one arbitrator to be chosen by the Joint Parties involved (in the completion of the hull) jointly, which two arbiters will choose the third arbitrator.
Arbitration shall be conducted at Rotterdam, the Netherlands, and shall take place in the English language, under the TAMARA Arbitration Rules.
Any decision or assignment of arbitration shall be final and binding upon the Parties, the Parties hereby waive in advance and in any case the right of appeal against decision or assignments."

9. Art. XIV.4. of the Building Contract dated 19 May 2015 read as follows:

"In the event of any dispute or difference between the Parties to any matter or thing arising out of or relating to this Contract or its termination or any stipulation herein not already covered in paragraph 3 above, which cannot be settled by the parties themselves, the parties shall submit the matter in dispute to arbitration by three arbitrators, one of the arbitrators to be chosen by each party and the third arbitrator by the two thus chosen.

The arbitration shall be conducted at Rotterdam, the Netherlands, and shall take place in the English language, under the TAMARA Arbitration Rules.

Decision or award of arbitration shall be final and binding upon both parties, the parties waiving in advance and in any case the right of appeal against decision or award."

E. Place and Language of the Arbitration

10. Art. 8.10 ("Disputes and arbitration") of the Framework Agreement provides as follows:

> *"... Arbitration shall be conducted at Rotterdam, the Netherlands, and shall take place in the English language, under the TAMARA Arbitration Rules..."*

11. Art. XIV 4. ("Arbitration") of the "Building Contract" provides as follows:

> *"... The arbitration shall be conducted at Rotterdam, the Netherlands, and shall take place in the English language, under the TAMARA Arbitration Rules ..."*

II. SUMMARY OF THE PROCEEDINGS

12. By e-mail dated 10 April 2017, Mr Kees de Vries, Counsel for Claimants, sent Claimants' notification of arbitration to Mr Nigel Margetson and Mr Tonci Bezmalinovic, Counsel for Respondent, with copy to the arbitral institution. In the same e-mail, Claimants appointed Mr A.I.M. van Mierlo as arbitrator who was later replaced by Mr Sjoerd Rutten.[3]

13. In its letters dated 12 and 19 April 2017, the Secretariat confirmed that arbitration proceedings between Centraalstaal B.V., eL-Tec Elektrotechnologie B.V., Konstructiebedrijf Coops & Nieborg B.V. and Barkmeijer Stroobos B.V. as Claimants and Brodotrogir d.d. as Respondent were commenced on 10 April 2017.

[3] Mr A.I.M. van Mierlo withdrew as arbitrator on 4 May 2017 following a challenge by Respondent. Claimants subsequently appointed Mr Sjoerd Rutten whose appointment was confirmed by the institution on 11 May 2017.

14. On 24 April 2017, Respondent appointed Mr Anto Nobilo as arbitrator who was later replaced by Mr Neven Bahun.[4]

15. On 22 December 2017, Mr de Vries gave notice that, from 1 January 2018 on, Mr de Hoop would replace him as Counsel for Claimants.

16. By e-mail dated 31 January 2018, the institution informed the Parties that the arbitrators Mr Sjoerd Rutten and Mr Neven Bahun had appointed Mr Andreas Reiner as third arbitrator.

17. On 8 February 2018, the Arbitral Tribunal held a telephone conference with the Parties concerning the further conduct of the arbitration.

18. On 12 February 2018, the Arbitral Tribunal issued Procedural Order No. 1, which included a draft of Procedural Order No. 2 regarding the further conduct of the arbitration on which the Parties were given the opportunity to comment.

19. The Parties submitted their respective comments on Draft Procedural Order No 2 on 14 February 2018.

20. On 19 February 2018, the Arbitral Tribunal issued Procedural Order No. 2 regarding the further conduct of the arbitration.

21. By e-mail dated 22 February 2018, Respondent *inter alia* requested that the Arbitral Tribunal render a decision on confidentiality with regard to Article 7 of the Framework Agreement.

22. By letter dated 23 February 2018, Claimants *inter alia* stated that Respondent's request to render a decision on confidentiality regarding Article 7 of the Framework Agreement should be rejected.

23. On 26 February 2018, Respondent reacted to Claimants' letter dated 23 February 2018 stating that, since Claimants' position was "*that [the Framework] agreement remain[ed] in existence*", "*Claimants [were] bound to that agreement*" and that the question whether or not arbitration proceedings were confidential lied within the jurisdiction of the arbitrators.

24. On 8 March 2018, Claimants submitted their Statement of Claim.

25. On 20 March 2018, the Arbitral Tribunal issued Procedural Order No. 3 in which the Arbitral Tribunal *inter alia* reserved its decision on confidentiality pursuant to Art. 7 of the

[4] Claimants challenged Mr Anto Nobilo as arbitrator on 5 May 2017. Mr Nobilo did not withdraw. By submission dated 1 June 2017 Claimants challenged him before the Court of Noord-Nederland which, on 22 November 2017, decided to remove him as arbitrator. In an e-mail to the arbitral institution dated 30 December 2017, Respondent appointed Mr Neven Bahun as arbitrator. Respondent added that "*with this nomination Brodotrogir is not waiving any rights / defences regarding Mr. Nobilo*". On 28 February 2018, Respondent stated that it had filed an appeal against the decision of the Court of Noord-Nederland. On 28 January 2019,

Framework Agreement as requested by Respondent until an appropriate later stage of the proceedings, adding that this should not prevent the Parties from reaching an agreement on the confidentiality of this arbitration.[5]

26. On 3 May 2018, Respondent filed its Statement of Defence.

27. On 28 June 2018, Claimants filed their Reply to Statement of Defence.

28. On 23 July 2018, Claimants submitted witness statements of Mr Hilkhuysen, Mr Veraart and Mr Manning.

29. On 3 August 2018, Mr Nigel Margetson withdrew as Counsel of Brodotrogir.

30. On 11 September 2018, Respondent filed its Rejoinder to Reply to Defence including witness statements of Mr Koncar, Mr Tramontana and Ms. Vukman.

31. On 15 October 2018, a pre-Hearing telephone conference was held to discuss organisational matters concerning the Hearing.

32. These organisational matters were addressed in Procedural Order No. 4 dated 18 October 2018 and in Procedural Order No. 5 dated 24 October 2018.

33. On 31 October 2018, Counsel for Claimants gave notice about the insolvency of Barkmeijer Stroobos B.V., Claimant 4 (and member of the Consortium). On 2 November 2018, the liquidator, Mr Marco Kalmijn, declared that he would continue the arbitral proceedings and that he would be using the services of the same counsel, *i.e.* of Mr de Hoop.

34. The Hearing took place in Rotterdam from 6 to 8 November 2018 during which the following witnesses were heard (in the following order):

    - on Respondent's side

        - Mr Danko Koncar
        - Ms Vedrana Vukman
        - Mr Mateo Tramontana

    and

    - on Claimants' side

        - Mr Hans Veraart

Claimants announced that on 25 January 2019 the Court of Appeal in Leeuwarden had rendered a decision in that matter.

- Mr Rutger Hilkhuysen
- Mr Paul Manning.

Present at the Hearing were also Ms Melissa Volpi from John Larking Verbatim Reporters, acting as court reporter, and, during the examination of Mr Paul Manning, Ms Jannie van Ravensteijn-Prins, acting as interpreter.

35. On 12 November 2018, the Arbitral Tribunal issued Procedural Order No. 6, which in point 1. took note that the arbitral proceedings were closed at the end of the Hearing subject to certain points that were dealt with in points 2. to 11. of Procedural Order No. 6.

36. On 15 November 2018, Respondent submitted a "*request for the order for full disclosure of the court documents in the Groningen proceedings between Barkmeijer and CFL c.s.*" and on 16 November 2018 Respondent requested the Arbitral Tribunal "*to set a reasonable term within which [...] summary proceedings have to be made pending by Respondent*" against Mr Manning.

37. On 19 November 2018, Claimants submitted their comments on Respondent's two aforementioned requests.

38. In its Procedural Order No. 7 dated 21 November 2018, the Arbitral Tribunal denied Respondent's two aforementioned requests.

39. On 23 November 2018, the Parties submitted their respective Post Hearing Briefs.

40. On 26 November 2018, Claimants submitted two requests by which Claimants, in reaction to Respondent's Post Hearing Brief, asked the Arbitral Tribunal to either not admit "*the new invocation by Respondent of the 'exceptio plurium litis consortium' and the new exhibit submitted in that respect*" (first request), or to grant Claimants the opportunity to react to the invocation of the "*exceptio plurium litis consortium*" and the new exhibit (legal exhibit RL-19) submitted (second request).

41. By letter dated 28 November 2018, Respondent commented on Claimants' above-mentioned requests.

42. In its letter dated 30 November 2018, the Arbitral Tribunal gave Claimants the opportunity to comment on Respondent's newly submitted legal exhibit RL-19 and, in that context, also on Respondent's related argument on the "*exceptio plurium litis consortium*" as presented in Respondent's Post Hearing Brief. At the same time Respondent was given the opportunity to

[5] In the end, the matter was never addressed again by any of the Parties and there was no need to address it in the further course of the arbitration.

comment on Claimants' newly submitted legal exhibit CL-30 and in that context also on Claimants' related argument in their Post Hearing Brief that all circumstances of the case can be of importance when considering whether rescission according to Art. 6:265 DCC is justified or not.

43. On 7 December 2018, Claimants submitted their additional submission regarding the "*exceptio plurium litis consortium*".

44. On 7 December 2018, Respondent submitted its "Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30".

45. On 17 December 2018, the Parties submitted their respective Cost Submissions.

46. On 18 December 2018, Respondent submitted three separate requests to suspend the arbitration proceedings.

47. The same day Claimants commented on Respondent's suspension requests.

48. On 28 December 2018, the Parties submitted their comments on the other side's Cost Submission.

49. On 2 January 2019, the Arbitral Tribunal issued Procedural Order No. 8 closing the proceedings. In that Procedural Order the Arbitral Tribunal also rejected Respondent's suspension requests.

50. Following an exchange of written drafts, on 18 January 2019 the Arbitral Tribunal held a telephone conference in order to deliberate on the final award.

51. On 28 January 2019, Claimants announced that "*on 25 January 2019 the Court of Appeal in Leeuwarden has rendered a decision in the matter of the challenge of Mr Nobilo as an arbitrator nominated by Brodotrogir. The Court of Appeal has confirmed the judgement of the court in Groningen [...]*".

52. By letter dated 1 February 2019 the Arbitral Tribunal gave Respondent the opportunity to comment on the Court of Appeal's aforementioned decision. On 5 February 2019 Respondent submitted its comments.

53. The deliberation continued by way of written exchanges between the members of the Arbitral Tribunal, a further telephone conference on 13 February 2019 and final written exchanges.

III. RELIEF REQUESTED BY THE PARTIES

A. Claimants' Request for relief

54. In their Statement of Claim, Claimants requested the following relief:

"*VII. THE CLAIMS*

Claimants hereby request the Arbitral Tribunal to render an arbitral award in which:

a. Respondent will be ordered to pay to Claimants an amount of € 10,164,688.19 (in words: ten million one hundred sixty four thousand six hundred eighty eight euro and nineteen eurocents), increased with the contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR (as applicable) two and a half percent (2.5 %) per annum commencing with (from and including) 17 March 2017, or any other date set by the arbitral tribunal, to the date of payment of the full amount, by transferring the total amount due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410;

b. Respondent will be ordered to pay to Claimants a compensation for any and all damage and losses they have suffered and may suffer, including (without limitation) the costs for preservation and mooring expenses for the Hull after 13 March 2017, to be assessed later by the Court and subsequent proceedings (in Dutch: nader op te maken bij staat en te vereffenen volgens de wet), increased with the contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR (as applicable) two and a half percent (2.5 %) per annum commencing with (from and including) fourth day following the date the amounts were or will be due to the date of payment of the full amount;

c. Respondent will be ordered to pay to Centraalstaal an amount of € 2,750,000 (in words: two million seven hundred fifty thousand euro), increased with the statutory interest as meant in article 6:119a of the DCC over (i) the amount of the down payment of € 550,000 as from 14 January 2016 and (ii) the remaining amount of the contract price of € 2,200,000 as from 27 March 2017, or as from any other date set by the arbitral tribunal, to the date of payment of the full amount, by transferring the total amount due to the clients' account (as referred to *in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410;*

d. Respondent will be ordered to pay to Centraalstaal compensation for any and all damage and losses it has suffered and may suffer, including (without limitation) the costs for preservation and storage of the steel package Centraalstaal has produced in accordance with article 5 under 1 of the Framework Agreement, to be assessed later by the Court and subsequent proceedings (in Dutch: nader op te maken bij staat en te vereffenen volgens de wet), increased with the statutory interest as meant in article 6:119a of the DCC as from the date the amounts were or will be due to the date of payment of the full amount;

e. Respondent will be ordered to bear the costs of the arbitration, including the fees and the expenses of the arbitrator(s) and the TAMARA administrative expenses as well as the fees and expenses of any witnesses heard and experts appointed by the arbitrator(s) and the reasonable legal and other costs incurred by Claimants."[6]

55. In their Reply "*Claimants persist to the claims as mentioned in the statement of claim!*"[7]

56. In their Post Hearing Brief, Claimants submitted the following "Reworded Reliefs":[8]

Claimants hereby request the Arbitral Tribunal to render an arbitral award in which:

a. Respondent will be ordered to pay to Claimants an amount of € 10,164,688.19 (in words: ten million one hundred sixty four thousand six hundred eighty eight euro and nineteen eurocents), increased with the contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR plus two and a half percent (2.5 %) per annum commencing with (from and including) 17 March 2017, or any other date set by the arbitral tribunal, amounting up to 1 December 2018 € 392,873,72 and amounting € 572.25 for each day from and including 1 December 2018 until the date of payment of the full amount, by transferring the total amount due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A.

[6] SoC, VII.
[7] Reply, p. 19.
[8] Claimants' Post Hearing Brief, point 5. See also point 10. (last two paragraphs) of Procedural Order No. 6 dated 12 November 2018 as well as Respondent's "Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30" dated 7 December 2018.

Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410;

b. Respondent will be ordered to pay to Claimants a compensation for damage and losses they have suffered for an amount of € 187,466.41, increased with the contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR plus two and a half percent (2.5 %) per annum commencing with (from and including) fourth day following the date the amounts were or will be due, amounting up to 1 December 2018 € 3,760.57 and amounting € 10.37 for each day after 1 December 2018 until the date of payment of the full amount;

c. Respondent will be ordered to pay to Centraalstaal an amount of € 2,222,500 (in words: two million two hundred twenty two thousand five hundred euro), increased with the statutory interest as meant in article 6:119a of the DCC over (i) the amount of the down payment of € 550,000 as from 14 January 2016 and (ii) the remaining amount of the contract price of € 1,672,500 as from 27 March 2017, or as from any other date set by the arbitral tribunal, amounting up to 1 December 2018 € 369,186.06 and amounting € 536.54 for each day after 1 December 2018 until the date of payment of the full amount, by transferring the total amount due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410;

d. Respondent will be ordered to pay to Centraalstaal compensation for any and all damage and losses it has suffered for an amount of € 439,835.17, increased with the statutory interest as meant in article 6:119a of the DCC as from the date the amounts were or will be due, amounting up to 1 December 2018 € 47,950.82 and amounting € 96.40 for each day after 1 December 2018 until the date of payment of the full amount;

e. Respondent will be ordered to bear the costs of the arbitration, including the fees and the expenses of the arbitrator(s) and the TAMARA administrative expenses as well as the fees and expenses of any witnesses heard and experts appointed by the arbitrator(s) and the reasonable legal and other costs incurred by Claimants.

B. Respondent's Request for relief

57. The relief requested by Respondent in its Statement of Defence reads as follows:

    "*Brodotrogir requests the Arbitral Tribunal to dismiss all claims of Claimants and to order that Claimants to bear the complete costs of the arbitration including the costs of legal assistance incurred by Brodotrogir.*"[9]

58. Respondent's relief requested in its Rejoinder reads as follows:

    "*Brodotrogir persists to the request as formulated in its Statement of Defence.*"[10]

59. In its "Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30" dated 7 December 2018, Respondent submits that "*[a]ccording to Respondent all claims of Claimants should be dismissed. As a result Claimants have to bear all costs of this arbitration including the costs of legal assistance as incurred by Respondent*".[11]

IV. Background and the relevant factual developments

60. The purpose of the following summaries points A. to E. is to facilitate the understanding of the issues. If and to the extent necessary for the Arbitral Tribunal's analysis and decisions relevant elements of fact which are in dispute between the Parties will be addressed in chapter V (The Arbitral Tribunal's analysis and decisions).

A. Two Shipbuilding contracts

61. The dispute arises out of a shipbuilding project.

62. In March 2013, Scheepswerf Peters B.V., a shipyard in Kampen (Netherlands), entered into two shipbuilding contracts with one of the CFL-companies, i.e. CFL Finance B.V. (a Dutch company from Groningen/Netherlands): One contract for the construction of a ship under built number 1601, and another shipbuilding contract for the construction of a ship under built number 1602.

63. Claimants' 10 Mio payment-claim[12] as well as Claimants' related damage claim[13] relate to this ship 1601. Claimants' payment claim in the amount EUR 2.222.500,- as well as

[9] SoD, p. 74.
[10] Rejoinder, p. 41.
[11] Respondent's "Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30" dated 7 December 2018, para. 24.
[12] See para. 56 a. above.

the related claim for damages,[14] are unrelated to the aforementioned ships as they relate to the construction of another ship (which has the built number 1603).

B. The bankruptcy of the shipyard Peters

64. On 8 April 2014 Scheepswerf Peters was declared bankrupt. As a consequence, the construction of ship 1601 (and 1602) at Scheepswerf Peters came to a halt.

C. CFL introduces Brodotrogir as a possible new investor

65. First contacts between CFL and Scheepswerf Peters on the one hand and Respondent on the other hand for the participation of Respondent in the shipbuilding project of ships 1601 (and 1602) had been made in 2013.[15]

66. Later, after the insolvency of Scheepswerf Peters in April 2014, Respondent was again contacted by CFL and Scheepswerf Peters with a view to convince Respondent to invest into the shipbuilding project in order to finalize the unfinished ships and to exploit them.[16]

67. These contacts led to a Memorandum of Agreement signed between CFL and Respondent in December 2014 in which CFL and Respondent set out their plan to finalize and exploit the ships through a joint venture.[17]

68. Later, in January 2015, Claimants were informed that Respondent would have an interest in the finalisation and exploitation of ships 1601 and 1602.[18] In February 2017 Claimants were introduced to Respondent by CFL.[19]

69. The Claimants had acted as suppliers of Scheepswerf Peters for the construction of ship 1601. Due to the bankruptcy of Scheepswerf Peters, Scheepswerf Peters had open accounts vis-à-vis Claimants and Claimants hoped that with an investment from Respondent the shipbuilding project could be finalized which would enable Claimants to recover their outstanding invoices.

D. The new agreements

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[13] See para.56.b. above.
[14] See paras.56.c. and d. above.
[15] Witness Testimony Koncar, Transcript I, p. 152/153. Witness Statement Koncar (Exh. R-20), para. 1.
[16] Witness Statement Koncar (Exh. R-20), paras. 2 et seq.; Witness Statement Vukman (Exh. R-19), para. 2.
[17] Witness Statement Koncar (Exh. R-20), paras. 7 and 8; Witness Statement Vukman (Exh. R-19), para. 4.
[18] Witness Statement Veraart (Exh. C-30), p. 1; Witness Statement Hilkhuysen (Exh. C-29), p. 1.
[19] Witness Statement Veraart (Exh. C-30), p. 1; Witness Statement Hilkhuysen (Exh. C-29), p. 1.

1. The Framework Agreement (FA) and the Building Contract (BC)

70. In order to finalize the construction of ship 1601, on 19 May 2015 Claimants entered into an agreement (the "Framework Agreement"; or "FA") with Respondent.

71. In addition, on 19 May 2015, then Claimant No.4 (Barkmeijer) as builder entered into a separate contract (the "Building Contract"; or "BC") with Respondent as buyer.

72. Whereas the Framework Agreement sets the general framework for the finalization of ship 1601 and the related payments to be made by Respondent, the Building Contract more specifically regulates the mode of completion of ship 1601.

2. The Tripartite Agreement (TPA)

73. Separately from the aforementioned agreements regarding the finalization of ship 1601, CFL and Respondent negotiated and concluded an agreement regarding transfer of ownership of ship 1601 (and 1602) from CFL to Respondent.

74. That agreement (the "Tripartite Agreement") was concluded between CFL and Respondent on 6 October 2015.

3. The Steel Package Agreement

75. Claimant No. 1 (Centraalstaal) under Art. 5.1 of the Framework Agreement concluded a separate agreement with Respondent for the construction of a steel package (unrelated to ship 1601).

E. The present status

1. The Receiver of Scheepswerf Peters (Mr Manning) got EUR 750.000,- for the release of the unfinished ship 1601

76. The receiver of the shipyard, Mr Manning, confirmed that he received EUR 750.000,- for releasing the unfinished ship 1601.[20]

[20] Transcript III, p. 9.

2. The works under the FA and the BC were performed and were finalized in January 2017

77. As confirmed both by Ms Vukman[21] and Mr Veraart[22], the works on ship 1601 were finalized in January 2017.

3. Brodotrogir's investment into the ship 1601

78. Respondent made payments under the FA and the BC in the aggregate amount of EUR 3,25 Mio, EUR 2,25 Mio. as a "down payment" and EUR 1 Mio. as an "interim payment". In addition, Respondent made a payment under the TPA in the amount of EUR 500.000. Respondent also made further payments to suppliers, including MRK and Rolls Royce.

4. Brodotrogir stopped making payments

79. Respondent argued that, as a consequence of its declaration of annulment[23] of the TPA, the FA (and the BC) are null and void, and Respondent made no further payments and refused to take over the ship 1601.

5. The bankruptcy of Barkmeijer

80. On 30 October 2018 Barkmeijer was declared bankrupt. On 2 November 2018 the liquidator of Barkmeijer, Mr Marco Kalmijn, declared that he continues the arbitration proceedings as liquidator in the bankruptcy of Barkmeijer.

6. The present situation concerning the ship 1601

81. The ship 1601 is currently berthed in Harlingen under the control of (the liquidator of) Barkmeijer.

82. The ship 1601 is still owned by CFL.[24]

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[21] Vukman, Transcript I, p. 258.
[22] Veraart, Transcript II, p. 121.
[23] The proper Dutch term is "vernietigen" according to Art. 6:228 DCC. The Parties used in English interchangeably to "annul", to "nullify" and to "terminate", respectively the nouns "annulment", "nullification" and "termination". The present award does the same.
[24] See extract from the register (Kadaster) dated 6 November 2018 submitted by Respondent on 7 November 2018.

83. The liquidator of Scheepswerf Peters has a security right on the ship 1601. In addition, there are several mortgages on the ship.

84. According to an extract from the register (Kadaster) dated 6 November 2018 submitted by Respondent on 7 November 2018 as "Mortgages Joint Runner I 06112018", there are currently the following mortgages on ship 1601: a first mortgage (mortgage holder: Caranx Investments B.V., one of the CFL companies), a second mortgage (mortgage holder: Centraalstaal B.V.), a third mortgage (mortgage holder: Rolls-Royce Marine AS), a fourth mortgage (mortgage holder: eL-Tec Elektrotechnologie B.V.) and a fifth mortgage (mortgage holder: Centraalstaal B.V.).

85. The running costs for the preservation of ship 1601 are subject of separate proceedings by Barkmeijer against CFL before the Court of Noord-Nederland.

