

ALBERT LUDWIG
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Memorandum for
CLAIMANT

On Behalf Of

HydroEN plc
Rue Whittle 9
Capital City, Mediterraneo

– CLAIMANT –

Against

TurbinaEnergia Ltd
Lester-Pelton-Crescent 3
Oceanside, Equatoriana

– RESPONDENT –

ANTON AUGENSTEIN • ELOISE BLIESENER • MAXIMILIAN BURGER • SEVERIN BURKART
LEANDER FUNCK • RAFAELA HAID • GABRIELLA KINEFSS • GIDEON WHEELER



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AC	Advisory Council
Art./Artt.	Article/Articles
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGER	Schweizerisches Bundesgericht
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	confer
CIArb	Chartered Institute of Arbitrators
CISG	United Nations Conventions on Contracts for the International Sale of Goods
Co.	Company
Ed./Eds.	editor/editors
ed.	edition
emph. Add	emphasis added
e.g.	exempli gratia
et seq.	et sequens (and the following)
FG	Festgabe
FS	Festschrift
GH	Gerechtshof (Court of Appeal)
HG	Handelsgericht (commercial court)
HGB	Handelsgesetzbuch (German Commercial Code)
i.e.	id est (that is)
IBA	International Bar Association
ibid.	ibidem (in the same place)
LCIA	London Court of International Arbitration



Inc.	Incorporation
Ltd	Limited
No.	Number
OLG	Oberlandesgericht (appellate court)
Op.	Opinion
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PICC	UNIDROIT Principles of International Commercial Contracts
PO	Procedural Order
ULFF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Program
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
US\$	United States Dollar
v.	Versus
Vol.	Volume
%	Percent



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STATEMENT OF FACTS

The parties to this arbitration are *HydroEN plc* [hereafter: “CLAIMANT”] and *TurbinaEnergia Ltd* [hereafter: “RESPONDENT”]. CLAIMANT is a market leader in the construction of pump hydro power plants and based in Mediterraneo. RESPONDENT is a world-renowned producer of premium water turbines registered in Equatoriana. It supplied CLAIMANT with its newest R-27V Francis Turbines.

24 Aug 2013 At the Hydro Power Energy Fair, the Community of Greenacre presents its plan to build a pump hydro power plant to fulfil its green energy strategy. At the same fair, RESPONDENT presents its new R-27V Francis Turbine. Highly praised by Prof. John, a well-known expert for turbines, this new turbine outshines its competitors.

Mar 2014 CLAIMANT, prepares a bid for the Greenacre pump hydro power plant tender and contacts RESPONDENT as a potential supplier of the turbines to be installed in the plant.

22 May 2014 CLAIMANT and RESPONDENT conclude a Sales Agreement for the production and installation of two of RESPONDENT’s turbines in case CLAIMANT is awarded the tender.

15 Jul 2014 CLAIMANT wins the tender and is awarded the contract to construct and operate the hydro power plant in Greenacre.

3 Aug 2014 The hydro power plant project is controversially discussed in Greenacre. To reduce the opposition to the project in Greenacre, CLAIMANT agrees to the amendment to include a penalty clause into its contract with Greenacre

2017 One of RESPONDENT’s employees erases backup files for the years 2015-2017; subsequently, the IT system is hacked which leads to a significant loss of data. The lost data mainly concerned the steel RESPONDENT uses for its turbines.



- May 2018** At Riverhead Tidal Power Plant, a plant which also uses turbines produced by RESPONDENT, severe corrosion of the turbine blades is discovered during an inspection. The turbines have to be replaced after only two years of running time.
- 20 May 2018** RESPONDENT delivers the turbines to CLAIMANT and installs them in the Greenacre hydro power plant.
- 25 Aug 2018** RESPONDENT is informed by the authorities about a fraud committed by Trusted Quality Steel, its main supplier of steel used for its turbines.
- 19 Sep 2018** The Greenacre pump hydro power plant starts operating.
- 29 Sep 2018** CLAIMANT learns of the fraud of Trusted Quality Steel.
- 4 Oct 2018** RESPONDENT is unable to dispel CLAIMANT's concerns about the steel used in its turbines and offers to examine the turbines during a pulled forward inspection in September 2020.
- 6 Oct 2018** After consultation with Greenacre, CLAIMANT informs RESPONDENT that it requests a complete replacement of the turbines.
- 10 Oct 2018** RESPONDENT rejects CLAIMANT's request to replace the turbines.
- 11 Dec 2018** RESPONDENT offers to pre-produce two turbines at CLAIMANT's expense which could serve as a replacement if the inspection shows that the installed turbines are affected by corrosion due to inferior steel used.
- 31 July 2019** CLAIMANT initiates arbitral proceedings against RESPONDENT.
- 30 Aug 2019** RESPONDENT indicates that it would submit an expert report by Prof. John, whom it had retained five days prior.
- 21 September 2019** CLAIMANT's arbitrator discloses that her husband is currently engaged in a lawsuit with the expert named by RESPONDENT, Prof. John.



SUMMARY OF ARGUMENTS

“It takes 20 years to build a reputation and five minutes to ruin it” (Warren Buffett).

In business transactions, reliability is vital for a good reputation. In the same way the city of Greenacre relies on CLAIMANT in order to achieve its carbon-free energy strategy, CLAIMANT relies on RESPONDENT in order to fulfil its responsibilities towards Greenacre. But just like its turbines, RESPONDENT does not seem to be reliable after all.

The Parties drafted a clause which allows CLAIMANT to refer any dispute to arbitration. Hence, CLAIMANT thought it could rely on an agreement between two business partners when it initiated arbitral proceedings against RESPONDENT. The latter, however, now claims the clause to be asymmetrical and unjustly contests the Arbitral Tribunal’s jurisdiction **[Issue I]**.

