AWARD

IN

THE ARBITRATION CASE (078/200):

TNK TRADE LIMITED vs SWONCO SWEDISH OIL AB

OF THE ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

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1. INTRODUCTION

(1) On 7 August 2002 TNK Trade Ltd. (hereinafter called TNK Trade or the Claimant) submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce. In the Request the Claimant demanded payment of US Dollars 31,900,628.50 with addition of interest as outstanding payment for the Claimant's deliveries of oil to Swonco Swedish Oil AB (Hereinafter called Swonco or the Respondent) under a contract entered into between TNK Trade and Swonco on 2 April 2002.

(2) Swonco submitted its Reply to the Request for Arbitration on 10 September 2002. In the Reply Swonco rejected TNK Trade's claim, arguing that TNK Trade had no valid claim under the 2 April 2002 contract against Swonco. Should the Arbitral Tribunal accept such a claim, Swonco argued that it should be set off against Swonco's counterclaim. The

counterclaim was raised in the Reply and stated to be "at least USD 16 million". The counterclaim has later increased to a total amount of USD 36 million, thus covering the Claimant's claim with interest added.

2. THE BASIS FOR ARBITRATION

(3) In the contract of 2 April 2002 is set out in:

> *"Clause 24 Applicable Law*
> *This Contract shall be governed by and construed in accordance with Swedish law."*

and in:

> *"Clause 25 Arbitration*
> *Any dispute that arises between the Parties, including but not limited to any question regarding its existence, validity or termination, shall be referred to and finally resolved by Arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce, Sweden."*

(4) In its Request for Arbitration of 7 August 2002 the Claimant appointed as arbitrator professor Sergei Lebedev, Moscow. In its Reply of 10 September 2002 the Respondent appointed advokat Karl Johan Dhunér, Stockholm. He later withdrew as arbitrator and advokat Hans Liljeblad was appointed in his place.

(5) The Arbitration Institute of the Stockholm Chamber of Commerce on 13 September 2002 appointed Supreme Court Barrister Helge Jakob Kolrud, Oslo, as chairman of the Arbitral Tribunal.

(6) The parties then exchanged three pleadings each. The main hearing was held in Stockholm on 2, 3, 4, 5, 9, 10 and 11 February 2004.

(7) At the start of the main hearing the parties reiterated their position from the meeting between the Tribunal and the parties on 9 September 2003 that TNK Trade and Swonco were the right parties to the arbitration case. Therefore, no jurisdictional dispute exists between the parties.

3. HISTORIA FACTI

3.1 The parties

(8) TNK Trade Ltd is a Cyprus based oil trading company. The company is a sister company of a group of companies formerly known as the Onako Group that was originally owned by the Russian state, but was privatized in September 2000.

(9) The group was and is engaged in the development and exploitation of the Orenburg oilfields in the Orenburg region in the southern Ural in Russia. Through the privatization in September 2000, full control over the Onako Group was assumed by the Russian oil company ISC Tuymen Oil Company (hereinafter called TNK). TNK is a major Russian oil company consisting of a conglomerate of enterprises.

(10) After a series of transactions TNK and TNK Trade, which was incorporated in 2001, today are sister companies owned by TNK International of which TNK and BP is said to have equal interests.

(11) Swonco, short for Swedish Onako Company, was established as a trading firm in Sweden for marketing products of the Onako Group, see (8) above. Originally, it was planned that Swonco should be partly owned by Onako Group, but this did not materialise. Swonco is owned through 60% shareholding by SWH Holding HB, a Swedish company in which Mr Vladimir Dezinov holds 33,3% of the shares, and through a 40% shareholding by HME Oil AB, a Swedish company in which Mr Vladimir Dezinov holds 16 2/3 % of the shares. Mr Vladimir Dezinov is managing director of Swonco and is the sole member of Swonco's board.

3.2 Background of the dispute

(12) Due to the geographical location of the Russian oil fields it is necessary to transport oil to the markets over long distances, traditionally to the Black Sea ports or the ports of the Baltic Sea. Part of the oil has been transported through the state owned pipeline system known as "Transneft". A large part has also been transported on railway, creating a constant demand for railway transportation. The Transneft pipeline is being used for standard crude oil qualities, while the railway transportation is being used for higher quality crude oil which should not risk being mixed with standard qualities in the pipeline system.

(13) The crude oil from the Orenburg oil field is generally of a high quality, being light crude oil that can be used as a complement by oil refineries to other crude oil qualities. It is therefore much sought after by oil companies on the market. During the latter part of the 1990s Swonco developed a special quality crude oil with higher standards than the basic "Zaykinskaya" crude oil from the Orenburg oil field, by the use of mixing procedures in

connection with the transhipment operations at the oil terminal in Tallinn. This quality has been marketed by Swonco under the brand name "Onako light".

(14) The "Onako light" oil is of a quality that necessitates the use of railway transportation as pointed out under (12) above. The Onako Group sought to make a rational organisation of the logistics scheme for exporting this oil to the markets of Western Europe through Estonian ports. The Onako Group therefore established, in 1997, together with Estonian business interests a company called Onako Eesti AS. This company established a logistical scheme for effective transport of the crude oil from the Orenburg oil field at the loading terminal at Krotovka railway station through Russia and Estonia to the sea port of Tallinn. From there it was transported by tankers to central ports in Western Europe such as Rotterdam.

(15) Originally the Onako Group owned as much as 70% of the shares of Onako Eesti AS, but by the end of the year 2000, all of these shares had been sold to mainly Estonian business interests. Mr Dezinov, the managing director of Swonco, owns personally 80% of the shares of the Estonian company Benevent, which again owns some 99% of Onako Eesti AS.

(16) Onako Eesti AS developed the logistical scheme for transporting the crude oil from Orenburg through Tallinn to the Western Europe in cooperation with two Estonian companies, AVR Trans and AVR Marine. Mr Dezinov owns personally 20% of AVR Trans which organised the railway transport of the oil and 18% of AVR Marine which were responsible for the sea transport. Some of the owners of shares in AVR Trans and AVR Marine were persons employed by Onako Eesti, AVR Trans and AVR Marine.

(17) In the latter half of the 1990 the logistical scheme was used by Swonco for the export of oil from the Orenburg oil field by rail and ship to the Western European markets. The quantities of crude oil exported through the system increased from 741,868 metric tons in 1998 to 1,513,787 metric tons in 2001. Despite this increase, Swonco experienced difficulties in developing a successful export business, partly because Onako Group was mainly controlled by the Russian state the behaviour of which was not particularly businesslike. The difficulties were also caused by the insecurity caused by the expected privatization of Onako Group.

(18) When the Onako Group was privatized through a public auction in October 2000, it came under the control of TNK. The management of Onako Group was replaced by TNK managers without previous relations to Onako Eesti, AVR Trans, AVR Marine and Swonco. The new management, so Swonco maintains, seemed more interested in directing export business towards the Crown Trading Group which was affiliated to TNK through an international conglomerate, the Alfa Group. In the Respondent's point of view, which the

Tribunal sees no reason to doubt, the Crown Trading Group had difficulties in mastering the logistics necessary to take delivery by railway transport of the quantities TNK wanted to sell. As a result TNK had to feed the crude oil into the Transneft pipelines, thereby mixing high quality light crude oil with lower priced qualities. This caused considerable losses to TNK leading TNK to approach Swonco and Oneka Eesti by the end of the 2000.

(19) TNK's approach towards Swonco led to the conclusion of some supply contracts. In the first part of 2001 TNK and Swonco further concluded a frame contract for the period of April through December 2001. The maximum volume for this period was set to 1,000,000 metric tons of crude oil. The contract did not, however, contain any precise commitments for deliveries each month. This had to be agreed separately.

(20) TNK decided to base the sales on tenders from customers on a quarterly or even a monthly basis. Through the tender system, Swonco purchased crude oil from TNK during most of 2001. In his testimony, Mr Dezinov stated that about 70% of Swonco's volume of trade with crude oil in 2001 were deliveries from TNK. Swonco and TNK therefore had established a significant business relationship with each other during that year. This was not, however, as pointed out by the Respondent, a particularly satisfactory relationship for Swonco.

(21) The system of tenders as opposed to secured deliveries over a long term made it difficult for Swonco and Onako Eesti to plan the logistical system appropriately. Exporting large quantities over long distances by railway and ship requires complex planning and administration of a large fleet of railway tank cars and a number of sea vessels. The tendering system does not ensure regular crude oil deliveries and therefore exposes the logistical scheme to abrupt changes in the flow of crude oil. It was therefore important for Swonco and Onako Eesti to secure a stable flow of oil through long term delivery agreements.

(22) When the frame contract between TNK and Swonco, see (19) above, expired by the end of 2001, no immediate agreement was made for further deliveries from TNK to Swonco. TNK invited to tender for deliveries in the first quarter of 2002. Swonco participated in the tender, but did not get any deliveries from TNK which awarded the deliveries to the Crown Trading Group. Swonco had to look for other suppliers and did enter into contracts with various suppliers from Russia and Kazakhstan.

3.3 The contract between Swonco and TNK Trade

3.3.1 The contact concerning deliveries

(23) The deliveries from TNK to Crown Trading Group, see (22) above, in the first quarter of 2002, ran, according to the Respondent, into problems because Crown had difficulties in mobilizing sufficient logistical resources. Whatever the reason was, the Arbitral Tribunal considers it documented that TNK during the first quarter of 2002 again approached Swonco about deliveries. On 5 March 2002 TNK in a letter to Swonco asked for confirmation of Swonco's:

> *"... possibility to receive 50 00 tons (minimum) of light low-sulphur crude oil from Krotovka railway station within April – December 2002. ..."*
> (translated from Russian)

The letter was signed M. Kuvykov on behalf of TNK.

(24) The letter was answered by Swonco on 7 March 2002 which i.a. stated that Swonco:

> *"... will confirm the readiness to buy in April – December, 2002 on 50 000 – 150 000 mt (+/- 5%) per one month petroleum exported by you "Light Crude Oil" ..."*

(25) This letter met with TNK's confirmation of 13 March 2002, signed by Mr Kuvykov; stating (in translation from Russian):

> *"We hereby confirm the monthly delivery of 100 000 tons of REBCO oil to your company within the period from April to December 2002.*
>
> *The contract for the amount of goods mentioned above shall be prepared and concluded with you shortly by the firm TNK Trade Ltd."*

(26) On 19 March 2002 TNK followed up with a letter to Swonco, signed by Mr Kuvykov stating that:

> *"... ISC Tyumen Oil Company plans in the 2nd quarter of 2002 to deliver additionally 30 000 tons of Zaikino crude oil from Krotovka railway station under the contract concluded with TNK Trade Limited."*

The letter asked for Swonco's confirmation of acceptance of the extra quantity, something Swonco gave already the same day, stating i.a.:

"... we already have made all necessary actions on the organization of logistic, and also on delivery of the goods to end users in originally coordinated quantity, namely 100 thousand mt monthly. We are ready to accept additional volume at a rate of about 30 thousand mt (under condition of delivery of such additional volume up to the end of the current year) ...

...

In case of confirmation of delivery 30 thousand mt volume only within 2nd quarter, we also can accept it, however in this case we have no opportunity of the long-term coordination with factories of such quantity and economically expedient changes in logistic that will result in additional charges at a rate of 1.088 USA dollars/barrel (on 30 thousand mt)."

TNK confirmed on 21 march 2002 that TNK could make monthly deliveries of 130 000 metric tons of Zaikino crude oil from Krotovka railway station from April to December 2002.

(27) The delivery was formally confirmed in yet another letter from TNK to Swonco of 27 March 2002 stating inter alia:

"Herewith we confirm delivery of approx. 130 00 mts (monthly) of Light Crude Oil to be dispatched from Krotovka station within the period of April – December 2002.

We also confirm that the contract has to be signed with TNK Trade Limited. As you are aware the contract is being negotiated and we are confident it will be signed by the end of this week.

We confirm that loadings of April volume (i.e. 130.000 mts) will start under the condition your esteemed company provides for all the necessary operative formalities."

3.3.2 The contract

(28) The contract was signed by Swonco and TNK Trade Limited on 2 April 2002. It is of a type that TNK and TNK Trade use as a more or less standard type, with the text in Russian language in the left column and in English language in the right column. In clause 26.1 under "26 General Terms" is stated:

"The Contract is drawn in both English and Russian languages in two originals. In case of inconsistency between the two versions, the Russian language version shall prevail."

The Arbitral Tribunal shall under this chapter 3.3.2 quote those parts of the contract that have relevance for the arguments of the parties and the dispute.

(29) In article 3 the contract states:

"3. QUANTITY

3.1 The quantity of Crude Oil to be delivered under the present Contract shall be up to 1.500.000 metric tons. The Crude Oil is to be delivered in lots to be agreed between the Parties five days prior to the beginning of delivery and a separate Addendum to the present Contract is signed by the Parties.

3.2 Quantities of the Crude Oil stated in Clause 2.1 [obviously an error for 3.1]*above are not considered as firm delivery obligation of the Seller. The indicated data are stated for determination of maximum quantity of the Crude Oil that can be delivered under this Contract.*

3.3 The Seller's responsibility for delivery of lot of Crude Oil comes into force after the quantity and delivery terms of each lot of Crude Oil are agreed by Parties and separate Addendum to the present Contract is signed by the parties.

3.4 The Buyer's responsibility to accept a lot of Crude Oil comes into force after the quantity and delivery terms of each lot of Crude Oil are agreed by the Parties and a separate Addendum to the present Contract is signed by the Parties.

3.5 Each lot of Crude Oil agreed between the Parties for shipment shall have an operational quantity shipping tolerance +/- 5% at Seller's option."

As will be seen from sub-articles 3.2 and 3.3, the quantity set out in 3.1 is the maximum amount of crude oil that may be delivered under the contract. What in fact should be delivered would have to be agreed between the parties and set out in signed addenda to the Contract. There is no disagreement between the parties concerning this interpretation.

