

MONASH UNIVERSITY

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MEMORANDUM FOR RESPONDENT

HYDROEN PLC v. TURBINA ENERGLA LTD

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– RESPONDENT –

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INDEX OF ABBREVIATIONS

Arbitration Agreement	Art. 21 of the SA
Art.	Article
Arts.	Articles
<i>Contra</i>	Against
CIArb Protocols	CIArb Protocols for the Use of Party-Appointed Expert Witnesses in International Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex.	CLAIMANT's Exhibit
Cl. Memo.	CLAIMANT'S Memorandum of Argument filed in this proceeding on 5 December 2019 by Counsel of St Petersburg University
ECHR	European Convention on Human Rights
Edn.	Edition
e.g.	<i>exempli gratia</i> (for example)
Greenacre Plant	Greenacre Pump Hydro Power Project
IBA Rules	IBA Rules on the Taking of Evidence
IBA Guidelines	IBA Guidelines to Conflicts of Interest in International Arbitration
<i>ibid</i>	<i>ibidem</i> (in the same place)
i.e.	<i>Id est</i> (that is to say)
SA	Sales Agreement being Cl. Ex. C2 executed 22 May 2014 by the Parties
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules
ICSID	International Centre for Settlement of Investment Disputes



Inc.	Incorporated
Ltd.	Limited
ML	UNCITRAL Model Law
No.	Number
NYC	New York Convention
p./pp.	Page/Pages
PAE	Party Appointed Expert
Parties	CLAIMANT and RESPONDENT
para./paras.	Paragraph/Paragraphs
P.O.	Procedural Order
Prof.	Professor
Response	RESPONDENT's Response to Request for Arbitration
Request	CLAIMANT's Request for Arbitration
Rsp. Ex.	RESPONDENT'S Exhibit
Tender	Invitation to tender for construction and operation of the Plant
Tender Contract	Contract between CLAIMANT and Council of Greenacre
Turbines	R-27V Francis Turbines delivered by RESPONDENT
UNCITRAL	The United Nations Commission on International Trade Law
UPICC	UNIDROIT Principles of International Commercial Contracts
<i>v.</i>	<i>versus</i> (against)
US\$	US-Dollars
%	Per cent



SUMMARY OF FACTS

The Parties to this arbitration are HydroEn Plc (*hereinafter* **CLAIMANT**) and TurbineEnergia Ltd (*hereinafter* **RESPONDENT**). CLAIMANT is a market leader in providing pump hydro power plants. RESPONDENT is a world-renowned producer of premium water turbines. The contract (*hereinafter* **SA**) is to deliver the Turbines to CLAIMANT for the Greenacre Plant under tender.

January 2014	Council of Greenacre invites tenders for construction and operation of the Plant.
Early March 2014	CLAIMANT contacts RESPONDENT to enquire about potential delivery of the Turbines in preparation for CLAIMANT's tender.
22 May 2014	CLAIMANT and RESPONDENT sign the SA for delivery and installation of the Turbines at US\$ 40,000,000, conditional upon CLAIMANT being awarded the Tender.
15 July 2014	CLAIMANT awarded tender; CLAIMANT commences construction.
Late Spring 2018	RESPONDENT delivers and installs the Turbines.
~May 2018	Incident at Riverhead Tidal power plant occurs.
19 September 2018	Plant starts operating.
29 September 2018	Renewable Daily News publishes allegations of fraudulent quality certificates against Trusted Quality Steel, RESPONDENT's main supplier. TechProof fails to confirm fraud.
3 October 2018	CLAIMANT contacts RESPONDENT to inquire as to extent the Turbines could be compromised by Trusted Quality Steel's fraud.
4 October 2018	RESPONDENT replies to CLAIMANT to suggest waiting until First Inspection which has been brought forward to September 2020. The Parties can then ascertain whether turbine runner or blades were produced from steel of inferior quality.
~4 October 2018	CLAIMANT contacts Greenacre to discuss potential contamination to the steel in the Plant. Greenacre calls for installation of replacement Turbines by September/October 2020.
6 October 2018	CLAIMANT replies to RESPONDENT, requesting replacement of the Turbines (or runners) by September/October 2020.
10 October 2018	RESPONDENT replies to CLAIMANT, stating that the Turbines cannot be replaced 'merely for the possibility' they have contaminated steel. RESPONDENT also cites lack of capacity to undertake replacement.
1 December 2018	The Parties meet to discuss potential solutions. No agreement is reached.
11 December 2018	Following refusal to replace the Turbines, RESPONDENT offers to make preparations to, upon a finding of corrosion, repair the blades on site or at RESPONDENT's nearest factory.
31 July 2019	CLAIMANT issues Request for Arbitration.
30 August 2019	RESPONDENT issues Response to Request for Arbitration.



SUMMARY OF ARGUMENT

- 1 RESPONDENT has been subjected to arbitration under an invalid Arbitration Agreement, in circumstances where CLAIMANT's allegations are lacking legal basis. CLAIMANT seeks to compel RESPONDENT to produce, deliver and install two replacement R-27V Francis Turbines. However, CLAIMANT has neither alleged nor proven that the existing Turbines are non-conforming under the SA. Acting in good faith, RESPONDENT has honoured the SA by proposing to bring forward the First Inspection of the Turbines by one year. Subsequently, four issues arise:
- 2 *First*, the Tribunal does not have jurisdiction under the Arbitration Agreement, being Art. 21 SA, to hear the dispute, on the basis that: **(I)** the party's autonomy in drafting the Arbitration Agreement is restricted by the principle of Equal Treatment; **(II)** the Arbitration Agreement violates the principle of Equal Treatment; and **(III)** such a violation of Equal Treatment creates a salient risk that any arbitral award rendered will not be recognised in the enforcing jurisdictions, *i.e.* Danubia, Mediterraneo and/or Equatoriana (**Issue 1**).
- 3 *Second*, the Tribunal should not order the exclusion of Prof. John, the expert suggested by RESPONDENT, on the basis that: **(I)** the LCIA Rules does not empower the Tribunal to dismiss a party-appointed expert; **(II)** even if it did, the alleged conflicts are insufficient to dismiss Prof. John; **(III)** RESPONDENT reserves its right to challenge Ms Burdin's appointment as the arbitrator nominated by CLAIMANT; **(IV)** a decision to dismiss Prof. John would prevent RESPONDENT presenting its case fairly; and **(V)** even if the Tribunal is empowered to dismiss Prof. John, Ms Burdin cannot be present when the award is rendered (**Issue 2**).
- 4 *Third*, the Tribunal should not find that RESPONDENT has breached the SA by delivering non-conforming Turbines under Art. 35 CISG. This is on the basis that: **(I)** the Turbines are conforming with the requirements set out by the SA; **(II)** the standard under Art. 35(2)(b) CISG does not apply; and therefore **(III)** the Turbines are conforming with their ordinary purpose under Art. 35(2)(a) CISG (**Issue 3**).
- 5 *Fourth*, the Tribunal should find that CLAIMANT is not entitled to request the delivery of replacement turbines from RESPONDENT. This is on the basis that: **(I)** there has been no fundamental breach under Art. 25 CISG; and **(II)** the alleged non-conformity can be remedied through RESPONDENT's reasonable offer to cure (**Issue 4**).



SUBMISSIONS

ISSUE 1: THE TRIBUNAL SHOULD DECLINE JURISDICTION BECAUSE THE ARBITRATION AGREEMENT IS INVALID

- 6 The Tribunal is competent in determining its own jurisdiction [*Born 2015*, p. 853; *Waincymer*, p. 114; Art. 16(1) ML; Art. 23.1 LCIA Rules].
- 7 RESPONDENT submits that should this Tribunal conclude the Arbitration Agreement is valid and thereby, that it has jurisdiction, such a determination will have adverse implications for the resolution of the merits of this dispute. Subsequently, RESPONDENT would be denied a full and equal opportunity to present its case, contrary to the principle of equal treatment as per Art. 18 ML [*hereinafter* **Equal Treatment**].
- 8 Thus, RESPONDENT respectfully submits that this Tribunal should decline jurisdiction as the Arbitration Agreement is invalid. This is on the basis that: **(I)** the Parties' autonomy in drafting the Arbitration Agreement is restricted by Equal Treatment; **(II)** the Arbitration Agreement violates Equal Treatment; and **(III)** such a violation creates a salient risk that any award rendered by the Tribunal will not be recognised in the enforcing jurisdictions.
- 9 For the purposes of these Submissions, it is not disputed that the *lex arbitri* is Danubian Arbitration Law (*hereinafter* **DAL**), which is a verbatim adoption of the ML. It is also not disputed that the LCIA Rules apply [Art. 21 SA], and, that Danubia is a Contracting State of the NYC [*P.O. No. 1*, p. 46, para. 4].

I. Equal Treatment Validly Restricts Party Autonomy in Drafting the Arbitration Agreement

- 10 RESPONDENT recognises that party autonomy is paramount in international commercial arbitration under both NYC and ML [Art. 19(1) ML; *Born 2015*, p. 788-91]. However, Equal Treatment is a valid limitation on party autonomy [Art. 18 ML; *Redfern*, p. 317; *Born 2015*, pp. 793-4]. Art. 18 ML imposes an obligation on the Tribunal to afford the parties Equal Treatment in the arbitral process. RESPONDENT thus submits that: **(A)** Equal Treatment applies to challenges to the Tribunal's jurisdiction; and **(B)** Equal Treatment is critical under DAL.

A. Equal Treatment Applies to Jurisdictional Challenges

- 11 CLAIMANT's position is that party autonomy is not restricted by Equal Treatment, and that the Parties themselves willingly agreed to the asymmetrical form of the Arbitration Agreement [*Cl. Memo*, p. 3, para. 7]. On this reasoning, it appears that Equal Treatment only applies to procedural rights of the Parties following the commencement of the arbitration, but not to mediate the Parties' prior conduct.



- 12 However, RESPONDENT contends that Equal Treatment, properly understood, applies at the time the election to arbitrate is made under the Arbitration Agreement and therefore extends to protecting RESPONDENT against any asymmetry in *accessing* arbitration. For instance, the Supreme Court of Poland has voided asymmetrical arbitration clauses on the basis that a unilateral option granted to only one party is so unfair as to consequently impact their standing procedurally, and their ability to present their case properly once the arbitration has commenced [*T.S.A Case*; *CIRS Case*; *Draguiev*, p. 32].
- 13 In fact, RESPONDENT submits that a jurisdictional challenge is very much a question of procedure, since the election to arbitrate constitutes conduct capable of affecting the arbitration from the outset until such time as an award is rendered [*Born 2014*, p. 988; *Fouchard*, p. 647, paras. 1197-8]. Additionally, the fact that the parties did not provide that the Tribunal should render an award on its jurisdiction separate from an award on the merits implies that a jurisdictional challenge cannot be separated from the resolution of the substantive questions in this dispute [*Born 2015*, p. 991, *Fouchard*, p. 684, para. 1252]. In fact, a separate jurisdiction award would incur unnecessary cost in time and money to parties, by effectively creating the need for two separate proceedings.
- 14 Thus, it is only open to the Tribunal to conclude that Equal Treatment, even during the negotiation and contractual-drafting stage, acts as a limitation on party autonomy because it impacts not only the Tribunal's decision on procedure and merits, but also the enforceability of any award rendered on the merits [*Draguiev*, p. 32; *Born 2015*, p. 991; *Fouchard*, p. 684, para. 1252].