For the arbitral proceedings RESPONDENT nominated an expert witness, Prof. John, who shares a long-lasting relationship with RESPONDENT. Since Prof. John could serve as an instrument to pressure Ms. Burdin to resign as arbitrator, CLAIMANT now relies on the Arbitral Tribunal to find that RESPONDENT’s expert should be excluded from the arbitral proceedings **[Issue II]**.

CLAIMANT particularly approached RESPONDENT because of the unique performance ability of its turbines. As was later revealed that the majority of steel RESPONDENT had used in its turbines is potentially defective, CLAIMANT is doubtful whether it can still rely on the product delivered by RESPONDENT. Greenacre, on the other hand, has already made up its mind and wants the turbines replaced. This shows that Greenacre does not deem the turbines reliable to produce green energy which renders the turbines non-conforming to their particular purpose **[Issue III]**.

In order to clarify the quality of the steel, RESPONDENT suggested an inspection of the turbines in conjunction with a lengthy potential repair. However, RESPONDENT fails to see that only a full replacement of the turbines is compatible with Greenacres clean energy strategy **[Issue IV]**.

CLAIMANT has used its best efforts to find a satisfying solution for both Parties. Regrettably, RESPONDENT does not seem to share this ambition. Therefore, the Arbitral Tribunal is kindly requested to order RESPONDENT to deliver two substitute turbines fit for the purpose set out in the Contract between the Parties.



FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE CASE

1 CLAIMANT and RESPONDENT concluded a Sales Agreement regarding the delivery and installation of two R-27V Francis Turbines [*Exhibit C 2, pp. 11-13*]. During the contract negotiations, the Parties jointly considered possible constellations for a dispute resolution clause to be included into the Sales Agreement [*PO No. 2, p. 47 para. 2*]. In the end, they settled on the following clause as set out in Art. 21(2) of the Sales Agreement:

„The BUYER has the right to refer any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, to arbitration under the LCLA Rules, which Rules are deemed to be incorporated by reference into this clause.“ [*Exhibit C 2, p. 13 Art. 21(2); hereafter “Arbitration Agreement”*].

2 Even though RESPONDENT deemed this clause valid during the contractual negotiations, it seems to have had a sudden change of mind as soon as CLAIMANT actually decided to initiate arbitral proceedings. Criticising the asymmetry of the clause, RESPONDENT now contests the jurisdiction of the Arbitral Tribunal to decide on the case and claims the clause to be invalid [*Response to the Request for Arbitration, p. 27 para. 12*]. However, Art. 21(2) Sales Agreement in fact constitutes a valid arbitration agreement [A] and does not violate the principle of equal treatment [B].

A. Art. 21(2) of the Sales Agreement constitutes a valid arbitration agreement

3 The Parties concluded a valid arbitration agreement by incorporating Art. 21(2) into their Sales Agreement. Arbitral proceedings are always based on an agreement between the parties [*Fagbemi 6 J Sust Dev (2015), p. 226 para. 1; Yu 1 Contemp. Asia Arb. J. (2008), p. 275 para. 1*]. Such an agreement is concluded if it allows to submit present or future disputes to arbitration [*UN Arbitration, p. 3 para. 5*]. It is generally established that if only one party is granted the privilege to initiate arbitration, this nevertheless constitutes an arbitration agreement [*Wilson Tailor Asian Pacific v. DynaJet, 26 Apr 2017; Draguiev 31 IntlArb (20A14), p. 23 para. 2; Henriques 11 YAR (2011), p. 44 para. 1; Magee/Mulholland 28 Mealey’s Int’l. Arb. Rep. (2013), p. 14 para. 4*]. When reaching an arbitral agreement, the principle of party autonomy is of crucial importance [*Carlevaris, p. 1 para. 1; Moses, p. 1 para. 2; Ahmed 31 J Int l Arb (1999), p. 515 para. 2*]. The parties have to be entirely free in their decision-making and come to a mutual agreement [*Carlevaris, p. 2 para. 2; cf. NB Three v Harebell, Royal Courts of Justice (England), 13 Oct 2004; cf. Ansari 6 Researcher (2014), p. 47 para. 3; Chatterjee 20 J. Int. l. Arb. (2003), p. 539 para. 1; Rosenfeld, p. 419 para. 1*]. During the contractual negotiations, CLAIMANT and RESPONDENT took their time to agree on the final version



of the dispute resolution clause [*Exhibit R 2, p. 32 para. 6*]. In fact, the first draft of the Sales Agreement already included the asymmetrical clause [*PO No. 2, p. 47 para. 2*]. This shows, that the decision to include an asymmetrical dispute resolution clause was neither rushed nor pressured but instead mutually agreed upon between the Parties. Hence, in the present case, party autonomy must be upheld, and the Parties concluded a valid arbitration agreement by incorporating Art. 21(2) into their Sales Agreement.

B. Art. 21(2) of the Sales Agreement does not violate the Principle of Equal Treatment

- 4 The incorporation of Art. 21(2) into the Sales Agreement does not violate the principle of equal treatment as set out in Art. 18 Model Law. According to the Arbitration Agreement, the applicable institutional rules are the London Court of International Arbitration Rules 2014 [*hereafter: "LCIA Rules"; Exhibit C 2, p. 13 Art. 21(2)*]. Pursuant to Art. 16(4) LCIA Rules, the law applicable to an arbitration agreement shall be the law applicable at the seat of the arbitration. The Parties agreed that the seat of arbitration is Vindobona, Danubia [*Exhibit C 2, p. 13 Art. 21(2)*]. The applicable procedural law in Danubia is the Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*hereafter: "Model Law"; PO No. 1, p. 46 para. 4*]. Thus, both the LCIA Rules and the Model Law are the law applicable to the present case. According to Art. 18 Model Law, "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case*" when exercising their party autonomy. This principle, however, does not apply to the conclusion of an arbitration agreement [I]. Even if the principle of equal treatment were applicable prior to the initiation of the arbitral proceedings, the Arbitration Agreement concluded by the Parties would be in accordance with it [II]. The Arbitration Agreement does not deprive RESPONDENT of its access to justice [III].