Such agreement concerning deliveries was in fact also concluded on 2 April 2002 and attached to the Contract as Addendum No 1 where inter alia is stated:

"1. SUBJECT OF ADDENDUM

Parties agreed the following Delivery schedule for Crude Oil from Zaikinskoye oilfields on FCE Krotovka basis as per following lots:

April 2002	*130 000 mt*	*(+/- 5 per cent)*
May 2002	*130 000 mt*	*(+/- 5 per cent)*
June 2002	*130 000 mt*	*(+/- 5 per cent)*
July 2002	*130 000 mt*	*(+/- 5 per cent)*
August 2002	*130 000 mt*	*(+/- 5 per cent)*
September 2002	*130 000 mt*	*(+/- 5 per cent)*
October 2002	*130 000 mt*	*(+/- 5 per cent)*
November 2002	*130 000 mt*	*(+/- 5 per cent)*
December 2002	*130 000 mt*	*(+/- 5 per cent)"*

(30) In articles 4 and 5 of the Contract is inter alia stated:

"4. DELIVERY

4.1 The quantity of Crude Oil delivered in accordance with clause 3 will be delivered on the terms:

4.1.1 FCA Krotovka and/or Novosergievskaya station and/or Stenkino-2 and/or Nikel;

4.1.2 DAF Russian-Estonian and/or Russian-Finnish border and/or Russian-Ukraine border.

4.1.3 CPT destination station;

5. DELIVERY PERIOD

5.1 The quantity of Crude Oil referred to in Clause 3 can be delivered in the period from 01.04.2002 till 31.01.2003.

5.2 In the event that a delivery is late to the extent that it involves its shift to the next Month, both parties reserve the right to re-negotiate the price consistent with the new Month of delivery.

5.3 In case the Crude Oil is dispatched in rail tankcars belonging to the Seller or in rented rail tankcars they are to be returned to the Seller according to the Seller's instructions.

5.4 The Seller shall give the Buyer sufficient notice of the dispatch of the Crude Oil to the named place as well as any other notice as soon as possible within reasonable period required in order to allow the Buyer to take measures which would normally be necessary to enable it to take delivery of the Crude Oil.

5.5 *The Seller shall organise main and additional rail plans (the "Plans") for transportation of Crude Oil according to Buyer's written requests in time and as per "Regulations of Rail roads of the RF"."*

Through Article 3, Addendum No 1 and Article 5 to the Contract, it was therefore formally confirmed between the parties that which had been agreed in the correspondence between TNK and Swonco in March 2002, see above under 3.3.1; that Swonco should take monthly deliveries of 130 000 metric tons per month from April through December 2002. There is no dispute between the parties concerning this understanding of the Contract.

(31) Under Article 6 of the Contract the following sub-articles is quoted:

"6. DETERMINATION OF QUALITY AND QUANTITY

...

6.7 *Claims on the quality of the Crude Oil may be presented by Buyer only in case if the actual quality of the delivered Crude Oil differs from the specification mentioned in the Enclosure 1 to the present Contract and this fact is confirmed by quality certificate issued at the point of pouring Crude oil in railway tankcars and by results of independent inspection's analysis. In case of discrepancies in results, the results of inspection held by Independent Inspectors referred to in Clause 6.3 shall be final and binding on the Parties save for fraud or manifest error.*

6.8 *Any claims on quantity and quality of the Crude Oil shall be presented to Seller within 60 days from the last date of delivery of the agreed lot of the Crude Oil.*

6.9 *Seller shall examine and present the written reply to the claim within 30 Days from the date of receipt of the claim. Should Seller fail to present the reply in the above stated period the claim is considered as accepted by Seller. In case the claim is duly confirmed the Seller shall pay the amount of the claim not later that 30 Days after the claim and the relevant invoice have been received by the Seller.*

6.10 *Claims presented to any part of the Crude Oil do not give the Buyer the right to reject the Crude Oil, delivered as per this Contract."*

(32) Article 7 in the Contract states the following concerning the price of the crude oil:

"7. PRICE

7.1 *The price for the Crude Oil is to be defined in USD per one net barrel and is to be agreed by the Parties not later than 5 (five) calendar days prior the*

beginning of the delivery month and the Parties shall sign about it a separate Addendum to the present Contract.

7.2 *The renegotiations of the price for actually delivered and/or agreed to be delivered quantities of the Crude Oil is non-admissible unless mutually agreed by both Parties.*

7.3 *Final price to be rounded to three decimal places.*

7.4 *The basic price for the "Dated Brent" Crude Oil can be fixed."*

The Contract therefore sets out a system whereby the price shall be decided individually for each delivery in accordance with an agreement. This agreement was also signed on 2 April 2002 and attached as Addendum No 2 to the Contract. It states inter alia:

1. SUBJECT OF ADDENDUM

1.1 Parties agreed the following price for crude oil from Zaikinskoye oilfield to be delivered as per Addendum No. 1 to the present Contract on FCA Krotovka basis:

Mean of the means of Brent (Dtd) quotations as published in Platt's Crude Oil Marketwire during period from 1st until 15th day of the month of delivery or from 16th until the last day of the month of delivery depending on the time of delivery or during period from 1st until the last day of the month of delivery less USD 8,06 per net barrel.

Or

Mean of the means of five consecutive quotations of Brent (Dtd) as published in Platt's Crude Oil Marketwire immediately after the Bill of Lading date (Bill of Lading date is not included) less USD 8,06 per net barrel."

The reduction by an amount of USD 8,06 per barrel represents the compensation for transport costs to Swonco which took delivery of the crude oil at Krotovka railway station. The less reduction the seller must accept the more cost-efficient the transportation system of the purchaser is.

(33) The Contract states the following about payment in Article 8:

"8. PAYMENT

8.1 *The Buyer thall pay for the value of the delivered Crude Oil to the bank of the Seller, to the account of the Seller without any deductions, counterclaims and set-offs of any kind.*

8.2 *The Buyer shall pay: within twenty two (22) days after the last date of quotation period in case quotation period linked to the month of delivery is used or within 30 (thirty) days from the bill of lading in case quotation period*

linked to the bill of lading date is used, against presentation of the following documents:

8.2.1 Commercial invoice;
8.2.2 List of railway bills;
8.2.3 Quality Certificate issued by the laboratory in the point of pouring Crude oil in railway tankcars;

8.3 If the payment due date falls on a Saturday or Bank Holiday other than Monday, then payment shall be due on the preceding Banking Day. If the payment due date falls on a Sunday or a Monday Bank Holiday then payment shall be due on the following Banking Day.

8.4 As a payment guarantee the Seller may require from the Buyer to open an irrevocable stand-by Letter of Credit issued in a first class international bank in an agreed format."

There is agreement between the parties that sub-article 8.4 deviate from the normal regime of an obligatory opening of a Letter of Credit. Usually the contracts used by TNK and TNK Trade state that a Letter of Credit shall be presented before or at delivery of the crude oil, as a condition and security for delivery. In this contract it was made an option for the Seller.

(34) The parties agree that the deviation from a more rigid scheme of security for payment was made on the initiative of Swonco, which was represented by Mr Dezinov under the contract negotiations. There is, however, strong disagreement concerning what was said on this occasion by Mr Dezinov and by TNK Trade's representative, Mr Sapronov.

(35) It is not in dispute that Mr Dezinov told Mr Sapronov that Swonco was in the process of changing bank from BN Paribas to the Austrian Raiffeisenbank. This made it difficult for Swonco to submit a Letter of Credit until the change of bank had been completed.

(36) Mr Sapronov, for the Claimant, testified that his impression was that opening a credit line necessary for submitting letters of credit would take a few days. Still it was a certain apprehension on the TNK side whether this represented a great risk. It was, however, decided to trust Swonco and Mr Dezinov on the background of the longstanding business relationship TNK had had with Swonco.

(37) Mr Dezinov, for the Respondent, testified that he had told TNK's people that the opening of a credit line would take at least two months, or in other words not be ready until

June 2002. He therefore stated that he failed to understand TNK's anxiety about Swonco's inability to present a Letter of Credit already in May 2002.

(38) In Article 10 of the Contract is stated:

"10. PRE-PAYMENT

10.1 Parties may agree to make a prepayment as partial payment for crude oil.

10.2 Pre-payment will be effected by the Buyer to the Seller's account by direct banking transfer following receipt of Seller's faxed written instructions.

10.3 Amount, form and terms of such pre-payment and the formula for assessing the deemed market value are to be agreed by the Parties on a case by case basis and incorporated as an Addendum to this Contract."

(39) In Article 13 of the Contract is stated:

"13. TITLE AND RISK

13.1 If the Crude Oil is delivered in accordance with Clause 4.1.1 and 4.1.3 title and all risks including the risk of accidental loss or damage to the Crude Oil under this Contract shall pass from the Seller to the Buyer at the moment of the stamping of the Railway Bill at the dispatch station.

13.2 If the Crude Oil is delivered in accordance with Clause 4.1.2 title and all risks including the risk of accidental loss or damage to the Crude Oil under this Contract shall pass from the Seller to the Buyer at the time of the stamping of the Railway Bill at the border crossing station in accordance with delivery DAF."

(40) In Article 14 of the Contract is set out:

"14. DURATION AND TERMINATION

14.1 This Contract shall come into effect on the Commencement Date and, subject to Sub-clauses 14.2.1-14.2.2 shall continue in force till 31.01.03 and in part of payments – until all payments have been made.

14.2 Without prejudice to any other rights to which it may be entitled, either party may give notice in writing to the other terminating this Contract with immediate effect if:

14.2.1 the other Party commits any material breach of any of the terms of this Contract and (if such a breach is remediable) fails to remedy that breach within 30 Days of that party being notified of the breach:

14.2.2 if an order is made or a resolution is passed for the winding up of the other Party or if an order is made for the appointment of an administrator to manage the affairs, business and property of the other Party or if a receiver is appointed of any of the other Party's assets or undertaking or if circumstances arise which entitle the Court or a creditor to appoint a receiver or manager or which entitled the Court to make a winding up order or if the other Party takes or suffers any similar or analogous action in the consequence of debt;

14.3 Termination of this Contract however caused shall be without prejudice to any rights or liabilities accrued at the date of termination."

(41) In Articles 22 and 26 of the Contract is stated:

"22. NOTICES

22.1 All notices or other communication under or in connection with this Contract must be in writing and made in one of the following manners and will be deemed to have been received at the following times:

Manner of Delivery and Time of Delivery

Courier
One Banking Day (in the country of receipt) after receipt of confirmation of delivery by courier.

Fax
When the sender's fax machine issues a report showing the notice as having been duly sent to the recipient's number.

All documents sent and received by fax will have legal power.

E-mail
When the sender received confirmation of delivery

22.2 Subject as provided in Clause 22.1 in proving the giving of notice it shall be sufficient to prove that the notice or other communications was properly couriered to or transmitted by fax and telex to that address

...

26. GENERAL TERMS

26.1 The Contract is drawn in both English and Russian languages in two originals. In case of inconsistency between the two versions, the Russian language version shall prevail.

26.2 The Contract may be signed by fax. In such case the Parties shall exchange original copies within 30 days.

26.3 Both Parties agree to accept Addenda, Enclosures signed by Buyers and Sellers using facsimile signatures of the Buyer and the Seller, as duly signed."

(42) The Contract was signed in Moscow at TNK's offices by Mr Sapronov for TNK Trade Limited and by Mr Dezinov for Swonco on 2 April 2002. On that date the deliveries under the contract started at the Krotovka rail terminal.

3.4 The period from signature of the Contract until the end of June 2002

3.4.1 The deliveries in the second quarter of 2002

(43) As stated under (41) above, the deliveries under the Contract started immediately on 2 April 2002 and went on almost continuously during April. The April delivery amounted to 112,009.573 gross metric tons, somewhat less than agreed on 2 April 2002, see (29) above. In May 2002 there were also continuous deliveries, resulting in 130,015.664 gross metric tons and in July in the same manner but again somewhat less than agreed; 122,013.772 gross metric tons.

(44) For these three montly deliveries Swonco was presented with three invoices. The invoice for April with due date on 22 May 2002 amounted to USD 15,390,290.54, the invoice for May with due date on 21 June 2002 amounted to USD 15,244,807.66 and the invoice for June with due date on 22 July 2002 amounted to USD 14,365,530.30

(45) The total amount of the three here listed invoices is USD 45,000,628.50. There were no payments on the due dates of the invoices. In June and July Swonco paid in total USD 13,100,000, so that of the total amount mentioned above, USD 31,900,628.50 remain unpaid. This amount should, however, be reduced by USD 515,993.52 which is the result of a set off agreement between the parties, concluded on the 19 July 2002. There is no dispute between the parties concerning these facts.

3.4.2 Events leading up to the 20 May meeting in Moscow

(46) The parties disagree to a large extent about the background of the meeting between Mr Dezinov and Mr Sapronov and Mr Kuvikov on 20 May 2002 at TNK's offices in Moscow. That is, the parties agree that the meeting was set up through a telephone conversation some days prior to the meeting between Mr Dezinov and Mr Kuvikov. It is also in evidence that the meeting should discuss adjustments in the agreed price for the April delivery of crude oil because of a lesser volume delivered than agreed on 2 April 2002 and the fact that the transport had been conducted via another and costlier route than foreseen.

(47) The witnesses for the Claimant have emphasized that their main purpose with the meeting was discussing the problem Swonco had in financing the purchases of crude oil. They maintain that sub-article 8.4 was written in the form of an option for TNK Trade to demand a Letter of Credit because Swonco at the moment could not present a Letter of Credit from a bank. They trusted Swonco and Mr Dezinov because of long standing business relations and based their acceptance on that financing would be established in a few days. They deny having been informed about a period as long as two months, or even more, waiting for the establishment of the financing. The witness Mr Shapiro told that he had several times orally asked Mr Dezinov when he would submit the Letter of Credit without getting a definite answer. He stated that he did not send a written request because that would have resulted in Swonco being in default of sub-article 8.4 of the Contract, something he wished to avoid.

