

TWENTY SEVENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT



COLUMBIA LAW SCHOOL

On Behalf Of:

HYDROEN PLC
Rue Whittle 9
Capital City
Mediterraneo

As CLAIMANT

Against:

TURBINAENERGIA LTD
Lester-Pelton-Crescent 3
Oceanside
Equatoriana

As RESPONDENT

COUNSEL

B. KEITH GEDDINGS II • ZACHARY KAPLAN • NIKA MADYOON • YERVAND MELKONYAN

NEEMA H. NODOUST • EMILY PARK • MATTHEW A. ROBINSON • DAVIS ZOSEL



TABLE OF CONTENTS

INDEX OF AUTHORITIES III

INDEX OF CASES AND ARBITRATIONS IX

INDEX OF ABBREVIATIONS.....XV

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENTS.....2

ISSUE A: THE TRIBUNAL SHOULD UPHOLD THE ASYMMETRICAL ARBITRATION CLAUSE AND EXERCISE JURISDICTION OVER THE DISPUTE.....3

 I. THE ARBITRATION CLAUSE IS VALID BECAUSE IT WAS AGREED UPON AND BARGAINED OVER... 3

 A. The parties bound themselves only to Article 21.2, not to the mutuality principle 3

 B. The parties’ agreement comports with recent case law that looks to agreement, not to mutuality. . 5

 II. THE APPLICABLE LAWS DO NOT PROHIBIT ASYMMETRICAL ARBITRATION CLAUSES..... 6

 A. The applicable law of arbitration does not invalidate asymmetrical arbitration agreements. 6

 B. Article 21.2 is justly asymmetrical..... 8

 C. The arbitration is enforceable, not null and void, under the New York Convention. 9

 III. EVEN IF THE TRIBUNAL FINDS THE ASYMMETRY OF THE ARBITRATION CLAUSE TO BE INVALID, THE TRIBUNAL SHOULD GRANT RESPONDENT A BILATERAL RIGHT TO ARBITRATION AND UPHOLD THE CURRENT PROCEEDINGS 10

ISSUE B: THE TRIBUNAL SHOULD EXCLUDE RESPONDENT’S EXPERT WITNESS, PROFESSOR TIM JOHN..... 10

 I. RESPONDENT’S APPOINTMENT OF PROF. JOHN WAS IMPROPER..... 11

 A. Prof. John’s expertise is irrelevant to RESPONDENT’S legal position..... 11

 B. RESPONDENT knew, or should have known, that appointing Prof. John would create grounds for a procedural challenge. 12

 C. Prof. John’s close personal relationship with RESPONDENT is inappropriate. 13

 II. IN LIGHT OF RESPONDENT’S IMPROPRIETY, THE TRIBUNAL SHOULD REFUSE PROF. JOHN’S APPOINTMENT 14

 A. The appointment of Prof. John should be properly refused pursuant to Articles 18.3 and 18.4 of the LCIA Rules..... 14

 B. CLAIMANT’S right to appoint an arbitrator should overcome RESPONDENT’S right to appoint an expert witness..... 15

 C. Prof. John should be excluded in favor of a tribunal-appointed expert to avoid significant efficiency concerns..... 18

ISSUE C: THE TURBINES DELIVERED TO CLAIMANT ARE NON-CONFORMING, AND THUS RESPONDENT HAS BREACHED THE CONTRACT 19



I. THE TURBINES ARE UNFIT FOR THEIR ORDINARY PURPOSE BECAUSE RESPONDENT CANNOT GUARANTEE THE QUALITY OF STEEL USED 19

 A. RESPONDENT’s inability to guarantee the quality of the steel means that the turbines are of insufficient quality..... 20

 B. Due to their insufficient quality, the turbines are not fit for their ordinary purpose. 21

II. THE TURBINES ARE NOT FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO RESPONDENT 22

 A. The turbines are not reliable and are thus not fit for their particular purpose..... 23

 B. The turbines have lost their positive reputation, and therefore are unfit for their particular purpose. 24

ISSUE D: CLAIMANT IS ENTITLED TO REQUEST THE DELIVERY OF REPLACEMENT TURBINES 25

 I. CLAIMANT IS ENTITLED TO SUBSTITUTE GOODS UNDER ARTICLE 46 OF THE CISG..... 25

 A. Respondent’s delivery of non-conforming goods constitutes a fundamental breach under Article 20 of the Sales Agreement..... 26

 B. Respondent’s delivery of non-conforming goods constitutes a fundamental breach under Article 25 of the CISG. 30

 II. FULL REPLACEMENT OF THE TURBINES IS THE ONLY APPROPRIATE REMEDY 33

 A. Repair would cause an unreasonable inconvenience to CLAIMANT..... 34

 B. Repair would be done with unreasonable delay. 34

PRAYER FOR RELIEF 35



INDEX OF AUTHORITIES

TREATIES, STATUTES & RULES

CITED AS	CITATION	PARAGRAPH(S)
<i>C. Civ. Français</i>	Code Civil Français [Civil Code of France].	¶ 9
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods, 11 Apr. 1980, 1489 U.N.T.S. 58.	¶¶ 6, 68, 70, 72, 83, 94, 101, 105, 107, 116
<i>IBA Guide on Conflict of Interest</i>	International Bar Association Council, <i>IBA Guidelines on Conflicts of Interest in International Arbitration</i> , Adopted 23 October 2014, Updated 10 August 2016	¶ 60
<i>IBA Guidelines on Party Representation</i>	International Bar Association Council, <i>IBA Guidelines on Conflicts of Interest in International Arbitration</i> , Adopted 23 October 2014, Updated 10 August 2015	¶ 46
<i>LCIA Rules</i>	London Court of International Arbitration, <i>LCIA Arbitration Rules</i> , 1 October 2014.	¶¶ 40, 46, 47, 53, 57, 59
<i>N.Y. Conv.</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 10 June 1958, 330 U.N.T.S. 1958.	¶ 22
<i>UNCITRAL Model Law</i>	United Nations Commission on International Trade Law Secretariat, <i>UNCITRAL Model Law on International Commercial Arbitration</i> , U.N. Docs. A/40/17 annex I & A/61/17 annex I (21 June 1985) (amended in 7 July 2006).	¶¶ 14, 52



<i>UNCITRAL Travaux Préparatoires 330th Meeting</i>	<i>330th Meeting</i> , [1985] XVI Y.B. U.N. Commission on International Trade Law 497, U.N. Doc. A/CN.9/246, annex.	¶ 15
<i>UNIDROIT</i>	International Institute for the Unification of Private Law (UNIDROIT), <i>UNIDROIT Principles of International Commercial Contracts</i> (May 2016).	¶¶ 3, 7, 20



ARTICLES & COMMENTARIES

CITED AS	CITATION	PARAGRAPH(S)
<i>Affaki & Naón</i>	Maxi Scherer, A Cross-Channel Divide Over Unilateral Dispute Resolution Clauses, <i>in</i> 12 Jurisdictional Choices in Times of Trouble (Bachir G. Affaki & Horacio A.G. Naón eds., 2015).	¶ 10
<i>Bianca</i>	Cesare Massimo Bianca, <i>Article 35</i> , <i>in</i> Bianca-Bonell Commentary on the International Sales Law (1987).	¶ 77
<i>Blair</i>	H.A. Blair, Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges, 21 Duke Journal of Comparative and International Law 269 (2011).	¶ 20
<i>Born 2001</i>	Gary B. Born, International Commercial Arbitration: Commentary and Materials (2nd ed. 2001).	¶ 54
<i>Born 2014</i>	Gary B. Born, International Commercial Arbitration (2nd ed. 2014).	¶ 8
<i>CISG Expl. Note</i>	United Nations Commission on International Trade Law Secretariat, <i>Explanatory Note on the United Nations Convention on Contracts for the International Sale of Goods</i> , U.N. Sales No. V.89-53886 (June 1988).	¶ 3
<i>Digest of Article 39 Case Law</i>	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, U.N. Sales No. E.08.V.15 (2016).	¶ 95



<i>DiMatteo</i>	Larry A. DiMatteo, <i>The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings</i> , 22 <i>Yale Journal of International Law</i> 111 (1997).	¶ 19
<i>Honnold on Art. 35</i>	John Honnold, <i>Article 35: Conformity of the Goods</i> , in <i>Uniform Law for International Sales under the 1980 United Nations Convention</i> (3rd ed. 1999).	¶ 83
<i>Honnold on Art. 8</i>	John Honnold, <i>Article 8: Interpretation of Statements or Other Conduct of a Party</i> , in <i>Uniform Law for International Sales under the 1980 United Nations Convention</i> (3rd ed. 1999).	¶ 83
<i>Liu on Fundamental Breach</i>	Chengwei Liu, <i>The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and case law</i> , CISG Database (last updated May 23, 2005).	¶ 108
<i>Liu on Non-Conformity</i>	Chengwei Liu, <i>Cure by Non-Conforming Party: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law</i> , CISG Database (last updated April 6, 2005).	¶ 120
<i>Lorenz</i>	Alexander Lorenz, <i>Fundamental Breach under the CISG</i> , CISG Database (last updated Sept. 21, 1998).	¶ 108
<i>Maley</i>	Kristian Maley, <i>The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)</i> , 12 <i>International Trade & Business Law Review</i> 82–126 (2009).	¶ 90



<i>Mills</i>	Alex Mills, Party Autonomy in Private International Law (2018).	¶¶ 7, 10
<i>Poikela</i>	Teija Poikela, <i>Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods</i> , Nordic Journal of Commercial Law (2003).	¶¶ 71, 86
<i>Saidov</i>	Djakhongir Saidov, <i>Damages: The Need for Uniformity</i> , 25 Journal of Law & Commerce 393 (2006).	¶ 111
<i>Schlechtriem 1984</i>	Peter Schlechtriem, <i>The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods</i> , in <i>International Sales: The United Nations Convention on Contracts for the International Sale of Goods</i> (Galston & Smit ed. 1984).	¶¶ 71, 72
<i>Schlechtriem 1986</i>	Peter Schlechtriem, <i>Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods</i> (1986).	¶ 113
<i>Sec. Guide on N.Y. Conv.</i>	United Nations Commission on International Trade Law Secretariat, <i>UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i> , U.N. Doc. E.16.V.7 (Sept. 2016).	¶ 23
<i>CISG Sec. Cmtry.</i>	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, U.N. Doc. A/CONF. 97/5 (1978).	¶ 117



<i>Spivack</i>	Carla Spivack, <i>Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. 2-615 and CISG Article 79</i> , 27 University of Pennsylvania Journal of International Economic Law 757 (2006).	¶ 114
<i>UNCITRAL Expl. Note</i>	United Nations Commission on International Trade Law Secretariat, UNCITRAL Model Law on International Commercial Arbitration: 1985 with Amendments as Adopted in 2006, Part Two, U.N. Sales No. E.08.V.4 (Jan. 2008).	¶ 14
<i>Wade, Clifford & Clanchy</i>	S. Wade, P. Clifford & J. Clanchey, A Commentary on the LCIA Rules 2014 (2014).	¶¶ 40, 46, 47
<i>Waincymer</i>	Jeffrey A. Waincymer, Procedure and Evidence in International Arbitration (2012).	¶¶ 12, 17



INDEX OF CASES AND ARBITRATIONS

CASES BY JURISDICTION

ARGENTINA		
CITED AS	CITATION	PARAGRAPH(S)
<i>Vanger SRL</i>	Cámara Federal de Apelaciones [CFed.] [Federal Appellate Court for Commercial Matters] Ch. C, 6 June 2019, “Vanger SRL v. Minera Don Nicolás SAs/ Ordinario,” (Nº 5688/2018/CA2). Federal Appellate Court for Commercial Matters	¶ 20
AUSTRALIA		
CITED AS	CITATION	PARAGRAPH(S)
<i>PMT Partners Pty Ltd.</i>	<i>PMT Partners Pty Ltd (In Liq) v Australian Nat’l Parks & Wildlife Serv.</i> [1995] 131 ALR 377. High Court of Australia	¶ 8
AUSTRIA		
CITED AS	CITATION	PARAGRAPH(S)
<i>Arbitration Costs Case</i>	Oberster Gerichtshof [OGH] [Supreme Court] 3 Apr. 2001, 4 Ob 37/01x. Supreme Court of Austria	¶ 27
<i>Imitation CPUs Case</i>	Oberster Gerichtshof [OGH] [Supreme Court] 5 July 2001, 6 Ob 117/01a. Supreme Court of Austria	¶¶ 109, 118
<i>Tantalum Powder Case</i>	Oberster Gerichtshof [OGH] [Supreme Court] 17 Dec. 2003, 7 Ob 275/03x. Supreme Court of Austria	¶ 102



BELGIUM		
CITED AS	CITATION	PARAGRAPH(S)
<i>Tomatoes Case</i>	Rechtbank van Koophandel [Kh.] [District Court for Commercial Matters] Mechelen, 18 January 2002. District Court for Commercial Matters	¶ 78
FRANCE		
CITED AS	CITATION	PARAGRAPH(S)
<i>Rothschild</i>	Cour de cassation [Cass.] [Court of Cassation], 1e civ., 26 Sept. 2012, <i>Mme X v Banque Privée Edmond de Rothschild Europe</i> , No. 11-26.022. French Court of Cassation	¶ 9
GERMANY		
CITED AS	CITATION	PARAGRAPH(S)
<i>Chemical Substance Case</i>	Amtsgericht München [AG] [Petty District Court] June 23, 1995, 271 C 18968/94. Petty District Court	¶ 121
<i>Frozen Pork Case</i>	Bundesgerichtshof [BGH] [Federal Court of Justice] 2 March 2005 VIII ZR 67/04. Federal Court of Justice	¶ 74
<i>Vine Wax Case</i>	Bundesgerichtshof [Federal Supreme Court] Mar. 24, 1999, VIII ZR 121/98. Federal Supreme Court	¶ 115
ITALY		
CITED AS	CITATION	PARAGRAPH(S)
<i>Grinka in Liquidazione</i>	Corte di cassazione [Cass.] [Court of Cassation], 11 April 2012, n. 5705, <i>Grinka in liquidazione v Intesa San Paolo, Simest, HSBC</i> . Court of Cassation	¶ 8



Machinery Case

Tribunale di Busto Arsizio [District Court] 13
December 2001, CLOUT no. 1192.
Italian District Court

¶ 88

RUSSIAN FEDERATION

CITED AS
CJSC Russian Tel. Co.

