AWARD

rendered in Stockholm on 11 October 2010 in an arbitration conducted according to the UNCITRAL Arbitration Rules between the following Parties.

A

Claimants:

1. The Boeing Company, 100 North Riverside, CHICAGO, IL 60606, USA

2. Boeing Commercial Space Company

Counsel for 1 and 2:

(a) Mr. Reed Oslan, Mr. Michael B. Slade and Mr. Christopher J. Esbrook, Kirkland & Ellis LLP, 300 N. Lasalle, CHICAGO, IL 60654, USA

(b) Mr. Christopher Colbridge and Mr. Chiraag Shah, Kirkland & Ellis International LLP, 30 St. Mary's Axe, LONDON EC3A 8AF, United Kingdom

(c) Mr. Lars Edlund and Mr. Fredrik Forssman, G. Grönberg Advokatbyrå AB, P.O. Box 7418, SE-103 91 STOCKHOLM, Sweden

Respondents:

1. Open Joint-Stock Company S.P. Korolev Rocket and Space Corporation Energia, 4 A Lenin Street, KOROLEV, Moscow Area, 141070, Russian Federation

Counsel: Mr. Kaj Hobér and Mr. Richard Chlup, Mannheimer Swartling Advokatbyrå AB, P.O. Box 1711, SE-111 87 STOCKHOLM, Sweden

2. KB Yuzhnoye, 3 Krivorozhskaya Street, DNIEPROPETROVSK 49008, Ukraine

3. State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov", 1 Krivorozhskaya Street, DNIEPROPETROVSK 49047, Ukraine

Counsel for 2 and 3: Mr. Christer Söderlund, Mr. Mattias Rosengren and Ms. Olga Zelepukina, Advokatfirman Vinge KB, P.O. Box 1703, SE-111 87 STOCKHOLM, Sweden

4. Aker Maritime Finance AS, Fjordalléen 16, NO-0250 OSLO, Norway, succeeded during the proceedings by Kværner AS

Counsel for Aker Maritime Finance AS and Kværner AS:

(a) Mr. Rolf Johan Ringdal and Mr. Bård Sandstad, Bugge, Arentz-Hansen & Rasmussen Law Firm, P.O. Box 1524 Vika, NO-0117 OSLO, Norway

(b) Mr. Claes Lundblad and Mr. Henrik Fieber, Roschier Advokatbyrå AB, P.O. Box 7358, SE-103 90 STOCKHOLM, Sweden

B

Cross-Claimant:

Kværner AS

Counsel: Mr. Claes Lundblad and Mr. Henrik Fieber

Cross-Respondents:

1. Open Joint-Stock Company S.P. Korolev Rocket and Space Corporation Energia

Counsel: Mr. Kaj Hobér and Mr. Richard Chlup

2. KB Yuzhnoye

3. State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov"

Counsel for 2 and 3: Mr Christer Söderlund, Mr. Mattias Rosengren and Ms. Olga Zelepukina

Sole Arbitrator:

Former Justice Hans Danelius

I. Background

1. On 3 May 1995, Boeing Commercial Space Company (hereinafter called *"BCSC"*), Rocket and Space Company, limited Energia (hereinafter called *"Energia"*), Kværner Moss Technology a.s. (hereinafter called *"Kværner Moss"*), KB Yuzhnoye (Yuzhnoye State Design Office) and PO Yuzhnoye Mashinostroitelny Zavod (State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov", hereinafter called *"PO Yuzhnoye"*) (the two latter companies hereinafter jointly referred to as *"Yuzhnoye"*) concluded an Agreement for Creation of Sea Launch Companies (hereinafter called the *"Creation Agreement"*). BCSC was a wholly-owned subsidiary of The Boeing Company (hereinafter called *"Boeing"*). Kværner Moss was a wholly-owned subsidiary of Kværner ASA.

2. The Creation Agreement concerned a project to launch commercial satellites from a sea-based platform and contained, *inter alia*, the following provisions:

ARTICLE I - GENERAL

1.1 Definitions

The following are terms used in this Agreement with special definitions:

"Affiliate" means a legal entity that is a Subsidiary of a Party, a legal entity that is the Parent of a Party or a legal entity that is the Subsidiary of the Parent of a Party.

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"Company" and "Venture Company" mean the legal entities established as described in Articles 5 through 8.

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"Guarantee" means a legal commitment by a Party or its Affiliate to a Venture Company customer or any other Third Party, by which that Party or Affiliate becomes obligated to make a payment of money to the Third Party if any Venture Company fails to perform obligations that the Venture Company has to that Third Party.

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"Party" means Boeing Commercial Space Company, Kværner Moss Technology a.s., S.P. Korolev Rocket and Space Company, limited Energia, KB Yuzhnoye and PO Yuzhnoye Mashinostroitelny Zavod.

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"Third Party" means any person or business or legal entity that is not a Party, an Affiliate of a Party or a Venture Company. The term Third Party includes but is not limited to governments, employees and representatives of governments, customers and customer representatives, and employees and representatives of political parties.

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1.5 **Ownership Percentages.** Each Party will make capital contributions to each of the joint Venture Companies in the following proportions: BCSC 40%, Kværner[1] 20%, Energia 25% and Yuzhnoye[2] 15%.

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1.7 Voting. Notwithstanding any provision in the Foundation Documents of any Venture Company, the Parties agree that their representatives in the decision-making body of each Company (e.g., the Board of Directors, shareholders meeting or partners meeting) will vote in accordance with the following rules:

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(i) Representatives owning 67 percent of the interests in the Company have to approve borrowing or lending of money, issuance of debentures, issuance of Guarantees, redemption of debentures or shares by the Company.

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1.8 Priority of Joint Venture Agreement. In the event that any Foundation Document for any Venture Company is inconsistent with or in conflict with this Agreement, the terms of this Agreement shall prevail and take precedence over the Foundation Document.

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[1] In the Creation Agreement, "Kværner Moss" is referred to as "Kværner".

[2] In the Creation Agreement, "Yuzhnoye" is used as the collective name of KB Yuzhnoye and PO Yuzhnoye.

ARTICLE 5 – SEA LAUNCH LIMITED PARTNERSHIP

5.1 **Responsibilities**. Sea Launch Limited Partnership will be the Venture Company responsible for Developmental work and for entering into launch contracts with customers and performing those contracts. It will subcontract work to the other Venture Companies and to the Parties as set forth in this Article 5.

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5.4 **General Partner**. The Parties will form a Company to be the general partner in Sea Launch Limited Partnership. The general partner will be a limited duration company formed under the International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas.[1] The general partner will be named Sea Launch Company, LDC. The Sea Launch Company, LDC will be owned by the Parties in the percentages set forth in Article 1.5. Sea Launch Company, LDC will contribute five percent (5%) of the capital of Sea Launch Limited Partnership.

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ARTICLE 6 – UNITED STATES SEA LAUNCH LIMITED PARTNERSHIP

6.1 **General**. The Parties agree to form United States Sea Launch Limited Partnership when the Preconditions to Venture Formation are satisfied. United States Sea Launch Limited Partnership will be a Delaware limited partnership. The capital will be contributed on the schedule that will be set forth in the Business Plan, subject to the limitations of Article 4.

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6.3 **General Partner**. The Parties will form a Company, limited to be the general partner in United States Sea Launch Limited Partnership. The general partner will be a limited liability company formed under the Company, limited law of the state of Delaware, USA. The general partner will be named United States Sea Launch Company, limited. United States Sea Launch Company, limited will be owned by the Parties in the percentages set forth in Article 1.5. United States Sea Launch Company, limited will contribute five percent (5%) of the capital of United States Sea Launch Limited Partnership.

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ARTICLE 7 – ACS LIMITED PARTNERSHIP[4]

7.1 **Responsibilities**. ACS Limited Partnership will be the Venture Company responsible for building the assembly and command ship and providing the vessel to Sea Launch Limited Partnership on a time charter. It will subcontract work to the Parties as set forth in this Article 7.

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7.4. **General Partner**. The Parties will form a company to be the general partner in ACS Limited Partnership. The general partner will be a limited duration company

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[1] In the First Amendment to the Creation Agreement, dated 29 June 1995, the words "International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas" were changed to "The Companies Law (Revised) of the Cayman Islands".

[4] Article 3 of the Second Amendment of 12 December 1995 to the Creation Agreement reads: "The name of the Venture Company identified in Article 7 of the Creation Agreement as 'ACS Limited Partnership' is changed to 'Sea Launch ACS Limited Partnership'. Sea Launch ACS Limited Partnership will be formed under the laws of the Isle of Man."

formed under the International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas.[5] The general partner will be named ACS Company, LDC. The ACS Company, LDC will be owned by the Parties in the percentages set forth in Article 1.5. ACS Company, LDC will contribute five percent (5%) of the capital of ACS Limited Partnership.

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ARTICLE 8 – PLATFORM LIMITED PARTNERSHIP

8.1 **Responsibilities**. Platform Limited Partnership will be the Venture Company responsible for building the platform and providing the vessel to Sea Launch Limited Partnership on a time charter. It will subcontract work to the other Venture Companies and to the Parties as set forth in this Article 8.

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8.4. General Partner. The Parties will form a Company to be the general partner in Platform Limited Partnership. The general partner will be a limited duration company formed under the International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas.[6] The general partner will be named Platform Company, LDC. Platform Company, LDC will be owned by the Parties in the percentages set forth in Article 1.5. Platform Company, LDC will contribute five percent (5%) of the capital of Platform Limited Partnership.

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ARTICLE 9 – LIABILITIES

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9.4 Guarantees

9.4.1 Procedure for Obtaining Guarantees. If a Third Party informs a Venture Company that it requires a Guarantee from a Party or its Affiliate, the Venture Company receiving the request will determine whether to seek a Guarantee (subject to Article 1.7 (i)). No Party or its Affiliate is obligated to provide any Guarantees, but each Party agrees to consider requests from a Venture Company for a Guarantee. The Guarantor is entitled to be paid a reasonable sum for providing the Guarantee.

9.4.2 Reimbursement for Guarantee. If any Party or its Affiliate provides a Guarantee to a Third Party in response to a request from a Venture Company, then all Venture Companies will be obligated to reimburse the Guarantor for any money that the Guarantor has to pay to the Third Party. If the Venture Companies fail to reimburse the Guarantor in full within thirty days of receipt of an invoice from the Guarantor, then each Party agrees to pay the Guarantor a percent of the amount paid to the Third Party (after subtracting money paid by the Venture Companies to the Guarantor) equal to the percent ownership identified for that Party in the Venture Companies in Article 1.5.

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[5] In the First Amendment to the Creation Agreement, dated 29 June 1995, the words "International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas" were changed to "The Companies Law (Revised) of the Cayman Islands".

[6] In the First Amendment to the Creation Agreement, dated 29 June 1995, the words "International Business Companies Act of the Statute Laws of the Commonwealth of the Bahamas" were changed to "The Companies Law (Revised) of the Cayman Islands".

ARTICLE 14 – ASSIGNMENT

Each Party may become a partner or owner in a Venture Company through an Affiliate, but each Party guarantees to the other Parties that the Affiliate will comply with and be bound by the terms of this Agreement. No Party shall assign, nor in any manner transfer, its interests or any part thereof in this Agreement. Kværner, BCSC, Yuzhnoye and Energia may participate in the Venture Companies through an Affiliate.

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ARTICLE 17 – ENTIRE AGREEMENT

The foregoing articles and Exhibit A comprise the entire agreement between the Parties and supersede any prior oral or written agreement, commitments, understandings, or communications with respect to the subject matter of this Agreement. This Agreement shall not be amended unless agreed to in writing by the Authorized Representatives of each Party.

3. As regards applicable law and arbitration, Article 13 of the Creation Agreement provided as follows:

ARTICLE 13 – APPLICABLE LAW AND ARBITRATION

The formation, interpretation and performance of this Agreement shall be governed by and interpreted in accordance with the law of the Kingdom of Sweden. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with "Optional Arbitration Clause for Use in Contracts in U.S.A. – Russian Trade and Investment – 1992" (Prepared by American Arbitration Association and Chamber of Commerce and Industry of the RF), as modified in Exhibit A to this Agreement. The arbitration will be conducted exclusively in English and will be conducted in Stockholm.

4. Exhibit A, to which reference was made in Article 13, provided as follows:

Arbitration Agreement

1. Agreement to Arbitrate. Any dispute, controversy or claim between two or more of the Parties arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration. The award of the arbitrator shall be final and binding upon the parties.

2. Governing Rules. The arbitration shall be in accordance with the UNCITRAL Arbitration Rules as in effect on the date of this contract, except that in the event of any conflict between those Rules and arbitration provisions of this contract, the provisions of this Agreement shall govern. The arbitrator shall determine the matters in dispute in accordance with the substantive law, excluding choice of law rules, of the Kingdom of Sweden.

3. Appointment of Arbitrator. The number of the arbitrators shall be one. Upon application of one of the Parties, the Stockholm Chamber of Commerce shall appoint the arbitrator. The arbitration, including the making of the award, shall take place in Stockholm, Sweden.

4. Commencement of Arbitration. Any Party may commence an arbitration by applying to the Stockholm Chamber of Commerce for appointment of an arbitrator. The Party making the application for appointment of an arbitrator is the Claimant under the UNCITRAL Rules. The application for appointment will identify the other Parties to

this Agreement by name and address. A copy of the application for appointment of an arbitrator will be sent to all other Parties, and this copy will satisfy the requirement of Article 3, paragraph 1 of the UNCITRAL Rules for a notice of arbitration.

5. Issues in Dispute. The application for appointment will specify the issues that are in dispute, the position of the Initiating Party as to those issues, the identity of the Parties with whom the Initiating Party is in dispute, and will state the remedy that the Initiating Party seeks.

6. Participation. All Parties to this Agreement are entitled to participate in the arbitration hearing and to submit evidence to the arbitrator. For purposes of procedure under the UNCITRAL Rules, all Parties other than the Initiating Party will be treated as Respondents, even if they agree with some or all of the positions on the issues taken by the Initiating Party. The decision of the arbitrator will be binding on all Parties and their Affiliates, regardless of whether they choose to participate in the hearing.

7. Award. The arbitrator is authorized to award damages to the prevailing party and to order specific performance of any contractual obligation that he finds a Party is failing to perform. The arbitrator will make his award within thirty (30) days from the date that he establishes for final submittal or oral or written statements and documents to the arbitrators. An award will be in writing, will state the precise reasons for the award and will specify the remedy or relief granted (if any).

8. Enforcement. An award by the arbitrator will be final and conclusive as to the issue or issues that were the subject of the arbitration. The Parties hereby exclude any right of application or appeal to any court and in particular in connection with any question of jurisdiction or question of law arising in the arbitration or out of the award. The award will be enforceable in any court having jurisdiction over the Party against whom enforcement is sought, as well as in the courts of The Commonwealth of The Bahamas. All Parties hereby submit to the jurisdiction of the courts of The Commonwealth of The Bahamas for purposes of enforcement of any arbitration award.

9. Language. The Parties will use English as the single language for the arbitration proceeding.

10. Sovereign Immunity Waiver. Each Party hereby agrees that its participation in this transaction constitutes private and commercial activity and shall not be regarded as a governmental or public act. - - -

Should one Party or a Venture Company bring an arbitration proceeding against any other Party or its Affiliates arising out of the Joint Venture Agreement, no immunity from such arbitration or other legal proceeding to enforce an arbitration award (including, but not limited to, service of process, pre-judgment attachment of assets, suit, attachment of assets in aid of execution to enforce a judgment or arbitral award or other enforcement) shall be claimed by any Party or its Affiliate, or on behalf of the Government of the country (or with respect to the assets of that country) in which any Party or its Affiliate is located. To the extent that any Party may be considered an agent or instrumentality of a Government, that Party hereby irrevocably waives on behalf of that Government any such right of immunity which it or its assets now has or may hereafter acquire. As used herein, the term "assets" means all or any of the following, regardless of its intended use: money in any currency or form, any bank account and any other real or personal property.

This waiver is an explicit waiver of immunity under the Act against enforcements and execution of any judgment rendered in any dispute or action arising out of or related to the Agreement. Such judgment, if unsatisfied, shall be enforceable in the courts of any nation in accordance with the laws of such nation.

11. Interim of Provisional Remedies. Any Party commencing an arbitration under this Agreement may seek from any court of competent jurisdiction a temporary remedy

(such as an injunction or order to refrain from taking certain action) that is needed to preserve assets or the rights of that Party while the arbitration is being conducted. Once an arbitrator is appointed, the arbitrator may impose a temporary remedy, in addition to or to supplement any temporary remedy imposed by a court.

5. According to a notification, registered in the Norwegian Companies Register on 4 July 1996, Kværner Moss had changed its name to Kværner Maritime AS (hereinafter called *"Kværner Maritime"*).

6. In a letter of 8 October 1999, Kværner ASA, as parent company in the Kværner Group, sent to BCSC, Energia and Yuzhnoye a draft Assignment Agreement, also dated 8 October 1999, and asked them to sign it. According to its text, the parties to the Assignment Agreement were Kværner Maritime, as "Vendor", Kværner Invest Norge AS (hereinafter called *"Kværner Invest"*), as "Purchaser", and BCSC, Energia and Yuzhnoye, as "Partners". The Assignment Agreement contained the following provisions:

> WHEREAS:
>
> A. Vendor and Partners entered into an Agreement for Creation of Sea Launch Companies dated 3 May 1995 (the "Contract").
>
> B. The Vendor whishes (*sic*) to transfer all its obligations and benefits under the Contract to the Purchaser and the Partners agree to this in accordance with the terms and conditions contained herein.
>
> NOW IT IS AGREED as follows:
>
> 1. **Purchaser's undertaking**
>
> The Purchaser undertakes to perform the Contract and to be bound by the terms of the Contract in every way as if the Purchaser originally were a party to the Contract in lieu of the Vendor.
>
> The Purchaser also undertakes to cause its affiliates having ownership interests in the Company (as defined in the Contract) to perform the Contract and to be bound by the terms of the Contract in every way as if they originally were a party to the Contract in lieu of the Vendor.
>
> 2. **Partners undertaking**
>
> The Partners undertake to perform the Contract and to be bound by the terms of the Contract in every way as if the Purchaser originally were a party to the Contract in lieu of the Vendor.
>
> 3. **Release of Vendor**
>
> The Partners release and discharge the Vendor from all claims and demands whatever in respect of the Contract and accepts the liability of the Purchaser under the Contract in lieu of the liability of the Vendor.

7. The Assignment Agreement was signed by Kværner Maritime, Kværner Invest, BCSC and Yuzhnoye but not by Energia.

8. A document entitled "Boeing/Kværner Understandings", dated 30 June 2000, was signed by Boeing and Kværner ASA. It contained the following clauses:

> **Whereas certain clarifications are necessary and beneficial for the continued effective future operations and partner relationships of Sea Launch, Boeing and Kværner agree to the following understandings, which are subject to the full agreement of Sea Launch partners:**
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> - - -
>
> **Kværner Ownership Structure**
>
> 1. Kværner proposes that its Sea Launch legal and beneficial ownership obligations, as defined by the Creation Agreement, will be respectively transferred to the following Kværner ASA subsidiaries in accordance with Kværner's prior proposals:
> - Kværner Sea Launch, Ltd.
> - Kværner Sea Launch US, Inc.
> - Kværner Invest Norge, AS
>
> 2. Kværner Invest Norge, AS shall replace Maritime in the Creation Agreement. The obligations of Kværner Invest Norge under the Creation Agreement shall be guaranteed by Kværner ASA. Prior to the replacement of Maritime with Kværner Invest Norge, AS, Kværner ASA shall guarantee all obligations of Maritime under the Creation Agreement (as qualified hereunder).