(48) Mr Dezinov in his testimony accepted that the question of payment was discussed at the 20 May meeting, but maintains that this was on his initiative. There was no reason for such discussion prior to that meeting, because the due date of the invoice for the April delivery was 22 May 2002. Mr Dezinov had frequent telephonic contacts with TNK, especially with Mr Kuvikov who was responsible for the export of crude oil, about technical matters, such as the route of railway transportation.

(49) Swonco contests that the invoice for the April delivery, which is dated 7 May 2002, was sent to Swonco before the 20 May meeting. Swonco points to the fact that the invoice is based upon a reduction for transport of USD 8,92 per barrel, whereas Addendum No 2 to the 2 April 2002 Contract states that the reduction should be USD 8.06 per barrel, see (32) above. The reduction of USD 8.92 per barrel was agreed as Addendum No 3 on 20 May 2002 together with the other agreements made that day. The invoice cannot therefore have been written before 20 May 2002.

(50) Swonco also refers to its letter of 24 May 2002 to TNK Trade with copy to TNK attention of Mr Kuvyov, where Swonco complained about a mistake in the "Invoice no 43 dated May 7, 2002".

(51) The Arbitral Tribunal does not agree with the Respondent concerning the submission of the invoice. The invoice presented by the Claimant as exhibit 6 of the Statement of Claim must clearly be a corrected invoice, prepared after the 20 May meeting. The original invoice, containing mistakes pointed out by Swonco on 24 May, must have been sent to Swonco on or about 7 May 2002.

Still the due date was 22 May, which occurred after the 20 May meeting. On that background Swonco maintains that there was no reason to put the payment on the agenda when TNK Trade refers to Swonco's delay in submitting a Letter of Credit as a reason for making the financing situation an important point on the agenda. In any case there could be no delay here before 22 May 2002.

3.4.3 The 20 May meeting

(52) The parties again disagree to a large extent concerning what happened at the meeting. It is, however, not in dispute that the principal attendants were Mr Sapronov and Mr Kuvikov from TNK and Mr Dezinov from Swonco. Neither is it in dispute that the meeting lasted – at least - 3-5 hours and resulted in three agreements:

The Amendment Agreement
Addendum No 3 to the Contract of 2 April 2002
Addendum No 4 to the Contract of 2 April 2002,

although Swonco has serious allegations against the legal character and the validity of the first mentioned agreement.

(53) It is in dispute whether the meeting also communicated by conference call with Mr Shapiro at TNK Trade in Cyprus, the Claimant maintaining that this took place and the Respondent denying it.

(54) The most serious dispute concerns the Amendment Agreement which reads in toto:

"Amendment No 1
To Addendum No 1

To CONTRACT
No. 12-02/SWONCO/LCO-02.04.02
Dated 02/04/2002

Stockholm 20 May 2002

"TNK TRADE LIMITED", Julia House, 1st Floor, 3rd Dervis Street, CY-1066, Nicosia, PO Box 25549, CYPRUS, hereinafter referred to as the "Seller", and "SWONCO Swedish Oil AB", Box 7814 S-103 96, Stockholm, Sweden, hereinafter referred as the "Buyer", have concluded the present Amendment to Addendum No 1 dated 02.04.02 to the contract No. 12-02/SWONCO/LCO-02.04.02 (hereinafter referred to as "Contract") as follows:

1. SUBJECT OF ADDENDUM
The Parties have agreed to read item 1.1 of the Addendum 1 dated 02.04.02 to contract No. 12-02/SWONCO/LCO-02.04.02 dated 02.04.02 as follows:

"1.1 Parties agreed the following Delivery schedule for crude oil from Zaikinskoye oilfield on FCA Krotovka basis in 2-nd quarter 2002:

April 2002	*112 000 mt (+/- 5 per cent)*
May 2002	*130 000 mt (+/- 5 per cent)*
June 2002	*130 000 mt (+/- 5 per cent)*

The parties have agreed the preliminary schedule with of deliveries for the next quarter not later than 30 day before commencement of this quarter.

2. OTHER CONDITIONS
2.1 The present Amendment is the integral part of Contract No 12-02/SWONCO/LCO-02.04.02 dated 2nd of April, 2002. In everything else which is not envisaged in the present Amendment, terms and conditions of Contract No 12-02/SWONCO/LCO-02.04.02 dated 2nd of April, 2002 remain unchanged."

There are several differences in the Russian and English text that should be pointed out:

The text "The Parties have agreed to read item 1.1 ..." (emphasis added) should rather be translated from Russian as "The parties have agreed to write/set out item 1.1" (emphasis added). Likewise the last para of 1. SUBJECT OF ADDENDUM can be directly translated

from Russian as "Within 30 days prior to the commencement of the next quarter the parties shall agree on the preliminary schedule of deliveries for that quarter."

(55) The witnesses Sapronov and Kuvikov testify that the Amendment Agreement was made in order to reduce the risk for TNK Trade under the Contract for further deliveries without appropriate security. Therefore only the first three months of crude oil delivery were set out as originally agreed, while the remaining six months were changed to being dependant on the parties agreement of deliveries ahead of each quarter. The reason for the change was in Sapronov's and Kuvikov's points of view the difficulty Swonco had in presenting appropriate security for payment. It is also their view that this was made clear to and accepted by Mr Dezinov.

(56) Mr Dezinov contests the testimony of Mr Sapronov and Mr Kuvikov. He was, so he testified, asked by mr Sapronov to change the wording of Addendum No 1 of 2 April 2002 Contract so that it no longer could be seen as a long-term contract. Mr Sapronov told him, so Mr Dezinov testifies, that the TNK leadership had been furious when they discovered that Mr Sapronov had accepted a long term obligation on behalf of TNK in disregard of TNK's internal rules. He was in danger of being fired if this was not changed. He therefore asked Mr Dezinov to agree to the change, while he assured Mr Dezinov that he still would be getting the crude oil deliveries as originally agreed. Mr Dezinov wanted to help Mr Sapronov and therefore he signed. Mr Sapronov denies having made such a statement and Mr Kuvikov denies having overheard it. Mr Sapronov testified that he did indeed talk about the danger of people being fired, but that was in connection with the discussion on payment, not in connection with the content of the Amendment Agreement.

(57) In conformity with the testimony later given by Mr Dezinov, counsel for the Respondent made the following statement concerning the Amendment Agreement on behalf of the Respondent to the protocol of the arbitration proceedings of 2 February 2004:

> *"We acknowledge that the document according to its wording constitutes a replacement of the corresponding provision in Addendum No. 1. However, it was not intended by the parties that the document would be applied in accordance with its wording."*

(58) The Claimant maintains that the text of the Amendment Agreement was prepared in TNK Trade's office on Cyprus and faxed or mailed to Moscow. Several drafts with corrections following from the negotiations in Moscow were faxed or mailed to Cyprus and returned in corrected version. When the final text was agreed, it was written out in Cyprus and signed by Mr Shapiro on behalf of TNK Trade and then scanned and e-mailed to Moscow,

where it was signed by Mr Dezinov in the presence of Mr Sapronov and Mr Kuvikov. Swonco alleges that this way of signing the agreement is not in compliance with the Contract.

(59) According to Mr Dezinov, he was the one who took up the payment question at the meeting. In his view, contested by Mr Sapronov and Mr Kuvikov, this was the first time a possible delayed payment was discussed. According to Mr. Dezinov's testimony he told Mr Sapronov and Mr Kuvikov that the money for his sales of the April delivery was beginning to come in. As he had had to prepay the railway transportation, he did not, however, have the money to pay the April invoice on the due date of 22 May. He asked for an extension until 10 June 2002. To this Mr Sapronov answered that payment later than the end of May would cause serious trouble.

(60) Mr Sapronov testified that he was shocked by the proposal. He told mr Dezinov that the financial monitoring in the big TNK company was such that serious consequences would ensue, unless payment was received within 31 May 2002. The staff members responsible for such a huge deficit might face being fired. He did not say that he himself was in danger of being fired, and he was not when the invoice was not paid.

3.4.4 The 31 May letter

(61) When the due date of the April invoice arrived, TNK Trade did not receive any payment. TNK Trade sent a letter to Swonco on 28 May 2002 stating:

> *"Dear Vladimir!,*
> *I ask you to carry out payment of the debt of Swonco Swedish Oil AB to TNK Trade Ltd. With regard to the crude petroleum shipped in April, 2002 (invoice No. 43 of May 07 2002) not later than May 29 – 30, 2002 so that our company in turn could carry out our obligation to the supplier OAO "Tuymen Petroleum Company" without infringement of terms.*
>
> *Also I ask you to inform us of the maturity date and conditions of settlement of the delay of the specified payment in as soon as possible.*
>
> *We look forward to further mutually advantageous cooperation."*

(62) In his testimony Mr Dezinov stated that he considered the letter as a confirmation of what had been said at the meeting in Moscow 20 May 2002, in other words he considered the time for payment extended to the end of May.

(63) On 31 May TNK Trade sent Swonco a letter addressed to Mr Dezinov in which was stated:

> *"Dear Messrs !*
> *According to par. 1 of the Amendment 1 to the Addendum 1 of the Contract No 12-02.SWONCO/LCO-02.04.02 we inform you, that no loading of crude oil under the mentioned contract is planned for the 3rd quarter of 2002.*
>
> *We look forward to the further collaboration.*
> *TNK Trade Ltd."*

The parties view this letter in very different ways.

(64) The Claimant regards it as a notice in conformity with the Amendment Agreement of 20 May 2002. The Claimant considered itself entitled to send the notice on the background that Swonco had not paid the April invoice and had not put up any Letter of Credit. The 31 May was the latest day TNK Trade could give notice that no further deliveries would take place unless payment was made. The reason why the lack of payment was not mentioned in the letter, was according to the witness Mark Shapiro that this was a formal notice under the Contract that should contain only the contractual message that was in fact given. The letter of 28 May should in the view of the Claimant be considered as a sufficient warning before the 31 May 2002 letter.

(65) Mr Dezinov stated in his testimony that he was very surprised by the letter, which Swonco primarily regards as a breach of the Contract. In his view, Swonco was under the Contract entitled to crude oil deliveries of 130 000 metric tons each month from April through December 2002. The letter was in clear breach of Mr Sapronov's promise to him on the 20 May 2002 that the Amendment Agreement should only be used for internal purposes in TNK and not change the long term obligation of deliveries from April until the end of December. He tried immediately to get in contact with Mr Sapronov and met him on 3 or 4 June 2002 in Moscow. When Mr Sapronov was asked about his promises, he answered that he had been told to do this by people higher up in the chain of command in TNK. When Dezinov asked for the grounds for what he regarded as a cancellation, Mr Sapronov just told him that he had signed the Amendment Agreement. Mr Dezinov then, according to his testimony, became very angry and shouted that the Amendment Agreement had been made by fraud.

(66) TNK Trade did not, as Swonco, consider the 31 May letter as a cancellation. It was made in accordance with the Amendment Agreement and concerned deliveries in the third quarter of 2002. There was nothing preventing the parties taking up deliveries under the Contract for the fourth quarter, provided Swonco paid for the deliveries already made.

3.4.5 Correspondence and contacts between the parties in June 2002

(67) The first written reaction from Swonco on the 31 May letter was a letter dated 10 June 2002 to TNK Trade, attention: Mr O. Sapronov, with copy to TNK attention: first vice president Mr A. Kaplan. The letter reads:

> *"Dear Mr Sapronov*
> *Hereby we would like to express our deepest respect and to inform You of the following.*
>
> *We were extremely surprised when we received Your letter as of May 31, 2002. As we understood from Your letter, TNK Trade Ltd. is not going to deliver to our company Zaikinskaja crude oil on terms FCA Krotovka as from July, 2002.*
>
> *In this respect we would like to draw Your attention to the fact, that as per the contract No. 12-02/Swonco/LCO-02.04.02 as of April 2, 2002 TNK Trade Ltd. undertook to deliver Zaikinskaja Crude Oil in the amount of 130,000 MT per month within the period from April till December 2002. Upon signing of the said contract in April 2002 our company took actions necessary to fulfil obligations on receipt and loading of crude oil as follows: we rented on a long-term basis additional railway tanks for transportation of crude oil, concluded time-charter parties for tankers for loading crude oil onboard, signed long-term contracts on purchase of crude oil, etc.*
>
> *Considering the aforementioned, we are forced to consider Your refusal to deliver the agreed amount of crude oil within the 3rd quarter as a rough breach of the contract, which can result in serious negative consequences for our business. Therefore we consider ourselves entitled for actions necessary to be taken in this situation, including but not only the right to present to You claims for reimbursement of all damage and expenses suffered by our company, including revenues lost as a result of the breach of the contract.*

At the same time we are willing to do our best in order to resolve the situation amicably and to find the solution that would be acceptable for both parties. In order to do so, we are ready to arrange a meeting with You."

(68) TNK Trade, on the other hand, continued to write to Swonco about the delay in payment, as witnessed by its letter of 11 June 2002:

"Dear Mr Dezinov,
Continued from the dd. June 06th this year we express an utmost concern about the very long delay with the payment for the Zaikino crude oil delivered to you in April this year. We remind you that, you must have made the payment in the amount of 15 390 290,54 USD (fifteen million tree hundred and ninety thousand two hundred and ninety US dollars and fifty four cents) by May 22nd, 2002 at the latest as to the Contract 12-02/SWONCO/LCO 0104.02.

We draw your attention to the fact, that we have not received any explanation from your company for the extensive delay in payment.

Your company also has numerously breached the due time of payment for the tariff of transportation of crude oil in June this year, as we made clear in our letter dd. June 06th, 2002.