7. Claimants' claims

7.1. Remaining Fee under the FA (EUR 5.175.000,00)

86. Claimants' claim for EUR 5.175.000,00 for the unpaid part of the Fee for the completion of the Hull [ship 1601] under Art. 3.1.a. of the FA (EUR 8.425.000,00 minus the "down payment" in the amount of EUR 2.250.000,00 and minus the "interim payment" in the amount of EUR 1.000.000,00 made by Respondent in accordance with Art. 3.1.e. and f. of the Framework Agreement).

7.2. Premium under the FA (EUR 900.000,00)

87. Claimants also request the payment of the premium in the amount of EUR 900.000,00 under Art. 3.1.b. and c. of the Framework Agreement for having arranged an export financing.

7.3. Change Orders (EUR 4.089.688,19)

88. Claimants request the payment of EUR 4.089.688,19 (EUR 3.867.717,00 + EUR 221.971,19) for additional work carried out (so-called "Change Orders") in relation to ship 1601 under Article X.3. of the Building Contract.

7.4. Additional damage claim (EUR 187.466,41)

89. Claimants request the payment of EUR 187.466,41 as an "*additional damage suffered by Claimants as a result of the default of Respondent in respect of the non-acceptance of the Hull* [ship 1601] *and the non-payment of the amount due for the completion of the*

Hull", consisting of expenses regarding mooring preservation, insurance costs and travelling costs.[25]

7.5. Steel package claim (EUR 2.222.500,00)

90. Under this request Claimants request payment for the construction of the steel package in accordance with Art. 5.1 of the Framework Agreement. The purchase price under Art. 5.1. was EUR 2.750.000,00. Claimants argue that "*because Respondent did not pay and the storage was rather expensive*", Centraalstaal scrapped the steel package and sold the scrap steel for an amount of EUR 527.000,00.[26] The amount claimed by Claimants represents the difference between the purchase price of EUR 2.750.000,00 and EUR 527.000,00 Centraalstaal received for the scrap steel.[27]

7.6. Additional damage claim (EUR 439.835,17)

91. Under this claim, Claimants claim "*additional damage suffered by Centraalstaal as a result of the default of Respondent in respect of the non-acceptance of the steel package for Vessel 1603 [and] the non-payment of the amount due in that respect*".[28] The claim consists of "*costs of the plant*" and "*[r]ent of the warehouse in which the steel was stored*".[29]

8. Summary of the main substantive issues

92. Brodotrogir argues that it was the victim of misrepresentations by CFL and the Claimants in relation to the so-called Tri-Partite Agreement Brodotrogir has entered into with CFL for the sale of the ship 1601, the release of security rights and the transfer of ownership.

93. Brodotrogir argues that it has, based on those misrepresentations, successfully nullified the Tri-Partite Agreement, as a consequence of which, according to Brodotrogir, the allegedly related Framework Agreement and the Building Contract, which Brodotrogir had entered into for the completion of the ship 1601 and on which Claimants' claims are based, have also become null and void.

[25] Claimants' Post-Hearing Brief, para. 4.3.
[26] Claimants' Post Hearing Brief, para. 4.6.
[27] Claimants' Post Hearing Brief, paras. 4.6. and 4.7.
[28] Claimants' Post Hearing Brief, para. 4.9.
[29] Claimants' Post Hearing Brief, para. 4.9.

94. In addition, Brodotrogir argues that it is not obliged to make any further payments because the Consortium and Barkmeijer were incapable of transferring ownership of the ship 1601.

95. As a defence to the payment claims Brodotrogir also relies on its termination of the Building Contract following the bankruptcy of Barkmeijer.

96. The above main substantive issues as well as all other substantive and/or procedural issues will be addressed in detail in the following chapter V.

V. The Arbitral Tribunal's analysis and decisions

97. By way of introduction the Arbitral Tribunal notes the following with regard to the applicable evidentiary rules.

98. According to Art. 1039(1) DCCP the arbitral tribunal "*shall be free to determine the rules of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence, unless the parties have agreed otherwise*".

99. Art. 8 of the TAMARA Rules on which the Parties have agreed[30] states that "*the provisions of the DCCP shall apply*" to any matter not governed by the TAMARA Rules and that "*[t]his applies, for instance, to the law of evidence [...and the] examination of witnesses, ...*"

100. Thus, whenever necessary, the Arbitral Tribunal will apply the relevant procedural rules of the DCCP.

A. The payment claim under the FA and the BC concerning ship 1601 (EUR 10.164.688,19)

1. The basis of Claimants' claim for ship 1601

[30] Art. 8 of the TAMARA Rules provides as follows:
Applicability of the Dutch Code of Civil Procedure
The provisions of the Dutch Code of Civil Procedure shall apply to any matter insofar as it is not governed by these rules. This applies, for instance, to the law of evidence, amendment of claims, submission of documents, examination of witnesses, appointment of experts, on-site inspections and the participation of the parties in a hearing.

101. Claimants argue that the works on ship 1601 have been finalized in accordance with the FA and the BC and that, as a consequence, the unpaid part of the fee for completing the ship according to Art. 3.1 a. FA is due (EUR 5.175.000,00).

102. Claimants further argue that "*Barkmeijer has arranged that an export financing [...] could be obtained from Atradius Dutch State Business N.V.*" and that, as a consequence, "*the Premium is due by Brodotrogir*" in accordance with Art. 3.1. b. and c. FA (EUR 900.000,00).[31]

103. Furthermore, Claimants submit that Barkmeijer has performed extra work requested by Respondent on the basis of so-called "Change Orders". Claimants request payment for this extra work in accordance with Art. X.3. BC (EUR 4.089.688,19).

2. Respondent's objections

104. The first objection by Respondent is that it was the victim of misrepresentations by CFL with the knowledge of the Consortium in relation to the Tri-Partite Agreement.

2.1. The (alleged) misrepresentations

105. Respondent argues that CFL has not provided Respondent with "*the correct information regarding:*

- *the real invested amount in the Caranx I and Caranx II on CFL c.s.' side;*
- *the real status or better said validity of the securities which CFL c.s. had on both vessels related to these investments: first mortgage regarding Caranx I and pledge regarding Caranx II;*
- *the real position towards ABN AMRO Bank, namely that there is a corporate guarantee of CFL c.s. given to ABN AMRO Bank of EUR 50 million in which the Caranx I and Caranx II are involved and therefore exposed*".[32]

106. More particularly, Respondent argues that "*CFL c.s. has given wrong information about both the investment amount and the status/validity of the securities (mortgage and pledge); the investment amount is substantially lower than both the initial USD 16 million and later USD 13 million*".[33] Respondent further argues that "*[t]he securities are actually not valid. Centraalstaal has clearly taken the position that the first mortgage is not valid and that therefore Centraalstaal has the strongest mortgage (reference is made*

[31] SoC, para. II.9.
[32] Rejoinder, para. 47.
[33] Rejoinder, para. 48.

to Exhibit R-11)".[34] Respondent also asserts that "*during the negotiations no disclosure was made about the fact that the Caranx I and Caranx II are actually exposed to ABN AMRO Bank as a result of debts regarding former vessels*".[35]

107. In its Post Hearing Brief Respondent argues that "*[f]rom the witness statements therefore it appears that several things have been wrongly presented by CFL c.s. about whom Claimants had the knowledge describing them as a party using all kind of tricks, namely:*

    - *Respondent did not have a clue (as Mr. Manning did not have as well – he cannot say that this is none of his business as he wants to be at the same time decided about alleged pledges of ABN AMRO without substantiating his statement in this regard) about the corporate guarantee of EUR 50 million on the Caranx-vessels: no one would step in this project (including Respondent) if knowing this.*
    - *there has not been an investment of EUR 16 or EUR million: it is doubtful whether there is any investment. Even the amount of EUR 7.587.200 seems to be exaggerated and is not substantiated by Mr. Manning's statement;*
    - *there is no first mortgage right on "Joint Runner I" and pledges on "Joint Runner II" as well as there are no other security rights: no one would give CFL c.s. 49% (Exhibit R-4 – page 2 and 5 - CFL c.s. would get 49% in Joint Runner Holding Limited) and even EUR 2 million "cash" (as per Tri-partite agreement) for non-existing security rights (valued at 2 million Euros)*".[36]

108. Before dealing specifically with the alleged misrepresentations it seems useful to examine whether and if so to what extent the Consortium and/or its members were involved in the Tri-Partite Agreement which dealt with the sale and purchase of the ship 1601 and the transfer of ownership.

2.1.1. Were the Consortium and/or its members involved in the TPA and its negotiation?

2.1.1.1. Respondent's position

[34] Rejoinder, para. 48.
[35] Rejoinder, para. 48.
[36] Respondent's Post Hearing Brief, p. 5.

109. Respondent argues in its Rejoinder that "*[f]rom the witness statement of Ms. Vukman it can be derived that CFL c.s. and the Consortium of inter alia Centraalstaal and Barkmeijer have teamed up together in relation to Brodotrogir*".[37]

110. Respondent further argues that "*Claimants cannot just deny now Brodotrogir's mistake by stating that they have not been present during the negotiations of the Tri-Partite Agreement. They have intentionally not been because at that time Centraalstaal at least knew about his position regarding the first mortgage*".[38] Respondent submits that "*[t]he fact that in the complete constellation of all agreements Claimants have chosen to not participate in the negotiations about the ownership and securities transfer as regulated in the end in the Tri-Partite Agreement and therefore have chosen to not prevent the mistake on Brodotrogir's side: this risk is borne by the Claimants [...]*".[39]

2.1.1.2. Claimants' position

111. Claimants argue that "*they have not been involved in the negotiations between CFL c.s. and Brodotrogir in relation to the Tri-Partite Agreement. For this reason Claimants have no knowledge of the representations made or information provided by CFL c.s. to Brodotrogir, nor about the relevance of such representations or information for Brodotrogir, nor of the recognisability (in Dutch: "kenbaarheid") of such relevance for CFL c.s. Because of this lack of knowledge, Claimants dispute the correctness of the statements of CFL in this respect*".[40]

2.1.1.3. The Arbitral Tribunal's analysis and decision

112. As a starting point it is useful to recall who met whom and when and to remember the contractual history of the TPA.

113. The evidence shows that the first contact between Claimants and Respondent took place early 2015.[41] It is irrelevant whether that contact happened in January or in February

[37] Rejoinder, para. 39.
[38] Rejoinder, para. 61.
[39] Rejoinder, para. 61.
[40] Reply, para. VI.2.
[41] Mr Veraart and Mr Hilkhuysen both state in their Witness Statements, that "*[i]n January 2015 we were informed that a Croatian, named Brodotrogir, funded by Mr Danko Koncar, would have interest in finalisation and exploitation*" of the ships 1601 and 1602. They further state that on 12 February 2015 they were introduced by CFL (Mr Kees Koolhof) to Brodotrogir (Mr Tramontana and Ms Vukman).
Ms Vukman in her witness testimony stated that meetings of Brodotrogir with members of the Consortium started in January 2015, Transcript I, p. 225.

2015.[42] In any case, this was after the first contact and first negotiations between Respondent and CFL and, even more importantly, after Offshore Facilities LLC (OFL), a company related to CFL, and Trogir Maritime d.o.o., a company linked to Brodotrogir, signed the Memorandum of Understanding (including a 1st Rider) on 22 December 2014 in the presence of the then Croatian Prime Minister.[43]

114. This Memorandum of Understanding set out the whole business case of the intended joint business between CFL and Respondent including the responsibility of Trogir for "*arranging pre- and post-delivery financing for the full acquisition price of the Vessels [...]*" and the future joint exploitation of the vessels, including ship 1601 "*by companies to be incorporated by OFL and Trogir as bareboat charterers [...]*".

115. Only thereafter Claimants got involved.

116. Thereafter, Respondent had separate meetings and discussions with CFL on the one hand and with the Claimants on the other.[44]

117. Finally, Respondent signed in May 2015 with the Claimants the Framework Agreement which set out the framework for the completion of the ship 1601 and on the same day with Barkmeijer the Building Contract which set out the details for the works to be carried out by Barkmeijer on ship 1601.

118. The Tri-Partite Agreement (which covered the sale of ship 1601 and the release of security rights) was entered into later, i.e. on 6 October 2015, between various CFL companies defined as "*the Sellers*" and Respondent defined as "*the Purchaser*".

119. Mr Manning, the liquidator of Scheepswerf Peters, testified that he had not heard of the TPA prior to March 2017 when Respondent wrote to him arguing that he, i.e. Mr Manning, was liable.[45]

120. There is no evidence that the Consortium or any of its members would have been involved in the discussions leading to the TPA. Mr Koncar[46] and Ms Vukman[47] testified that the initial intention would have been to have one global contract including CFL, Respondent and the Consortium. Their testimony is, however, contradicted by all other available evidence concerning the history of the TPA, the FA and the BC. But even if

[42] See the previous footnote.
[43] Memorandum of Understanding between Offshore Facilities LLC and Trogir Maritime d.o.o. dated 22 December 2014.
[44] Veraart, Transcript II, p. 117/118; p. 132/133; Hilkhuysen, Transcript II, p. 186.
[45] Manning, Transcript III, p. 23/24.
[46] Koncar, Transcript I, p. 200.
[47] Vukman, Transcript I, p. 219.

Ms Vukman's recollection was right, the fact that finally separate agreements were concluded, i.e. the FA and the BC with the Consortium/Barkmeijer and the TPA with CFL, would show that the Parties, including Respondent, intentionally deviated from their initial concept and decided to establish separate contractual relations concerning the works on the ship by the Consortium and Barkmeijer on the one hand and the sale of the ship by CFL on the other hand.

121. Under those conditions it is difficult to see how the Claimants could have committed any misrepresentation or how they could be liable for any misrepresentation by CFL. The Arbitral Tribunal also notes in this context that Ms Vukman testified concerning security rights on ship 1601 and ship 1602 that "*[w]e relied on the information from CFL*".[48]

122. Nevertheless, the Arbitral Tribunal will examine whether there was any misrepresentation by CFL (with or without the active or passive involvement of the Consortium) and whether any such misrepresentation may have justified the nullification of the TPA and, as a consequence, of the FA and the BC.

123. According to Respondent's written submissions Respondent argues that it was misled a) with regard to the amount of the investment by CFL, b) concerning the first mortgage and c) concerning ABN AMRO's pledge and corporate guarantee. The Arbitral Tribunal will examine these three allegations one by one.

2.1.2. The amount of investment by CFL

2.1.2.1. Respondent's position

124. Respondent argues that "*[t]he Tri-Partite agreement has been successfully nullified / terminated (in Dutch: "vernietigd") due to misrepresentation of several facts on CFL c.s. side*".[49]

125. Respondent submits that "*[f]rom the witness statements therefore it appears that several things have been wrongly presented by CFL c.s. about whom Claimants had the knowledge describing them as a party using all kind of tricks, namely: [...] there has not been an investment of EUR 16 or EUR million: it is doubtful whether there is any investment. Even the amount of EUR 7.587.200 seems to be exaggerated and is not substantiated by Mr. Manning's statement*".[50]

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[48] Vukman, Transcript I, p. 280.
[49] Respondent's Post Hearing Brief, p. 2.
[50] Respondent's Post Hearing Brief, p. 5.

2.1.2.2. Claimants' position

126. Claimants argue that "*Respondent did not provide sufficient proof that it indeed would have entered the Tri-Partite Agreement under the influence of mistake caused by misrepresentations made by CFL c.s. The alleged misrepresentations itself have not been proven and/or must be deemed to be irrelevant, which can be summarized as follows:*

    1. *The alleged misrepresentation regarding the amount CFL c.s. would have invested in the ships is not relevant, since Respondent knew the factual situation of the Hull of the Joint Runner I* [ship 1601] *and the parts for the Joint Runner II* [ship 1602] *at the shipyard of Scheepswerf Peters at the time of its bankruptcy and has made its own assessment as regards the value thereof (being very experienced in shipbuilding itself)*

    [...]".[51]

127. According to Claimants "*[t]he real reasons why Respondent has refused to fulfill its obligations have emerged during the oral Hearing: (i) the offshore market deteriorated after the signing of the agreements which made the business case for Respondent less profitable [...]*".[52]

2.1.2.3. The Arbitral Tribunal's analysis and decision

128. The documentary evidence shows that the figure of 16 million was mentioned in the 1st Rider dated 22 December 2014 to the Memorandum of Understanding of the same day. At that point in time Brodotrogir was having discussions with CFL only. The Claimants were not yet involved.

129. In addition, the oral testimony has clearly shown that Respondent was not interested in the amount invested by CFL so far, nor in the then value of the ship 1601. As confirmed by Mr Koncar, Respondent's financial analysis and its decision to enter into the TPA, the FA, and the BC was based on the expected future profitability of the exploitation of the ship compared to Respondent's investments under the FA and BC on the one hand (vis-à-vis the Claimants) and under the TPA on the other hand (vis-à-vis CFL):

> THE PRESIDENT: [...] Why would somebody sell half of a ship for

[51] Claimants' Post Hearing Brief, para. 3.61.
[52] Claimants' Post Hearing Brief, para. 3.62.

2 million if that person has invested 13.5 million into that ship, or 6 or 7 million?

A. Look, I believe that always the story was: never mind, what we have situation today, but I as CFL I will manage the vessel.

THE PRESIDENT: Mm.

A. You know? That is number 1. I will rent that vessel to somebody, I don't know, this offshore operator, big company, CC, I know what is the name.

THE PRESIDENT: It does not matter.

A. Never mind. Big, and they offer, I think, $35,000 or $36,000 per day. And if you like, calculate, say that you borrow 30 million, that your interest is 3 per cent and that you need to repay this 30 million in three years, yes? This mean you need to pay every year 3 million from the capital and around, roughly speaking, less than 1 million for interest. That is 4 million. When you multiply 36,000 with 365 days you come that you will have three times more than you need to pay. This mean CFL said, "Okay, I have this possibility but I need to build a ship." This mean the value of the ship is not so important as it is important what I will gain when I have ship in my hand.[53]

A. -- on one side, never mind how he invest - it's 16 and 13 or two or zero. This is not important, but he see ah ha, I as the CFO - because the market price in that moment was 35 per day.[54]

[53] Koncar, Transcript I, p. 161/162.
[54] Koncar, Transcript I, p. 176.

THE PRESIDENT: Just one last question, if I may. At some point in time you said you would be able to continue if the sharing was not 49/51 but 15/85, and if you didn't have to pay this two million. How did you get at those figures economically?
A. Because this 35 wasn't any more 35. We come to 12, 13 or something with that. It's (inaudible) drop off --
Q. What do you mean by 12 or 13?
A. Look, I told you. Look, it was never intention or was never present to us as intention to sell the vessel. To finish and to sell. Always was the case that CFL will have go on the market and have bareboat charter for that. In the beginning when we start to discuss this project, the price of the market was higher than $35,000 per day. In time when this was 85/15 or something like that, that's drops to level of – I don't know exactly – 12, 13. This mean wasn't anything there different, which mean from fewer, is no additional profit, you know. You know.[55]

Q. How much did the market deteriorate over that period in your view?
A. In the beginning we were talking about 30 or 30 plus earnings, at that time we were talking about 10 or even less.
Q. That is a drastic change?
A. Yes [...].[56]

[55] Koncar, Transcript I, p. 206/207.
[56] Vukman, Transcript I, p. 236/237.

130. Even if Brodotrogir would not have relied on the future profitability of the exploitation of the ship 1601, it is difficult to see or understand why CFL's past investment into the ship would have been essential for Respondent's business decisions concerning the ship 1601. What might have been relevant, is the then value of the ship, whatever amounts might have been invested previously.

131. This has also has been confirmed by Mr Tramontana in his witness testimony:

> A. Yes, 2 million, but during the month we understood that Kees mispresentate (sic) the project and cost to us.
>
> Q. Yes, but the question is what did he misrepresent?
>
> A. Level of investment. First of all, level of investment. He invest much, much less than presented.
>
> Q. But why is that relevant? You knew at that point in time the value or you had a good idea as to the value of the vessel as it was. Whoever had to pay it or not pay it doesn't matter. The value was there. You had an idea of that value.
>
> A. I agree with you [...].[57]

132. As to the assessment of the value of the ship, Respondent no doubt had all the necessary know-how due to its long-lasting experience in the shipping industry.[58]

133. To conclude on this point: Even assuming that CFL provided a wrong figure concerning the amount of its investments, this had no impact on the TPA.

134. The Arbitral Tribunal does not exclude that a misrepresentation by CFL concerning the amount of its investments may have had an impact on the conditions of the future exploitation of the ship 1601 and in particular on the agreement between Respondent and CFL as to the sharing of their interests in the future joint venture agreements for the

[57] Tramontana, Transcript II, p. 38.
[58] See point 2.1.5. below.

exploitation of the ship 1601 (and those other ships that they intended to exploit jointly), i.e. 51% Respondent and 49% CFL.[59] [60]

135. This is, however, of no relevance to the TPA (which Respondent attempted to nullify as a justification for nullifying also the FA and the BC) since the TPA does not deal with the intended future cooperation between CFL and Respondent. Respondent did not rely on the nullification of any other agreements with CFL, such as any agreement concerning the sharing of any future benefits resulting from the future exploitation of the ship 1601 (and any other ships), as a justification for nullifying the FA and the BC and for not honouring Claimants' claims arising under those two agreements.

2.1.3. The first mortgage

2.1.3.1. Respondent's position

136. Respondent argues "*[f]rom the witness statements therefore it appears that several things have been wrongly presented by CFL c.s. about whom Claimants had the knowledge describing them as a party using all kind of tricks, namely: [...] there is no first mortgage right on "Joint Runner I" and pledges on "Joint Runner II" as well as there are no other security rights: no one would give CFL c.s. 49% (Exhibit R-4 – page 2 and 5 - CFL c.s. would get 49% in Joint Runner Holding Limited) and even EUR 2 million "cash" (as per Tri-partite agreement) for non-existing security rights (valued at 2 million Euros)*".[61]

2.1.3.2. Claimants' position

137. Claimants argue that "*[t]he discussion regarding the validity of the first mortgage is not relevant, because (i) if it would be valid and that was the situation Respondent expected and moreover the release or transfer of the mortgage was in that case taken care of in the Tri-Partite Agreement, and (ii) is [sic] the mortgage would not be valid this would not be detrimental to Respondent since the release of the other mortgages and securities was sufficiently taken care of in the Framework Agreement*".[62]

[59] See the Memorandum of Understanding, section 1.
[60] This may explain why Brodotrogir attempted to obtain CFL's consent to a change of the 51/49 - ratio in the intended joint venture companies in favour of Brodotrogir. See, for example, the testimony by Ms Vukman that "*the problem was that we cannot give 49% ownership in the company if someone is not investing*" (Transcript I, p. 237).
[61] Respondent's Post Hearing Brief, p. 5.
[62] Claimants' Post Hearing Brief, para. 3.61.

138. Claimants assert that "*Mr Koncar apparently after signing the agreements decided that he wanted to obtain the first mortgage. This was not for[e]seen in the agreements until ful[l] payment (in which case all security rights including the first mortgage would be released and Respondent could have obtain[e]d exactly what was agreed upon)*".[63]

139. Claimants further argue that "*[t]he real reasons why Respondent has refused to fulfill its obligations*" were the deterioration of the offshore market and that "*Respondent decided after the signing of the agreements that it would prefer another sequence of steps in respect of the securities than the agreements provided for (Respondent wanted to obtain the first mortgage after payment of the firsts instalment of € 500.000 to CFL, which was not agreed upon)*".[64]

2.1.3.3. The Arbitral Tribunal's analysis and decision

140. The Arbitral Tribunal has difficulties to understand Brodotrogir's complaints that "*there is no first mortgage right*" on ship 1601 and that "*no one would give CFL 49% [...] for non-existing security rights*".