CITATION
Resolution of the Presidium of the Supreme
Arbitrazh Court of the Russian Federation No.
1831/12 (19 June 2012).
Supreme Arbitrazh Court of the Russian
Federation

PARAGRAPH(S)
¶¶ 10, 27

SINGAPORE

CITED AS
Dyna-Jet Pte Ltd

CITATION
Dyna-Jet v Wilson Taylor Asia Pacific Pte Ltd [2016]
SGHC 238.
High Court of Singapore

PARAGRAPH(S)
¶ 8

FirstLink

*FirstLink Investments Corp Ltd v GTPayment Pte Ltd et
al.* [2014] SGHCR 12.
High Court of Singapore

¶ 24

SPAIN

CITED AS
Camimalaga S.A.U.

CITATION
S.A.P. [Court of Appeal], *Camimalaga S.A.U. v.
DAF Vehiculos Industriales, S.A.*, 18 Oct. 2013 (No.
AAP M 1988/2013).
Provincial Court of Appeal, Madrid

PARAGRAPH(S)
¶ 8

**SWITZERLAND**

CITED AS	CITATION	PARAGRAPH(S)
<i>Art Books Case</i>	Handelsgericht Zürich [HG] [Commercial Court] Feb. 10, 1999, HG 970238.1. Swiss Commercial Court	¶ 28
<i>Pocket Ashtrays Case</i>	Bundesgericht [BGer] [Federal Supreme Court] 10 October 2005, 4P.146/2005/biz. Federal Supreme Court	¶ 91
<i>Tennis Player Case</i>	Bundesgericht [BGer] [Federal Supreme Court] 22 Mar. 2007, 4P.172/2006. Federal Supreme Court	¶ 27

UNITED KINGDOM

CITED AS	CITATION	PARAGRAPH(S)
<i>Law Debenture Trust Corp.</i>	<i>Law Debenture Trust Corp. plc v. Elektrim Fin. BV</i> [2005] EWHC 1412 (Ch). England and Wales High Court (Chancery Division)	¶ 8
<i>Liverpool Archdiocese Case</i>	<i>Liverpool Roman Catholic Archdiocesan Trust v. Goldberg</i> [2001] WLR 2337. England and Wales High Court (Chancery Division)	¶ 40
<i>Pittalis</i>	<i>Pittalis v. Sherefettin</i> [1986] 1 QB 868. England and Wales Court of Appeal (Civil)	¶ 8
<i>RGE (Group Servs.) Ltd.</i>	<i>RGE (Group Servs.) Ltd v. Cleveland Offshore Ltd</i> [1986] 11 Con. L.R. 78. England and Wales High Court (Technology & Construction Division)	¶ 8



<i>Three Shipping</i>	<i>NB Three Shipping Ltd v. Harebell Shipping Ltd</i> [2005] 1 AER 200. England and Wales High Court (Commercial Division)	¶ 8
-----------------------	---	-----

UNITED STATES OF AMERICA

CITED AS	CITATION	PARAGRAPH(S)
<i>Copper Molding Plates Case</i>	<i>Roser Tech., Inc. v. Carl Schreiber GmbH</i> , No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. 10 Sept. 2013). Federal District Court, Western District of Pennsylvania	¶ 102
<i>Faber</i>	<i>Faber v. Menard, Inc.</i> , 367 F.3d 1048 (8th Cir. 2004). Federal Court of Appeals for the 8th Circuit	¶ 28
<i>Filanto</i>	<i>Filanto, S.p.A. v. Chilewich Int'l Corp.</i> , 789 F. Supp. 1229 (S.D.N.Y. 1992). Federal District Court, Southern District of New York	¶ 106
<i>Lindo</i>	<i>Lindo v. NCL (Bah.), Ltd.</i> , 652 F.3d 1257 (11th Cir. 2011). Federal Court of Appeals for the 11th Circuit	¶ 24
<i>Sablosky</i>	<i>Sablosky v. Edward S. Gordon Co.</i> , 73 N.Y.2d 133 (1989). Court of Appeals of the State of New York	¶ 8
<i>Sydnor</i>	<i>Sydnor v. Conseco Fin. Servicing Corp.</i> , 252 F.3d 302 (4th Cir. 2001). Federal Court of Appeals for the 4th Circuit	¶ 20
<i>Vegter</i>	<i>Vegter v. Forecast Fin. Corp.</i> , No. 1:07-CV-279, 2007 WL 4178947 (W.D. Mich. 20 Nov. 2007).	¶ 27



Federal District Court, Western District of
Michigan

ARBITRATIONS

CITED AS	CITATION	PARAGRAPH(S)
<i>Chinese Goods Case</i>	Schiedsgericht der Handelskammer Hamburg [Arbitral Tribunal] Mar. 21, 1996, CLOUT no. 166. Hamburg Arbitral Tribunal	¶ 114
<i>Hrvatska Case</i>	<i>Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia</i> , ICSID Case No. ARB/05/24, International Centre for Settlement of Investment Disputes, Washington D.C., Decided 6 May 2008. International Centre for Settlement of Investment Disputes	¶ 48
<i>Scaffold Fittings Case</i>	ICC Arbitration Case No. 7531 of 1994. International Court of Arbitration	¶¶ 110, 119



INDEX OF ABBREVIATIONS

CITED AS	CITATION
<i>∞</i>	And
<i>App.</i>	Appendix
<i>Art(s).</i>	Article
<i>Arb.</i>	Arbitration
<i>CISG</i>	U.N. Convention on Contracts for the International Sale of Goods
<i>Cl.</i>	Claimant
<i>Cmt.</i>	Comment
<i>Cmtry.</i>	Commentary
<i>Ex.</i>	Exhibit
<i>Expl.</i>	Explanatory
<i>IBA</i>	International Bar Association
<i>ICSID</i>	International Centre for Settlement of Investment Disputes
<i>Id.</i>	Refers to the immediately preceding source.
<i>Infra</i>	Refers to a forthcoming portion of the Memorandum.
<i>LCLA</i>	London Court of International Arbitration
<i>No(s).</i>	Number(s)
<i>Ord.</i>	Order
¶, ¶¶	Paragraph(s)
<i>Proc.</i>	Procedural
<i>Req.</i>	Request
<i>Res.</i>	Respondent
<i>Res. Answer</i>	Respondent Response to the Notice of Arbitration
<i>Sec.</i>	Secretariat
<i>Supra</i>	Refers to a prior portion of the Memorandum.
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNIDROIT</i>	International Institute for the Unification of Private Law



STATEMENT OF FACTS

- i. CLAIMANT, HydroEN plc, is a global provider of pump hydro power plants. During the tender process for the construction of a new hydro power plant in the City of Greenacre, CLAIMANT contracted with RESPONDENT, TurbinaEnergia Ltd, a leading producer of water turbines.
- ii. CLAIMANT submitted the first draft of the Sales Agreement, which included an asymmetrical dispute resolution clause. RESPONDENT initially objected but ultimately struck a bargain, agreeing to CLAIMANT's proposed clause and a liquidated damages clause in return for a limitation of liability clause and an entire agreement clause.
- iii. CLAIMANT made clear to RESPONDENT during negotiations that this project required turbines of a particular quality that would ensure the plant's uninterrupted operation. As a result of this mutual understanding, CLAIMANT contracted for the delivery of the two newly developed R-27V Francis Turbines. The agreement between the parties became effective when CLAIMANT was awarded the contract to construct the Greenacre Pump Hydro Power Plant.
- iv. Pursuant to the Sales Agreement, RESPONDENT delivered and installed two R-27V Francis Turbines. The Greenacre Pump Hydro Power Plant began operation on 18 September 2018. Ten days later, a news outlet reported the failure of the R-27V Francis Turbines at the Riverhead Tidal Power Plant. RESPONDENT was forced to replace the turbines after only two years of use at that Plant. Trusted Quality Steel, the company that supplies RESPONDENT with seventy percent of its steel, provided RESPONDENT with defective steel which caused the failure of the turbines at the Riverhead Plant.
- v. Due to the Riverhead Plant incident, CLAIMANT contacted RESPONDENT to inquire about concerns regarding the quality of the turbines delivered to the Greenacre Plant. CLAIMANT expressed its concern that any additional repairs that the turbines may need as a result of the defective steel would delay crucial energy production or result in the temporary shutdown of the Greenacre Plant. Though negotiations ensued, RESPONDENT rejected CLAIMANT's reasonable request to fully replace both R-27V Francis Turbines in order to minimize the risks caused by RESPONDENT.
- vi. Following the failure of those negotiations, CLAIMANT initiated these proceedings. On the same day, CLAIMANT nominated Ms. Claire Burdin to serve on the tribunal. RESPONDENT has since retained an expert witness, Professor Tim John, who has a string of interests that potentially risks prejudice to CLAIMANT and Ms. Burdin.



SUMMARY OF ARGUMENTS

A. The Tribunal should uphold the validity of the asymmetrical arbitration clause.

The Tribunal should uphold the validity of the arbitration clause in Article 21.2 of the Sales Agreement because, in line with the principle of party autonomy, both CLAIMANT and RESPONDENT agreed to and bargained over the clause. Furthermore, the Tribunal should find that the arbitration clause is valid under the UNCITRAL Model Law, is fair despite its asymmetry, and is not null and void under the New York Convention. Finally, even if the Tribunal finds the asymmetrical arbitration clause to be invalid, the Tribunal should exercise jurisdiction regardless.

B. The Tribunal should exclude RESPONDENT's expert witness, Professor Tim John.

The Tribunal should refuse RESPONDENT's appointment of Professor Tim John as an expert witness in these proceedings. His expertise is irrelevant to the legal questions at issue; he has a well-known conflict of interest with CLAIMANT's arbitrator of choice, Ms. Claire Burdin; and he enjoys a long-standing, close relationship with RESPONDENT. This impropriety precludes admission of his testimony pursuant to Article 18 of the LCIA Rules, undermines CLAIMANT's absolute right to influence the selection of arbitrators, and raises serious efficiency concerns.

C. The Tribunal should find that the turbines do not conform to the contract.

The Tribunal should find that the turbines delivered to CLAIMANT do not conform to the contract under Article 35 of the CISG. Article 35(1) of the CISG establishes RESPONDENT's obligation to deliver goods that are of the "quantity, quality and description required by the contract." Article 35(2) requires RESPONDENT to deliver goods that are fit for both their ordinary and particular purposes. Due to the risk that the turbines were produced with defective steel, RESPONDENT has failed to deliver goods that are fit for their ordinary and particular purposes.

D. The Tribunal should hold that CLAIMANT is entitled to request the delivery of replacement turbines.

The Tribunal should hold that CLAIMANT is entitled to request the delivery of replacement turbines under Article 46 of the CISG. The turbines' non-conformity constitutes a fundamental breach of contract. RESPONDENT's delivery of non-conforming turbines meets the definition of "fundamental breach" set forth in Article 20 of the Sales Agreement, as well as in Article 25 of the CISG. Furthermore, replacement of the turbines is the only appropriate remedy. Pursuant to Article 48(1) of the CISG, RESPONDENT's proposed repair is an unacceptable remedy because it entails unreasonable inconvenience and delay to CLAIMANT.



**ISSUE A: THE TRIBUNAL SHOULD UPHOLD THE ASYMMETRICAL ARBITRATION
CLAUSE AND EXERCISE JURISDICTION OVER THE DISPUTE**

1. In RESPONDENT's Response to the Request for Arbitration, RESPONDENT has inappropriately declared the arbitration clause to be invalid because Article 21.2 of the Sales Agreement grants CLAIMANT the exclusive right to commence arbitration. In turn, RESPONDENT asks the Tribunal to decline jurisdiction. But the Tribunal should exercise jurisdiction because the asymmetrical arbitration clause, having been agreed upon and bargained over, is valid **(I)**. Furthermore, the Tribunal should reject RESPONDENT's challenges to its validity because none of the applicable laws preclude such clauses **(II)**. Finally, even if the Tribunal finds the asymmetrical arbitration clause to be invalid, the Tribunal should uphold the remainder of the arbitration agreement **(III)**.

**I. THE ARBITRATION CLAUSE IS VALID BECAUSE IT WAS AGREED UPON AND BARGAINED
OVER**

2. The first issue is whether the asymmetrical arbitration agreement is invalid because it favors CLAIMANT. [*Res. Answer* ¶ 12]. Because RESPONDENT not only accepted Article 21 of the Sales Agreement but also used it as a bargaining chip in the parties' negotiations to reach a final agreement, RESPONDENT affirmed the validity of Article 21 of the Sales Agreement. Party autonomy is the touchstone of the jurisdiction issue, and party autonomy does not require mutuality **(I.A)**. Furthermore, this Tribunal should heed recent trends to look to agreement, not mutuality **(I.B)**.