In connection with the above said, we consider the actions of SWONCO Swedish Oil AS as a heavy violation of the Contract No 12-02/Swonco/LCO-03.04.02 and we secure our right for the actions necessary in such situations.

We believe that the mentioned liability shall be settled before June 13th, 2002.

We also propose you to hand shortly over the guarantee of payments for the goods delivered in May-June this year (open the Letter of Credit).

Along with this, we are ready to give maximum effort to finding a mutually acceptable solution, and we offer you to meet in Moscow on June 18th, 2002.

(69) The parties did start negotiations in the second half of June 2002. The purpose of the negotiations seems somewhat in dispute, but that may in the opinion of the Arbitral Tribunal be caused by the different focus of the two parties. Swonco had its focus on the speedy resumption of the deliveries while TNK Trade concentrated on getting paid for the deliveries already made.

(70) Swonco did, however, start paying TNK Trade in June and continued paying in instalments thus:

a) USD 2,000,000 was paid on 13 June 2002
b) USD 2,000,000 was paid on 20 June 2002
c) USD 1,000,000 was paid on 21 June 2002
d) USD 1,000,000 was paid on 26 June 2002
e) USD 4,000,000 was paid on 1 July 2002
f) USD 3,100,000 was paid on 19 July 2002

so that in all USD 13,100,000 had been paid by 19 July 2002. On 19 July 2002 the parties also agreed on a set-off contract whereby TNK Trade purchased oil from Swonco and set-off the payment in Swonco's debt. By the set-off contract, Swonco's debt was reduced by USD 515,993.52.

(71) The negotiations between the parties continued into July and August 2002.

3.4.6 Correspondence and negotiations between the parties from 1 July until 7 August 2002

(72) The meeting that TNK Trade invited to in its letter of 11 June 2002, see above under (68), was held, but the negotiations were without result. This led Swonco to submit a notice of claim on 3 July 2002 to TNK Trade:

> *"Dear Sirs*
> *NOTICE OF CLAIM*
> *We refer to our meeting on June 18, 2002 and previous discussions concerning contract No. 12-02/SWONCO/LCO-02.04.02.*
>
> *As already mentioned in our letter to you dated June 10, 2002 we consider your decision not to deliver any crude oil to us during the 3rd quarter of 2002, a serious breach of contract. Regrettably we can now also conclude that your refusal seems definite. As also previously mentioned our business will suffer extensive economical consequences for which we hold TNK Trade Ltd. Responsible. The amounts are presently being calculated by our transport and transhipment service provider Onako Eesti AS and the final amounts are yet to be determined. Despite this we can already now in general present the size of the loss of profits as well as direct costs which are*

incurred within the logistical system resulting from your improper decision not to fulfill your delivery undertaking. In accordance therewith we hold you responsible as follows:

Cost for terminal handling in port of Muuga, Tallinn

In accordance with the existing contracts for storage and transhipment services of the terminal in the port of Muuga, Tallinn, charges for terminal rental and other transhipment services for the contractual volumes (130 000 mt/month) during the period July – September, amounts to approximately USD 450 000 per month. In total this amounts to approximately USD 1 350 000 for the said period.

Cost for rail tank cars

The fleet or rail tank cars designated for the transportation from Krotovka railway station to port of Muuga, Tallinn, during the period July – September are approximately 1341 tank cars, which are subject to substantial lease costs, costs for storage rental on the railway lines, transportation of empty cars of other operational costs.

In total, the cost for leasing, storage rental and operational costs and service charges of these railtank cars amounts to approximately USD 1 998 460 per month during this period or in total USD 5 995 380.

Cost for time charter and operation of sea vessels

To secure the stable shipment of the contractual volumes for the third quarter of 2002 three vessels have been contracted. Thus, there are significant costs in connection with time charter of these vessels, idle time as well as other operational costs and service charges.

Based on the contractual volumes (130 000 mt/month) the accumulated cost for these three vessels amount to approximately USD 1 303 500 per month. During the period July – September the cost thus amounts to no less than USD 3 910 500.

Loss of profits

The loss of profit in connection with the sales of the contractual volumes during the third quarter of 2002 is not at this time possible to compute with any certainty. Assuming that the loss of profit is not in any case less than an amount corresponding to a premium of 0,20 USD/bbl (1,6 USD/mt) a preliminary figure can however be determined as follows:

130 000 mt x 1,6 x 3 month = 624 000 USD

To summarize the situation, we can identify considerable direct costs within the logistical system and a preliminary loss of profits for which we hold you responsible. In total these costs and loss of profits amounts to not less than USD 11 679 880 during the period of July, August and September 2002 and which amount we hereby claim from TNK Trade Ltd.

Furthermore, to the extent you will fail to meet also the delivery obligation for the 4th quarter of 2002 there will be additional costs and loss of profits which today can be estimated to an amount not less than USD 11 543 480. It shall thereby be noted that we reserve all of our rights in relation thereto including but not limited to the right to cancel the contract and/or to claim additional compensation. In this context it shall be further noted that the sums referenced in this letter are preliminary and that we will revert with such clarifications and/or additional claims as we will deem appropriate."

(73) The letter was met with a renewal dated 11 July 2002 of TNK Trade's request for payments of invoiced amounts that had fallen due:

"Dear Sirs
We would like to inform you that according to the Contract No 12-02/Swonco/LCO-02.04.02 TNK Trade Ltd delivered the following quantities of crude oil from Zaikinskoe oil field:

April - 112,009.573 metric tons (Invoice No 43 dated 07.05.2002)
May - 130,015.664 metric tons (Invoice No 138 dated 13.06.2002)

The amount due to TNK Trade Ltd was USD 30,635,098.20
The amount paid by your Company was USD 10,000,000.00

The outstanding amount therefore is USD 20,635,098.20
The interest amount for late payment
For today 11.07.02 is USD 2,148,214.15

June - 122,013.722 metric tons (Invoice No 222 dated 11.07.2002)

The amount for June deliveries is USD 14,365,530.30
Total amount due to TNK Trade Ltd is USD 37,148,842.65

We insist on immediate payment the outstanding amounts and opening the irrevocable Letter of Credit to cover June deliveries.

Until the full settlement of the above we are not in a position to deliver any crude oil under the Contract 12-02/Swonco/LCO – 02.04.02 and expressing our great surprise receiving your Notice of Claim dated the 03-d of July, 2002.

We without prejudice reserve the right to hold you fully responsible for all expenses and damages occurred."

(74) The negotiations between the parties continued in July, and the parties again disagree to a considerable extent on what was the purpose of the negotiations. They agree, however, that the first vice president of TNK, Mr Kaplan, took part in the most important of the negotiations as did Mr Shapiro and to some extent Mr Vakhnin. On the other side mr Dezinov negotiated on behalf of Swonco, assisted by Mr Zimin of Onaka Eesti, Mr Vinogradov of AVR Trans and Mr Ugom of Onaka Eesti.

(75) After negotiations a security agreement was entered into on 19 July 2002 between TNK Trade and Onako Eesti, 98% of the shares of which were owned by the company Benevent where Mr Dezinov owns 80% of the shares. The Agreement makes Onako Eesti jointly and severally liable for Swonco's debt of 35 million USD to TNK Trade:

"AGREEMENT
This agreement, hereinafter the Agreement, has been executed in Tallinn, on this 19 July 2002 by and between:

Onako Eesti Aktsiaselts, a joint-stock company registered and operating under the laws of the Republic of Estonia, registration code 10306415, located at Marati 14, Tallinn, hereinafter Onak, represented by a member of the Board of Directors, Mr. Vladimir Dezinov, personal Id No 36109080336, who is acting by virtue of the applicable law,

And

TNK Trade Limited, a company registered and operating under the laws of Cyprus, located at 3 Th Dervis Street, CY-1066, Nicosia, Cyprus, hereinafter TNK Trade, represented by the General Manager, Mr. Mark Shapiro, who is acting by virtue of a power of attorney,

Hereinafter referred to as "Party" or "Parties"

Whereas, *Swonco Swedish Oil AB, a company registered and operating under the laws of Sweden, located in Stockholm, hereinafter Swonco, and TNK Trade have executed a contract No 12-02/SWONCO/LCO-02.04.02 on 5 April 2002, hereinafter the Oil Sales Agreement, whereby TNK Trade has sold and delivered crude oil to Swonco and Swonco has undertook to pay to TNK Trade for it;*

whereas, *Swonco has failed to pay the purchase price for the crude oil shipments delivered to it by TNK Trade under the Oil Sales Agreement. At the time of the signing of this Agreement the outstanding debt of Swonco to TNK Trade under the Oil Sales Agreement is in the amount of 35,000,000 (thirty five million) US dollars (hereinafter the Debt);*

whereas, *Onako acknowledges the Debt of Swonco in full amount and, by the signing of this Agreement, and agrees to guarantee the repayment of the Debt to TNK Trade jointly and severally with Swonco;*

whereas, *in order to secure the performance of its obligations under this Agreement Onako shall pledge its assets under the terms and conditions of this Agreement and incur certain other obligations to achieve repayment of the Debt to TNK Trade in full amount."*

(76) As part of the Security Agreement, Onako Eesti made a guarantee to pay Swonco's debt to TNK Trade on written request from TNK Trade if Swonco did not pay.

(77) As another part of the Security Agreement Onako Eesti obliged itself to establish a second ranking commercial pledge of railway cars for transport of oil controlled by AVR Trans which was stated to belong to the same group of companies as Onako Eesti.

(78) As a further part of the Security Agreement Onako Eesti pledged a Learjet 55 airplane owned by Onako to the benefit of TNK Trade.

The pledges had been agreed without the formal acceptance of a general meeting of the shareholders of Onako Eesti. An extraordinary general meeting held 31 July 2002 accepted the pledges.

(79) The negotiations also led to other pledging agreements, either of shares in companies controlled by Mr Dezinov or of shares owned by persons employed by the Onako Eesti or companies working with or under Onako Eesti in the logistics scheme, such as AVR Trans and AVR Marine. These pledging agreements were signed 1 August 2002 and concerned:

a) Share Pledge Agreement between AKTIASELTS BENEVENT and TNK Trade for the pledging of 99.8% of the shares in Onako Eesti to TNK Trade.

b) Share Pledge Agreement between Vladimir Dezinov, Rein Sillar and Juri Zimin, which together owned 100% of the shares in AKTIASELTS BENEVENTE and TNK Trade, for the pledging of the shares to TNK Trade.

c) Share Pledge Agreement between Andrus Nurk, Alvar Ilves, Rein Sillar, Vladimir Dezinov and Vladimir Vinogradov owning in total 4908 shares of AVR Trans and TNK Trade for the pledging of these shares to TNK Trade.

d) Share Pledge Agreement between Vladimir Ugom, Eduard Pall, Andrus Nurk, Rein Sillar and Vladimir Dezinov owning in total 344 shares of AVR Marine and TNK Trade for the pledging of these shares to TNK Trade.

e) Pledge Agreement between Onako Eesti and TNK Trade pledging an aircraft owned by Onako Eesti to TNK Trade.

All of the pledge agreements stated that the pledges were made in:

"... order to secure the performance of Swonco's obligations under the Oil Sales Agreement and Onako's obligations under the Surety Agreement."

(80) The witnesses from the Respondent's side have all stated that the negotiations concerned, and their pledges had as condition, the resumption of the crude oil deliveries in some form. Otherwise the share owners that are not party to the Contract would not have pledged their shares. When asked by the Arbitral Tribunal why this condition had not been stated in written form anywhere in the pledging agreements, Mr Dezinov stated that it had been pointed out by TNK and TNK Trade that entitlements or advantages for third parties could not be included in the pledge agreements. His lawyers had confirmed this.

These witnesses point out that several alternatives were discussed and many calculations made during the negotiations. Onako Eesti, AVR Trans and AVR Marine submitted their cost calculations to the TNK and TNK Trade people so that they could control the correctness of

the calculations. The negotiations concerned repayment of Swonco's debts through using the Onako Eesti, AVR Trans and AVR Marine transport system. This would save money compared with TNK's own arrangement of the transport and the savings could repay Swonco's debts over a number of years.

(81) The witnesses from the Respondent's side also maintain that, as an alternative, trading the oil through Swonco was discussed. In that connection the parties discussed a draft contract dated 26 July 2002 between TNK – not TNK Trade – and Swonco. The draft contract had stipulated a frame of "up to 4,000,000 metric tons" of deliveries during a "period from 01.09.2002 till 31.07.2005".

(82) The witnesses from the Claimant's side agree that the resumption of deliveries in some form was discussed. That was, however, discussed in the light of a firm commitment of repayment of Swonco's debt. The pledge agreements were a step in the right direction. The pledges could not, however, provide sufficient security for such repayment. In TNK Trade's point of view the total pledges were not worth more than 5-6 million USD, while Mr Dezinov maintained that they were worth more than the whole of Swonco's debts, about 36 million USD.

(83) TNK Trade disagrees that their negotiators ever indicated that crude oil deliveries through Swonco could be resumed. It is agreed, however, that discussions were conducted on the basis of TNK using the Onaka Eesti system for transport and that savings made through that could repay Swonco's debt. It was because of these discussions that Mr Kaplan of TNK indicated that he might convince his superiors about a resumption on this basis. How clear this indication was, is in dispute between the parties. The discussions on the basis of the draft contract dated 26 July 2002 was in TNK Trade's view just that, discussions on the basis of a draft in which many alternatives were discussed.

(84) The parties also disagree on whether it was a condition for an agreement that there should be no court or arbitration case between TNK Trade and Swonco concerning the repayment of Swonco's debt. The witnesses for the Respondent maintain that Mr Kaplan accepted this condition, while the Claimant denies that such acceptance was given.