141. The Arbitral Tribunal accepts that it is uncertain whether the "first mortgage" existed. It is true that Dutch law does not allow the owner of a ship to establish a mortgage on the ship he owns. On the other side, as noted by Claimants, the civil law notary passed the deed of mortgage and the register (Kadaster) shows that the first mortgage was registered which speaks in favour of the validity of that mortgage.[65]

142. More importantly, however, the issue whether the first mortgage validly existed or not, is irrelevant, for the simple reason that according to the TPA, which explicitly mentions the first mortgage in favour of Newbuilding Investments[66] (one of the CFL companies), this first mortgage (- as well as all other "security rights" -) were to be released by Newbuilding Investments in exchange for the payment by Respondent of the "Purchase Price" in the amount of EUR 2.000.000,- [67] (out of which Respondent only paid EUR 500.000,-[68]). Had Respondent complied with its payment obligations under the TPA, the

[63] Claimants' Post Hearing Brief, para. 3.11.
[64] Claimants' Post Hearing Brief, para. 3.62.
[65] Reply, para. VI. 4.5.
[66] Whereas-clause (C)
[67] See Section 2 („Agreement to Sell and to release Security Rights"), in particular section 2.1. (iii) and section 2.2.
[68] Transcript I, p. 225: "*The President: So the 500,000 that you paid under the tri-partite agreement were for the second ship*" and response by Ms Vukman: "*Yes, that was the first condition under the tri-partite agreement that they will release the second ship from their pledge or title or whatever they have*".

first mortgage would have been released, whether it was valid and rightly registered or not.

2.1.4. The alleged pledge and the alleged corporate guarantee of ABN AMRO

2.1.4.1. Respondent's position

143. Respondent in its Statement of Defence asserts that after the signing of all the agreements it "*discovered that the "Caranx I" and "Caranx II" form a sort of security under a "corporate guarantee" issued by CFL c.s. to ABN AMRO Bank for debts regarding other vessels. Furthermore, he discovered that the ABN AMRO Bank had a pledge (in Dutch: "pandrecht") on the Caranx II whereas before the signing of the agreements CFL c.s. had told Brodotrogir that the "Caranx I" and "Caranx II" were unemcumbered assets*" and "*if Brodotrogir had known all these things before signing all the agreements, it would not have signed those agreements, at least not under the same conditions*".[69]

144. In addition, Respondent in its Rejoinder argues "*that CFL c.s. had the obligation to disclose the correct information regarding: [...] that there is a corporate guarantee of CFL c.s. given to ABN AMRO Bank of EUR 50 million in which the Caranx I and Caranx II are involved and therefore exposed*".[70] According to Respondent "*CFL c.s. has given wrong information about both the investment amount and the status/validity of the securities (mortgage and pledge). [...] [D]uring the negotiations no disclosure was made about the fact that the Caranx I and Caranx II are actually exposed to ABN AMRO Bank as a result of debts regarding former vessels*".[71]

145. Respondent in its Post Hearing Brief argues that "*Respondent did not have a clue (as Mr. Manning did not have as well – he cannot say that this is none of his business as he wants to be at the same time decided about alleged pledges of ABN AMRO without substantiating his statement in this regard) about the corporate guarantee of EUR 50 million on the Caranx-vessels: no one would step in this project (including Respondent) if knowing this*".[72]

[69] SoD, para. 25.
[70] Rejoinder, para. 47.
[71] Rejoinder, para. 48.
[72] Respondent's Post Hearing Brief, p. 5.

2.1.4.2. Claimants' position

146. In their Reply, Claimants argue that "*[a]s regards (i) the right of pledge of ABN AMRO Bank on Caranx II and (ii) the Caranx project being connected to that of € 50,000,000.-- to ABN AMRO Bank, which would create risks for Brodotrogir in case CFL c.s. would not fulfil its obligations towards the bank, it is obvious that Brodotrogir did not perform any or at least not sufficient research. For this reason alone the alleged mistake should remain for the account of Brodotrogir.*"[73]

147. In their Post Hearing Brief Claimants argue that "*[t]he alleged pledges on the Joint runner II of ABN AMRO Bank have not been proven (not one single statement from this bank has been submitted) and Mr Manning has testified that ABN AMRO Bank has agreed to release its pledge in respect of the transaction between Mr Manning and the parties to the Framework Agreement*".[74]

2.1.4.3. The Arbitral Tribunal's analysis and decision

148. The evidence before the Arbitral Tribunal does not allow the determination that ABN AMRO did have a pledge on ship 1602. If there had been a pledge, there necessarily would have to be a related written document. No written evidence was, however, provided. In addition, the witness evidence was extremely vague and unspecific, including the evidence of Mr Manning.[75]

149. Under those conditions the Arbitral Tribunal considers that Respondent as the party relying on an alleged pledge in favour of ABN AMRO has not discharged its burden of proof. It is therefore unnecessary to deal with the question whether ABN AMRO would have been prepared to abandon such a pledge, assuming it existed, if Respondent had complied with its financial obligations under the TPA, as stated in relatively vague terms by Mr Manning.[76]

150. The alleged corporate guarantee is mentioned in the e-mail correspondence between CFL and Respondent in the period from 24 to 26 May 2016.[77] CFL indeed argued in this correspondence that there is a corporate guarantee and that CFL needs the approval of

[73] Reply, para. VI.4.5.
[74] Claimants' Post Hearing Brief, para. 3.61.
[75] Manning, Transcript III, p. 33/34, p. 39/40.
[76] Manning, Transcript III, p. 33/34, p. 39/40.
[77] Exh. R-15.

ABN AMRO for signing a new MoU.[78] Kees Koolhof of CFL also states in that correspondence that there is a debt of EUR 50 Mio. owed to ABN AMRO.

151. Considering that, with the exception of the e-mails, there is no other evidence for the existence of the above-mentioned corporate guarantee, the question is whether it really exists/existed or whether it is was used as a means by which CFL attempted to obtain the best position possible in the further negotiations with Respondent by referring to the restrictions allegedly set up by ABN AMRO.

152. If the corporate guarantee really existed, its date of issuance as well as its scope and content are unknown. Additionally, none of the witnesses had any knowledge of the corporate guarantee except for what is written in the e-mails referred to above. Even Mr Manning, who says he was in contact with ABN AMRO, has no knowledge of the alleged guarantee:

> Q. Are you aware of a corporate bank guarantee of 50 million euros where the Joint Runner I is also involved?
>
> A. Can you show me? I don't know it. Corporate bank guarantee - to whom?
>
> Q. So, a corporate bank guarantee given by CFL to the ABN AMRO, as a result of which ABN AMRO via that guarantee has rights on the Joint Runner I?
>
> A. No.
>
> Q. Are you aware of such a document?
>
> A. No, I don't know that.
>
> Q. Has that ever been discussed with you?
>
> A. No. I am receiver of the company and I have information of that company, but I don't have information about CFL, and they are not willing, I think, to give me any information. What other company would give such

[78] In that correspondence, Mark Nieuwland of CFL explained the relationship between CFL and ABN AMRO in an e-mail dated 26 May 2016, 10:30: "*CFL ultimately owns the Joint Runners. CFL is corporate guarantor. We cannot take out the assets without their consent. They are ok with the current agreements, i.e. framework, tripartite, joint venture agreement etc., but they will not give their consent for transferring the shares without any clear and balanced ultimate position for CFL.*"

> information to me as a receiver? No. I don't
> know.[79]

153. The Arbitral Tribunal does not consider that Brodotrogir had a positive duty prior to the entering into the TPA to undertake any research as to any possible rights of third parties beyond the "Security Rights" disclosed by CFL.[80] The Arbitral Tribunal notes, however, that at the time of the above-mentioned correspondence, i.e. in May 2016, Respondent did not make any attempt to ascertain whether the alleged corporate guarantee existed and, if it existed, whether it would have prevented compliance by CFL with their obligations under the TPA.

154. To conclude on the issue concerning the corporate guarantee: On the basis of the available evidence, the Arbitral Tribunal is unable to determine with the required degree of probability that a corporate guarantee in favour of ABN AMRO existed and that such guarantee would have prevented compliance by CFL with the TPA had Respondent fulfilled its payment obligations under the TPA.

155. As stated by Ms Vukman in her testimony, the change of the market conditions happened at the end of 2015 and the beginning of 2016:

> MR JAN LEO de HOOP: May I ask, at what
> time are we speaking about this market drop?
> A. We were speaking somewhere ...
> Q. At what time did it happen, I mean?
> A. We were speaking - we were aware of that,
> I believe, end of 2015/2016.[81]

156. The above analysis of the CFL investment issue, of the first mortgage issue and of the ABN AMRO pledge/corporate guarantee issue does not allow to conclude that Respondent would have discharged its burden of proof that CFL committed any relevant misrepresentation which could have justified a termination of the TPA by Respondent.

157. In additional support for that conclusion the Arbitral Tribunal will recall in the following point 2.1.5. the considerable experience of Respondent in the shipbuilding business and the involvement of Respondent's legal department and set out in point 2.1.6. what it

[79] Manning, Transcript III, p. 64/65.
[80] Contrary to Claimants' view expressed in Reply, para. VI. 4.5.
[81] Transcript I, p. 237.

understands from the evidence to have been the true reasons for Respondent's change of mind and change of attitude and that they were unrelated to the TPA.

2.1.5. The experience of Respondent in shipbuilding and the involvement of Respondent's legal department

158. In the Arbitral Tribunal's view, it is important to recall in the overall context, but in particular with regard to Respondent's allegation of having been the victim of several misrepresentations, that Respondent was not an unexperienced newcomer in the shipbuilding business. Respondent had already many years of experience in the shipbuilding business and an experienced legal department that was not only available, but actually involved throughout the whole period:

> Who did you ask before you engaged in this project what is the value of the ship 1601 presently? I would assume this would have been an important information for you.
>
> A. Look, personally, I'm not expert for that.
>
> THE PRESIDENT: Okay, but you may have asked somebody.
>
> A. But --
>
> THE PRESIDENT: Did you ask somebody to give you a figure?
>
> A. -- Brodotrogir is people who are long, long period of time only involved in the vessel, in shipbuilding, and they judge that --[82]
>
> THE PRESIDENT: Okay. But initially in 2014/2015 who was looking at this project from a legal point of view for Brodotrogir?
>
> A. Our legal department, our internal legal department. We had three experienced lawyers, now we have one new guy, therefore (inaudible) our legal department.[83]

[82] Koncar, Transcript I, p. 168.
[83] Vukman, Transcript I, p. 216/217.

Q. Just to be sure, you talked about the
framework agreement and the tri-partite
agreement, both agreements were also
checked by your legal department?
A. Yes.[84]

2.1.6. The true reasons why Respondent stopped making payments under the TPA and under the FA/BC

159. The true and decisive reason why Respondent stopped making payments under the TPA and under the FA/BC was, in the Arbitral Tribunal's view, an important deterioration of the (offshore) market conditions for the operation of ships like the ship 1601. This had a major negative impact on the possible profitability of ships like ship 1601, as can be seen from the witness testimony of Respondent's witnesses Mr Koncar and Ms Vukman:

A. Never mind. Big, and they offer, I think,
$35,000 or $36,000 per day. And if you like,
calculate, say that you borrow 30 million,
that your interest is 3 per cent and that you
need to repay this 30 million in three years,
yes? This mean you need to pay every year 3
million from the capital and around, roughly
speaking, less than 1 million for interest.
That is 4 million. When you multiply 36,000
with 365 days you come that you will have
three times more than you need to pay. This
mean CFL said, "Okay, I have this possibility
but I need to build a ship." This mean the
value of the ship is not so important as it is
important what I will gain when I have ship
in my hand.[85]

[84] Tramontana, Transcript II, p. 94/95.
[85] Koncar, Transcript I, p. 162.

Okay, the market is not any more 35 that you rent. It's maybe 25. It may be - I don't know how much - 20.[86]

Q. Okay. Why did the market go down for that type of ships?
A. Look, you know what happened with offshore or with oil, you know, from say about 100, they come to 20. Now it's 60 –[87]

Q. When you say plus minus 25, what do you mean by "25"?
A. 25,000 per day.
Q. Although your initial calculation was based on 35 --
A. On the 35.
Q. -- thousand?
A. On much higher it was done [...].[88]

THE PRESIDENT: Just one last question, if I may. At some point in time you said you would be able to continue if the sharing was not 49/51 but 15/85, and if you didn't have to pay this two million. How did you get at those figures economically?
A. Because this 35 wasn't any more 35. We come to 12, 13 or something with that. It's (inaudible) drop off --
Q. What do you mean by 12 or 13?
A. Look, I told you. Look, it was never intention or was never present to us as intention to sell the vessel. To finish and to sell. Always was the case that CFL will have

[86] Koncar, Transcript I, p. 171.
[87] Koncar, Transcript I, p. 172.

go on the market and have bareboat charter for that. In the beginning when we start to discuss this project, the price of the market was higher than $35,000 per day. In time when this was 85/15 or something like that, that's drops to level of – I don't know exactly – 12, 13. This mean wasn't anything there different, which mean from fewer, is no additional profit, you know. You know.[89]

THE PRESIDENT: What was the attractive part of that project?
A. Attractive part of that project, if I am asked from the position of sales director, is that at that time offshore market was excellent, booming, very good, so for some time we had been planning to enter into that market and that was an opportunity for us.[90]

MR JAN LEO de HOOP: May I ask, at what time are we speaking about this market drop?
A. We were speaking somewhere ...
Q. At what time did it happen, I mean?
A. We were speaking - we were aware of that, I believe, end of 2015/2016.
THE PRESIDENT: That was basically after the signing of the framework agreement and after the signing of the tri-partite agreement?
A. Yes.[91]

160. Only as a consequence of those changed market conditions and the drastically reduced profit forecast did Respondent put in question not the TPA, but the 51%/49% sharing of

[88] Koncar, Transcript I, p. 173.
[89] Koncar, Transcript I, p. 206/207.
[90] Vukman, Transcript I, p. 211.
[91] Vukman, Transcript I, p. 237/238.

future profits with CFL, which was not part of the TPA, but part of some other agreement(s) between CFL and Respondent.

161. Whether Respondent was or is entitled to nullify the 51%/49% sharing agreement as a consequence of a possible misrepresentation by CFL concerning the amount of CFL's investment can be left undecided. Respondent only relied on the nullification of the TPA.

2.1.7. No evidence that Claimants committed any misrepresentation

162. Finally, before examining whether a successful nullification of the TPA could justify Respondent's nullification of the FA/BC, the Arbitral Tribunal wishes to state that there is no evidence which would show, or make it likely, that the Consortium or any of its members actively misinformed Respondent or were aware of any misrepresentation by CFL and, in addition, violated any fiduciary duty vis-à-vis Respondent by not informing them of the true situation.

2.1.8. Conclusion on the question of misrepresentation

163. The above analysis has shown that there was no misrepresentation, at least no misrepresentation concerning or relevant for the TPA. For the sake of completeness the Arbitral Tribunal will now examine whether - assuming that there was a relevant misrepresentation and assuming that Respondent has validly nullified the TPA[92] - the nullification of the TPA justifies the nullification of the FA/BC.

2.2. **Could a successful nullification of the TPA by Respondent justify the nullification of the FA/BC?**

164. The above question raises two issues: First, does any provision in the FA and/or in the BC isolate these agreements vis-à-vis the TPA and protect them against any impact resulting from a successful nullification of the TPA. Second, assuming the answer to the first question is "no", are the FA and the BC sufficiently "related" to the TPA with the

[92] In this context, the Arbitral Tribunal asked itself the question whether it has, in principle, the power to decide whether the TPA has been validly nullified by Brodotrogir. The reason for that question is that the TPA was entered into between Rederij Caranx I, CFL Caranx I Beheer B.V, Newbuilding Investments B.V., Caranx II V.O.F., CFL Caranx II Beheer B.V. (as Sellers / Releasing Parties) and Brodotrogir D.D.O. (as Purchaser), but that none of those CFL-parties to the TPA is party to the present arbitration.
It is obvious that the present Arbitral Tribunal cannot render any decision that could bind the CFL-parties to the TPA. The Arbitral Tribunal can, however, and must deal with the Parties' submissions concerning the TPA and decide, as a preliminary issue, with binding effect for and between the Parties to this arbitration (only), whether Brodotrogir has validly nullified the TPA.

consequence that a successful nullification of the TPA leads to or justifies a successful nullification of the FA and/or BC.

2.2.1. Art. 8.6. FA ("Non termination")

2.2.1.1. Respondent's position

165. Respondent argues that "*the non-termination clause is irrelevant as Brodotrogir has not terminated the Framework Agreement separately*".[93] According to Respondent "*the "non-termination clause" in the Framework Agreement to which Claimants are referring could only be applicable in case Brodotrogir would terminate (in Dutch: "vernietigen") the Framework Agreement directly and separately*".[94] Respondent states that "*[t]hat is not the case here*".[95]

166. According to Respondent "*[t]he Framework Agreement has been terminated as a result of a – according to Brodotrogir – successful termination of the Tri-Partite Agreement*".[96]

167. Respondent submits that "*[i]n itself indeed such a non-termination clause can be applied in an agreement*"[97] but that "*[t]he non-termination clause however does not prevent that the Framework Agreement (as well as the First Amendment to the Framework Agreement and the Building Agreement) gets automatically terminated because of termination of a related agreement as it happened in this dispute by means of termination of the Tri-Partite Agreement*".[98]

168. In Respondent's view "*the "Tri-Partite Agreement", "Framework Agreement" and "Building Agreement" [...] are sufficiently factual-economically connected as a result of which the termination of the "Tri-Partite Agreement" resulted in a [...] successful termination of the "Framework Agreement", "First Amendment of the Framework Agreement" and the "Building Agreement"*".[99]

2.2.1.2. Claimants' position

In any case, as the analysis below will show, even assuming that Brodotrogir has validly nullified the TPA, this does not lead to or justify the nullification of the FA and/or the BC. As a consequence, it is not decisive for the outcome of this arbitration, whether Brodotrogir has validly nullified the TPA or not.

[93] Rejoinder, para. 5.
[94] Rejoinder, para. 13.
[95] Rejoinder, para. 14.
[96] Rejoinder, para. 15.
[97] Rejoinder, para. 17.
[98] Rejoinder, para. 18.
[99] Rejoinder, para. 19.

169. Claimants argue that "*the "non-termination clause" included in the Framework Agreement is valid and may be invoked (and is hereby invoked!) by Claimants*".[100]

170. Claimants further argue that "*[t]he result of Claimants invoking the "non-termination clause" is that the defence of Brodotrogir against the claims of Claimants in this arbitration are void and should be rejected for this reason alone*".[101] According to Claimants this is "*regardless:*

- whether or not Brodotrogir indeed would have entered into the Tri-Partite Agreement under the influence of a mistake (which is not the case, as will be shown below superfluously);
- whether or not the Tri-Partite Agreement has been or can be successfully nullified (which is not the case [...]);
- whether or not the Tri-Partite Agreement on the one hand and the Completion Agreements on the other hand would be deemed to be related agreements (which is not the case, as will be shown below superfluously)".[102]

2.2.1.3. The Arbitral Tribunal's analysis and decision

171. Art. 8.6 of the FA ("Non termination") reads as follows:

1. *Parties hereby mutually waive their right to terminate and/or nullify this Agreement or to demand amendment, termination or declare void in court of law, on basis that afterward it turns out, one or more of the Parties did not have an accurate presentation of affairs regarding facts and/or circumstances that were of importance to one and/or more Parties before entering into this Agreement.*
2. *To the extent permitted by law, the Parties hereby waive their rights under Article 6:265 up to and including 6:272 Dutch Civil Code to terminate or to claim termination of this Agreement.*

172. Brodotrogir does not dispute the general validity and effect of the non-termination clause included in Art. 8.6 of the FA, but argues that the non-termination clause "*could only be applicable in case Brodotrogir would terminate [...] the Framework Agreement directly and separately*". In the present case, however, Respondent does not rely on a

[100] Reply, para. II.8.
[101] Reply, para. II.8.
[102] Reply, para. II.8.

direct or separate termination of the FA, but argues that the FA was automatically terminated as a consequence of the nullification of the TPA, and that Art. 8.6 of the FA does not apply in that scenario.

173. Respondent's reading of Art. 8.6 is not convincing. The distinction suggested by Respondent between a direct and separate termination of the FA by a contract party (in which case Art. 8.6 would apply and disallow a termination) and an "automatic" termination as a consequence of the termination or nullification of another, but related agreement (in which case Art. 8.6 would not apply) appears rather artificial and counterintuitive.

174. Respondent's distinction finds no support in the text of Art. 8.6. Even a purely literal interpretation leads to the result that the waiver of the right "to terminate and/or nullify" the FA includes the waiver of the right *to rely on an automatic termination or nullification of the FA*.

175. In addition, and even more importantly, looking at the (explicit or hypothetical) intent of the parties and at the object and purpose of the non-termination clause, the distinction suggested by Respondent makes no sense. Since the parties have clearly expressed their wish to make the FA nullification- and termination-proof by waiving all their personal and direct rights to terminate or nullify the FA (i.e. for reasons directly related to the FA, and even if "*one or more of the Parties did not have an accurate presentation of affairs*"), why would they have wanted to allow a termination or nullification of the FA for reasons that are further away, i.e. linked to another agreement between partly different parties?

176. Finally, Claimants' reliance on Art. 8.6 is not abusive or, to use the terminology of article 6:248 paragraph 2 DCC, "*unacceptable to standards of reasonableness and fairness*". As mentioned above, if any misrepresentation occurred, it was a misrepresentation by CFL, without any active or passive involvement of the Consortium or any of its members.

177. The BC contains neither the same nor a similar non-termination clause, but the BC is an appendix to the FA and the FA explicitly states that it "includes" the BC (see the definition in Art. 1.1 of the FA). The link between the two is also confirmed in the BC. The (fourth) Whereas-clause of the BC states that the BC "*forms a part of the Framework Agreement and therefore jointly constitutes as a [sic] whole*". In other words, Art. 8.6 of the FA also extends to the BC and the effect of the non-termination clause therefore not only covers the FA but also the BC.

178. This result makes sense, given that the FA sets the general framework for the more specific BC and finds also support in the text of the BC which says that "*the Framework Agreement shall take precedence over this present Building Contract [...]*".[103]

2.2.2. Are the FA (and the BC) and the TPA "related agreements"?

179. Even if the FA and the BC were not protected by Art. 8.6 against termination, a successful termination of the TPA could only extend to the FA and the BC, if the FA and the BC qualify under Dutch law as agreements "related" to the TPA.

2.2.2.1. Respondent's position

180. The Respondent considers that the doctrine of the related agreements (Dutch: samenhangende overeenkomsten), which has developed in the last twenty years under the influence of judgments of the Supreme Court of the Netherlands (SCN), should be applied in the case at hand.

181. The Respondent alleges that there is a close factual-economical connection between the FA, the BA and the TPA, i.e. that they are related agreements. Considering that the Respondent terminated the TPA, he finds that both the FA and BA are automatically terminated, all based on the doctrine of related agreements. The Respondent relies on the SCN's decision of 20 January 2012 - Agfaphoto Finance /Photo Noort:

"*3.5.3 [...] The decision of the Appeal Court must be understood in such a way that based on the close factual-economical relationship between the lease agreement and the financing agreement, the failure in performance regarding the lease agreement based on reasonableness and fairness is justifying the rescission as claimed by Foto Noort c.s. even if the rescission of the lease agreement has not been as well claimed explicitly.*"

182. Respondent argues that "*there is a close factual-economical relationship between Framework agreement, Building agreement and Tri-partite agreement as a result of which the termination / nullification of the Tri-partite agreement has resulted in the termination / nullification of both the Framework and Building agreement*".[104]

183. Respondent submits that from the witness statements of Mr Veraart, Mr Hilkhuysen, Ms Vukman and Mr Tramontana "*it all appears that what has been in this case agreed and regulated in three agreements, normally - when taking the nature of this transaction*

[103] Fourth Whereas-Clause of the BC.
[104] Respondent's Post Hearing Brief, p. 2.