**A. THE PARTIES BOUND THEMSELVES ONLY TO ARTICLE 21.2, NOT TO THE
MUTUALITY PRINCIPLE.**

3. Party autonomy is the touchstone of the jurisdiction issue. The CISG Explanatory Note states that party autonomy is "[t]he basic principle of contractual freedom in the international sale of goods." [*CISG Expl. Note* ¶ 12]. The Comment to UNIDROIT Article 1 emphasizes that "[t]he principle of freedom of contract is of paramount importance in the context of international trade." [*UNIDROIT Art. 1 cmt. 1*]. These standards on party autonomy are binding because the parties expressly agreed that "the substantive law of Danubia," which includes the CISG and UNIDROIT Principles, should apply to the entirety of the Sales Agreement. [*Proc. Ord. 1* ¶ III.4; *Cl. Ex. 2 Art. 21.2*]. Particularly, the CISG and UNIDROIT Principles apply to the interpretation and conclusion of Article 21 of the Sales Agreement. [*Proc. Ord. 1* ¶ III.5].



4. On 22 May 2014, both CLAIMANT and RESPONDENT executed the Sales Agreement. Article 21.2 of the Sales Agreement states, “The BUYER has the right to refer any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, to arbitration under the LCIA Rules.” [*Cl. Ex. 2* Art. 21.2]. Article 21.2 grants the right to commence arbitration exclusively to CLAIMANT, but not to RESPONDENT. When CLAIMANT exercised its contractual right to commence arbitration, RESPONDENT collaterally challenged the arbitration clause and labelled it invalid. [*Res. Answer* ¶¶ 12–14].
5. At no point in the negotiation process was RESPONDENT obliged to accept an agreement it was not satisfied with. It is dispositive that RESPONDENT consented to the arbitration clause. [*Proc. Ord. 2* ¶ 2]. Initially, CLAIMANT submitted the first draft, which included the asymmetrical dispute resolution clause; RESPONDENT objected and proposed a symmetrical arbitration clause. [*Id.* ¶ 2]. The Parties engaged in “numerous unsuccessful efforts” to agree on balanced arbitration terms. [*Res. Ex. 2* ¶ 6]. But when CLAIMANT declined to remove the clause, RESPONDENT did not walk away from the negotiation. Instead, RESPONDENT used CLAIMANT’s preference for asymmetrical arbitration terms as a bargaining chip when it accepted the asymmetrical dispute resolution clause and the liquidated damages clause “in return for HydroEN’s consent to the limitation of liability and the inclusion of an entire agreement clause.” [*Proc. Ord. 2* ¶ 2]. Through their negotiation and final bargain, the parties used the asymmetrical arbitration clause to adequately distribute risk in the contract.
6. In addition, under Article 9 of the CISG, CLAIMANT’s usage of asymmetric arbitration clauses in prior transactions further validates Article 21.2. Article 9(2) states, “The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known.” [*CISG* Art. 9(2)]. CLAIMANT had a largely consistent history of seeking asymmetrical arbitration clauses in its contracts with suppliers. [*Proc. Ord. 2* ¶ 2]. RESPONDENT, as an established supplier in the turbine industry, should have “otherwise agreed” to another dispute resolution clause instead of bargaining over a provision that reaffirmed CLAIMANT’s established usage of asymmetrical arbitration clauses.
7. The Tribunal should recognize and reaffirm the autonomy of two parties to enter into business agreements, despite being under no obligation to do so. Parties are free to walk away from forming a contract as long as both parties negotiated in good faith with the intent to reach an agreement. [*UNIDROIT* Art. 2.1.15(1)]. RESPONDENT does not contend that CLAIMANT acted in bad faith or that the language of Article 21.2 is ambiguous. Furthermore, none of the provisions on



party autonomy in the CISG or UNIDROIT Principles require mutuality. Scholar Alex Mills views asymmetric agreements, in the context of arbitration clauses, as a mere part of the parties' bargaining process during negotiations with no additional mutuality requirement. [Mills 161]. The parties' negotiation and bargaining over the arbitration clause fits squarely within this view.

B. THE PARTIES' AGREEMENT COMPORTS WITH RECENT CASE LAW THAT LOOKS TO AGREEMENT, NOT TO MUTUALITY.

8. RESPONDENT's reliance on mutuality doctrine fails to consider recent trends in case law shifting towards the validation of asymmetric arbitration clauses. RESPONDENT states that "courts in numerous jurisdictions have considered [asymmetrical] clauses to be invalid, as they unduly favor one of the parties." [Res. Answer ¶ 13]. But important decisions from foreign jurisdictions have indicated otherwise. Having once largely required mutuality in arbitration clauses, courts have undergone an evolution in approach and now look to the parties' autonomy and agreement. [Born 2014 at 867–68]. For instance, the State of New York's highest court ruled that "[m]utuality of remedy is not required in arbitration contracts." [Sablosky (1989) 137]. Several seminal English cases support the same concept. [Three Shipping (2005) 37–38; Law Debenture Trust Corp. (2005); Pittalis (1986); RGE (Group Servs.) Ltd. (1986)]. The same pattern of party consent has clearly emerged in Australian, Italian, Singaporean, and Spanish case law, all upholding asymmetrical dispute resolution clauses. [PMT Partners Pty Ltd. (1995) (Austl.); Grinka in Liquidazione (2012) (It.); Dyna-Jet Pte Ltd (2016) (Sing.); Camimalaga S.A.U. (2013) (Spain)].
9. Additionally, the case before the Tribunal can be distinguished from the few but notable cases advocating the mutuality requirement. The French *Cour de Cassation* invalidated an asymmetrical litigation clause because the provision violated the "potestative" condition of the French Civil Code, in which one party cannot have the exclusive power to fulfill or nullify an agreement. [Rothschild]. But the Tribunal should first note that the French Civil Code was amended in 2016, after the *Rothschild* case, to formally abandon the language of "conditions potestatives," applying the doctrine only to lending agreements. [C. Civ. Français Art. 1304-2]. Second, RESPONDENT does not contend, nor does the record indicate, that Danubia, Mediterraneo, or Equatoriana adopts *conditions potestatives* in its law. Therefore, the *Rothschild* ruling seems to lend little, if any, applicability to the dispute between CLAIMANT and RESPONDENT.
10. Another recent case from the Supreme Arbitrazh Court of the Russian Federation is also inapposite. The Russian court converted an asymmetrical litigation clause into a bilateral option on the basis of procedural equality principles. [CJSC Russian Tel. Co. 5–6]. But that ruling



incorrectly applied the equality principle to issues of jurisdiction rather than to the laws applicable to the proceedings, similar to RESPONDENT's arguments in this case. [*Affaki & Naón* 57–59; *Mills* 163; *Res. Answer* ¶ 14; *infra* Section II.A]. The court also relied on European Court of Human Rights cases that were not relevant to asymmetrical dispute resolution clauses. [*CJSC Russian Tel. Co.* 5–6]. The Tribunal should limit the application of these esoteric precedents to this dispute.

11. Instead, the Tribunal should respect the parties' autonomy and exercise jurisdiction. This would bring the arbitration in line with recent jurisprudence that has rejected outdated approaches of mutuality. It is ultimately determinative that RESPONDENT was never obliged to accept an agreement it was not satisfied with, but still consented to and bargained over Article 21.2.

II. THE APPLICABLE LAWS DO NOT PROHIBIT ASYMMETRICAL ARBITRATION CLAUSES

12. In line with the principle of party autonomy, because the parties selected Danubia as the seat of arbitration, the parties bound themselves to the Danubian Arbitration Law. [*Cl. Ex. 2* Art. 21.2; *Waincymer* 183]. As a threshold matter, the applicable law of arbitration does not invalidate asymmetrical arbitration agreements (II.A). Furthermore, the arbitration agreement is not unjustly asymmetrical (II.B). Nor is the arbitration agreement null and void under the New York Convention (II.C).

A. THE APPLICABLE LAW OF ARBITRATION DOES NOT INVALIDATE ASYMMETRICAL ARBITRATION AGREEMENTS.

13. The second issue before the Tribunal is whether the Danubian Arbitration Law, a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration, prohibits asymmetrical arbitration agreements. [*Proc. Ord. 1* ¶ III.4]. RESPONDENT argues that Article 18 of the UNCITRAL Model Law “expressly stipulates that in relation to *all* procedural questions the parties should be treated equally.” [*Res. Answer* ¶ 14 (emphasis added)]. Accordingly, RESPONDENT submits that the arbitration clause in the Sales Agreement violates the Article 18 procedural equality principle. [*Id.*]. But this Tribunal should find that Article 18 of the UNCITRAL Model Law does not address jurisdictional matters (II.A.1). Furthermore, this Tribunal should conclude that Equatorianian arbitration law is neither binding nor relevant to the arbitration (II.A.2).

1. Article 18 of the UNCITRAL Model Law does not invalidate Article 21.2 of the Sales Agreement.

14. The Tribunal should find that RESPONDENT overextends the language of Article 18, which applies only to procedural law regulating conduct during arbitral proceedings and not to



jurisdictional issues. Article 18 of the UNCITRAL Model Law states, “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” [UNCITRAL Model Law Art. 18; Proc. Ord. 1 ¶ III.4]. The UNICTRAL Model Law Explanatory Note establishes that Article 18 sets out the fundamental requirements of procedural justice. [UNCITRAL Expl. Note ¶ 31].

15. Notably, the UNCITRAL Explanatory Note and *travaux préparatoires* limit the scope of Article 18. First, the examples provided in the Explanatory Note acknowledge the duties to notify the opposing party of one party’s communications with the tribunal and to give sufficient notice for a meeting of the arbitral tribunal. [*Id.* ¶¶ 32–33]. These examples concern the parties’ conduct during arbitral proceedings, and the Explanatory Note’s discussion of Article 18 is titled “Conduct of arbitral proceedings.” [*Id.* ¶ 31]. Second, the *travaux préparatoires* indicate that Article 18 was originally under Article 19, titled “Determination of rules of procedure,” but the Iraqi, Tanzanian, and British delegations argued that Article 18 “embodied a general principle that should govern all phases of the *arbitration proceedings*.” [UNCITRAL Travaux Préparatoires 330th Meeting ¶¶ 62–65 (emphasis added)]. None of these materials apply Article 18 to jurisdictional issues.
16. RESPONDENT itself concedes that Article 18 does not directly apply to jurisdiction when RESPONDENT, after citing Article 18, asks, “Why should that be different in relation to jurisdictional issues?” [*Res. Answer* ¶ 14]. Consistent with RESPONDENT’s question, CLAIMANT submits that there is no binding basis for applying Article 18 to questions of jurisdiction. Thus, the Tribunal should reject RESPONDENT’s broad interpretation that the asymmetrical arbitration clause is invalid under the equal treatment provision of Article 18.

2. Equatorianian arbitration law is inapplicable to the jurisdictional question before the Tribunal.

17. Equatorianian arbitration law is not binding on or relevant to this arbitration. RESPONDENT states that courts in Equatoriana have found asymmetric dispute resolution clauses to be invalid. [*Res. Answer* ¶ 13]. RESPONDENT also suggests that because it is based in Equatoriana and because it is “negatively affected by the clause,” Equatorianian arbitration law applies. But RESPONDENT’s argument ignores the dispositive fact that the parties consented to an arbitral seat in Danubia. [*Cl. Ex. 2* Art. 21.2]. The parties, RESPONDENT included, bound themselves to the Danubian Arbitration Law. [*Waincymer* 183]. Because the parties did not agree to an Equatorianian seat, the Tribunal should find that Equatorianian law is inapplicable.



18. Instead, the Tribunal should reaffirm the applicability of the Danubian Arbitration Law in the arbitration and should not hold that Article 21.2 of the Sales Agreement is invalid. Even RESPONDENT acknowledges that there is “no direct precedent on the issue of asymmetrical dispute resolution clauses” under Danubian arbitration case law. [*Res. Answer* ¶ 14]. Therefore, the Tribunal lacks a binding basis under the law of arbitration to nullify the arbitration clause.

B. ARTICLE 21.2 IS JUSTLY ASYMMETRICAL.

19. The third issue is whether the asymmetrical arbitration clause is invalid because it is unjust. Unconscionability, a common law doctrine, and just contract, a civil law doctrine, are similarly concerned with regulating the baseline fairness of contracts. [*DiMatteo* 149]. While RESPONDENT does not directly invoke these doctrines, RESPONDENT’s claim that the arbitration clause should be invalidated because it unduly favors CLAIMANT suggests a level of injustice in the asymmetry. [*Res. Answer* ¶¶ 12–13]. But this Tribunal should find that Article 21.2 is not fundamentally unjust.

20. The CISG and UNIDROIT Principles do not address the issue of unconscionability. [*Blair* 317; *UNIDROIT* Art. 7.1.6 cmt. 1]. But the UNIDROIT Principles, adopted verbatim as Danubian contract law, do permit the avoidance of a contract if a party “has taken unfair advantage of the first party’s dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill.” [*UNIDROIT* Art. 3.2.7; *Proc. Ord. 1* ¶ III.4]. Courts across jurisdictions have also recognized varying standards and definitions in determining the unconscionability of arbitration clauses in contracts. [*Vanger SRL* (holding that an arbitration clause was not unconscionable if it was not abusive) (Arg.); *Sydnor* 305 (ruling that an agreement will be held unconscionable only if it were so grossly unequal “as to shock the conscience”) (U.S.)].