I. The Principle of Equal Treatment Does Not Apply to the Conclusion of an Arbitration Agreement

- 5 The principle of equal treatment does not apply to the Arbitration Agreement. First, this principle is generally only applicable after arbitral proceedings have been initiated.
- 6 The principle of equal treatment is a procedural right, which only applies after the initiation of the arbitral proceedings. Art. 18 Model Law lays down the fundamental requirements to achieve procedural justice and requires similar standards to all parties throughout the arbitral process [*Model Law Digest, p. 97, para. 5*]. In this context, "arbitral process" means "*from notice of the arbitration [...]*"



to making of the award” [Born, p. 2173 para. 3]. Hence, the expression “arbitral process” does not entail the formation of the arbitration agreement.

- 7 This is also supported by the fact that Art. 18 Model Law is contained in chapter five of the Model Law. This chapter provides the legal framework for fair and effective arbitral proceedings [Model Law Digest, p. 97 para. 1], as, for example, the language to be used in the proceedings (Art. 22 Model Law) or the conduct of the oral hearings (Art. 24 Model Law). This shows that the principle of equal treatment as set out in Art. 18 Model Law only applies during the arbitral proceedings, *i.e. after the* initiation of the process.

II. Even if the Principle of Equal Treatment Applied Before the Proceedings, the Arbitration Agreement Would Comply with It

- 8 Even if the principle of equal treatment were applicable prior to the initiation of the arbitral process, it would not be violated by the Arbitration Agreement concluded by the Parties. The Siemens-Dutco decision relied on by RESPONDENT deems the principle of equal treatment to be applicable even before a dispute has arisen [1]. However, this decision cannot be applied to the present case [2].

1. The Siemens-Dutco Decision Deems the Principle of Equal Treatment Applicable Before a Dispute Has Arisen Between the Parties

- 9 In its Response to the Request for Arbitration, RESPONDENT referred to a case of the French Supreme Court, the “Siemens-Dutco decision” [Cour de Cassation (France), 7 January 1992; *Dehvolvé 9 ArbIntl (1993)*, p. 198 para. 2]. In that case, the court held that the principle of equal treatment is a procedural principle which can only be waived *after* the dispute has arisen [*ibid.*]. *E contrario*, the principle of equal treatment cannot be waived *before* the dispute has arisen. This reasoning, however, can be understood to mean that the principle of equal treatment is applicable prior to the dispute.
- 10 In contrast to the Siemens-Dutco decision, the question in the present case is whether the principle of equal treatment governs the conclusion of the Arbitration Agreement (as opposed to the appointment of the arbitrators). Pursuant to Art. 1.4 LCIA Rules, the arbitration commences on the date the Registrar receives the request for arbitration. With the Parties agreeing upon the Arbitration Agreement on 22 May 2014 [Exhibit C 2, p. 13] and CLAIMANT initiating the proceedings on 31 July 2019 [Letter by Langweiler (31 July 2019), p. 3], there is a timeframe of five whole years between these events. Therefore, the Siemens-Dutco decision indeed demands the observation of equal treatment requests, but at another stage of the dispute, *i.e.* after the initiation of the proceedings. In the present case, by contrast, it is the point in time of the Sales Agreement



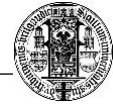
negotiations long before the start of the proceedings, which is at issue. Thus, the Siemens-Dutco case is not comparable and does not govern the present case. Hence, the Siemens-Dutco decision does not contradict the conclusion that the principle of equal treatment only applies after the initiation of the proceedings.

2. The Case at Hand Is Different to the Case of the Siemens-Dutco Decision

- 11 The present case is different from the one in the Siemens-Dutco decision, and it, therefore, cannot be consulted as persuasive authority. The principle of equal treatment must be applied with care and is therefore only violated in exceptional circumstances [*Born*, p. 2173 para. 4; *High Court (Hongkong)*, 13-15 January, 10 February 2009; *Constitutional Court (South Africa)*, 20 March 2009; *Provincial High Court (Spain)*, 27 June 2006; *Supreme Commercial Court (Russia)*, 20 July 2010; *Court of Appeal Bialystok (Poland)*, 9 May 2011]. However, in the present no such exceptional circumstances occurred, as the Parties negotiated at eye-level [a] and the Arbitration Agreement was part of a trade-off during the negotiations [b].

a) The Parties' Negotiations were held at Arms-Length

- 12 The Parties negotiations were held at arms-length. In such cases it appears doubtful that they “require the be protected by public policy when they decide to waive their right to strict equality [...] before the dispute has arisen” [*Kröll, Siemens-Dutco Revisited para. 11*]. This is due to the fact that, unlike consumers, commercially experienced businesses are capable of protecting their interests on their own [*Born*, p. 2152 paras. 3-4; *Draguiev 31 Jour Int Arb (2014)*, 19, 31; *Stipanovich 2010 Univ. Ill. Law Rev. (2010)*, p. 53 para. 1; cf. *Drabozal 3 Ill. L. Rev. (2003)*, p. 697]. CLAIMANT is a market leader in constructing pump hydro power plants with an annual turnover of US\$ 4.3 billion [*Request for Arbitration*, p. 4 paras. 1 et seq; *PO No. 2*, p. 47 para. 1]. RESPONDENT is a world-renowned producer of turbines and has a profit margin of US\$ 180 million per year [*ibid.*]. These amounts show that both Parties conduct business on a daily basis and are therefore commercially experienced.
- 13 This is not contradicted by the fact that when comparing the annual turnovers of the Parties, CLAIMANT's has a superior market position. A violation of the principle of equal treatment can also occur if one party has superior negotiating power which forces the other party to accept a disadvantageous agreement [cf. *Harding Utah L. Rev. (1999)*, p. 862 et seq; cf. *Nesbitt/Quinlan 22 IntLArb (2006)*, p. 134 para. 4; cf. *Park 15 B. U. Int'l. L. J. (1997)*, p. 193 para. 3]. In the case at hand, however, RESPONDENT has a strong negotiating position. It was a requirement of the tender process of Greenacre that Respondent's highly specialised R-27V Francis Turbines would be



installed into the hydro power plant in Greenacre. [*Request for Arbitration*, p. 5 para. 5]. Hence, RESPONDENT had a very strong negotiating position compensating for CLAIMANT's market power. Therefore, it is negligible with regard to the Parties' negotiating position. Thus, the negotiations were held at arm's length.