9. In a letter of 3 July 2000, PO Yuzhnoye stated its approval of the "Understandings", subject to two amendments. In another letter of the same date, Energia proposed certain amendments. Energia ended its letter as follows:

> We would like to note that we did not receive yet completed draft of Boeing/Kværner Understandings, promised by Sea Launch in ref.(a), for review.

10. On 22 November 2000, Sea Launch Company, LLC circulated to Boeing, Kværner ASA, Energia and Yuzhnoye a Resolution with the heading "SEA LAUNCH CORPORATE STRUCTURE" and asked them to sign it. Sea Launch Company explained that they needed the Resolution signed in order to close a new loan. The Resolution was subsequently signed by BCSC, Moss Maritime (formerly Kværner Maritime), Energia and Yuzhnoye. It contained, *inter alia*, the following clause:

> 2.5. It is noted that it is proposed (i) to amend the Creation Agreement to substitute Invest for Maritime and to make the amendments set out in the Memorandum of Understanding dated 30th June 2000, and (ii) for Kværner to take over the loans previously made by Maritime to Sea Launch Limited Partnership and the obligation to make further advances in respect of the Loan Agreements dated 2nd February 1996 in each case with effect from the Effective Date and that it is intended to produce documentation in the short term in conjunction with the amendment of the financing structure of the project.

11. According to a notification, registered in the Norwegian Companies Register on 8 December 2005, Kværner Invest had changed its name to Kværner AS.

12. On 23 June and 12 October 2004 and on 11 July and 31 August 2005, Boeing and Kværner ASA entered into various Guarantee Agreements in

connection with loans to Sea Launch entities (the various Sea Launch partnerships and companies are hereinafter collectively referred to as *"Sea Launch"*).

13. According to information provided by Kværner AS in the present proceedings, there was a merger in 2005 between Kværner ASA and Aker Maritime Finance AS (hereinafter called *"Aker"*), from which Aker was the surviving entity.

14. On 22 June 2009, Sea Launch filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code before the United States Bankruptcy Court in the District of Delaware.

15. On 20 July 2009, Boeing sent an invoice of US$ 449,082,461.84 to Sea Launch, claiming that this was the total amount it had paid under the Guarantee Agreements.

16. On 21 August 2009, Boeing sent letters to Energia and Yuzhnoye, informing them that on 1 July 2009 it had made payments of altogether US$ 449,082,461.84 on each of the Guarantees and asking them to pay their shares in accordance with Article 9.4.2 of the Creation Agreement.

17. Moreover, according to information provided by Boeing, BCSC and Kværner AS in the present proceedings, Aker had issued a Promissory Note in favour of Boeing for the sum of US$ 121,611,530.94 representing approximately 27% of the debt Boeing had paid under the Guarantees. According to Kværner AS, this had been done on 11 September 2009.

18. According to an Assignment Agreement, dated 22 December 2009, Aker transferred to Kværner AS its claims related to the Guarantee Payments against Energia and Yuzhnoye.

II. Proceedings

19. On 19 October 2009, Boeing and BCSC submitted to the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter called *"SCC"*) a Notice of Arbitration against Energia, Yuzhnoye and Aker, the latter company as successor in interest to Kværner Moss and Kværner ASA. They indicated, however, that relief was sought only from Energia and Yuzhnoye and that Aker was named as Respondent for formal reasons. In the Notice of Arbitration, Boeing and BCSC requested SCC to appoint a sole arbitrator in accordance with Article 6(3) of the UNCITRAL Arbitration Rules.

20. Answers to the Notice of Arbitration were submitted to SCC by Energia, KB Yuzhnoye and Aker on 4 November 2009. In its Answer, Aker also gave Notice of its intention to file Cross-Claims against Energia and Yuzhnoye.

21. On 18 November 2009, SCC appointed former Justice Hans Danelius as Sole Arbitrator.

22. On 4 December 2009, Boeing and BCSC informed the Arbitrator that they did not intend to file an additional Statement of Claim but would rely on their Notice of Arbitration.

23. On 7 December 2009, the Arbitrator, after consultations with the Parties, determined a timetable for the Parties' Memorials. According to this timetable, Aker was to present its claims no later than 23 December 2009. Statements of Defense were to be presented by Energia and Yuzhnoye no later than 1 March 2010, after which Second Memorials were to be submitted by Boeing, BCSC and Aker no later than 15 April 2010 and by Energia and Yuzhnoye no later than 31 May 2010. As regards Yuzhnoye, the time-limit of 1 March 2010 was subsequently extended to 29 March 2010.

24. On 22 December 2009, Kværner AS announced that Aker had assigned its claims against Energia and Yuzhnoye to Kværner AS and that Kværner AS was therefore entitled to participate in the proceedings. Kværner AS also submitted a Statement of Cross-Claim against Energia and Yuzhnoye.

25. During the months of December 2009, January 2010 and February 2010, the Parties, at the Arbitrator's request, deposited the following advances for the Arbitrator's fees and expenses:

(a) Boeing/BCSC: EUR 25,000,
(b) Aker/Kværner AS: EUR 25,000,
(c) Energia: EUR 25,000,
(d) KB Yuzhnoye: EUR 12,500, and
(e) PO Yuzhnoye: EUR 12,500.

26. On 1 March 2010, Energia raised objections to the Arbitrator's jurisdiction.

27. On 4 March 2010, Kværner AS pointed out that Energia, instead of submitting a Statement of Defense within the time-limit of 1 March 2010, had only raised jurisdictional objections. Kværner AS requested the Arbitrator to order Energia to immediately submit its Statement of Defense in regard to the claims brought by Boeing, BCSC and Kværner AS. A similar request was made by Boeing and BCSC on 5 March 2010.

28. On 5 March 2010, Energia requested that the jurisdictional issue be dealt with as a preliminary question in a separate stage of the proceedings. On the same day, Yuzhnoye announced that they also intended to submit objections to jurisdiction and made a similar request for the jurisdictional issue to be dealt with separately as a preliminary question.

29. On 8 March 2010, Boeing, BCSC and Kværner AS objected to the requests for a separate examination of the jurisdictional issue.

30. On 10 March 2010, the Arbitrator decided to deal with the issues of jurisdiction separately as preliminary questions and determined a time schedule for written submissions on these issues.

31. On 29 March 2010, Yuzhnoye submitted a Memorial on the jurisdictional issues.

32. On 19 April 2010, Boeing, BCSC and Kværner AS submitted Memorials in response to Energia's and Yuzhnoye's jurisdictional objections.

33. On 10 May 2010, Energia and Yuzhnoye submitted their Second Memorials. Cost claims were submitted by Yuzhnoye on 10 May 2010 and by Energia on 18 May 2010.

34. On 31 May 2010, Boeing, BCSC and Kværner AS submitted their Second Memorials in which they also commented on Energia's and Yuzhnoye's cost claims.

35. Further submissions were made on 8 June 2010 by Boeing, BCSC, Energia and Yuzhnoye and on 9 June 2010 by Kværner AS. In their submissions of 8 June 2010, Energia and Yuzhnoye provided certain information on the calculation of their cost claims. In their submissions of 8 and 9 June 2010, Boeing, BCSC and Kværner AS drew the Arbitrator's attention to the position taken by PO Yuzhnoye in the bankruptcy proceedings in the USA in regard to the interpretation of the Creation Agreement.

36. On 9 June 2010, the Arbitrator decided that an oral hearing on jurisdictional issues should be held and that 13-15 September 2010 should be reserved for this purpose.

37. In accordance with that decision, a hearing was held in Stockholm on 13-15 September 2010. At the hearing the Parties were represented as follows:

(a) *Boeing and BCSC* by Mr. Michael B. Slade, Mr. Christopher J. Esbrook, Mr. Mark Light, Mr. Lars Edlund and Mr. Fredrik Elmér,

(b) *Kværner AS* by Mr. Claes Lundblad, Mr. Henrik Fieber, Mr. Torsten Storækre, Mr. Bård Sandstad and Ms. Jeanette Björk,

(c) *Energia* by Mr. Kaj Hobér, Mr. Richard Chlup, Mr. Fredrik Ringquist and Mr. Konstantin Ryabinin, and

(d) *Yuzhnoye* by Mr. Christer Söderlund, Mr. Mattias Rosengren and Ms. Olga Zelepukina.

38. The following persons were heard as witnesses at the hearing:

(a) *at Boeing's and BCSC's request:* Mr. James P. Noblitt and Mr. Patrick Enyeart,

(b) *at Kværner AS' request:* Mr. Hans Petter Høegh and Mr. Diderik B. Schnitler, and

(c) *at Energia's request:* Mr. Vyacheslav Vasilievich Vasiliev and Mr. Aleksandr Gdalevich Derechin.

39. In a letter of 14 September 2010, Boeing and BCSC declared that they accepted that Kværner AS had replaced Aker as a party in the arbitration and that the substitution of Kværner AS for Aker was effective with the date of filing.

40. Cost claims were submitted on 29 September 2010 by Yuzhnoye and on 30 September 2010 by Energia. Comments on these claims were received from Boeing and BCSC on 1 October 2010 and from Kværner AS on 6 October 2010.

III. Claims for Relief

41. Boeing and BCSC request

(a) reimbursement from Energia to Boeing of US$92,398,716.69 with interest,

(b) reimbursement from Yuzhnoye to Boeing of US$55,439,230.01 with interest, and

(c) compensation for costs.

42. Alternatively, BCSC independently seeks payment on Boeing's behalf of the same amounts from Energia and Yuzhnoye.

43. Kværner AS requests

(a) an order requiring Energia to pay to Kværner AS US$19,871,898.98 with interest,

(b) an order requiring Yuzhnoye to pay to Kværner AS US$11,923,139.39 with interest, and

(c) compensation for costs.

44. Energia requests that the Arbitrator

(a) dismiss the claims brought by Boeing, BCSC and Kværner AS for lack of jurisdiction;

(b) declare that Aker lacks *jus standi* in this arbitration; and

(c) order Boeing, BCSC, Aker and Kværner AS to compensate Energia, on a joint and several basis, for its arbitration costs, together with interest thereon in accordance with Sections 4 and 6 of the Swedish Interest Act, as from the date of the Award until full payment, and

(d) order Boeing, BCSC, Aker and Kværner AS to bear the fees and expenses of the Arbitrator.

45. Yuzhnoye requests

(a) that the Arbitrator dismiss the claims of Boeing, BCSC and Kvaerner AS for lack of jurisdiction and declare Aker in lack of *jus standi* and also in lack of "invitee status" in this arbitration, and

(b) that each and all of Boeing, BCSC, Aker and Kværner AS, on a joint and several basis, be ordered to reimburse Yuzhnoye's costs as well as the Arbitrator's fees and expenses, together with interest according to Article 6 of the Swedish Interest Act from the date of the Award until payment is made.

46. Boeing and BCSC request that the Arbitrator reject Energia's and Yuzhnoye's jurisdictional objections and order the Parties to proceed promptly to the merits of this dispute.

47. Kværner AS requests the Arbitrator to assume jurisdiction of the dispute and to allow Kværner AS to proceed with its cross-claims within the present arbitration.

IV. Arguments

Boeing and BCSC:

48. Pursuant to the Creation Agreement, BCSC, Energia, Yuzhnoye and Aker (as successor in interest to Kværner Moss and Kværner ASA) are partners in and owners of a venture known as Sea Launch. The shares of ownership are: BCSC 40%, Aker Group 20%, Energia 25% and Yuzhnoye 15%. Sea Launch is in the business of launching satellites into space from a modified offshore oil drilling platform anchored in the Pacific Ocean.

49. Article 9.4.2 of the Creation Agreement gives a Party *or an Affiliate* that guarantees Sea Launch debt a *substantive right to reimbursement* against Sea Launch and the Parties if any amounts are paid by that Party or Affiliate under the Guarantee. There is thus no doubt that the Creation Agreement created a substantive right of reimbursement for Boeing as an Affiliate of BCSC and "each Party" – including Energia and Yuzhnoye – agreed to that substantive right.

50. On 23 June 2004, at the request of Sea Launch, Boeing (as an Affiliate of BCSC) and Aker (through its predecessor in interest, Kværner ASA) entered into a Guarantee Agreement with JPMorgan Chase Bank (*"JPM"*) in which they jointly and severally guaranteed a US$270,000,000 loan by JPM to Sea Launch (as subsequently amended and restated in a US$260,000,000 Amended and Restated Credit Agreement between Sea Launch and Citicorp USA Inc., dated 19 June 2006).

51. On 12 October 2004, at the request of Sea Launch, Boeing (as an Affiliate of BCSC) and Aker (through its predecessor in interest, Kværner ASA) entered into a Guarantee Agreement with Sumitomo Mitsui Banking Corporation (*"Sumitomo"*) in which they jointly and severally guaranteed a US$31,000,000 loan by Sumitomo to Sea Launch.

52. On 11 July 2005, at the request of Sea Launch, Boeing (as an Affiliate of BCSC) and Aker (through its predecessor in interest, Kværner ASA) entered into a Guarantee Agreement in which they jointly and severally guaranteed a US$100,000,000 aggregate principal amount issue of floating rate senior notes to certain note investors.

53. On 31 August 2005, at the request of Sea Launch, Boeing (as an Affiliate of BCSC) and Aker (through its predecessor in interest, Kværner ASA) entered into another Guarantee Agreement with Sumitomo in which they jointly and severally guaranteed a US$100,000,000 loan by Sumitomo to Sea Launch.

54. On 22 June 2009, Sea Launch filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. Pursuant to calls received on the said Bank Guarantees, Boeing paid out a sum of US$449,082,462.84 on 1 July 2009.

55. On 20 July 2009, pursuant to Article 9.4.2 of the Creation Agreement, Boeing sent to Sea Launch an invoice requesting reimbursement of US$449,082,462.84. Thirty days passed without payment of the invoice by Sea Launch. Consequently, pursuant to the said Article 9.4.2, each of the partners must repay Boeing as Guarantor in proportion to their respective percentage ownership in Sea Launch. BCSC and Boeing have by agreement settled the share payable by BCSC.

56. Aker subsequently executed a promissory note in favour of Boeing for the sum of US$121,611,530.94, which represents approximately 27% of the debt Boeing paid on Sea Launch's behalf. Aker agreed to pay this sum to Boeing, even though it is in excess of the amount due under the Creation Agreement based on its *pro rata* ownership share in Sea Launch, because Aker was jointly and severally liable under the Bank Guarantees. Thus, Aker paid US$31,795,038.37 in excess of what it owed based solely on its 20% *pro rata* ownership share in Sea Launch. Boeing and BCSC do not seek reimbursement from Energia and Yuzhnoye of that amount. Thus, when calculating the claim for reimbursement, Boeing and BCSC subtracted US$31,795,038.37 from the amount Energia and Yuzhnoye are obligated to pay on the basis of their ownership share.

57. Alternatively, as a secondary position, BCSC alone seeks reimbursement under Article 9.4.2 of the Creation Agreement and the Guarantees issued pursuant to that provision. If Boeing did not have the right to initiate this arbitration, BCSC did, since BSCS has an independent right to initiate a claim on behalf of Boeing.

58. Although Energia and Yuzhnoye have made jurisdictional objections in the present case, it should be noted that PO Yuzhnoye, as a party to the Sea Launch bankruptcy proceedings in the United States, has taken the position that Article 13 of the Creation Agreement applies to non-signatories and that any dispute arising out of or relating to the Creation Agreement must be arbitrated regardless of whether the parties to the dispute signed the Creation Agreement. PO Yuzhnoye argued that the Official Committee of Unsecured Creditors – which was neither a signatory to the Creation Agreement nor an Affiliate under that Agreement – was nevertheless obligated to arbitrate disputes relating to the Agreement. This admission must be binding on PO Yuzhnoye in the present arbitration.

Kværner AS:

(a) The Kværner Group

59. The initial discussions regarding the Sea Launch project began in 1993. Participants in these discussions were Boeing, Energia, Yuzhnoye and Kværner ASA. It emerged that the parties had different resources and areas of expertise. This was, eventually, reflected in their respective contributions to the project.

60. Kværner ASA was, at the time, the parent company of the Kværner Group, which would be the supplier of the launch platform and command ship to the joint venture. Kværner ASA, which was the Kværner entity that negotiated the terms of the Creation Agreement, was the most substantive and resourceful entity within the Kværner Group. Yet, the other parties did not require that Kværner ASA would subsequently become a formal Party to the Creation Agreement. Instead, Kværner Moss, a wholly-owned subsidiary of Kværner ASA, became the formal Party to the Creation Agreement. Similarly, BCSC, rather than Boeing, signed the Creation Agreement as the formal participant representing the Boeing Group, in spite of Boeing being the more resourceful entity.

61. On 4 July 1996, Kværner Moss was renamed Kværner Maritime.

62. In 1999, the Kværner Group initiated a process with the goal of exiting all shipbuilding related businesses (with certain exceptions). As part of that process, the Kværner Group decided to sell off most of its shipbuilding division, including Kværner Maritime. However, it was not intended that the Kværner Group's interest in the Sea Launch project would be included in the sale of Kværner Maritime. Hence, as a preparatory step prior to the divestment, the Kværner interest in the Sea Launch project was to be transferred to Kværner Invest, another wholly-owned subsidiary of Kværner ASA. The Creation Agreement does not require that a Party to the Creation Agreement also holds the ownership in Sea Launch. This being so, the shares in the Venture Companies were, for organizational purposes, to be distributed among Kværner Invest and two of its subsidiaries, Kværner Sea Launch Ltd. and Kværner US Sea Launch Inc.

63. The Kværner Group continuously kept the other Parties updated on the progress of its divestment of Kværner Maritime. Hence, on 8 October 1999, the Parties were informed that Kværner Maritime's ownership interest in the Venture Companies constituting the Sea Launch project had been transferred to Kværner Invest and its subsidiaries. In that process, the Parties were also asked to sign the Assignment Agreement, giving their express consent to the transfer of Kværner Maritime's rights and obligations under the Creation Agreement to Kværner Invest. Both BCSC and the Yuzhnoye companies promptly signed the Assignment Agreement. Energia took the view that the Assignment Agreement as drafted might not cover the entire scope of Kværner Maritime's commitments and liabilities under the Creation Agreement. Hence, Energia suggested certain supplements to the Assignment Agreement. This notwithstanding, it was clear that Energia was not opposed to the assignment as such.

64. Even though Energia had not signed the Assignment Agreement, it was clear that the Parties had agreed that Kværner Invest had substituted Kværner Maritime in the Creation Agreement. This appeared, *inter alia*, from the Resolutions which followed a meeting held by the Parties on 22-23 January 2000 where Kværner Invest participated as an authorized representative instead of Kværner Maritime.

65. On 12 February 2000, and in accordance with the announced plan, Kværner ASA disposed of its shares in Kværner Maritime. All ownership interest in the Sea Launch project was at this point held by Kværner Invest and its subsidiaries. By omission, this was not reflected in Sea Launch's share registers. Instead, Kværner Maritime was still named as the shareholder. This omission however was of an administrative nature only and did not affect the true factual position as agreed between the Parties.

66. Sea Launch had over the years entered into numerous loan agreements with third party lenders. Some of these loan agreements required continued ownership and control by Kværner ASA over the Kværner Group's participation in the project. If a company outside the Kværner Group were to be the registered owner in the share registers of the Venture Companies, this might have violated relevant ownership covenants and, as such, constituted a technical event of default under these loan agreements. This possibility caused some concern particularly for Boeing.