B. Equal Treatment is Critical under DAL

- 15 CLAIMANT suggests that 'international judicial practice' supports the position that agreements which contradict national law or even public policy of a state are enforceable [*Cl. Memo*, p. 3, para. 5]. However, this ignores the fact that the key jurisdictional basis of the rights, duties and powers of arbitrators derives from the *lex arbitri*, i.e. DAL [*Waincymer*, p. 67; *Reymond*, p. 3]. The Danubian Court of Appeal relied upon the decision of *Siemens-Dutco* in deciding that Equal Treatment is of crucial importance under domestic law [Response, p. 28, para. 14]. In fact, CLAIMANT concedes that 'equality of parties in the formation of the tribunal' forms part of Danubian public policy [*Cl. Memo*, p. 3, para. 10].
- 16 However, CLAIMANT seeks to distinguish *Siemens-Dutco* from the facts before this Tribunal. This is on the basis that the Parties had equal influence on the composition of the Tribunal, as RESPONDENT was able to nominate its own arbitrator, Mr Deriaz [*Cl. Memo*, p. 4, paras. 11-3; *Fasttrack Letter*, p. 25]. With respect, RESPONDENT's position is that confining the



application of *Siemens-Dutco* to the composition of a tribunal would be too restrictive an interpretation of Equal Treatment. *Siemens-Dutco* was decided on the basis of the underlying principle of Equal Treatment, and it is for this reason that the Danubian Court of Appeal relied on *Siemens-Dutco* [Response, p. 28, para. 13].

II. The Arbitration Agreement Violates Equal Treatment

17 RESPONDENT submits the Arbitration Agreement is so asymmetrical that it violates Equal Treatment. For a valid arbitration agreement, there must be a conferral of reciprocal and mutual rights or obligations on both parties [Briggs, pp. 137-40; *Dyna-Jet*, para. 8]. However, the Arbitration Agreement creates unequal opportunities for the Parties to resolve the dispute before this Tribunal. This is because: (A) the availability of arbitration is subject to the whim of CLAIMANT; (B) there is no ‘equal influence’ in choosing the appropriate forum for dispute resolution; and (C) CLAIMANT attempts to control RESPONDENT’s procedural rights.

A. Availability of Arbitration is Subject to the Whim of CLAIMANT

18 RESPONDENT’s right to access dispute resolution is subject to the whim of CLAIMANT, as is clear from the express words of the Arbitration Agreement and the nature of CLAIMANT’s election to arbitrate.

19 Although the Arbitration Agreement permits RESPONDENT to commence litigation in the courts of Mediterraneo, this right is *always* subject to CLAIMANT’s right to elect to arbitrate [Art. 21.1 SA]. Hypothetically, had RESPONDENT initiated proceedings, this would likely result in a stay of the litigation the moment CLAIMANT elected to refer the matter to arbitration [*Three Shipping; Law Debenture v Elektrim Finance*]. The mere fact that RESPONDENT is at arbitration now does not justify the fact that, under the SA, the power to refer any dispute to arbitration is exercisable at the sole election of CLAIMANT [*Rothschild; Decision No. 71 of Supreme Court of Bulgaria*]. In fact, CLAIMANT’s right to arbitrate under Art. 21.2 will *always* prevail over the shared right to litigate under Art. 21.1. This is not consistent with the pro-arbitration approach of ML courts [ML, Part Two, p. 29].

20 In such circumstances, the Arbitration Agreement is potestative in nature as it depends ‘entirely on the intention of only one of the Parties’ [*Draguiev*, p. 29]. Potestative clauses can exceed the limits of party autonomy [*Rothschild; Bulgarian Lending Case; Draguiev*, p. 31]. This is compounded by the fact that CLAIMANT operates in 100 countries and has an annual turnover 24 times greater than that of RESPONDENT [P.O No. 2, p. 47, para. 1].

21 Further, CLAIMANT alleges that asymmetrical arbitration agreements are necessary because, as an operator of hydro power plants, it relies heavily on its suppliers and therefore bears significant risk under the Tender Contract [*Cl. Memo*, p. 6, para. 21]. However,



RESPONDENT submits this cannot be the case since CLAIMANT themselves chose not to pass on the risk from the Tender Contract to the SA and thereby to RESPONDENT [*Cl. Memo*, p. 51, para. 26]. For example, CLAIMANT could have sought to ensure the SA made express reference to the penalty clause under the Tender Contract [*Cl. Ex. C6*, p. 19, para. 7]. As CLAIMANT correctly notes, party autonomy is paramount, but the choice not to pass on this risk reflects that CLAIMANT voluntarily assumed it [*Born 2014*, p. 1257].

B. There is No Equal Influence in Choosing the Appropriate Forum for Dispute Resolution

- 22 RESPONDENT's right to 'equal influence' in the arbitral procedure is restricted given that it cannot participate in choosing the appropriate forum for dispute resolution.
- 23 The decision of *Russian Telephone Company v Sony Ericsson* is persuasive since it concerned an asymmetrical choice of forum clause. Sony Ericsson obtained for itself the greater right to elect between litigation and arbitration, whereas Russian Telephone Company had a limited right to only litigate. The Supreme Court of Russia concluded that this clause violated Equal Treatment, because 'Sony Ericsson [gained] an advantage over Russian Telephone Company, since it is the only one granted the right to choose the method of dispute resolution' [*Russian Telephone Company v Sony Ericsson*; see also *Draguiev*, p. 30]. Similarly, in *Piramida*, the same court upheld the importance of equal rights in choosing the appropriate forum, highlighting that to provide rights for one party to access dispute resolution whilst restricting the other reflects an 'impairment' on the parties' rights.
- 24 *Russian Telephone Company v Sony Ericsson* is particularly relevant, as Equal Treatment is an important aspect of Russian public policy which is not dissimilar to the facts before this Tribunal in that Equal Treatment is critical to Danubian public policy [*Asoskov & Kucher*, p. 582]. Russian courts have defined the country's public policy as concerning 'the good faith and equality of the parties entering into a private relationship, as well as, a proportionality between the extent of civil liability and culpable wrong' [*ibid*; *Information Letter of HAC Presidium*].
- 25 While *Russian Telephone Company v Sony Ericsson* has been criticised, RESPONDENT submits that such criticism is irrelevant in this dispute. For example, Nasser argues that equality of procedural rights does not apply to conduct prior to the commencement of dispute resolution proceedings. However, RESPONDENT submits that Art 21.1 SA avoids this criticism, given that RESPONDENT's right to litigate can always be nullified by CLAIMANT exercising its unilateral option to arbitrate under Art. 21.2 SA.
- 26 Ultimately, the dualism of the asymmetrical clause strips RESPONDENT's right to jurisdictional access, evincing an inequality in procedural rights [*PMT Partners*].



C. CLAIMANT Attempts to Control RESPONDENT's Procedural Rights

- 27 A claimant might argue that RESPONDENT voluntarily agreed to the asymmetrical Arbitration Agreement in exchange for the limitation of liability [Art. 19 SA] and the entire agreement clause [Art. 22.2 SA], as consideration under the Arbitration Agreement. However, RESPONDENT submits there is no requirement for consideration under the applicable law [Art. 3.1.2 UPICC], and in any case, an exchange of promises does not equate to mutuality.
- 28 A lack of mutuality can indicate further imbalance between the Parties [*Armendariz, PMT Partners*]. This is for two reasons.
- 29 *First*, RESPONDENT submits the Arbitration Agreement is defective because CLAIMANT insisted on its asymmetry to deliberately control RESPONDENT's procedural rights. This is evidenced by the fact that CLAIMANT tries to include asymmetrical arbitration agreements in all of its contracts with its suppliers, and rejected RESPONDENT's request to have a *symmetrical* arbitration clause [*P.O No. 2*, p. 47, para. 2]. CLAIMANT uses imbalances in procedural rights to its economic advantage, electing between arbitration and litigation when it suits them [*ibid*]. For example, if CLAIMANT considers publicity to be in its interests, it will elect for litigation but where it desires confidentiality, it can opt for arbitration [*ibid*].
- 30 *Second*, should RESPONDENT decide to litigate, it is confined to litigating before the courts of Mediterraneo. This is disadvantageous to RESPONDENT given that Mediterraneo is the place of the domicile of CLAIMANT. Additionally, Mediterraneo courts consider asymmetrical clauses to be valid [*Langweiler Letter*, p. 41]. Hence, the inability to properly challenge the validity of asymmetric clauses in Mediterraneo places a further restriction on RESPONDENT in accessing a forum that will properly vindicate its claim of having unequal dispute resolution rights [*Draguiev*, p. 32].
- 31 Thus, CLAIMANT can effectively control the entire dispute resolution process, displaying a complete violation of the reciprocal rights and obligations ordinarily conferred on parties to resolve disputes [*Briggs*, pp. 137-40]. It follows that the asymmetry manifested by the Arbitration Agreement has strong implications for resolution of the merits of the dispute before this Tribunal. Hence, CLAIMANT preserves imbalance between the Parties when presenting its case in respect of **Issue 3** and **Issue 4**.

III. Violation of Equal Treatment Creates Salient Risk of Non-Enforcement of Any Arbitral Award in the Enforcing Jurisdictions

- 32 RESPONDENT submits that Equal Treatment is critical under DAL, and, comprises part of Danubia's public policy [*Response*, p. 28, para. 14]. Equal Treatment also comprises part of Equatoriana's public policy [*P.O. No. 2*, p. 54, para. 52], although it is unclear whether this is



true of Mediterraneo [*Langweiler Letter*, p. 41, para. 2]. Thus, a non-adherence to the principle of Equal Treatment creates a salient risk of non-enforcement of any arbitral award rendered by this Tribunal in each of the relevant enforcing jurisdictions, *i.e.* Danubia, Equatoriana and Mediterraneo.

- 33 In light of the above, RESPONDENT submits that: (A) the obligation to render an enforceable award is a central element of arbitration; and (B) the award may become unenforceable for being contrary to the public policy of the relevant enforcing jurisdictions.

A. The Obligation to Render an Enforceable Award is a Central Element of Arbitration

- 34 With respect, the obligation to render an enforceable award is a central function of this Tribunal [*Waincymmer*, p. 97; *Lew*, p. 117]. The procedure shaped by the arbitrators must, from the very beginning, aim to result in an enforceable award [*Böckstiegel*, p. 50; *Waincymmer*, p. 97].
- 35 RESPONDENT acknowledges the views of numerous commentators that the duty to render an enforceable award does not *per se* impact a decision on jurisdiction [*Waincymmer*, p. 98; *Jarvin*, p. 153; *Platte*, pp. 309-10]. Indeed, the Tribunal does have the power, under the competence-competence principle, to decide its own jurisdiction and this duty should not automatically be obviated because of a lack of enforceability [*ICC Case 4695*].
- 36 However, the Tribunal should not be ‘deaf’ to RESPONDENT’s concerns regarding the enforceability of an award, even if conclusive weight is not given to the issue [*Blessing*, p. 206]. This is for two reasons.
- 37 *First*, the asymmetrical nature of the Arbitration Agreement means that issues of enforceability will impact the Tribunal’s decision on its jurisdiction. Asymmetrical arbitration agreements, by their very nature, confer exclusive benefits on one party, which ensures that one party gains the benefit of greater recourse to methods to *enforce* its rights against the other’s assets [*Draguiev*, p. 21]. Given the purpose of asymmetrical clauses is, in part, to secure an imbalance in enforcement options, CLAIMANT’s unilateral option to elect arbitration simultaneously includes the ability to enforce a potential award – this necessarily bears upon issues of jurisdiction.
- 38 *Second*, the parties’ reasonable expectations, when entering arbitration, is to receive an enforceable award at the end of the process. RESPONDENT should not be required to expend resources responding to arbitration, at the sole election of CLAIMANT, when there are doubts surrounding the enforceability of such awards [*Platte*, p. 308]. In addition, Art. 32.2 LCIA Rules requires that the Tribunal ‘make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat’.



39 Therefore, the Tribunal ought to give weight to the issue of enforceability when deciding its jurisdiction.

B. The Award May Become Unenforceable if Contrary to Public Policy

40 Should CLAIMANT seek to enforce any award rendered by this Tribunal, RESPONDENT submits that enforcement may be refused as any such award would be contrary to the public policy of the enforcing jurisdictions, *i.e.* Danubia, Equatoriana and Mediterraeno [*Moses*, p. 223].

41 If enforcement is sought in Danubia where RESPONDENT has 400 employees [P.O. No. 2, p. 47, para. 47], the Danubian Courts will not be restricted to the public policy of the *lex loci situs*, *i.e.* DAL [*Fouchard*, p. 3655]. It is well recognised that courts may consider international public policy [*Barley Case*], as exhibited by the Danubian Court of Appeal in relying on *Siemens-Dutco* to refuse the enforcement of an award from Mediterraneo [*Response*, p. 28, para. 14]. The Tribunal may then be guided by the fact that while there is no precedent regarding asymmetrical clauses in Danubia, Danubian Courts nevertheless consider Equal Treatment to be ‘of crucial importance’ [*Response*, p. 28, para. 14].