b) The Arbitration Agreement Is Part of a Trade-off

- 14 The Arbitration Agreement is part of a trade-off concluded with RESPONDENT. The equal treatment of the parties is ensured as long as no party is given any advantage over the other [*Binder*, p. 331 para. 4; cf. *Valens v Hopkins*, *Supreme Court (New York County USA)*, 7 January 2010]. When drafting the Sales Agreement, each party was able to introduce its preferred contractual clauses in exchange for the other party doing the same [*Exhibit R 2*, p. 32 para. 6]. While CLAIMANT acquired the right to refer any dispute arising out of the Sales Agreement to arbitration and to demand liquidated damages [cf. *Exhibit C 2*, p. 12 et seq. Art. 19(1),(2), Art. 21(2)], RESPONDENT was able to secure the inclusion of both an entire agreement clause and an overall limitation of damages to US\$ 20 million [cf. *Exhibit C 2*, p. 13 Art. 19(6), Art. 22(2)]. The limitation of damages, in particular, is highly valuable to RESPONDENT, as its economic survival could be threatened in case of a major breakdown of the plant [*Exhibit R 2*, p. 32 para. 6]. RESPONDENT even stated that it “*accepted the one-sided dispute resolution clause [...] in return for [...] the limitation of liability and the inclusion of an entire agreement clause and the limitation of damages*” [*ibid.*]. Hence, the asymmetrical Arbitration Agreement is part of a trade-off concluded with RESPONDENT.
- 15 In conclusion, the Siemens-Dutco decision does not hold any persuasive authority for the case at hand.

III. The Arbitration Agreement Does Not Deprive RESPONDENT of Its Access to Justice

- 16 The Arbitration Agreement does not deprive RESPONDENT of its access to justice. An arbitration agreement is invalid if it deprives a party of accessing justice [cf. *Russkaya v Sony Ericsson*, *Supreme Arbitration Court (Russia)*, 19 June 2012; cf. *Miller 51 Tex. Int'l. L. J. (2016)*, p. 332 para. 2]. Access to justice is guaranteed as long as the parties are able to present their case in front of a judicial institution, regardless of whether it is a state court or a tribunal [*Kudrna N.Y.U. J. Int'l L. & Pol. (2013)*, p. 4 para. 4; *Schetzler et al.*, p. 7 para. 2; *UNDP Practice Note*, p. 6 para. 1]. Under the Parties' agreement, arbitration is not the only way of resolving disputes. According to Art. 21(1) of the Sales Agreement, “[*t*]he courts in Mediterraneo have exclusive jurisdiction [...] subject to the BUYER's right to go to arbitration“ Thus, even though the Parties concluded an Arbitration Agreement that only granted CLAIMANT the right to initiate arbitral proceedings, RESPONDENT still had the possibility



of referring any dispute to the courts in Mediterraneo. Consequently, RESPONDENT was not deprived of its access to justice by the Arbitration Agreement.

- 17 **Conclusion of the First Issue:** The Parties concluded an Arbitration Agreement on their own volition. Neither the circumstances the agreement was concluded under nor the adherence to the principle of equal treatment raise any doubt with regards to the validity of the Arbitration Agreement. Thus, the Arbitral Tribunal is respectfully requested to decide that the Arbitration Agreement is valid and that it, therefore, has jurisdiction to hear the case.



SECOND ISSUE: PROF. JOHN SHOULD BE EXCLUDED FROM THE ARBITRAL PROCEEDINGS

- 1 In July 2019, CLAIMANT nominated Ms Burdin as arbitrator [*Letter by Langweiler, 31 Jul 2019, p. 3 para. 4*]. Four weeks later, RESPONDENT retained Prof. John as its expert witness [*Response to Request for Arbitration, p. 28 para. 20; Exhibit R 2, p. 32 para. 8*]. His report would analyse the likelihood of corrosion of the turbines if they were affected by inferior steel [*Letter by Fasttrack, 30 Aug 2019, p. 29 para. 20*]. It would further establish the comparability of the corrosion of the turbines used at the Riverhead Tidal Power Plant with the ones in the present case [*ibid.*]. However, several circumstances relating to Prof. John give rise to justifiable doubts as to his impartiality. Further, Prof. John's participation could lead to CLAIMANT being deprived of its right to nominate an arbitrator, as Ms Burdin could resign. This situation is so severe and consequential that CLAIMANT respectfully requests the Tribunal to remove Prof. John from the arbitral proceedings to guarantee a fair process and decision of the dispute at hand.
- 2 The Tribunal has the power to exclude Prof. John from the arbitral proceedings. Pursuant to Art. 20(3) LCIA Rules the Arbitral Tribunal “*may [...] refuse or limit the written and oral testimony of [...] expert witnesses*”. Expert witnesses provide opinions and reasoning underlying the opinions about evidence otherwise before the tribunal [*Born, p. 931; Redfern/Hunter, p. 394*]. RESPONDENT retained Prof. John to give an expert opinion on the likelihood of corrosion leading to the need to replace the turbines and the comparability of the Riverhead Tidal Power Plant incident to the one in question. Prof. John, therefore, is an expert witness. Accordingly, the Tribunal has the power to refuse Prof. John's testimony and exclude him under Art. 20(3) LCIA Rules.
- 3 The LCIA Rules do not prescribe any criteria or standards when the exclusion of a party-appointed expert is admissible or necessary. Arbitral tribunals have the power to fill procedural gaps in institutional rules [*Green Tree v. Bazzle; Born, p. 2145; Webb, Florida A & M Univ. Law Review (2019), p. 127*]. To fill this regulatory gap within the LCIA Rules, several options are available. On the one hand, the IBA Rules on the Taking of Evidence and the CIarb Protocol on Party-Appointed Experts can be applied in order to augment Art. 20(3) LCIA Rules. Under this standard, the Arbitral Tribunal should exclude Prof. John due to his lack of impartiality **[A]**. Alternatively, Art. 18(4) LCIA Rules can be used to supplement the lack of criteria in Art. 20(3) LCIA Rules. This would require Prof. John to be removed from the proceedings since he could compromise the composition of the Arbitral Tribunal **[B]**. In any case, the exclusion of Prof. John would not violate RESPONDENT's right to present its case as set out in Art. 18 Model Law **[C]**.