67. During 2000, partly as a result of a previous launch failure, it became clear to the Parties that Sea Launch would soon experience a cash flow deficit. It therefore became vital that Sea Launch would receive additional financing. In order to allow Sea Launch to amend certain loan agreements, the potential event of default under the existing loan agreements needed to be cured.

68. On 30 June 2000, Boeing and Kværner ASA reached an understanding as to how they would secure the future operations of Sea Launch (the *"Boeing/Kværner Understandings"*). It was thereby agreed that the share transfers should be formalized and that Kværner Invest and its subsidiaries should be registered as the Sea Launch owners in the relevant Venture

Companies' share registers. Furthermore, the Parties' earlier agreement that Kværner Invest was to replace Kværner Maritime in the Creation Agreement was re-confirmed in the Boeing/Kværner Understandings.

69. The Boeing/Kværner Understandings were made subject to confirmation by all Parties to the Creation Agreement. In order to secure that the content of the Boeing/Kværner Understandings would later be ratified by all Parties, a draft version of the agreement was sent to Energia and Yuzhnoye for their review. Energia and Yuzhnoye, in letters of 3 July 2000, both took the position that some changes would have to be made regarding Sea Launch's repayment of partner loan losses. Energia's and Yuzhnoye's comments were taken into account in the final version. No amendment was proposed or made to the provision regarding the substitution of Kværner Invest for Kværner Maritime in the Creation Agreement.

70. In November 2000, a Resolution was circulated to all original Parties to the Creation Agreement. The Parties were informed that the Resolution had to be signed in order to formalize the transfer of Kværner Maritime's share in Sea Launch so that the additional financing needed could be put in place.

71. The Resolution made express reference to the Boeing/Kværner Understandings. The objective was to have the Parties formally confirm their acceptance of what had previously been agreed between Boeing and Kværner ASA for the benefit of the joint venture. The Resolution was subsequently signed by all Parties which implied that the Parties confirmed their agreement to substitute Kværner Invest for Kværner Maritime in the Creation Agreement.

72. On 8 December 2005, Kværner Invest was renamed Kværner AS. As part of a major company re-organization in 2005, Kværner ASA merged with Aker. Hence, as a matter of Norwegian law, Aker is the successor in interest of Kværner ASA.

73. Consequently, Kværner AS is now the proper Party to the Creation Agreement and hence entitled to invoke its arbitration clause against Energia and Yuzhnoye.

(b) Reimbursement of Guarantees

74. At the request of Sea Launch, and prior to Sea Launch filing for bankruptcy protection, Boeing, as an Affiliate of BCSC, and Aker had issued several Guarantees in favour of creditors of Sea Launch. Thus, Boeing and Aker had entered into Guarantee Agreements with banks and guaranteed an issue of floating rate senior notes to certain note investors.

75. After Sea Launch's bankruptcy filing, Boeing paid a sum of US$449,082,462.84 to the creditors under the Bank Guarantees. While Aker did not reject liability under these guarantees, Aker wanted to investigate the circumstances in some further detail, whereas Boeing elected to make payment in full without delay. On 11 September 2009, Aker issued a promissory note to Boeing for the sum of US$121,611,530.94. This sum represented about 27.1%

of the payment made by Boeing on behalf of Sea Launch. This percentage reflects the portion of the total amount of the Bank Guarantees due from Aker based on the inter-creditor obligations between Aker and Boeing towards the relevant lenders.

76. In its capacity of Affiliate, Aker held claims against Energia and Yuzhnoye by virtue of Aker's payment in relation to the guarantee commitments. These claims have subsequently been assigned to Kværner AS. While Aker was an Affiliate, the proper Party to the Creation Agreement is Kværner AS which in this capacity is entitled to participate in these arbitral proceedings.

77. According to the Creation Agreement, Kværner AS's portion of the total liability under the Bank Guarantees amounts to US$89,816,492.57. The balance in the amount of US$31,795,038.37 equals the amount owed by Energia and Yuzhnoye.

78. It should be noted that in the Sea Launch bankruptcy proceedings in the United States, the Respondents, in their alleged capacity as creditors, have filed proof of claims with respect to Sea Launch. On 4 May 2010, the appointed Creditor's Committee filed an objection to certain of these claims before the Bankruptcy Court. On 4 June 2010, PO Yuzhnoye filed a response to the Committee's objection. In its response, PO Yuzhnoye argued that any controversies in connection with the Creation Agreement are to be resolved by arbitration under the arbitration agreement contained therein. Hence, PO Yuzhnoye took the position that the Creditor's Committee cannot avoid the mandatory arbitration requirements of the Creation Agreement simply because the Committee is not a signatory to the Agreement.

79. The arguments presented by one of the Yuzhnoye parties before the Bankruptcy Court show that the position on jurisdiction taken by Energia and Yuzhnoye in the present arbitration is taken in bad faith. It is noteworthy that PO Yuzhnoye takes the position that the arbitration agreement now in dispute may extend so far as to comprise even Third Parties, as defined in the Creation Agreement. It would appear to be an inevitable consequence that the arbitration agreement also extends to Affiliates with a cause of action arising under the Creation Agreement.

Energia:

(a) General remarks

80. The Creation Agreement was signed by five parties, *i.e.* BCSC, Energia, Kværner Moss, KB Yuzhnoye and PO Yuzhnoye. It contains an Exhibit A which is the arbitration agreement and was signed by the same parties as the parties to the Creation Agreement. The arbitration agreement therefore relates to and covers only those parties which have signed it.

81. The Creation Agreement and the arbitration agreement are silent as to what law shall govern the arbitration agreement. In such case, it follows from Section 48 first paragraph of the Swedish Arbitration Act of 1999 that it shall

be governed by the law of the country in which "the proceedings have taken place or shall take place" pursuant to the agreement of the parties, *i.e.* in this case Swedish law. The law applicable to the arbitration agreement governs all issues concerning its validity, save for the question of whether a party was authorized to enter into an arbitration agreement or was duly represented.

82. Under Swedish law an arbitration agreement is only binding on those who are parties to it. Thus, no other parties are bound by the arbitration agreement than BCSC, Energia, Kværner Moss, KB Yuzhnoye and PO Yuzhnoye. This also appears from the wording of the arbitration agreement which refers to the "Parties" as they are defined in Article 1.1 of the Creation Agreement. It follows from the definition of a "Party" in the Creation Agreement that there are no other Parties to the Creation Agreement nor to the arbitration agreement. Consequently, the Arbitrator has no jurisdiction over the claims brought by Boeing.

83. Boeing and BCSC collectively claim payment from Energia to Boeing. BCSC is thus not bringing any claims of its own in this arbitration. Therefore, BCSC's claims against Energia for payment to Boeing must be dismissed.

84. The "cross-claim" is brought by Kværner AS. However, the signatory to the Creation Agreement and the arbitration agreement is not Kværner AS but Kværner Moss. Kværner AS has not shown that it is the "successor in interest" to Kværner Moss. It follows that the Arbitrator lacks jurisdiction over the claim brought by Kværner AS.

85. Energia does not consent to a "cross-claim" being brought by Kværner AS in this arbitration. In the absence of any express provision in the UNCITRAL Rules and in the arbitration agreement, there is no possibility for Kværner AS to bring a "cross-claim" against Energia in this arbitration. It follows from Clauses 4 and 6 of the arbitration agreement that arbitration must be initiated by applying to the SCC for appointment of an arbitrator. This has not been done by Kværner AS. The only Initiating Parties, as defined in Clause 6 of the arbitration agreement, are Boeing and BCSC. All parties other than the Initiating Party are to be treated as Respondents, which means that Kværner AS can only act as Respondent in this arbitration. The Arbitrator therefore lacks jurisdiction over the "cross-claim" brought by Kværner AS.

(b) Boeing's claims

86. Boeing is not a party to the Creation Agreement. Without being a party to the Creation Agreement and against the clear wording of that Agreement, Boeing alleges that it is entitled to bring a claim under the arbitration agreement in the Creation Agreement. Boeing essentially asserts *(i)* that the Parties to the Creation Agreement intended to create "multiple" substantive rights and obligations not only for the Parties but also for their "Affiliates" (including rights for Affiliates acting as third party Guarantors), and *(ii)* that the Parties also intended that any dispute concerning such alleged rights and obligations be resolved by arbitration pursuant to the arbitration agreement in the Creation Agreement.

87. The Creation Agreement has not conferred substantive rights and obligations on third parties such as Boeing. The principle of privity of contract is fundamental in Swedish law. A consequence of this principle is that a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. The prohibition is categorical with respect to the transfer of obligations to non-parties. Therefore, the Parties to the Creation Agreement could not have conferred any obligations on non-Parties. Whilst it is correct that a third party under certain exceptional circumstances is entitled to invoke rights arising under a contract to which it is not a party, the third party must prove that the parties intended to confer an independent right on him. That was not the intent of the parties in this case.

88. Moreover, as obligations cannot be imposed on a third party, dispositions of this kind cannot be conditional and require any counter-performance on part of the beneficiary. However, in this instance, any undertaking by a "Guarantor" to a third party lender is conditioned on the Guarantor's performance. Accordingly, Article 9.4.2 of the Creation Agreement does not constitute a third party beneficiary agreement.

89. Article 9.4.2 of the Creation Agreement is, at most, an undertaking made by the Parties vis-à-vis each other. Thus, a failure by a Party to make a payment pursuant to this Article could in principle constitute a breach of such Party's obligations vis-à-vis the other Parties. Having said that, and in view of the fact that the Parties under Article 9.4.2 are only liable *pro rata parte*, any such breach does not (and cannot) create an actionable claim between two or more Parties.

90. However, even if one were to assume that the Parties through the Creation Agreement conferred substantive rights on their Affiliates (which Energia disputes), it would not follow that a Party, let alone every Party, had agreed to arbitrate disputes under the Creation Agreement with Boeing. An arbitration agreement is separate from and independent of the main agreement. As a consequence, each and every Party must have expressed its intent to let Boeing bring claims under the arbitration agreement in the Creation Agreement. Additionally, for an arbitration agreement to come about, Swedish law requires that such intent be expressed clearly and unambiguously. Needless to say, the burden of proof for the existence of an arbitration agreement between the Parties and Boeing rests with Boeing.

91. It is clear from the wording of the Creation Agreement that the Parties did not intend that claims brought by or against Affiliates (or any other third party, for that matter) be covered by the arbitration agreement. The arbitration agreement relates to disputes between the Parties only. The Arbitrator therefore lacks jurisdiction to examine any claim brought by Boeing.

92. Boeing did not take part in the negotiations regarding the Creation Agreement. Energia, BCSC, Kværner Moss, KB Yuzhnoye and PO Yuzhnoye were the only Parties to the Creation Agreement and the arbitration agreement.

93. The reference in Article 13 of the Creation Agreement to "[a]ny dispute, controversy or claim arising out of or relating to the [Creation Agreement]" does not show that the Parties agreed that "any dispute" relating to the Creation Agreement would be arbitrated, irrespective of whether it was a dispute between the Parties. Such an argument lacks merit for a number of reasons.

94. First, it is clear that Article 13 of the Creation Agreement deals with the objective scope of the arbitration agreement (*i.e.* the issues covered by the agreement), and not with its subjective scope (*i.e.* who is bound by the agreement). The fact that Article 13 is silent on the subjective scope of the arbitration agreement cannot be taken to mean, and does not mean, that the Parties intended that non-Parties would be entitled to invoke the same.

95. Second, the Parties have in fact agreed on the subjective scope in the arbitration agreement. This agreement makes it clear that the Parties to the Creation Agreement alone are entitled and required to arbitrate disputes under that instrument. Clause 1 of the arbitration agreement refers to disputes between the Parties, and there are a number of other provisions (Clauses 3, 4, 5, 8, 9 and 11) which specifically mention the Parties.

96. Consequently, there is little doubt that the Parties did not intend to extend the arbitration agreement of the Creation Agreement to Affiliates or to any other third parties.

97. The reference to Affiliates in Clause 6 of the arbitration agreement cannot be taken to mean that the Parties envisioned that Affiliates would have *jus standi* to arbitrate disputes under the Creation Agreement, for the following two reasons.

98. First, while the last sentence of Clause 6 of the arbitration agreement provides that "[t]he decision of the arbitrator will be final and binding on all Parties and their Affiliates", the award would not be binding on such Affiliates even if that had been the intention of the Parties. Hence, the Parties could not have conferred a contractual obligation on Boeing to be bound by the arbitrator's award. At most, this clause means that the Parties have an obligation vis-à-vis one another to ensure that their respective Affiliates comply with the arbitrator's award.

99. Second, while the pronoun "they" in the last sentence of Clause 6 of the arbitration agreement could theoretically refer not only to "all Parties" but also to "their Affiliates", a more reasonable interpretation would be that "they" refers exclusively to the Parties, as mentioned in Clauses 1, 3, 4, 5, 8, 9 and 11 of the arbitration agreement. Such an interpretation is consistent with the first sentence of Clause 6, which only mentions the Parties as "entitled to participate in the arbitration hearing". If the Parties had intended that Affiliates should have a right to "participate in arbitration hearings", the normal approach would be to mention Affiliates in this first sentence. The fact that they did not do so strongly suggests that the final sentence of Clause 6 should be understood to mean that the arbitrator's decision will be binding on all Parties and their Affiliates, regardless of whether the Parties choose to participate in the hearing.

100. Furthermore, Article 14 of the Creation Agreement does not support Boeing's assertion that it is entitled to invoke the arbitration agreement in the Creation Agreement. In addition to a categorical prohibition for a Party to assign or transfer its interests or any part thereof in the Creation Agreement, this provision stipulates that a Party may become a partner or owner in a "Venture Company" through an Affiliate, but that each Party "guarantees to the other Parties that the Affiliate will comply with and be bound by the terms of the Agreement".

101. Article 14 of the Creation Agreement makes it clear that, even if Boeing were an Affiliate that was a partner or owner in a Venture Company, which it is not, Boeing would still not be a Party to the Creation Agreement. Thus, even in this situation, Boeing would not be entitled to invoke the arbitration agreement, which only applies to Parties. This is fully consistent with the prohibition of assignment contained in the same article. Consequently, Article 14 of the Creation Agreement does not support Boeing's position on the issue of jurisdiction.

102. Moreover, a dismissal would not result in there being no venue for Boeing to pursue its alleged claims. During the past 15 years, the entities active in the Sea Launch project have concluded numerous agreements containing different kinds of dispute resolution clauses. Consequently, it is by no means true that there has been an agreement that all disputes relating to the project be settled under the Creation Agreement.

(c) BCSC's claims

103. As a Party, BCSC is, as a matter of principle, entitled to submit a claim to arbitration pursuant to the arbitration agreement in the Creation Agreement. However, even on its own case, BCSC does not have a claim as a "Guarantor" under Article 9.4.2 of the Creation Agreement and, consequently, is not the holder of the purported right to reimbursement under this Article. Nor could BCSC have any other claim vis-à-vis Energia (or any other Party, for that matter), based on Article 9.4.2 of the Creation Agreement.

104. The argument that BCSC would exercise the rights of Boeing ignores the fact that the party on whose behalf BCSC wishes to bring a claim, *i.e.* Boeing, is not a Party to the arbitration agreement. BCSC's claims must be dismissed for this reason alone.

105. BCSC's assertion also ignores the well-established procedural principle under which a judgment or an arbitral award cannot order performance in favour of a third party.

(d) Kværner AS's claims

106. Kværner AS is not the "proper party" to the Creation Agreement and the arbitration agreement. In fact, the authorized representatives of Energia had

never heard of Kværner AS prior to these arbitral proceedings. The only Kvaerner entity involved in those negotiations was Kværner Moss.

107. The wording of the Creation Agreement indicates that the Parties attached importance to the identity of the counterparties under the Creation Agreement. Article 14 sets forth a categorical prohibition for a Party to assign or transfer its interests or any part thereof in the Creation Agreement. The Parties adopted a more liberal approach as to who could become partners or owners in the Venture Companies comprising the Sea Launch partnership. Hence, the Parties made a very clear distinction between the assignment and transfer of interests in the Creation Agreement, on the one hand, and the transfer of ownership in a Venture Company, on the other. It was the Parties' understanding that Article 14 refers only to the possibility of Affiliates becoming partners or owners in the Venture Companies. The Parties had no intention to extend rights and obligations under the Creation Agreement to Affiliates.

108. The importance of the above cannot be overstated with respect to the issue as to whether Kværner AS is a Party to the arbitration agreement. First, the prohibition of assignment in Article 14 of the Creation Agreement means that any non-signatory to the Creation Agreement which asserts that it has become a Party to that Agreement must be held to a very high standard of proof. Such non-signatory must show that each Party gave its unconditional consent to succession not only under the Creation Agreement but also under the arbitration agreement. This is all the more the case as the Parties agreed that the Creation Agreement shall not be amended unless agreed to in writing by each Party. The Creation Agreement has not been amended with respect to what entities are "Parties". Second, the fact that each Party was given the right to transfer ownership in a Venture Company to an Affiliate means that the participation of non-Parties in Venture Companies was foreseen and did not have any bearing on the issue of succession under the Creation Agreement and the arbitration agreement.

109. Kværner AS has not shown that Energia consented to the assignment of Kværner Maritime's interests under the Creation Agreement to Kværner Invest, let alone consented to the assignment of the arbitration agreement in the Creation Agreement.

110. Energia never signed the draft Assignment Agreement. In fact, although not necessary, Energia even wrote a letter, dated 26 October 1999, clarifying that it *did not consent* to the proposed assignment. In the letter, Energia raised objections to the proposed assignment and proposed that these be discussed at the next board meeting in November 1999.

111. In support of its assertion, Kværner AS relies on resolutions of the members of Sea Launch Company, LDC, one of the Venture Companies. However, these resolutions only show that Kværner Invest participated in the decisions of one of the Venture Companies. The Parties (including Kværner Moss as renamed) were free to transfer ownership in a Venture Company to an Affiliate, in accordance with Article 14 of the Creation Agreement. Thus, the fact that Energia did not object to Kværner Invest's participation in these

meetings does not imply that Energia had agreed that Kværner Invest had replaced Kværner Maritime in the Creation Agreement. Nor does it mean that Kværner Invest had replaced Kværner Maritime in the arbitration agreement. Consequently, Kværner Maritime still held all rights and obligations under the Creation Agreement when, on 12 February 2000, Kværner ASA, the parent company of Kværner Maritime, divested its interests in Kværner Maritime. It is a fundamental principle of any legal system that a party cannot confer rights and obligations which it does not have. This fact alone means that Kværner AS cannot have become a Party to the Creation Agreement, nor to the arbitration agreement contained therein.

112. Energia has not subsequently consented to any transfer of rights and obligations under the Creation Agreement. The "Boeing/Kværner Understandings" are, as the title suggests, "Understandings" between those two companies. Energia has no part in them. If anything, the "Understandings" confirm Energia's position, since they make it clear that no assignment or transfer of rights and obligations under the Creation Agreement (valid or invalid) had in fact taken place. The letter of Energia dated 3 July 2000, relied on by Kværner AS, does not support the proposition that Energia agreed that Kværner Invest could substitute Kvaerner Maritime under the Creation Agreement, nor under the arbitration agreement. In fact, in the last sentence of the letter Energia states that it "did not receive yet completed draft of Boeing/Kværner Understandings". Energia cannot be expected to object to proposed language in a preliminary draft. Failure to do so cannot be viewed as constituting unconditional consent to the assignment of rights and obligations under the Creation Agreement and the arbitration agreement, not least since Energia actually objected to the proposed assignment in a letter dated 26 October 1999.