(85) All the pledge agreements were signed the 1 August 2002 in Moscow where Mr Kaplan asked the people attending the meeting to start up transportation. It is doubtful what Mr Kaplan meant by that. In the opinion of the Arbitral Tribunal he cannot have meant a resumption of trade through Swonco but may have meant start of TNK's use of the transportation scheme of Onako Eesti, AVR Trans and AVR Marine. Such start of TNK's use was, however, not to be.

(86) It is not quite clear to the Arbitral Tribunal what happened between 1 and 7 August 2002. It is, however, in evidence that no start of transportation through the Onako Eesti system took place. When the persons who had pledged their shares became aware of TNK Trade's request for arbitration, they considered it a breach of contract by TNK Trade.

(87) After August 2002 the companies Onako Eesti, AVR Trans and AVR Marine have become either bankrupt or on the verge of bankruptcy because of lack of business.

(88) On 7 August TNK Trade submitted its Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

4. THE ALLEGATIONS OF THE PARTIES

4.1 The claim

(89) The Claimant maintains that this part of the case is very simple. Swonco has purchased three monthly deliveries of crude oil and has only paid a small part of the purchase price. Accordingly Swonco is in delay with the payment of an amount of USD 31,384,634.98 to which must be added interest.

(90) The Claimant points out that Swonco has had no complaints about the quality of the oil which has been sold on to Swonco's customers. Swonco has accepted the correctness of the amount claimed by TNK Trade. It has in TNK Trade's point of view not submitted any sensible argument against payment of the debt except for the counterclaim to which will be reverted below.

(91) The Respondent maintains, as far as the Arbitral Tribunal can ascertain, as an argument that the Contract in reality is not between Swonco and TNK Trade, but between Swonco and TNK. TNK Trade was inserted into the contract at the last minute, after all parts of the contract had been negotiated and agreed with TNK. Therefore Swonco disputes owing TNK Trade anything, in spite of Swonco's explicit statement to the protocol of the proceedings on 2 February 2004 reading:

> *"3. The chairman of the Arbitral Tribunal directed the attention of the counsel to the minutes of the meeting of 9 September 2003 and read point 1 of the minutes. The counsel confirmed that they stood by what had been minuted then; that TNK Trade*

and Swonco were the right parties to the arbitration so that no jurisdictional dispute would arise."

(92) The Respondent does not dispute the correctness of the amount claimed by TNK Trade. Should the Arbitral Tribunal find that Swonco owes TNK Trade that amount, Swonco submits that it should be acquitted by the Arbitral Tribunal, the reason for such acquittal being that Swonco has a counterclaim against TNK Trade which is bigger than TNK Trade's claim.

4.2 The counterclaim

(93) The Respondent submits that Swonco has a counterclaim against TNK Trade to in amount of USD 36,000,000. The counterclaim contains losses suffered by Swonco because of TNK Trade's breach of contract.

(94) As its first argument the Respondent alleges that the Amendment Agreement of 20 May 2002 has not been signed in accordance with the Contract. It is therefore not a valid change of the Contract, and the 31 May letter must be regarded as described below under (94) resulting in its being considered as a wilful breach of the Contract.

(95) As its second argument the Respondent submits that TNK Trade made a fundamental breach by cancelling deliveries under the Contract by its 31 May 2002 letter. This letter referred only to the Amendment Agreement of 20 May. The Respondent's argument here is that the Amendment Agreement is a "sham" contract and therefore invalid. It was written for internal purposes in TNK and should not be considered as a valid change of the 2 April 2002 Contract. On 31 May 2002 the entitlement for Swonco of 130,000 metric tons of crude oil in the months after June existed under the Contract. TNK Trade could not unilaterally cancel its obligations under the Contract. The 31 May 2002 letter therefore represents a wilful breach of the Contract for which TNK Trade is liable to pay unlimited damages.

(96) The Respondent further disputes that the 31 May letter can be considered as an appropriate notice under § 71 in CISG for withholding deliveries because of Swonco's delay in payment.

(97) The Respondent submits as its third argument that as TNK Trade knew full well that Swonco signed the Amendment Agreement on the assumption that it would not be applied, it would be contrary to Sections 33 and 36 of the Swedish Contracts Act (SFS 1915:218) to apply the Amendment Agreement. It must be considered disloyal by TNK Trade to cancel the Contract with full knowledge of the big expenses that had been incurred by Swonco in organizing the logistical scheme for the transport of the deliveries. A correct interpretation of

Sections 33 and 36 must lead to the invalidity of the Amendment Agreement. Consequently it could not be used as basis for the 31 May letter, which again has the consequence that this letter represents a wilful breach of the 2 April 2002 letter.

The Respondent no longer refers to Section 32 in the Swedish Contracts Act as an argument for the invalidity of the Amendment Agreement.

(98) The Respondent maintains as its fourth argument that the 31 May letter cannot be considered as a suspension of the deliveries. Because of the fact that the 2 April 2002 Contract was based on a nine month term of deliveries, the resale by Swonco to its customers had to be based on "principles of continuance and indivisibility". It was of paramount importance that the delivery period was not interrupted. By sending the 31 May letter, TNK Trade in reality terminated the Contract in its entirety which again must lead to TNK Trade being liable to compensate al losses suffered by Swonco.

(99) The Respondent maintains as its fifth argument that TNK Trade acted disloyally by informing the Raiffeisenbank that no more deliveries would be made. That took away the basis for the credit line the bank should establish for Swonco. During his testimony Mr Dezinov stated, however, that the bank still had accepted to establish a credit line. This was told to Mr Dezinov on the phone by an employee of the bank in June or July 2002. No written confirmation was given and Mr Dezinov did not follow it up because of the situation between the parties.

(100) The Respondent further submits that TNK Trade also acted disloyally against Swonco by contacting Swonco's customers directly in order to circumvent Swonco in trading the crude oil. This entails working against Swonco while still being obliged to further deliveries to Swonco.

(101) The Respondent submits as its sixth argument that TNK Trade in any case committed a breach of contract by refusing to resume the oil deliveries under the 2 April 2002 Contract in July/August 2002. Even if TNK Trade should have been entitled to suspend deliveries because of delay in payment, something which Swonco contests, it was not entitled to refuse resumption of the deliveries as was done. Swonco and associated companies in the logistical chain had put up securities that gave TNK Trade adequate security for payment of the already made and for all future deliveries. There was therefore no valid reason for TNK Trade's continued refusal to resume the deliveries. TNK Trade prolonged the discussions knowing full well that Swonco and Onako Eesti kept the whole logistical apparatus mobilized for resumption of the deliveries.

(102) The Respondent therefore concludes that TNK Trade has committed a fundamental breach of the contract and is therefore liable to compensate Swonco for all losses suffered which have been caused by the breach. The Respondent here refers to the statement and testimony of the expert witness Panfilov which concludes that Swonco has suffered a loss in the range from USD 10,782,735 to USD 16,043,909.70 for the period from July to December 2002 and a loss in the range of USD 18 – 20 million for the first half year of 2003. In addition comes the penalty that Swonco has had to pay Onako Eesti for non-delivery from July to December 2002. According to the contract between Swonco and Onako Eesti the penalty was 22.50 USD per metric ton not transported, which gives a total penalty of USD 16,672,500. Swonco accepts to limit the total claim for losses suffered to USD 36,000,000 which constitutes Swonco's counterclaim. As it is clearly bigger than TNK Trade's claim, Swonco must be acquitted of the claim.

(103) The Claimant disputes that Swonco has any counterclaim. The point of departure and first argument is that it was no breach of contract of TNK Trade to suspend the deliveries in the 3rd quarter of 2002 by the letter of 31 May 2002.

(104) In the first place, so the Claimant argues, the letter was sent in compliance with the Amend Agreement of 20 May 2002, which was a valid basis.

(105) As its second argument the Claimant submits that the Amendment Agreement of 20 May 2002 was signed in accordance with Article 26 of the Contract. Mr Shapiro signed the document in Cyprus, the document was scanned and mailed to Moscow where it was signed by Mr Dezinov in the presence of Mr Sapronov and Kuvikov. It is therefore validly signed.

(106) As its third argument the Claimant maintains that the Amendment Agreement is no "sham" contract. Mr Dezinov was called to the 20 May 2002 for several reasons, but most important was the financing problems of Swonco. There can be no doubt that the parties meant what is stated in the Amendment Agreement; to change the delivery obligations of TNK Trade. The reason for the change was that Swonco had not been able to submit a Letter of Credit in spite of numerous oral reminders from TNK Trade. The lack of security caused considerable anxiety in TNK Trade and led to the decisions of changing the delivery obligations. This Mr Dezinov was well aware of. His testimony concerning Mr Sapronov's problems as reason for a "sham" contract is simply true.

(107) The Claimant maintains as its fourth argument that TNK Trade in any case was entitled to suspend the deliveries by the letter of 31 May 2002. The invoice for the April deliveries had not been paid and TNK had in its letter of 28 May 2002 to Swonco stated that payment must occur before the end of May. When that did not occur, TNK Trade was entitled

to suspend deliveries on 31 May 2002. The Claimant further maintains that the letter is in full compliance with the requirements for notices under § 71 in CISG.

(108) On the background of what has been stated under (105) and (106) above, the Claimant maintains as its fifth argument that application of Sections 33 and 36 of the Swedish Contract Act cannot lead to the invalidity of the Amendment Agreement. These Sections are rarely invoked in business transactions under Swedish law and have never been applied to such business entities that are parties to this arbitration case. The main point is that Swonco was in the process of establishing a total debt of around USD 45 million without security. TNK Trade was in its full right to arrest an otherwise extremely serious development. The fact that Swonco had mobilised a large logistic chain with high cost to the knowledge of TNK Trade, cannot make TNK Trade's actions unfair or disloyal. TNK Trade was entitled to protect itself against further development of Swonco's debt.

(109) The Claimant further maintains that it is not disloyal to have alerted the Raiffeisenbank to Swonco's situation. Neither it is disloyal in the highly competitive oil trade to approach directly Swonco's customers.

(110) The Claimant in its sixth argument further disputes that TNK Trade was in breach of contract by refusing to resume the deliveries in July and August 2002. As a point of departure, there was no question of letting Swonco resume trading for TNK Trade until payment had been made in full of the debt. TNK Trade had waived the standard provision of Letter of Credit for a short time only and trusted Swonco. The trust had been misused. Furthermore, the collateral put up by Swonco and cooperating companies was far from adequate security for Swonco's debt. TNK Trade had therefore no obligation to resume the deliveries; on the contrary it was entitled to pursue its claims.

(111) The Claimant therefore concludes that there exists no breach of contract of TNK Trade and therefore is no counterclaim.

(112) Should the Arbitral Tribunal find that there is a basis for a counterclaim, the Claimant maintains that the statement and testimony of Mr Panfilov must be rejected as basis for assessing the claim. It is severely exaggerated and based on erroneous assessments of the sales performed by Swonco. Here it is correct to base the assessment of damages on Mr Nilsson's statement and testimony. The penalty or cancellation fee to Onako Eesti must be disregarded because there is no "arms length" between Swonco and a firm in practice wholly owned by Mr Dezinov.

5. THE CLAIMS FROM THE PARTIES

5.1 The Claimant

(113) The Claimant has set forth:

"1. REQUESTS FOR RELIEF

1.1 TNK's Requests for Relief

I. TNK requests that the Arbitral Tribunal shall order Swonco Swedish Oil AB ("Swonco") to pay USD 31,384,634.98 together with an annual interest rate, calculated in accordance with section 6 of the Swedish Interest Actas applicable from time to time;

(a) Invoice No. 43

- *on USD 15,390,290.54 as from 22 May 2002 up to 13 June 2002,*
- *on USD 13,390,290.54 as from 14 June 2002 up to 20 June 2002,*
- *on USD 11,390,290.54 on 21 June 2002,*
- *on USD 10,390,290.54 as from 22 June 2002 up to 26 June 2002,*
- *on USD 9,390,290.54 as from 27 June 2002 up to 1 July 2002,*
- *on USD 5,390,290.54 as from 2 July 2002 up to 19 July 2002,*
- *on USD 2,290,290.54 as from 20 July 2002 up to 16 August 2002, and*
- *on USD 1,774,297.02 as from 17 August 2002 until full payment is made.*

(b) Invoice No. 138

- on USD 15,244,807.66 as from 22 June 2002 until full payment is made, and

(c) Invoice No. 222

- *on USD 14,365,530.30 as from 23 July 2002 until full payment is made.*

II. TNK requests that Swonco's counter-claim shall be dismissed. [A reference to the original counterclaim has been deleted]

1.2 Further Request for Relief

TNK requests that the Arbitral Tribunal shall order Swonco to pay all TNK's costs for the arbitration, including all compensation to the Arbitral Tribunal, to the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC

Institute"), the attorneys fees and other costs and expenses incurred by TNK in connection with or otherwise related to this arbitration."

5.2 The Respondent

(114) The Respondent has set forth in its pleading of 31 July 2003:

"I. STATEMENT OF RELIEF

1. The main claim

1.1 Swonco rejects TNK Trade's claim in accordance with the Requests for Relief (the Statement of Claim, Section 1.1 and 1.2) and requests that the Arbitral Tribunal shall dismiss TNK Trade's claims in their entirety.

2. The counterclaim and claim for set-off

2.1 Swonco requests that the Arbitral Tribunal shall order TNK Trade to pay to Swonco without delay USD 36,000,000 plus interest on the said amount calculated in accordance with article 4, paragraph 4, and article 6 of the Swedish Interest Act (SFS 1975:635). With respect to an amount of USD 16,00,000 the interest shall be calculated from the date of TNK Trade's receipt of Swonco's submission dated 10 September, 2002, and with respect to an amount of USD 20,000,000 the interest shall be calculated from the date of TNK Trade's receipt of this submission.