A. The Tribunal Should Exclude Prof. John Because He is not Impartial

- 4 The Tribunal should exclude Prof. John under Art. 20(3) LCIA Rules as he is not impartial. First, party-appointed experts must be impartial [I]. Second, there is the appearance of partiality on the part of Prof. John [II].

I. Party-Appointed Experts Must Be Impartial

- 5 Party-appointed experts must be independent and impartial. The LCIA Rules do not explicitly deal with party-appointed experts and do not stipulate if they need to be impartial. However, the Tribunal may, under Art. 22(1)(vi) LCIA Rules, “decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any [...] expert opinion”. “Other rules” in the sense of Art. 22(1)(vi) LCIA Rules can be soft law such as the IBA Rules on the Taking of Evidence (hereafter “IBA Rules”) [Pilokv, *CIarb Journal* (2014), Issue 2, p. 147; Kubalczyk, *GroJIL* (3)1 (2015), p. 93 et seq.; Redfern/Hunter, p. 228]. The IBA Rules are not directly applicable but are generally recognised and considered “best practice” in international arbitration [Welser/de Berti, *Ch. II*, p. 80; Heilbron/Reichert, *Ch. 13*, p. 209; Harris, *13 Int. A.L.R.* (2010), p. 215; Müller/Besson/Rigozzi-Nessi, p. 82 et seq.]. Furthermore, the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (hereafter “CIArb Protocol”) aims at supplementing the IBA Rules by providing the most elaborate rules on the use of party-appointed experts and is therefore also considered to be best practice in this matter [Samaras/Strasser, *SchiedsVZ* (2017), p. 317 et seq.; Jones, *24 ArbIntl* (2008), p. 141 et seq.]. Hence, the Tribunal should take them into consideration when deciding on the admissibility, relevance or weight of any expert opinion.
- 6 Both sets of rules set a clear standard concerning the impartiality and independence of party-appointed experts. Pursuant to Art. 5(2)(c) of the IBA Rules, a party-appointed expert’s report “shall contain a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal”. Independence in this context also encompasses impartiality as these two terms are generally used interchangeably [Lew/Mistelis/Kröll, p. 257; Burianski/Lang, *SchiedsVZ* (2017), p. 275; Polkinghorne/Gonin, *5 Disp. Resol. Int’l* 163 (2011), p. 165]. According to Art. 4(1) CIArb Protocol, an “expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party”. Accordingly, party-appointed experts are required to be impartial and independent.



II. Prof. John Is Not Impartial

- 7 Prof. John does not meet the requirement of impartiality. The CIArb Protocol and the IBA Rules do not provide further specification to determine when experts cannot be considered impartial anymore. However, tribunal-appointed experts are considered partial when there are justifiable doubts as to their impartiality [*BGH (Germany)*, 2 May 2017; *Kärcher, SchiedsVZ (2017)*, p. 282]. This standard also applies to party-appointed experts. The 2010 IBA Rules stress that both, party-appointed and tribunal-appointed experts, are subject to the same standard of quality, accuracy and independence, thereby aligning the requirements for both types of expert [*Sachs/Schmidt-Abrendts*, 13 *Int. A. L. R. (2010)*, p. 218; *Waincymer, Int. Arb. 2012*, p. 941]. Therefore, party-appointed experts, like tribunal-appointed experts, can be considered not impartial when justifiable doubts as to the impartiality exist. In the present case, numerous facts concerning Prof. John give rise to the possibility of him being biased.
- 8 First, Prof. John and RESPONDENT share a long and close relationship. They have had business relations for more than 15 years [*PO No. 2*, p. 49 *et seq. para. 17*]. This connection has led, *inter alia*, to Prof. John appearing as a guest of RESPONDENT at the Hydro Energy fair in August 2013 [*Exhibit R 1*, p. 30 *para. 3*]. At this fair, Prof. John praised the turbine of his host, RESPONDENT, which also happens to be the turbine in the dispute at hand [*ibid.*]. He further compared RESPONDENT's turbine with its direct competitor and explained why the 10% higher price of RESPONDENT's model was justified [*ibid.*]. The close business relationship of Prof. John and RESPONDENT brings his impartiality into question.
- 9 Second, the close relationship Prof. John and two managers of RESPONDENT share raises justifiable doubts whether Prof. John will objectively assess the matter. Two of Prof. John's former assistants were hired by RESPONDENT on account of their joint work with Prof. John as experts in an arbitration [*PO No. 2*, p. 49 *et seq. para. 17*]. These former assistants are now managers of RESPONDENT directly below the board of directors [*ibid.*]. This relationship led to Prof. John being invited as guest to the presentation of RESPONDENT's new turbines at the Hydro Energy fair [*Exhibit R1*, p. 30 *para. 3*]. This personal relationship between Prof. John and RESPONDENT raises doubts whether he will assess the question at hand objectively.
- 10 Third, the relationship of Prof. John with RESPONDENT is so close that he will not undermine the arguments brought forward by RESPONDENT. RESPONDENT's CEO, Mr Fourneyron asserted the likelihood for the necessity of turbine replacement at 5% in December 2018 [*Exhibit C 7*, p. 21 *para. 4*]. It has turned out that this claim was not scientifically supported but originates from a first estimation made by Prof. John during a break in November 2018 [*PO No. 2*, p. 49 *para. 15*].