(building, delivery and transfer of ownership of a ship) - would be dealt with in one and the same agreement, the shipbuilding agreement". According to Respondent, these witnesses "*have stated this based on their experience in the shipbuilding industry and involvement in many shipbuilding transactions*".[105]

184. In Respondent's view "*[t]herefore no other conclusion can be made than that the Framework, Building and Tri-Partite agreement have to [be] regarded as connected one with another in the sense that there is a close factual-economical relationship between them according to the rule of the Dutch Supreme Court: they are forming together factually and economically what would normally be one shipbuilding agreement*".[106]

2.2.2.2. Claimants' position

185. The Claimants are not disputing that there is a possibility that the termination of one agreement could lead to the termination of another agreement pursuant to the doctrine of "related agreements". They consider that from the various judgments of the SCN and the Courts of Appeal in the Netherlands it could be concluded that the following circumstances are to be taken into account when rendering a decision: whether or not the agreements have been concluded (almost) at the same time; whether or not all parties were involved in both agreements; whether or not there was a consistent relationship between the parties; whether or not the purpose of both agreements was the same; whether or not the terms for which the agreements have been concluded are aligned with each other; whether or not the agreements contain explicit provisions connecting them with each other.[107]

186. However, the Claimants also advocate that in recent decisions the SCN itself pointed to certain limitations in the application of the doctrine of related agreements. In the judgement of 11 July 2014, Eneco/Ronde van Nederland, the SCN expressed the view that the doctrine of the related agreements does not eliminate that the starting point in contract law remains that an agreement in principle merely binds the contractual parties:

> "*Although it is true that in various judgements of the Supreme Court in the framework of the assessment of the legal relationship between parties which are not in a contractual relationship one to another, the factual-economical connection which existed between agreements to which they were a party was considered of importance, however this does not mean that the mere*

[105] Respondent's Post Hearing Brief, p. 2.
[106] Respondent's Post Hearing Brief, p. 2.
[107] Reply, para. III.6.

circumstance that such connection exists in all cases is of importance for the assessment of the legal relationship between the parties thereto. Starting point is that agreements merely bind the parties."[108]

187. Claimants argue that "*Respondent did not [prove] the alleged close factual-economical connection between the Completion Agreements on the on[e] side and the Tri-Partite Agreement on the other side*".[109]

188. Claimants further submit that "*Respondent's witnesses have stated that originally the plan would have been to make one agreement covering both the completion and the ownership, but [t]his has been challenged by Claimants' witnesses*".[110]

189. In Claimants' view, "*[t]he statements of Respondent's witnesses are not credible in this respect, because the MoU of December 2014 shows that Respondent and CFL c.s. already had made a bilateral agreement before Claimants even were introduced to Respondent, which MoU dealt with their mutual cooperation, the completion of the Joint Runner I* [i.e. ship 1601] *and the Joint Runner II* [i.e. ship 1602] *as well as the financing. Furthermore the MoU was followed by the joint venture agreement between CFL c.s. and Respondent, which agreement shows that they had another agenda than Claimants had*".[111]

2.2.2.3. The Arbitral Tribunal's analysis and decision

190. There is no substantial disagreement between Claimants and Respondent as to the scope and content of the doctrine of related agreements. However, their views differ substantially as to the application of this doctrine to the specific facts of this case.

191. In Respondent's view it is clear in view of all the facts and circumstances that the TPA, the FA (including the First Amendment) and the BC are related agreements. The Respondent bases its conclusion on arguments that can be divided into four groups:

- Provisions/Text of the Agreements;
- CFL and Claimants were cooperating intensively and teamed up;

[108] Reply, para. III.4.
[109] Claimants' Post Hearing Brief, para. 3.64.
[110] Claimants' Post Hearing Brief, para. 3.64.
[111] Claimants' Post Hearing Brief, para. 3.64.

- Nature of the Agreements seen in the context of the complete transaction (the FA being an "agreement generalis" and the BA and the TPA being "agreements specialis");
- Witness testimonies of Mr Veraart, Mr Hilkhuysen, Ms Vukman and Mr Tramontana which would show that normally building, delivery and transfer of ownership of a ship would be dealt with in one shipbuilding agreement.[112]

192. In contrast, according to Claimants, it is clear that the TPA on the one hand and the Completion Agreements (the FA, the First Amendment to the FA and the BC) on the other hand cannot be deemed to be factually-economically connected so closely that they should be qualified as an inseparable unity. Claimants give the following reasons:

- The provisions of the agreements do not back up Respondent's assertions;
- Claimants are not contractual partners in the TPA, Claimants have never been involved in the negotiations between Brodotrogir and CFL regarding the TPA and Claimants did not know about the TPA until 2017;
- Claimants have never formed a consortium with CFL, CFL has never represented Claimants and CFL did not have any authority to represent Claimants.

193. As regards the provisions of the FA, the BC and the TPA on which the Respondent relies, the inevitable conclusion is that these provisions do not justify the conclusion that these agreements are "related" in the sense of the jurisprudence of the Dutch Supreme Court.

194. Out of all the provisions of the FA on which the Respondent relies, the only one that could be relevant is recital I. that mentions the purchase agreement of the ship 1601. Recital I. states as follows:

> *"that Brodotrogir has entered into a (purchase) agreement with Rederij in respect of the Vessel 1601 and that for that purpose separately has and accordingly wishes to enter into a building contract to finish the construction of Vessel 1601"*

195. However, even this provision in its substance clearly shows that the sale and purchase between Brodotrogir and CFL is considered to be a separate arrangement that will be regulated by a separate agreement. The fact that the FA contains the incorrect statement that such purchase agreement has already been concluded does not alter the above stated

[112] Respondent's Post Hearing Brief, p. 2.

conclusion. On the contrary, it shows Brodotrogir's and CFL's view that the Claimants should not be included in the TPA and that Brodotrogir and CFL have not shared any information with them in relation to it.

196. On the other hand, some relevant provisions show that the parties to the FA (including the First Amendment) have considered which contractual documents in their opinion formed an inseparable unity and that the TPA is not one of those documents (see article 1.1 of the First Amendment and para. IV.7. of the Reply).

197. The provisions of the BC on which the Respondent relies show that it is linked to the FA, but they do not prove in any way the link between these two agreements with the TPA.[113] The BC, in the second Whereas-Clause, contains a provision which is essentially identical to the provisions of the recital I. of the FA. Everything that has been said for recital I. applies to this provision as well.

198. The provisions of the Tri-partite Agreement are no support to Respondent's "related agreement"-argument as Claimants are neither parties to the TPA nor have they participated in the negotiations and the drafting of the TPA. Claimants have not attended the meetings where the conclusion of the TPA was discussed (e.g. Trogir 22 December 2014, Trogir 09 July 2015, Amsterdam 5 and 6 October 2015 – see exhibit R-19).

199. Besides, the e-mail correspondence on which the Respondent relies,[114] does not show that Claimants and CFL "*have teamed up together in relation to Brodotrogir.*"[115] Part of the e-mail correspondence is totally irrelevant and does not prove anything. From the rest of the emails, which to some extent point to the cooperation between the parties of the FA, one can deduce that there was a much closer cooperation between CFL and Brodotrogir than between CFL and Claimants.

200. In conclusion, no evidence, not even the witness testimonies of Ms Vukman, Mr Končar and Mr Tramontana justify the opposite conclusion.

201. It is possible to accept the argumentation of Respondent that it is common practice for the building, delivery and transfer of ownership of a ship to be dealt with in one shipbuilding agreement. This, however, does not mean that the parties cannot decide otherwise or that the existence of three agreements instead of the usual one shipbuilding

[113] SoD, p. 63/64.
[114] Exh. R-22 to R-36.
[115] See Rejoinder, paras. 39 and 42.

agreement automatically means that they are related agreements. It is still necessary to interpret the legal relationship in light of the circumstances.

202. The strongest arguments in support of the view that the agreements are not related are that the Claimants have never been involved in any negotiations between Brodotrogir and CFL regarding the TPA nor have they had any knowledge about the TPA. Furthermore, the Respondent did not prove (nor did Respondent try to prove) that CFL has ever represented the Claimants and that it had any authority to represent them.

203. In order to ascertain whether in the present case the agreements should be regarded as related agreements, other agreements signed between the signatories of the FA should also be taken into account, in particular the MoU of 22 December 2014. In addition, attention must be paid to the chronology of the contractual history.

204. It is indisputable that already on 22 December 2014 the companies Offshore Facilities LLC (connected to CFL) and Trogir Maritime d.o.o (connected to Respondent) signed a MoU which set the grounds of cooperation between CFL and Respondent in relation to the acquisition and completion of the vessels as well as in relation to the joint exploitation through JVC on the 51/49 % basis. It is also an undisputed fact that at that moment in time the Claimants had not yet entered the scene.

205. Approximately five months later (19/20 May 2015) the FA and the BC were signed, which fail to mention the MoU from 22 December 2014 and contain the wrong assertion that Respondent has (already) entered into a (purchase) agreement with CFL. The correct information on the (then) situation resulting from the MoU and concerning the purchase agreement was obviously known to the Respondent and CFL (but not to the Claimants). Nevertheless, the passage was not corrected and the mentioned wrong statement remained part of the FA.

206. On 6 October 2015, less than five months after the signing of the FA and BC, the TPA was signed. As mentioned, the Claimants were not parties to that agreement and they did not participate in the negotiations or in the drafting of it. After the signing of the TPA, the Claimants have not been notified about this agreement until the year 2017.

207. The logical conclusion is that Respondent and CFL over a long period of time either considered that their mutual relationship and the transfer of ownership of the vessels were not related to the Framework Agreement and the Building Agreement or held the Claimants for other reasons in the dark in relation to the Tripartite Agreement and their

relationship. The time line of events, as well as the MoU signed on 22 December 2014 also point to the fact that in the case at hand we are not dealing with related contracts.

208. Finally, taking into account all the above reasons, the important and regularly used principle of Dutch contract law concerning reasonableness and fairness (article 6:248 Dutch Civil Code), also mentioned by the SCN in its aforementioned judgment Agfaphoto Finance/Photo Noort, upon which Respondent relies, according to the Arbitral Tribunal would not justify that the termination of the TPA leads to an automatic termination of the FA and the BC.

2.3. Is Claimants' claim to be dismissed because Barkmeijer is not able to deliver the vessel to Respondent?

209. Brodotrogir's second major objection is related to the issue of ownership of ship 1601. The relevant question is, whether the Claimants (and more particularly whether Barkmeijer) had the obligation to transfer ownership to Brodotrogir or to ensure that Brodotrogir becomes owner of the ship.

2.3.1. Respondent's position

210. Respondent argues that "*Claimant's claim cannot be awarded as a result of Barkmeijer not being able to deliver the vessel to Brodotrogir*".[116]

211. Respondent submits that "*[i]t has been stated by Mr. Veraart that the "Joint Runner I" cannot be delivered to Respondent without consent of CFL c.s. as the owner. This means that Barkmeijer cannot fulfil its obligation from Article VI paragraph 1 of the Building Agreement which is making part of the Framework Agreement. Only for this reason the claim of Claimants cannot be awarded as their payment is (logically) depending on the delivery of the vessel to Respondent*".[117]

212. Respondent asserts that "*for this reason Barkmeijer had to involve CFL c.s. in these arbitration proceedings to get an award (title) regarding delivery of the vessel*".[118]

2.3.2. Claimants' position

213. Claimants, by reference to the witness testimony of Mr Veraart, argue that "*[a]s regards the Building Contract, the delivery as meant in clause 6.1. means the physical delivery*

[116] Respondent's Post Hearing Brief, p. 6.
[117] Respondent's Post Hearing Brief, p. 6.

of the ship and not the delivery of ownership, since all parties concerned knew that this was a matter between CFL and Respondent".[119]

214. Claimants argue that "*Barkmeijer is capable to factually hand over the Hull and Barkmeijer has no more far-reaching obligation in this respect. The transfer of ownership has been arranged for in a separate agreement between Brodotrogir and CFL c.s. (the Tri-Partite Agreement)*".[120]

2.3.3. The Arbitral Tribunal's analysis and decision

215. It is true that the BC defines Barkmeijer as the "Builder" and that according to Art. VI of the BC ("Delivery Date and Delivery") the ship 1601 "*shall be delivered by the BUILDER to the BUYER [...]*". It is also true that under normal circumstances the builder of a ship has the obligation to transfer ownership of the ship.[121] The present case is, however, different in many respects, compared to a "normal" shipbuilding contract.

216. The most important difference is that at the time of entering into the FA and the BC ship 1601 was already partly constructed by the Scheepswerf Peters (before this shipyard went bankrupt) and owned by CFL. The ownership situation was known to all concerned parties and this explains why Brodotrogir started its discussions related to the ship 1601 with CFL, not with Barkmeijer or any other member of the Consortium, and why Brodotrogir entered into a sale and purchase agreement with CFL, the so-called TPA.

217. The TPA explicitly defines the involved CFL-companies as "the Sellers" and Brodotrogir as "the Purchaser". The role of these CFL-companies as the sellers is clearly defined in Clause 2 which defines "Purchase Price" and deals with the "release of Security Rights".

218. Finally, the inclusion of the ownership question in the TPA, not in the FA, is confirmed by the Whereas-Clause (H) in the TPA which says that "*[t]he Purchaser's entering into the Framework Agreement [...] is subject to the Purchaser* [i.e. Brodotrogir] *having reached an agreement with* [CFL] *for the purchase and unencumbered delivery of the Vessels* [including ship 1601]".

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[118] Respondent's Post Hearing Brief, p. 6.
[119] Claimants' Post Hearing Brief, para. 3.34.
[120] Claimants' Additional Submission regarding "Exceptio Plurium Litis Consortium" dated 7 December 2018, para. 8.
[121] See also Respondent's Post Hearing Brief, p. 2.

219. "Delivery" under the BC therefore means (only) factual or physical delivery. The BC does not deal with ownership and includes no obligation by Barkmeijer to transfer ownership.

220. This is also confirmed by Clause VI.7. of the BC which says that "*[t]he HULL under construction shall remain the property of the BUYER* [i.e. Brodotrogir]". This text is incorrect insofar as Brodotrogir was not the owner of the ship at that time (and in fact has not become the owner of the ship since). The important point, however, is that Clause VI.7. makes it clear that the contractual intent of the parties to the BC did not include any ownership issues and that Barkmeijer did not undertake any obligation to transfer or to ensure the transfer of ownership to Brodotrogir.

221. It is irrelevant that the TPA was signed neither before nor simultaneously with the FA and the BC, but thereafter. The reasons for that sequence of events were within Brodotrogir's sphere of influence and responsibility. The Consortium or Barkmeijer bear no liability in this respect and any problems that resulted from the non-performance of the TPA did not and could not have any influence on the FA and the BC.

2.4. Is Claimants' claim to be dismissed because Respondent has validly rescinded or terminated the BC? (R-41 6 November 2018)

222. Brodotrogir also argued as a defence against Claimants' claims, that it terminated the BC following the opening of bankruptcy proceedings against Barkmeijer.

2.4.1. Respondent's position

223. Respondent argues that "*Claimants' claim cannot be awarded as Respondent has terminated separately the building agreement with Barkmeijer*".[122]

224. Respondent argues that "*[d]ue to the bankruptcy of Barkmeijer Respondent could terminate the building agreement* [...]. *Mr. Veraart has in his witness statement explained why: besides CFL c.s. now also consent is needed from the Liquidator of Barkmeijer. Respondent does not want to deal with the Liquidator of Barkmeijer regarding inter alia delivery and has therefore the full right to terminate the building agreement: this right of Respondent has been clearly agreed without any limitation as that this should not be possible from a certain stage. Also no specific and explicit*

[122] Respondent's Post Hearing Brief, p. 7.

prohibition in this regard has been agreed. Also for this reason Claimant's claim is anyway not awardable".[123]

2.4.2. Claimants' position

225. Claimants submit that "*[b]y means of this letter* [Exh. R-41] *Respondent has invoked the rescission (in Dutch: "ontbinding") of the Building Contract because of the bankruptcy of Barkmeijer*".[124] According to Claimants "*[f]or several reasons this letter has no effect whatsoever for the current arbitral proceedings*".[125]

2.4.3. The Arbitral Tribunal's analysis and decision

226. Brodotrogir relies on point 2 of Art. XII of the BC ("Effect of Default") which states that

> "*If the BUILDER is in default as provided for in paragraph 1 herein, the BUYER may, at its option, terminate this Contract by serving upon the BUILDER a written notice of termination.*"

227. Point 1 of Art. XII defines "Default" and states that "*[t]he BUILDER shall be deemed to be in default [...]*

> (ii) *if the BUILDER is declared bankrupt, files a petition of cessation of payments or is subject to any similar insolvency proceedings under applicable law,* [...]".

228. The purpose of that provision is obvious. Brodotrogir as the customer that ordered the completion of the ship 1601 shall not be obliged to suffer any delay or any complications in the performance of the building works under the BC as a consequence of a bankruptcy or any other insolvency proceedings of Barkmeijer. In that situation Brodotrogir as the client was given the option to terminate the BC. That termination clause, however, does not apply - and cannot reasonably have been intended to apply - in a situation where the works to be performed by Barkmeijer under the BC had been completed prior to the insolvency proceedings, and where the only performance that remained due under the BC was the payment by Brodotrogir for the works performed by

[123] Respondent's Post Hearing Brief, p. 7.
[124] Claimants' Post Hearing Brief, para. 2.5.
[125] Claimants' Post Hearing Brief, para. 2.6.

the Consortium and where the non-payment by Brodotrogir has most likely at least contributed to the insolvency of Barkmeijer.

2.5. Is Claimants' claim to be dismissed because CFL is not involved in the arbitration? ("exceptio plurium litis consortium")

229. Another defence by Brodotrogir is that the Arbitral Tribunal cannot decide on Claimants' claims and, in particular, cannot decide to grant those claims without the involvement of CFL in the present arbitral proceedings.

2.5.1. Respondent's position

230. Respondent argues that "*Claimants' claim cannot be awarded as a result of CFL c.s. not being involved in the arbitration proceedings ("exceptio plurium litis consortium")*".[126]

231. According to Respondent "*[w]hen the arbitrators would decide that the mere fact that CFL c.s. has not been involved in this arbitration, does not lead to the conclusion that Claimants cannot be received in their claim in this arbitration, then from the witness statements it became clear that in this arbitration no award can be rendered without CFL c.s. being involved*".[127]

232. According to Respondent, "*CFL c.s. had to be involved in these proceedings by Claimants because of both Respondent's nullification / termination defence and the "delivery of the vessel" issue*".[128]

2.5.2. Claimants' position

233. Claimants argue that "*the invocation by Respondent of the exceptio plurium litis consortium should be rejected*".[129]

234. According to Claimants, "*[t]he exception plurium litis consortium cannot be successfully invoked for the reason that the involvement of another party in the proceedings would be desirable or convenient, nor for the reason that conflicting judgements in different proceedings between (partly) the same parties should be avoided. The possibility of conflicting judgements in different proceedings between*

[126] Respondent's Post Hearing Brief, p. 7.
[127] Respondent's Post Hearing Brief, p. 7.
[128] Respondent's Post Hearing Brief, p. 8.
[129] Claimants' Additional Submission regarding "Exceptio Plurium Litis Consortium" dated 7 December 2018, para. 9.

(partly) the same parties is considered to be inherent to the system of Dutch civil procedural law".[130]

235. Claimants further argue that "*[i]n the current arbitral proceedings there is no processual indivisible relationship which legally requires that a judgement is the same to all who are involved in such a legal relationship*". Claimants add that "*[a]n arbitral judgement awarding the claims of the Claimants can be executed against Respondent separately from the legal relationship between Respondent and CFL c.s.*".[131]

236. Claimants also submit that "*[t]he transfer of ownership has been arranged for in a separate agreement between Brodotrogir and CFL c.s. (the Tri-Partite Agreement). This situation does not constitute a processual indivisible legal relationship which legally requires that the judgement is the same with respect to all who are involved*".[132]

2.5.3. The Arbitral Tribunal's analysis and decision

237. The concept on which Brodotrogir relies is both important and easy to understand. As explained in the Dutch Supreme Court's judgment dated 10 March 2017, there are legal relationships which are of such a nature that a decision concerning that relationship must be "*the same with respect to all who are involved in that legal relationship (a so-called processual indivisible legal relationship)*".[133]

238. This "exceptio plurium litis consortium" can, as rightly indicated by Brodotrogir, be raised at any stage of the proceedings, even at a (very) late stage. The real problem in the present case for Brodotrogir's position is, however, that the conditions for the application of this "exceptio" are not met because the legal relationship between Brodotrogir and the Claimants on the one hand and the legal relationship between Brodotrogir and CFL on the other hand are not a "processual indivisible legal relationship".

239. It is perfectly possible for a party A

- to enter into a contract with party B for completing the building of a ship that belongs to C

and

[130] Claimants' Additional Submission regarding "Exceptio Plurium Litis Consortium" dated 7 December 2018, para. 5.
[131] Claimants' Additional Submission regarding "Exceptio Plurium Litis Consortium" dated 7 December 2018, para. 7.
[132] Claimants' Additional Submission regarding "Exceptio Plurium Litis Consortium" dated 7 December 2018, para. 8.
[133] Exh. CL-32/33.

- to enter into a separate contract with C for the purchase and the transfer of ownership of that ship.

240. That is exactly what happened in the present case. The Arbitral Tribunal is therefore perfectly capable of resolving the dispute between Claimants and Brodotrogir without the participation of CFL.

2.6. Is Claimants' claim to be dismissed because Barkmeijer/the Consortium should go after CFL, not after Respondent?

241. Brodotrogir's further objection that the Claimants' payment claims should be pursued against CFL, not against Brodotrogir, is equally unjustified.

2.6.1. Respondent's position

242. Respondent argues that "*Barkmeijer should go after CFL c.s. as it is doing currently in the separate state court proceedings regarding berthage costs*".[134]

2.6.2. Claimants' position

243. Claimants in their opening statement at the Hearing stated the following:

> Respondent also has stated in these proceedings that CFL c.s. should be involved in these proceedings. However, claimants have no ground to enforce CFL c.s. These claimants have no claims against CFL c.s. Claimants merely have a claim against respondent; that's why they started proceedings against respondent. Respondent is the party who could have involved CFL c.s. in the arbitration proceedings in order to safeguard respondent for the situation that the claims of claimants will be honoured. It is striking that respondent did not take any action in this respect also, and again maybe the witnesses can explain why.[135]

[134] Respondent's Post Hearing Brief, p. 6.

2.6.3. The Arbitral Tribunal's analysis and decision

244. Brodotrogir relies on the state court proceedings initiated by Barkmeijer in the Dutch state courts in Groningen against CFL for payment of the berthage costs caused by the non-acceptance of ship 1601 by Brodotrogir.

245. Without going into any details, this claim against CFL is based on CFL's position as (still) owner of the ship 1601. That claim and the underlying legal argumentation including the fact that CFL is still the owner of the ship has nothing to do with Claimants' and Barkmeijer's position under the FA and the BC and their claims under those agreements against Brodotrogir.