21. The arbitration agreement before the Tribunal is not unconscionable because the parties were not unequal in bargaining power. RESPONDENT does not allege that it entered into the negotiations with unequal bargaining power. [*Proc. Ord. 2* ¶ 1]. While CLAIMANT is larger than RESPONDENT, RESPONDENT is a highly sophisticated corporate entity that employs about 550 employees, operates transnationally, and turns over \$180 million annually. [*Id.*]. The Tribunal should not find Article 21.2 to be unequal when RESPONDENT negotiated the terms of the agreement with CLAIMANT numerous times, received a “crucial” limitation of liability clause, and fully consented to the agreement without alleging dependence, ignorance, or economic distress. [*Proc. Ord. 2* ¶ 2; *Res. Ex. 2* ¶ 6].



C. THE ARBITRATION IS ENFORCEABLE, NOT NULL AND VOID, UNDER THE NEW YORK CONVENTION.

22. The fourth issue is whether Article 21.2 is null and void under Article II(3) of the New York Convention. Equal treatment regarding asymmetrical agreements is “of crucial importance and therefore part of public policy” in Equatoriana; RESPONDENT further notes that the influence of all parties on the composition of the arbitral tribunal is a matter of Danubian public policy. [*Proc. Ord.* 2 ¶ 52; *Res. Answer* ¶ 14]. Article II(3) of the New York Convention—of which Danubia, Equatoriana, and Mediterraneo are members—requires that “[t]he court of a Contracting State . . . refer the parties to arbitration, unless it finds that the said agreement is *null and void*.” [*N.Y. Conv. Art. II(3)* (emphasis added); *Proc. Ord.* 1. ¶ III.4]. While RESPONDENT does not expressly raise the argument, RESPONDENT could have contended that the existence of public policy against asymmetrical arbitration agreements in Equatoriana would invalidate this arbitration clause in national courts. [*Proc. Ord.* 2 ¶ 52].
23. But this Tribunal should find that Article 21.2 of the Sales Agreement passes muster under the null and void test. Neither Article II(3) nor the *travaux préparatoires* define the standard for “null and void.” [*Sec. Guide on N.Y. Conv.* ¶¶ 79–99]. The Secretariat Guide initially notes that municipal law may apply. [*Id.* ¶ 103]. This Tribunal should apply Danubian law because Article 21.2 specifies that Danubian law applies to the entire Sales Agreement. [*Cl. Ex.* 2 Art. 21.2]. Because no direct precedent on asymmetrical arbitration clauses exists in Danubian arbitration law, this Tribunal should avoid determinations of first legal impression and find the clause valid. [*Res. Answer* ¶ 14].
24. Even if this Tribunal should rely on foreign judicial interpretation, and not on Danubian law, Article 21.2 should remain valid. U.S. and Singaporean courts have ruled that “[t]he limited scope of the Convention’s null and void clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied *neutrally on an international scale*.” [*Lindo* 1272 (U.S.) (internal quotation marks omitted); *FirstLink* (Sing.)].
25. But contravention of public policy against asymmetrical arbitration clauses is not such an internationally neutral defense. This is apparent from the facts in this arbitration: While Equatoriana has a clear public policy against asymmetrical arbitration agreements, Danubia and Mediterraneo do not. [*Proc. Ord.* 2 ¶ 52; *Res. Answer* ¶ 14]. Furthermore, the Tribunal should reject public policy as an internationally neutral defense because ruling otherwise would not only contradict party autonomy, but also stifle the legal innovation surrounding the doctrine governing asymmetric arbitration clauses.



III. EVEN IF THE TRIBUNAL FINDS THE ASYMMETRY OF THE ARBITRATION CLAUSE TO BE INVALID, THE TRIBUNAL SHOULD GRANT RESPONDENT A BILATERAL RIGHT TO ARBITRATION AND UPHOLD THE CURRENT PROCEEDINGS

26. Even if the Tribunal accepted RESPONDENT's claim that the asymmetry of the arbitration clause makes it invalid, the Tribunal should uphold the arbitration by severing only CLAIMANT's asymmetrical right to commence arbitration from the rest of Article 21.2. In effect, this is identical to granting RESPONDENT a bilateral *ex post* right to commence arbitration.
27. Contrary to RESPONDENT's assumption, invalidating one aspect of the arbitration clause does not necessarily invalidate the entire arbitration agreement. [*Res. Answer* ¶ 12]. To the contrary, courts have upheld arbitration agreements while severing parts that were ruled invalid. [*Vegter* (severing the unconscionable portion of the arbitration agreement regarding the place of arbitration and enforcing the remainder) (U.S.); *Tennis Player Case* (invalidating a waiver of right to seek annulment of award while leaving the remaining arbitration agreement in effect) (Switz.); *Arbitration Costs Case* (ruling that even if some cost provisions of the arbitration clause are invalid, the arbitration clause itself is valid) (Austria)]. In the asymmetrical arbitration clause context, the Russian court in *CJSC Russian Telephone Company* converted a unilateral option to litigate into a bilateral option, rather than invalidating the option altogether. [*CJSC Russian Tel. Co.* 6].
28. In addition, the Tribunal should note that the asymmetrical arbitration clause is easily severable from the rest of Article 21.2. RESPONDENT has not alleged that severability is impossible. In fact, the language of the arbitration clause establishes procedural rights, forum, language, and choice of law separate from the asymmetrical component, which can be severed without changing the nature of the arbitration. [*Cl. Ex. 2 Art. 21.2*]. For comparison, U.S. courts have invalidated entire arbitration clauses on the grounds that the unconscionable aspects could not be severed from the rest of the arbitration agreement. [*Faber*]. Thus, even if the Tribunal finds the asymmetrical arbitration clause to be invalid, the Tribunal should follow the precedent allowing severability and cleanly sever the asymmetrical right to commence arbitration from the rest of Article 21.2, allowing for the arbitration to continue onto the merits of the dispute.

**ISSUE B: THE TRIBUNAL SHOULD EXCLUDE RESPONDENT'S EXPERT
WITNESS, PROFESSOR TIM JOHN**

29. In August of 2019, RESPONDENT retained cavitation scholar Professor Tim John to represent it as an expert witness in these proceedings. Prof. John has a conflict of interest with



CLAIMANT's appointed arbitrator, Ms. Claire Burdin. CLAIMANT challenges RESPONDENT's appointment of Prof. John because it was improper **(I)**. In light of RESPONDENT's impropriety, the Tribunal should refuse the appointment of Prof. John **(II)**.

I. RESPONDENT'S APPOINTMENT OF PROF. JOHN WAS IMPROPER

30. Prof. John's legal expertise is irrelevant to RESPONDENT's legal position **(I.A)**. RESPONDENT knew, or should have known, that appointing Prof. John would create grounds for a procedural challenge **(I.B)**. Prof. John's close personal relationship with RESPONDENT is inappropriate and further disqualifies him from acting as a representative on behalf of RESPONDENT **(I.C)**.

A. PROF. JOHN'S EXPERTISE IS IRRELEVANT TO RESPONDENT'S LEGAL POSITION.

31. RESPONDENT intends to offer evidence from Prof. John only in support of its position that the turbines were conforming. RESPONDENT does not assert that Prof. John has been appointed for any other purpose. The standard for conformity is whether the turbines were produced with steel that was suitable for CLAIMANT's expressed purpose. [*Infra* Issue C]. Problematically, Prof. John has no expertise that qualifies him to testify on whether the quality of the steel meets the standards provided for under the contract.
32. RESPONDENT will likely argue that Prof. John's expertise is relevant because he can give testimony that will elucidate the steel's suitability for CLAIMANT's stated purpose. The trouble with this counterargument is that Prof. John is appointed only to testify about facts that would indicate whether the turbines delivered were conforming. Conformity in these proceedings is a question of process, not substance. Specifically, for Prof. John's testimony to be relevant for the reasons RESPONDENT has offered, he would need to be able to testify that the steel used was verified for CLAIMANT's stated purpose, while the turbines were still in the process of production.
33. Prof. John is unable to offer such testimony as he was unfamiliar with the turbines in question until after they were already delivered. [*Proc. Order 2* ¶ 14; *Fasttrack Letter* ¶ 3]. Further, there is no indication that Prof. John will provide any evidence in his report to corroborate the proposition that the turbines installed in Greenacre were, in fact, verified for CLAIMANT's stated purposes, and therefore conforming to the specifications of the contract. While the condition of the turbines is tangential, Prof. John will not be able to provide any testimony to substantiate whether the turbines were constructed using steel that was quality checked and would then conform to the terms of the parties' agreement. Additionally, Prof. John will not provide testimony on behalf of



Trusted Quality Steel, the original supplier of the steel used by RESPONDENT, or on behalf of TechProof, the inspector who failed to perform steel inspections.

34. Since Prof. John is unable to address the issue of quality control or verification during the turbines' production process, his expertise will not include evidence of whether the steel delivered was conforming. But this is the only purpose for which he has been called. Therefore, his testimony is irrelevant to these proceedings and will only serve to obscure the tribunal's analysis of issues being arbitrated, as well as to undermine the procedural integrity of these proceedings.

B. RESPONDENT KNEW, OR SHOULD HAVE KNOWN, THAT APPOINTING PROF. JOHN WOULD CREATE GROUNDS FOR A PROCEDURAL CHALLENGE.

35. RESPONDENT knew, or should have known, that appointing Prof. John would create a conflict of interest between RESPONDENT and CLAIMANT's appointed arbitrator, Ms. Claire Burdin. Since Prof. John's expertise is irrelevant to either party's legal position, his appointment primarily serves to create a procedural hurdle for CLAIMANT. Such action is categorically contrary to good faith and further renders Prof. John's appointment improper.
36. LCIA Arbitration Rules provide that "each of the parties shall act at all times in good faith . . . , and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat." [*LCIA Rules* Art. 32(2)]. Appointing an expert witness that primarily serves to manufacture a procedural hurdle is contrary to good faith.
37. Prof. John is conflicted with Ms. Burdin insofar as his claim pertaining to the patent owned by Ms. Burdin's husband, Mr. Burdin, stands to deprive the Burdins of tens of thousands of dollars in the coming years. [*Proc. Order 2* ¶ 10]. Prof. John was added to RESPONDENT's team for this arbitration twenty days after the nomination of Ms. Burdin. [*Id.* ¶ 12]. At the time, RESPONDENT had multiple reasons to be aware of the conflict of interest between Prof. John and Ms. Burdin. First, Prof. John mentioned the ongoing litigation, where he is the adversary to Mr. Burdin, in a conversation with a manager employed by RESPONDENT during meetings regarding the Riverhead Tidal Power Plant. [*Id.* ¶ 13]. Second, the litigation between Prof. John and Ms. Burdin was reported in a widely circulated newspaper article in December of 2018 [*Id.* ¶ 13]. Third, the Burdin's marriage is public knowledge. [*Proc. Order 2* ¶ 8]. Fourth, the overlap of their professional lives reinforces the premise that RESPONDENT made the connection between Mr. and Ms. Burdin prior to appointing Prof. John: Ms. Burdin has participated in two prior arbitrations regarding hydropower plants and issues of cavitation; her husband is a leading engineer specializing in steel alloys used for turbine production. [*Proc. Order 2* ¶ 8]. Finally, seeing



as RESPONDENT used the newspaper article as the basis for its contention that CLAIMANT knew of a connection between Ms. Burdin and Prof. John, RESPONDENT was aware, or should have been aware, of the conflict as well. [*Proc. Order 2* ¶ 15].

38. While appointing Prof. John does little to substantiate its position on the merits, RESPONDENT almost certainly knew that doing so would create procedural grounds to challenge either Ms. Burdin's appointment or the enforceability of any award rendered against RESPONDENT's interests. RESPONDENT's addition of Prof. John to the arbitral proceedings with the knowledge that he had a conflict with the arbitrator nominated by CLAIMANT was contrary to good faith.

C. PROF. JOHN'S CLOSE PERSONAL RELATIONSHIP WITH RESPONDENT IS INAPPROPRIATE.

39. Prof. John has a long-standing relationship with RESPONDENT. The LCIA Rules, as well as noted scholarship on expert witnesses, indicate that RESPONDENT's close association with its expert exacerbates the impropriety of its appointment.
40. Article 21 of the LCIA Arbitration Rules suggests that closeness between expert witnesses and parties raises doubt as to those experts' credibility. [See *LCIA Arb. Rules* Art. 21]. Article 21 preferences tribunal-appointed experts over party-appointed experts based on reliability. The Commentary to Article 21 of the LCIA Arbitration Rules states, "the fact that an expert has been appointed directly by the Arbitral Tribunal means that they should not be prone to any suggestion that they are the 'hired gun' of a party." [*Wade, Clifford & Clanchy* ¶ 21-006]. Outside of the LCIA context, scholar Howard Rosen, cited by the England and Wales High Court, acknowledged that a personal relationship between party and expert could create a conflict. He writes that "Where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be." [*Liverpool Archdiocese Case* ¶ 14].
41. The long-standing relationship between RESPONDENT and Prof. John is the kind of party-appointed expert these rules and scholarship counsel against. As far back as 2005, RESPONDENT hired two engineers who previously worked as assistants to Prof. John and are now part of RESPONDENT's management team. [*Proc. Order 2* ¶ 17]. Furthermore, Prof. John was invited to the presentation of the R-27V turbine in 2013 where he commented on the corrosion and cavitation resistance of the new turbine. [*Id.* ¶ 13]. Finally, RESPONDENT has engaged Prof. John to work as an advisor to supervise the replacement of the R-27V turbines at



the Riverhead Tidal Power Plant. [*Id.* ¶ 15]. Prof. John's involvement with RESPONDENT and its management suggests a direct interest in the ongoing success of RESPONDENT's business.