Regardless of the lack of scientific testing and support for this hypothesis, RESPONDENT has confidently referred to it as fact in late August 2019 and stated that the report of Prof. John *will* confirm it [*Response to Request for Arbitration*, p. 32 para. 8]. Prof. John, however, was only retained by RESPONDENT on 20 August 2019 [*PO No. 2*, p. 49 para. 15]. RESPONDENT also provided Prof. John with the Parties' communication [*PO No. 2*, p. 49 para. 16], making him aware that confirming anything else than the 5 % chance would significantly undermine RESPONDENT's position.

- 11 Fourth, Prof. John could submit a biased report in order to protect his reputation. The reputation of Prof. John depends on the performance of RESPONDENT's turbines. In the past, Prof. John has advocated the new generation of turbines, predominantly RESPONDENT's R-27V Francis Turbine [*Exhibit R 1*, p. 30 para. 3]. He argued for a reduction of insurance fees for standstills of new generation turbines due to their improved performance [*PO No. 2*, p. 49 para. 14]. A reduction of insurance fees appears untenable now, considering the fraud discovered at Trusted Quality Steel and its consequences, *e.g.* the significant downtime of the Riverhead Tidal Power Plant [*Exhibit C 3*, p. 14 para. 5; *PO No. 2*, p. 50 para. 21]. If the Tribunal ordered RESPONDENT to deliver substitute turbines for the Greenacre Power Plant, a second incident of RESPONDENT's turbines being defective would become public. An accumulation of incidents like this could taint Prof. John's reputation as a reliable authority on turbines. Prof. John with his expert report, however, has the opportunity to persuade the Arbitral Tribunal that the turbines in Greenacre do not need to be replaced. In order to protect his reputation, Prof. John might try to portray his past statements as accurate and reliable. Therefore, the prior advocacy of Prof. John calls his impartiality into doubt, because he could act in a manner that preserves his reputation as an expert on turbines. Hence, Prof. John could submit a biased report in order to protect his reputation.
- 12 Considering these facts, a fair-minded and informed observer would identify justifiable doubts. Therefore, Prof. John does not meet the requirement of impartiality set out in Art. 5(2)(c) IBA Rules and Art. 4(1) CIArb Protocol. Accordingly, the Tribunal should and is respectfully requested to exclude Prof. John from the arbitral proceedings.

B. The Tribunal Should Exclude Prof. John as He Could Compromise the Composition of the Tribunal

- 13 Prof. John should be excluded under Art. 20(3) LCIA Rules because his participation in the arbitral proceedings poses the risk that the composition of the tribunal could be compromised. First, the Tribunal can exclude a party-appointed expert under Art. 20(3) LCIA Rules in the cases outlined in Art. 18(4) LCIA Rules for the exclusion of legal representatives [I]. Second, the composition of



the Tribunal could be compromised because Prof. John taking part in the proceedings could lead Ms Burdin, one of the arbitrators, to resign [II].

I. The Tribunal Can Exclude Party-Appointed Experts in the Cases Outlined by Art.

18(4) LCIA Rules

- 14 The standard of Art. 18(4) LCIA Rules, which applies to legal representatives, can be used to supplement Art. 20(3) LCIA Rules. Pursuant to Art. 18(4) LCIA Rules, the “*Arbitral Tribunal may withhold approval of any intended change or addition to a party’s legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award*”. Experts, like lawyers, are appointed, instructed and often paid by one party, and almost exclusively have contact with their party [*cf. Burianski/Lang, SchiedsVZ (2017), p. 273; Nappert/Fortese, p. 839 et seq.; Kantor, 26 ArbIntl. (2010), p. 334 para. 1; Jones, p. 803*]. This results in party-appointed experts serving as an extension of the legal team [*Hayes, Ch. 11 p. 279; Nappert/Fortese, p. 84*]. Accordingly, the situation of party-appointed experts is comparable to legal representatives. Thus, experts can compromise the composition of the tribunal in the same way as legal representatives can when they have a conflict of interest with one of the arbitrators for example [*World Duty Free v. Republic of Kenya; Smiley, 85 Arbitration 2019, p. 367; Burianski/Lang, SchiedsVZ (2017), p. 271; MüKo-ZPO-Münch, § 1036 para. 33*]. Hence, the participation of an expert can compromise the composition of the tribunal in the same way as the participation of a legal representative.

II. The Composition of the Tribunal Could Be Compromised by Prof. John

- 15 Prof. John participating in the proceedings could compromise the composition of the Tribunal. The composition of the tribunal could be compromised when there is the possibility of an arbitrator resigning and thereby his appointment being revoked [*cf. King, p. 62*]. Pursuant to Art. 10(1) LCIA Rules, the LCIA Court may revoke any arbitrator’s appointment in the case of a successful challenge or when an arbitrator wishes to resign.
- 16 Ms Burdin, one of the arbitrators, could resign as a result of RESPONDENT’s undue pressure. RESPONDENT opposes Ms Burdin’s wide legal opinion on Art. 35 CISG as this could harm its case [*Letter by Fasttrack, p. 42 para. 6*]. RESPONDENT has twice iterated that it has doubts about Ms Burdin’s impartiality [*PO No. 2, p. 48 para. 12; Letter by Fasttrack, p. 42 para. 5*]. There is an ongoing patent claim lawsuit between Prof. John and the husband of Ms Burdin [*Letter by Ms Burdin, 21 Sep 2019, p. 40 para. 3; PO No. 2, p. 48 para. 10*]. RESPONDENT’s management knew about this ongoing dispute as Prof. John had mentioned the dispute to one of his former assistants who now works for RESPONDENT [*PO No. 2, p. 48 et. seq., para. 13*]. When RESPONDENT announced