2.7. Specific issues related to Claimants' Fee-claim, Premium-claim and Change Order-claim

246. Having dismissed the above general objections of Brodotrogir, the Arbitral Tribunal will now examine the three individual claims that make up Claimants' payment claim related to the ship 1601 in the amount of approximately EUR 10 Mio. In this context, the Arbitral Tribunal will also deal with Brodotrogir's objection that these claims should be dismissed because of "deficiencies in quantum" [136].

247. The FA provided for a basic "Fee" in the amount of EUR 8.425.000,00. Respondent paid EUR 3.250.000,00, leaving an unpaid basic "Fee" of EUR 5.175.000,00.[137]

248. In order to facilitate financing, Brodotrogir hoped to obtain export financing and the Consortium was confident to be able to assist in this respect due to its experience with export financing.

249. Whether or not Brodotrogir would be able to obtain export financing was relevant in two ways:

a. In case export financing can be obtained, the FA provides for an increase of the basic "Fee" by EUR 900.000,00 (the "Premium") to be paid on the Completion Date, together with the remaining part of the basic "Fee" of EUR 5.175.000,00.[138]

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[135] Transcript I, p. 38.
[136] Respondent's Post Hearing Brief, p. 10.
[137] See point IV. E. 7.1. above.
[138] FA, Art. 3.2 C.b.

b. In case export financing cannot be obtained, the Consortium is not entitled to the "Premium" and, in addition, only EUR 3.675.000,00 out of the EUR 5.175.000,00 would be payable on the Completion Date. The remaining portion of the basic "Fee" in the amount of EUR 1.500.000,00 would be treated as a "Subordinated Loan" to be repaid three years later.[139]

250. In view of the link between the basic "Fee" and the "Premium", the Arbitral Tribunal will first examine the export financing issue and the question whether the Claimants are entitled to the "Premium" or not.

251. Finally, the Arbitral Tribunal will deal with the "Change Order"-claim.

2.7.1. Specific issues related to the Premium-claim

252. The Arbitral Tribunal will analyse the Premium-claim both from a procedural perspective and on the merits.

253. As already mentioned, the completion works on the ship 1601 under the FA and the BC were finalised in January 2017. On 19 January 2017[140] Barkmeijer informed Brodotrogir "*that the HULL of Joint Runner I* [ship 1601] *will be ready for technical acceptance and delivery on the 31st of January 2017*" and announced "*on the shortest notice*" the invoice for the payments due under Art. 3 FA mentioning not only the "*Contract Price including Change Orders*", but mentioning also explicitly the "*Premium*".

254. Payment of the Premium was again requested in Barkmeijer's notice of default dated 15 February 2017[141] and on 16 February 2017 an invoice was sent to Brodotrogir[142] in accordance with Art. X BC (Contract Price and Terms of Payment), sub-point 5.1 (Commercial Invoice).

255. On 13 March 2017, K. de Vries from Plas Bossinade intervened for the first time and sent a letter to Brodotrogir claiming payment of the Fee, including the Premium:

> "*Since the condition mentioned in Article 3.1. sub b of the FA has been met, the Fee is to be increased by an additional payment regarding the premium of € 900,000.*"[143]

256. The claim for payment of the Premium was also included in K. de Vries' notice of arbitration dated 10 April 2017.[144]

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[139] FA, Art. 3.2.C.a.
[140] Exh. C-20.
[141] Exh. C-21.
[142] Exh. C-23.

257. There is no evidence before the Tribunal that at any point in time between January 2017 and the commencement of the arbitration Respondent would have objected to the Premium-claim. Brodotrogir's only reaction was the letter sent by Brodotrogir's Counsel (Mr Margetson and Mr Bezmalinovic) on 27 March 2017 to all Claimants, to Mr Manning, to several CFL companies and to the notary public[145] arguing that, as a result of the nullification of the TPA, the FA and the BC "*retroactively never entered into force*" and that they "*were and / or hereby are nullified as well*".

The letter does not deal with the Premium-claim.

258. On 31 January 2018, the Arbitral Tribunal was given access to the case file. On 8 February 2018, a telephone conference was held and on 19 February 2018 it issued a Procedural Order No. 2 which provided for a double round of written submissions. In the first round of submissions Claimants were to submit their "*Statement of Claim, including all documentary evidence, witness statements (if any) and expert reports (if any)*" and Respondent was to submit its "*Statement of Defence, including any Counterclaim(s) (if any), all documentary evidence, witness statements (if any) and expert reports (if any)*".[146]

259. The second round of submissions was to include Claimants' "*Reply to Respondent's Statement of Defence including any rebuttal evidence*" and Respondent's "*Rejoinder including any rebuttal evidence*".[147]

260. In their Statement of Claim, Claimants addressed the Premium-claim and submitted in support of that claim four documents[148], including Rabobank's term sheet dated 3 March 2016[149] arguing that the only reason why the export financing was not effectuated was because Brodotrogir failed to timely meet the conditions set by Rabobank and Atradius and that the Premium is due according to Art. 3.1. c. and 3.1. g. of the FA because the export financing could have been obtained.

261. Respondent's Statement of Defence does not say a word on the Premium-claim. Unsurprisingly Claimants' Reply does not deal with the Premium-claim either.

262. Respondent's Rejoinder is also silent on the Premium-claim, as is Respondent's Post Hearing Brief.

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143 Exh. C-25.
144 Exh. C-27.
145 Exh. C-26 (also submitted as Exh. R-6).
146 Point 1.1.
147 Point 1.2.
148 Exh. C-9 – C-12.

263. The first time Respondent raised specific objections[150] was in "Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30" dated 7 December 2018 stating that "*Claimants have no right to the premium in the amount of EUR 900,000 as the Consortium has not obtained the financing*"[151], that "*[a]rranging that the Rabobank has sent an indicative term sheet cannot be regarded as fulfilment of Article 3.1 under b and c of the Framework Agreement as neither the export financing has been obtained nor the export financing could not be obtained or formalized due to deliberate failure and omissions that could be attributed to Respondent*"[152] and that "*Claimants have not substantiated let alone proven their claim in this regard*".[153]

264. In the Arbitral Tribunal's view, these objections well after the written submissions and after the oral Hearing and the taking of evidence were too late and procedurally inadmissible according to Art. 128 of the Dutch Code of Civil Procedure. Respondent had only been given the opportunity to react after the Hearing to some relatively minor adaptations of Claimants' claims in Claimants' Post Hearing Brief.[154] There was, however, no change to Claimants' Premium-claim. This claim had remained unchanged since the commencement of the arbitration in April 2017 and even since mid-January 2017 when the works on the ship 1601 were being completed.

265. The fact that Respondent's objections are procedurally inadmissible (because they were submitted too late and were, in addition, too unspecific) does not relive the Arbitral Tribunal from the duty to examine whether Claimants' presentation of their Premium-claim in combination with the documentary and oral evidence submitted appears to be justified.

266. The examination of Claimants' allegations and the documentary evidence (which included Rabobank and Respondent) submitted in support of their Premium-claim, justifies the conclusion that export financing could have been obtained.

267. In the Arbitral Tribunal's view, based on the evidence before it, the only reason why export financing was finally not obtained was that Respondent lost interest in obtaining export financing. This becomes apparent when putting the end of the correspondence

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[149] Exh. C-9.
[150] As to some unspecific references to the Premium-claim at the oral Hearing see Transcript I, p. 131/132.
[151] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 9.
[152] Ibid., para. 9.
[153] Ibid., para. 9.

concerning export financing into the chronological context. The correspondence ended in March 2016 and that coincides with Respondent's concern due to the change in the market conditions for the exploitation of ships like ship 1601.[155] In February 2016 Brodotrogir engaged outside counsel, started to question whether the TPA signed in October 2015 gave it sufficient comfort, in particular vis-à-vis the three external investors[156] and told CFL "*at a meeting at the office of CFL somewhere in march 2016*" in which Mr Bezmalinovic participated "*that before paying any penny further Brodotrogir first wants to know now what the [true] position of CFL is in the project which Brodotrogir was taking over*"[157].

2.7.2. Specific issues related to the Fee-claim

268. Brodotrogir does not contest that the works under the FA and the BC were completed in January 2017, but argues that Claimants are not entitled to any additional Fee-payment because Claimants were unable to "deliver" the ship 1601 in the sense of transferring ownership:

> "*[t]he amount of EUR 3,675,000 has not become due as the Joint Runner I (the Hull) was not lawfully tendered for delivery in Amsterdam to Respondent according to inter alia Article VI paragraph 1 of the Building Contract and in relation to that Article 6.6 of the Framework Agreement*".[158]

269. Since, according to Brodotrogir, the Claimants are not entitled to the "Premium", the EUR 1.500.000,00-portion of the Fee would, for that reason alone, not be due now, nor will it be due in the future because Claimants are unable to secure the ownership of Brodotrogir:

[154] As discussed at the end of the Hearing (see Transcript III, p. 75) and then confirmed in point 10. of Procedural Order No. 6 dated 12 November 2018.

[155] Ms Vukman (Transcript I, p. 237) situated the market drop as follows:

„18 MR JAN LEO de HOOP: May I ask, at what
19 time are we speaking about this market drop?
20 A. We were speaking somewhere ...
21 Q. At what time did it happen, I mean?
22 A. We were speaking - we were aware of that,
23 I believe, end of 2015/2016."

[156] Exh. R-10.

[157] Witness Statement Koncar (Exh. R-20), paras. 17 and 18.

[158] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 9.

"EUR 1,500,000 (Article 3.2 C. a. (ii) of the Framework Agreement) as subordinated loan to be repaid at the end of third year after delivery has not become due as delivery has not and cannot be effected".[159]

270. The Arbitral Tribunal has already dealt with the Premium-issue and with the Delivery-issue and decided on both points in favour of Claimants. As a consequence, the Arbitral Tribunal only needs to address Brodotrogir's additional argument that "*Claimants' claim cannot be awarded because of several deficiencies in quantum*". The Arbitral Tribunal will do so after addressing first Claimants' Change Order-claims.

2.7.3. Specific issues related to the Change Order-claim

271. Art. IV.2. of the BC deals with possible modifications required by the Buyer

"*The BUILDER will agree to reasonable modifications of or additions to the Specifications required by the BUYER.*"

and says that

"*Before such modifications are carried out, the parties will make a written agreement ("**Change Order**") constituting the effect such modifications will have on the Contract Price, the Delivery Date, the weight and any other terms of this Contract.*"

272. 31 Change Orders were issued. It is undisputed that one of the Change Orders, i.e. Change Order No. 15, was cancelled. Out of the remaining thirty Change Orders seventeen were signed by Brodotrogir, i.e. Change Orders No. 1 to 12, 13A, 14, 16, 17 and 19 with a total value of EUR 1.535.600,00. The remaining Change Orders No. 18 and 20 to 23, 24A and 25 to 31 in the total amount of EUR 2.519.088,00 were not signed by any member of Brodotrogir. It is contested whether they were signed on behalf of Brodotrogir.

273. Claimants submit that between Barkmeijer and Brodotrogir "*31 Change Orders were agreed upon*" and that "*[e]ach of these Change Order mentioned the reason for the extra work*".[160]

274. As regards Change Order No. 15, Claimants submit that "*the Change Order 15 was cancelled and is therefore not included*". The Arbitral Tribunal notes, however, that the total amount of Claimants' payment claim regarding ship 1601 (EUR 10.164.688,19)

[159] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 9.

includes an amount of EUR 4.089.688,19 for Claimants' Change Order-claim. That includes Change Order No. 15 in the amount of EUR 35.000,-. Given that the latter had been cancelled, the correct aggregate amount of Claimants' Change Order-claim is not EUR 4.089.688,19 but EUR 4.054.688,19.

275. Regarding the signing of these Change Orders Claimants submit that "*[t]he Change Orders 1 up to including 14 and 16, 17 and 19 have been signed on behalf of Respondent by the supervisor Mr. Medendorp, the project manager Mr. Soda-Codic and the director Mr. Tramontana*" and that "*[t]he Change Orders 18 and 20 up to including 31 have been signed on behalf of Respondent only by the supervisor Mr. Medendorp. Barkmeijer has requested several times to complete the Change Orders with the other signatures, since they were agreed upon verbally. For reasons which have not been clarified to Barkmeijer, these signatures were not added*".[161]

276. The Change Order-claim had already been raised prior to the commencement of this arbitration, similar to what happened concerning the Premium-claim. Barkmeijer's letter dated 19 January 2017 to Brodotrogir explicitly requests payment for the "*Extra Work performed (in accordance with agreed change orders) for the amount of € 3.867.717,-*"[162]

277. Respondent's Statement of Defence did not address the Change Order-claim, and, unsurprisingly, Claimants' Reply does not deal with the Change Order-claim either.

278. Respondent's Post Hearing Brief contains a short and indirect reference to the Change Order-claim stating, in the context of the discussion on the "exceptio plurium litis consortium":

> "*...it is denied that the employees of CFL c.s. which were inspecting the works on the "Joint Runner I" were representing also Respondent.*"[163]

279. The first time Respondent addressed specifically the Change Order-claim, was in "Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018". Respondent argued that

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[160] SoC, para. II.11.
[161] SoC, para. II.11.
[162] When this letter was written, the last three Change Orders No. 29, 30 and 31 dated 8 March 2017 in the total amount of EUR 221.971,19 had not yet been issued. This explains the difference to the final Change Order-claim in the amount of EUR 4.089.688,19.
[163] Respondent's Post Hearing Brief, p. 8.

"[i]nvoices for Change Orders No. 1-12, 13A, 14-17 and 19 (Exhibit C-14) in the total amount of EUR 1,535,600 which were signed by Respondent were not issued in accordance with Article IV.5 ("The adjustments of price made under this Article shall be paid/credited at delivery of the Hull") and Article X.3 of the Building Contract [...]"[164]

and that

"Barkmeijer has neither kept an "Adjustment account of the accumulated price" for extras and modifications according to Article IV of the Building Contract nor has the amounts become due as those were eventually due at delivery of the hull which has not taken place".[165]

280. As regards "*[c]hange orders No. 18, 20-23, 24A, 25-31 (Exhibit C-14) in the total amount of EUR 2.519.088,00*", Respondent argued

- that the latter "*were not signed and therefore not approved by Respondent*",[166]
- that "*Mr. Kerst Medendorp* [a member of CFL who had signed the Change Orders] *had no authority to sign on behalf of Respondent*",[167]
- "*that the invoices were not issued in accordance with Article IV.5 ("The adjustments of price made under this Article shall be paid/credited at delivery of the Hull") and Article X.3 of the Building Contract*"[168] and
- that also for those Change Orders "*Barkmeijer has neither kept an "Adjustment account of the accumulated price" for extras and modifications according to Article IV of the Building Contract nor has the amounts become due as those were eventually due at delivery of the hull which has not taken place*".[169]

281. Like Brodotrogir's objections concerning the Premium-claim,[170] Brodotrogir's short and indirect objection in its Post Hearing Brief dated 23 November 2018 and its more developed objections on 7 December 2018 were submitted too late.

282. This, however, does not relieve the Arbitral Tribunal from the duty to examine whether Claimants' presentation of its Change Order-claim in combination with the documentary and oral evidence submitted appears to be justified, in particular in view of the relevant contractual provisions in the BC.

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[164] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 9.
[165] Ibid., para. 9.
[166] Ibid., para. 9.
[167] Ibid., para. 9.
[168] Ibid., para. 9.
[169] Ibid., para. 9.

283. The BC envisaged "BUYER's MODIFICATIONS" in the following terms:

> *"The BUILDER will agree to reasonable modifications of or additions to the Specifications required by the BUYER. (the "BUYER's Modifications").*
>
> *The period used for determining the possible modification shall be determined as permissible delay*
>
> *Before such modifications are carried out, the parties will make a written agreement ("Change Order") constituting the effect such modifications will have on the Contract Price, the Delivery Date, the weight and any other terms of this Contract."*

284. In accordance with this provision Barkmeijer issued a number of documents entitled "Agreement on Change Order" with a total value of EUR 4.054.688,19. It is undisputed that all the works covered or to be covered by these Change Orders were performed. The difficulty arises from the fact that certain Change Orders were signed by Brodotrogir and that others were not.

285. The Arbitral Tribunal shows below, as example for the first category, a copy of Change Order No. 1 which shows three signatures for Brodotrogir, i.e. the signature of Mr Medendorp as well as the signatures of Mr Soda-Codic (project manager at Brodotrogir) and of Mr Tramontana (director at Brodotrogir).

[170] See point 2.7.1. above.

AGREEMENT ON CHANGE ORDER No: 1

We, the undersigned parties:

1. Brodotrogir d.d., Put Brodograditelja 16, 21220 Trogir, Croatia, Buyer,
   and
2. Barkmeijer Stroobos B.V., Hellingstraat 10, 9872 PT Stroobos, The Netherlands, Builder,

Herewith agree to amend the Contract dated 19th May 2015 for the Construction and Delivery of one Joint Runner, hull number BT331 and we wish to record our agreement as provided for under Article IV of the Framework agreement:

Description	Delivery and mounting of the travel gantry crane foundation. Consisting of 192 m off pre-drilled HEM120 steel bars. Performed before leaving production hall Extrawork is part of option 1F scope of supply

Request by:	Brodotrogir
Consequences for material price	+ € 11,250,-
Consequences for hour costs	+ € 16,000,-
Consequences for draft	None
Consequences for speed	None
Consequences for fuel consumption	None
Consequences for capacity	None
Other consequences	None

Agreed this 18th January of the year 2016 and signed in two originals.

Barkmeijer Stroobos B.V.
for the Builder

By: M.R. Verschut

Brodotrogir d.d.
for the Buyer

By: K. Medendorp

By: S. Soda-Codic

By: M. Tramontana

286. As an example of the second category of Change Orders the Arbitral Tribunal reproduces below a copy of Change Order No. 20 which shows only one signature under the heading "Brodotrogir d.d., for the Buyer", i.e. the signature of Mr Medendorp. The signature lines for Mr Soda-Codic and Mr Tramontana are blank.

AGREEMENT ON CHANGE ORDER No: 20

We, the undersigned parties:

1. Brodotrogir d.d., Put Brodograditelja 16, 21220 Trogir, Croatia, Buyer,
and
2. Barkmeijer Stroobos B.V., Hellingstraat 10, 9872 PT Stroobos, The Netherlands, Builder,

Herewith agree to amend the Building Contract dated 19th May 2015 for the Completion of the hull for the vessel Caranx 1(BT331) and we wish to record our agreement as provided for under Article IV of the Building Contract 1D:

Description	Second engineering using Shipconstructor Up until and including week 33-2016 Extrawork is part of a lumpsum in option 1F, #34: €20.000,- Extrawork is part of option 1F, #4: € 167.845,-. Extrawork is part of option 1F, #14 € 35.000,-

Request by	Brodotrogir
Consequences for Contract Price	+ € 222.845,-
Consequences for Delivery Date	None
Consequences for draft	None
Consequences for speed	None
Consequences for fuel consumption	None
Consequences for capacity	None
Other consequences	None

Agreed this 1st of September of the year 2016 and signed in two originals.

Barkmeijer Stroobos B.V.
for the Builder

By: M.R. Verschut

Brodotrogir d.d.
for the Buyer

By: K. Medendorp

By: S. Sodic Codic

By: M. Tramontana

287. Claimants' Change Order-claim is clearly justified to the extent it is based on Change Orders countersigned by Brodotrogir itself. This applies to the Change Orders No. 1-12, 13A, 14-17 and 19 in the total amount of EUR 1.535.600,19.

288. The fact that Barkmeijer apparently failed to "*keep an account (the "Adjustment Account") of the accumulated price in euro for extras and modifications*" as requested by Art. X.3. of the BC does not deprive Barkmeijer of its rights to claim payment for additional work performed, particularly in the absence of any argument that Brodotrogir

suffered any disadvantage, let alone any damage because no specific "Adjustment Account" was kept, and in the absence of any contemporaneous complaint.

289. Brodotrogir's second defence that Claimants were not capable of "delivering" fails for the reasons already given.[171]

290. The contested and difficult issue is whether the fact that certain Change Orders, i.e. No. 18, 20-23, 24A and 25-31 (in the total amount of EUR 2.519.088,00) were signed only by Mr Medendorp, prevents Claimants from successfully claiming their payment.

291. Claimants argue that Mr Medendorp was authorized to approve Change Orders on behalf of Brodotrogir. That is, however, a difficult argument. Mr Medendorp was a member of CFL[172] and his involvement "for Brodotrogir"[173] was limited to purely technical matters. There is no sufficient evidence to show or even to make it likely, that Mr Medendorp, as a member of CFL, had the power to bind Brodotrogir with his sole signature.[174] Otherwise it would also be difficult to explain why the Change Order-form foresaw in addition the signatures of two members of Brodotrogir, Mr Soda-Codic and Mr Tramontana.[175]

292. Claimants at least implicitly admitted that Mr Medendorp's signature was insufficient because Claimants made several attempts to obtain the signatures "of Brodotrogir", in addition to the signature of Mr Medendorp.[176]

293. Although, according to Art. IV.2. BC a "*written agreement ("Change Order")*" was required before carrying out any "modifications", Claimants relied on an oral agreement as well as on an acceptance of those additional works by Brodotrogir: "*The Change Orders 18 and 20 up to including 31 have been signed on behalf of Respondent only by the supervisor Mr. Medendorp. Barkmeijer has requested several times to complete the Change Orders with the other signatures, since they were agreed upon verbally. For reasons which have not been clarified to Barkmeijer, these signatures were not added. Barkmeijer in the end has confirmed the verbal agreement for the Change Orders 18, 20, 21, 22, 23 and 24A by letter dated 21 December 2016 and (once again) for the*

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[171] See point 2.3. above.
[172] CFL obviously had an interest in the additional works as joint venture partner of Brodotrogir for the future exploitation of the ship.
[173] See the above reproduced Change Order-forms.
[174] Tramontana, Transcript II, p. 66/67: „*Kerst [i.e. Mr Medendorp]. Yes, because he is, you know, technical representative [...] he is technical person, good skill.*"
[175] It is therefore irrelevant whether Mr Medendorp had a written power to act on behalf of Brodotrogir; see Mr Veraart's testimony (Transcript II, p. 147/148).
[176] See, for instance, Hans Veraart's emails of 13 September 2016, 12 October 2016 and 7 December 2016 (Exh. C-16).

Change Orders 18, 20, 21, 22, 23, 24A, 25, 26, 27 and 28 by letter dated 26 January 2017".[177]

294. The Arbitral Tribunal has some difficulties with the "oral agreement"-argument. The BC explicitly provides for a "*written agreement*" the purpose of which was obviously to clarify whether Brodotrogir accepts a modification of the scope of works and any related increase in the contract price. In addition, Claimants do not specify who would have orally agreed to those Change Orders that were not signed by Mr Soda-Codic and Mr Tramontana, and when.

295. On the other hand, the evidence shows that Brodotrogir knew of the Change Orders and of the execution of the related additional works by Barkmeijer (but never requested Claimants and Barkmeijer to stop working) and that Brodotrogir never argued that the additional works would be useless or inappropriate.

296. Claimants were, in the Arbitral Tribunal's view, entitled, at least initially, to hope that the Change Orders would be signed, particularly since there were no problems between Claimants and Brodotrogir. The problems which finally led to the collapse of the whole project were problems between Brodotrogir and CFL.

297. Things did change, however, between Brodotrogir and Claimants when Brodotrogir announced to Claimants that it would not make any further payments. That was in May/June 2016 as confirmed by Mr Veraart:

> THE PRESIDENT: Did Brodotrogir explain why they would not sign the other ones?
> A. No, no. Let me think. That was around May/June 2016, I think, and then there was a discussion about are they going to pay or not, and then they say: "We are not going to pay you anything because we have no ownership in the vessel, we don't get the ownership so we are not going to sign, we will not sign these change orders.[178]

298. From that point in time Claimants clearly took the risk of not getting paid for work under any Change Orders not signed by Brodotrogir. Mr Veraart very openly admitted that risk:

[177] SoC, para. II.11.