113. Nor did Energia consent to such assignment through the document titled "SEA LAUNCH CORPORATE STRUCTURE" as of November 2000. The document only states that "[i]t is noted that it is proposed (i) to amend the Creation Agreement to substitute Invest for Maritime". Thus, there was no assignment request in this document, but simply a proposal to amend the Creation Agreement that was "noted". Moreover, this proposal did not result in an amendment of the Creation Agreement, which shows that Energia never consented to the substitution. In view of the foregoing, Kværner AS has not become a Party to the Creation Agreement. In any event, Kværner AS has not shown that Energia specifically consented to the assignment of the arbitration agreement contained in the Creation Agreement.

114. Kværner AS's claims must in any event be dismissed. On its own case, Kværner AS bases its purported right to reimbursement on the Assignment Agreement concluded between Aker and Kværner AS on 22 December 2009. A fundamental principle of Swedish law, enshrined in Section 27 of the Instruments of Debt Act (1936:81), is that a successor does not acquire a "better" right against the debtor than the assignor had. This principle, which applies also with respect to rights under arbitration agreements, means that the purported debtor (in this case Energia) is entitled to raise the same objections against the assignee (Kværner AS) as against the assignor (Aker).

115. Energia invokes the same arguments on jurisdiction against Kværner AS's claim as against Boeing. Privity of contract is a fundamental principle of Swedish law. Although a third party under certain exceptional circumstances can invoke rights arising under a contract to which it is not a party, the party in question must prove that it was the intention of the contracting parties to confer an independent right on the third party. The Parties to the Creation Agreement did not intend to confer a right on Aker. At most, Article 9.4.2 of the Creation Agreement can be viewed as an undertaking made by the Parties vis-à-vis each other.

116. Moreover, and in any event, it is clear from the wording of the Creation Agreement and the arbitration agreement contained therein that the Parties did not intend to extend the arbitration agreement of the Creation Agreement to Aker or to any other third parties.

117. The Parties have defined the subjective scope of the arbitration agreement in a clear and unambiguous manner. Clauses 1, 3, 4, 5, 8, 9 and 11 of that agreement demonstrate the Parties' intention to limit the subjective scope of the agreement to disputes between the Parties to the Creation Agreement. The reference to Affiliates in Clause 6 of the arbitration agreement cannot be taken to mean, and does not mean, that it was the Parties' intention to confer the right to bring claims under the arbitration agreement on Aker. A dismissal of Kværner AS's claims would not result in there being no venue for Kværner AS to pursue its alleged claims.

(e) Cross-claims

118. In the absence of any express provision in the arbitration agreement and in the UNCITRAL Arbitration Rules, there is no possibility for Kværner AS to bring a cross-claim against Energia in this arbitration. Based on the arbitration agreement, it is clear that the Parties never intended that a Party (let alone non-Party Affiliates such as Kværner AS) should have the right to bring cross-claims. When interpreting the arbitration agreement, Kværner AS ignores a number of provisions which demonstrate this fact, in particular Clauses 4, 5 and 6. Read together, these provisions mean *(i)* that an arbitration can only be commenced by application to the SCC for appointment of an arbitrator, *(ii)* that the "Initiating Party" is the Claimant under the UNCITRAL Arbitration Rules, and *(iii)* that all other parties than the "Initiating Party" will be treated as Respondents. Thus, Kvaerner AS is to be treated as a Respondent, and the Parties have not given a Respondent the right to submit cross-claims. Had they wanted to do so, it would have been perfectly natural to express such an intention in the detailed arbitration agreement. By contrast, the arbitration agreement demonstrates that the Parties had the opposite intention, *i.e.* that a Respondent cannot at the same time act as a Claimant. This intention of the Parties is further demonstrated by the fact that they selected the UNCITRAL Arbitration Rules, which do not entitle a Respondent to submit a cross-claim, but only a counter-claim and/or a set-off claim (Article 19 of UNCITRAL Arbitration Rules).

119. Moreover, the inclusion of Kværner AS's cross-claim in this arbitration would be inappropriate. First, Kværner AS waited more than two months before submitting an eight-page Statement of Cross-Claim. Second, an inclusion of this cross-claim would cause inconvenience and burden the proceedings. The proceedings have already been adversely affected by Kværner AS's cross-claim. Due to complicated circumstances surrounding the alleged assignment of rights and obligations under the Creation Agreement, Energia has been forced to spend a considerable amount of time and resources on factual and legal issues which do not arise in relation to the alleged claims of Boeing and BCSC.

120. Boeing and BCSC initiated this arbitration on 19 October 2009. However, the assignment of Aker's alleged claims against Energia and the notification of such assignment did not take place until 22 December 2009, *i.e.* after the initiation of the arbitration. In such situations a respondent/debtor is not bound by an arbitration agreement. The Arbitrator therefore lacks jurisdiction.

(f) Aker's position

121. There were no "formal" reasons to name Aker a Respondent in this matter. Aker should therefore be dismissed as a Respondent. Energia has noted that Boeing and BCSC have subsequently substituted Kværner AS for Aker as a Respondent and has no comments on this substitution.

Yuzhnoye:

(a) General remarks

122. Boeing seeks reimbursement of certain moneys allegedly due from Yuzhnoye under Article 9.4.2 of the Creation Agreement which provides that, if a Venture Company fails to reimburse a Guarantor for any payment made by the Guarantor to a third party lender, then each Party to the Creation Agreement shall pay a *pro rata* part of such amount to the Guarantor.

123. The Parties to the Creation Agreement are listed in the head of that instrument. There is also *ex abundante cautela* in Article 1.1 a definition of "Party". In Article 14 of the Creation Agreement there is a categorical prohibition of assignment of a Party's interests in the Agreement. In the arbitration agreement, the essential elements of which are found in Exhibit A to the Creation Agreement, there are several references to "Parties" or "Party".

124. The Creation Agreement makes a distinction between the question of which entities shall be Parties to the Agreement and the question of which entities shall have ownership rights in the Venture Companies. Assignment and transfer are treated differently in the Creation Agreement. The entities must not necessarily be the same but may be different. However, the only legal entities that can bring proceedings under the arbitration agreement are the "Parties" as defined in that instrument. They do not include Boeing, Kværner AS or Aker.

125. Not only have the Parties given particular weight to defining which entities are "Parties" to the arbitration agreement, but it also follows from this agreement that they have intended other entities not to be "Parties" thereto. For instance, the fact that Clause 6 of the arbitration agreement specifically stipulates that an award shall be binding also on an "Affiliate" would have been superfluous, if the Parties had intended that an "Affiliate" were to qualify as a "Party" under the Arbitration Agreement.

126. It is a fundamental tenet of arbitration law that arbitration is based on consent, *i.e.* that it is binding only on those who are parties to an arbitration agreement. In the event where a particular arbitration agreement – as in the present case – is clear and unambiguous, there can be no uncertainty as to which entity may initiate arbitration and which entity may not. As there is a perfectly clear and unambiguous expression of intent by the Parties to the Creation Agreement, there is no room for entering into a reasoning based on hypothetical or assumed intent (in clear conflict with the express wording of the arbitration agreement) and on certain theories based on third party beneficiary, assignment, representation and the like. There is also no justification for discussing "intent" in respect of Affiliates, as these entities have not expressed any intent by acceding to the Creation Agreement.

127. Boeing is not a Party to the Creation Agreement but an "Affiliate" in the meaning of that Agreement and does not have *jus standi* to bring a claim under the arbitration agreement. As a consequence, the Arbitrator lacks competence to adjudicate any claim brought by that company.

128. BCSC is a Party to the Creation Agreement and is, as such, entitled to submit a dispute to arbitration on the basis of the arbitration agreement. However, based on the presentation made by Boeing and BCSC, it is only Boeing, as purported Guarantor, that could arguably be advancing a claim for reimbursement. As BCSC is not advancing any claim of its own, the Arbitrator lacks competence to adjudicate any claim also in relation to BCSC. When two parties jointly advance a claim, both parties must have *jus standi* in order for the claim to be admissible in arbitration.

129. In order for a matter to be brought to arbitration, and for jurisdiction to be vested in the arbitrator, it is a prerequisite that there is a dispute between the parties. From the factual account presented by BCSC it appears that BCSC does not bring any dispute on its own against the other entities figuring in the arbitration. Hence, there is no dispute involving BCSC.

130. According to the assertions of the Claimant parties, neither BCSC nor Kværner AS (or Aker) has discharged any payment obligation vis-à-vis third party lenders as "Guarantor". Consequently, there are no facts alleged by the Claimant parties which create a *prima facie* assumption that jurisdiction exists.

131. Aker was named as a Respondent by Boeing and BCSC, although they sought no payment from Aker, only to satisfy the formal requirements of the arbitration agreement. However, there is no requirement to name a non-Party to the Creation Agreement as "Respondent". Aker must be dismissed as

Respondent, firstly because it is not a Party to the arbitration agreement and secondly because there is no dispute between Aker and any Party to the Creation Agreement. A party, whether claimant or respondent, need not accept that another person not bound by the applicable arbitration agreement is allowed to take part in the proceedings. Yuzhnoye does not consent to Aker taking part in this arbitration. Yuzhnoye has noted that Boeing and BCSC have subsequently substituted Kværner AS for Aker as a Respondent.

132. Boeing and BCSC are, in the terminology of the Creation Agreement, the "Initiating Parties" in this arbitration. Kværner AS has interloped in the arbitration under the guise of "Cross-Claimant". Yuzhnoye rejects Kværner AS's intrusion for the following reasons.

133. Kværner AS is not a party to these proceedings by succession or otherwise. It lacks *jus standi*, and its claim must be rejected for lack of jurisdiction. Clause 6 of the arbitration agreement simply means that a non-disputant party may take part in the proceedings as an "invitee".

134. So called cross-claims, *i.e.* claims raised by one respondent against another respondent, are not admissible in the absence of a specific agreement to such effect. In the case of the Creation Agreement, the Parties have not admitted the lodging of cross-claims. Instead, they have, by referring to the UNCITRAL Arbitration Rules, which only allow for counter-claims and set-off claims, explicitly excluded the possibility to submit any cross-claim in this arbitration. Clause 6 of the arbitration agreement also proscribes a situation where a Respondent will at the same time act as a Claimant.

135. Kværner AS's claim is based on the affirmation that Aker's purported claims against Yuzhnoye have been assigned to Kværner AS and that this would entitle Kværner AS to bring a claim in this arbitration. However, a party which does not have an arbitrable claim cannot procure that such claim be allowed in arbitration by simply assigning it to a party which has concluded an arbitration agreement in respect of another contractual relationship. The assignment of a claim cannot vest other or different rights – such as an entitlement to arbitration – in the assignee than those held by the assignor.

136. Additionally, Yuzhnoye has not been notified of any assignment of any purported claim by Aker against Yuzhnoye. In order for an assignee to be able to vindicate an assigned claim in arbitration, it is necessary that the notification reaches the addressee prior to – or, possibly, at the same time as – the request for arbitration.

137. Yuzhnoye does not accept the suggestion that there has been an assignment of a claim from Aker to Kværner AS. Furthermore, if a payment had taken place, it has been made on the basis of an undisclosed inter-guarantor agreement between Boeing and Aker and not on the basis of any Guarantee undertaken vis-à-vis a third party lender. Kværner AS has not even alleged that it advances a claim for reimbursement of a Guarantor payment to a third party lender but stated that it made a payment to Boeing under an inter-guarantor

agreement, and its claim must also be dismissed on the ground that there is a clear lack of asserted facts grounding competence.

(b) Boeing's and BCSC's claims

138. Boeing and BCSC appear to bring a joint action, not distinguishing the alleged causes of action that they may entertain (with the exception of the secondary position of BCSC representing Boeing). In view hereof, it should be emphasized that if two parties bring a joint action and one of those parties lacks *jus standi*, the action must be dismissed *in toto* on jurisdictional grounds.

139. The argument that Yuzhnoye agreed in Article 13 of the Creation Agreement to arbitrate all claims related to the Creation Agreement must fail, because Article 13 cannot imply that Yuzhnoye gave its consent to arbitrate claims with other entities than the Parties. The provision is obviously concerned with the objective scope of the arbitration agreement.

140. The Creation Agreement does not create rights and obligations for the Affiliates. A contract can only create rights and obligations for the parties to an agreement. A party can certainly assume a duty to discharge certain functions of any third party (such as Affiliates, Venture Companies, Parents or Subsidiaries), but that does not mean that such third party can exercise any right or obligation that derives from a contract to which it is not a party.

141. Consequently, the Creation Agreement does not bind, by its substantive or procedural provisions, Affiliates. In fact, Affiliates are not signatories to the Creation Agreement and have not committed themselves under this instrument. On the contrary, the Agreement provides that the identity of the Parties shall remain unchanged (and that those Parties thus shall be bound by the Creation Agreement). An Affiliate can, exceptionally, be a title holder to a Venture Company (and Article 14 may be considered as containing an option to such effect). However, only Kværner Moss has made use of the possibility to have an Affiliate hold title to Venture Companies. Boeing does not hold title to any Venture Company, and its cause of action is not premised on any such purported (non-existing) title.

142. The undertaking in Article 9.4.2 of the Creation Agreement to the effect that "each Party agrees to pay the Guarantor a percent of the amount paid to the Third Party" is an undertaking made by the Parties in their relationship to each other. The fact that a Party would not make such a payment would arguably constitute a breach in a Party's relationship to the other Parties. However, as the Parties are liable *pro rata parte* and do not carry joint and several liability for such breach – if it had occurred – it does not give rise to an action for damages or any other relief in the relationship between one Party and another.

143. There is no duty for a Party – owed to the other Parties to the Creation Agreement – to answer for any Guarantee undertaken by an Affiliate to a Third Party that can be exercised on a substantive level. Such a liability is contingent on the provision of a Guarantee and the failure of the Venture Companies to reimburse such a Guarantee, and on the absence of circumstances which would

vitiate any right of reimbursement, matters which must be based on a contractual relationship between a Party and Boeing (whether represented by BCSC or not) and Aker.

144. Yuzhnoye recognizes that BCSC is a "Party" to the Creation Agreement, and that this legal entity therefore would be entitled to submit a dispute "arising out of or relating to" the Creation Agreement to arbitration on the strength of the arbitration agreement. However, BCSC is not entitled to bring a claim on behalf of Boeing, because the determinative question for such right is whether the principal – *i.e.* the party in whose interest and on the account of which a claim is pursued – is a party to an arbitration agreement and not its representative. Nor is there any justification for BCSC otherwise to pursue an action in Boeing's interest.

(c) Kværner AS's claims

145. The position of, and all objections raised by, Yuzhnoye against the Arbitrator's jurisdiction vis-à-vis Boeing and BCSC are invoked also in respect of Kværner AS. In addition, the following is submitted.

146. Yuzhnoye accepts that it has signed the Assignment Agreement of 8 October 1999. As for the "Boeing/Kværner Understandings", there is no final approval given in Yuzhnoye's letter of 3 July 2000 or otherwise. According to Article 17 of the Creation Agreement, any amendment of the Creation Agreement may not be made "unless agreed to in writing by - - - each Party".

147. It would also seem that Energia has not given any form of acceptance to the substitution of Parties. This must imply that there has not occurred any effective Party substitution, since Article 14 of the Creation Agreement includes a categorical prohibition for any Party to transfer its interest in the Agreement.

148. It is clear that this unconditional proscription against assignment may be overridden by any subsequent agreement by the Parties. However, in view of the categorical wording of this prohibition, it is necessary that such amendment must have the unconditional approval by *all* Parties to the Creation Agreement, *i.e.* also Energia. Lacking the latter, there cannot have occurred any Party substitution.

149. Moreover, cross-claims are only allowed if they can be based on an agreement between the parties. In the present case, a cross-claim is not allowed by the arbitration agreement. Nor have the Parties accepted such claims by referring to the UNCITRAL Arbitration Rules which do not contain any provision allowing such claims.

150. In the course of ongoing discussions on the revision of the UNCITRAL Rules, the matter is being considered, but it is clear that at the present stage these Rules do not envisage the admissibility of cross-claims.

151. It is not sufficient to base jurisdiction on the fact that Kværner AS has *asserted* that its claim is based on the Creation Agreement. According to the so-called assertion doctrine, it is not enough for a party to assert that its claims are based on a particular substantive agreement (including an arbitration clause). It is instead for the Arbitrator to determine whether the factual circumstances invoked, but not necessarily proven, by the party would or would not ground jurisdiction.

152. In the present case it is clear that the factual circumstances which are alleged by Kværner AS do not ground jurisdiction. Kværner AS does not assert that the alleged claim which has been assigned to Kværner AS is based on any payment by Aker as "Guarantor" to any "Third Party" lender. Instead Kværner AS describes that the claim which has been assigned to the company relates to an alleged payment made by Aker (in the form of a promissory note) to Boeing based on an alleged inter-creditor agreement between these parties. It is therefore evident that the claim submitted by Kværner AS is not, by the company's own description, a situation where an Affiliate has made a payment to a Third Party on the basis of a Guarantee as described by Article 9.4.2 of the Creation Agreement.

153. The assignment of Aker's purported claim against Yuzhnoye and the notification hereof were made after initiation of this arbitration, and does not vest *jus standi* in Kværner AS.

(d) Additional considerations

154. Yuzhnoye does not consider it useful to engage in any general discussion of whether the Parties wanted to minimize the procedural complications inherent in a multi-jurisdictional effort. It is not for the Arbitrator to evaluate any general issues of dispute resolution policies that may or may not have been considered in any particular case, but to simply consider the remit of the Parties' agreement on dispute resolution as it has manifested itself in the relevant arbitration agreement.

155. Obviously, it is not sufficient that a dispute may be related to a contractual relationship, but there must also be *jus standi* in respect of the disputants for purposes of referring a particular dispute to arbitration (subjective arbitrability).

156. The relevant contractual provision, Article 14, means that a Party to the Creation Agreement may have an Affiliate hold the ownership interest in a Venture Company. This has nothing to do with the question which entities are "Parties" to the Creation Agreement. Quite on the contrary, Article 14 goes on to say that "no Party shall assign, nor in any manner transfer, its interests or any part thereof in this Agreement". Therefore, Article 14 of the Creation Agreement reconfirms the limitation of the *jus standi* in the arbitration to the Parties as defined in that Agreement.

157. It is obvious and fundamental that an arbitral award cannot *ipso jure* be binding on anyone else than a party to the pertinent proceedings. The fact that a

non-party is identified to assume obligations in a contract to which it is not a party carries no contractual implications.

158. The Creation Agreement is an agreement between the Parties, and not an agreement between Parties and any Third Party, including an Affiliate.

159. A third party beneficiary agreement (*"tredjemansavtal"*) is an agreement whereby two or more parties bequeath on a third party – *i.e.* an entity not a party to the agreement – an independent right. Normally, it is a matter of a bi-partite agreement, where the two parties agree that one of them shall extend a certain beneficial right to a third party. As such a contractual disposition cannot be subject to any obligation – obligations cannot be imposed on a third party – the right cannot be made contingent on conditions, and cannot therefore require any counter-performance on the part of the third party. In the circumstances of the present case, any purported undertaking by a Party to an Affiliate as a "Guarantor" to a third party – is conditioned on the Guarantor's performance, *i.e.* the issuance of a Guarantee to a "Third Party" and a payment under that Guarantee. Therefore the Creation Agreement does not, and did not, intend to confer upon an Affiliate or any other Third Party an independent and unconditional benefit. The arbitration agreement of the Creation Agreement clearly establishes that a "Guarantor", which is not a Party to the Agreement, was not intended by the Parties to submit such question in the present arbitration.