42. While most party-appointed experts who fail to provide effective testimony stand to lose only one paycheck, Prof. John is at risk of losing two. In line with standard practice, Prof. John would be a paid expert witness for RESPONDENT. But this Tribunal should note that RESPONDENT has been compensating Prof. John for over a year in his role as an advisor on the Riverhead Tidal Power Plant project. [*Id.* ¶ 15]. This double-compensation scheme strengthens the financial incentive to produce biased testimony.

43. Prof. John's fourteen-year relationship with RESPONDENT, as well as his misaligned financial incentives, raise serious doubts about his credibility. Due to the irrelevance of his testimony and impropriety of his relationship with RESPONDENT, the Tribunal should exclude Prof. John.

II. IN LIGHT OF RESPONDENT'S IMPROPRIETY, THE TRIBUNAL SHOULD REFUSE PROF. JOHN'S APPOINTMENT

44. This Tribunal should properly refuse Prof. John's appointment pursuant to Articles 18.3 and 18.4 of the LCIA Rules **(II.A)**. CLAIMANT's right to appoint an arbitrator should overcome RESPONDENT's ability to appoint an expert witness **(II.B)**. There are efficiency considerations that favor tribunal-appointed expert witnesses as opposed to a party-appointed expert **(II.C)**.

A. THE APPOINTMENT OF PROF. JOHN SHOULD BE PROPERLY REFUSED PURSUANT TO ARTICLES 18.3 AND 18.4 OF THE LCIA RULES.

45. Prof. John's appointment creates a conflict of interest between one of the parties and an arbitrator after the tribunal was convened. Articles 18.3 and 18.4 of the LCIA Rules operate to preclude this exact type of appointment and should be applied in this arbitration.

46. The LCIA Rules are intended to safeguard the integrity of the arbitral proceedings. [*LCIA Rules* Preamble]. The Commentary to the LCIA Rules locates Article 18's basis in Guideline 5 of the IBA Guidelines on Party Representation. [*Wade, Clifford & Clanchy* ¶ 18-004]. Guideline 5 provides, "Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest." [*IBA Guidelines on Party Representation* Guideline 5].

47. The force and effect of this guideline is codified in Article 18.4 of the LCIA Rules. Specifically, this Article provides that the Arbitral Tribunal has the power to refuse the addition of any "legal representative" that "could compromise the composition of the Arbitral Tribunal or the finality of the Award." [*LCIA Rules* Art. 18.4]. Prof. John's appointment creates a conflict of interest after



the tribunal has formed. [*supra* I(B)]. That said, the text of Article 18.3 directs Article 18.4's application against "legal representatives," as opposed to all representatives. The only basis for this textual distinction is to encourage parties applying the LCIA Rules to appoint lawyers as their advocates. [*Wade, Clifford & Clanchy* ¶ 18-005]. If Prof. John were a legal representative, the text and purpose of Articles 18.3 and 18.4 would clearly preclude his appointment.

48. But applying Article 18.4 of the LCIA rules *a fortiori*, irrespective of the distinction between legal representatives and experts, would adequately effectuate the goals of the LCIA Rules. Such an *a fortiori* application of LCIA Articles 18.3 and 18.4 would be consistent with prevailing precedent, specifically a 2008 ICSID case titled *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia*. In *Hrvatska*, the respondent appointed counsel who was a barrister in the same chambers as a tribunal member. [*Hrvatska Case* ¶ 4]. This prompted the claimant to initiate a similar challenge to the one CLAIMANT makes here, asking that tribunal to exclude a conflicted party appointee. [*Id.*]. Similar to the dispute before this Tribunal, the *Hrvatska* tribunal noted no applicable law expressly directed the exclusion of this appointee. [*Id.* ¶ 24].
49. But the tribunal ruled that party appointment of an individual who is even only tenuously conflicted with an arbitrator creates reasons to doubt the impartiality of the tribunal. [*Id.* ¶ 32]. This ultimately requires said arbitrator to resign or the tribunal to refuse appointment. [*Id.*]. From this subsidiary conclusion, that tribunal ultimately held that the underlying purposes of applicable procedural law required refusal of the respondent's conflicted representative. [*Id.* Ruling ¶ 1].
50. Applying the principles of Article 18 to Prof. John would satisfy the goals of the LCIA Rules without frustrating its intent. Looking to the intent of LCIA Article 18, it is clear that the behavior it sought to address is the behavior being exhibited by RESPONDENT, namely tactical moves by parties that are intended to disrupt the arbitral proceedings.

**B. CLAIMANT'S RIGHT TO APPOINT AN ARBITRATOR SHOULD OVERCOME
RESPONDENT'S RIGHT TO APPOINT AN EXPERT WITNESS.**

51. CLAIMANT's right to select an arbitrator should overcome RESPONDENT's right to appoint an expert witness for three reasons. While CLAIMANT's right to select an arbitrator of its choosing is absolute **(II.B.1)**, RESPONDENT's right to appoint an expert witness is not **(II.B.2)**. RESPONDENT's appointment of Prof. John interferes with, and is subordinate to, CLAIMANT's absolute right to select Ms. Burdin as an arbitrator **(II.B.3)**.

**1. CLAIMANT's right to select an arbitrator of its choosing is absolute.**

52. CLAIMANT's right to influence selection of an arbitrator is absolute. Article 11 of the UNCITRAL Model Law states, "The parties are free to agree on a procedure of appointing the arbitrator or arbitrators." [*UNCITRAL Model Law* Art. 11]. Further, the same Article provides that parties "are free to agree on a procedure of appointing the arbitrator or arbitrators." [*Id.*].
53. The parties each intended to reserve such a right by consenting to Article 21.2 of the Sales Agreement, which reads, "Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by the LCIA." [*Cl. Ex. 2*]. The Tribunal should further note that the parties deviated from the LCIA default rule, which provides for a sole arbitrator, in order to specify a three-person tribunal. [*LCIA Rules* Art. 5]. CLAIMANT and RESPONDENT deliberately chose to create a mutual right to nominate an arbitrator of their choosing.
54. The importance of these parties' rights to appoint their own arbitrators is further supported by noted scholarship. While it's clear that undermining CLAIMANT's right to appoint an arbitrator and not RESPONDENT's would give rise to concerns about equal treatment, Gary Born has argued that a single party's right to appoint an arbitrator carries even greater weight. [*Born 2001* at 699]. Born writes that "the 'right' to appoint an arbitrator is widely regarded as fundamental in international arbitration." [*Id.*]. Specifically, Born reasons that the collective voice of parties in deciding how disputes are adjudicated is a cornerstone of contemporary international arbitration. [*Id.* at 677]. He affirms that "the right of each party to appoint an arbitrator appears to be mandatory and substantially linked to arbitration." [*Id.*].
55. It follows then that CLAIMANT's right to nominate Ms. Burdin is absolute. The critical nature of this right suggests that it must be protected from RESPONDENT's use of less important entitlements that endanger CLAIMANT's free exercise of that right.

2. RESPONDENT has no comparable right to appoint an expert witness.

56. RESPONDENT does not have a protected right to appoint an expert witness. While parties to arbitrations have historically been allowed to appoint their own experts, nowhere do the rules applicable to this arbitration provide an explicit right for either party to appoint such witnesses.
57. While neither the LCIA Rules or UNCITRAL Model Law protect parties' choices over expert witnesses, the LCIA Rules include various provisions that serve to undermine that choice. Particularly, the Arbitral Tribunal has the authority to "allow, refuse or limit the written and oral testimony of witnesses." [*LCIA Rules* Art. 20(3)]. Further, in the event that the arbitral tribunal desires expert testimony to assist with their evaluation of issues, the tribunal has the power to



directly appoint expert witnesses to report back to it. [*Id.* Art. 21(1)]. This obviates the importance of RESPONDENT's ability to select an expert to substantiate its defense.

3. RESPONDENT's selection of Prof. John as an arbitrator interferes with CLAIMANT's right to appoint Ms. Burdin to the arbitral tribunal.

58. CLAIMANT's absolute right to nominate an arbitrator is imperiled by RESPONDENT's appointment of Prof. John. Appointing Prof. John creates multiple grounds for challenging the appointment of Ms. Burdin, that could ultimately result in an irreparable loss of CLAIMANT's right to influence the selection of arbitrators. The Tribunal must protect CLAIMANT's absolute right to nominate an arbitrator, by refusing RESPONDENT's appointment of Prof. John.
59. Article 11 of the LCIA Rules provides that the LCIA Court may revoke appointment of an arbitrator, should it find doubt as to their "suitability, independence, or impartiality." [*LCIA Rules* Art. 11.1]. The same Article empowers the LCIA Court to then determine whether it shall follow the original arbitrator nomination process, "or not." [*Id.*]. Accordingly, should Prof. John's appointment be accepted, it would be left uncertain whether CLAIMANT would retain the ability to exercise its absolute right to select an arbitrator, thus subordinating that right to RESPONDENT's appointment of a witness.
60. One place the LCIA Court may ultimately look to for determining whether Ms. Burdin's relationship with Prof. John gives rise to doubt as to her suitability, independence, or impartiality is the IBA Guidelines on Conflicts of Interest. These guidelines include an Orange List, that specifies examples that may provoke such doubts. [*IBA Guide on Conflict of Interest* Part 2 ¶ 3]. The Orange List specifies that "enmity" between an arbitrator and party witness raises doubt as to that arbitrator's impartiality.
61. There is clearly established enmity between Mr. Burdin and Prof. John. Should Prof. John prevail in his ongoing patent litigation, Ms. Burdin and her husband stand to lose tens of thousands of dollars. [*Proc. Order 2* ¶ 10]. Inevitably this gives rise to doubts about the impartiality and independence of Ms. Burdin toward a party appointee, and whatever evidence they may proffer.
62. This concern is exacerbated by RESPONDENT's express refusal to waive any right to challenge to challenge Ms. Burdin's appointment based on her known ties to Prof. John. [*Id.* ¶ 12]. LCIA Rules Article 10.3 requires parties challenging appointment of an arbitrator to do so within 14 days of appointment, or from learning of grounds for initiating such a challenge. [*LCIA Rules* Art. 10.3]. RESPONDENT affirmatively acknowledged its awareness of these grounds on 27 September 2019. More than sixty-nine days later, RESPONDENT has initiated no formal challenge to Ms.



Burdin's appointment, while placing the tribunal on notice that it will only do so on its own timeline. [*Fasttrack Letter; Proc. Order 2 ¶ 12*].

63. The right of CLAIMANT to select an arbitrator, as enshrined in the parties' arbitration agreement, is absolute and must be protected. RESPONDENT's appointment of Prof. John places that right in serious jeopardy and subordinates a party's right to influence selection of an arbitrator to a party's ability to select an expert witness. Accordingly, it is incumbent upon this Tribunal to protect CLAIMANT's right to appoint an arbitrator, by refusing RESPONDENT's *de minimus* entitlement to choose an expert witness.

C. PROF. JOHN SHOULD BE EXCLUDED IN FAVOR OF A TRIBUNAL-APPOINTED EXPERT TO AVOID SIGNIFICANT EFFICIENCY CONCERNS.

64. If the Arbitral Tribunal were to accept Prof. John's testimony, they would have to weigh his relationship with RESPONDENT and his enmity with CLAIMANT's appointed arbitrator in order to determine the value of his testimony. Additionally, since CLAIMANT would inevitably appoint a rebuttal expert, the Tribunal will then have to compare Prof. John's testimony to that of said rebuttal expert. This creates multiple inefficiencies in the arbitration process and destroys the marginal degree of efficiency sought by the parties when they agreeing to arbitration.
65. The importance of efficiency under the LCIA Rules is codified in Article 14, requiring that the Tribunal has "a duty to adopt procedures suitable . . . as to provide efficient and expeditious means for the final resolution of the parties' dispute." [*LCIA Rules* Art. 14(4)(ii)]. The rules also grant the tribunal "the widest discretion in discharging these general duties." [*Id.* Art. 14(5)].
66. This tribunal can remediate inefficiencies associated with RESPONDENT's appointment of Prof. John by appointing its own expert, pursuant to LCIA Rules Articles 14.4(ii) and 14.5. The Arbitral Tribunal can direct the expert to address the specific issues that the tribunal is concerned with in coming to a judgement so the expert does not waste time covering irrelevant material in their report. Additionally, appointing an alternative expert to Prof. John would be fairly easy, as he has at least three English speaking colleagues with comparable levels of expertise and experience with international arbitration, that this Tribunal can select from. [*Proc. Order 2 ¶ 17*].
67. The tribunal should replace Prof. John with a tribunal-appointed expert to testify on the relevant issues, should they find any. In doing so, the tribunal will be more adequately discharging their duty to run the proceedings efficiently pursuant to Article 14 of the LCIA Rules.