42 If enforcement is sought in Equatoriana, RESPONDENT may have recourse to seek refusal to recognise and enforce an award which violates the Equatoriana’s public policy, under Art. V(2)(b) NYC and Art. 36(2)(b)(ii) ML [*Response*, p. 28, para. 13; P.O. No. 2, p. 54, para. 52]. CLAIMANT asserts that both NYC and ML demonstrate a pro-enforcement attitude [*Cl. Memo*, p. 7, para. 24]. However, the public policy exception is clearly a limitation on this pro-enforcement approach [*Born 2009*, p. 2620]. For instance, the case of *Ledee v Ceramiche* (as cited by CLAIMANT) highlights that international public policy can be limiting if it ‘can be applied neutrally on an international scale’ [*Cl. Memo*, p. 3, para. 5]. This extends to Equal Treatment, forms a neutral basis upon which international public policy can limit the enforceability of an award [*Ledee v Ceramiche*, p. 187; *Born 2009*, p. 2622].

43 In response to the possibility of non-enforcement, CLAIMANT relies on the US District Court case of *Rhone v Lauro*, noting that the *possibility* of RESPONDENT’s voluntary compliance with any award justifies the rendering of an award, even if grounds for non-recognition may be found [*Cl. Memo*, p. 7]. However, *Rhone v Lauro* presumes that ‘parties are satisfied with the arbitrator’s decision’. This argument is somewhat circular as the election of voluntary compliance rests on RESPONDENT. Neither the Tribunal, CLAIMANT, nor RESPONDENT can themselves predict from the outset – before arbitration has commenced – whether the ‘parties are satisfied with the arbitrator’s decision’ [*Rhone v Lauro*].

44 If enforcement was sought in Mediterraneo, refusal by Equatorianian courts to enforce awards would automatically apply in Mediterraneo too [*Moses*, p. 223]. This is because there exists a



bilateral enforcement agreement between the two states [*P.O. No. 2*, p. 54, para. 59]. Additionally, both Mediterraneo and Equatoria have similar national law since both have adopted the ML [*ibid*]. Hence, the bilateral enforcement agreement would likely be interpreted in a way consistent with public policy [*McLaughlin & Geneva*, p. 272], which favours non-enforcement.

CONCLUSION OF ISSUE 1

45 In light of the above, RESPONDENT respectfully requests this Tribunal to decline jurisdiction and find the Arbitration Agreement is invalid due to its asymmetry, which exceeds the limits of party autonomy by violating Equal Treatment in international commercial arbitration.

ISSUE 2: THE TRIBUNAL SHOULD NOT ORDER THE EXCLUSION OF THE EXPERT SUGGESTED BY RESPONDENT, PROF. JOHN

46 RESPONDENT respectfully requests the Tribunal not to exclude Prof. John on the basis that: (I) the LCIA Rules does not empower the Tribunal to dismiss a PAE; (II) even if it did, the alleged conflicts are insufficient to dismiss Prof. John; (III) RESPONDENT reserves its right to challenge Ms. Burdin's appointment as the arbitrator nominated by CLAIMANT; (IV) a decision to dismiss Prof. John would prevent RESPONDENT presenting its case fairly; and (V) even if the Tribunal is empowered to dismiss Prof. John, Ms. Burdin cannot be present when the award is rendered.

I. The LCIA Rules Are Silent on Dismissing PAEs

47 CLAIMANT is misguided in its request to the Tribunal to dismiss Prof. John, because the Tribunal lacks explicit authority within the LCIA Rules to dismiss PAEs. CLAIMANT is further misguided in seeking Prof. John's dismissal on the basis of Arts. 22.1(iv-vi) LCIA Rules, which concern rules of evidence but not the procedural question as to whether to dismiss Prof. John as a PAE [*Cl. Memo*, pp. 14-5, paras. 57-8].

48 RESPONDENT believes there is no need to dismiss a PAE within the LCIA Rules, given that Art. 22.1(vi) confers extensive powers on the Tribunal regarding rules of evidence [see also IBA Rules]. Therefore, CLAIMANT's argument that Prof. John must be dismissed is ineffectual given that the Tribunal has the power to weigh the evidence on its merits irrespective of any alleged conflict of interest. This is the preferred approach when a question arises concerning the evidence or appointment of PAE's [*Burianski & Lang*, p. 276].

49 Consequently, RESPONDENT submits that the Tribunal is not empowered to dismiss a PAE because neither of the following two sources are available on the facts: (A) dismissing an Arbitrator within LCIA Rules by analogy; and (B) within the inherent powers of the Tribunal.

A. The Power to Dismiss PAEs under LCIA Rules by Analogy is Inappropriate



- 50 A claimant may allege that Arts. 18.3-4 LCIA Rules governing the exclusion of a legal representative extend *a fortiori* to a PAE [*Cl. Memo*, p. 10, para. 38; *Langweiler Letter*, p. 41]. However, this is problematic as those provisions require that this Tribunal find that a PAE is equal to a legal representative, under the LCIA Rules. This is contrary to the appointment of an expert in principle, whose duty is to guide the Tribunal in their opinion rather than to advocate for the appointing party's position [*Born 2014*, pp. 2280-1].
- 51 Requirements for a PAE are inconsistent with the standards of a legal representative whose role is to present the case of their client [*Burianski & Lang*, p. 272; Art. 3 IBA Guidelines; Art. V(1)(b) NYC]. The IBA Rules introduces requirements under Art. 5.2 that PAEs provide a statement of independence [Art. 5.2(c) IBA Rules] and a statement of their past and present relationships with the Parties [Art 5.2(a) IBA Rules]. The commentary by the IBA on these provisions explains that Art. 5.2(a) requires disclosure whereas 'Art. 5.2(c) is intended to emphasise the duty of each PAE to evaluate the case in an independent and neutral fashion rather than to exclude experts with some connections to the participants or the subject matter of the case' [IBA Rules, p. 19].
- 52 Furthermore, the silence of the LCIA Rules on dismissing a PAE cannot be considered unintentional. To equate PAEs to legal representatives by analogy would be contrary to the drafters' intent, especially given the significant difference between the IBA 1999 Rules and IBA 2010 Rules [*Waincymer*, p. 942].
- 53 For instance, taking into account the revision of Art. 5, as described in the commentary on the revised text of the IBA 2010 Rules, it seems unlikely that the omission of an objection procedure for PAEs is an unintentional gap. This means that allowing for an analogous application to, for example, a legal representative or a Tribunal-appointed expert under the IBA Rules Art 6.2, would be contrary to the purpose of the IBA Guidelines. On the contrary, if the drafters of the 2010 version eliminated one of the differences between tribunal-appointed experts and PAEs while keeping another one, this permits the conclusion that the other difference was intentionally maintained [*Burianski & Lang*, pp. 272-3].
- 54 RESPONDENT invites the Tribunal to find that, as a consequence of the drafting of the IBA Rules, and the silence of the LCIA Rules, that the argument by analogy to exclude Prof. John is not within the scope of powers conferred by the LCIA Rules.

B. Even if the Tribunal Could Dismiss Prof. John Under its Inherent Powers, the Circumstances are Insufficient to Trigger this Power

- 55 It has been held that a tribunal has the inherent power to uphold its integrity and ensure parties have free and fair arbitrations. The ICSID Tribunal in *Hrvatska* adopted this argument, and



while RESPONDENT accepts the legal basis, RESPONDENT questions their possible application to Prof. John.

- 56 In *Hrvatska*, the tribunal based the exclusion of the respondent's counsel on the tribunal's inherent powers because they shared the same chambers as the president of the tribunal, whilst acknowledging that the ICSID Rules did not explicitly provide them the power to do so. This exercise of powers was confirmed in *Rompotrol* in a limited sense – if the *Hrvatska* powers existed, they were to be exercised only in 'extraordinary circumstances ... which genuinely touch on the integrity of the arbitral process'. Therefore, if this LCIA-bound Tribunal were to evoke similar principles, then it must find such 'extraordinary circumstances' that there is a genuine threat to the Arbitral process.
- 57 However, it is important to acknowledge that, in relation to the LCIA, the mere fact that a counsel for a party is from the same chambers as an arbitrator does not give rise to justifiable doubts as to impartiality or independence [*LCIA Reference No. UN97/X11*]. Therefore, the underlying factual scenario of *Hrvatska* which considered 'extraordinary circumstances' does not appear to be of the same standard in LCIA proceedings.
- 58 Furthermore, RESPONDENT points to the case of *Bridgestone* (an ICSID case) as informing what triggers the 'extraordinary circumstances' required to dismiss a PAE in the *Hrvatska*-sense. In *Bridgestone*, the respondent's PAE had previously met with Bridgestone and unknowingly been provided with confidential materials, before the claimant elected another PAE. The ICSID Tribunal here acknowledged that they could dismiss the PAE according to the *Hrvatska* principles but found that even though the PAE had been provided confidential materials by the claimant, this was not 'extraordinary circumstances' to trigger *Hrvatska*. If *Bridgestone* is not circumstances worthy of dismissal, RESPONDENT respectfully submits that the tenuous conflict of interest between Prof. John and Ms. Burdin is not 'extraordinary' to trigger such powers. This is because, ultimately, the alleged conflict of interest of Prof. John does not undermine the arbitration process, especially given the powers under Art. 22.1(iv-vi) LCIA Rules to which CLAIMANT points [*Cl. Memo*, p. 14, para. 56].
- 59 Therefore, whilst the Tribunal under the LCIA Rules may have inherent powers to dismiss a PAE, as a Tribunal upholding fundamental principles of arbitration, the circumstances here are not extraordinary in the *Hrvatska*-sense to be triggered.

II. Even if the Tribunal was Empowered to Dismiss Prof. John, the Alleged Conflicts of Interest are Insufficient for His Dismissal

A. The Relationship between Ms. Burdin and Prof. John Does Not Create a Sufficient Conflict of Interest Warranting Prof. John's Dismissal



- 60 CLAIMANT alleges the relationship between Ms. Burdin and Prof. John is a conflict of interest sufficient to warrant the Tribunal's dismissal of Prof. John [*Cl. Memo*, p. 9, para. 32]. Here, the Tribunal should consider the IBA Guidelines as 'best practise', as stated by CLAIMANT and which RESPONDENT accepts [*Cl. Memo*, pp. 9-10, para. 32, 42]. The IBA Guidelines provide that disclosure of a potential conflict of interest does not imply or constitute the existence of a conflict of interest, and, in turn the presumption of disqualification [IBA Guidelines, p. 18]. Rather, disclosure of any relationship between the Parties is to be assessed objectively from the perspective of a reasonable third person having knowledge of the relevant facts and circumstances [*ibid*; see also *Parsons*, pp. 8-9]. The Tribunal must determine that there are 'justifiable doubts as to the PAE's impartiality and independence [IBA Guidelines, p. 18].
- 61 RESPONDENT invites the Tribunal to also consider the IBA Guidelines 'Orange List', specifically, conflict 3.4.4 which covers situations where '[e]nimity exists between an arbitrator and ... or a witness or expert' [IBA Guidelines, p. 25 emphasis added; see also *Cl. Memo*, p.9, para. 32].
- 62 Although, this 'Orange List' is subject to criticism, RESPONDENT respectfully submits that the Tribunal should uphold it as Best Practice and adopt its test to find that an objective, third-party observer would not believe that Prof. John's patent dispute with Mr. Burdin can impact his or Ms. Burdin's conduct within the arbitration [*Parsons*, pp. 8-9; *Redfern*, p. 258; Art. 4(1) CI Arb Protocol; *Born 2014*, p. 2280].
- 63 Further, RESPONDENT emphasises that a PAE expert report is merely evidence to be assessed on its merits [Art. 22.1(vi) LCIA Rules]. The report is not 'binding the tribunal in any way', and, a tribunal cannot 'delegate its obligation' by adopting a report's findings [*Redfern*, p. 313]. Hence, it would be inappropriate for this Tribunal to dismiss Prof. John on the basis of his relationship with Ms. Burdin if it cannot impact their respective abilities to provide the expert report and to weigh it on its merits.