Q. Okay. Did you ever consider to stop your works?

A. Sure.

Q. Was that crossing your mind?

A. Always, yes, but as soon as there's a small light in the tunnel, we proceeded. Yes? As I explained to Mr Reiner, to stop 50/60 people who are acting in that project, to say, "Go home", that's quite a decision, so we kept on working, yes. Yes?

Q. Okay.

A. But we always, every day, considered, "Are we going to stop or not?" Yes, sure, yes.[179]

It seems to the Arbitral Tribunal that Barkmeijer took a sensible business decision under the given difficult circumstances, based on its own business judgment as to the advantages and disadvantages of stopping or continuing the works and as to the likelihood of finally being paid by Brodotrogir. However, the circumstances at that time, after Brodotrogir's announcement that they would not make any further payments, do not allow the conclusion that Brodotrogir orally agreed to the unsigned Change Order No. 20 (dated 1 September 2016) and the following Change Orders No. 21-23, 24A and 25-31.

299. Furthermore, as late as September 2016, Claimants themselves had admitted in their email to Tonci Bezmalinovic concerning "Extra work order in relation 1F" that part of the extra work had not yet been agreed by Brodotrogir:

> "*Currently Barkmeijer has approx. € 3,2 mio outstanding extra work of which approx.. € 1,6 mio is agreed by Brodotrogir and CFL and the remaining €1,6 mio is agreed by CFL and pending for agreement with Brodotrogir. [...].*"[180]

300. Claimants' admission that part of the works was not yet agreed by Brodotrogir is confirmed by the next two sentences in the "road map". The first sentence says

> "*The contract 1F is drawn and 99% agreed by Barkmeijer and Brodotrogir.*"

which shows that no final agreement had been reached yet.

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[178] Veraart, Transcript II. p. 108.
[179] Veraart, Transcript II, p. 150.
[180] Email dated 23 September 2016, Annex 16 to witness statements of Mr Veraart and of Mr Hilkhuysen.

The following sentence says

> *"Both [i.e. Barkmeijer and Brodotrogir] will make additional arrangements on payment of this extra work (week 39)."*

which shows that no binding "arrangements" (for payment) had been reached yet, at least not for those extra works to which Brodotrogir had not yet agreed.[181]

301. Things are different concerning the chronologically first unsigned Change Order No. 18 dated 18 March 2016. This Change Order was issued prior to Brodotrogir's announcement that it would not make any further payments because of the problems with CFL. Brodotrogir had never asked Barkmeijer not to perform the works under the Change Order No. 18 and, in addition, Brodotrogir had signed the chronologically next Change Order No. 19. Barkmeijer therefore was entitled to assume, in the absence of any contrary indication by Brodotrogir, that Change Order No. 18 is ok as well and will be signed in due course, like all other earlier Change Orders.

302. As to the unsigned Change Orders Barkmeijer also relies on an alleged acceptance of the performed works by Brodotrogir and refers, in support of that argument, to two letters sent to Brodotrogir. In the first letter dated 21 December 2016 (C-17) Barkmeijer writes with regard to change orders 18, 20, 21, 22, 23 and 24A, that "*you [Mr Tramontana], as well as your employees during their visit in Harlingen on 26 and 27 October 2018, already acknowledged these extra works*". In the second letter to Brodotrogir dated 26 January 2016 (C-18) Barkmeijer refers to past "*clear commitments and assurances*" and states that in the course of a discussion on 20 January 2017 in Trogir "*Brodotrogir admitted that the unsigned change orders have been carried out to their satisfaction*".

303. It is true that Brodotrogir objected to none of those two letters. It is, however, difficult to attribute to those two letters the evidentiary value that Barkmeijer wishes to attribute to them. The reason is that already prior to the visit in Harlingen (end of October 2016) Brodotrogir had formally declared the termination of the TPA it had entered into with CFL, the owner of ship 1601 and Brodotrogir's intended joint venture partner. It is very difficult to accept and not plausible that under those circumstances Brodotrogir would have validly acknowledged any works under any unsigned Change Order and would have undertaken the obligation to pay for those works.

304. With regard to the Change Orders No. 29, 30 and 31 which were all issued on 8 March 2017 only, the Arbitral Tribunal adds that they could under no circumstances have been

covered by an acknowledgement in October 2016 or January 2017, if there had been an acknowledgement.

305. To conclude on the Change Orders: Brodotrogir is liable for the signed Change Orders (in the total amount of EUR 1.535.600,00) as well as for Change Order No. 18, although not signed (in the amount of EUR 436.400,00), but not for the other unsigned Change Orders No. 20-23, 24A and 25-31 (in the total amount of EUR 2.082.688,19).

2.7.4. On the alleged "deficiencies in quantum" of Claimants' claims

306. As the last point in its Post Hearing Brief Brodotrogir said that "*Claimants' claim cannot be awarded because of several deficiencies in quantum*".[182] Under this heading Brodotrogir raises the following points:

- "*Brodotrogir cannot say anything about quantum (and as a result is contesting it) as the "Joint Runner I" cannot be delivered to Brodotrogir and is not under Brodotrogir's control*"[183] and that Brodotrogir "*cannot [...] assess the works and claims of Claimants as Respondent has no access to the "Joint Runner I" which is owned by CFL c.s.. Mr. Veraart as previously shown has admitted that delivery cannot take place without consent of CFL c.s. which is also implying inspection of the works carried out on the vessel*"[184]
- "*Mr. Veraart is assessing that the "Joint Runner I" has a value of between EUR 1.5 and 2 million: this is a very low value implying that the works as claimed by Claimants have not the value as claimed by them*".[185]

307. Leaving aside that those arguments were submitted too late, i.e. in the Post Hearing Brief only, they are, in any case, without merit.

308. The evidence shows that Brodotrogir was invited in accordance with the provisions of the BC to the technical acceptance of the ship. That would have allowed Brodotrogir if and to the extent necessary, to inspect the works performed. Brodotrogir voluntarily abstained. In addition, in the course of this arbitration, Brodotrogir never raised any

[181] The sentence on page 1 of the "road map" "*Brodotrogir has secured again that it will fulfill its outstanding obligations towards the consortium parties.*" is too unspecific for being qualified as sufficient evidence for a binding undertaking by Brodotrogir to pay the extra works under the unsigned Change Orders.
[182] Respondent's Post Hearing Brief, p. 10.
[183] Respondent's Post Hearing Brief, p. 10.
[184] Respondent's Post Hearing Brief, p. 11.
[185] Respondent's Post Hearing Brief, p. 11.

quality issues, except a short, belated paragraph in very unspecific terms in the Post Hearing Brief. As to the delivery issue see point 2.3. above.

309. An estimation of the value of the ship 1601 at the time of the Hearing helps to assess economically how dramatic the present situation seems to be, two years after the finalization of the works on ship 1601, but is legally irrelevant. Claimants' contractual payment claims are unrelated to and are not dependent upon any (minimum) value of the ship (be it in January 2017 or any later point in time) after completion of the works.

2.8. Why there was no reason to hear Mr Koolhof and Mr Keuning and/or to suspend the arbitration (see Procedural Order No. 8)

2.8.1. On Brodotrogir's requests to hear Mr Koolhof and Mr Keuning

310. Both requests were dismissed in Procedural Order No. 8 and the reasons were reserved for this Final Award.

311. There was no need to hear Mr Koolhof on the alleged misrepresentations concerning the TPA. Even assuming there had been any relevant misrepresentation concerning the TPA, which justified the nullification of the TPA, that nullification could not lead to a nullification of the FA and the BC because of Art. 8.6 of the FA and, in addition, even if Art. 8.6 did not exist, because the FA and the BC on the one hand and the TPA on the other hand are not "related agreements" (see point 2.2. above). In addition, the content of the TPA, the FA and the BC are clearly set out in those written agreements without requiring any witness evidence. The relevant chronology and the contract history is sufficiently documented by written evidence, including in particular the MoU of December 2014.

312. Similarly, there was no need to hear Mr Keuning. Even assuming that he was "the architect" of the FA and that he was acting in the interest of the Claimants (only), the FA says what it says and Brodotrogir had not only the possibility to have the FA checked by its legal department, but the evidence shows that Brodotrogir legal department was indeed involved.

2.8.2. On Respondent's suspension requests

313. On 18 December 2018 Respondent submitted three suspension requests. Claimants, by letter dated 28 December 2018, commented on these suspension requests. They were dismissed in Procedural Order No. 8 and the Arbitral Tribunal announced that the reasons will be given in the Final Award.

2.8.2.1. Proceedings against CFL c.s. made pending at the Court of Amsterdam

314. Respondent submitted that "*Respondent has made on 14 December 2018 pending proceedings against CFL c.s. at the Court of Amsterdam in which Respondent is asking the Court of Amsterdam in a so called declaration of right (in Dutch: "verklaring voor recht") to confirm that the "Tri-Partite Agreement" has been nullified (in Dutch: "vernietigd") by Respondent*".

315. According to Respondent, "*[t]hese proceedings have been made pending inter alia because Claimants in their latest submission (reaction on the "exceptio plurium litis consortium") of dated 7 December 2018 have stated in paragraph 7 of this submission that "Respondent did not even start any proceedings against CFL c.s. which means that the Tri-Partite Agreement should be considered as valid in this arbitral proceedings anyway*".

316. Respondent further submits that "*in case the arbitrators are of the opinion that Respondent's defence is depending on the outcome of the proceedings of the Court of Amsterdam regarding the Tri-partite agreement then Respondent is hereby requesting the arbitrators to suspend their decision in these proceedings until the moment that a final decision is rendered in the state court proceedings between Respondent and CFL c.s. about the tri-partite agreement*".

317. Claimants in their comment dated 28 December 2018 submit that this request should be denied.

318. Claimants assert that their "*argument that Respondent did not start any proceedings against CFL c.s. was certainly not made for the first time in the submission dated 7 December 2018*". According to Claimants they have already made that argument in their Reply and in their opening statement at the Hearing.

319. In Claimants' view, "*[t]he writ of summons which apparently has been served to CFL c.s. on 14 December 2018 could and should have been served much earlier, even before these arbitral proceedings started and in any case at least shortly after the Statement of Reply dated 28 June 2018*".

320. Claimants argue that "*Respondent's defence is not depending on the outcome of the proceedings before the court of Amsterdam against CFL c.s. (and Claimants did not argue it would be), but is dependent on the ability of Respondent to prove in (the normal course of) these arbitral proceedings whether the extrajudicial nullification of the Tri-Partite Agreement would have been accepted (which it is not) or confirmed/established by a court of law*". Claimants assert that "*[t]he mere fact that Respondent has waited until 14 December 2018 to even start legal proceedings against CFL c.s. shows that Respondent is not able to render the proof it should render in this arbitral proceedings*". Claimants add that "*this does not by any means form a justification for suspending these arbitral proceedings. This is not the case as a principle, and all the more because of the very late moment Respondent has started legal proceedings against CFL c.s.*"

321. The Arbitral Tribunal agreed with Claimants and dismissed Respondent's (late) request (see Procedural Order No. 8), in particular because even if the TPA was successfully nullified, this would not lead to a successful nullification of the FA and the BC (see point 2.2. above).

2.8.2.2. Claim filed by Respondent in the bankruptcy proceedings of Barkmeijer

322. Respondent requested the Arbitral Tribunal to suspend the arbitral proceedings until the liquidator in the bankruptcy of Barkmeijer has taken his decision regarding the claim which Respondent has filed in the bankruptcy proceedings of Barkmeijer.

323. Claimants in their comment dated 28 December 2018 argue that this request should be denied.

324. Claimants assert that the liquidator in the bankruptcy of Barkmeijer, Mr Kalmijn, "*has informed Respondent's counsel that he cannot accept any claim of Respondent in the bankruptcy of Barkmeijer and that the claims as mentioned in the letter of Respondent's counsel will be listed in the list of temporary rejected claims in the bankruptcy of Barkmeijer. Mr Kalmijn also has informed Respondent's counsel in this email that a hearing on this subject may only become relevant in case a verification meeting will take place in the bankruptcy, which will only be the case if the expectation is that any payment to creditors will be possible. Mr Kalmijn adds that in this stage of the bankruptcy he cannot say anything about such expectation*".

325. Claimants argue that "*under Dutch insolvency law no proceedings (hearing) regarding rejected claims will take place in case there is no verification meeting. A verification*

meeting will only take place in case the liquidator expects to be able to make any payments to (non-preferred) creditors. In most bankruptcies this is not the case and anyway it may take years before the liquidator can say anything about the final financial situation in the bankruptcy". Claimants also assert that "*[t]he filing by Respondent of a claim in the bankruptcy of Barkmeijer, which clearly has been rejected, forms no justification whatsoever for suspending these arbitral proceedings. This would be in conflict with the fundamental principle that the arbitral proceedings should be conducted expeditiously*".

326. Brodotrogir's position on the basis of which it requests the suspension of the present arbitration is that the FA and the BC have been successfully nullified.[186] That position has been dismissed by the Arbitral Tribunal in the present arbitration. It is therefore difficult to see how Brodotrogir's unsuccessful legal argument, even if repeated in the insolvency proceedings of Barkmeijer, could justify a suspension of the present arbitration

2.8.2.3. Appeal proceedings regarding challenge of Mr Nobilo

327. Finally, Respondent requested the Arbitral Tribunal to suspend the arbitration proceedings until 14 February 2019, because the decision in the matter of the challenge of Mr Nobilo would be taken on that date, or to let Mr Nobilo participate in the arbitral proceedings until that moment.[187]

328. Claimants in their comment dated 28 December 2018 submitted that this request should be rejected.

329. Claimants argued that "*the fact that the Court of Appeal in Leeuwarden has set the date for its decision in the proceedings regarding the challenge of Mr Nobilo on 14 February 2019 does not mean that the decision indeed will be given on that date*" and that "*according to article 1070 DCCP, the decision of the court to relieve a challenged arbitrator of function is not even open to appeal. The reason for this exclusion of appeal is that the arbitration proceedings should continue expeditiously. All the more since Respondent has appointed another arbitrator (Mr Bahun) and the arbitral proceedings have in the meantime been conducted all the way including the participation of Mr Bahun, there is no reason to suspend these arbitral proceedings in this very late stage*".

[186] See enclosure 2 to Respondent's suspension request dated 18 December 2018.
[187] See Respondent's suspension requests dated 18 December 2018, point 3.

330. Claimants also asserted that "*[a]lso there is no reason to let Mr Nobilo participate in the arbitral proceedings. This is a possibility which is not available under Dutch procedural law (which is applicable to these arbitration proceedings) nor under the UNUM arbitration rules*" and that "*[i]n these arbitral proceedings there is not only a challenge of an arbitrator, but there is a court decision dated 22 November 2017 relieving Mr Nobilo from function followed by the appointment of another arbitrator by Respondent*".

331. By Procedural Order No. 8 dated 2 January 2019 the Arbitral Tribunal dismissed Respondent's request and reserved its decision to the Final Award.

332. In the meantime Counsel for Claimants informed the Arbitral Tribunal that "*on 25 January 2019 the Court of Appeal in Leeuwarden has rendered a decision in the matter of the challenge of Mr Nobilo as an arbitrator nominated by Brodotrogir. The Court of Appeal has confirmed the judgement of the court in Groningen that because of the business connections between Mr Nobilo and Mr Koncar there are legitimate doubts about the impartiality and independence of Mr Nobilo as an arbitrator*".

333. Brodotrogir was given the opportunity to comment and takes the position that the decision of the Appeal Court Arnhem-Leeuwarden is "*wrong*" and that "*Respondent is therefore reserving all its rights in this regard, including its right to appeal the decision at the Dutch Supreme Court or if this is not possible to file a complaint at the ECHR in Strasbourg as well as rely in whatever jurisdiction on the relevant provisions of the New York 1958 Convention and other Dutch proceedings (non limitative list).*" Brodotrogir, however, does not contest Claimants' information as to the content and result of the Appeal Court's decision, which justifies the Arbitral Tribunal's decision not to suspend the arbitration, without having to go into any further details.

2.8.3. Concluding table showing to what extent the payment claim under the FA and the BC concerning ship 1601 is granted/dismissed

334. The following table shows which amounts the Tribunal finds justified and which not:

	claimed	awarded
Fee-claim	EUR 5.175.000,00	**EUR 5.175.000,00**
Premium-claim	EUR 900.000,00	**EUR 900.000,00**

Change Order-claim	EUR 4.089.688,19	EUR 4.089.688,19 minus C.O.15 EUR 35.000,00 C.O.20 EUR 222.845,00 C.O.21 EUR 845.000,00 C.O.22 EUR 27.500,00 C.O.23 EUR 23.940,00 C.O.24A EUR63.000,00 C.O.25 EUR 515.382,00 C.O.26 EUR 66.050,00 C.O.27 EUR 42.000,00 C.O.28 EUR 55.000,00 C.O.29 EUR 55.000,00 C.O.30 EUR 3.100,00 <u>C.O.31 EUR 163.871,19</u> EUR 2.117.688,19 **EUR 1.972.000,00**
total	EUR 10.164.688,19	**EUR 8.047.000,00**

B. The damage claim related to the non-acceptance of the Hull and the non-payment of the amount due for the completion of the Hull (EUR 187.466,41)

1. Claimants' position

335. Claimants argue that this is a claim for "*[t]he additional damage suffered by Claimants as a result of the default of Respondent in respect of the non-acceptance of the Hull [ship 1601] and the non-payment of the amount due for the completion of the Hull*".[188]

336. According to Claimants, this claim "*consists of the following elements: expenses regarding mooring preservation and towing of the Hull [...]; [i]nsurance costs [...]; [t]ravelling costs for meetings with Respondent [...]*".[189] According to the "*Calculation of additional damage in respect of the Hull*"[190] submitted by Claimants in support of their damage claim, the expenses regarding mooring preservation and towing of the Hull amount to EUR 98.724,50, the insurance costs amount to EUR 83.946,23 and the

[188] Claimants' Post Hearing Brief, para. 4.3.
[189] Claimants' Post Hearing Brief, para. 4.3.
[190] Exh. C-39.

travelling costs for meeting with Respondent amount to EUR 4.795,68, which leads to Claimants' claim in the aggregate amount of EUR 187.466,41.

2. **Respondent's position**

337. Respondent "*is contesting fully the amount as claimed [...] being:*
    - *Expenses regarding mooring preservation and towing of the Hull, invoiced by ship's agent NESTA Shipping;*
    - *Insurance costs, invoiced by the insurance broker Aon;*
    - *Traveling costs for meetings with Respondent, invoiced by its travel agent Munckhof Business Travel.*"[191]

338. Respondent argues that "*[t]hese costs cannot be claimed as the Joint Runner I (the Hull) was not lawfully tendered for delivery in Amsterdam to Respondent [...]*".[192]

339. Respondent submits that "*Barkmeijer as the builder did not settle with CFL c.s. as the owner and the liquidator of Barkmeijer as the one exercising a retention right about their consents to deliver the hull to Respondent, even not in the situation that Claimants would be paid fully by Respondent or any other amount would be awarded by the Arbitral Tribunal: in both situations Claimants, more specific Barkmeijer cannot fulfil his obligation from Article VI paragraph 1 of the Building Contract*".[193]

340. As regards "*mooring preservation and towing of the Hull*" Respondent argues that these expenses "*should be claimed from CFL c.s. which – as far as Respondent has understood – is currently the case in separate proceedings at the Court of Noord-Nederland, location Groningen in proceedings between Barkmeijer and CFL c.s., at least regarding similar costs*"[194] and that "*[t]hese are obviously non-contractual claims which are not falling under the scope of arbitration*".[195]

341. Respondent further asserts that "*it cannot be that these or similar claims are subject of the proceedings at the Court of Noord-Nederland, location Groningen and at the same time claimed also from Respondent which [...] is not the owner of the "Joint Runner*

[191] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 12.
[192] Ibid., para. 13.
[193] Ibid., para. 13.
[194] Ibid., para. 14.
[195] Ibid., para. 14.

I"".[196] According to Respondent "*[t]hese are costs which eventually should be claimed from the current owner CFL c.s.*".[197]

342. Regarding insurance costs Respondent argues that "*[t]he same applies to insurance costs. The "Joint Runner I" is not Respondent's property as the hull has not and can / could not be delivered to Respondent*".[198]

343. As regards travelling costs, Respondent argues that "*[c]laiming also travelling costs for meetings with Respondent shows the over-confidence and even arrogance of Claimants in these arbitration proceedings*".[199] According to Respondent "*[t]here is no legal basis for this. Respondent has also made considerable costs regarding those meetings*".[200]

344. Respondent concludes that "*[t]he total amount of the claimed additional damage of EUR 187,466.41 and claimed interest should according to Respondent be dismissed*".[201]

3. The Arbitral Tribunal's analysis and decision

345. Respondent has raised a number of objections to this damage claim which is based on the non-acceptance of the ship 1601 by Brodotrogir.[202]

346. In the context of examining Claimants' main claim the Arbitral Tribunal has already analysed the Parties' positions and arguments concerning the TPA, the FA and the BC and has come to the conclusion that the FA and the BC continued to be valid and that Brodotrogir breached its contractual obligations by stopping further payments after payment of the down payment and of the interim payment.[203]

Respondent's argument that no delivery of the ship has or could have taken place has specifically been addressed and considered unjustified in point A.2.3. above.

347. Claimants' damage claim is a contractual claim that arises under the FA and the BC and is justified as a consequence of Brodotrogir's refusal to accept delivery of the ship. The court case started by Barkmeijer against CFL as the owner of the ship for payment of certain costs is not relevant, even assuming that those non-contractual claims against CFL overlap totally or partially with Claimants' contractual damage claim against

[196] Ibid., para. 14.
[197] Ibid., para. 14.
[198] Ibid., para. 15.
[199] Ibid., para. 16.
[200] Ibid., para. 16.
[201] Ibid., para. 16.
[202] Ibid., paras. 12 et seq.
[203] See point IV.E.7.1. above.

Brodotrogir. Claimants do not lose their contractual claim against Brodotrogir because of a third party's non-contractual liability for the same amounts. Brodotrogir could only oppose this claim by showing that Barkmeijer has already been paid by CFL or any other party. There is, however, no evidence to that effect.

Irrespective of whether Claimants'/Barkmeijer's claims against Brodotrogir (in this arbitration) and against CFL (before the Court of Groningen) are related or not, Claimants/Barkmeijer are entitled to bring their claim in this arbitration. Should there be any overlap with the claim(s) asserted in the court proceedings in Groningen, this could still be taken into account in the (subsequent) court proceedings or between Respondent and CFL.

348. As to the insurance costs: If Respondent had fulfilled its obligation to take delivery under the BC, Barkmeijer would not have incurred those additional insurance costs for ship 1601. The fact that Respondent is not the owner of ship 1601 is irrelevant for that claim (and in any event outside of Barkmeijer's sphere of influence as ownership transfer was regulated under the TPA),

349. Claimants finally claim reimbursement of travelling costs (EUR 4.795,68) for meetings with Respondent as "*additional damage suffered by Claimants as a result of the default of Respondent in respect of the non-acceptance of the Hull and the non-payment of the amount due for the completion of the Hull*".[204]

350. Claimants do not provide any details as to those meetings, but Respondent confirms, at least indirectly, that those meetings took place by saying that "*there is no legal basis for this. Respondent has also made considerable costs regarding those meetings*".[205] In addition, Claimants claim is supported by invoices from their travel agency.[206]

351. Finally, the Arbitral Tribunal notes that neither the quantum of the mooring/preservation expenses, nor the quantum of the insurance costs or of the travelling costs is contested by Respondent.