Prof. John as his expert witness, Ms Burdin did not hesitate to inform the Tribunal and the Parties about this potential conflict [*Letter by Ms Burdin, 21 Sep 2019, p. 40 para. 3*]. RESPONDENT took Ms Burdin's disclosure as the reason to state that this justified scrutinising her. RESPONDENT declared that it would keep a close eye on her to check whether she is affected by this connection, and even went to the length of attempting to retain the right to challenge Ms Burdin beyond the expiration of the deadline of 14 days pursuant to Art. 10(3) LCIA Rules [*PO No. 2, p. 48 para. 12*]. However, a challenge after the deadline has expired is improper [*cf. Technostroyexport v. Int'l Development & Trade Services; Shipping of India v T.T.M.I of England*]. RESPONDENT's effort to retain its right to challenge Ms Burdin, therefore, has no legal merit. It does, however, put pressure on Ms Burdin who has shown that she takes transparency seriously [*cf. Letter by Ms Burdin, 21 September 2019, p. 40*], and the integrity of the proceedings very. Hence, if Prof. John participates in the proceedings, Ms Burdin might feel compelled and pressured to protect the integrity of the proceedings by resigning as there is no other legal remedy available to resolve the situation.

- 17 If Ms Burdin requested to the LCIA Court to resign, this would lead to the Court revoking her appointment as arbitrator. The composition of the Tribunal would be compromised. Therefore, Prof. John taking part in the proceedings could lead to the composition of the Tribunal being compromised.

C. Respondent Is Not Deprived of Its Right to Present Case

- 18 The exclusion of Prof. John would not violate RESPONDENT's right to present its case as set out in Art. 18 Model Law. The right to present its case of Art. 18 Model Law is not absolute [*Holtzmann/Neubaus, Art. 18, p. 551 et seq.; A/CN.9/264, Art. 19, para. 8; Model Law Case Digest 2012, p. 97 et seq.*]. A party has only been deprived of the opportunity to present its case under Art. 18 Model Law when a reasonable party in the applicant's position would not have foreseen the reasoning of the tribunal which allegedly deprives it of its right to present its case [*Model Law Case Digest 2012, p. 98; Acorn Farms v. Schnuriger; Rotoaira Forest Trust v. Attorney-General*]. The exclusion of Prof. John, if ordered by the Tribunal, is foreseeable for RESPONDENT. The Tribunal has given both Parties time to respond to the matter after CLAIMANT's request for exclusion of the expert and express its legal opinion; an exclusion is foreseeable for RESPONDENT [*PO No. 1, p. 45 para. 2*]. Hence, the exclusion of Prof. John is foreseeable, and RESPONDENT is not deprived of its right to present its case.
- 19 In any case, RESPONDENT would maintain its possibility and opportunity to convince the Tribunal of a different opinion. There are other experts equally qualified as Prof. John to provide expert evidence for RESPONDENT [*PO No. 2 p. 49 para. 17*]. RESPONDENT could retain one of them in the



case of Prof. John being excluded and therefore maintain its opportunity to convince the Tribunal of its position. Therefore, the exclusion of Prof. John would still leave RESPONDENT in a position in which it could submit expert evidence and present its case to the Tribunal.

- 20** In conclusion, the exclusion of RESPONDENT's expert Prof. John would not infringe on RESPONDENT's right to present its case.

Conclusion of the Second Issue: Prof. John is required to be impartial, and there are justifiable doubts as to his impartiality. Next to that, Prof. John's participating in the proceedings compromises the composition of the Tribunal. Therefore, Prof. John taking part in the proceedings is a grave complication for and obstacle to a fair, speedy and fair judgment of the case. For these reasons, CLAIMANT respectfully requests the Tribunal to exclude Prof. John under Art. 20(3) LCIA Rules.



THIRD ISSUE: RESPONDENT BREACHED THE CONTRACT BY DELIVERING TURBINES WHICH ARE NON-CONFORMING

- 18 In January 2014, CLAIMANT participated in a tender process for the construction of a hydro power plant in the city of Greenacre [*Request for Arbitration*, p. 5, para. 5]. RESPONDENT had just launched its new Francis Turbine R-27V [*Exhibit C 1*, p. 10 para. 2] which seemed to be the ideal turbine for the power plant [*ibid*]. After the construction of the plant, however, it turned out that RESPONDENT had received steel of inferior quality from its main supplier [*Exhibit C 3*, p. 14 para. 2 et seq.]. Subsequently, Greenacre threatened to terminate the contract with CLAIMANT on the basis that the turbines installed in the Greenacre power plant potentially contained such steel of inferior quality [*Request for Arbitration*, p. 7 para. 15; *Exhibit C 6*, p. 18 para. 2].
- 19 This suspicion renders the turbines non-conforming according to Art. 35(2)(b) of the Convention of International Sale of Goods [*hereafter* “CISG”]. Pursuant to that provision, goods do not conform with the contract unless they are fit for any particular purpose made known to the seller at the time of the conclusion of the contract. The turbines were intended to reliably produce energy so that Greenacre could ensure a consistent supply of renewable energy [A]. The reasonable risk that the steel of inferior quality was used in the manufacture of the turbines makes them not fit for this particular purpose [B]. The defect existed at the time of the passing of the risk according to Art. 36 CISG [C].

A. The Turbines Were Intended to Reliably Produce Energy

- 20 The particular purpose of the turbines was to use them for a reliable supply of renewable energy in Greenacre. This purpose is clear from the provisions of the Sales Agreement [I]. Such an interpretation is not precluded by the entire agreement clause contained in Art. 22(2) of the Sales Agreement [II].

I. The Sales Agreement Defines the Turbines’ Reliable Energy Production as Their Particular Purpose

- 21 The turbines were intended to reliably produce energy so that Greenacre could ensure a consistent supply of renewable energy as set out in the Sales Agreement. This is clear from a literal interpretation of the provisions of the Sales Agreement in accordance with Art. 8(2) CISG. Pursuant to Art. 8(2) CISG statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. The Sales Agreement depends on CLAIMANT’s contract with Greenacre [1]. The requirements regarding the performance as set out by Greenacre [2] were



incorporated into the Sales Agreement [3].