B. Alternatively, Prof. John Should Not be Dismissed because of his Previous Commercial Dealings with RESPONDENT

- 64 'Tribunals virtually never "disqualify" experts or exclude their testimony for lack of independence' because the rules of evidence and the powers of a Tribunal to consider the evidence before them would override the conflict of interest in question [*Born 2014*, p. 2281; Art. 22.1(iv-vi) LCIA Rules; *Kantor*, pp. 335-6; *Karrer*, p. 8] Therefore, CLAIMANT submits that Prof. John's presence is of no significance to the Tribunal, which is not a point which CLAIMANT may argue but which is subject to the Tribunal's own discretion [*Cl. Memo*, p. 13, para. 49].



- 65 CLAIMANT is misguided in arguing that Prof. John's relationship and previous dealings with RESPONDENT entitles the Tribunal to dismiss Prof. John [*Cl. Memo*, p. 13, para. 48]. Walde suggests 'that the independence of PAE witness is largely (but not completely) a fiction' [*Kantor*, p. 334; see also *Born 2014*, p. 2281]. The relationship between Prof. John and RESPONDENT is professional, as described by CLAIMANT [*Cl. Memo*, p. 13, para. 48; *P.O. No. 2*, p. 49, para. 17]. Prof. John and RESPONDENT have had prior commercial engagements, but RESPONDENT requests the Tribunal acknowledge that this does not raise 'justifiable doubts' under the terms of the IBA Guidelines, because a relationship between PAE and the party themselves does not inherently result in partiality. Importantly, Art. 20(6) LCIA Rules provides that there is no impropriety if a party interviews, among others, an expert before appointment [see also *Born 2014*, pp. 2863-4; Art. 4(3) IBA Rules].
- 66 This argument is compounded by the absence of any mention of previous professional relationships between a party and its expert in the IBA Guidelines 2014. Even if this relationship is considered problematic, conflicts involving previous services for one of the parties are limited to three years preceding the arbitration [IBA Guidelines, 'Orange List' conflict 3.1].
- 67 The relationship between a PAE and their appointing party cannot be described as wholly independent [*Waincymer*, p. 942]. Kantor observes that experts are rarely engaged before there has been questioning to determining whether their opinion is likely to be advantageous [*Kantor*, p. 335; *Waincymer*, pp. 942-3]. CLAIMANT's articulation that any PAE opinion should be honest, objective and independent is true [*Cl. Memo*, p. 12, para. 46]. However, the presence of a PAE can never be described as 'wholly independent' given the fact that a party appoints the PAE; there will always be a relationship, if not one that has already been established [*Waincymer*, pp. 942-3; *Kantor*, pp. 329, 335].
- 68 Dr. Karrer points out that in the IBA Rules, 'it is quite clear that it is for the arbitral tribunal to decide how much to believe a [PAE]'s report' and, therefore, 'even those who are biased may still be helpful to arbitrators' [p. 8; *Kantor*, pp. 335-6]. So, whilst CLAIMANT may seek to dismiss Prof. John, it is more appropriate that the Tribunal consider Prof. John's evidence on its merits and weigh it accordingly [*Karrer*, p. 8; Art. 22.1(vi) LCIA Rules].
- 69 Therefore, RESPONDENT respectfully requests the Tribunal to find that Prof. John and RESPONDENT's relationship is not sufficient to trigger the 'extraordinary circumstances' in the *Hrvatska*-sense, which is coloured by the higher threshold of previous LCIA rulings as discussed [*LCLA Reference No. UN97/X11*; *LCLA Reference No. 81160* cited in *Qureshi*, pp. 22-3].



C. Dismissing Prof. John, in Either Alleged Conflict of Interest, is Disproportionate

- 70 For this Tribunal to dismiss Prof. John would be to accept the *Hrvatska* principle, and in turn, accept a potentially biased or partial PAE threatening the arbitral process. RESPONDENT respectfully submits that this is a disproportionate response to the issue at hand [*Burianksi & Lang*, p. 276].
- 71 It is contemplated that dismissal would be necessary if evidence adduced by the PAE was made via illegal means, such as fraud or breach of confidentiality [*Burianksi & Lang*, p. 276; *contra Bridgestone*]. Even so, such evidence would be inadmissible under both the LCIA Rules and IBA Guidelines such that dismissing the PAE would not be necessary [Art. 22.1(vi) LCIA Rules; Art. 5 IBA Rules]. As such, dismissing Prof. John would be disproportionate to the circumstances before this Tribunal as well as contrary to contemplated procedures already in place.

D. The Conflict of Interests Does Not Meet the Threshold to Evoke the Power to Dismiss a PAE in These Circumstances

- 72 Finally, the ‘Orange’ Conflict of Interest before this Tribunal must subsequently be found by to exceed the *Hrvatska* ‘extraordinary circumstances’ threshold, which RESPONDENT argues is not open for it to find [see also *Rompetrol*; *LCIA Ref. No. UN97/X11*].

III. RESPONDENT Reserving its Right to Challenge Ms. Burdin’s Appointment is Not in Bad Faith

- 73 CLAIMANT argues RESPONDENT’s behaviour is in bad faith [*Cl. Memo*, p. 10, paras. 35-7], and not permissible under Art 10.3 LCIA Rules [*Cl. Memo*, p. 10, para. 35]. However, RESPONDENT submits that the right to reserve its challenge to Ms. Burdin’s appointment as arbitrator is not in bad faith. Further, the right arises under Art. V(1)(d) NYC.
- 74 Ms. Burdin has published two significant papers stating that mere suspicion of non-conformity is sufficient to establish Art. 35 CISG [*Cl. Memo*, p. 10, paras. 33-4]. CLAIMANT argues this does not undermine Ms. Burdin’s ability to assess the issues before this Tribunal. However, RESPONDENT respectfully reserves its ‘right to challenge’ because Ms. Burdin’s publications align with CLAIMANT’s submissions in regard to Art. 35 CISG, which is in issue before this Tribunal [*Fasttrack Letter*, p. 42; *P.O. No. 2*, p. 48, para. 9; see *infra* **Issue 3**]. Prejudgment of issues before a case undermines an arbitrator’s ability to act independently and impartially and hence, allows for a right to challenge the arbitral award [Art. 5.3 LCIA Rules; *Born 2009*, pp. 2592, 2755-6].
- 75 RESPONDENT argues that the issue of prejudgment within proceedings is not one grounded in bad faith, but a legitimate concern, especially concerning party-appointed arbitrators



[*Waincymer*, p. 307-8]. Instances such as the *Telekom Malaysia Case* and *Perenco* have found that prejudgment by arbitrators (either in failing to assess a case on its merits or in making public comments on a proceeding's issues) gives rise to justifiable doubts as to the impartiality of an arbitrator, thus exposing an award to challenge [*LCIA Reference No. UN7949*; *Luttrell*, pp. 18-9].

- 76 Therefore, this Tribunal should see that Ms. Burdin's pre-existing views on the matter of 'mere' suspicions raises concerns for RESPONDENT. Therefore, RESPONDENT acts in its best interests and not in bad faith by reserving its right to challenge Ms. Burdin's appointment.

IV. Dismissing Prof. John Infringes RESPONDENT's Ability to Present Its Case Fairly

- 77 As mentioned above, the Parties shall be treated in accordance with Equal Treatment [see *supra* para. 10]. Accordingly, RESPONDENT submits dismissing Prof. John would infringe its ability to present its case, constituting abuse of due process. CLAIMANT's argument that appointing another PAE would remedy the dismissal of Prof. John is incorrect because, by the time of arbitration, Prof. John's report will have been produced [*P.O. No. 2*, p. 54, para. 56]. The report will undeniably be relied upon by RESPONDENT; so to dismiss Prof. John will unduly disadvantage RESPONDENT's ability to present its case. It follow that the Tribunal should allow Prof. John as RESPONDENT's PAE and assess his report on its merits, in order to afford 'an equal, adequate opportunity to present one's case ... to an impartial tribunal which applies regular, rational procedures' [*Cl. Memo*, p. 14, paras. 53-4; Art. 2.1(iv-vi) LCIA Rules; *Born 2009*, p. 2745; *Luttrell*, p. 2].

- 78 Born writes that cases where a party is misled or denied the opportunity to present evidence provides sufficient grounds to challenge an arbitral award [*Born 2009*, p. 2753]. Therefore to exclude Prof. John could result in a 'violation of basic principles of procedural fairness' [*Born 2009*, p. 2763] because 'it is appropriate to [deny recognition of] an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing' [*Karaha Bodas Co.*]. RESPONDENT may thus rely on Art. V(1)(d) NYC in seeking the refusal of recognition and enforcement of the Tribunal's award.

- 79 Therefore, to dismiss Prof. John on CLAIMANT's baseless allegations of conflicts of interest is to deny RESPONDENT of its ability to present its case as it sees fit, undermining the arbitral award's enforceability.

V. If the Tribunal Has the Power to Dismiss a PAE and Prof. John is Subject to a Conflict of Interest Worthy of His Dismissal, then Ms. Burdin Cannot be Present in the Handing Down of that Award



- 80 RESPONDENT submits that even if this Tribunal was to find that, *first*, it has the power to dismiss Prof. John, *second*, Prof. John should be dismissed, and, *third*, dismissal is procedurally fair, Ms. Burdin cannot be preside over the arbitration, given her relationship with Prof. John.
- 81 It is generally recognised that no one should be the judge of their own case [*Dr. Bonham's Case*; Art. 10.6 LCIA Rules]. Should the Tribunal find that Prof. John's relationship with Ms. Burdin enlivens grounds for the former's dismissal, then the latter's reciprocal relationship would preclude the Tribunal from being 'impartial and independent' on the same basis, given that Ms. Burdin presides over the issues concerning both her and Prof. John [Art. 5.3 LCIA Rules].
- 82 The presence of Ms. Burdin as arbitrator will also undermine the enforceability of the award as the presence of an arbitrator who is lacking impartiality or independence would be an 'egregious breach' of procedural fairness [Art. 5 (1)(b) NYC; *Born 2009*, p. 2763]. This compounds RESPONDENTS's right to challenge Ms. Burdin's appointment [see *supra* paras. 60-3].

CONCLUSION OF ISSUE 2

- 83 In light of the above, RESPONDENT respectfully requests the Tribunal find that it cannot dismiss Prof. John because the conflicts alleged by CLAIMANT do not warrant dismissal, and even if they did, the Tribunal lacks the power to do so under the LCIA Rules.

ISSUE 3: THE TRIBUNAL SHOULD FIND THAT THE TURBINES ARE CONFORMING IN THE SENSE OF ART. 35 CISG

- 84 RESPONDENT respectfully requests that the Tribunal find the Turbines are conforming in the sense of Art. 35 CISG. CLAIMANT contends the Turbines 'most likely do not comply with their corrosion resistant requirement' [*Request*, p. 8 para. 24]. RESPONDENT submits that: (I) this mere suspicion does not suffice to render the Turbines non-conforming with the SA [Art. 35(1) CISG]. RESPONDENT further submits that: (II) no particular purpose was made known to it; and therefore (III) the suspicion does not preclude conformity with the Turbines' ordinary purpose.

I. The Turbines Are Conforming Under Art. 35(1) CISG

- 85 RESPONDENT accepts CLAIMANT's concession that the Turbines are *prima facie* conforming in the sense of Art. 35(1) CISG [*Cl. Memo*, p. 16, para. 61]. It is important to emphasise how a mere suspicion does not preclude the finding that the Turbines are conforming under Art. 35(1) CISG.
- A. To Establish Conformity Under Art. 35(1) CISG, the Usability of the Goods Prevails Over the Agreed Features**



(1) The Standard for Art. 35(1) CISG

86 Under Art. 35(1) CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract. Art. 35(1) CISG therefore defines the contractual provisions of the parties as the primary standard for conformity [Kroll, p.496; *Schwenzer 1998*, p. 276; *Brunner & Gottlieb*, p. 228]. It follows that it is necessary to look to the SA to determine the standard of conformity under Art. 35(1) CISG.