2.2 Swonco further requests that the Arbitral Tribunal shall order that the amounts awarded to Swonco under its Counterclaim shall be set-off against any amount that may be awarded to TNK Trade under its main claim. In so far as the amount awarded to Swonco exceeds the amount awarded to TNK Trade, Swonco requests that the Arbitral Tribunal shall order TNK Trade to pay to Swonco the additional amount, plus interest in accordance with article 4, paragraph 4, and article 6 of the Swedish Interest Act (SFS 1975:635).

2.3 The rate of interest in accordance with above shall be equivalent to the reference rate established by the Central Bank of Sweden from time to time plus eight percentage points.

3. *Costs for the arbitration*

3.1 *Swonco requests that the Arbitral Tribunal shall order TNK Trade to pay all Swonco's costs for the arbitration, including all compensation to the Arbitral Tribunal, to the SCC Institute, the attorneys fees and other costs and expenses incurred by Swonco in connection with or otherwise related to this arbitration."*

6. REASONS OF THE ARBITRAL TRIBUNAL

6.1 Introduction

(115) The Claimant has presented a claim for payment against the Respondent. The correctness of the claimed amount has not been disputed by the Respondent who nevertheless contests that it is obliged to pay because the agreement is not between the Claimant and the Respondent but between the Respondent and TNK.

(116) Should the Arbitral Tribunal find that the contract is between the Claimant and the Respondent, the Respondent still maintains that it should be acquitted because of the counterclaim which is, it is submitted, larger than the claim and should be set off against it.

(117) Much of the arguments in the case has been related to the facts that form the basis for the counterclaim, e.g. the Amendment Agreement and the letter of 31 May 2002 from TNK Trade.

(118) The Arbitral Tribunal finds it appropriate to assess the claim first and then the counterclaim.

6.2 The claim

(119) There is no dispute between the parties concerning that TNK Trade made deliveries to Swonco at the Krotovka station in April 2002 of 112,009.573 gross metric tons of crude oil, in May 2002 of 130,015.664 gross metric tons and in June 2002 of 122,013.772 gross metric tons. Neither is there a dispute that Swonco from TNK Trade has received invoices of USD 15,390,290.54 for deliveries in April, of USD 15,244,807.66 for deliveries in May and USD 14,365,530.30 for deliveries in June 2002.

(120) Neither is it disputed that none of the invoices were paid on their due dates. It is also undisputed that Swonco paid to TNK Trade an amount of USD 13,100.00 between 13 June and 19 July 2002 and further reduced its debt by USD 515,993.52 through a setoff agreement on 19 July 2002.

(121) There is therefore no disagreement that the remaining unpaid invoiced amount is USD 31,384,634.98 exclusive of interest.

(122) As far as the Arbitral Tribunal can ascertain, the only argument submitted directly against the claim is that the Contract of 2 April 2002 was not between TNK Trade and Swonco but between TNK and Swonco, and that therefore TNK Trade is not the right creditor.

(123) In the opinion of the Arbitral Tribunal this argument cannot be accepted. The point of departure is that the Contract was entered into between TNK Trade and Swonco on 2 April 2002.

(124) Even if Swonco had had some years of business relations with TNK and its predecessor, Swonco entered into the Contract with TNK Trade with open eyes. Immediately after TNK's first letter of renewed relations of 5 March 2002, it was stated by TNK in its 13 March letter that TNK Trade would be the contract party, see above under (25), something that was reiterated in TNK's letter of 19 March, see (26) above, and again by TNK's letter of 27 March, see (27) above. There can be no doubt that Swonco had been thoroughly informed that TNK Trade was to be the contract party in good time before the conclusion of the Contract on 2 April 2002. There is no sign of evidence that Swonco protested against TNK Trade as contract party.

(125) Not only did Swonco sign the contract with TNK Trade after having been thoroughly informed. Also after the signature did Swonco behave in accordance with TNK Trade being the party to the Contract. When paying part of its debt, it paid to TNK Trade. It concluded a setoff agreement on 19 July 2002 with TNK Trade in order to reduce its debts to TNK Trade. The pledging agreements were made by companies and people related to Swonco to TNK Trade.

(126) Swonco has pointed to the undisputed fact that many of Swonco's contacts during loading and transportation of the crude oil were with employees of TNK, especially Mr Kuvikov, not TNK Trade. The Arbitral Tribunal cannot see this as supporting Swonco's submissions. TNK Trade is a trading company, selling oil that it purchases from its sister

company TNK. The technical side of the transactions naturally rests with TNK as the original provider of the crude oil. It does not, however, make TNK a party to the contract.

(127) In the opinion of the Arbitral Tribunal, TNK Trade is the right contract party to the Contract of 2 April 2002. TNK Trade has delivered crude oil to Swonco in accordance with the 2 April Contract. Swonco has only paid part of what it owns to TNK Trade. It is the conclusion of the Tribunal that TNK Trade therefore has a valid claim against Swonco of USD 31,384,634.98 plus interest.

Whether Swonco must pay this amount to TNK Trade depends on the Arbitral Tribunal's assessment of the counterclaim.

6.3 The counterclaim

6.3.1 Introduction

(128) The counterclaim rests on the assumption that TNK Trade's letter of 31 May 2002 represented a fundamental breach of the 2 April 2002 Contract. That assumption rests on another; that the Amendment Agreement of 20 May 2002 for several reasons must be considered invalid. As the 31 May 2002 letter refers to and is based on the Amendment Agreement, there is therefore in Swonco's opinion no valid basis for it.

(129) The point of departure for the Arbitral Tribunal's assessment must therefore be the validity or otherwise of the Amendment Agreement. As the parties disagree to a large extent on what actually happened before and at the conclusion of the Amendment Agreement, the Arbitral Tribunal's assessment of the facts will be decisive.

6.3.2 The parties' knowledge when entering into the 2 April 2002 Contract

(130) It is in evidence that TNK wanted a long term delivery contract and that Swonco wanted one. It is further in evidence that the transport involved in the contracted deliveries is complex and in need of thorough and systematic planning. This must have been clear to TNK as well as TNK Trade. TNK was reminded of this fact by Swonco's letter of 19 March 2002, see (26) above.

(131) Swonco has submitted that it had, or its contractors for the transport had, purchased or leased a large number of railway tank cars for the deliveries under the Contract of 2 April 2002. This is, as the Arbitral Tribunal sees it, not entirely accurate.

(132) Swonco's own witness, Mr Vinogradov who worked for AVR Trans, stated to the Tribunal that AVK Trans had acquired less than 200 tanker cars by July 2001. Another 320 were gradually acquired during the autumn of 2001. The remaining 300 were acquired by 100 each in January, February and March 2002. In other words, almost all tanker cars had been acquired by AVR Trans before the first approach of TNK to Swonco on 5 Marcy 2002, see (23) above. The acquisitions must therefore have had another intention than this specific contract. It may well have been a general intention of having a greater capacity for such transport including for purchases from TNK, but it was not with the 2 April 2002 Contract as a basis.

(133) Nevertheless, TNK must have known that the Contract would entail a complicated and costly mobilization of a railway and sea transport system. Indeed, it must have been the fact that Swonco could manage such a mobilization and that the Crown group could not, that led TNK to approach Swonco in March 2002. This may be an explanation, albeit a relatively speculative one, of TNK Trade's leniency when discussing the Letter of Credit with Swonco. Without Swonco as a purchaser from April 2002, TNK and TNK Trade would encounter difficulties in exporting crude oil for some time.

6.3.3 The negotiations concerning security

(134) The parties have presented widely differing versions of what the parties said about security and the Letter of Credit during the negotiations. Mr Dezinov stated as a witness that he had told Mr Shapiro and Mr Kuvikov that the change of bank to the Austrian Raiffeisenbank and opening a credit line would take at least two months. The reason for the long time was, he stated, that the bank needed long time to assess properly the complicated logistic scheme. Both Mr Shapiro and Mr Kuvikov deny having received such information from Mr Dezinov.

(135) Mr Shapiro stated that his impression was that the delay would last only a short time, a matter of days or perhaps a week because of bureaucratic problems within the Austrian bank.

(136) Both parties agree that the normal security clause – "… the Buyer shall open an irrevocable Letter of Credit on or before the delivery …" (emphasis added) was changed to "… the Seller may require from the Buyer to open an irrevocable …" (emphasis added). It is also agreed that it was changed at the proposal of Mr Dezinov.

(137) The Arbitral Tribunal has been in some doubt but has come to the conclusion that TNK Trade's version is more probable than Swonco's. If Mr Shapiro should have granted an unsecured credit to Swonco for over two months, which is what Swonco in fact maintains, he would risk not being paid for at least 260,000 metric tons and at least USD 30 million. That would be a considerable risk to take. It would in the opinion of the Arbitral Tribunal be a risk that it was highly unlikely that TNK Trade would accept. Waiting a few days or a week for an old business acquaintance to sort out bureaucratic difficulties is another matter entirely, even if this also entailed taking a risk.

(138) What makes the assessment of the facts a bit difficult is that Mr Shapiro, who not long after the conclusion of the Contract must have become aware that it was not a question of a few days to settle the banking difficulties, stated to the Tribunal that he orally reminded Mr Dezinov of the Letter of Credit but did not require this in writing. He explained that Swonco could not have complied with such a request and therefore would have been rendered in breach of the Contract, something that would have resulted in the termination of the Contract and of the deliveries.

(139) With his point of departure "... a few days or at most a week" – Mr Shapiro in other words by his actions accepted a prolongation of the time needed for establishing a credit line and submitting a Letter of Credit. He may have felt that the situation compelled him, nonetheless he did not use the instrument the Contract gave him – the written request for a Letter of Credit.

(140) The facts set out in (138) and (139) above cannot, however, change the Arbitral Tribunal's conclusion. The events that occurred are well supported by the testimony of Mr Shapiro and later actions by Mr Dezinov and Swonco. Whatever the length of time that was agreed for settling the banking problems, it was a fundamental basis for any agreement that the deliveries were paid on their due date. From the meeting of 20 May 2002 onwards it became clear that Swonco in fact was unable to pay at the due dates.

(141) As pointed out by TNK Trade, a view which is shared by the Arbitral Tribunal, it is clear from Swonco's accounts that the company in fact was in a weak financial position in the spring of 2002. This may very well have accounted for most of the difficulties in establishing the credit line at the Austrian bank. The Arbitral Tribunal does not know whether this was the case. What it does know, however, is that Swonco never paid the invoices at their due dates and did not put up a Letter of Credit when required to do so by TNK Trade on 11 June 2002.

(142) It is further a fact that if Swonco, as it alleges, did believe that TNK Trade had granted an extension of the due date of the April 2002 invoice from 22 to the end of May, Swonco did

not pay by the end of May. It only started paying part of the April invoice on 13 June 2002. It never submitted any Letter of Credit even if Mr Dezinov stated that the Austrian bank, according to a telephonic message from an employee, accepted doing so in July 2002.

(143) On this background it is the conclusion of the Arbitral Tribunal that sub-article 8.4 of the Contract was included through a proposal from Mr Dezinov. It is further the opinion of the Tribunal that this change of the standard contract clause was made on the basis of an explanation from Mr Dezinov that certain bureaucratic difficulties needed to be settled with the bank before a credit line and a Letter of Credit could be established. The Arbitral Tribunal further finds that Mr Dezinov explained that this would take a few days; and that TNK Trade therefore accepted to trust Swonco and Mr Dezinov, but not without a certain apprehension.

(144) The Arbitral Tribunal further concludes that TNK Trade became progressively more worried as it became clear that Swonco was unable to settle the banking problems quickly. It finds that this led Mr Shapiro of TNK Trade several times in April and May to ask Mr Dezinov for a solution, something which Mr Dezinov continued to promise but did not procure.

(145) This, in the opinion of the Arbitral Tribunal, is the correct background for understanding what happened at the 20 May meeting.

6.3.4 The preparations for the 20 May meeting

(146) There is no dispute about that the 20 May meeting resulted in three different agreements, the Amendment Agreement, Addendum No 3 and Addendum No 4. The Respondent maintains that the first mentioned agreement must be invalid for a number of reasons, something which results in the 31 May 2002 letter being a breach of the 2 April 2002 contract.

(147) Deciding on these allegations makes it necessary to look into why the meeting was held and what occurred at the meeting.

(148) There seems to be agreement between the parties that the meeting was scheduled in a telephone conversation between Mr Kuvikov and Mr Dezinov some days before 20 May 2002. There seems also to be agreement about that Mr Kuvikov and Mr Dezinov had had regular telephone conferences concerning technical matters of the deliveries under the Contract.

(149) When it comes to what should be the purpose or agenda of the meeting, there is agreement on certain parts. It is agreed that it was considered necessary by both parties that Addendum No 1 to the Contract had to be changed because the April deliveries had amounted to around 112,000 metric tons compared with the originally agreed 130,000 metric tons. It was also considered necessary to negotiate a new deduction for transport costs, because the April deliveries had been sent through another and more costly route than originally anticipated.

(150) It is when the question of payment comes up that the parties disagree. TNK Trade maintains that he question of payment, the paying of Swonco's debts, was the main reason for holding the meeting, something which Mr Dezinov and Swonco were very well aware of. Swonco and Mr Dezinov contest this allegation, stating that the question of payment was brought up by Mr Dezinov himself at the meeting of 20 May 2002. It is alleged by Mr Dezinov that the question had not been raised before as there was no reason for that. The due date of the first invoice, that of April 2002, was the 22 May 2002, two days after the meeting had been held. There was no reason before the 20 May 2002 to believe that the payment from Swonco would not be forthcoming on the 22 May 2002.

(151) On this background the Respondent maintains that it was on the initiative of Mr Dezinov at the meeting and not before, that the payment of the invoices was raised and that by Swonco and Mr Dezinov.