160. The fact that the Parties may have reaffirmed the contents of Article 9.4.2 of the Creation Agreement in the context of certain board resolutions involving the Venture Companies does not add or detract anything to the reasoning above, and, in particular, does not bring any non-party Guarantor within the remit of the arbitration agreement.

161. If Article 9.4.2 of the Creation Agreement were to be considered a third party beneficiary agreement, it should be noted that a third party beneficiary cannot invoke an arbitration clause contained in the agreement, where two or more parties have granted the third party a right. The reason for this is the following.

162. The arbitration agreement is separate from the main agreement containing the substantive terms. The relevance of this principle is present not only when determining whether an agreement alleged to be invalid is subject to arbitration, but also in the context of agreements that bestow a benefit on a third party.

163. It is clear that an arbitration agreement bestows not only benefits but also obligations. Most importantly, it prevents a party from bringing an action before a court of law to obtain any kind of relief. It also imposes an economic burden, and the necessity to subject itself to a specific procedure to which it cannot be bound in the absence of consent. If not for the principle of separability, any third party agreement including an arbitration agreement would not represent only a right and could not be exercised by the third party.

164. Consequently, a third party cannot be bound to an arbitration agreement for the simple reason that it has not given its consent to arbitrate. If it were considered to be bound, it would produce the absurd result of a third party being effectively deprived of its right to recourse to the court without its consent.

165. As it is not possible to bind a third party to an arbitration agreement without its consent, it follows that a third party beneficiary does not have a right to invoke an arbitration agreement.

166. It is an intrinsic feature of Swedish arbitration law that it does not accept an asymmetrically binding effect (*"haltande bundenhet"*) of an arbitration agreement.

167. There can certainly exist arbitration agreements which are asymmetric in nature, which by their very wording confer upon a party the choice of going to court or to arbitration (and, obviously, investment protection treaties typically contain a choice of options extended to the investor). Such clauses are normally accepted as enforceable. However, this requires express language to such effect.

168. First of all, Yuzhnoye does not accept that Boeing or Aker has any rights based on the Creation Agreement. There is no agreement signed by the Parties to the Creation Agreement, on the one hand, and Boeing and Aker, on the other, as to the former Parties' undertaking of a second-tier guarantee.

169. On the question whether an arbitrator may order a party to effect payment – or other performance – to a third party, *i.e.* a non-party to the arbitration, the following should be noted.

170. The question whether a party is entitled to bring a certain legal action on behalf of a third person – not party to the relevant proceedings – is a matter of procedural law. Such a matter – which does not constitute part of the substantive aspect of the dispute – must be determined according to the procedural rules at the seat of the arbitration.

171. The matter of whether an action may be brought to order a counterparty to effect payment to a third party not taking part in the particular action has been decided in a Swedish Supreme Court judgment in 1984 (NJA 1984 p. 215). The Supreme Court held that there is no reason to allow a party to bring an action concerning a third person's rights. Such an action should therefore, the Court held, be dismissed on procedural grounds. In the present case there are no circumstances which would justify a Party to the Creation Agreement to bring an action against another Party for the benefit of a third person, *i.e.* a "Guarantor".

172. There are other compelling reasons why an arbitrator cannot grant relief vis-à-vis a third party which has not been a party to the proceedings. There is the question of the *res judicata* effect of the award. Potentially insoluble situations would arise where the third party considers that the action, as it has

been framed by the unauthorized interlocutor, should have been represented in a different way for a more auspicious outcome, and where the procedural bar of *res judicata* should normally be the appropriate tool.

173. There is also the inherent inequality in the concept of a non-party beneficiary, where the third party risks nothing in the event of failure, and where another party will be liable for costs as between the parties. Extricating from each other the assessment of the merits of the case from the potential liability for costs, depending on that assessment, will upset the balance of procedural equality.

174. BCSC's and Kværner AS's claims, if and to the extent they have been submitted on behalf of Boeing and Aker, respectively, must therefore be dismissed on procedural grounds for lack of jurisdiction.

Boeing and BCSC:

175. Although Yuzhnoye admits that a Party-Guarantor has a substantive right to reimbursement under Article 9.4.2 and that a failure to reimburse the Party-Guarantor would be a breach of the Creation Agreement, Yuzhnoye takes the position that an Affiliate-Guarantor somehow lacks a substantive right to reimbursement. That position is impossible to reconcile with the language of the contract.

176. Energia admits, on its part, that under Article 9.4.2, a failure to reimburse a Party-Guarantor is a breach of the Creation Agreement. However, Energia argues that a breach of Article 9.4.2 somehow does not create a claim for the Guarantor (Boeing) against a Party (like Energia). This argument undercuts the very basic tenets of contract law. The document clearly gives Affiliates like Boeing a right to recover directly from the Parties. To adopt Energia's argument would read the term "Affiliate" out of Article 9.4.2 and would render including "Affiliate" within the definition of "Guarantor" (in Article 1.1) entirely superfluous.

177. Energia's and Yuzhnoye's arguments in this arbitration contradict not only the Creation Agreement, but also the position that each of them took on the matter during the course of the Parties' business dealings. When Sea Launch borrowed US$448.1 million from a series of third party banks, Energia and Yuzhnoye expressly agreed that the money would be guaranteed by Boeing and Kværner ASA, and both expressly reaffirmed that they would comply with Article 9.4.2 of the Creation Agreement to pay Boeing and Kværner ASA their fair share in the event those "Parent Guarantees" were called.

178. Energia and Yuzhnoye have contractually agreed to arbitrate *all* claims related to the Creation Agreement. The claims raised certainly fall within this ambit as they relate to the Creation Agreement. Swedish law clearly provides that this is the appropriate forum against Energia and Yuzhnoye.

179. Under Swedish law, as well as in most legal systems, the intent of the parties is the overriding principle when interpreting commercial contracts.

180. The Creation Agreement covers a complex business joint venture involving companies from the United States, Norway, Russia and Ukraine. Although four parties are signatories to the Agreement (the Parties), the plain language of the Agreement creates multiple rights and obligations for the Parties and their Affiliates. Reference is made to Articles 1.4, 1.6.2, 2.1, 2.2, 3.5, 6.7, 9.4.2, 12.4 and 14 of the Agreement. Most applicable here is Article 9.4.2 which entitles a Party or an Affiliate providing a guarantee of a Sea Launch debt to a third party to a right of reimbursement against Sea Launch *and the Parties* if any amounts have to be paid to the third party. The Parties to the Creation Agreement thus intended to create substantive rights in favour of Affiliates of the Parties acting as third party guarantors.

181. The Parties and their Affiliates wanted to minimize the procedural complications inherent in a multi-jurisdictional effort like Sea Launch. Those affected by the Creation Agreement clearly envisioned the possibility of disputes arising out of the various obligations. Given that the Parties and their Affiliates were from diverse nations around the world, they agreed to a single, uniform venue where all disputes related to the Creation Agreement would be resolved (arbitration before the SCC) and a single, uniform law that would apply (Swedish law). Article 13 of the Creation Agreement is very clear on this point. Nothing in that Article provides, or remotely suggests, that Affiliates of the four Parties to the document would be unable to participate in such an arbitration to enforce the rights granted to them or to defend themselves against claims that they failed to meet the obligations imposed upon them. Since this is a dispute "relating to" the Creation Agreement, it clearly falls within the agreed arbitration clause.

182. Despite this clear language, Energia and Yuzhnoye seek to argue that only "Parties", as defined in the Creation Agreement, may commence an arbitration. This argument entirely ignores Article 13 of the Creation Agreement. Since both Energia and Yuzhnoye agreed in Article 13 that *all* disputes related to the Creation Agreement would be arbitrated, their jurisdictional arguments should be rejected.

183. Indeed, the Creation Agreement makes quite clear that Affiliates are meant to be bound by the substantive and procedural provisions of the Creation Agreement. For example, Article 14 explicitly permits any Party to participate in the Sea Launch venture through an Affiliate, provided that "the Affiliate will comply with and be bound by the terms of this Agreement".

184. In sum, Energia's and Yuzhnoye's contractual arguments essentially ignore the Creation Agreement's two main provisions – Articles 9.4.2 and 13. Those provisions clearly give Boeing a substantive right to reimbursement from both Energia and Yuzhnoye and require Energia and Yuzhnoye to arbitrate any dispute arising out of or relating to the Agreement.

185. Instead, ignoring the actual agreement to arbitrate (Article 13 of the Creation Agreement) Energia and Yuzhnoye focus on Exhibit A to the Creation Agreement. Exhibit A to the Creation Agreement cannot plausibly

overcome the broad language contained in Article 13. Exhibit A sets out procedural rules for the arbitration and neither states, defines, nor limits the scope of the arbitration, nor does it even purport to address the scope of issues subject to arbitration or limit the particular entities which can participate in an arbitration.

186. Moreover, the wording of Exhibit A demonstrates that the Parties intended their Affiliates to be bound by the arbitration clause in the Creation Agreement, and establishes that all Parties knew that Affiliates were potential parties to an arbitration, should a dispute over the Creation Agreement arise. Clauses 6 and 10 of those procedural rules expressly mention arbitrations brought by Venture Companies (which are not signatories of the Creation Agreement) and arbitrations in which Parties *and Affiliates* are involved and must waive potential immunity. These provisions are entirely inconsistent with Energia's and Yuzhnoye's arguments that the Parties intended to limit the arbitration clause to disputes between the signatories to the Creation Agreement.

187. Clause 6 of Exhibit A impliedly recognizes that Affiliates are entitled to arbitrate their substantive rights under the Creation Agreement. Energia's argument that the word "they" in Clause 6 does not refer to the phrase "Parties and their Affiliates" borders on the absurd. If one were to follow the logic of Energia and Yuzhnoye, Boeing would be bound by the results of any arbitration relating to the Sea Launch venture, but would not be able to initiate any such proceeding even if the rights at stake solely accrued to Boeing. Such an absurd result was clearly not intended by the Parties. The clear intent of the document was to allow Affiliates such as Boeing to participate in an arbitration to adjudicate disputes under the Creation Agreement. That is why the document requires that *all disputes* relating to it be submitted to arbitration.

188. Energia's fall-back position is that Clause 6 of Exhibit A is unenforceable as a matter of law because "Affiliates" are not Parties to the Agreement and cannot therefore be bound to an arbitration clause. This is simply incorrect under Swedish law, as third parties can be – and often are – so bound. The wording of Exhibit A thus substantiates the intention of all parties that all disputes under the Creation Agreement were to be arbitrated.

189. Finally, as a practical matter, it would defy logic to deny Boeing the opportunity to redress the substantive rights created by the Creation Agreement in the venue required by that Agreement. Boeing took part in the negotiations leading up to the Creation Agreement and later issued the loan guarantees at issue in this arbitration to facilitate the financing of the project. All the "Parties" to the Creation Agreement were well aware of this, as is shown by Article 9.4.2 of the Agreement. In fact, the Parties repeatedly reaffirmed the substantive rights given to Boeing and BCSC by Article 9.4.2 in resolutions of Sea Launch's Board and reaffirmed that they would pay if their obligations became due. Unfortunately, Energia and Yuzhnoye have simply refused to do so.

190. The fact that an arbitral award would be binding not only on BCSC but also on Boeing shows the intent of the Parties to look to the business realities of the project, minimize the number of disputes which could arise out of the project, and require them all to be resolved before a single forum, *i.e.* in this arbitration. That is precisely why Article 13 requires all disputes relating to the Creation Agreement to be resolved through arbitration. Boeing is a potential respondent in an arbitration under the Creation Agreement and must also be entitled to invoke the arbitration clause.

191. Article 9.4.2 of the Creation Agreement and the Guarantees issued pursuant to that provision created substantive rights for Boeing. The proper forum for the exercise of these rights is arbitration under the arbitration clause of the Creation Agreement. But even if Boeing did not have the right to initiate this arbitration, BCSC did, since BSCS has an independent right to initiate a claim on behalf of Boeing. BSCS maintains this as a secondary position in this arbitration. Energia's and Yuzhnoye's jurisdictional position must therefore be rejected.

192. The Creation Agreement created obligations for BCSC that are directly related to this arbitration. Article 9.4.2 requires BCSC – just as it does Energia and Yuzhnoye – to pay its proportionate share of the Sea Launch Loan Guarantees. Accordingly, BCSC has as much a right as any other Party (including Aker and Kværner AS) to invoke arbitral jurisdiction to *(i)* declare the rights and obligations of all Parties and their Affiliates under the Creation Agreement, and *(ii)* assess the relevant entities' proportionate share of the US$448.1 million paid to satisfy third party Guarantees issued at the request of Sea Launch.

193. Indeed, Exhibit A to the Creation Agreement clearly provides in Clause 6 that all Parties are entitled to participate in any arbitration proceedings relating to the Creation Agreement, and that all Parties and their Affiliates will be bound by the arbitration award whether or not they choose to participate in the arbitration. In sum, the Creation Agreement provides that, if there is a dispute arising out of the Creation Agreement, there will be a single proceeding and all other Parties and their Affiliates have a right to participate in the process.

194. Moreover, BCSC has an independent basis to initiate these proceedings because BCSC clearly has a claim against Energia and Yuzhnoye that they shall pay the Guarantee sums owed to Boeing. The substantive rights of Boeing are based on the Creation Agreement, and Boeing as an Affiliate of BCSC would be bound by an arbitration award under the Creation Agreement. The only reasonable procedural solution would then be for BCSC to exercise these substantive rights on behalf of Boeing. In that case, Boeing, which would certainly have a right to participate in the arbitration, would also bring a cross-claim to pursue its substantive rights against the Respondents. Thus, even if the Arbitrator were to find that Boeing cannot initiate these proceedings (which would be contrary to Article 13 of the Creation Agreement), the parties to this arbitration would be in the same position as they are now, albeit by an alternative procedural method, in that BCSC and Boeing would be pursuing their rights against the Respondents.

195. Even if the provisions of the Creation Agreement had not given each of Boeing and BCSC a right to bring this arbitration (which it did), Boeing and BCSC would still be allowed to commence arbitration under Swedish arbitration law.

196. Under Swedish law the legal effects of an agreement are not limited to the signatory parties. The general principle of privity of contract has certain exceptions. One such exception is the fact that a third party may invoke rights emanating from a contract it did not sign, provided that the signatory parties intended to create such a right for the third party.

197. The principle of third party rights is further demonstrated in Swedish arbitration law. The legal effects of an arbitration agreement are not limited to the signatory parties. An assignee to a contract will be bound by an arbitration clause in the contract (NJA 1997 p. 866, the *Emja* case). Furthermore, guarantors who are aware or ought to have been aware of the arbitration clause are also bound by the arbitration clause (RH 2003:61). These principles are in line with international arbitration practice. Indeed, many provisions of the Creation Agreement created rights and obligations not only for the Parties to the document but also for their Affiliates.

198. Swedish arbitration law is based *inter alia* on the principle of equality of arms. In the Emja case, the Supreme Court of Sweden found that a party should not be allowed to have the tactical advantage over his opponent in the choice of venue for a claim. The court was not willing to allow an imperfectly binding effect (*"haltande bundenhet"*) of an arbitration agreement. However, this is exactly what Energia and Yuzhnoye are trying to achieve. Under their interpretation of the Creation Agreement, Boeing would be bound by an arbitration award, but Boeing would still not be allowed to invoke the arbitration clause in order to protect its legal rights. This procedural situation would obviously violate all basic notions of fairness in arbitration proceedings.

199. BCSC's secondary request for relief would be an action for payment to a third party, which is allowed under Swedish law in special circumstances (NJA 1984 p. 215).

200. In sum, Energia and Yuzhnoye cannot delay their clear liability in this case by reneging on their promise to arbitrate "any dispute" relating to the terms of the Creation Agreement. The Creation Agreement demands arbitration and this is the proper tribunal to resolve this dispute. Boeing's and BCSC's position may be summarized as follows.

201. *First*, Energia and Yuzhnoye are clearly bound by their undertaking to Boeing through application of Swedish law on unilateral promises. Under Swedish law, a guarantee like the one issued by Energia and Yuzhnoye to Boeing in Article 9.4.2 of the Creation Agreement may be issued orally, in writing, or even through implied acts. A guarantee is immediately binding and the creditor (here Boeing) may rely upon it as soon as it has been issued. Further, where the guarantor (here Energia and Yuzhnoye) has informed the

debtor (here Sea Launch) of its undertaking to guarantee the debtor's payment to the debtor's creditor, the debtor may forward the guarantee to its creditors with a binding effect for the guarantor. That happened here. Boeing may thus invoke the Article 9.4.2 Guarantee under Swedish law based merely on the fact that it has been issued and brought to Boeing's attention.

202. *Second*, Boeing is entitled to enforce its substantive rights in this arbitration because Boeing is clearly a third party beneficiary under the Creation Agreement. Under Swedish law, a third party may invoke rights emanating from an agreement to which it is not a formal party, provided that the parties to the agreement intended that the third party have an independent right against a party to the agreement. A right is independent in the meaning of Swedish law as long as the third party can exercise its right against a party to the agreement, without being dependent on another party to the agreement.

203. *Third*, if Boeing is instead the recipient of a guarantee expressed in that agreement or as a third party beneficiary under that agreement, it is still bound by and entitled to invoke the arbitration clause under Swedish law. Arbitration clauses in unilateral undertakings (such as deeds of gifts, wills, promissory notes and guarantee undertakings) are enforceable under Swedish arbitration law. In the same way, a third party is bound by, and may invoke, an arbitration clause in an agreement where two or more parties have granted the third party a right. Energia's and Yuzhnoye's arguments to the contrary, which form the basis of their jurisdictional objections, thus lack merit.

204. *Fourth*, BCSC has a right to bring this arbitration based on its own independent rights under the Creation Agreement. Indeed, Energia concedes that BCSC has such a right. And Energia does not dispute that Article 9.4.2 obligates BCSC (like Energia and Yuzhnoye) to pay its proportionate share of the Sea Launch guarantees at issue. Accordingly, BCSC has an absolute right under the Creation Agreement to bring this arbitration to *(i)* declare the rights and obligations of all Parties (including itself, Energia and Yuzhnoye) and their Affiliates, and *(ii)* assess the relevant entities' proportionate share of the US$448.1 million paid to satisfy third party Guarantees issued at the request of Sea Launch. Energia cannot at the same time argue that only "Parties" have the right to arbitrate claims under the Creation Agreement and also deny BCSC that very right.

205. Further, the principle according to which an action brought by two parties must be dismissed *in toto* if one of the parties lacks *jus standi* applies only in cases of necessary joinder, *i.e.* when the action concerns a joint and indivisible right. As Boeing's and BCSC's case does not concern a joint and indivisible right, necessary joinder does not apply. If Boeing would be found to lack *jus standi*, BCSC's secondary position, being separate and independent from Boeing's claim, can still be arbitrated.

Kværner AS:

(a) The Creation Agreement

206. Sea Launch's operations were largely dependent on the financial support of Kværner ASA and Boeing which, over the years, granted several loans to Sea Launch, and put up security (by way of Guarantees) in respect of numerous loans. The total amounts committed by Kværner ASA and Boeing were not only very substantial, but also a precondition for loans, supplies and orders from third parties. The majority of the relevant lenders were western banks. Hence, the success of the Sea Launch project was largely dependent on Kværner ASA's and Boeing's active support. No third party lenders would have accepted undertakings by Energia or Yuzhnoye companies as sufficient for credit purposes. Among the Parties it was always clear, however, that the ultimate financial responsibility, as between the Parties, would be shared on a *pro rata* basis.