(2) The Standard in the SA

87 The seller's primary obligation under the SA is to produce and deliver the Turbines of 300MW each [Cl. Ex. C2, p. 11]. The preamble may be included as a standard of conformity/incorporated into the contract [Art. 4.3 UPICC; Art. 8(1) CISG].

88 RESPONDENT therefore acknowledges that the Turbines must have increased corrosion and cavitation resistance, consistent with its new and innovative design [Cl. Ex. C2, p. 11; *Resp. Ex. R1*, p. 30]. Further, the increased efficiency must lengthen the time period between repair and maintenance intervals, and conversely shorten the repair and maintenance intervals themselves [Cl. Ex. C2, p. 11; *Resp. Ex. R1*, p. 30].

89 RESPONDENT is not a party to the Tender Contract between CLAIMANT and Greenacre Council [Cl. Ex. C7, p. 20]. Therefore, the standard in the SA does not include the guarantee of energy supply to avoid the penalty clause of the Tender Contract [Cl. Ex. C6, p. 19].

(3) Suspicions Based on Agreed Features

90 CLAIMANT contends that the Turbines 'most likely' do not comply with the corrosion resistant requirement [*Request*, p. 8, para.24]. This is not proof of a defect, but a suspicion that the Turbines may be non-conforming [*Response*, p. 28, para.15].

91 To determine whether a suspicion relating to agreed features renders goods non-conforming [Art. 35(1) CISG], the usability of the goods prevail over fulfilment of the agreed features [*Schwenzer & Tebel*, p. 158]. Generally, the agreed features of the contract prevail, and must be complied with [*ibid*]. However, where a suspicion arises after the conclusion of a contract, there is a contradiction between the agreed features and the goods' usability created by subsequent circumstances not envisaged by the parties [*ibid*; *Argentinian Rabbit Case*]. In this situation the usability of the goods prevails over the agreed features [*Schwenzer & Tebel*, p. 158]. Consequently, where there is a suspicion relating to agreed features of goods, the goods are conforming unless the suspicion impedes usability.

B. The Goods Are Conforming Under Art. 35(1) CISG

92 RESPONDENT submits that the goods conform under Art. 35(1) CISG because the suspicion has not undermined the usability of the Turbines. This is the case for three main reasons.



- 93 *First*, the Turbines have been functioning since 19 September 2018 [*Request*, p. 6 para. 11]. The operation of the Plant was preceded by an inspection and approval by the relevant authority, which included a test run of the turbines [*ibid*].
- 94 *Second*, the Turbines successfully passed their acceptance test two weeks prior to 3 October 2018 [*Cl. Ex. C4*, p. 15]. The passing of the acceptance test was the condition for the remainder of the payment of the purchase price for the Turbines [*Cl. Ex. C2*, p. 12]. The successful passing of the acceptance test indicates that the Turbines operate properly, have the agreed output of 300MW, and that extraordinary corrosion was not detected [*P.O. No. 2*, p.47 para.3].
- 95 *Third*, RESPONDENT has made an offer to ensure it complies with its obligation to ensure a power supply with minimal interruptions [*Cl. Ex. C2*, p. 11]. RESPONDENT has offered to produce, at CLAIMANT's expense, two turbine runners [*Cl. Ex. C7*, p. 21]. In the unlikely event the Turbines must be replaced, RESPONDENT will repurchase the Turbines from CLAIMANT and install them at its own expense [*ibid*]. This is consistent with the request of Greenacre councillor in charge of the Plant, Mr. Crewdson [*Request*, p.7 para.16]. Under this arrangement, RESPONDENT protects CLAIMANT's 'well understood interest in a smooth operation of the plant with as little downtime as possible' [*Cl. Ex. C5*, p. 16; *Cl. Ex. C7*, p. 21]. Therefore, even in the unlikely event that it transpires that the turbine runners must be replaced, RESPONDENT would still maintain an energy supply with minimal downtime, maximising the usability of the Turbines.

II. The Standard under Art. 35(2)(b) CISG Does Not Apply

- 96 RESPONDENT accepts CLAIMANT's submission that Arts. 35(1) and 35(2) CISG apply cumulatively and supplement each other [*Cl. Memo*, p. 16, para. 62; *Flechtner*, p. 580; *Schwenzer 2016*, p. 600]. Art. 35(2) CISG addresses the seller's implied obligations [*Lookofsky 2016*, p. 110], in containing supplementary standards which apply unless excluded by the parties [*Kroll*, p. 502]. Art. 35(2)(b) CISG prevails over art. 35(2)(a) CISG, as goods must be fit for a particular purpose before their ordinary purposes [*ibid* p. 503].
- 97 CLAIMANT alleges the turbines are not fit for the particular purpose of meeting all the obligations in the Tender Contract. For goods to be conforming under Art. 35(2)(b) CISG, the particular purpose must have been communicated by the buyer to the seller, the buyer must have relied on the skill and judgment of the seller, and that reliance must have been reasonable [*Kroll*, p. 515; *Schwenzer 2016*, p. 605]. RESPONDENT submits that the standard in Art. 35(2)(b) CISG does not apply as the particular purpose alleged by CLAIMANT was not expressly or impliedly made known to RESPONDENT.



A. RESPONDENT Was Not Expressly or Impliedly Made Aware of the Alleged Particular Purpose

98 The particular purpose of the goods must be expressly or impliedly made known to the seller [*Schwenzer 2016*, p. 606; *Kroll*, p. 515]. RESPONDENT submits that it was not made aware of the particular purpose of the Turbines [*New Zealand Mussels Case*].

(1) The Particular Purpose is to Guarantee a Permanent Availability and Avoid Any Penalty

99 The particular purpose of the goods should be interpreted narrowly as it gives the buyer a unilateral right to determine the content of the contract by informing the seller about its particular purpose [*Kroll*, p. 515]. CLAIMANT contends that the particular purpose of the Turbines is to fulfil CLAIMANT's obligation under the Tender Contract [*Cl. Memo*, p. 16, para. 65].

100 More specifically, this particular purpose would be to guarantee the availability of the Plant for at least 11 months per year [*Request*, p. 27, para. 9] and avoid penalty payment [*Cl. Ex. C6*, p. 19, para. 7; *Kroll*, p. 515]. This purpose requires RESPONDENT to 'avoid or at least minimise the need to rely on carbon energy' [*Request*, p. 27, para. 9; *Cl. Ex. C1*, p. 10, para. 2].

(2) RESPONDENT Was Not Expressly or Impliedly Made Aware of This Particular Purpose

101 RESPONDENT submits it did not have actual knowledge of the special purpose [*Schwenzer 1998*, p. 281], nor was it able to deduce the particular purpose from the information passed [*Kroll*, p. 516].

102 RESPONDENT submits it did not have actual knowledge of the particular purpose. The penalty clause to guarantee an availability of the Greenacre Plant of at least 335 days was inserted into the Tender Contract on 3 August 2014 [*Cl. Ex. C6*, p. 18, para. 5] whilst the SA was concluded more than two months later [*ibid*]. CLAIMANT did not inform RESPONDENT about the subsequent changes in the SA [*ibid*]. Consequently, RESPONDENT did not have actual knowledge of the newly formed special purpose to avoid any penalty payment until January 2018 [*P.O No. 2*, p. 51, para. 26], 8 months after the SA was concluded. Further, CLAIMANT did not subsequently seek an amendment to the SA to increase the liability cap after accepting the penalty clause [*Cl. Ex. C6*, p. 19, para. 7] to pass on or apportion that risk. It was therefore not reflected in the risk allocation under the SA, and the purpose was not made known to RESPONDENT at the time the SA was concluded because the purpose was only formulated after the SA was concluded.



103 In the absence of actual knowledge, it would be sufficient if a reasonable seller could have recognised the particular purpose from the circumstances [*Schwenzer 1998*, p. 281]. Further, a reasonable buyer in CLAIMANT's position could have interpreted the seller's conduct as accepting the particular purpose [*Schwenzer, Hachem & Kee*, p. 387]. RESPONDENT submits that even under this objective test, it would not have constructive knowledge of the particular purpose

104 A reasonable seller in RESPONDENT's position would not be able to deduce the full implication of the permanent availability based on the tender documents [*Cl. Ex. C1*, p. 10, para. 3] and the SA. In the absence of any indication of change in the SA, no reasonable seller would be in a position to expect a potential increase in the liability arising out of the unusual penalty clause. Given the information regarding the 'unusual penalty clause' was not explicitly or implicitly communicated to RESPONDENT, a reasonable buyer in CLAIMANT's position would not have inferred from the mere fact that RESPONDENT entered the SA that RESPONDENT was accepting that particular purpose.

105 Furthermore, CLAIMANT downplayed the importance of the uninterrupted availability of the turbines with its subsequent conduct [*Schwenzer 1998*, p. 281]. CLAIMANT rejected RESPONDENT's two construction proposals which will considerably improve the availability of the Plant [*Rep. Ex. R2*, p. 31, para. 5]. CLAIMANT was also not willing to incur extra costs to guarantee the availability of the plant [*ibid*]. Thus, a reasonable seller could not have reasonably inferred the full implication of that purpose from this conduct.

B. Even If This Particular Purpose Was Made Known to RESPONDENT, CLAIMANT's Reliance on RESPONDENT's Skill and Judgment Was Unreasonable

106 Should the Tribunal find, against RESPONDENT's submission, that the particular purpose was made known to it, RESPONDENT submits that CLAIMANT's reliance on its skill and judgment in relation to this particular purpose was unreasonable. More specifically, CLAIMANT unreasonably expected RESPONDENT to provide a turbine free from defects to avoid the penalty clause.

107 It is unreasonable to expect RESPONDENT to detect fraud two steps removed from it in the supply chain. Trusted Quality Steel (*hereinafter TQS*), RESPONDENT's supplier, was party to a fraud along with TechProof, a well-known quality and certification entity [*Cl. Ex. C3*, p. 14]. To meet RESPONDENT's particular purpose would have required RESPONDENT to proactively detect fraud in the third-party production process. Although it is true that RESPONDENT is a world-renowned producer of premium water turbines [*Request*, p. 4, para.



2], it has no special knowledge and this requisite skill is unusual in its 'branch of trade' [*Schwenzer 2016*, p. 606].

III. The Turbines Are Conforming Under Art. 35(2)(a) CISG

108 Where Art. 35(2)(b) CISG does not apply, Art. 35(2)(a) CISG is the 'final default rule' for the required quality of goods [*Kroll*, p. 504]. CLAIMANT emphasises the importance of Art. 35(2)(a) CISG in protecting the Parties' reasonable expectation that goods are fit for their ordinary purpose [*Cl. Memo*, p. 16, para. 62; *Kroll*, p. 503; *Schwenzer 2016*, p. 599]. RESPONDENT submits that CLAIMANT's suspicion does not preclude the finding that the Turbines are conforming with their ordinary purpose.

A. For a Suspicion to Render Goods Non-Conforming Under Art. 35(2)(a) CISG, It Must Be Proven With a Reasonable Degree of Certainty

109 Under Art. 35(2)(a) CISG, goods must be fit for the purposes for which goods of the same description would ordinarily be used [*Schwenzer 1998*, p. 279].

(1) Defining the Ordinary Purpose of the Turbines

110 For the Turbines to conform under Art. 35(2)(a) CISG, they need to be fit for ordinary purposes and use [*Schwenzer 2016*, p. 600; *Kroll* p. 504; *Schwenzer 1998*, p.279]. Factors the Tribunal should consider in determining the ordinary purpose of the Turbines include the nature of the goods, advertisements made by the seller, the price of the goods and the nature of the seller [*Kroll*, p. 505].

111 RESPONDENT agrees with CLAIMANT's submission that the ordinary purpose of the Turbines is to produce energy for the community of Greenacre with increased efficiency and minimal downtime [*Cl. Memo*, p. 22, para. 101]. The increased efficiency derives from the innovative design and materials used, which increases the corrosion and cavitation resistance of the Turbines [*Resp. Ex. R1*, p. 30]. The minimal downtime is possible due to the increased inspection and maintenance intervals exclusive to the R-27V Francis Turbines [*ibid*, *Resp. Ex. R2*, p. 31, para. 2].