**ISSUE C: THE TURBINES DELIVERED TO CLAIMANT ARE NON-CONFORMING,
AND THUS RESPONDENT HAS BREACHED THE CONTRACT**

68. The Tribunal should find that RESPONDENT has breached its contractual obligations to CLAIMANT by delivering turbines that do not conform to the specifications agreed upon by the parties in the Sales Agreement. Both CLAIMANT and RESPONDENT are contracting states of the CISG and are therefore governed by the convention. [*Proc. Ord.* ¶ III.4]. Pursuant to CISG Article 35(1), RESPONDENT must deliver goods that are of the “quantity, quality, and description” required by the parties’ contract. [*CISG Art.* 35(1)]. Article 35(2) sets forth a list of criteria that the goods must meet in order to qualify as conforming. More specifically, Article 35(2) provides that in order to conform with the contract, goods must be “fit for the purposes for which goods of the same description would ordinarily be used,” and they must be “fit for any particular purpose expressly or impliedly made known to the seller.” [*Id.* Art. 35(2)(a) and (b)].
69. The Tribunal should find that the turbines delivered by RESPONDENT are non-conforming under Article 35 for two reasons. First, the turbines are not fit for their ordinary purpose because the quality of the steel used to produce the turbines cannot be guaranteed **(I)**. Second, the turbines are especially unfit for use in the Greenacre Plant, because they are incapable of satisfying their particular purposes made known to RESPONDENT **(II)**.
- I. THE TURBINES ARE UNFIT FOR THEIR ORDINARY PURPOSE BECAUSE RESPONDENT CANNOT GUARANTEE THE QUALITY OF STEEL USED**
70. CISG Article 35(2)(a) provides that goods are non-conforming if they are not “fit for the purposes for which goods of the same description would ordinarily be used.” [*Id.* Art. 35(2)(a)]. In order for goods to be fit for their ordinary purpose, they must meet a minimum standard of quality. For example, in order for shoes to be fit for their ordinary purpose, i.e. walking, the shoes must be of a high enough quality such that the soles remain intact. This basic principle applies equally to more complex goods such as turbines; if turbines are of insufficient quality, they will not be able to perform as intended, and will therefore be unfit for their ordinary purpose. In this case, the potential quality issues with the steel used to construct the turbines means that they are of insufficient quality **(I.A)**. Due to this insufficient quality, the turbines cannot fulfill their ordinary purpose **(I.B)**.



A. RESPONDENT'S INABILITY TO GUARANTEE THE QUALITY OF THE STEEL MEANS THAT THE TURBINES ARE OF INSUFFICIENT QUALITY.

71. The quality of a good is determined by the average expectations of consumers and industry norms. [*Schlechtriem 1984 6-19–6-21* (providing several examples of quality outcomes based on buyer expectations and norms)]. The obligation established in CISG Article 35 to deliver goods of a certain quality is tied to a general “implied warranty of fitness for ordinary use.” [*Poikela* ¶ 5.2.1]. This “implied warranty” means that a seller has an obligation to guarantee that a delivered good will meet a certain minimum level of quality in order for a good to be fit for ordinary use [*Id.*].
72. This obligation to guarantee quality is illustrated in product recall standards. Products that may be contaminated or otherwise undesirably altered are recalled by producers and manufacturers because there is a risk that the products are defective or of insufficient quality. Often, producers will recall entire lines of product based on the suspicion that they are contaminated, or that there is a defect in only a select number of units. This is because the producer does not know which specific units are contaminated. Pursuant to CISG Article 36(1), producers are liable for this risk of contamination even if such a risk is discovered after delivery. [*CISG Art. 36(1)*]. Sellers are liable for the reality of the condition of goods at delivery. [*Schlechtriem 1984 6-23*].
73. Tribunals have held that suspicion of contamination of goods constitutes non-conformity under CISG Article 35 when a seller either cannot or will not confirm non-contamination, and thus breaches its obligation to guarantee goods that meet a minimum level of quality. In the *Frozen Pork Case*, the German Appellate Court upheld the finding that the pork delivered to the German buyer by the Belgian seller was non-conforming based on the risk of dioxin contamination, which the EU prohibits. Moreover, the Court held that because the risk of contamination existed before delivery, the buyer still had a claim for non-conformity arising after delivery. [*Frozen Pork Case*]. The principle established here is that, absent specific standards, sellers should uphold certain reasonable standards related to the quality of goods. One such reasonable standard is that the goods delivered should be free from the risk of contamination, as seen in the *Frozen Pork Case*. Generally, this standard supports the expectation that buyers should not have to doubt the quality of the goods they receive, and that all potentially defective products are of insufficient quality because of the possible injury that they could cause to buyers. In short, the risk that a good contains a defect means the good is of insufficient quality.
74. In the context of the turbine industry, the industry norm is that turbines should contain steel that meets a minimum standard of quality. The rigorous licensing and certificate standards for steel in



this industry demonstrate that it is reasonable for buyers to expect a certain quality of steel. [*Cl. Ex. 3*]. In fact, quality certification of steel is so critical that a violation of this obligation carries heavy criminal penalties. [*Id.*]. Therefore, the producer of the turbines has an obligation to guarantee that the turbines contain steel of a certain quality.

75. In this case, the fraud perpetrated by RESPONDENT's steel supplier, Trusted Quality Steel ("TQS"), means that the quality of the steel used in the turbines produced by RESPONDENT is unknown. [*Cl. Ex. 5*]. The fraudulent certification leaves open the possibility that the steel is low-grade and vulnerable to weakness. TQS was the supplier for seventy percent of the steel used by RESPONDENT when the turbines were produced. [*Proc. Ord. 2 ¶ 24*]. This creates a disproportionately high risk that the turbines delivered were made with low-grade steel. If the turbines were made with low-grade steel, they are likely to require more frequent repair or to function in a way incompatible with their design. Indeed, defective steel would make the turbine blades more susceptible to "corrosion and breakage." [*Cl. Req. for Arb. ¶ 13*].
76. There is a substantial risk that the turbines are prone to the many problems associated with defective steel. Because RESPONDENT has failed to eliminate this risk, it cannot fulfill its obligation to guarantee that the steel meets the minimum quality standards. As such, the turbines are of insufficient quality.

B. DUE TO THEIR INSUFFICIENT QUALITY, THE TURBINES ARE NOT FIT FOR THEIR ORDINARY PURPOSE.

77. In order to be fit for their ordinary purpose, goods must "possess the normal qualities . . . [and be] free from defects normally not expected in such goods." [*Bianca 273*]. A good's ordinary purpose is defined by industrial norms and reasonable expectations related to the specific category of goods. A buyer's expectation that goods will be fit for their ordinary purpose does not need to be explicitly expressed; it may be implied by the nature of the goods themselves.
78. For example, in the *Tomatoes Case*, the Belgian Court of Commerce held that the tomatoes delivered to the French buyer were non-conforming because the tomatoes were overripe and unfit for resale. The Court found that the buyer was reasonable in expecting the tomatoes to be fit for resale, since their resale was the purpose for which these goods are normally used. [*Tomatoes Case*].
79. In this case, the quality of the steel in the turbines is a precondition for their ordinary use—without steel of a certain quality, the turbines will fail to function normally. Turbines are expected to contain steel of a high enough grade such that they will resist damage during everyday operation.



This is because the turbines are supposed to have a long lifespan and be durable enough for ordinary use in a hydro power plant. [*Res. Answer*. ¶ 3].

80. As described above, low-quality steel in CLAIMANT's turbines can cause them to corrode or break while in operation at a hydro power plant. [*Cl. Req. for Arb.* ¶ 13]. The fact that there is a risk of these issues occurring means that CLAIMANT cannot rely on the durability and expected life span of the turbines in the Greenacre Plant. These quality concerns could not only inhibit the ordinary purpose of the turbines—namely that they function reliably and serve as a continuous source of power—but could also lead to their complete malfunction. RESPONDENT itself even recognized the decreased reliability of CLAIMANT's turbines by suggesting that the first inspection be moved forward by about one year. [*Cl. Ex. 5*; *Cl. Ex. 2 Art. 2.1(d)*].
81. The Riverhead incident illustrates how the potential defect in steel quality can ultimately render a turbine unfit for its ordinary purpose. In 2016, RESPONDENT installed two Francis Turbine R-27V models at Riverhead [*Cl. Ex. 3*—the same model of turbines used in the Greenacre Plant. In May 2018, two years later, the turbines at Riverhead were inspected and the blades were found to be corroded to a greater extent than previously expected. [*Id.*]. Turbines of ordinary quality would not have experienced the same degree of corrosion, and the damage was likely related to the use of low-grade steel. [*Cl. Ex. 5*]. These turbines, which had an expected lifetime of forty years, were replaced after just two years. [*Cl. Ex. 2, Art. 2 ¶ (e)*; *Cl. Ex. 4*]. Given the replacement after such a short time relative to their expected lifespan, the insufficient quality of the steel rendered the turbines unfit for their ordinary purpose. This failure of the exact same model of turbines at Riverhead exemplifies how insufficient steel quality leads to an inability of the turbines to fulfill their ordinary purpose at hydro power plants.
82. The Tribunal should find that the turbines, because their quality cannot be guaranteed, are not fit for their ordinary purpose and are therefore non-conforming under Article 35.

II. **THE TURBINES ARE NOT FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO RESPONDENT**

83. CISG Article 35(2)(b) explicitly states that goods are non-conforming to the contract if they are not fit for “any particular purpose . . . made known to the seller.” [*CISG Art. 35(2)(b)*]. If a particular purpose is made known, either impliedly or expressly, to a seller before the conclusion of a contract, then the seller is obligated to ensure the goods are fit for that particular purpose. [*UNCITRAL CISG Digest 142 ¶ 11*]. CISG Article 35 supplements a written contract with the intent of the contracting parties when determining the obligations of the seller. [*Honnold on Art.*



35 at 252–53]. A buyer’s statements and actions can be considered when determining their intention, as both can indicate what a buyer was relying on and expecting from the seller. [*CISG* Art. 8(3); *Honnold on Art. 8* at 119].

84. The particular purpose of the turbines was expressly stated in the Preamble of the Sales Agreement. [*Cl. Ex. 2* Preamble]. The turbines CLAIMANT purchased were to be used in the Greenacre Plant to stabilize the supply of renewable energy for the City of Greenacre. [*Id.*]. As such, the Greenacre Plant would have to provide energy on demand when wind and solar could not, and store excess energy when it came on the grid. CLAIMANT made the particular purpose of the turbines known to RESPONDENT before, during, and after the contracting process. RESPONDENT knew that the turbines were expected and required to be operational at all times—outside of scheduled and known maintenance downtimes. [*Res. Answer* ¶ 9].
85. RESPONDENT promised the delivery of two R-27V Francis Turbines to CLAIMANT. The turbines were chosen specifically for the qualities that RESPONDENT stated they possessed. RESPONDENT knew that these qualities were critical for the turbines to fulfill their particular purpose—the turbines had to be extremely reliable to reduce maintenance issues and service downtimes and had to maintain a reputation for reliability amongst the general public. [*Cl. Req. for Arb.* ¶ 6]. The turbines ultimately delivered by RESPONDENT, however, do not fit their particular purpose because they are not sufficiently reliable **(II.A)**, and because due to the fraud by TQS and the failure at Riverhead, the turbines now have a diminished reputation **(II.B)**.

A. THE TURBINES ARE NOT RELIABLE AND ARE THUS NOT FIT FOR THEIR PARTICULAR PURPOSE.

86. In order for a good to be fit for its ordinary purpose, it must possess the requisite qualities necessary to fulfill that purpose. [*Poikela* ¶ 5.2.1.1]. The same is true for a good to be fit for a specific purpose. A particular purpose has been found to imply specific quality requirements. [*UNCITRAL CISG Digest* 142 ¶ 11]. In order to be fit for its particular purpose, a good must have both the qualities necessary for ordinary purpose and the particular qualities necessary for it to fulfill its additional, particular purpose.
87. In the *Machinery Case*, the Italian District Court found that the Ecuadorian buyer had made known to the Italian seller that the machinery purchased would have to process material at a certain level above the ordinary level of production. [*Machinery Case*]. In order to be fit for the particular purpose of a certain production level, the machinery would also have to be fit for the ordinary level of production. The machinery could not reliably process any material, much less at the high level



required. [*Id.*]. Therefore, the court held that lack of fitness for ordinary purpose is also a lack of fitness for particular purpose.

88. In this case, CLAIMANT repeatedly explained to RESPONDENT the particular demands of the Greenacre Plant. Throughout the negotiation and tender process, CLAIMANT made very clear the need that the turbines would be reliable such that they would not break down, would be available on demand, and would need service only during specific time periods. [*Cl. Ex 2 Preamble*]. The Preamble of the Sales Agreement establishes the need for above-average reliability. [*Id.*]. The turbines must be of a higher quality than that which is required for their ordinary purpose. RESPONDENT even suggested changes to the design of the Greenacre Plant for ease of maintenance based on the particular need for above-average reliability and short maintenance intervals—indicating RESPONDENT’s awareness of the turbines’ particular purpose. [*Res. Ex. 2 ¶ 5*].

89. As discussed in Part I, CLAIMANT’s turbines are not even of the quality necessary to fulfill their ordinary purpose. They are of below-average quality, meaning they could not possibly meet the above-average quality specified in the parties’ contract. The insufficient quality of the turbines means that they cannot reliably reduce maintenance intervals and provide a continuous power supply to the extent required by CLAIMANT. Their particular purpose does not allow for *any* deviation from expected maintenance intervals. This is evidenced by the fact that the first inspection has already been moved up by one year. RESPONDENT’s delivery of turbines produced with potentially defective steel means that the turbines fail to meet their particular purpose: the need for above-average reliability.