352. In conclusion, the Arbitral Tribunal finds this damage claim to be justified in the full amount claimed, i.e. EUR 187.466,41.

C. The claim concerning the steel package (EUR 2.222.500,00)

[204] Claimants' Post Hearing Brief, para. 4.3.
[205] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, paras. 16.
[206] Exh. C-39.

1. The legal basis for this claim and the (reduced) amount claimed

353. As mentioned above,[207] Claimants request payment for the construction of the steel package in accordance with Art. 5.1 of the FA.

354. Art. 5 of the FA ("Additional agreements") provides as follows:

> "*In the Meeting the attending Parties have made additional agreements regarding what has to count between them, therefore it was concluded and agreed upon that the following items will be delivered and loaded onboard the Vessel 1601 ultimately upon Completion Date 1.D., Completion Date 1.E or as the case may be Completion Date Call Option:*
>
> 1. *the steel package for Vessel 3 (to be built in Trogir (Croatia), delivered by Centraalstaal to Brodotrogir for a purchase price of € 2,750,000.00 (In words: two million seven hundred fifty thousand euro), which price is based on an a total weight of the steel package of 2,673 tonne. The terms and conditions as concluded in the original offer (quotation with reference OFF-91447 dated January 26, 2015) are applicable on the delivery of the aforementioned steel package.*
>
>   *[...].*"

355. As provided for in Art. 5.1. FA, the purchase price for the steel package was EUR 2.750.000,00. Claimants argue that "*because Respondent did not pay and the storage was rather expensive*", Centraalstaal scrapped the steel package and sold the scrap steel for an amount of EUR 527.000,00.[208] The amount claimed by Claimants represents the difference between the purchase price of EUR 2.750.000,00 and the amount received by Centraalstaal for the scrap steel.[209]

2. Respondent's defence

[207] See point IV.E.7.5.above.
[208] Claimants' Post Hearing Brief, para. 4.6. See also Mr Hilkhuysen's testimony at the Hearing, Transcript II, p. 162/163.
[209] Claimants' Post Hearing Brief, paras. 4.6. and 4.7.

356. Respondent argues, by reference to Art. 5 of the Framework Agreement, that "*the delivery of the steel package for vessel 3 should take place together with the delivery of the Joint Runner I*".[210]

357. Respondent further argues that "*[n]either the "Joint Runner I" nor connected with that the aforementioned steel package have been delivered*".[211]

358. Respondent submits that "*[a]foremented steel package has not been delivered by Centraalstaal to Respondent as a result of which Respondent has not been obliged to pay the price of EUR 2,750,000.00 nor interest thereon or any damage*".[212]

359. Respondent asserts that "*[f]urther, Centraalstaal neither has offered to Respondent an alternative delivery of the steel package for vessel 3 nor has Centraalstaal offered the steel package to Respondent for vessel 3 at scrap price at which it was sold to a third party nor had it ever sent the notice to Respondent about its intention to sell it for the price of scrap*".[213]

360. Respondent concludes that "*all claims in this regard [...] should therefore be dismissed*".[214]

3. The Arbitral Tribunal's analysis and decision

361. It is undisputed that the steel package was built and completed and that it was to be delivered to Brodotrogir on board of the ship 1601 simultaneously with the delivery of that ship.

362. The first objection by Brodotrogir is based on Brodotrogir's "non-delivery"-argument which has already been examined and dismissed.[215]

363. The second objection is that Centraalstaal did not offer an alternative way of delivery to Claimants and scrapped the steel package without any pre-warning instead of delivering the steel package to Brodotrogir for the scrap-value of the steel package.

364. The Arbitral Tribunal agrees with Brodotrogir that it would have been preferable to contact Brodotrogir before scrapping the steel package. On the other hand, the evidence shows that Brodotrogir would in any case have continued to refuse acceptance of the steel package and payment of the purchase price. This is, at least indirectly, confirmed

[210] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, paras. 19 and 20.
[211] Ibid., para. 20.
[212] Ibid., para. 20.
[213] Ibid., para. 23.
[214] Ibid., para. 23.

by the position taken by Brodotrogir in this arbitration. Brodotrogir does not say that it would have been willing to accept the steel package and to pay the contractually agreed price (plus any additional costs for any alternative mode of transport) in spite of the unresolved differences of opinion with CFL concerning the ship 1601. To the contrary, Brodotrogir criticizes Centraalstaal for not having offered the steel package to them at scrap price at which it was sold to a third party. A defaulting buyer does not, however, have a right to such a "price reduction".

365. As to the quantum of this claim: the price for the steel package was agreed (EUR 2.750.000,00). The value of the scrap is documented by the invoice of the company that scrapped the steel package (Exh. C-41). There is no evidence that Centraalstaal could have obtained a better price and it was, in any case, in the best interest of Centraalstaal to obtain the best possible price.

D. The damage claim related to the steel package claim (EUR 439.835,17)

366. Centralstaal argues that is has suffered "*additional damage [...] as a result of the non-acceptance of the steel package for Vessel 1603 [and] the non-payment of the amount due in that respect*".[216] Under this heading Centraalstaal claims EUR 385.027,96 as "costs of the plant" and EUR 54.807,21 as warehouse rental costs.

367. Respondent argues that the "*steel package has not been delivered by Centraalstaal to Respondent as a result of which Respondent has not been obliged to pay the price of EUR 2,750,000.00 nor interest thereon <u>or any damage</u>*".[217] (underlining added)

368. As regards the "*unnecessary costs which Centraalstaal allegedly has made in this regard and which are fully contested by Respondent*", Respondent argues that "*[i]f any costs have been made, then they are coming fully for account of Centraalstaal as Centraalstaal has not done anything to prevent them or to limit them to the minimum. Centraalstaal has connected the delivery of the steel package with the delivery of the "Joint Runner I" and has to bear all the consequences for the fact that the "Joint Runner I" could not be delivered to Respondent and therefore also not the steel package number 3*".[218]

[215] See point A.2.3. above.
[216] Claimants' Post Hearing Brief, para. 4.9.
[217] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 20.
[218] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 23.

369. As to the first item (EUR 385.027,96), Centraalstaal relies on Exh. C-43 which is nothing more than a table "Costs of the plant" (apparently prepared by Centraalstaal itself) that indicates for the period "Q4-2015" until "Q3-2018" "Banking costs" in the total amount of EUR 385.027,96. Centraalstaal does not explain and it is unclear for the Arbitral Tribunal what is meant by "Costs of the plant" and "Banking costs". Centraalstaal did not submit any supporting documentary evidence. Under those conditions the Arbitral Tribunal can only dismiss this part of this damage claim.

370. In contrast, the second item (Rent of warehouse; EUR 54.807,21) is documented by three invoices to Centraalstaal by a third company named BRIVEC (apparently the company which runs the warehouse in which the steel package was stored). In addition, there is no specific objection to the quantum. This part of the claim is therefore justified.

E. **Interest**

1. **Relief requested concerning interest**

371. Claimants claim interest as follows:

- concerning the payment claim in relation to ship 1601 (see point A. above):

  "*...contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR plus two and a half percent (2.5 %) per annum commencing with (from and including) 17 March 2017, or any other date set by the arbitral tribunal, amounting up to 1 December 2018 € 392,873,72 and amounting € 572.25 for each day from and including 1 December 2018 until the date of payment of the full amount...*"[219]

- concerning the damage claim in relation to ship 1601 (see point B. above):

  "*...contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR plus two and a half percent (2.5 %) per annum commencing with (from and including) fourth day following the date the amounts were or will be due, amounting up to 1 December 2018 € 3,760.57 and amounting € 10.37 for each day after 1 December 2018 until the date of payment of the full amount.*"[220]

[219] Claimants' Post Hearing Brief, para. 5.a.
[220] Claimants' Post Hearing Brief, para. 5.b.

- concerning the payment claim in relation to the steel package (see point C. above):

  "*...statutory interest as meant in article 6:119a of the DCC over (i) the amount of the down payment of € 550,000 as from 14 January 2016 and (ii) the remaining amount of the contract price of € 1,672,500 as from 27 March 2017, or as from any other date set by the arbitral tribunal, amounting up to 1 December 2018 € 369,186.06 and amounting € 536.54 for each day after 1 December 2018 until the date of payment of the full amount...*"[221]

- concerning the damage claim in relation to the steel package (see point D. above):

  "*...statutory interest as meant in article 6:119a of the DCC as from the date the amounts were or will be due, amounting up to 1 December 2018 € 47,950.82 and amounting € 96.40 for each day after 1 December 2018 until the date of payment of the full amount.*"[222]

372. Respondent requests that all claims of Claimants, i.e. also their interest claims, be dismissed.[223]

2. Interest rates and due dates

2.1. Interest rate and due date for the payment claim concerning ship 1601[224]

373. For the main payment claim concerning ship 1601, Claimants rely on "*the rate of 6 months EURIBOR plus two and a half percent (2.5 %) per annum*"[225] as provided for in Art. XI ("Default by the Buyer"), sub-point 2. ("Interest Charges") of the BC which provides as follows:

> "*If the BUYER is in default of payment as to any instalment, as provided in sub-article 1 herein, the BUYER shall, commencing with the fourth day following the date the instalment is due, pay compounded interest on such unpaid instalments at the rate of 6 months EURIBOR (as applicable) two and a half percent (2,5 %) per annum (the "Default Rate") from and including such*

[221] Claimants' Post Hearing Brief, para. 5.c.
[222] Claimants' Post Hearing Brief, para. 5.d.
[223] SoD, p. 74; Rejoinder, p. 41; Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, paras. 10, 16, 20, 23.
[224] See point A. above.

day to the date of payment to the BUILDER of the full amount, including interest, that is due."

374. Claimants argue that "*this contractual arrangement is not in conflict with Dutch Law. Article 6:119a of the DCC states in section 1 that compensation for damage, chargeable because of a delay in payment of a sum of money, consists, in case of a commercial agreement, of the statutory interest on the unpaid part of that sum from the day following the date that has to be considered as the expiry date for payment under the agreement up until and including the day on which the debtor has paid the amount chargeable to him. [...].*"[226]

375. Claimants further assert that Respondent is in default regarding the payment claim,[227] and that "*[b]ecause of this default, Respondent is also due the contractual compounded interest on the unpaid amounts at the rate of 6 months EURIBOR (as applicable) two and a half percent (2,5 %) per annum as meant in article XI.2. of the Building Contract, commencing with (from and including) the fourth day following the date the amount was due (17 March 2017) to the date of payment to Barkmeijer of the full amount*".[228]

376. Claimants submit that "*[i]n order to explain the interest rate used in the calculation, Claimants point at the charts regarding the 6 months EURIBOR included in the exhibit. The 6 months EURIBOR is a fluctuating interest rate. For the sake of simplicity Claimants have calculated with the 6 months EURIBOR rate of 21 November 2018 (-/- 0.257%), which is the lowest rate since the starting date of 17 March 2017. This interest rate has been increased with the contractual interest premium of 2.5%, resulting in an interest percentage of 2.243%*".[229]

377. Claimants assert that "*[t]he interest up to 1 December 2018 amounts to € 392,873,72. As from 1 December 2018 the daily interest due amounts € 572.75*".[230]

378. As regards the starting date for the calculation of interest, Claimants rely on the starting date 17 March 2017, i.e. four days after the 13 March 2017 letter (Exhibit C-25), in accordance with Art. XI.2. of the BC.

379. As regards the interest rate, Claimants have relied on Art. XI.2. of the BC and have used the lowest 6 months EURIBOR rate since 17 March 2017.

[225] Claimants' Post Hearing Brief, paras. 5.a. and b.
[226] SoC, para. III.7.
[227] SoC, para. III.5. and 6.
[228] SoC, para. III.7.
[229] Claimants' Post Hearing Brief, para. 4.2.
[230] Claimants' Post Hearing Brief, para. 4.2.

380. Respondent has not submitted any objection, neither regarding the due date nor regarding the interest rate relied upon by Claimants.

381. In the Arbitral Tribunal's view, Claimants' interest claim is justified as to the rate and the due date. As to the relevant capital amount see point A.2.8.3. above.

2.2. Interest rate and due date(s) for the damage claim concerning ship 1601[231]

382. Also with regard to this claim, Claimants claim "*6 months EURIBOR plus two and a half percent (2.5 %) per annum*".

383. Claimants argue that "*[t]he legal basis for this obligation to pay damages can be found in article XI.3 of the Building Contract*[232] *as well as in article 6:74 in conjunction with article 6:81 et seq. of the DCC*"[233] and that "*[a]lso the compensation for damage and losses should be increased with the contractual compounded interest*", i.e. with interest according to Art. XI.2. BC.[234]

384. Respondent has raised no objection to the interest rate requested by Claimants under this claim.

385. The Arbitral Tribunal notes that Art. XI.2. BC directly applies only to "default of payment" and not to damages. However, Art. XI.3. BC, which covers the damage claims arising from the default of the buyer (which according to Art. XI.1. (ii) BC includes the failure to take delivery), is placed within the same section (Art. XI BC). Therefore the Arbitral Tribunal considers that the section on interest in Art. XI.2. BC is also applicable to damages arising from the default of the buyer.

386. The interest rate requested by Claimants under this claim, to which Respondent has raised no objection, is therefore justified.

387. As regards the starting date for the calculation of interest, Claimants request interest commencing with the fourth day following the date "*the amounts were or will be due*". The Arbitral Tribunal notes that Respondent raised no objections to the due dates listed in Respondent's calculation of interest (Exhibit C-40) which therefore apply to this interest claim.

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[231] See point B. above.

[232] Art. XI.3. BC ("Effect of Default") provides as follows: "*In the event of default of the BUYER, as provided above, the BUILDER shall be entitled to recover any unpaid part of the Contract Price accrued up to the date of termination, together with any losses the BUILDER may suffer, or liability to Sub-contractors. [...].*"

[233] SoC, para. III.8.

[234] SoC, para. III.8.

2.3. Interest rate and due date(s) for the payment claim concerning the steel package[235]

388. Under this claim, Claimants request "*statutory interest as meant in article 6:119a of the DCC*".[236]

389. Claimants, in their interest calculations, rely on an interest rate of 8%.[237]

390. Respondent has raised no objections, neither in relation to Claimants' request for statutory interest according to Art. 6:119a DCC nor in relation to the specific interest rate of 8 % applied by Claimants.

391. In the Arbitral Tribunal's view, Claimants are indeed entitled to statutory interest according to Art. 6:119a DCC, which applies to cases of "*a delay in payment of a sum of money [...] in case of a commercial contract*"[238].

392. The interest rate follows from Art. 6:120 (2) DCC ("*the refinancing interest as determined by the European Central Bank for its most recent basic refinancing transaction, taken place for the first calendar day of the concerning six-month period, plus eight percent points*").

393. The Arbitral Tribunal notes that the same interest rate would also follow from the "quotation" regarding the steel package to which Art. 5.1. FA refers. The quotation[239], in its "General Conditions" at para. 21, also provides for an interest rate of "*8 percentage points above the rate of the main refinancing facility of the European Central Bank*".

394. As regards the starting date for the calculation of interest, Claimants rely on the starting date 14 January 2016 (regarding the down payment), i.e. seven days after the 7 January 2016 letter (Exhibit C-8),[240] and on the starting date 27 March 2017 (regarding the remaining amount), i.e. two weeks after the 13 March 2017 letter (Exhibit C-25).[241] Those due dates were not contested and are justified.

2.4. Interest rate and due date(s) for the damage claim concerning the steel package[242]

395. For this damage claim, Claimants request "*statutory interest as meant in article 6:119a of the DCC*".[243]

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[235] See point C. above.
[236] Claimants' Post Hearing Brief, para. 5.c.
[237] See Exh. C-42.
[238] Art. 6:119a (1) DCC.
[239] Submitted as Exh. C-4.
[240] See SoC, para. III.11.
[241] See SoC, para. III.12.
[242] See point D. above.

396. The Arbitral Tribunal notes that Art. 6:119a DCC only covers default interest for claims for payments due under a contract (with the corresponding interest rate provided for in Art. 6:120(2) DCC) and does not apply to claims for damages.

397. As a consequence, Claimants are not entitled to statutory interest according to Art. 6:119a / Art. 6:120(2) DCC in the amount of 8 %.

398. Claimants are entitled only to the (lower) statutory default interest rate regarding damage claims as provided for in Art. 6:119 / Art. 6:120(1) DCC, the interest rate of which has been 2% per annum since 1 January 2015. Claimants are, therefore, entitled to rely on an interest rate of 2% p.a. (only).

399. As regards the starting date for the calculation of interest, Claimants request interest "*from the date the amounts were or will be due*". The Arbitral Tribunal notes that Respondent raised no objections to the due dates listed in Claimants' calculation of interest ("rent of warehouse", Exhibit C-44) which therefore apply to this interest claim.

3. Compound interest

3.1. The payment claim and the damage claim concerning ship 1601

400. For both claims Claimants request "*contractual compounded interest on the unpaid amounts*".[244]

401. The Arbitral Tribunal has already found that Art. XI.2. BC applies to both Claimants' payment claim and Claimants' damage claim concerning ship 1601.[245] Art. XI.2. BC explicitly states that the buyer shall "*pay compounded interest*". Therefore, Claimants are entitled to compound interest.

402. As regards the calculation of compound interest, Art. XI.2 BC does not contain a specific provision. Therefore, the - default - calculation method of the applicable Dutch law applies. According to Art. 6:119(2) DCC and Art. 6:119a (3) DCC "*[a]t the end of each year the amount on which the statutory interest is to be calculated, shall be increased with the unpaid statutory interest chargeable over that year.*"

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[243] Claimants' Post Hearing Brief, para. 5.c.
[244] Claimants' Post Hearing Brief, paras. 5.a. and b.
[245] See points 2.1. and 2.2. above.

3.2. The payment claim and the damage claim concerning the steel package

403. As regards the steel package claims, Claimants request/rely on "*statutory interest as meant in article 6:119a of the DCC*".[246]

404. The statutory interest under Dutch law includes by default compound interest.[247] In addition, the interest calculations submitted by Claimants (Exhibits C-42 and C-44) also show that Claimants rely on compound interest.

405. For the above reasons, Claimants are entitled to compound interest:
   - for Claimants' payment claim, the entitlement to compound interest follows from Art. 6:119a (3) DCC.
   - for Claimants' damage claim, the entitlement to compound interest follows from Art. 6:119 (2) DCC.

406. As regards the calculation of compound interest, both provisions, Art. 6:119(2) DCC and Art. 6:119a (3) DCC, provide in identical terms that "*[a]t the end of each year the amount on which the statutory interest is to be calculated, shall be increased with the unpaid statutory interest chargeable over that year.*"

4. The Arbitral Tribunal's application of the above decisions concerning interest rates, due dates and compound interest

4.1. On the payment claim concerning ship 1601

407. Claimants are entitled to the contractual compound interest at the rate of 2,243% p.a. on EUR 8.047.000,00 as from 17 March 2017 until the date on which payment is made in full. Interest accrued in the period 17 March 2017 to 16 March 2018 is to be added on 17 March 2018 to the initial capital amount of EUR 8.047.000,00 for the calculation of interest for the next one-year period starting on 17 March 2018 and if / to the extent full payment has not been made by 16 March 2019, the interest accrued from 17 March 2018 until 16 March 2019 has to be added to the capital amount due on 17 March 2018 (which includes the interest accrued from 17 March 2017 to 16 March 2018). That same system is to be applied until full payment.

[246] Claimants' Post Hearing Brief, paras. 5.c. and d.
[247] See Art. 6:119(2) DCC and Art. 6:119a(3) DCC.

4.2. On the damage claim concerning ship 1601

408. Claimants have submitted an interest calculation based on the individual invoices the sum of which corresponds to the total capital amount of EUR 187.466,41 (Exhibit C-40). This interest calculation, which applies the correct interest rate to the individual invoices[248] from the correct due dates until 1 December 2018 and which was not contested by Respondent shows a "Total amount interest" up to 1 December 2018 of EUR 3.760,57.

409. The amount of EUR 10,37 claimed for each day after 1 December 2018 until the date of payment of the full amount is also justified.[249]

4.3. On the payment claim concerning the steel package

410. Centraalstaal is entitled to statutory interest pursuant to Art. 6:119a DCC on

(i) the amount of EUR 550.000,00 from 14 January 2016, and

(ii) the amount of EUR 1.672.500,00 from 27 March 2017

until the date on which payment is made in full.

411. The applicable interest rate is for the period 14 January 2016 until 30 June 2016 8,05% p.a. and for the periods thereafter 8% p.a.

412. The statutory interest pursuant to Art. 6:119a DCC includes compound interest according to para. 3 of Art. 6:119a DCC which provides that "*[a]t the end of each year the amount on which the statutory interest is to be calculated, shall be increased with the unpaid statutory interest chargeable over that year.*"

413. In accordance with that principle

(i) the capital amount of EUR 550.000,00 was increased on 14 January 2017 to EUR 594.131,26 and on 14 January 2018 to EUR 641.661,76[250].

(ii) the capital amount EUR 1.672.500,00 was increased on 27 March 2018 to EUR 1.806.300,00[251].

414. Up to 1 December 2018 the interest

(i) on the EUR 550.000,00-part of the claim amounts to EUR 136.806,62 and

(ii) on the EUR 1.672.500,00-part of the claim amounts to EUR 232.379,44.

[248] See Exh. C-40. As to the relevant total capital amount see point B.3. above.
[249] The figure of EUR 10,37 is slightly lower than the result obtained when applying the interest rate of 2,243% p.a. to the capital amount of EUR 187.466,41 divided by 365, i.e. EUR 11,52.
[250] Exh. C-42.
[251] Exh. C-42.

415. The daily interest for the period starting 1 December 2018 on both parts of the claim amounts to EUR 536,54 (EUR 641.661,76 plus EUR 1.806.300,00 = 2.447.961,76 multiplied by 8% divided by 365).

4.4. On the damage claim concerning the steel package

416. The interest calculation submitted by Claimants based on the individual invoices for "rent of warehouse" the sum of which corresponds to the total capital amount of EUR 54.807,21 (Exhibit C-44) applies an interest rate of 8,05% p.a. (for the first period for the first invoice) and of 8% p.a. for the remaining periods and invoices. This interest calculation therefore needs to be corrected by applying the proper interest rate of 2% p.a. This leads up to and including 30 November 2018 to interest for the three invoices in the amount of EUR 1.010,91 plus EUR 875,56 plus EUR 454, 93, i.e. EUR 2.341,40.[252]

417. Claimants claim for the period starting 1 December 2018 interest in the amount of EUR 96,40 for each day until the date of payment of the full amount, but this figure is based on a capital amount of EUR 439.835,17 and an interest rate of 8% p.a. The correct capital amount is, however, EUR 54.807,21 and the correct interest rate is 2% p.a.

418. Adding to the capital amount of EUR 54.807,21 the interest accumulated at the rate of 2% p.a. until 1 December 2018 (EUR 2.342,34) gives a new capital amount of EUR 57.149,55. On that basis the daily interest when applying the interest rate of 2% p.a. is EUR 3,13.

419. To conclude, Centraalstaal is entitled to statutory interest pursuant to Art. 6:119 DCC at the rate of 2% p.a. on the invoices in the total amount of EUR 54.807,21 ("rent of warehouse"; Exhibit C-44). Up to and including 30 November 2018 this amounts to EUR 2.342,34. The daily interest for the period thereafter, based on an interest rate of 2% p.a. on EUR 57.149,55 (EUR 54.807,21 plus EUR 2.342,34) amounts to EUR 3,13.