(2) Defining the Standard of the Turbines

112 It has been extensively discussed whether, in order to be fit for their ordinary purpose, goods have to be of an average quality, of a merchantable quality, or of a reasonable quality [*Kroll*, p. 506; *Rijn Case*]. The dominant view is that goods must be of a reasonable quality, as this interpretation supports a uniform interpretation of the CISG [*Kroll*, p. 507; *Schwenzer 2016*, p. 603; *Rijn Case*; *Beijing Light*].

113 Ordinarily, goods will not be of reasonable quality fit for their ordinary purpose where they have defects which impede their material use [*Maley*, p. 113]. However, CLAIMANT's



submission is that the Turbines are ‘most likely’ not corrosion resistant [*Request*, p. 8, para. 24]. This is a suspicion, not a proven defect.

114 In principle, the mere suspicion that goods *may* be defective does not render them non-conforming – they must *actually* not be fit for their ordinary purpose [*Kroll*, p. 513]. The only circumstance where a suspicion in itself is able to render goods non-conforming is if it is reasonable, based on past events or experience [*Kroll*, p. 513; *Saidov*, p. 104].

115 A suspicion is reasonable if it affects the market valuation of the goods, thereby impeding their intended use by the buyer [*Schwenzer & Tebel*, p. 157; *Frozen Pork Case*]. Further, reasonable suspicions have been held to render goods non-conforming if they are based on concrete facts, or obvious [*Argentinian Rabbit Case*; *Frozen Pork Case*; *Dry Rot Case*]. This threshold is reached where the suspected defect has been proven to a considerable extent at the place of origin prior to the transfer of risk [*Argentinian Rabbit Case*; *Frozen Pork Case*; *contra Austrian Wine Case*].

116 It is RESPONDENT’s submission that only reasonable suspicions meeting the aforementioned threshold could render goods non-conforming under Art. 35(2)(a) CISG.

B. CLAIMANT’s Suspicion is Not a Reasonable Suspicion and Cannot Render the Goods Non-Conforming under Art. 35(2)(a) CISG

117 RESPONDENT submits that CLAIMANT has not adequately discharged its burden of proving a reasonable suspicion, and in turn, non-conformity under Art. 35(2)(a) CISG [*Request*, p. 8 para. 24; *Kroll*, p. 513; *Rijn Case*; *contra Cl. Memo*, p. 23, para. 108]. CLAIMANT only has a mere suspicion due to the following considerations.

(1) The Market Valuation of the Goods is Not a Relevant Consideration

118 One determination of whether a suspicion is reasonable is whether it affects the market valuation of the goods, impeding the buyer’s intended use [*Schwenzer & Tebel*, p. 157]. RESPONDENT submits that any market valuation of the Turbines does not impede CLAIMANT’s intended use.

119 If the intended use of goods is resale or consumption, this intended use will be impeded if a suspicion affects the goods’ market valuation. This is because the market will no longer value the purchase or consumption of the goods, undermining the buyer’s interest in the goods [*Frozen Pork Case*]. It is irrelevant whether the suspicion is actually true; the decisive factor is the effect of the suspicion on the buyer’s ability to resell or trade the goods [*Animal Feed Case*; *Austrian Wine Case*; *Schwenzer & Tebel*, p. 157].

120 In the situation at hand, CLAIMANT’s intended use of the turbines is not affected by the market valuation. CLAIMANT intends to use the Turbines to supply hydro power through the Greenacre Plant [*Cl. Ex. C2*, p. 12]. The market valuation of the Turbines itself will not impede



CLAIMANT's intended use, which is not resale or consumption [*contra Frozen Pork Case; Austrian Wine Case; Animal Feed Case*].

121 CLAIMANT's intended use will only be impacted if the suspicion prohibits the energy supply to the community of Greenacre. The subsequent factors establish that this is not the case.

(2) The Riverhead Tidal Plant is Not Comparable to the Greenacre Plant

122 CLAIMANT relies on the problems at the Riverhead Tidal Plant as the basis of its suspicion [*Cl. Ex. C4*, p. 15]. For the following two reasons, RESPONDENT submits that this event is insufficient to sustain a reasonable suspicion.

123 *First*, the Riverhead Tidal Plant is a different project to the Greenacre Plant, using a different charge of steel [*Response*, p. 28, para. 16]. This demonstrates that the crux of the issue – the steel used in the Turbines at the Greenacre Plant – is not the same as that in the Riverhead Tidal Plant. The corrosion in the latter plant therefore cannot sustain a suspicion as to corrosion in the former Plant.

124 *Second*, even if the Riverhead and Greenacre turbines were manufactured with the same charge of steel (which they are not), the environment of the Riverhead Tidal Plant makes it more prone to corrosion. The Riverhead Tidal Plant is exposed to the far more corrosive salt-water [*Cl. Ex. C5*, p. 16; *Response* p. 28, para. 16]. The design and manufacturing process of the R-27V Francis Turbines makes it extremely unlikely that these turbines could be affected to the same extent as the Riverhead Tidal Plant [*Cl. Ex. C5*, p. 16].

(3) The Probability of the Suspicion Materialising Does Not Support the Finding of a Reasonable Suspicion

125 A suspicion is a fear founded on probability [*Maley*, p. 116]. RESPONDENT submits that the probability of the suspicion materialising is insufficient to amount to a reasonable suspicion for the following reasons.

126 *First*, there is a real possibility that the Turbines have been produced without using steel from TQS, let alone inferior steel [*P.O. No. 2*, p. 51 para. 31]. An important rationale behind cases where a reasonable suspicion has rendered goods non-conforming is that there are concrete facts at the goods' origin proving the suspicion to be true [*Argentinian Rabbit Case; Frozen Pork Case; Dry Rot Case*]. Not all of RESPONDENT's steel supply came from TQS [*P.O. No. 2*, p. 50, para. 24]. Contrary to CLAIMANT's submission that facts forming the suspicion exist prior to the passing of risk [*Cl. Memo*, p. 20, para. 90], RESPONDENT therefore submits that the situation at hand does not feature the concrete facts necessary for the suspicion to be reasonable.



127 *Second*, there is only a 5% chance that the turbines must be replaced in their entirety [*Cl. Ex. C7*, p. 21; *P.O. No. 2*, p. 55]. This is in the unlikely event that the Turbines have been manufactured with steel of inferior quality.

128 *Third*, as a matter of policy, the risk posed by a *mere* suspicion arising after the passing of risk from the seller to the buyer must be borne by the buyer. Otherwise, the seller may be held liable for any number of suspicions arising in an infinite timeframe after delivery [*Schwenzer & Tebel*, p. 161].

C. Even if the Suspicion is Reasonable, RESPONDENT is Still Not Liable

129 RESPONDENT submits that, even if the Tribunal finds that the suspicion is reasonable, it is not liable for the suspicion. This is because the risk of change in market requirements only arose after the delivery date of 20 May 2018 [see *supra* paras. 36-9; *Schwenzer & Tebel*, p. 160; *P.O. No. 2*, para. 19].

130 Art. 36(1) CISG states that the seller is responsible for a non-conformity if it existed *in nuce* at the time of the passing of risk, even if it became apparent only later [Art. 36(1) CISG; *Schwenzer & Tebel*, p. 160]. In circumstances where there is a reasonable suspicion, the seller is only liable if the risk of market valuation of the feature exists at the time the risk passed [*Schwenzer & Tebel* p. 160].

131 CLAIMANT attempted to demonstrate that the factors forming the suspicion in relation to the Riverhead plant incident already existed at the time of delivery [*Cl. Memo*, p. 20, paras. 91-2]. However, this view does not find support in *Schwenzer and Tebel* as it would ‘undermine the high threshold under Art. 36 of the CISG’ [p. 160].

132 In the current situation, the suspicion only arose after the risk passed [*Cl. Ex. C4*, p. 15]. This means that any possible risk of change in market valuation could not have occurred at the time of passing of risk [see *supra* paras 36-39]. According to *Schwenzer & Tebel*, the risk of change of the market requirements after the passing of risk must be borne by CLAIMANT [p. 161].

CONCLUSION OF ISSUE 3

133 RESPONDENT submits that the aforementioned factors render CLAIMANT’s suspicion below the threshold of reasonable. Rather, there is only a mere suspicion, which is insufficient to render the Turbines non-conforming under Art. 35(2)(a) CISG [*Kroll*, p. 513].

134 The Turbines are therefore fit for their ordinary purpose of providing power to the Greenacre community with increased efficiency and minimal downtime [see *supra* para. 16]. Contrary to CLAIMANT’s submission, a mere suspicion where the turbines are fit for their ordinary purpose will still justify the premium paid of 10% [*Resp. Ex. R1*, p. 30].



135 RESPONDENT respectfully requests that the Tribunal to find the turbines conforming in the sense of Art. 35 CISG. CLAIMANT has not discharged its burden of proving that its suspicion is reasonable. It is therefore only a mere suspicion, which is insufficient to amount to a non-conformity. For this Tribunal to find otherwise would risk lowering the threshold of non-conformity below that of a reasonable suspicion.

ISSUE 4: THE TRIBUNAL SHOULD FIND CLAIMANT IS NOT ENTITLED TO REQUEST REPLACEMENT OF THE TURBINES

136 Under Art. 46(2) CISG, CLAIMANT is only entitled to request replacement turbines if it is shown that non-conformity [see *supra* **Issue 3**] amounts to a fundamental breach under Art. 25 CISG, and timely notice of the request is made.

137 CLAIMANT seeks delivery of replacement turbines as the allegedly non-conforming Turbines constitute a fundamental breach of the SA [*Cl. Memo*, p. 24, para. 116]. However, Respondent submits that: (I) there is no fundamental breach under Art. 25 CISG; and subsequently (II) the alleged non-conformity can be cured by repair, despite CLAIMANT's request for replacement under Art. 46(2) CISG. For clarity, RESPONDENT does not dispute that sufficient notice was given by CLAIMANT.

I. There is No Fundamental Breach under Art. 25 CISG

138 RESPONDENT submits that there has been no fundamental breach under Art. 25 CISG.

139 CLAIMANT bears the burden of establishing the facts giving rise to fundamental breach [*Müller-Chen*, p. 747], which is a two-limb test [*Whittington*, p. 433]. However, RESPONDENT submits that CLAIMANT has not discharged this burden as: (A) there has been no substantial deprivation; and, (B) even if there was substantial deprivation, such a result was not foreseeable.

A. There Has Been No Substantial Deprivation to CLAIMANT

140 CLAIMANT submits it is substantially deprived what it was entitled to expect under the SA [*Cl. Memo*, p. 25] (*hereinafter* the **Expectation Interest**). RESPONDENT invites this Tribunal to find otherwise, given that: (1) the threshold for 'substantial deprivation' is high; (2) that threshold is not lowered by Art. 20(2)(d) SA; and (3) CLAIMANT has not been substantially deprived of its Expectation Interest.

(1) The Threshold to Establish Substantial Deprivation is High

141 It is unclear what constitutes 'substantial deprivation' under Art. 25 CISG. This 'uncertainty' [*Lookofsky 2000*, p. 79] makes it difficult for the Parties 'in case of dispute, to determine *ex ante* [in forecast rather than in actuality] whether a breach was fundamental' [*Koch 1998*, pp. 184-5]. Thus, it is for this Tribunal to ascertain the threshold for 'substantial deprivation' [*ibid*, p. 188].



142 RESPONDENT submits that the threshold is high, for two reasons. *First*, '[t]he breach must ... nullify or essentially depreciate the aggrieved party's justified contract expectations' [*Ferrari et al*, p. 601, para. 3], such that the contract cannot be performed [*Whittington*, p. 345; *Shoes Case*; *Curran*, p. 233]. *Second*, the term 'fundamental breach' is not readily applied [*Packaging Machine Case*, para. 7.1]. There is no presumption of fundamental breach which automatically arises under Art. 25 CISG, particularly in cases where it is unclear whether or not the alleged breach may qualify as fundamental [*ibid*]. This is justified by the primary purpose of the CISG, which is to avoid termination by preserving contractual performance, i.e. *favor contractus* [*Sono*, p. 167; *Packaging Machine Case*, para. 7.1; *Meat Case*, para. 2(b)].