(152) The Arbitral Tribunal refers to its assessment of the negotiations concerning security under 6.3.3 especially (143), (144) and (145) where it was concluded that TNK Trade's factual allegations are considered to be correct and not the factual allegations of Swonco. It is therefore the conclusion of the Tribunal that the parties had continuous contact concerning payment during the latter half of April and most part of May 2002 and that TNK Trade grew more and more apprehensive about the situation. The Arbitral Tribunal therefore accepts that there was contact between the parties concerning payment and that this was one of the main reasons for holding 20 May 2002 meeting. It cannot have come as a surprise to Swonco.

6.3.5 The 20 May meeting and the Amendment Agreement

(153) It is in evidence that the main attendants to the meeting were Mr Sapronov and Mr Kuvikov from TNK and Mr Dezinov from Swonco.

(154) Swonco firstly maintains that the Amendment Agreement is invalid because it was not signed in accordance with Article 26 of the Contract. The Arbitral Tribunal does not agree.

The Amendment Agreement concerns an addendum or enclosure to the Contract of 2 April 2002.

(155) In this case sub-article 26.3 states that documents signed by the parties "using facsimile signatures" of the parties are accepted "as duly signed". It is in evidence that the finalized document was written out in TNK Trade's office in Cyprus. It was thereafter signed by Mr Shapiro and the document with signature scanned and e-mailed to TNK's office in Moscow. There the e-mailed version was signed by Mr Dezinov on behalf of Swonco. In the opinion of the Arbitral Tribunal this must be considered to be in compliance with the requirements of sub-article 26.3. Swonco's argument for the invalidity of the Amendment Agreement on this basis must be rejected.

(156) Swonco secondly maintains that the Amendment Agreement was a "sham" contract only meant for internal purposes in TNK. It should not be complied with between the parties.

(157) On 2 February 2004 the Respondent protocolled that the Amendment Agreement *"according to its wording constitutes a replacement of the corresponding provision in Addendum No. 1. However, it was not intended by the parties that the document would be applied in accordance with its wording."* In other words; it is accepted that a provision setting out monthly deliveries from April through December of 130,000 metric tons was replaced. Instead came a provision confirming the factual delivery in April and setting out deliveries of 130,000 metric tons in May and June 2002. The deliveries in the 3rd and 4th quarter of 2002 were made dependent upon what the parties agreed, see above under (54).

(158) It is worth pointing out that there were, according to the wording of the Amendment Agreement, no other changes made in the 2 April 2002 Contract. Several provisions reflecting a long term delivery contract remained unchanged; such as art 3 "Quantity" stipulating a quantity of "up to 1,500,000 metric tons"; art 5 "Delivery Period" stipulating the period to be from "01.04.2002 till 31.01.2003" and art 14 "Duration and Termination" stipulating that the contract should "come into effect on the Commencement Date" and "shall continue in force till 31.01.03." In other words; the change only concerned the specification of the monthly deliveries for the whole contract period.

(159) Swonco maintains that the change was agreed in order to help Mr Sapronov who had breached TNK's internal rules of not entering into long term delivery contracts and therefore faced being fired if no change was implemented. Mr Dezinov alleges that Mr Sapronov promised that the deliveries should continue as agreed in the original Addendum No 1. This is disputed by Mr Sapronov and Mr Kuvikov who allege that the change was made because of

Swonco's financial problems to get a better control of any later deliveries and that this was accepted and understood by Mr Dezinov.

(160) The changes made or alleged to have been made by the Amendment Agreement do not wholly support any of the versions given by the parties, but clearly are most supportive of TNK Trade' version. The change would not give TNK Trade total control of later deliveries, something the Arbitral Tribunal will revert to while discussing the 31 May letter and the application of § 36 of the Swedish Contract Act. It would, however, at least give TNK Trade a far stronger position for putting pressure on Swonco to pay its debt and arrest any further aggregation of debt. By its wording, the Amendment Agreement did not terminate the deliveries, it only changed the way such deliveries should be decided in the future. Deliveries could be resumed, provided payment was properly secured.

(161) The Amendment Agreement does not contain a word about the reasons for the change being the financial difficulties of Swonco, nor is there any other written evidence confirming this. While this exposes a certain weakness in TNK Trade's position, it is not in any way decisive. It would not, in the opinion of the Arbitral Tribunal have been appropriate to include any wording of this kind in the Amend Agreement that should comply with the requirements of sub-articles 3.3 and 3.4.

(162) While the content of the Amendment Agreement with some reservations support TNK Trade's version, Swonco has greater difficulties. First of all, the changes in the 2 April 2002 Contract set out in the Amendment Agreement, do not at all remove all features of a long term delivery. If entering into such contracts were against TNK's internal rules, the changed version would still be in contravention, at least formally. The alleged purpose of helping Mr Sapronov would not be fulfilled even if it can be argued that it by the new wording had been practically fulfilled.

(163) What makes Swonco's version even less probable is that Mr Dezinov signed the Amendment Agreement and thereby bound Swonco to the written agreement without any other assurance than an oral promise from Mr Sapronov that it should not be applied. There is not a shred of written evidence that the Amendment Agreement should not be applied according to its wording. In the environment of the international oil trade, which Mr Dezinov knows very well, this was – if he is to be believed – a most hazardous risk to take. It is difficult to trust such a version of events.

(164) It is in evidence that Mr Dezinov at the meeting stated that he would have difficulties in paying the April invoice before around 10 June 2002. The Arbitral Tribunal sees no reason to doubt that this came as a chock for Mr Sapronov who also stated to Mr Dezinov that

employees in TNK risked being fired if payment was not made before the end of May. Mr Dezinov in his testimony told the Tribunal that he understood this as granting Swonco an extension of the due date of the April invoice from 22 May to the end of May. In the opinion of the Arbitral Tribunal it is beyond belief that this should have occurred at the same time as Mr Dezinov signed the Amendment Agreement on the promise that it should not be applied.

(165) It is in the opinion of the Arbitral Tribunal a far more probable course of events that the parties had protracted discussions about the financial difficulties, which were now openly admitted by Mr Dezinov, and that he accepted that further deliveries would be dependent on agreement and – of course – payment of the invoices at there due dates. Such a sequence of events in a meeting that lasted 3-5 hours is in the opinion of the Arbitral Tribunal clearly the most probable.

(166) It is therefore the conclusion of the Arbitral Tribunal that the Amendment Agreement was concluded as a consequence of Swonco's financial difficulties. It is therefore not a "sham" contract, but can be applied according to its wording.

(167) Having reached this conclusion the Arbitral Tribunal has no reason to discuss an application of § 33 in the Swedish Contracts Act. There were no facts known to TNK Trade that would make it unconscionable to apply the Amendment Agreement, as the Tribunal has found that there was no promise from TNK Trade of non-application of the Amendment Agreement.

(168) The Arbitral Tribunal's conclusion so far is that the Amendment Agreement represents a valid change of the 2 April 2002 Contract that can be applied in accordance with its wording. An eventual application of § 36 of the Swedish Contracts Act is best discussed in relation into the 31 May letter, see below under 6.3.6.

6.3.6 The 31 May letter

(169) Between the 22 May meeting and the end of May 2002, TNK Trade sent two letters to Swonco. The first was dated 28 May 2002 and reminded Mr Dezinov to *"carry out payment of the debt of Swonco Swedish Oil AB to TNK Trade Ltd. With regard to the crude petroleum shipped in April, 2002 (invoice No. 43 of May 07 2002) not later than May 29-30, 2002 ..."*. Mr Dezinov considered this as an extension of the due date of the April invoice from 22 to the end of May 2202. He did not, however, pay on what he considered to be the extended due date.

(170) The second letter, dated 31 May 2002, referred to the first para of the Amendment Agreement and informed Swonco *"that no loading of crude oil under the mentioned contract is planned for the 3rd quarter of 2002."*

(171) Swonco has maintained that the letter represented a fundamental breach of contract by TNK Trade because it was based on the Amendment Agreement that Swonco considered invalid for several reason. Since the Arbitral Tribunal has concluded in (168) above that the Amendment Agreement must be considered a valid change of the 2 April 2002 Contract, this allegation by Swonco must be dismissed.

(172) There remains, however, two questions that must be looked into concerning the 31 May letter. The first question concerns whether TNK Trade was entitled to send such a letter on the basis of a correct interpretation of the Amendment Agreement. The other concerns whether § 36 of the Swedish Contracts Act prevents the use of the Amendment Agreement as a basis for sending the letter. As will be easily seen, the two questions are closely related.

(173) According to the direct translation from Russian of the second para of art. 1.1 of the Amendment Agreement this should correctly be read as *"Within 30 days prior to the commencement of the next quarter the parties shall agree on the preliminary schedule of deliveries for that quarter."* There is no doubt that the letter was sent *"within 30 days prior to"* 1 July 2002 and therefore was sent in time.

(174) In the Amendment Agreement it is stated that the parties "shall agree" on the "preliminary schedule of deliveries". The 31 May letter was not, however, the result of an agreement between the parties. It was a declaration of an unilateral decision of TNK Trade without prior discussions. The question is whether this is in compliance with the Amendment Agreement.

(175) The Arbitral Tribunal has found this question doubtful, but has concluded that the 31 May letter must be accepted as being in conformity with the Amendment Agreement. The Amendment Agreement changing the 2 April 2002 Contract was made because of the financial difficulties of Swonco. The provision of agreeing beforehand of deliveries for each quarter was set out to give TNK Trade better control of the events and a possibility of arresting a further increase in Swonco's unsecured debt.

(176) At the meeting of 20 May 2002 Mr Dezinov had informed Mr Sapronov and Mr Kuvikov of Swonco's inability to pay by the due date of 22 May 2002. The debt would by then be around USD 15 million and would increase to USD 45 million, a huge amount, if no payment was made or security for payment established. The letter from TNK Trade of 28

May 2002 set the time limit for payment to "not later than 29-30 May". By 31 May 2002 no payment had been made, and at the same time the time limit for agreement on the deliveries in the 3rd quarter had arrived. By sending the letter of 31 May 2002, TNK Trade used the Amendment Agreement for the purpose for which it had been established; to arrest a further increase in Swonco's unsecured debt. Under the circumstances TNK Trade must be entitled to act as it did.

(177) Swonco has maintained that this use of the Amendment Agreement, even if it is accepted that it was validly concluded, represents a breach of § 36 of the Swedish Contracts Act. The allegation is that it would be unreasonable under the circumstances to make such use of the Amendment Agreement as the letter of 31 May 2002 represents. This application of the Amendment Agreement is particularly harmful to Swonco in that the letter in fact terminates the deliveries under the Contract exposing Swonco and its associates in the logistical scheme to very serious losses.

(178) Swonco and its associates had mobilized a complex and comprehensive transport system for the whole contract period. When the letter in reality terminated the Contract, substantial losses were incurred something TNK Trade knew full well. These losses represent such an unreasonable consequence that the Amendment Agreement, in the opinion of Swonco, must be set aside on this point in compliance with § 36. If it is set aside, the obligations of deliveries under the Contract still existed and TNK Trade's terminating the deliveries accordingly represented a fundamental breach of the Contract.

(179) The Arbitral Tribunal cannot agree with the Respondent's allegations on this point. As a point of departure, Swonco's costs in mobilizing the transport system necessary for taking delivery of the crude oil are part of the costs Swonco incurs in order to comply with its obligations under the Contract. The costs are part of Swonco's risk in entering into the Contract, the size of which is decisive for whether Swonco would make a profit. If such costs are incurred in vain they can only be compensated if the other party, here TNK Trade, has caused them by a breach of contract.

(180) That a suspension of part of the deliveries causes Swonco to incur mobilization costs in vain does not, however, automatically entitle Swonco to compensation. The point of departure here is that TNK Trade and Swonco agreed on a change of the Contract through the Amendment Agreement because of Swonco's financial difficulties. It cannot be considered unreasonable towards Swonco that the Amendment Agreement was used for the purpose that the Amendment Agreement was concluded; to make possible the arrest of further increases of Swonco's unsecured debt. On 31 May 2002 Swonco's unsecured debt had already reached huge proportions. Swonco could have avoided incurring mobilization costs in vain by paying

its debt or putting up adequate security. On this background it cannot be considered unreasonable that TNK Trade suspended the deliveries for the 3rd quarter of 2002.

(181) It is therefore the conclusion of the Arbitral Tribunal that the Amendment Agreement was neither invalid because of the way it was signed, nor because of being an alleged "sham" contract. Finally it can not be considered contrary to § 36 of the Swedish Contracts Act that the Amendment Agreement serves as a basis for the 31 May 2002 letter

(182) Having thus concluded, the Arbitral Tribunal does not need to go into the question of whether the 31 May letter can be considered a correct notice of suspension under § 71 of CISG. TNK Trade was in any way entitled to send the 31 May letter under the Contract.

(183) The only remaining question is whether Swonco can find a basis for its counterclaim in the negotiations between the parties from June until primo August 2002.

6.3.7 The negotiations between the parties from the last part of June until primo August 2002

(184) The Respondent submits that, even if TNK Trade could validly suspend the deliveries for the 3rd quarter of 2002, as the Arbitral Tribunal has concluded that it could, TNK Trade caused losses to Swonco through its actions under the negotiations in June, July and part of August 2002. These losses must, in Swonco's view, TNK Trade be liable to compensate Swonco for.

(185) There is some dispute as to the purpose of the negotiations. TNK Trade alleges that the purpose was to secure payment of Swonco's incurred debt for the April, May and June deliveries. This debt did increase during the negotiation period. At he same time it was also reduced by part payment by Swonco of USD 13,100,000 from 13 June through 19 July 2002 and further reduced by a set off agreement of some USD 515,000 on 19 July 2002. At the due date for the June delivery, 22 July 2002, the debt was USD 31,384,634.98.

(186) According to TNK Trade's allegations, the negotiations concerned how this very considerable debt could be paid. In order to secure payment a number of pledges from related companies to Swonco were negotiated. The pledges were either made by business entities controlled by Mr Dezinov or by his business associates working in the transport system, all interested in maintaining a good relationship with such a big potential future customer.