207. The Parties to the Creation Agreement attached little weight to the identity of the entity which assumed the role of counterpart to the Creation Agreement, because the project relied on the commitment of the respective participating groups, the key being that the commitment to and the interest in the project should remain within the same group of companies. To secure the long term stability of the project, certain restrictions on transfers and assignments outside the spheres of the original Parties were set out in Article 14 of the Creation Agreement.

208. Energia and Yuzhnoye argue that the events described by Kværner AS are not sufficient to show that they gave their consent to Kværner Maritime being replaced by Kværner Invest as a Party to the Creation Agreement. This objection lacks merit.

209. In Kværner AS's view, Energia's and Yuzhnoye's approach to the party constellation issue is deplorable, as it leads to a result which *(i)* is extremely unreasonable, (ii) is contrary to a fair interpretation of the relevant agreements, and certainly contrary to the intent and spirit of the joint venture efforts, and *(iii)* defies the actual conduct and implicit intent of the Parties. The result of such reasoning is that the proper Party to the Creation Agreement is a legal entity which was sold out of the Kværner/Aker group a decade ago. It is indisputable that the sale of Kværner Maritime to outside interests was known to Energia and Yuzhnoye. It would therefore be difficult to explain why the Venture Companies were permitted to be owned by Kværner companies, which, after the sale of Kværner Maritime, were no longer Affiliates of that company. It would also be difficult to explain why Kværner ASA, upon the request of the Venture Companies and with the acceptance of Energia and Yuzhnoye, continued to offer financial and other support to Sea Launch after completion of the sale of Kværner Maritime.

210. Notably, the substantial loans and guarantees issued by Kværner ASA over the years were undertakings not only accepted but also requested by the other Parties. For example, in 2004 and 2005, the Parties decided that Sea

Launch would request several guarantees from Kværner ASA, as provided for in Article 9.4.1 of the Creation Agreement. Such decision required, as a minimum, the consent of Parties representing 67% of the Sea Launch interest. BCSC and Kværner AS, which together hold only 60% of the shares in Sea Launch, could never have attained such majority on their own. In other words, it is evident that also Energia and Yuzhnoye actively continued to treat Kværner ASA as an Affiliate following the sale of Kværner Maritime. Therefore, Energia's and Yuzhnoye's contention that, in this respect, the Parties failed to consent to a change of Party to the Creation Agreement is simply disingenuous.

211. Yuzhnoye expressly consented to the change of Party by signing the Assignment Agreement. Energia, which did not give its express consent to the assignment by signing the Assignment Agreement, expressly consented to this assignment when it signed the Resolution from November 2000. At the very least, there can be no doubt that Energia consented to the assignment, at least tacitly, by its own conduct over the years.

212. It should be clear that the proper Party to the Creation Agreement is a Kværner/Aker entity. Energia's and Yuzhnoye's attempt to evade paying their share of the sacrifice made by Aker and Boeing for the common good on the basis of unmeritorious technical arguments is untenable and improper. Kværner AS should be allowed to participate in this arbitration consistent with its rights.

213. As a matter of Swedish law, it is an established principle that it is the *alleged* relation of the dispute to the main contract which is decisive in making a determination on the matter of jurisdiction. The validity of this "doctrine of assertion" (*"påståendedoktrinen"*) was confirmed by the Swedish Supreme Court in NJA 2008 p. 406. Hence, for Kværner AS's claims to be considered as falling within the scope of the arbitration agreement, it is sufficient that Kværner AS has *asserted* that the claims are based on the Creation Agreement. Kværner AS maintains that Aker has effected such payment for which it was entitled to reimbursement under the Creation Agreement, and that Kværner AS has subsequently taken over Aker's claims. Whether the payment to Boeing *did in fact* entitle Aker to reimbursement from Energia and Yuzhnoye, and whether the claims against the Respondents were ever properly assigned, are matters that concern the merits of the case. In this context it is nevertheless relevant and noteworthy that Boeing has made no objection to Kværner AS asserting the claim presently pursued by Kværner AS in this arbitration.

214. Yuzhnoye has stated that a non-arbitrable claim cannot become arbitrable by way of assignment, thereby suggesting that Aker would not have been entitled to invoke the arbitration agreement against the Respondents. As there can hardly be any doubt that the claims now in dispute are "arbitrable" in the ordinary sense of that term, Kværner AS interprets the objection as meaning that Aker's claim does not fall within the scope of the arbitration agreement.

215. It is evident that the assignor, Aker, would have had an independent right to pursue a claim for reimbursement based on the Creation Agreement in this arbitration, had it so chosen. In this regard, it may be noted that there is nothing

preventing an arbitration agreement from having the character of a third party agreement.

216. Kværner ASA, *i.e.* the predecessor in interest of Aker, together with Boeing, issued Bank Guarantees with joint and several liability in favour of Sea Launch's lenders. Aker then effected payment under these Guarantees. Although the payments were not made directly to the third party lenders but via Boeing, Aker clearly effected such payment under the ambit of Article 9.4.2 of the Creation Agreement.

217. It is clear from the structure of the Creation Agreement that the Parties meant for Affiliates to be bound by both the substantive and the procedural provisions therein. Hence, if Aker had pursued a right to reimbursement on its own, Aker would have had to comply with the arbitration clause contained in the Creation Agreement. It would be manifestly unreasonable if an Affiliate of a Party that loyally undertook obligations under the Creation Agreement – indisputably for the benefit of the other Parties – would not be entitled to avail itself of the remedies afforded by the contractual framework. Such formalistic approach, if adopted, borders on abuse, for which there is no reason to provide protection by way of a narrow or restrictive interpretation of the arbitration agreement.

218. Both Energia and Yuzhnoye have argued that the arbitration agreement is clear and unambiguous and that it is evident from its wording that Affiliates are not bound by it or entitled to invoke it. Consequently, Aker, if it had still been substantively entitled, would (allegedly) not have been entitled to pursue a claim in this arbitration. On the basis of the principle that a successor cannot acquire a better right than the assignor, Energia and Yuzhnoye conclude that Kværner AS is not entitled to do so either.

219. There are however several reasons why Energia's and Yuzhnoye's conclusion is incorrect. The reasons for this assertion are the following:

220. First, the claim now advanced by Kværner AS relates to the Creation Agreement and must therefore be considered *per se* to fall within the broad scope of the arbitration clause.

221. Secondly, the Creation Agreement was to be the framework contract encapsulating a complex and multi-tiered project with the participation of a number of legal entities controlled by the Parties. This is the background for the use of the "Affiliate" and "Subsidiary" concepts set out in the definitions section of the Creation Agreement. It would have been overly complicated to bring all such Affiliates into the contract as a signor party. A more practical and equally effective solution would be to let the principal entities in each camp appear as the formal party and to let Affiliates participate as such. The necessity to draw a line vis-à-vis third parties resulted in a special definition of "Third Party" in Article 1.1 which demonstrates that the Parties wished to make a distinction between Affiliates and Third Parties. This was natural and necessary because the Creation Agreement imposes upon Affiliates a number of obligations (Articles 1.4, 1.7 (h), 2.1, 2.2, 3.3, 3.5, 5.6.3 (a), 5.7.2, 11.1.1,

11.1.3 and 12.4) and also creates a number of rights (Articles 1.6.1, 1.6.2, 1.9, 2.1, 2.2, 7.6.5, 8.6.5, 9.4.2, 14 and 16.2). To these rights and obligations attach quite naturally certain procedural rights. These rights and obligations are both implicit and explicit. The explicit obligations are set out in the arbitration agreement contained in Exhibit A to the Creation Agreement. To the category of explicit procedural obligations imposed upon Affiliates belong the obligation to accept that the decision of the arbitrator sitting under the arbitration agreement is binding upon the Affiliates "*regardless of whether they choose to participate in the hearing*" (Clause 6) and the obligation not to claim immunity if a Party or a Venture Company should bring arbitral proceedings against the Affiliate (Clause 10).

222. In fact, it is generally accepted that, if a third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause, such third party is also bound by the arbitration clause even if it did not sign it. Given the wording of the Creation Agreement in general and its arbitration clause in particular, it is evident that it was the intention of the Parties to confer rights on Affiliates. Hence, not only would Aker have been bound by the arbitration clause if it had pursued the claims against the Respondents on its own. Aker, like Boeing, would also have had the *right* to invoke it, despite not being a formal Party to the Creation Agreement.

223. Given the basis on which Aker's payment was effected and the close connection between the payment and the Creation Agreement, Kværner AS would be bound by, and also entitled to invoke, the arbitration agreement irrespective of whether the claims assigned fell within the scope of the arbitration agreement when held by Aker. A different conclusion would facilitate attempts at circumventing the arbitration agreement. Both Kværner AS and Aker should be permitted to participate in this arbitration as parties with full rights to pursue claims so long as such claims fall within the scope of the arbitration agreement.

224. Aker has not assigned the arbitration agreement to Kværner AS, but Kværner AS is a Party to the Creation Agreement, and can as such rely on the arbitration clause contained therein. The only assignment which has taken place is an assignment of a claim which gives Kværner AS the right to receive payment from Energia and Yuzhnoye. Needless to say, it is a well established principle of Swedish law that a creditor may freely assign its right to receive payment.

225. A reasonable interpretation of Clause 6 of the arbitration agreement in Exhibit A must be that an Affiliate has a right to participate in an arbitration. This is consistent with the substantive rights and obligations. It is also consistent with the binding effect of the award upon an Affiliate. A proposition to the contrary would be abhorrent to a fundamental principle of procedural justice, *i.e.* the right to participate and plead one's case in a process, the result of which may be a binding obligation. The broad interpretation of Exhibit A proffered by Kværner AS, *i.e.* that it extends not only to Parties but also to Affiliates, is also consistent with the immunity waiver in Clause 10. The language there obviously departs from the assumption that a Party may bring

arbitral proceedings against an Affiliate if that action is brought under the "Joint Venture Agreement". The latter expression obviously refers to the Creation Agreement.

226. This reasoning begs the question as to how, at law, it is possible that an Affiliate, which is not a signatory to the Creation Agreement, can nevertheless enjoy rights and assume obligations under that contract. In Kværner AS's submission two legal principles apply.

227. The *first principle* is simple. When concluding the Creation Agreement the signatories did so both on their own behalf and on behalf of their Affiliates. The result of this right of representation was confirmed by conduct both by the Parties and by the Affiliates concerned. All lived by this construct for many years. No protest was heard or seen until the advent of the present proceedings where certain Parties prefer to evade financial responsibility on misconceived technical arguments.

228. Under the *second principle*, the Parties are considered to have made the Creation Agreement with the intent that Affiliates (*i.e.* not "Third Parties") should derive certain benefits therefrom. There is nothing in Swedish law which, in the prevailing circumstances, would prevent that legal theory being applied.

229. It was the Parties' intention that they should be able to initiate arbitration against Affiliates, should any dispute arise. As pointed out by Yuzhnoye, it is an intrinsic feature of Swedish arbitration law that it does not accept an asymmetrically binding effect of an arbitration agreement. In a situation where Affiliates would be bound by the arbitration agreement, they should also be entitled to invoke it.

230. In the present case, both Boeing and Kværner ASA were fully aware of the arbitration clause contained in the Creation Agreement when issuing the Guarantees for which they now seek reimbursement. They were also aware of the fact that, in the event of the Guarantees being called upon, their only means of recourse *against the Parties* would derive from the Creation Agreement. There is nothing unreasonable or strange about Boeing and Aker being subject to a specific procedure when pursuing such claim for reimbursement against a Party. On the contrary, it is only logical and fair that they would have to abide by the arbitration clause in such case. Consequently, no asymmetrically binding effect would exist in the present case, should the Arbitrator find that Affiliates are entitled to invoke the arbitration agreement. Instead, Affiliates are both bound by and entitled to invoke the arbitration clause when claiming rights under the Creation Agreement.

231. Article 9.4.2 contains one of the many rights given to Affiliates under the Creation Agreement, namely the right to reimbursement for Guarantees. However, in one important way, the application of Article 9.4.2 is different from the other provisions containing rights for Affiliates. In the case of Article 9.4.2, its applicability is fully subject to the control of the Parties. In fact, without the active participation of the Parties, a situation where an Affiliate

would be able to claim rights under said provision would not arise. It follows from Article 9.4.1, compared to Article 1.7 (i), that representatives owning at least 67% of the shares in the relevant Venture Company must give their approval before a guarantee is sought from an Affiliate. An Affiliate could never on its own authority issue a Guarantee which would entitle it to *(i)* compensation (amounting to a reasonable sum), and *(ii)* reimbursement (in the event of the Guarantee being called in). The argument for allowing an Affiliate to pursue its claim for reimbursement under a Guarantee specifically requested by the Parties would appear especially strong.

232. Energia and Yuzhnoye argue that an agreement by which rights are conferred upon Affiliates as beneficiaries cannot be conditional or require any counter-performance on the part of the latter. This assertion lacks foundation in Swedish law. In addition, the undertaking by the Parties in Article 9.4.2 was not conditional. While it is true that Article 9.4.2 is "activated" by the issue of the guarantees on behalf of Sea Launch, the Parties' sub-guarantee is not contingent on any condition. According to Article 9.4.1 of the Creation Agreement, no Affiliate is obligated to provide any guarantees. Once Boeing and Kværner ASA, at Sea Launch's request (which was subject to the Parties' decision), freely decided to issue Guarantees to support the financing of Sea Launch, pursuant to Article 9.4.2 the Parties *unconditionally* agreed to guarantee reimbursement.

233. There can be no doubt as to whether the provision currently in dispute, *i.e.* Article 9.4.2, can be characterized as a so called third party beneficiary agreement (*"tredjemansavtal"*). The Creation Agreement confers both substantive and procedural rights upon Affiliates. Energia and Yuzhnoye have argued, however, that Article 9.4.2 is, at most, an undertaking by the Parties vis-à-vis each other. Furthermore, and quite remarkably, they argue that a breach of this obligation (if any) would nonetheless never create an actionable claim *between the Parties*. Needless to say, it is difficult to see why Boeing and Kværner ASA, on whose financial support the Sea Launch project has been so dependent, would ever have offered its support, should Energia's and Yuzhnoye's interpretation of this provision be correct. Even more difficult to understand is why the Parties would have included Article 9.4.2 in the Creation Agreement if it so clearly served no purpose, as Energia and Yuzhnoye now argue. It cannot be presumed that such was the intention of the Parties when entering into the Creation Agreement.

234. In summary, it should be clear that the Parties as well as their Affiliates may invoke the arbitration agreement when pursuing a claim based on Article 9.4.2 of the Creation Agreement. Referring to the Swedish doctrine of assertion, Yuzhnoye has argued that the Arbitrator does not have jurisdiction, the reason being that Kværner AS has based its claim on a payment made by Aker to Boeing, a claim which in Yuzhnoye's submission is *not* comprised by Article 9.4.2. This is an incorrect application of the doctrine. Provided that Kværner AS maintains that Aker's payment to Boeing entitled Aker to reimbursement under Article 9.4.2 (which Kværner AS does), the claim falls within the scope of the arbitration agreement. Whether Kværner AS's *interpretation* of Article 9.4.2 is correct may be subject to debate, but as long

as such interpretation is not manifestly unreasonable, this is a question for the merits phase and does not apply to the question of jurisdiction.

235. Finally, it should be noted that the assignment from Aker of a claim based on Article 9.4.2 is not the only legal ground Kværner has invoked in support of its claim. Not only could Kværner AS's right to payment be derived from a payment made by Aker pursuant to Article 9.4.2, but it can also be derived directly from the general *pro rata* division of rights and duties that permeates the Creation Agreement as a whole.

236. The payment made by Kværner AS to Aker (voluntary or not) was a payment made for the benefit of Sea Launch (and, consequently, for the benefit of the other Parties). Kværner AS submits that, pursuant to the general *pro rata* division principle in the Creation Agreement, this sacrifice for the common good entitles Kværner to reimbursement from the other Parties. Clearly, there cannot be any doubt as to whether this claim falls within the scope of the arbitration agreement.

(b) The cross-claim

237. In considering the admissibility of Kværner AS's cross-claim, the Arbitrator should first consider whether the arbitration agreement should be interpreted as reflecting the intent that potential cross-claims should be encompassed thereby.

238. The arbitration agreement which forms the basis for these proceedings is of an unusual nature. It is a multiparty agreement among four parties. The regulation of different aspects of the arbitration is unusually detailed. The arbitration agreement is set out in Article 13 of the Creation Agreement in which reference is made to the more detailed provisions in Exhibit A to that Agreement.

239. As appears from Article 13, the Arbitration Agreement was intended to cover "(a)ny dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof". According to Clause 1 of Exhibit A, an award rendered "shall be final and binding upon the parties". But not only is an award rendered under the arbitration agreement binding upon the Parties. Clause 6 provides that the award shall also be binding upon "all the Parties and their Affiliates, regardless of whether they choose to participate in the hearing". This illustrates how the Parties envisaged that *e.g.* a dispute between a Party and an Affiliate of another Party should be covered by the arbitration agreement. The same follows from Clause 10 second paragraph which addresses the eventuality that a Party *or* a Venture Company should bring arbitration proceedings against another Party *or* its Affiliate. The term "Affiliate" is defined in Article 1.1 of the Creation Agreement.

240. This all shows that the Parties envisaged that the possible party constellation in a dispute concerning the Creation Agreement could take many shapes. It also shows that whatever the party constellation, the Parties intended that it should come under the agreed dispute resolution mechanism. The only

limitation is that the dispute should arise out of or relate to the Creation Agreement. The rationality of that "catch all" construction is obvious. To ensure procedural efficiency the Parties agreed, as set out in Clause 6 of Exhibit A, that all other Parties would be treated as Respondents for the purposes of the UNCITRAL Rules. The possibility of a counter-claim is envisaged in Article 19.3 of the UNCITRAL Rules which by reference form part of the arbitration agreement. While cross-claims are not specifically addressed in the UNCITRAL Rules or the arbitration agreement, this is not decisive. The absence of any specific reference to cross-claims is explained by the simple fact that such claims are much more rare than counter-claims and should not be construed to mean that the Parties intended such claims to be excluded from the application of the arbitration agreement. Clearly, a reasonable interpretation of the arbitration agreement indicates that also a cross-claim should be permitted. It is indeed difficult to perceive any rational reasons why the Parties would have intended that cross-claims be dealt with in separate proceedings, one for each cross-claim. Such approach would be inconsistent with the Parties' manifest ambition to make the scope of application of the arbitration agreement broad. A more reasonable interpretation is therefore that cross-claims should be permitted.

241. The Swedish Arbitration Act is silent on the admissibility of cross-claims. However, pursuant to Section 23.2 of the Act, a respondent may submit its own claims, provided that the claims fall within the scope of the arbitration agreement. The request for arbitration under the Act does not set the frame for the proceedings. Rather, this frame is set by the arbitration agreement and by the subsequent procedural conduct of the parties. Hence, an arbitral tribunal should decide on the admissibility of a new claim being brought into the process having regard to the time at which the claim was submitted and other circumstances. A principal purpose of this rule is to enable the tribunal to prevent a party from obstructing a pending arbitration by successive inclusion of new claims. The presumption, however, is that, absent obstructive intent or clear inconvenience, new claims should be permitted. According to the statements in the *travaux préparatoires*, the rule was intended to facilitate a greater flexibility in arbitral proceedings.

242. The admissibility of Kværner AS's cross-claim is strongly supported also by the current trend in international arbitration. The ICC Court has changed its views on this matter in recent years. Pursuant to the Court's earlier position, measures not expressly allowed under the ICC Rules were not to be permitted. As a consequence, cross-claims were for a long time held to be inadmissible. However, in recent cases, the Court has departed from such strict reading of the Rules, the consequence being that the ICC Court now allows respondents to file cross-claims. It must therefore be assumed that, if this had been an ICC arbitration, the ICC Court would not have dismissed Kværner AS's cross-claim.