(2) Art. 20(2)(d) SA Does Not Lower the Threshold for Substantial Deprivation

143 RESPONDENT submits that Art. 20(2)(d) SA does not constitute a lowering of the threshold, contrary to CLAIMANT'S allegations [*Cl. Memo*, p. 29, paras. 146-7]. CLAIMANT argues that by omitting the word 'substantially', the Parties agreed to contract out of the otherwise high threshold set by the CISG [Art. 6(1) CISG; *Cl. Memo*, p. 29, para. 146].

144 However, if anything, Art. 25 CISG 'supplements the terms of sale where the Parties omit to consider a particular situation' [*Whittington*, p. 428]. Had the Parties truly intended to lower the threshold, the SA would have made express provision [CISG, Part II, p. 35].

145 Further, while Art. 20(2)(d) SA may constitute a reference to Art. 25 CISG, that is only insofar as one of the Parties would seek to avoid the contract. Since Art. 20 SA is entitled 'Termination for Cause', the 'breaches' listed therein apply to avoiding the SA, but not in seeking its performance. In fact, the Parties did not consider termination would be likely, since avoidance of the SA prevents CLAIMANT from performing its obligations under the Tender Contract [*P.O. No. 2*, p. 47, para. 4]. Indeed, lowering the threshold would lead to absurdity, such that virtually any non-conformity (whether serious or not) would constitute 'substantial deprivation'. This conflicts with the view that '[t]he most important principle is that the default attains a certain minimum degree of seriousness' [*Schroeter*, p. 417]. Thus, Art. 20(2)(d) SA should not be too readily applied.

(3) CLAIMANT Has Not Been Substantially Deprived of Its Expectation Interest

146 CLAIMANT alleges the suspicion of the Turbines' non-conformity *may* lead to: economic loss higher than the value of any profit it would receive under the Tender Contract; a risk that Greenacre will terminate the Tender Contract; and harm to CLAIMANT's business reputation [*Cl. Memo*, p. 25, para. 123] (cumulatively, the Expectation Interest) [see *supra* para. 89].

147 However, RESPONDENT submits the importance of CLAIMANT's Expectation Interest should be considered 'along with the actual consequences of the breach' [*Whittington*, p. 436].



This is because the Parties' interests (as expressed in the SA and/or inferred from the circumstances of the transaction) are relevant in assessing the fundamentality of any alleged breach [*Schroeter*, p. 421].

148 RESPONDENT argues further that the Tribunal can only conclude that CLAIMANT has not suffered detriment, substantially depriving it of its Expectation Interest, for two reasons.

149 *First*, the Turbines can and are presently being used, in full performance of the SA. It is clear from the SA (and the Preamble therein) that minimum downtime for service/maintenance and a largely uninterrupted supply of hydro energy are critical to CLAIMANT [Art. 2 SA; *Cl. Ex. C2*, p. 11]. However, since RESPONDENT contracted in order to support the Tender, the use of the Turbines was of objective importance to both Parties such that CLAIMANT must show the (alleged) defect prevents the use of the Turbines [*Müller-Chen*, p. 745; *Cobalt Sulphate Case*, pp. 132, 135, 290, 298].

150 In this respect, RESPONDENT submits there is nothing on the facts supporting the conclusion that the Turbines are not usable, and in fact, the Turbines are currently operating in compliance with the SA. For example, the Turbines do not deviate from the contracted-for product specifications set out in Annex A to the SA [*P.O. No. 2*, p. 8, para. 6]. Additionally, CLAIMANT itself informed RESPONDENT on or about 3 October 2018 that the Turbines had passed the Acceptance Test and have been producing energy without fault since installation [*Cl. Ex. C4*, p. 15, para. 2]. Hence, the Turbines were and are still usable.

151 *Second*, the purpose of the SA remains achievable [*Koch 1998*, p. 214, *Enderlein & Maskow*, para. 3.4], pointing away from fundamental breach [*Koch 2007*, p. 126]. CLAIMANT has neither alleged nor proven that the Turbines are affected by corrosion, precluding a finding of substantial deprivation [*Response*, p. 26, para. 2].

152 According to Prof. John, there is less than a 5% chance the Turbines were constructed from faulty steel requiring total replacement [*Rsp. Ex. R1*, p. 30]. It follows there remains a 95% chance that CLAIMANT would *not* be substantially deprived [see e.g., *CLOUT Case No. 171*]. This is particularly the case given that the Riverhead incident, the catalyst for CLAIMANT's concern, is not comparable here, as the factors leading to replacement of the defective Riverhead turbine are not present at Greenacre. For example, the exposure of the Riverhead turbines to saltwater exacerbated the corrosion, necessitating replacement [*Cl. Ex. C5*, p. 16, para. 4].

153 Contrastingly, the Turbines at Greenacre are exposed only to freshwater and were designed to include specific anti-corrosive features [*Rsp. Ex. R1*, p. 30]. Both factors minimise the risk of corrosive damage, suggesting the Turbines are more resistant to corrosion [*ibid*]. Additionally,



RESPONDENT's suggestion to bring forward the First Inspection by one year and perform additional investigations at its own expense will prevent any immediate unplanned downtime interrupting energy supply [*Cl. Ex. C5*, p. 16, paras. 3, 5]. Hence, the objects of the SA can still be achieved.

154 Ultimately, RESPONDENT invites the Tribunal to conclude there has been no 'substantial deprivation', particularly in light of the high threshold for substantial deprivation.

B. Even if CLAIMANT was Substantially Deprived, Such a Result Was Not Foreseeable

155 Art. 25 CISG requires that RESPONDENT foresaw, and a reasonable person in RESPONDENT's position would have foreseen, that CLAIMANT would be substantially deprived of its Expectation Interest. The burden of proving lack of foreseeability lies with RESPONDENT, since foreseeability constitutes an exemption for breaching parties but does not cumulatively go to proving substantial deprivation [*Schroeter*, p. 430, para. 26; *Graffi*, p. 339, para. 17; *Koch 1998*, p. 264; *Bonell*, p. 215; *Whittington*, p. 436].

156 CLAIMANT alleges 'substantial deprivation' was foreseeable. However, RESPONDENT invites this Tribunal to find otherwise on the basis that: (1) foreseeability should be determined at the time of the conclusion of the SA; (2) RESPONDENT did not foresee the 'substantial deprivation'; and (3) a reasonable person in RESPONDENT's position would not have foreseen the 'substantial deprivation' either [Art. 25 CISG; *Ferrari*, p. 499].

(1) Foreseeability Should Be Determined at the Time of the Conclusion of the SA

157 While Art. 25 CISG does not specify the time to assess foreseeability, the dominant view is that the relevant time is at the conclusion of the contract [*Ferrari*, p. 499; *Schroeter*, p. 434, para. 32; *Graffi*, p. 340, para. 19; *Koch 2007*, p. 229], being 22 May 2014 [*Cl. Ex. C2*, p. 13]. CLAIMANT submits that foreseeability can be assessed by reference to 'information received after' conclusion of the contract [*Cl. Memo*, p. 28, para. 139]. However, RESPONDENT argues CLAIMANT has not justified why this Tribunal should deviate from the dominant view, and submits that it should reject this for two reasons.

158 First, fundamentality of breach relates directly to the Parties' legitimate expectations as agreed under the SA [*Ferrari*, p. 500]. It would be inappropriate for the Tribunal to consider 'information received after' conclusion, as that material could not reflect the Parties' true interests otherwise defined by the SA [*ibid*]. For example, CLAIMANT relies on its economic interest given the 'unusual penalty clause' contained in the Tender Contract [*Cl. Ex. C6*, p. 18, para. 5]. However, RESPONDENT was unaware of this the time it contracted with CLAIMANT [see *infra* para. 161]. Additionally, awareness of the penalty clause in assessing



‘substantial deprivation’ would neither objectively nor realistically reflect the expectations and agreed risk allocation between the Parties.

159 *Second*, adopting the minority view would lead to legal uncertainty, as parties assume their contract will be performed under the circumstances in which it was concluded. This is consistent with both the principle of good faith [*Graffi*, p. 340, paras. 19-20] and the meaning of foreseeability elsewhere in the CISG [see e.g., Art. 74 CISG; *Koch 2007*, p. 230].

(2) RESPONDENT Did Not Foresee the Substantial Deprivation

160 CLAIMANT alleges that ‘substantial deprivation’ was foreseeable by RESPONDENT as it had knowledge of the penalty clause, the importance of the obligations, and the media coverage of the project [*Cl. Memo*, p. 28, paras. 138-140]. However, RESPONDENT submits that, at the time of concluding the SA, it did not foresee that a mere suspicion of a risk that the Turbines might have been constructed from defective steel would substantially deprive CLAIMANT of its Expectation Interest. This is for two reasons.

161 *First*, RESPONDENT had no knowledge of the penalty clause and was therefore unable to foresee the related consequences. The penalty clause was inserted into the Tender Contract on 3 August 2014 [*Cl. Ex. C6*, p. 18, para. 5], which is 3 months after the SA was executed [*Cl. Ex. C2*, p. 13]. Additionally, RESPONDENT is not privy to the Tender Contract [*Cl. Ex. C7*, p. 20, para. 4] and was only informed of the penalty clause in January 2018 [*P.O. No. 2*, p. 51, para. 26]. Hence, CLAIMANT’s unusually high quantifiable liability under the penalty clause could not have been contemplated by the Parties at the time of contracting.

162 *Second*, RESPONDENT could not foresee that Greenacre Council would seek to terminate the Tender Contract with CLAIMANT (unless an immediate replacement of the Turbines occurs in 2020) [*Rsp. Ex. R3*, p. 33]. While RESPONDENT knew of the importance of a largely uninterrupted supply of hydro energy at the time of the conclusion of the contract, it could not have foreseen how Greenacre Council would respond, nor the serious political repercussions. While RESPONDENT was given CLAIMANT’s tender documents, the facts do not indicate that it directly dealt with Greenacre Council. RESPONDENT could not, thus, have foreseen Greenacre Council’s extreme political reaction, in threatening to terminate the Tender Contract.

(3) A Reasonable Person in RESPONDENT’s Position Would Not Have Foreseen the Substantial Deprivation

163 Additionally, the Tribunal should have regard to the nature of the ‘specific trade sector ... since reasonableness may considerably differ from one sector to another’ [*Graffi*, pp. 339-40, para. 18; *Schlechtriem 1998*, p. 179]. RESPONDENT submits that a reasonable person in its position



would not have foreseen ‘substantial deprivation’. Here, the reasonable person would be a globally-known and multi-million dollar turbine producer with over 500 employees (*hereinafter* a **RP**) [P.O. No. 2, p. 47, para. 1; *Request*, p. 4, para. 2].

164 Although penalty clauses are usually used in international commercial contracts [*Schwenzer, Hachem & Kee*, pp. 635-6], a RP would not have foreseen such an *unusual* penalty clause. In fact, the amount of penalty payable under the Tender Contract as amended is 1.5 times that of the profit which CLAIMANT would receive each month [P.O. No. 2, p. 55]. To use CLAIMANT’s wording, the penalty effectively acted as ‘a very unusual availability guarantee’ for Greenacre [Cl. EX. C6, p. 18, para. 5]. Additionally, a RP, at the time of contracting, could not foresee that the penalty clause would be made public to the Greenacre community [Cl. Ex. C6, p. 19, para. 6].

165 Thus, a RP would not have foreseen that mere suspicion of a risk that the Turbines might have been manufactured from inferior steel quality would substantially deprive CLAIMANT of its Expectation Interest. Should the Tribunal find that RESPONDENT has established lack of foreseeability, then CLAIMANT is precluded from seeking a remedy, including by way of specific performance [*Graffi*, p. 338, para. 16].

II. The Breach Can Be Remedied by Repair

166 RESPONDENT submits CLAIMANT is not entitled to require replacement under Art. 46(2) CISG. This is because RESPONDENT has made a reasonable offer to repair the Turbines under Art. 48(1) CISG [*Müller-Chen*, p. 744, para. 23; *Bridge* 12.08], such that there can be no fundamental breach [*Brunner et al*, p. 350; *Huber*, p. 684].