B. THE TURBINES HAVE LOST THEIR POSITIVE REPUTATION, AND THEREFORE ARE UNFIT FOR THEIR PARTICULAR PURPOSE.

90. In certain circumstances, goods must be reputable in order to satisfy their particular purpose. [*Maley 112*]. When a buyer contracts to purchase goods, they often choose a seller based on the reputation of the seller and of the goods the seller tenders. In fact, the CISG emphasizes the importance of a good’s reputation by upholding buyers’ claims of damages for their loss of reputation due to the non-conformity of the goods. [*Maley 93; CISG Advisory Council Opinion No. 6 ¶ 7*].

91. Loss of reputation has been found as grounds for non-conformity. In the *Pocket Ashtrays Case*, the Swiss Supreme Court upheld a finding that goods were non-conforming under CISG Article 35 based on a loss of reputation. The goods involved, ashtrays, were initially dangerous due to the



goods having an excessively sharp blade. Even after the defect was repaired, however, the ashtrays had gained such a bad reputation that they were no longer marketable. [*Pocket Ashtrays Case*].

92. CLAIMANT contracted with RESPONDENT for turbines based on RESPONDENT's positive reputation for producing turbines that were highly reliable. [*Cl. Ex. 2 Preamble*]. RESPONDENT's reputable claims as to the quality of its turbines were a key reason that CLAIMANT was awarded the contract for the Greenacre Plant by the City of Greenacre. [*Cl. Ex. 1 ¶ 1; Req. for Arb. ¶ 4*]. CLAIMANT needed turbines that could maintain public confidence in the reliability of the overall renewable energy project at the plant. The potential defect in steel and the events surrounding the Riverhead controversy, however, have caused an irreparable loss of reputation for RESPONDENT and its turbines. CLAIMANT has therefore effectively lost RESPONDENT's reputation for reliability that it contracted for. [*Cl. Req. for Arb. ¶ 6*]. In fact, the loss of RESPONDENT's reputation has threatened the primary contract between CLAIMANT and the City of Greenacre. [*Id. ¶ 15*]. Even if RESPONDENT replaces the turbines, CLAIMANT cannot restore total confidence in the project. Therefore, the insufficient quality of the turbines has rendered the turbines unfit for their particular purpose.

**ISSUE D: CLAIMANT IS ENTITLED TO REQUEST THE DELIVERY OF
REPLACEMENT TURBINES**

93. The Tribunal should find that CLAIMANT is entitled to request the delivery of replacement turbines for two reasons. First, RESPONDENT's delivery of non-conforming goods qualifies as a fundamental breach of the Sales Agreement. Pursuant to Article 46 of the CISG, the buyer is entitled to substitute goods in the event of fundamental breach by the seller **(I)**. Second, full replacement of the turbines is the only appropriate remedy. Though RESPONDENT insists on repairing the turbines, Article 48 of the CISG states that repair by the seller is only appropriate if it can be conducted without causing unreasonable delay and inconvenience to the buyer. Given the significant delay and inconvenience associated with RESPONDENT's proposed repair, the Tribunal should find that CLAIMANT is entitled to replacement of the turbines **(II)**.

I. CLAIMANT IS ENTITLED TO SUBSTITUTE GOODS UNDER ARTICLE 46 OF THE CISG

94. Article 46 of the CISG provides that a buyer is entitled to require the delivery of substitute goods in the event of non-conformity. Article 46(2) sets forth two requirements that must be met in order for buyers to require substitution. Namely, they can do so "only if the lack of conformity constitutes a fundamental breach of contract" and if "a request for substitute goods is made either



in conjunction with notice . . . or within a reasonable time thereafter.” [CISG Art. 46(2)]. Therefore, the Tribunal should consider two questions in order to determine whether CLAIMANT is within its rights to request replacement of the turbines. First, does RESPONDENT’s delivery of non-conforming goods constitute a fundamental breach of contract? And second, did CLAIMANT meet the notice requirements?

95. The notice requirements in the second question are easily satisfied. On 3 October 2018—within four days of learning about the steel’s potential non-conformity [*Cl. Ex. 3*—CLAIMANT contacted RESPONDENT expressing its concern that non-conforming turbines had been installed in the Greenacre Plant. [*Cl. Ex. 4*]. CLAIMANT’s email specified the nature of the non-conformity, referencing the “corrosion and abrasion problems” that could arise. [*Id.*]. RESPONDENT proposed repair. CLAIMANT then notified RESPONDENT during a 1 December 2018 meeting—within two months of notifying RESPONDENT about the problem—that repair was unacceptable, requesting replacement. This falls within the request timeframe that tribunals have deemed “reasonable” for non-conforming industrial machinery. [*Digest of Article 39 Case Law*].

96. The first question—whether RESPONDENT’s delivery of non-conforming goods qualifies as a fundamental breach of the parties’ contract—is more intricate. The Tribunal should find that it does for two reasons. First, it meets the threshold for “fundamental breach” set forth in Article 20 of the Sales Agreement (**I.A**). Second, it satisfies the definition of “fundamental breach” provided by Article 25 of the CISG (**I.B**).

**A. RESPONDENT’S DELIVERY OF NON-CONFORMING GOODS CONSTITUTES A
FUNDAMENTAL BREACH UNDER ARTICLE 20 OF THE SALES AGREEMENT.**

97. The parties included a termination clause in their Sales Agreement that grants CLAIMANT the right to terminate in case of a fundamental breach of contract. In Article 20(2), the parties set forth a list of breaches that are to be considered fundamental. The list includes inappropriate payments, long delivery delays, failure of the acceptance test, and “other breaches which deprive BUYER of what it is entitled to expect under the contract.” [*Cl. Ex. 2*]. The Tribunal should find that RESPONDENT’s delivery of non-conforming turbines falls within the scope of this final category—that it deprived CLAIMANT of expectations to which it was entitled under the contract—for two reasons. First, RESPONDENT violated CLAIMANT’s express expectation that the first inspection would occur three years after the start of the plant’s operation, during the



summer vacation period **(I.A.1)**. Second, RESPONDENT undermined CLAIMANT's ability to fulfill its obligations to the City of Greenacre **(I.A.2)**.

1. Claimant expected the first inspection to occur in 2021.

98. Article 2 of the Sales Agreement enumerates RESPONDENT's obligations under the contract with respect to installation, inspection, and warranty. Specifically, Article 2(1)(d) provides that RESPONDENT will "perform the first inspection of the turbines three years after the start of operation," and that the inspection "shall take place during the summer vacation period . . . where the energy produced by the other forms of renewables is normally sufficient to meet the decreased demand." [*Cl. Ex. 2*]. Due to the potential non-conformity of the steel, RESPONDENT now plans to perform the first inspection in September 2020—one year earlier than the inspection date for which the parties had originally contracted. This is a clear violation of Article 2(1)(d), which is an integral part of the parties' contract. Indeed, being able to commit to very limited downtime was critical to CLAIMANT's success in the tender process; Ms. Johanna Woods called it "one of the determinative factors for awarding the tender." [*Cl. Ex. 1*]. This commitment to keeping downtime at a minimum was codified both in the Preamble of the Sales Agreement ("[T]he time period between the repair and the maintenance intervals should be lengthy and . . . the repair and maintenance periods should be short" [*Cl. Ex. 2 Preamble*]) and in Clause 8 of CLAIMANT's ultimate agreement with Greenacre ("HydroEn guarantees an availability of the Greenacre Plant of at least 335 days per year" [*Cl. Ex. 6*]).
99. As it stands, the inspection date has been pushed up by one year. This amounts to much more than a mere scheduling change; it is a substantial deprivation of CLAIMANT's expectations. Even if only minor repairs are necessary, this inspection would result in a minimum of six months downtime. [*App. 1*]. This is highly problematic, given that the two months directly after the vacation break "are the months of peak demand" and that wind and solar energy production during that time is highly volatile. [*Cl. Req. for Arb.* ¶ 8]. This hinders CLAIMANT's ability to meet its commitments to Greenacre with respect to minimizing the downtime resulting from maintenance and repair. The parties specifically contracted for summer inspection such that the plant's downtime would not disrupt the City's objective of relying exclusively on clean energy. Given that minor repairs will require downtime to extend past the vacation period—when demand will no longer be low enough such that the energy produced by other renewables in Greenacre is sufficient to meet it—Greenacre will almost certainly have to source energy from Ruritania for at least two months. Under CLAIMANT's contract with Greenacre, it must pay \$40,000 for each



day that Greenacre sources energy from Ruritania due to the Greenacre Plant being offline. [*Cl. Req. for Arb.* ¶ 9]. This translates to a minimum \$2.4 million penalty for CLAIMANT. RESPONDENT has deprived CLAIMANT of expectations to which it was entitled by virtue of their express inclusion in the contract.

2. RESPONDENT undermined CLAIMANT's ability to fulfill its agreement with the City of Greenacre.

100. In addition to violating Article 2(1)(d) of the Sales Agreement, RESPONDENT's delivery of non-conforming goods constitutes a fundamental breach of contract because it undermines CLAIMANT's ability to fulfill its obligations to the City of Greenacre. CLAIMANT was entitled to expect that RESPONDENT would support its efforts throughout the tender process and for the duration of its operations in Greenacre. Indeed, CLAIMANT's decision to do business with RESPONDENT was premised on RESPONDENT's unique ability to support Greenacre's goals with its special turbines. Both parties understood the context in which the Sales Agreement was made; both knew that RESPONDENT's contract with CLAIMANT was formed in service of CLAIMANT's contract with the City of Greenacre.
101. Article 8 of the CISG provides that the Tribunal should consider the parties' intent to ascertain the meaning of their agreement. Article 8(1) directs the Tribunal to consider the subjective intent of the parties as revealed by their conduct. Article 8(3) provides that in so doing, the Tribunal should look to "all relevant circumstances," including "negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." [*CISG* Art. 8(3)]. Applying an Article 8(1) analysis to this case, the Tribunal should find that CLAIMANT's expectations rightfully extended beyond the express terms of the Sales Agreement; they included an obligation for RESPONDENT to ensure that CLAIMANT was able to fulfill its contract with Greenacre. Article 8(1) provides that the Tribunal should interpret a party's behavior "according to his intent where the other party knew or could not have been unaware what that intent was." [*Id.* Art. 8(1)]. RESPONDENT could not have been unaware of CLAIMANT's intent. First, the inclusion of the Preamble put RESPONDENT on notice that its entire agreement with CLAIMANT was intended to serve CLAIMANT's agreement with the City of Greenacre. RESPONDENT was also privy to the tender documents, and therefore knew the specific commitments that CLAIMANT was making. [*Cl. Ex. 1; Res. Ex. 2*].
102. Case law supports the applicability of Article 8(1) in disputes similar to this one. In the *Tantalum Powder Case*, the parties disagreed as to what body of law governed their contract, which was drafted



in English. Their order form contained a provision referring to the buyer's general terms of contract, reproduced on its back-side in German, according to which Austrian law would govern the contract. Applying Article 8(1), the Austrian Supreme Court found that Austrian law did indeed govern the contract; the buyer's general terms were valid and operative to the extent the parties realized they applied to the contract and had a reasonable possibility of understanding their content. [*Tantalum Powder Case*]. In the *Copper Molding Plates Case*, a United States District Court heard a breach of contract case arising from the defendant's request for expedited payment. The defendant argued that expedited payment was provided for in the supply contract, which referenced the defendant company's standard terms both by explicit quotation and by direction to the defendant's website. The Court held that in order for standard terms to be validly incorporated, the other party must have had the possibility of easily becoming aware of their content, and the party relying on them must have unambiguously shown its intent to have the contract governed by those terms. [*Copper Molding Plates Case*].

103. An Art. 8(1) analysis in this case reveals that RESPONDENT could not have been unaware of CLAIMANT's subjective intent that RESPONDENT would support its commitments to the City of Greenacre. The text of the Preamble makes specific reference to the terms of the tender documents, clearly indicating CLAIMANT's intent that RESPONDENT support and abide by such terms. Specifically, the Preamble states: "*Whereas* TurbinaEnergia Ltd has recently released its . . . Francis Turbine R-27V, which due to its characteristics complies with the requirements and considerations as set out in the tender." [*Cl. Ex. 2 Preamble*]. It also states: "*Whereas* one of the important considerations for awarding tender will be to minimize the risk of having to rely on energy produced by non-renewable sources by providing a largely uninterrupted supply of hydro energy." [*Id.*]. Given such explicit reference to the tender, RESPONDENT must have known that by signing the Sales Agreement, it was undertaking to help CLAIMANT fulfill the expectations set forth in the tender documents. Further, the language of the Preamble makes clear that RESPONDENT was being chosen not just *to* fulfill these expectations, but *because it could* fulfill these expectations. The expectations include that the Greenacre Plant would provide a largely uninterrupted supply of hydro energy.
104. CLAIMANT unambiguously demonstrated its intent that RESPONDENT abide by the tender terms. In addition to being put on notice of CLAIMANT's expectations through the Preamble, RESPONDENT was also given access to the tender documents. It therefore had ample opportunity to understand the broader context of the transaction, and was familiar with the



“requirements and considerations” referenced in the Preamble. Ms. Woods stated that she shared the tender documents with both Mr. Fourneyron (RESPONDENT’s CEO) and Mr. Gilkes (its chief engineer and main negotiator). [*Cl. Ex. 1*]. Her account is corroborated by Mr. Fourneyron’s Witness Statement, in which he references the tender documents and their emphasis on keeping downtime “to the absolute minimum.” [*Res. Ex. 2*].