243. In the present proceedings it is clear that Kværner AS's cross-claim falls within the scope of the arbitration agreement. Given the nature of the cross-claim and its early inclusion into these proceedings, there can be no reason to exclude it for reasons of obstructive intent or inconvenience in the process.

244. Another strong substantive argument for allowing Kværner AS to submit its cross-claim in the present arbitration is that of procedural efficiency. The facts underlying the principal claim and the cross-claim overlap. In fact, the grounds for the cross-claim are, in most aspects, identical to the grounds for the claim brought by Boeing and BCSC. The procedural material can be expected to be principally the same. It would therefore be highly ineffective from a cost perspective if Kværner AS were to be compelled to initiate separate proceedings for its cross-claim. Such parallel proceedings would entail a waste of resources and would ultimately benefit no one other than a party who wishes to cause delay or obstruction. Also, separate proceedings over the same dispute enhance the risk of inconsistent rulings.

245. To allow a respondent to file a cross-claim is not a matter of allowing the joining of a new party to the arbitral proceedings. Instead, a cross-claim is merely a new claim initiated between two existing parties in an ongoing arbitration. Provided that the arbitrator has jurisdiction over a multiparty dispute as such, there should be no valid reason why a respondent should not be able to file a claim against any other party in the arbitration.

246. Considering the wording of the arbitration agreement, the *travaux préparatoires* of the Swedish Arbitration Act as well as the general trend in international arbitration favouring a more flexible approach towards cross-claims, there are no valid arguments for dismissing Kværner AS's claims. On the contrary, the benefits in terms of efficiency are apparent.

247. The argument that the reference to the UNCITRAL Rules, and the bi-polar structure of these rules, prompts the conclusion that the Parties did not agree on the admission of cross-claims is not sustainable. First, the arbitration agreement must take precedence in this regard, and it is apparent that this agreement is *not* of a bi-polar nature but, rather, a multiparty agreement. Second, even if the traditional approach of the UNCITRAL Rules is a bi-polar one, the recent development and best practice in international arbitration in general must be taken into account. A case in point is the current practice of the ICC Court. Moreover, the ongoing revision of the ICC Rules will result in a codification of the ICC Court's practice in respect of cross-claims.

248. The inclusion of Kværner AS's claim in this arbitration would not be inappropriate. The claim was notified without delay when these proceedings were initiated. Kværner AS then proceeded to set forth the claim in more detail within the time stipulated by the Arbitrator. To the extent that these proceedings have been adversely affected by Kværner AS's cross-claim (which is denied), this is only attributable to the discussion resulting from Energia's and Yuzhnoye's unfounded objections regarding Kværner AS's status as a Party.

V. Costs

Energia:

249. Compensation for costs is claimed in the following amounts:

1. FEES FOR LEGAL SERVICES

Mannheimer Swartling (including travel expenses of witnesses)	EUR 497,990.60
VAT 18%	EUR 89,638.30
Subtotal	**EUR 587,628.90**

2. ADVANCE PAYMENTS OF COSTS OF THE SOLE ARBITRATOR

Advance payments of costs of the Sole Arbitrator	EUR 25,000.00
Subtotal	**EUR 25,000.00**
Total amount	**EUR 612,628.90**

250. Energia has annexed to its claim a summary of the work performed in the period from April 2009 to September 2010.

251. Energia further indicated on 8 June 2010 that the legal fees of EUR 299,366.09 claimed at that stage of the proceedings reflected the average market price and were calculated on the basis of approximately 1,660 hours, spent by partners, associates and assistants working on various issues. Energia further stated that these legal fees had been invoiced and paid, irrespective of the outcome of the jurisdictional issue.

252. As to the claim for reimbursement of 18% VAT on the legal services, paid after 1 January 2010, Energia gave the following information. EC Directive 2006/112/EC (amended by EC Directive 2008/8/EC) applies to services rendered by a company within the EC to a Russian client, but this Directive is not applicable to VAT to be paid in Russia under national tax legislation under which Energia has an obligation to pay VAT. As a matter of Russian law, legal services rendered by a foreign supplier such as Mannheimer Swartling to a Russian company are deemed to be supplied in Russia and, hence, are subject to 18% Russian VAT in accordance with Article 148, Section 1, Subsection 4 of the Tax Code of the Russian Federation, and Energia is not entitled to reimbursement of these VAT amounts under Russian law.

Yuzhnoye:

253. Compensation for costs is claimed in the following amounts:

KB Yuzhnoye	
Legal fees (Vinge)	EUR 120,000.00
Disbursements (Vinge)	EUR 1,950.00
Legal fees (Ukrainian legal counsel)	EUR 7,000.00
Costs for the attendance of Mr. Vedeneyev, representative of KB Yuzhnoye, at Hearing in Stockholm	EUR 2,300.00
TOTAL	**EUR 131,250.00**

PO Yuzhnoye	
Legal fees (Vinge)	EUR 120,000.00
Disbursements (Vinge)	EUR 1,950.00
Legal fees (Ukrainian legal counsel)	EUR 7,000.00
TOTAL	**EUR 128,950.00**

254. The costs for legal representation are based on a Retainer Agreement concluded by Yuzhnoye and the Vinge law firm. The Retainer Agreement provides for a fee calculation based on time spent at different hourly rates for senior and junior partners as well as for associates and assistants. These fee rates reflect market levels and are normal in the field of international arbitration. The Retainer Agreement requires Vinge to account for time spent on the matter, detailing the lawyers and assistants involved with the associated job description. No success fee or other contingency fee arrangement has been agreed between Yuzhnoye and Vinge.

Boeing and BCSC:

255. The amounts claimed by Energia and Yuzhnoye are excessive. The amount of work indicated by Energia in the request exceeds by a very broad margin what would have been reasonable in order to present Energia's case through the initial stages of the arbitration and on the jurisdictional issues. Yuzhnoye's claim for costs is excessive in view of the fact that the Vinge law firm was not involved during the initial stages of the arbitration. No specific amounts of the costs can be verified as reasonable.

256. Energia's claim regarding the advance on the Arbitrator's fee is not to be considered a cost to be reimbursed as a procedural cost but is to be handled as a part of the Arbitrator's decision on his own costs and the subsequent apportionment of these costs.

257. While Boeing and BCSC, with reference to EC Directive 2008/8/EG, initially questioned Energia's claim for reimbursement of VAT for the period after 1 January 2010, they did not revert to the issue after explanations had been provided by Energia as to the basis for the VAT claim.

Kværner AS:

258. The Yuzhnoye companies' respective cost claims are accepted as reasonable *per se*.

259. Energia's cost claim is clearly excessive. The unreasonableness of the claim is manifest, even though Energia has not specified which part of the total amount claimed represents counsel fees and which part represents expenses. It may be assumed, however, that the predominant part of the costs claimed by Energia represents fees for legal services.

260. Energia has claimed compensation, *inter alia*, for costs which relate to legal services carried out by Mannheimer Swartling between April 2009 and September 2010. Boeing did not send demand letters to Energia pursuant to Article 9.4.2 of the Creation Agreement until 21 August 2009, and the present

arbitral proceedings were not initiated until late October 2009. Energia cannot be awarded compensation for costs relating to general legal advice rendered months before the dispute between the Parties became a fact.

261. In light of the limited matters dealt with and the amount of work thus reasonably required, Kværner AS cannot accept the amount claimed by Energia as reasonable, especially considering the much lower costs incurred by Yuzhnoye. While it is admitted that a certain part of the increased costs incurred by Energia may be attributable to the fact that Energia invoked witnesses, the costs incurred by Yuzhnoye should, if the issue arises, be used as guidelines when determining what should be considered as reasonable compensation.

262. Kværner AS accepts Energia's explanation of why it has paid VAT on its legal fees after 1 January 2010.

263. As regards Energia's claim for reimbursement for the advance payment to the Arbitrator, Kværner AS shares Boeing's and BCSC's opinion that this is a cost to be dealt with in connection with the Arbitrator's decision on his own costs and their apportionment between the Parties.

VI. Reasons

1. General Considerations

264. The Creation Agreement, which is the central document in this arbitration, was concluded on 3 May 1995. The signatory parties were BCSC, Kværner Moss, Energia and the two Yuzhnoye companies. The Agreement provided for the creation of a structure for launching commercial satellites into space from a sea-based platform (the *"Sea Launch Project"*). For this purpose, a number of partnerships, *i.e.* Sea Launch Limited Partnership, United States Sea Launch Limited Partnership, Sea Launch ACS Limited Partnership and Platform Limited Partnership, with varying functions within the project were set up. The corporate structure was further developed by the establishment of companies which eventually were named Sea Launch Company LLC, Sea Launch ACS Limited, Platform Company LDC and US Sea Launch GP LLC.

265. The Sea Launch Project was extensive and costly and had been negotiated over a relatively long period of time. Before the Creation Agreement was concluded, preliminary agreements had been concluded by Boeing (through its Defense and Space Group) and Energia on 12 March 1993, and by Boeing Defense and Space Group, Kværner AS and Energia on 25 November 1993. A Memorandum of Agreement had also been signed on 22 May 1994 by Energia, Yuzhnoye, Kværner Moss and Boeing Commercial Space Development Company.

266. On 22 June 2009, Sea Launch lodged a petition before a Bankruptcy Court in the State of Delaware for protection under Chapter 11 of the US Bankruptcy Code.

267. Boeing's and BCSC's claims in this case are based on payments made after the initiation of the bankruptcy proceedings by Boeing as Guarantor under several Guarantee Agreements. Boeing and BCSC state that Boeing has unsuccessfully claimed reimbursement from Sea Launch and that payments to Boeing are therefore being requested from Energia and Yuzhnoye in relation to their proportionate shares of the paid guarantee amounts pursuant to Article 9.4.2 of the Creation Agreement. Boeing and BCSC initially also named Aker as Respondent but explained that this was only done for formal reasons. Subsequently, they declared that they substituted Kværner AS for Aker as Respondent. However, they presented no claim against either Aker or Kværner AS.

268. Kværner AS has referred to Kværner ASA's obligations as Guarantor under the Guarantee Agreements and to Aker's payment to Boeing in the form of a promissory note. Subsequently, Aker's claims against Energia and Yuzhnoye had been taken over by Kværner AS which, with reference to Article 9.4.2 of Creation Agreement, presents cross-claims against Energia and Yuzhnoye for reimbursement of their proportionate shares of the amount paid by way of the promissory note.

269. Energia and Yuzhnoye have raised jurisdictional objections. They hold that the Arbitrator has no jurisdiction to examine the merits of the claims presented by Boeing, BCSC and Kværner AS. In reply, Boeing, BCSC and Kværner AS argue that these objections are unfounded and request that they be rejected.

270. The Arbitrator notes that Energia's and Yuzhnoye's objections primarily relate to the interpretation of the Creation Agreement. Under Swedish law, which according to Article 13 of the Creation Agreement shall be the governing law in this context, the intentions of the parties to an agreement are the decisive factor in determining the content of the agreement. At the same time, in commercial agreements, in particular those concluded by companies with wide access to qualified legal advice, the wording of the agreement must be given particular weight, since the agreed text can be presumed to be an adequate reflection of the intentions of the parties. A party claiming that the intended content of the agreement is different from what can be derived from the text therefore has a heavy burden of proof and will have to show in a convincing manner that there is indeed a discrepancy between the parties' intentions and the wording of the agreement.

2. Parties, Affiliates, Venture Companies and Third Parties

271. The Creation Agreement distinguishes between Parties, Affiliates and Third Parties. These three concepts are defined in Article 1.1 of the Agreement. The concept of Venture Company is also defined in the same Article.

272. According to the definitions in Article 1.1, only BCSC, Kværner Moss, Energia and the two Yuzhnoye companies are to be regarded as Parties. An Affiliate is defined as a legal entity that is a Subsidiary of a Party, or the Parent of a Party, or the Subsidiary of the Parent of a Party. The concepts of Parent

and Subsidiary are defined in the same Article. A Venture Company is defined as one of the partnerships to be set up according to the Agreement. Finally, a Third Party is any person or business or legal entity that is not a Party, an Affiliate of a Party or a Venture Company.

273. The Arbitrator notes that, according to these definitions, BCSC as well as Energia and the two Yuzhnoye companies are Parties, whereas Boeing is an Affiliate. As regards Kværner AS and Aker, a further analysis is required.

3. Kvaerner AS and Aker

274. Neither Kværner AS nor Aker was one of the original Parties, as defined in the Creation Agreement. However, Kværner AS claims that it became a Party by succession from one of the original Parties, Kværner Moss. This is contested by Energia and Yuzhnoye.

275. Kværner AS argues that it became a Party to the Creation Agreement as a result of the following events:

(i) In 1996, the original Party Kværner Moss was renamed Kværner Maritime.

(ii) In 1999-2000, Kværner Maritime's rights and obligations under the Creation Agreement were assigned to Kværner Invest.

(iii) In 2005, Kværner Invest was renamed Kværner AS.

276. The crucial question is thus whether the assignment under (ii) has taken place.

277. In this respect, the Arbitrator first notes Article 14 of the Creation Agreement which provides that no Party shall assign, nor in any manner transfer, its interests or any part thereof in the Agreement. The Arbitrator also takes into account Article 17 of the Agreement which provides that the Agreement shall not be amended unless agreed to in writing by the Authorized Representatives of each Party.

278. As regards the assignment transaction between Kværner Maritime and Kværner Invest, the following facts appear from the documents produced by Kværner AS and the Parties' submissions:

(i) On 8 October 1999, Kværner ASA sent to BCSC, Energia and Yuzhnoye a draft Assignment Agreement regarding transfer to Kværner Invest of the rights and obligations of Kværner Moss under the Creation Agreement and asked BCSC, Energia and Yuzhnoye to sign and return the Agreement.

(ii) The Assignment Agreement was signed by BCSC and Yuzhnoye but not by Energia which made suggestions for amendments in a letter of 26 October 1999.

(iii) In the *"Boeing/Kværner Understandings"* of 30 June 2000, which were *"subject to the full agreement of Sea Launch partners"*, Boeing and Kværner ASA declared that *"Kværner Invest Norge, AS shall replace Maritime in the Creation Agreement"* and that *"[p]rior to the replacement of Maritime with Kværner Invest Norge, AS, Kværner ASA shall guarantee all obligations of Maritime under the Creation Agreement"*.

(iv) In letters of 3 July 2000, Energia and PO Yuzhnoye proposed an additional paragraph in the Boeing/Kværner Understandings. In Energia's letter, reference was made to the *"not completed draft Boeing/Kværner Understandings"*, and Energia also pointed out that *"we did not receive yet completed draft of Boeing/Kværner Understandings, promised by Sea Launch - - -, for review"*.

(v) In a document called "SEA LAUNCH CORPORATE STRUCTURE" (apparently from November 2000), it was *"noted that it is proposed - - - to amend the Creation Agreement to substitute Invest for Maritime and to make the amendments set out in the Memorandum of Understanding dated 30th June 2000"*. This document was subsequently signed by BCSC, Moss Maritime (formerly Kværner Maritime), Energia and Yuzhnoye.

279. From this documentation it appears that the Assignment Agreement of 8 October 1999 was not signed by Energia and was therefore not finally concluded by the Parties. This is confirmed by subsequent documents, in particular the Boeing/Kværner Understandings of 30 June 2000, from which it appears that the replacement of Kværner Maritime with Kværner Invest was envisaged but had not yet taken place.

280. It also appears that the Boeing/Kværner Understandings were not an assignment agreement but a document reflecting policies and intentions. Moreover, there was no final or unconditional approval of its contents by Energia and Yuzhnoye.

281. The subsequent document "SEA LAUNCH CORPORATE STRUCTURE" was signed by all Parties which thereby indicated their approval of its contents. However, the document only states – like the Boeing/Kværner Understandings to which reference is made – that note was taken of plans to effect party substitution by way of an amendment to the Creation Agreement. The document cannot therefore be regarded as an instrument by which Kværner Maritime's rights and obligations under the Creation Agreement were actually assigned to Kværner Invest.

282. Having regard also to the prohibition against assignments in Article 14 of the Creation Agreement and the requirement in Article 17 that agreements to amend the Creation Agreement should be in writing, the Arbitrator cannot find it demonstrated that there was in any other way a transfer to Kværner Invest of Kværner Maritime's rights and obligations in accordance with the requirements of the Creation Agreement.

283. Consequently, the Arbitrator concludes that Kværner AS cannot be accepted in the present case as a Party to the Creation Agreement.

284. However, the Arbitrator notes that the signatory company Kværner Moss was a subsidiary of Kværner ASA which was therefore an Affiliate according to the definition in the Creation Agreement. It has also been explained that in 2005 Kværner ASA merged with Aker and that Aker was the surviving entity after the merger. Finally, in an Assignment Agreement of 22 December 2009, Aker transferred its claims against Energia and Yuzhnoye to Kværner AS which accepted the transfers.

285. The Arbitrator therefore finds that Aker, as successor of the Affiliate Kværner ASA after the merger, became itself an Affiliate. As a result of the Assignment Agreement of 22 December 2009 Aker's claims as an Affiliate were transferred to Kværner AS. The Arbitrator thus considers that, as from the date of the Assignment Agreement, Kværner AS can be regarded, for the purposes of the Creation Agreement, as an Affiliate, in so far as the claims against Energia and Yuzhnoye are concerned.

4. "Affiliates" in the Creation Agreement

286. In various provisions of the Creation Agreement, Affiliates are assimilated to Parties and dealt with in the same way as Parties in regard to tasks, rights and even obligations. Boeing, BCSC and Kværner AS have enumerated a number of such clauses in the Agreement. These clauses differ as to their contents and character, and the question as to whether they were intended to confer rights or obligations directly on Affiliates or only to impose obligations on the Parties with repercussions for their Affiliates would have to be analyzed more closely and separately in regard to each provision. To some extent, the signatories BCSC and Kværner Moss, when concluding the Creation Agreement, seem to have acted as representatives of the whole Boeing Group and the whole Kværner Group, respectively. They may therefore have intended to make some undertakings which would also include their Affiliates, *i.e.* other companies within the same Group. The interpretation of those various clauses and their application to Affiliates are matters concerning the substance of the Agreement and not directly relevant for the issues of arbitral jurisdiction which are being examined in this Award.

287. Nevertheless, the Arbitrator notes that Article 9.4.2 of the Creation Agreement, which is of particular interest in this case, provides that where a Party or an Affiliate has issued a Guarantee to a Third Party for a debt of a Venture Company and has made a payment under the Guarantee to the Third Party, and reimbursement has not been made by the Venture Company, then each Party to the Agreement shall pay the Guarantor a percentage of the amount proportionate to its ownership in the Venture Companies. The wording of this provision does indeed suggest that it imposes on a Party an obligation to make a payment to a Guarantor, irrespective of whether the Guarantor is a Party or an Affiliate. In this regard, Boeing and BCSC have also referred to Resolutions of the Boards of Sea Launch Company LLC and Sea Launch ACS Limited Partnership from 2004 and 2005 in which reference was made to Guarantees issued by Boeing and Kværner ASA and in which it was resolved

that each of the partners of the Limited Partnerships concerned reaffirmed their obligation established in Article 9.4.2 of the Creation Agreement.

288. The fact that Article 9.4.2 expressly envisages that Guarantees may be provided by Affiliates naturally gives rise to the question how disputes involving Guarantees by Affiliates should be resolved. It may well be argued that in this respect an Affiliate should enjoy a procedural protection equivalent to that of a Party which provides a Guarantee. The question is, however, whether that it what the Parties agreed in the Creation Agreement.