167 By exercising its right to cure under Art. 48(1) CISG, RESPONDENT can ‘choose the means for performance’ [*Brunner et al*, p. 347; *Huber*, p. 684; *Müller-Chen*, p. 749, para. 35; *Lookofsky* 2012, p. 135]. Thus, RESPONDENT can defeat CLAIMANT’s preference for replacement [*Huber*, p. 683, para. 42], as the offer to cure can ‘exclude any remedy of the buyer that is inconsistent with the remedy chosen by the seller’ [*Brunner et al*, p. 347; *Lookofsky* 2012, p. 135; *Müller-Chen*, p. 749, para. 35].

168 RESPONDENT acknowledges that Art. 48 CISG is subject to a buyer’s right to avoid a contract under Art. 49(1) CISG. However, Huber explains (in detail) that the dominant view is that curability is directly linked to fundamental breach, and the CISG’s history reveals that Art. 48 CISG was not intended to be reserved in favour of Art. 49 CISG [pp. 683, 699; *Bach*, 708-10]. This is consistent with the principle of *favor contractus* [*Whittington*, p. 430].



169 Thus, RESPONDENT submits that: (A) its offer to cure the alleged defect by repair is reasonable compared to replacement; and (B) entitlement to specific performance is unlikely under Danubian substantive law.

A. Offer to Cure by Repair is Reasonable Compared to Replacement

170 RESPONDENT submits that its offer to cure by repair is reasonable compared to total replacement because: (1) repair would not cause unreasonable delay or inconvenience for CLAIMANT; (2) repair is justified on economic grounds; and (3) repair is consistent with the principle of *favor contractus*. The burden to prove that replacement is *unreasonable* lies with RESPONDENT [Huber, p. 685, para. 46].

(1) Repair Would Not Cause Unreasonable Delay or Inconvenience

171 RESPONDENT submits the repair is reasonable, as it does not cause ‘unreasonable delay’ or ‘unreasonable inconvenience’ for CLAIMANT [Müller-Chen, p. 715; Huber 1998, p. 387] and can be effected within reasonable time [Huber, p. 684]. This is for the following three reasons.

172 *First*, RESPONDENT recommended pulling forward the First Inspection by one year to 2020, and expressed its willingness to bear the costs directly associated with facilitating that inspection and the additional metallurgical examinations [Cl. Ex. C7, p. 21, para. 6; Response, p. 27, para. 8]. This is a responsive and commercially pragmatic plan, which accommodates CLAIMANT’s ‘interest in a smooth operation of the Plant with as little downtime’ [Cl. Ex. C5, p. 16, para. 6].

173 *Second*, there is no material difference in the Parties’ positions in terms of outcomes. The only disagreement between the Parties concerns which party will bear the cost of the runners, in the first instance. CLAIMANT has demanded replacement of the ‘Turbines’ runners by 2020, as this is ‘that part of the turbine which is exposed to the greatest stress’ [P.O. No. 2, p. 52, para. 34; Rsp. Ex. R3, p. 33, para. 2]. RESPONDENT has also proposed to replace the runners, if required following First Inspection [Cl. Ex. C6, p. 21, para. 3].

174 *Third*, repair of the ‘Turbines’ runners will not cause inconvenience to CLAIMANT. This is because RESPONDENT offered to install the new runners by August 2020 onsite at Greenacre, avoiding further delay or unplanned downtime [Cl. Ex. C6, p. 21, para. 3]. Additionally, RESPONDENT offered to simultaneously repurchase the existing runners from CLAIMANT, should First Inspection reveal a need to replace them [Cl. Ex. C7, p. 23, para. 8]. Comparably, prefabrication of the Turbines would incur 3 months of unplanned downtime, and it would be unreasonable to expect RESPONDENT to replace the Turbines by September or October 2020 [*ibid*].



(2) Repair is Justified on Economic Grounds

175 RESPONDENT submits that repair is also ‘justified on economic grounds’ [Huber, p. 684].

This is because the cost to repair is proportionate to the 70% risk that First Inspection may reveal the need for repair [P.O. No. 2, p. 55]. Comparably, it would cost US\$ 24,200,000 to replace the Turbines in circumstances where there is only a 5% chance that replacement would be required [P.O. No. 2, p. 55]. This is a remarkably low probability, and it is more likely that First Inspection will reveal that there is no extraordinary corrosion or corrosion inducing cavitation damage [Rsp. Ex. R2, p. 32, para. 8], according to the professional opinion of Prof. John [Rsp. Ex. R1, p. 30]. Moreover, the cost to replace one Turbine is US\$ 14,000,000 alone [Rsp. Ex. R2, para. 8].

176 Additionally, the production of one turbine would cost RESPONDENT at least US\$ 14,000,000 [Rsp. Ex. R2, p. 32, para. 8]. The cost to replace two turbines would amount to at least US\$ 28,000,000, which equates to approximately 18.57% of RESPONDENT’s annual turnover (US\$ 180,000,000) [P.O. No. 2, p. 47, para. 1]. Even if RESPONDENT used all 10 of its production lines to build new turbines, the production for each turbine would take 12 months [P.O. No. 2, p. 51, para. 28]. Additionally, the estimated downtime period is 12 months, including downtime for First Inspection [P.O. No. 2, p. 55]. This is compounded by the fact that the downtime calculated for the installation and deinstallation of just 1 turbine is approximately 5-6 weeks [P.O. No. 2, p. 52, para. 37].

(3) Repair is Consistent with the Principle of *Favor Contractus*

177 Reasonably expedient replacement is paramount in effecting specific performance [Müller-Chen, p. 744, para. 23; Lookofsky 2012, p. 131; Acrylic Case]. However, RESPONDENT submits that it would not likely be capable of effecting replacement within the time necessary to ensure performance of the SA in accordance with the principle of *favor contractus*, underlying the CISG.

178 The policy reason for inclusion of the fundamental breach requirement in Art. 46(2) CISG is to keep the contract alive and avoid unnecessary transfers of goods [Huber, p. 681]. However, in some circumstances, a claim for substitute delivery can cause unnecessary transfers of goods, similar to a claim for avoidance of contract.

179 In this dispute, the transport of replacement turbines to the Plant would take 10 days whereas transport to Equatoriana would take 24 days [P.O. No. 2, p. 47, para. 1]. Transport of the replacement turbines would also take the same amount of time. In addition to the significant financial implication of producing new turbines [see *supra* paras. 175-6], these transfers are unnecessary in that they would cause significant delay to both parties, whereas remedy by repair could be performed within reasonable time. Therefore, in order to keep the contract alive, such



undesirable result can be avoided by restricting CLAIMANT to claims for repair and/or damages.

180 Therefore, RESPONDENT's offer to cure by repair is reasonable since repair would not cause unreasonable delay or inconvenience to CLAIMANT, is justified on economic grounds and is consistent with the principle of *favor contractus*.

B. Entitlement to Specific Performance is Unlikely under Danubian Substantive Law

181 Art. 28 CISG confers autonomy on courts in ML countries *not* to order specific performance, unless they otherwise would under the national law where the CISG does not apply. Since Danubian substantive law is a verbatim adoption of UPICC, CLAIMANT alleges that under Art. 7.2.2. UPICC, specific performance would be ordered [*Cl. Memo*, p. 34, para. 180].

182 However, RESPONDENT submits that the CISG operates to cover all 'four corners' of a contract, and applies by default such that UPICC is only relevant where there is a 'gap' in the CISG [*Lookofsky* 2005, pp. 88-9; *Schlechtriem* 1998, p. 93; Art. 28 ML]. RESPONDENT asserts that there is no such 'gap' in respect of Art. 46(2) CISG, contrary to CLAIMANT's argument [*Cl. Memo*, p. 31, para. 162]. Rather, RESPONDENT is of the view that specific performance is sufficiently governed by Art. 46(2) CISG such that there is no justification for applying Art. 7.2.2 UPICC. Additionally, Art. 28 CISG does not bind this Tribunal to consider whether a Danubian court may or may not order specific performance [*Schwenzer, Hachem & Kee*, p. 572, para. 43.55].

183 Even if this Tribunal were to find such a 'gap', RESPONDENT submits that both the CISG and UPICC share the same interpretive principles, and must be interpreted and applied in accordance with the principles of *favor contractus*, good faith, and reasonableness [Art. 7 CISG; Art. 1.7 UPICC]. Thus, if this Tribunal were to conclude that replacement is inappropriate under the CISG, it would reach the same conclusion under UPICC [*Schwenzer* 1999, p. 300].

184 For example, any 'unreasonable burden' on the seller to deliver substitute goods constitutes an exception to requiring specific performance under Art. 7.2.2 UPICC [*Schwenzer* 1999, p. 295]. Reasonableness in this context extends to whether or not specific performance would be unduly expensive to the seller, such as to cause the seller to suffer heavy loss, or where specific performance would undermine the importance of good faith in international trade [*Schroeter*, pp. 295-6; *Co-Operative Insurance Society Ltd v Argyll Stores*]. Importantly, UPICC empowers the breaching party to choose the remedy to avoid scenarios where 'replacement would cause disproportionately high costs to the [seller] and the [buyer] can use the object of the contract as intended after the repair' [*Schroeter*, pp. 300-1]. As discussed above, replacement of the



Turbines would constitute an unreasonable burden for RESPONDENT, but not CLAIMANT [see *supra* **Issue 4(II)(A)**].

185 Additionally, RESPONDENT's offer to cure is both reasonable and made in good faith [*Koch* 1998, pp. 188-9]. Since reasonableness in dealings is considered an element of good faith [*Whittington*, p. 432], RESPONDENT submits that its offer to cure is reasonable in respect of not only time and cost, but also in preserving CLAIMANT's Expectation Interest [*Huber*, p. 685, paras. 46-7]. In mitigating loss, it has been found that preservation of goods can be characterised as a 'particular expression of the general requirement of good faith' [*Kastely*, p. 596].

CONCLUSION OF ISSUE 4

186 In light of the above, it is not open to this Tribunal to find that RESPONDENT committed a fundamental breach under Art. 25 CISG. CLAIMANT is not therefore entitled to require replacement turbines from RESPONDENT in reliance on Art. 46(2) CISG. Even if there was fundamental breach, the Tribunal should find that, in the circumstances, the only appropriate remedy is repair to, but not, replacement of the Turbines.



REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal to make the following orders:

- (1) The Tribunal does not have jurisdiction to hear the dispute under the Arbitration Agreement;
- (2) CLAIMANT's request to exclude Prof. John as the expert suggested by RESPONDENT be denied;
- (3) CLAIMANT's request for delivery and installation of two substitute R-27 Francis turbines is denied; and
- (4) CLAIMANT bear the costs of this arbitration.



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CISG	<i>UN Convention on Contracts for the International Sale of Goods</i> , opened for signature 11 April 1980, 1489 UNTS 58 (entered into force 1 January 1988)
CIArb Protocols	CIArb Protocols for the Use of Party-Appointed Expert Witnesses in International Arbitration
LCIA Rules	London Court of International Arbitration Rules, 2014
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
NYC	<i>UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i> , opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (<i>'New York Convention'</i>)
ML	<i>UN Commission on International Trade Law Model Law on International Commercial Arbitration</i> , GA Res 61/33, UN Doc A/40/17 (11 December 1985, adopted 4 December 2006) (<i>'Model Law'</i>)
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<i>Packaging Machine Case</i>	<i>Unknown Parties</i> (Bundesgerichtsbof) 4A_68/2009, 18 May 2009. ¶142

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<i>Law Debenture Trust</i>	<i>Law Debenture Trust Corp PLC v Elektrim Finance BV, Elektrim SA, Concord Trust</i> [2005] EWHC 1412 ¶19



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Riassicurazioni v. Achille Lauro, d/ b/ a Achille Lauro
Armatore, 712 F2d 50 (3rd Cir. 1983).

**CERTIFICATE**

Melbourne, 23 January 2020

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

(Moe Ayman)

(Murphy Bong)

(Samira Lindsey)

(Joseph McDonald)

(Dave Yan Sima)

(Lorena Stents)