105. An objective analysis of party intent under Article 8(2) also supports CLAIMANT’s entitlement to its expectations. Article 8(2) provides that in interpreting a party’s conduct, the Tribunal should interpret such behavior “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.” [*CISG Art. 8(2)*]. Any reasonable party in CLAIMANT’s position would have understood RESPONDENT’s behavior to mean it was committing to meet the expectations set forth in the tender documents.
106. In *Filanto, S.p.A. v. Chilewich International Corp.*, a U.S. enterprise agreed to sell shoes to a Russian enterprise. The parties’ agreement required disputes to be arbitrated in Moscow. To fulfill the agreement, the New York enterprise relied on an Italian manufacturer, which filed suit against it after a failed payment. Seeking a stay of the proceedings to permit arbitration, the U.S. enterprise argued that any disputes arising between itself and the Italian manufacturer must proceed to arbitration, because their contract incorporated the Russian master agreement by reference. Applying an Article 8(2) analysis, a U.S. District Court held that by failing to object to the master agreement’s terms, the Italian subcontractor was “deemed to have assented” to them. [*Filanto*]. In this case, RESPONDENT was privy to the tender documents before the closing of the Sales Agreement, and did nothing to indicate it objected to the terms. Furthermore, RESPONDENT allowed CLAIMANT to commence performance in accordance with those terms. There is therefore no reason why CLAIMANT—or any similarly situated party—would conclude that RESPONDENT did not intend to adhere to the terms set forth in the tender documents.

**B. RESPONDENT’S DELIVERY OF NON-CONFORMING GOODS CONSTITUTES A
FUNDAMENTAL BREACH UNDER ARTICLE 25 OF THE CISG.**

107. In addition to satisfying the definition of “fundamental breach” set forth by the parties in the Sales Agreement, RESPONDENT’s delivery of non-conforming goods meets the criteria for fundamental breach set forth in Article 25 of the CISG. Article 25 provides that a breach is fundamental “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a



result.” [CISG Art. 25]. Under this definition, RESPONDENT has fundamentally breached the Sales Agreement. First, RESPONDENT’S delivery of non-conforming goods constitutes a substantial detriment **(I.B.1)**. Second, this non-conformity deprived CLAIMANT of what it was entitled to expect **(I.B.2)**. Finally, this lack of conformity was foreseeable by RESPONDENT **(I.B.3)**.

1. Claimant has suffered a substantial detriment.

108. In evaluating whether CLAIMANT has suffered a substantial detriment, the Tribunal should not only consider actual economic damage, but also potential economic and reputational damage. Indeed, detriment “cannot be confined to an actual material loss or damage,” but should include “a broader sense including...immaterial detriments.” [Lorenz 5]. The concept of detriment goes beyond “injury,” “harm,” “result,” “monetary harm,” and detriment must not necessarily be “real” or “involve actual loss.” [Liu on Fundamental Breach 2.2(a)]. Immaterial detriments include “giving up something which one had the right to keep or doing something which he had the right not to do.” [Id.].
109. Relevant case law applying Article 25 is consistent with this view. In the *Imitation CPUs Case*, the Austrian Supreme Court recognized that in interpreting fundamental breach, damages can go beyond actual economic loss to include potential damages not yet actuated by the respondent. In that case, a wholesaler in computer parts delivered non-conforming Pentium CPUs to the buyer, who then resold them to third-party final users. Users complained regarding the non-conformity, citing possible forgery, and returned the goods to the reseller-buyer. The wholesaler exchanged some of the processors for credit notes and replacement goods. The court deemed this remedy insufficient because the seller was sourcing replacement CPUs from the same supplier without inspection. As such, the buyer “would be threatened with damage to its reputation should more forged processors be sold to its customers.” The wholesaler-seller was found in fundamental breach of the contract due to this substantial detriment. [*Imitation CPUs Case*]. This expansion of the scope of detriment can also be found in the *Shoe Leather Case*. Deciding whether the delivery of non-conforming shoe leather by a Polish manufacturer to the German Army constituted a fundamental breach, the Polish Supreme Court found that detriment includes “all actual and potential negative consequences of a breach of contract,” and that “a party claiming a fundamental breach of contract does not necessarily have to show that he suffered damages or did not receive benefits.” [*Shoe Leather Case*].



110. RESPONDENT's delivery of non-conforming turbines has effectively resulted in both actual and potential pecuniary damages to CLAIMANT. In the best-case scenario, CLAIMANT will lose an estimated \$1.2 million (if the inspection reveals no damage). The most minor of repairs would cost CLAIMANT \$10.2 million, just over fifty percent of the purchase price. More considerable repairs could total well over \$16 million, approximately 80 percent of the purchase price. [*App.* 1]. The facts here are a magnified version of those in the *Scaffold Fittings Case*, where the ICC held that the seller was in fundamental breach because the burden the buyer would incur from the proposed remedy (separating conforming from non-conforming scaffold fittings) would have amounted to one-third of the purchase price. [*Scaffold Fittings Case*].
111. Further, the non-conformity of the turbines has resulted in current and future reputational damage to CLAIMANT. Reputation "should be regarded as an independent 'asset' of a commercial actor which is a value in itself," and reputational damage should not solely be measured in terms of financial losses flowing from loss of reputation, but also in terms of potential "repercussions on business." [*Saidov* 398]. CLAIMANT has already suffered significant reputational damage due to RESPONDENT's delivery of non-conforming turbines. Greenacre Councilor Gilbert Crewdson has "threatened to terminate the contract between Claimant and Greenacre...for cause." [*Cl. Req. for Arb.* ¶ 15]. Indeed, in negotiating regarding potential remedies, Mr. Crewdson stated, "any other solution than an immediate replacement in 2020 is unacceptable for Greenacre and would probably result in the termination of the contract between Greenacre and HydroEN." [*Res. Ex.* 3]. Crewdson's remarks demonstrate that Greenacre's estimation of CLAIMANT's performance has suffered as a result of RESPONDENT's actions. Further, a termination of contract between CLAIMANT and Greenacre would significantly damage CLAIMANT's reputation, particularly after the negative publicity generated by the Riverhead incident.

2. Respondent deprived CLAIMANT of its contractual expectations.

112. As established in Section I.A, RESPONDENT failed to meet CLAIMANT's contractual expectations, both with respect to inspection timing and the overall agreement with Greenacre.

3. The lack of conformity was reasonably foreseeable by RESPONDENT.

113. RESPONDENT could have foreseen the non-conformity of the steel and taken steps to avoid it. As the obligor, RESPONDENT "is always responsible for impediments when he could have prevented them but, despite his control over preparation, organization, and execution, failed to do so." [*Schlechtriem 1986* 100]. In defining limits for this responsibility, Schlechtriem states that if



the obligor “wishes to restrict his liability, he must specify the particular impediments for which he will not be liable.” [*Id.*].

114. Such commentary is supported by case law. Courts have held that “the possible failure of a third party supplier is a contingency which the seller should have anticipated.” [*Spivack* 793]. In the *Chinese Goods Case*, a Hong Kong company and a German enterprise contracted to sell Chinese goods in Europe. The Hong Kong company failed to deliver goods due to the financial difficulties of its Chinese manufacturer. The tribunal held that “the possible supply failure was an impediment the seller should have taken into account.” [*Chinese Goods Case*]. In the *Vine Wax Case*, an Austrian nursery contracted with a German company for the purchase of wax. Plants treated with non-conforming wax suffered damage, and the seller blamed the non-conformity on the failure of a third-party supplier. The German Supreme Court held that “the seller has to bear the risk of a lack of conformity deriving from its own suppliers' non-performance, unless it brings evidence that the impediment did not lie in its and its supplier's control.” [*Vine Wax Case*].
115. While the impediment affecting the steel in this case was beyond RESPONDENT's immediate control, RESPONDENT is not free from liability. RESPONDENT accepted the risk inherent in sourcing steel from a third-party supplier, as well as the risk inherent in delegating the testing of that steel to a third-party company. As a sophisticated business party, it should have taken the possibility of its subcontractors' failures into account. Additionally, RESPONDENT could have taken various steps to avoid incurring liability for third-party failure. It could have included provisions in its contract explicitly disclaiming liability for the mistakes of Trusted Quality Steel or TechProof (the third-party steel quality tester). Alternatively, RESPONDENT could have instituted internal quality assurance tests rather than relying on a third party. Not only *could* RESPONDENT have taken this lack of conformity into account; as a responsible commercial entity relying on subcontractors for such a critical element of its turbines, it *should* have.

II. FULL REPLACEMENT OF THE TURBINES IS THE ONLY APPROPRIATE REMEDY

116. Although Article 46 of the CISG provides for other potential remedies, the Tribunal should find that replacement is the only appropriate remedy in this case. CISG Article 48 sets forth limitations for the availability of remedies, stating that “the seller may . . . remedy at his own expense any failure to perform . . . if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience.” [*CISG* Art. 48]. The Tribunal should find that CLAIMANT is entitled to refuse repair because RESPONDENT's proposed repair is unreasonably inconvenient for CLAIMANT (**II.A**), and it causes unreasonable delay (**II.B**).

**A. REPAIR WOULD CAUSE AN UNREASONABLE INCONVENIENCE TO CLAIMANT.**

117. RESPONDENT's proposed repair is extremely inconvenient for CLAIMANT. In order not to cause an unreasonable inconvenience, the seller must be able to perform without such delay as will amount to a fundamental breach of contract. [*CISG Sec. Cmty.* Art. 48].
118. In assessing a proposed remedy, it is important to consider whether it adequately addresses the risks flowing from non-conformity. [*Imitation CPUs Case*]. RESPONDENT's proposed solution fails to do so. In addition to the economic and reputational damage that CLAIMANT would suffer from repair, the Riverhead incident sheds further light on the risk that CLAIMANT is presently facing. Indeed, RESPONDENT delivered the same turbines to the Riverhead Plant for a similar operation, and it was later discovered that they suffered from excessive "corrosion and cavitation damage," most likely due to low quality steel. [*Cl. Req. for Arb.* ¶ 24]. This damage was observed after two years of operation, and was severe enough that RESPONDENT had to replace the turbines immediately. In this case, RESPONDENT's inspection would likewise occur two years after the start of the Greenacre Plant's operation. CLAIMANT thus faces a considerable risk that the turbines will be excessively corroded by the time of inspection.
119. Courts have also held that in cases of fundamental breach, determinations regarding the adequacy of proposed remedies should take into account the consent of the buyer. The ICC Court of Arbitration held in one case that given the nature of the seller's fundamental breach, "the seller was not entitled to supply substitute items after the delivery date...without the consent of the buyer." [*Scaffold Fittings Case*]. As established in Part I, RESPONDENT's delivery of non-conforming turbines constitutes a fundamental breach of contract. With damages potentially totaling well over \$16 million—approximately 80 percent of the purchase price—the Tribunal should find that CLAIMANT's consent to the proposed remedy should be taken into account. This consent is, manifestly, lacking. CLAIMANT rejected RESPONDENT's proposal to repair during the December 2018 meeting, and then proceeded to initiate this arbitration—unmistakable evidence that it does not consent to repair.

B. REPAIR WOULD BE DONE WITH UNREASONABLE DELAY.

120. In discussing the nature of unreasonable delay, "time is of the essence in the exercise of the right to cure," and the non-performing party "is not permitted to lock the aggrieved party into an extended waiting period." [*Liu on Non-Conformity* 9]. In the *Art Books Case*, wherein the seller offered to replace non-conforming art books at its own expense, the HG Zurich held that the buyer was entitled to refuse this remedy due to "shortage of time." It held that there would be an



unreasonable delay “if the delay would lead to a material breach of contract.” [*Art Books Case*]. Additionally, in the *Chemical Substance Case*, an Italian seller had sold a non-conforming chemical substance to a German buyer. The Court held that the seller’s proposed remedy—shipping the substance back to Italy for treatment—was unreasonable, as the buyer’s customer would be forced to stop production for the duration of the time that the goods underwent treatment. Under the circumstances, treating the substance was found to be unreasonable because it would lead to claims for damages on the part of the buyer's customer. [*Chemical Substance Case*].

121. In light of these standards, the Tribunal should find that RESPONDENT’s proposed remedy would result in an unreasonable delay. Indeed, as explained in Part I, it leads to a breach of contract and leads to claims for damages on the part of Greenacre. It requires that the turbines be repaired off-site. As such, it entails two shipments of the turbines—from Greenacre to the repair site and back again. The remedy is analogous to the one rejected in the *Chemical Substance Case*, but of a much more considerable magnitude given the higher cost of shipping massive turbines, and the cost associated with downtime in this case. Additionally, as discussed above, repair entails further economic and reputational damage for CLAIMANT. Finally, due to the unique and customized nature of the turbines, resale and third-party repair are not viable options. In light of RESPONDENT’S fundamental breach of the Sales Agreement, the Tribunal should find that full replacement is the only appropriate remedy.

PRAYER FOR RELIEF

In light of the foregoing submissions, counsel for CLAIMANT respectfully requests the Tribunal to:

1. Uphold the arbitration clause and exercise jurisdiction over the dispute;
2. Reject RESPONDENT’s appointment of Professor Tim John as an expert witness;
3. Find that the turbines are non-conforming in breach of the contract;
4. Order RESPONDENT to deliver two replacement R-27V Francis Turbines.



CERTIFICATE OF VERIFICATION

We hereby confirm that only those individuals whose names are written and signed below have authored this memorandum. We did not receive any assistance during the writing process from any person who is not a member of this team.

Respectfully submitted by Counsel for CLAIMANT on the fifth day of December 2019.

B. KEITH GEDDINGS II

ZACHARY KAPLAN

NIKA MADYOON

YERVAND MELKONYAN

NEEMA H. NODOUST

EMILY PARK

MATTHEW A. ROBINSON

DAVIS ZOSEL