5. Arbitration in the Creation Agreement

289. As a general observation, the Arbitrator notes that, if the parties to an arbitration agreement wish to make arbitration under the agreement available also to disputes with non-parties, some legal problems arise. Arbitration is based on consent, and consent to arbitration is given by the parties to the arbitration agreement. While the parties may agree to give certain favours also to non-parties, they cannot impose obligations on them without their consent, and since an arbitration agreement also includes the obligation to be a respondent in arbitration rather than court proceedings, the consent to such obligation by non-parties to the arbitration agreement will have to be obtained in some way.

290. The arbitration provisions in the Creation Agreement are to be found in its Article 13 and in Annex A with the heading "Arbitration Agreement". These provisions will be examined in the following paragraphs of the Award.

(a) Article 13 of the Creation Agreement

291. In support of their contention that Affiliates can be parties to arbitral proceedings under the Creation Agreement, Boeing, BCSC and Kværner AS rely strongly on Article 13 of the Agreement which provides that any dispute arising out of or relating to the Agreement shall be settled by arbitration. They argue that in this Article the right to submit a dispute to arbitration is not limited to the Parties and that Affiliates who have specific rights and obligations under the Agreement should therefore be entitled to have disputes about their rights and obligations settled by arbitration.

292. Article 13 of the Creation Agreement refers to the *"Optional Arbitration Clause for Use in Contracts in U.S.A. – Russian Trade and Investment – 1992"*, prepared by the American Arbitration Association and the Chamber of Commerce and Industry of the Russian Federation, which provides that *"[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration"*. It thus appears that the wording of Article 13 is practically identical with the wording of the said Optional Arbitration Clause. Although the latter clause does not expressly provide that the dispute must be between parties to a contract, it cannot be assumed that it was intended to give non-parties to the contract access to arbitration. Similarly, the Arbitrator cannot find that the absence in Article 13 of a specific limitation to disputes between Parties shows

that the Parties intended that arbitration should be available in all disputes arising out of or relating to the Creation Agreement, irrespective of who would be the parties to the dispute.

293. In any case, Article 13 of the Creation Agreement cannot be read in isolation. As stated above, the arbitration agreement between the Parties consists of both Article 13 and Exhibit A with the heading "Arbitration Agreement". Article 17 of the Creation Agreement expressly provides that the "foregoing articles", *i.e.* Articles 1-16, and Exhibit A comprise the entire agreement between the Parties. There is also in Article 13 a specific reference to Exhibit A in so far as it provides for arbitration in accordance with the Optional Arbitration Clause for use in US-Russian contracts, *"as modified in Exhibit A to this Agreement"*.

294. It follows that a conclusion on this matter should not be drawn from Article 13 alone but must involve an analysis of Article 13 and Exhibit A in combination.

(b) Exhibit A

295. The Arbitrator notes that, as in the Creation Agreement itself, the terms "Party", "Affiliate" and "Venture Company" also appear in Exhibit A which, according to Article 17 of the Agreement, is to be considered a part of the entire agreement between the Parties. These terms must therefore be considered to have the same meaning in Exhibit A as in the Agreement itself. In other words, the definitions in Article 1.1 of the Agreement are applicable also to Exhibit A.

296. The introductory Clause 1 in Exhibit A is worded in almost the same way as Article 13 of the Creation Agreement but with the additional specification that the dispute, controversy or claim shall be *"between two or more of the Parties"*. Furthermore, according to Clause 3, the Arbitrators shall be appointed *"[u]pon application of one of the Parties"*. According to Clause 4, *"[a]ny Party may commence an arbitration by applying to the Stockholm Chamber of Commerce for appointment of an arbitrator"*, and the application will identify *"the other Parties to this Agreement"*. Clause 5 also deals with *"the Initiating Party"* and with *"the Parties with whom the Initiating Party is in dispute"*.

297. Since Article 13 and Exhibit A are parts of the same agreement between the Parties, they should, as far as possible, be interpreted as one coherent text devoid of contradictions. If Article 13 were to be read as permitting any dispute relating to the Creation Agreement to be submitted to arbitration, it would be difficult to explain the limitations to the Parties appearing in Clauses 1, 3, 4 and 5 of Exhibit A. If, on the other hand, Article 13 is understood as a provision giving a general outline and supplemented with the more detailed provisions of Exhibit A, there is no contradiction between Article 13 and Clauses 1, 3, 4 and 5 of Exhibit A. The latter reading would therefore better satisfy the need for consistency in the agreement.

298. However, the conclusion to be drawn becomes less obvious if Clauses 6 and 10 of Exhibit A are also taken into account, since these clauses contain references to "Affiliates" which do not easily find their place in a consistent pattern.

(c) Clause 6 of Exhibit A

299. Clause 6, with the heading "Participation", provides in essence:

- that all Parties to the Agreement are entitled to participate in the arbitration hearing and to submit evidence (first sentence),

- that all Parties other than the Initiating Party will be treated as Respondents (second sentence), and

- that the decision of the arbitrator will be binding on all Parties and Affiliates, regardless of whether they choose to participate in the hearing (third sentence).

300. The Arbitrator first notes that Clause 6 does not suggest that an arbitration may be initiated by an Affiliate. Consequently, there is no direct contradiction with Clause 4 which requires that an arbitration shall be initiated by a Party.

301. The second sentence of Clause 6 provides that all Parties other than the Initiating Party are entitled to participate in the hearing as Respondents, and nothing is stated in this sentence about the position of any Affiliates in arbitral proceedings.

302. Affiliates are only referred to in the third sentence which provides that the arbitrator's decision will be *"binding on all Parties and their Affiliates, regardless of whether they choose to participate in the hearing"*. Boeing, BCSC and Kværner AS rely on this provision in support of their view that Affiliates may be parties to arbitral proceedings. Energia and Yuzhnoye object and explain their understanding of this provision. Energia suggests that the word "they" should be read as referring to the Parties only and not to "all Parties and their Affiliates". Yuzhnoye suggests that the phrase refers to situations where an Affiliate participates in proceedings as an "invitee".

303. The Arbitrator is not convinced by Energia's and Yuzhnoye's interpretations of the text. Indeed, a normal reading of the text would seem to imply that not only the Parties but also their Affiliates may "choose to participate in the hearing". However, if that is what the Parties intended, it is difficult to understand why this is not explicitly stated in the first sentence of Clause 6 which only provides that all Parties are entitled to participate in the hearing. Moreover, the statement that Affiliates may participate in hearings is made almost as an incidental remark in a sentence primarily dealing with the binding effect of the arbitrator's decision. This justifies some caution in drawing general conclusions from the wording. The Arbitrator considers that the reference in the third sentence of Clause 6 to the participation of Affiliates in a hearing is unclear as to its contents, and although it does indicate that Affiliates could in some circumstances choose to participate in proceedings, it

does not lead to the conclusion that Affiliates – notwithstanding the rule in Clause 1 – may, in the same way as Parties, be Claimants or Respondents in arbitral proceedings.

(d) Clause 10 of Exhibit A

304. Clause 10 of Exhibit A, with the heading *"Sovereign Immunity Waiver"*, is composed of three paragraphs. Whereas the first paragraph only deals with the Parties, the second paragraph also mentions Venture Companies and Affiliates. It provides, in essence, that if a Party or a Venture Company brings an arbitration proceeding arising out of the Joint Venture Agreement against any other Party or its Affiliates, no immunity shall be claimed by any Party or its Affiliate.

305. The Arbitrator first notes that Clause 10 contains an unexpected reference to the *"Joint Venture Agreement"*. It should be compared with Clauses 1, 2, 4 and 11 where reference is made to *"this Agreement"*. The term "Joint Venture Agreement" is not to be found among the definitions in the Creation Agreement. It does appear, however, in the heading of Article 1.8 of the Agreement and is there apparently used as another name for the Creation Agreement, although this is not entirely consistent with paragraph C of the Recitals to the Agreement which states that *"[t]he Parties do not intend by this Agreement to create a - - - joint venture"*.

306. However, assuming that the term "Joint Venture Agreement" in the second paragraph of Clause 10 does refer to the Creation Agreement, the Arbitrator notes that the clause deals with immunity waiver in cases where *"one Party or a Venture Company"* brings *"an arbitration proceeding against any other Party or its Affiliates"*. It thus suggests that not only a Party but also a Venture Company could initiate arbitral proceedings and that not only a Party but also its Affiliates could be Respondents in such proceedings. There is no explanation of the apparent contradiction with Clause 1 which only refers to disputes between two or more of the Parties. It is also difficult to understand why Affiliates are mentioned only as potential Respondents but not as potential Claimants, and why Venture Companies are mentioned only as potential Claimants but not as potential Respondents.

307. Although the drafting of Clause 10 is confusing and unclear, the references to Affiliates and Venture Companies in the second paragraph of the clause indicate that there are circumstances in which arbitration proceedings under the Creation Agreement could be conducted with Affiliates and Venture Companies as parties. However, it is not explained when this could happen and how it relates to Clause 1 which only refers to disputes between Parties. It should also be observed that the reference to proceedings against Affiliates only appears in connection with the very special issue of immunity waiver. In the Arbitrator's view, the vague indication, in this particular context, that an Affiliate may in some circumstances be a Respondent in arbitration proceedings cannot be considered a sufficient basis for concluding that Affiliates have been given a general right to initiate arbitration proceedings in

matters related to the Creation Agreement or to present claims for relief in such proceedings.

(e) Conclusion

308. For the reasons set out above, the Arbitrator, after analyzing Article 13 of the Creation Agreement together with Exhibit A, finds that these provisions, according to their wording and despite a few disturbing elements in the text of Exhibit A, cannot be so interpreted as to give an Affiliate a right to initiate arbitral proceedings.

309. Boeing, BCSC and Kvaerner AS have not shown that, irrespective of the wording of the Creation Agreement and its Exhibit A, the Parties to the Agreement intended to give Affiliates access to arbitration. The Arbitrator also notes that, if the Parties had intended to make arbitration available to Affiliates, it would not have been difficult for them, with the assistance of legal experts, to express this intention in a clear and unambiguous manner. Moreover, Article 17 of the Creation Agreement, which provides that Articles 1-16 of the Agreement and Exhibit A comprise the entire agreement between the Parties and supersede any prior oral or written agreement, commitments, understandings, or communications with respect to the subject matter of the Agreement, provides a further reason for not speculating about the Parties' intentions or understandings in so far as they have not been clearly reflected in the text of the Agreement or supported by solid evidence.

310. The Arbitrator has also considered Boeing's, BCSC's and Kværner AS's argument that PO Yuzhnoye, in bankruptcy proceedings in the United States, has taken a position on the interpretation of the arbitration agreement at variance with the position taken in the present case by Energia and the Yuzhnoye companies and that this shows that the restrictive reading advocated by them in this case is not tenable or is even presented in bad faith.

311. The Arbitrator notes first that this argument only concerns PO Yuzhnoye and does not – at least not directly – affect the positions taken by Energia and KB Yuzhnoye. As regards PO Yuzhnoye, the Arbitrator considers that, while there seems to be an inconsistency in the positions taken by that company in different contexts, this is not sufficient to justify a departure from the conclusion which the Arbitrator has reached when analyzing the text of the Creation Agreement and its Exhibit A.

312. The Arbitrator therefore concludes that Boeing's and Kværner AS's claims for relief must be dismissed for lack of jurisdiction.

313. Having reached this conclusion in respect of Kværner AS's claims, the Arbitrator does not find it necessary to examine the further issue of the admissibility of the cross-claims brought by Kværner AS. Nor it is necessary to determine whether the fact that the Assignment Agreement of 22 December 2009 was concluded after the initiation of the arbitral proceedings should prevent Kværner AS from relying on it in these proceedings.

6. BCSC's claims

314. Since Boeing, as an Affiliate under the Creation Agreement, was not entitled to initiate arbitral proceedings under that Agreement, it follows that the claims brought jointly by Boeing and BCSC cannot be examined on the merits. However, BCSC also declared that, if the joint claims should not be admitted, BCSC brings these claims in its own name but on Boeing's behalf. BCSC argues that, when it does so, Boeing would have a right to participate in the arbitration and bring a cross-claim to pursue its substantive rights against Energia and Yuzhnoye. BCSC adds that the parties to the arbitration would then be in the same position as under the primary joint claim, albeit by an alternative procedural method.

315. BCSC further argues that, even if the provisions of the Creation Agreement had not given each of Boeing and BCSC a right to initiate this arbitration, Boeing and BCSC would still be allowed to commence arbitration under Swedish arbitration law. BCSC refers in this context to "third party rights" in Swedish law and to assignees and guarantors who have been considered in some cases to be bound by an arbitration clause in a contract between the original parties to the transaction (NJA 1997 p. 866, the *Emja* case, and RH 2003:61).

316. BCSC adds that its alternative request for relief can also be seen as an action for payment to a third party, which is allowed under Swedish law in special circumstances (NJA 1984 p. 215).

317. The Arbitrator first notes that BCSC's alternative claim concerns the same amounts as Boeing's and BCSC's joint claim and has the same basis in the Creation Agreement. BCSC's request concerns reimbursement to Boeing and not payment to BCSC. In other words; BCSC acts in its own name but on Boeing's behalf or at least for the benefit of Boeing.

318. BCSC has referred to two cases in which an entity which was not a party to a contract was considered to be bound by the arbitration provisions in the contract. In the first case, the Emja case, the essential question was whether an assignee, *i.e.* the successor of one party to a contract, had become a party also to the arbitration agreement in its relations with the other party to the contract. The other case concerned the question whether a party to a contract was entitled to rely on the arbitration agreement in the contract in a dispute not with the other party to the contract but with the entity that had guaranteed that party's obligations under the contract. In these cases there was thus a question of the relations between one party and an entity which had taken over or guaranteed the other party's obligations. In the present case, there is no question of party succession between BCSC and Boeing. There is a question of loan guarantees, but not between the guarantor and the creditor but between the guarantor and other companies allegedly responsible for parts of the amounts paid under the guarantee. The Arbitrator finds this situation fundamentally different from the circumstances in the two cases referred to by BCSC and therefore considers that these cases do not provide any guidance in the present arbitration.

319. On the other hand, the Arbitrator attaches weight to the case NJA 1984 p. 215 which concerned a claim which, like BCSC's claim, was made in favour of a third person, *i.e.* a non-party to the proceedings. In its judgment, the Supreme Court, after referring to certain provisions in Swedish law which allow claims for payment to third persons, added that, even outside the law-regulated areas, such claims could be allowed and granted but only in *"clearly exceptional situations"* (*"utpräglade undantagssituationer"*). The Supreme Court did not give any examples of such situations and did not provide any definition or further explanations of what kind of situations it had in mind.

320. The Arbitrator finds it justified to apply the Supreme Court's reasoning in NJA 1984 p. 215 also to arbitral proceedings. The question therefore arises whether the situation in the present case has features which make it "clearly exceptional".

321. The Arbitrator has found above that the arbitration agreement between the Parties in Article 13 of the Creation Agreement and Exhibit A to that Agreement only allows the Parties – and not the Affiliates – to initiate arbitration proceedings. This limitation, being part of the Parties' agreement, would lose much of its practical effect if a Party was entitled to initiate proceedings instead of its Affiliate and present the very same claims for relief that the Affiliate cannot present in its own name. Permitting a Party to act in this manner on the Affiliate's behalf would be a circumvention of the agreed limitation to Parties in Exhibit A. Consequently, the Arbitrator cannot find it justified to regard this as a "clearly exceptional situation" in the Supreme Court's terminology.

322. The claims brought by BCSC in its own name must therefore be dismissed.

7. Aker and Kværner AS as Respondents

323. The Arbitrator notes that Boeing and BCSC initially named Aker as Respondent but explained that this was done for formal reasons only. Boeing and BCSC subsequently informed the Arbitrator that, having regard to the Assignment Agreement of 22 December 2009, they accepted that Kværner AS replaced Aker as Respondent.

324. However, since no claim has been directed against either Aker or Kværner AS in these proceedings, the Arbitrator finds that no decision is called for, in so far as Aker and Kværner AS have been named as Respondents.

8. Costs

325. The Arbitrator considers that, having regard to the outcome of the case, Energia and Yuzhnoye are entitled to reasonable compensation for their costs of legal representation and other expenses. Their claims for compensation are directed against Boeing, BCSC, Aker and Kværner AS.

332. The reasonableness of Yuzhnoye's claim for compensation has been contested by Boeing and BCSC but accepted by Kværner AS. The Arbitrator finds that Yuzhnoye's claims are reasonable and should be granted.

333. The Arbitrator agrees with Boeing, BCSC and Kværner AS in finding that advance payments to the Arbitrator should be dealt with in connection with the liability for the amount determined to be the Arbitrator's fee.

THE AWARD

A. The claims presented by The Boeing Company, Boeing Commercial Space Company and Kværner AS against Open Joint-Stock Company S.P. Korolev Rocket and Space Corporation Energia, KB Yuzhnoye and State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov" are dismissed for lack of jurisdiction.

B. No ruling is made in so far as Aker Maritime Finance AS and Kværner AS have successively been named as Respondents.

C. The Boeing Company, Boeing Commercial Space Company, Aker Maritime Finance AS and Kværner AS shall, jointly and severally, pay compensation for arbitration costs to:

(a) Open Joint-Stock Company S.P. Korolev Rocket and Space Corporation Energia in the amount of three hundred and seventy-five thousand euro (EUR 375,000) as legal fees and compensation for the travel expenses of witnesses as well as VAT of sixty-seven thousand five hundred euro (EUR 67,500), both amounts with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made,

(b) KB Yuzhnoye in the amount of one hundred and twenty-seven thousand euro (EUR 127,000) as legal fees and four thousand two hundred and fifty euro (EUR 4,250) as expenses, both amounts with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made, and

(c) State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov" costs in the amount of one hundred and twenty-seven thousand euro (EUR 127,000) as legal fees and one thousand nine hundred and fifty euro (EUR 1,950) as expenses, both amounts with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made.

D. The Arbitrator's fee shall be one hundred thousand euro (EUR 100,000) which shall be drawn from the amounts of totally EUR 100,000 advanced by the Parties. As between the Parties, half of these costs shall be borne jointly by The Boeing Company and Boeing Commercial Space Company and the other half jointly by Aker Maritime Finance AS and Kværner AS. Accordingly, The Boeing Company, Boeing Commercial Space Company, Aker Maritime Finance AS and Kværner AS are obligated, jointly and severally, to pay:

(a) to Open Joint-Stock Company S.P. Korolev Rocket and Space Corporation Energia an amount of twenty-five thousand euro (EUR 25,000) with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made,

(b) to KB Yuzhnoye an amount of twelve thousand five hundred euro (EUR 12,500) with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made, and

(c) to State Enterprise "Production Association Yuzhny Machine-Building Plant named after A.M. Makarov" an amount of twelve thousand five hundred euro (EUR 12,500) with interest according to Article 6 of the Swedish Interest Act from the date of this Award until payment is made.

According to Section 36 in conjunction with Section 43 of the Swedish Arbitration Act (*lagen 1999:116 om skiljeförfarande*), this Award may be amended, in whole or in part, upon application by a Party to the Svea Court of Appeal (*Svea hovrätt*), Stockholm. Such an application shall be submitted within three months from the date on which the Party received the Award.

According to Section 41 in conjunction with Section 43 of the Swedish Arbitration Act, a Party which is dissatisfied with the Award in respect of the compensation to the Arbitrator may bring an action before the Stockholm District Court (*Stockholms tingsrätt*) within three months from the date on which the Party received the Award.

Hans Danelius