(187) TNK Trade agrees that part of the negotiations concerned using the transport system of Onako Eesti for export of TNK's crude oil, but only by trading through TNK Trade or TNK itself, not through Swonco. After what TNK and TNK Trade regarded as Swonco's misuse of their trust concerning the security for Swonco's purchases of crude oil it was never a question of resuming deliveries through Swonco. Onako Eesti's logistical system was on the other hand so effective that savings in transport could be made by TNK or TNK Trade compared with transport organised by these companies themselves. The savings made could somehow be used to pay Swonco's debts.

(188) Swonco does not agree with TNK Trade's description of the negotiations. It was, in Swonco's view, also discussed a resumption of deliveries to Swonco for continuation of the deliveries under the 2 April 2002 Contract. Swonco and Onako Eesti kept the logistical system mobilized at huge costs during the negotiations in order to be ready for immediate resumption of deliveries, something which was well known by TNK and TNK Trade.

(189) Swonco further maintains that neither Onako Eesti nor many shareholders and employees of Benevent, AVR Trans and AVR Marine, that were no parties to the 2 April 2002 Contract between Swonco and TNK Trade, would have guaranteed or made pledges for payment of Swonco's debts unless the purpose was a resumption of deliveries under the Contract. Swonco therefore maintains that TNK Trade misled Swonco during the negotiations. TNK Trade's purpose cannot have been the resumption of the deliveries, but rather acquiring as much security as possible before going to arbitration to claim payment.

(190) Swonco further maintains that the negotiations did indeed concern the resumptions of deliveries to Swonco. This is in evidence by the draft contract between TNK, not TNK Trade, and Swonco. The draft was dated 26 July 2002 and was very near a finalized contract for deliveries of 4,000,000 metric tons in a period "from 01.09.2002 till 31.07.2005." This is another proof of, in Swonco's view, of how TNK and TNK Trade misled Swonco during the negotiations.

(191) Swonco alleges that TNK Trade has been grossly negligent or has been showing wilful misconduct in not resuming the suspended deliveries when Swonco and its associates had in fact submitted securities worth more than USD 36 million, more than sufficient for covering Swonco's debts. Thereby Swonco, which had kept the transport system mobilized incurred huge losses, something TNK Trade knew would occur.

(192) TNK Trade disputes that the securities put up were worth more than USD 5-6 million. Therefore there remained a very considerable debt to be paid which Swonco could not show that it could pay. Therefore different ways of repayment were discussed. TNK Trade denies

having misled Swonco and disputes having accepted not going to arbitration for claiming payment of Swonco's debts.

(193) Both parties can, in the opinion of the Arbitral Tribunal, be blamed for the somewhat confused circumstances of the negotiations in June, July and August 2002. The point of departure must, however, be that by July 2002 Swonco's unsecured debts had increased to very considerable amounts. Swonco made part payment from 13 June until 19 July. This was praiseworthy, but it also showed that Swonco in this period lacked the money to meet its undisputed debts at the due dates. This was the fact that obviously steered TNK Trade's course, something which TNK Trade cannot be blamed for.

(194) Neither can TNK Trade be blamed for showing some creativity in getting the debts paid. It was after all a very considerable amount of money that was owed to TNK Trade, it was a debt that had been established through what TNK Trade, with reason, considered a misuse of trust by Swonco.

(195) On this background it must be accepted that pressure was brought to bear on companies and persons not party to the 2 April 2002 Contract in order to make guarantees and pledges for the payment of Swonco's debts. These were companies and persons that had economic interests in restoring good relationships to TNK and TNK Trade and in resuming the deliveries under the Contract.

(196) It may be a legitimate interest in itself for these persons and companies issuing guarantees and making pledges helping Swonco restore its good relationship with a big potential customer. They had a clear economic interest in such a development. Far more important, however, especially in avoiding immediate losses would be to achieve a resumption of the deliveries under the Contract.

(197) TNK Trade was therefore threading a precarious line in the negotiations. There were clear limits of what it could promise in order to achieve more security for payment without also keeping the promises. One important question here is the real value of the total pledges. If these pledges were worth more than Swonco's unsecured debts, this would have been passing a big hurdle towards resumption of deliveries, but not all hurdles.

(198) Swonco had still not presented a Letter of Credit which by now must have become a minimum requirement for resumption. It is not convincing when Mr Dezinov states in his testimony that an employee of the Austrian bank told him sometimes in July that the credit line now could be opened. According to Mr Dezinov he did not follow up the conversation under the circumstances, something which is highly surprising. If resumption of the deliveries

under the Contract was Mr Dezinov's and Swonco's goal, a valid Letter of Credit might have made an important difference. There is no evidence that this was expressly offered during the negotiations in June, July and August.

(199) It is almost impossible for the Arbitral Tribunal to assess the true value of the pledges and guarantees on the basis of the evidence presented to it. In this connection it should be mentioned that according to testimony and submissions in this case arbitral proceedings have been opened in Tallin concerning the validity and enforceability of the pledges. At any rate the Tribunal finds that assessing the values must have been very difficult and therefore frought with risk for TNK Trade. In such a situation it is legitimate for TNK Trade to make a very conservative estimate. Even if such an estimate should have been higher than USD 5-6 million, it cannot be criticized that TNK Trade under the circumstances considered the value to be clearly less than the USD 36 million claimed by Swonco. It was in other words a legitimate position of TNK Trade that there still were insecured parts of Swonco's debts. How big the parts were the Arbitral Tribunal needs not go into.

(200) Even if TNK Trade rightfully could consider the pledges and guarantee inadequate, TNK Trade must negotiate under certain restraints with the purpose of extracting payment, guarantees and pledges from Swonco and its associates. It cannot for instance promise Swonco resumption of the deliveries under the 2 April 2002 Contract in exchange for certain pledges and afterwards renege on its promises.

(201) It is therefore not convincing when TNK Trade and TNK deny having negotiated resumption of crude oil deliveries with Swonco, when it is clear that they have done so. Neither is it convincing when the witness Vakhnin denies ever having heard of the 26 July 2002 draft contract and later remembers quite a bit concerning this draft. Whatever the parties have explained, the Arbitral Tribunal finds that the parties did negotiate on the basis of the draft contract, which was between TNK and Swonco and according to the wording should last from 1 September 2002 until 31 July 2005. TNK Trade and TNK did therefore indeed negotiate a possible resumption of crude oil deliveries to Swonco, besides negotiating other alternative transport schemes.

(202) As TNK and TNK Trade have stated that they would never have resumed oil deliveries with Swonco during the negotiations, the use of the 26 July 2002 draft comes dangerously close to misleading the other side. Even if according to witnesses Mr Kaplan of TNK on 1 August 2002 when stating the deliveries should start, meant only using the Onako Eesti transport system and not deliveries to Swonco, it is still a fact that such deliveries were never started for reasons which have not been explained to the Tribunal. It is also a fact that negotiations between the parties stopped around the beginning of August for reasons which

have not been explained to the Tribunal. This has, however, not prevented the parties from resuming negotiations and suspend the arbitral proceedings for that purpose, which the parties did.

(203) On the other hand Swonco and its associates have not been able to present a shred of evidence that TNK and TNK Trade really promised to resume deliveries under the Contract. In none of the pledge agreements or in the Security Agreement of 19 July can be found the slightest reference to resumption of the deliveries.

(204) The Respondent has maintained that such rights or benefits for third parties as a resumption of the deliveries would be, could not be included in the pledge agreements and the Security Agreement. Mr Dezinov and other witnesses for the Respondent stated that this was confirmed by their own lawyers.

(205) The Arbitral Tribunal finds these testimonies somewhat surprising. If it was impossible to include such a condition in the pledge agreements themselves, it should have been possible to ask for a written declaration from TNK Trade. Trusting oral declarations, as are alleged to have been given in the very formalistic environment of the pledge agreements seems surprising.

(206) Even more surprising is the statement that third party advantages could not be included when seen on the background of the Security Agreement of 19 July 2002 in which Onako Eesti towards TNK Trade guarantees for the payment of the debts of Swonco, a third party as good as any.

(207) The Arbitral Tribunal has been in considerable doubts, but has come to the conclusion that Swonco cannot base a counterclaim on losses alleged to have been caused by TNK Trade's actions during the negotiations. Both parties seem to have deliberately kept part of the purpose of the negotiations from being clarified. TNK Trade negotiated the resumption of the crude oil deliveries without committing itself totally, at least not on paper. Swonco negotiated for resumption of the deliveries without securing any written commitments. The Arbitral Tribunal points out that in fact no agreement on resumption of the crude oil deliveries under the 2 April 2002 agreement was ever made between Swonco and TNKTrade.

(208) What was a clear and joint purpose of the negotiations, however, was finding ways of securing and repaying Swonco's considerable debts to TNK Trade. Whether that goal was achieved is in dispute between the parties. It was, however, considering the background and the size of the debt, a goal in itself that had the legitimate interest of all involved in the pledges and the Security Agreement.

(209) It must be the risk of Swonco that a definite written commitment of resumption of the deliveries under the Contract was not secured. Swonco could all the time have achieved the resumption by paying the debts. Swonco could also, as stated by Mr Dezinov, have submitted a Letter of Credit for securing future deliveries, but chose not to follow up the message from the bank.

(210) It must also be the risk of Swonco that an alleged promise that no arbitration should be opened, was not committed to paper.

(211) Even if both parties can be blamed for keeping parts of the negotiations unclear, it was Swonco that had the obviously greatest interest in clarification and did not follow up that interest.

(212) On this background Swonco is clearly more to blame for the situation as it developed and cannot therefore have a basis for any counterclaim. It is the conclusion of the Arbitral Tribunal that the counterclaim be rejected. The Arbitral Tribunal needs therefore not go into the dispute about the size of the counterclaim.

6.3.8 Conclusion

(213) The Arbitral Tribunal has in (127) above concluded that TNK Trade has a valid claim of USD 31,384,634.98 plus interest. As the Tribunal in (212) has concluded that Swonco has no counterclaim, the final conclusion of the Tribunal is that TNK Trade be awarded USD 31,384,634.98.

(214) To this amount must be added interest. The interest shall be calculated in accordance with Section 6 of the Swedish Interest Act. The applicable interest rate in this case is the Swedish Central Bank's interest rate (diskonto) plus eight per cent. The total accumulated interest amount up until and including 19 March 2004 is calculated as follows:

	Accumulated Interest per 19 March 2004
(a) Invoice No. 43	
- USD 15,390,290.54 as from 22 May 2002 up to 13 June 2002,	92,763.40
- USD 13,390,290.54 as from 14 June 2002 up to 20 June 2002,	22,011.44
- USD 11,390,290.54 on 21 June 2002,	3,120.63
- USD 10,390,290.54 as from 22 June 2002 up to 26 June 2002,	11,386.62
- USD 9,390,290.54 as from 27 June 2002 up to 1 July 2002,	10,933,90
- USD 5,390,290.54 as from 2 July 2002 up to 19 July 2002,	31,381.83
- USD 2,290,290.54 as from 20 July 2002 up to 16 August 2002, and21.177,34	21,177.34
- USD 1,774,297.02 as from 17 August 2002 until full payment is made.	328,852.58
(b) Invoice No. 138	
- USD 15,244,807.66 as from 22 June 2002 until full payment is made, and	3,109,523.10
(c) Invoice No. 222	
- USD 14,365,530.30 as from 23 July 2002 until full payment is made.	2,785,535.36
	6,416,686.20

The total interest amount is US$ 6,416,686.20. Future interest shall be calculated in accordance with Section 6 in the Swedish Interest Act.

7. COSTS

(215) The Respondent has lost the case totally and must therefore pay the costs of the Claimant and fees and expenses of the Arbitral Tribunal and the Arbitration Institute.

(216) Counsel for the Claimant has submitted a bill of costs amounting to SEK 1,818,322 of which

SEK 1,600,000 and legal fees
SEK 47,308 are disbursements
SEK 35,000 are fees to the expert witness
SEK 136,014 are other expenditures

The Respondent has not had any remarks to the bill of costs, which the Arbitral Tribunal finds acceptable. The Claimant shall therefore be awarded this amount in costs.

(217) The total amount of costs for the Arbitration Institute and the Arbitral Tribunal is Euro 284,822.25, SEK 240,532.50 and NOK 71,500. of which

Euro 246,472.25 are the total fees to the Arbitral Tribunal, divided between

Helge J. Kolrud, chairman	Euro 104,882.
Hans Liljeblad	Euro 62,929. and VAT 15,732.25
Sergei Lebedev	Euro 62,929.

decided by the SCC Institute

Euro 29,976. and VAT 7,494. in administrative fee to the SCC Institute, and

Euro 880., NOK 71,500. and SEK 201,534. and VAT (on SEK 155,994.) SEK 38,998.50 are expenses incurred by the Arbitral Tribunal

(218) The decision is unanimous.

8. AWARD

(219) On this background the Arbitral Tribunal hereby submits the following

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AWARD

In the main claim

Swonco Swedish Oil AB shall pay to TNK Trade Ltd USD 31,384,634.98 with addition of USD 6,416,686.20 in interest up to and included 19 March 2004, and future interest in accordance with Section 6 of the Swedish Interest Act.

In the counterclaim

TNK Trade Ltd is aquitted.

In both claims

1. Swonco Swedish Oil AB shall pay all costs and fees to the SCC Institute and the Arbitral Tribunal in connection with the case.

2. Swonco Swedish Oil AB shall pay all costs, in the amount of SEK 1,818,322, incurred by TNK Trade Ltd in the case.

Any party who wishes to bring an action regarding the fees to the arbitrators, must bring the action before the relevant district court in accordance with Section 41 in the Swedish Arbitration Act within three months after having received this award.

Stockholm 19 March 2004

Helge Jakob Kolrud

Hans Liljeblad Sergei Lebedev