F. Costs

1. The Parties' requests regarding costs

420. Claimants, in their Post Hearing Brief have submitted the following request regarding costs:

[252] This corresponds to approximately 25% of the interest claimed by Claimants on the basis of an interest of 8,05% for the first interest period concerning the first invoice and an interest rate of 8% p.a. for all other interest periods and all other invoices.

"*Respondent will be ordered to bear the costs of the arbitration, including the fees and the expenses of the arbitrator(s) and the TAMARA administrative expenses as well as the fees and expenses of any witnesses heard and experts appointed by the arbitrator(s) and the reasonable legal and other costs incurred by Claimants.*"[253]

421. Respondent, in its "Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30" has submitted the following request:

> "*According to Respondent all claims of Claimants should be dismissed. As a result Claimants have to bear all costs of this arbitration including the costs of legal assistance as incurred by Respondent. Even if a part of the claim would be awarded, then Claimants have to bear all aforementioned costs as they have intentionally exaggerated their claim and forced Respondent to defend himself in this arbitration proceedings. Most substantially it is for the Tribunal to give a decision in this regard based on good justice and fairness taking all circumstances into regard, more specific the opportunistic way the claim has been presented in these arbitration proceedings.*"[254]

2. The Parties' Cost Submissions

2.1. Claimants' Cost Submission

422. Claimants, in their Cost Submission dated 17 December 2018, requested the total amount of EUR 130.226,06 as can be seen from the following "*Overview invoices and costs*" submitted by Claimants:

[253] Claimants' Post Hearing Brief, para. 5.e.

[254] Respondent's Reaction on Specification / Amendment of Reliefs Requested by Claimants as well as on Legal Exhibit CL-30 dated 7 December 2018, para. 24.

File: 20170146-12 Barkmeijer c.s./Brodotrogir

Overview invoices and costs

Invoicenumber	Invoicedate	Duedate	Total amount	Fee	Costs	VAT	Unpaid
Barkmeijer Stroobos B.V.							
171268	29-3-2017	28-4-2017	151,78		125,44	26,34	0,00
171612	11-4-2017	11-5-2017	10.228,74	8.453,50		1775,24	0,00
171801	2-5-2017	1-6-2017	673,37	556,5		116,87	0,00
172223	6-6-2017	6-7-2017	6.220,61	5.141,00		1.079,61	0,00
173240	7-8-2017	6-9-2017	1.988,03	1.643,00		345,03	0,00
180129	5-1-2018	4-2-2018	384,78	318		66,78	0,00
182478	7-6-2018	7-7-2018	22.006,25	18.186,98		3.819,27	0,00
182744	3-7-2018	2-8-2018	10.129,56	8.371,54		1.758,02	0,00
183193	3-8-2018	2-9-2018	20.594,52	12.309,63	5.699,87	2.585,02	0,00
183604	6-9-2018	6-10-2018	1.403,63	985,81	210,8	207,02	0,00
184022	8-10-2018	7-11-2018	2.253,10	1.862,07		391,03	2.253,10
184070	11-10-2018	10-11-2018	1.138,00		1.138,00		1.138,00
184762	5-12-2018	4-1-2019	37.204,23	30.297,30	450	6.456,93	37.204,23
			114.376,60	88.125,83	7.624,11	18.627,16	40.595,33
							40.595,33

Various costs	Amount		Costs	VAT	
Hearing venue	5.782,05		5.352,78	429,72	5.782,05
Bencs Advocaten (mr. Manning)	2.738,40		2.284,80	453,6	2.738,40
Court reporter	4.252,01	(£ 3.824,49)	4.252,01		4.252,01
5 hours for remaining activities	1.988,00			345	1.988,00
Sub total	15.849,46		11.889,59	1.228,32	15.849,46
Total	130.226,06		19.513,70	19.855,48	56.444,79

423. By letter dated 28 December 2018 Claimants corrected their cost submission by reducing the amount claimed to EUR 128.151,46:[255]

Overview invoices and costs

Invoicenumber	Invoicedate	Duedate	Total amount	Fee	Costs	VAT	Unpaid
Barkmeijer Stroobos B.V.							
171268	29-3-2017	28-4-2017	151,78		125,44	26,34	0,00
171612	11-4-2017	11-5-2017	10.228,74	8.453,50		1775,24	0,00
171801	2-5-2017	1-6-2017	673,37	556,5		116,87	0,00
172223	6-6-2017	6-7-2017	6.220,61	5.141,00		1.079,61	0,00
173240	7-8-2017	6-9-2017	1.988,03	1.643,00		345,03	0,00
180129	5-1-2018	4-2-2018	384,78	318		66,78	0,00
182478	7-6-2018	7-7-2018	22.006,25	18.186,98		3.819,27	0,00
182744	3-7-2018	2-8-2018	10.129,56	8.371,54		1.758,02	0,00
183193	3-8-2018	2-9-2018	20.594,52	12.309,63	5.699,87	2.585,02	0,00
183604	6-9-2018	6-10-2018	1.403,63	985,81	210,8	207,02	0,00
184022	8-10-2018	7-11-2018	2.253,10	1.862,07		391,03	2.253,10
184070	11-10-2018	10-11-2018	1.138,00		1.138,00		1.138,00
184762	5-12-2018	4-1-2019	37.204,23	30.297,30	450	6.456,93	37.204,23
			114.376,60	88.126,33	7.624,11	18.627,16	40.595,33
							40.595,33

Various costs	Amount		Costs	VAT	
Hearing venue	5.782,05		5.352,78	429,72	5.782,05
Bencs Advocaten (mr. Manning)	2.738,40		2.284,80	453,6	2.738,40
Court reporter	4.252,01	(£ 3.824,49)	4.252,01		4.252,01
5 hours for remaining activities	1.988,00			345	1.988,00
Sub total	15.849,46		11.889,59	1.228,32	15.849,46
correction as per letter of 28 December 2018	-2074.60			-360.05	
Total	128161.46		19.513,70	19495.43	56.444,79

255 In their letter dated 28 December 2018 Claimants submit that EUR 2.074,60 had to be deducted from their original Cost Submission dated 17 December 2018, because said amount, which was included in invoice no. 182478 dated 7 June 2018, referred to the challenge proceedings of Mr Nobilo *"which exclusion was agreed upon between the parties' counsels"*.

2.2. Respondent's Cost Submission

424. Respondent, in its Cost Submission dated 17 December 2018, requested the total amount of EUR 123.030,47 according to the following "*Overview of costs regarding arbitration proceedings*":

Overview of costs regarding arbitration proceedings

TAMARA (UNUM) 17004

Costs on Respondent's side

Invoice number and date	Amount related to arbitration proceedings itself	
2016/42 (9.2.2017)	EUR	0
2017/4 (3.4.2017)	EUR	0
NHM/2018/70 (12.4.2018)	EUR	30,877.45
NHM/2018/89 (14.5.2018)	EUR	7,631.62
NHM/2018/130 (24.7.2018)	EUR	3,598.18
2018/20 (24.7.2018)	EUR	15,375.45
2018/21 (12.9.2018)	EUR	25,634.70
2018/26 (17.12.2018)	EUR	39.913,07 +
Total	EUR	123,030.47

425. On 28 December 2018, Respondent increased its cost claim to 129.810,47[256] according to the following (corrected) "*Overview of costs regarding arbitration proceedings*":

[256] See Counsel for Respondent's accompanying email: "*I [...] discovered that regarding invoice 2018 / 20 I forgot to include in the total cost overview Mr. Margetson's time (22.6 hrs x EUR 300). Therefore the amount of invoice 2018 / 20 is now increased with EUR 6,780 (22,6 x EUR 300) resulting now in the amount of EUR 22,155.45 instead of previously EUR 15,375.45*".

Overview of costs regarding arbitration proceedings

TAMARA (UNUM) 17004

Costs on Respondent's side

Invoice number and date	Amount related to arbitration proceedings itself
2016/42 (9.2.2017)	EUR 0
2017/4 (3.4.2017)	EUR 0
NHM/2018/70 (12.4.2018)	EUR 30,877.45
NHM/2018/89 (14.5.2018)	EUR 7,631.62
NHM/2018/130 (24.7.2018)	EUR 3,598.18
2018/20 (24.7.2018)	EUR 22,155.45
2018/21 (12.9.2018)	EUR 25,634.70
2018/26 (17.12.2018)	EUR 39.913,07
	---------------------- +
Total	EUR 129,810.47

3. The Arbitral Tribunal's analysis and decision

3.1. Introduction

426. The relevant provisions of the TAMARA Rules dealing with the Arbitral Tribunal's award on cost provide as follows:

"*Cost award*

7.10 The unsuccessful party may be ordered to pay the arbitration costs. If more than one party is partly unsuccessful, they may each be ordered to pay such portion of the arbitration costs as the arbitrators deem reasonable.

[...]

7.12 The unsuccessful or partly unsuccessful party may be ordered to pay such portion of the other party's or parties' costs related to the arbitration as the arbitrators deem reasonable, namely the costs for legal and other assistance, and other reasonable costs made in relation to the arbitration. The party concerned may be ordered to pay these costs only in part, in the same way as he may be ordered to pay the arbitration costs only in part."

427. According to the aforementioned provisions the decision on costs (arbitration costs and party costs) depends on the (degree of) success of Claimants, and of Respondent.

428. The amount/degree of success can be determined by reference to the Parties' requests. The following table shows the amounts claimed and the amounts awarded:

	Claimed (EUR)	Awarded (EUR)
Claim A (payment claim concerning ship 1601)	10.164.688,19	8.047.000,00
Claim B (damage claim concerning ship 1601)	187.466,41	187.466,41
Claim C (payment claim concerning the steel package)	2.222.500,00 (initially 2.750.000,00)	2.222.500,00
Claim D (damage claim concerning the steel package)	439.835,17	54.807,21
Total	**13.014.489,77**	**10.511.773,62**

429. Given that Claimants' success rate is approximately 80 %, the Arbitral Tribunal finds it justified that Respondent bears the major part of Claimants' costs. The Arbitral Tribunal will first deal with the arbitration costs (see point 3.2. below) and then with Claimants' costs (see point 3.3. below).

3.2. Arbitration costs

430. The arbitration costs consist of the administration costs of the arbitral institution and the Arbitral Tribunal's fees and expenses. The administration costs of the arbitral institution amount to **EUR 2.100,00** (excl. VAT).[257]

431. The Arbitral Tribunal's fees and expenses are as follows:

- Mr Sjoerd Rutten (excl. VAT): **EUR 29.411,40**[258]
- Mr Neven Bahun (excl. VAT): **EUR 46.245,02**[259]
- Mr Andreas Reiner (excl. VAT): **EUR 131.611,85**[260]
- Total: **EUR 207.268,27**

432. The total arbitration costs (excl. VAT) amount to **EUR 209.368,27.**

433. Bearing in mind Claimants' success rate of approximately 80 % (based on the final claims after deduction of the value of the steel package scrapped end of 2017), respectively of approximately 77 % (based on the amount in dispute including the initial full steel package claim), the Arbitral Tribunal finds it appropriate to order Respondent to reimburse to Claimants arbitration costs in the amount of EUR 165.000,00.

3.3. Claimants' costs

434. As can be seen from the overview regarding costs submitted by Claimants, Claimants claim EUR 128.151,46 (incl. VAT).[261]

435. As regards the amount claimed by Claimants, the Arbitral Tribunal notes that a re-calculation of the individual cost items as presented by Claimants in their latest overview dated 28 December 2018 leads to an aggregate amount of EUR 127.062,46 (incl. VAT).

436. The individual cost items claimed by the Claimants can be summarized as follows:

Legal costs	EUR 113.152,00[262] (incl. VAT)	EUR 94.539,89 (excl. VAT)

[257] See TAMARA's invoice number 17.004-01 dated 13 May 2017 ("*Administratiekosten*").
[258] See invoices dated 5 March 2019.
[259] See invoices dated 6 March 2019.
[260] See invoices dated 7 March 2019.
[261] See point 2.1. above.
[262] Total amount of € 114.376,60 indicated by Claimants in their Cost Submission, reduced by € 2.074,60 (see Claimants' letter dated 28 December 2018) plus € 1.988,00 for remaining activities as indicated in Claimants' "Overview invoices and costs" dated 28 December 2018. Furthermore, an amount of € 1.138,00 (for the Court

Hearing venue	EUR 5.782,05 (incl. VAT)	EUR 5.352,78 (excl. VAT)
Witness (Mr Manning)	EUR 2.738,40 (incl. VAT)	EUR 2.284,80 (excl. VAT)
Court reporter	EUR 5.390,01 (no VAT)	EUR 5.390,01 (no VAT)
Total	**EUR 127.062,46**	**EUR 107.567,48**

437. Art. 7.12. of the TAMARA Rules provides that "*[t]he unsuccessful or partly unsuccessful party may be ordered to pay such portion of the other party's or parties' costs related to the arbitration as the arbitrators deem* <u>*reasonable*</u>*.*" (underlining added)

438. Therefore, as a first step, the Arbitral Tribunal has to determine whether and in what amount the costs claimed by Claimants are reasonable.

439. The Arbitral Tribunal notes that the amount of Claimants' costs is very close to the amount of costs claimed by Respondent (EUR 129.810,47) which is an indication that the overall amount of Claimants' costs claim is not unreasonable.

440. Apart from that, Respondent, in its Comments on Claimants' Cost Submission dated 28 December 2018, complained about several invoices relied upon by Claimants. The Arbitral Tribunal will describe and address these complaints:[263]

441. Invoices no. 171268 and no. 171612:

As regards invoice **no. 171268** dated 29 March 2017 in the amount of EUR 151,78, Respondent argues that "*[t]hese costs have nothing to do with the arbitration but with the letter of demand sent previous to the arbitration and are therefore fully contested*".

As regards invoice **no. 171612** dated 11 April 2017 in the amount of EUR 10.228,74, Respondent argues that "*[t]his invoice in the amount of EUR 10,228.74 is fully contested as these activities having nothing to do with the arbitration. The arbitration notice was sent on 10 April 2017 so it is reasonable that the activities regarding that notice are the [ones] that can be regarded as start of the arbitration. The activities in February and March 2017 have nothing to do with that*".

reporter) included in the € 114.376,60 was to be deducted from the cost item "Legal costs" and to be included in the cost item "Court reporter".

[263] The procedure for cost submissions discussed with the Parties at the telephone conference on 8 February 2018 and confirmed by Procedural Order No. 2, point 3.4. (without any objection from either Party), did not provide for any response to the other side's comments.

The Arbitral Tribunal is not persuaded by Respondent's argument that all invoices relating to activities before the date of the notice of arbitration, i.e. 10 April 2017, must be rejected. The two contested invoices refer to activities between 27 February 2017 and 31 March 2017, i.e. to a period shortly before the notice of arbitration. It is therefore quite plausible that those activities relate to the preparation of the case and the notice of arbitration by Claimants' Counsel.

442. Invoices no. 171801, no. 172223, no. 173240 and no. 180129:

As regards invoice **no. 171801** dated 2 May 2017 in the amount of EUR 673,37, Respondent submits that it is "*[t]otally unclear what documents needed to be studied on 25 April 2017 as the arbitration has been put on hold in the period from the arbitration notice on 10 April 2017 until end of December 2017 when Mr. Bahun was nominated as replacement of Mr. Nobilo as challenged arbitrator. This invoice is therefore totally contested*".

As regards invoice **no. 172223** dated 6 June 2017 in the amount of EUR 6.220,61, Respondent submits that "*[t]his invoice is as well contested as the only thing going on in this period were the challenge proceeding at the Court in Groningen. These activities are related to that. The only exception is the activity on 5 May 2017 (1,45 hrs) which was related to the challenge discussion in the context of communication with TAMARA. The rest of the activities had nothing to do with that and this is also not substantiated by a more clear specification in this regard. It is very clear that the activities between 17.05.2017 and 30.05.2017 are referring to the challenge proceedings in Groningen as there was no "processtuk" (which means court document) related to the arbitration proceedings itself*".

As regards invoice **no. 173240** dated 7 August 2017 in the amount of EUR 1988,03, Respondent submits that the latter "*is really too vague*". According to Respondent, it is "*[u]nclear what Mr. De Vries had to discuss with his client regarding arbitration which was at that time totally on hold. This invoice is therefore totally contested as it is not made clear that this has to do anything with arbitration proceedings itself*".

Respondent submits that invoice **no. 180129** dated 5 January 2018 in the amount of EUR 384,78 is "*[f]ully contested as there is no connection with the arbitration proceedings. On 19 December 2017 the arbitration was still on hold*".

Respondent argues that the arbitration was "put on hold" between 10 April 2017 (notice of arbitration) and the end of December 2017 due to the challenge proceedings regarding

Mr Nobilo and that the Parties have agreed that costs relating to those challenge proceedings shall not be reimbursed in this arbitration.

The Arbitral Tribunal notes that the period mentioned by Respondent is too long: Claimants' email in which they challenged Mr Nobilo is dated 5 May 2017; by submission dated 1 June 2017 Claimants challenged Mr Nobilo before the Court of Noord-Nederland; the decision by the Court of Noord-Nederland in that matter is dated 22 November 2017. Apart from that and more importantly, the Arbitral Tribunal finds it not implausible that Claimants' Counsel has worked on this arbitration even while the challenge proceedings were ongoing. In addition, there is no evidence that the activities under these invoices were related to the challenge proceedings concerning Mr Nobilo.

443. Invoice no. 182478:

Regarding the invoice **no. 182478** dated 7 June 2018 in the amount of EUR 22.006,25, Respondent submits that "*[t]he activities on 15, 16, 19, 27 and 28 March 2018 are contested as they have nothing to do with the arbitration proceedings but with the challenge proceedings in which regard counsel have agreed that those hours will not be included. The activities on 27 and 28 March 2018 are about "conservatory arrest" possibilities which are not related to the arbitration itself*". *With regard to the same invoice Respondent further submits that "[t]he activities on 6, 10, 12, 17 and 24 April 2018 are fully contested as they are about the "retentierecht" and "zaakwaarneming" which is obviously related to the proceedings against CFL at the Court in Groningen. The activities on 24 April 2018 are about "wraking" which is the challenge proceedings regarding Nobilo*".

The Arbitral Tribunal notes that concerning the invoice no. 182478 dated 7 June 2018 Claimants made the following statement in their letter dated 28 December 2018:

> "*Claimants have discovered that in respect of excluding the time spent on the proceedings regarding the challenge of Mr Nobilo (which exclusion was agreed upon between the parties' counsels) a mistake was made in the cost submission, since in the invoice number 182478 dated 7 June 2018 hours regarding this subject were included and have not been corrected in Claimants' cost submission. In this invoice 2 hours of Mr De Hoop and 9 hours and 15 minutes of his assistant Mr. Keekstra have incorrectly been included. Therefore the following amount should be deducted of the cost submission of Claimants*:
>
> - *2 hours Mr. de Hoop (rate EUR 300) EUR 600*
> - *9.15 hours Mr. Keekstra (rate EUR 110) EUR 1,017.50*

- *Sub total EUR 1,617,50*
- *Office costs EUR 97.05*
- *Sub total EUR 1,714.55*
- *VAT EUR 360.05*
- *Total EUR 2,074.60.*"

Since Claimants themselves have already corrected the amount claimed under this invoice deducting the time spent in relation to the challenge proceedings, the Arbitral Tribunal finds that no further deduction would be justified and that Respondent's objection against this invoice therefore fails.

444. The Arbitral Tribunal notes that all the remaining invoices/cost items are uncontested.[264]

445. In sum, the Arbitral Tribunal finds that the costs claimed by Claimants in the amount of EUR 127.062,46 (incl. VAT) are reasonable.

446. Based on the net-amount of EUR 107.567,48 and bearing in mind Claimants' success rate (see para. 433 above), the Arbitral Tribunal finds it appropriate to order Respondent to pay Claimants EUR 83.000,00 as partial reimbursement of Claimants' costs.

[264] With regard to the remaining invoices/cost items Respondent has submitted "*No Comments*".

VI.DISPOSITIVE SECTION

1. Respondent is ordered to pay to Claimants

    - the amount of EUR 8.047.000,00 (in words: eight million forty-seven thousand euros)

    and

    - compound interest at the rate of 2,243% p.a. on EUR 8.047.000,00 as from 17 March 2017 until the date on which payment is made in full. At the end of each year, i.e. on 17 March 2018, 17 March 2019 etc. the interest accrued in the preceding year is to be added to the last unpaid capital amount and the so increased capital amount will then bear interest for the following year as long as payment is not made in full.

    Payment of the capital amount and of interest is to be made by transferring the amounts due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410.

2. Respondent is ordered to pay to Claimants

    - the amount of EUR 187.466,41 (in words: one hundred eighty-seven thousand four hundred sixty-six euros and forty-one cents)

    - interest in the amount of EUR 3.760,57 (in words: three thousand seven hundred sixty euros and fifty-seven cents) and

- interest in the amount of EUR 10,37 (in words: ten euros and thirty-seven cents) per day starting on 1 December 2018 until the date of payment of the full amount of EUR 187.466,41.

3. Respondent is ordered to pay to Centraalstaal

- the amount of EUR 2.222.500,00 (in words: two million two hundred twenty-two thousand five hundred euros), i.e. EUR 550.000,00 plus EUR 1.672.500,00

- interest on EUR 550.000,00 for the period up to 30 November 2018 in the amount of EUR 136.806,62 (in words: one hundred thirty-six thousand eight hundred six euros and sixty-two cents)

- interest on EUR 1.672.500,00 for the period up to 30 November 2018 in the amount of EUR 232.379,44 (in words: two hundred thirty-two thousand three hundred seventy-nine euros and forty-four cents)

and

- daily interest in the amount of EUR 536,54 from 1 December 2018 until the date of payment of the full amount of EUR 2.222.500,00.

Payment of the capital amount and of interest is to be made by transferring the amounts due to the clients' account (as referred to in Section 25 of the Dutch Notaries Act (in Dutch: Notariswet)) of the notary mr. drs. F.A. Keuning (civil-law notary in the municipality of Groningen, associated with the firm of De Haan Notarissen) at Rabobank, in the name of De Haan Advocaten en Notarissen Groningen with bank account number (IBAN) NL14RABO0329437410.

4. Respondent is ordered to pay to Centraalstaal

- the amount of EUR 54.807,21 (in words: fifty-four thousand eight hundred seven euros and twenty-one cents)

- interest in the amount of EUR 2.342,34 (in words: two thousand three hundred forty-two euros and thirty-four cents) for the period up to and including 30 November 2018

and

- interest in the amount of EUR 3,13 (in words: three euros and thirteen cents) per day starting on 1 December 2018 until the date of payment of the full amount of EUR 54.807,21.

5. Respondent is ordered to pay to Claimants

- Arbitration costs in the amount of EUR 165.000,00 (in words: one hundred sixty-five thousand euros)

and

- Costs of Claimants in the amount of EUR 83.000,00 (in words: eighty-three thousand euros).

6. Any and all further claims are dismissed.

Place of arbitration: Rotterdam, Netherlands

Date: 7-3-2019

Andreas Reiner
Third Arbitrator

Sjoerd Rutten
Co-Arbitrator

Neven Bahun
Co-Arbitrator

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Primatelj

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Dopunske usluge
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ROK URUČENJA:

ZAPRIMANJE / URUČENJE:
- U DOGOVORENO VRIJEME od .... do ....
- SUBOTOM

SKUPNE POŠ. ______ kom.
- PLAĆA PRIMATELJ

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MASA: 1.244
POŠTARINA:
DATUM I VRIJEME PRIJAMA: 9 31

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