1. The Sales Agreement Is Dependent on CLAIMANT's Contract with Greenacre

- 22 The Sales Agreement is linked to CLAIMANT's contract with Greenacre. This is displayed by the provisions of the Sales Agreement. CLAIMANT approached RESPONDENT for the purchase of turbines in order to install them into the Greenacre power plant [*Response to Request for Arbitration, p. 26 para. 2 et seq.*]. In the Sales Agreement, Art. 2(1)(b) and Art. 3(1)(b) oblige RESPONDENT to deliver the turbines and CLAIMANT to pay the purchase price "in case the tender is awarded" [*Exhibit C 2, p. 11 et seq. Art. 2(1)(b), Art. 3(1)(b)*]. Hence, the main contractual obligations of the Parties are conditional upon CLAIMANT's successful participation in the tender process. In addition to that, Art. 2(1)(a) of the Sales Agreement even stipulates that RESPONDENT shall "support" CLAIMANT in its participation in the Greenacre tender process [*Exhibit C 2, p. 11, Art. 2(1)(a)*]. Therefore, a reasonable person in the position of RESPONDENT would have concluded that the Sales Agreement between CLAIMANT and RESPONDENT merely exists because CLAIMANT was awarded the tender by Greenacre. Hence, the Sales Agreement and the contract between Greenacre and CLAIMANT are interdependent.

2. The Tender Sets Out the Performance Required by the Contract between Greenacre and CLAIMANT with Regards to the Green Energy Strategy of Greenacre

- 23 The tender sets out the turbines' performance required under the contract between Greenacre and CLAIMANT to fulfil their green energy strategy. Greenacre's objective was to gain independence of their community's energy supply from carbon-based energy [*Request for Arbitration, p. 5 para. 4*]. In order to do so, Greenacre needed a hydro power plant, which could "guarantee a consistent power supply" of green energy as otherwise the energy supply had to be substituted with carbon-based energy [*Request for Arbitration, p. 5 para. 4 et seq. emph. add.; Exhibit C 1, p. 10 para. 2*]. This could only be achieved by restricting the standstill of the plant during inspections to the vacation time in Greenacre from September to October. As the other renewable energy sources are usually sufficient to supply enough energy during this time, downtimes of the plant were only permissible during these two months [*Request for Arbitration, p. 5 para. 7, p. 6 para. 8 et seq.; Response to Request for Arbitration, p. 27 para. 11*]. Thus, the plant had to perform from November to August. *i.e.* for at least ten months per year. In conclusion, the objective of the green energy strategy was to guarantee a consistent energy supply by commissioning a plant which performed reliably.



3. The Requirements Set out in the Greenacre Tender Have Been Incorporated into the Sales Agreement

24 The requirements regarding the performance of the plant as set out by the tender were incorporated into the Sales Agreement between CLAIMANT and RESPONDENT. According to Art. 8(3) CISG due consideration is to be given to all relevant circumstances of the case including the negotiations of the parties. A reasonable person would have concluded from both the precontractual circumstances [a] and the terms of the Sales Agreement [b] that the performance requirements of the tender were to be incorporated into the Sales Agreement.

a) The Precontractual Circumstances Display that CLAIMANT Intended to Incorporate the Requirements of Tender into the Sales Agreement

25 During the negotiations of the Parties, it became apparent that the requirements regarding the performance of the power plant as set out by the tender should be included into the Sales Agreement. CLAIMANT made clear to RESPONDENT that it had selected RESPONDENT as its supplier of the turbines due to the specific features of its Francis Turbine, such as the longer inspection and maintenance intervals [*Exhibit R 2, p. 31, para. 2*]. While negotiating, the Parties also extensively discussed Greenacre's green energy strategy [*Exhibit R 2, p. 31, paras. 2, 5*]. In fact, CLAIMANT even provided RESPONDENT with the original tender documents for the Greenacre project [*Exhibit R 2, p. 31, paras. 2, 5; Exhibit C 2, p. 10, para. 3*] and a model contract that emphasised the commitment to reduce “*downtimes to the absolute minimum*” in its preamble [*Exhibit R 2, p. 31, para. 4*]. Additionally, the Greenacre project was also broadly covered by media, which RESPONDENT was very pleased about [*Response to Request for Arbitration, p. 26 et. seq. para. 4*]. Taking into account these circumstances, a reasonable person in the position of RESPONDENT would have recognised the Sales Agreement's connection to the Greenacre project and its prerequisites at several points during the formation of the Contract between the Parties.

b) According to the Understanding of a Reasonable Person the Requirements of the Tender Are Incorporated into the Sales Agreement

26 A reasonable person in the same circumstances as RESPONDENT would have concluded that the Sales Agreement includes the prerequisites set out in the Greenacre tender. The Parties incorporated a preamble that sets out the underlying objectives [*Exhibit C 2, p. 11 recital 1 7*]. The preamble is of particular importance when interpreting the contract [*Schlechtriem/Schwenzler-Schmidt-Kessel, Art. 8 para. 29*]. Recital five refers to Greenacre's objective “*to minimise the risk of having to rely on energy produced by non-renewable sources*” [*ibid., recital 5*]. As this objective is explicitly referenced in

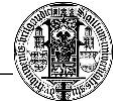


the Sales Agreement, a reasonable person would have concluded that Greenacre's objective was made one of the contractual objectives between CLAIMANT and RESPONDENT.

- 27 Further, recital seven highlights that the Francis Turbine R 27V “complies with the requirements and considerations as set out in the tender” [*ibid.*, recital 7]. These requirements are detailed in the sixth recital which states that in order to be independent from non-renewable energy the “*repair and maintenance periods should be short*” [*ibid.*, recital 6]. These periods are specified in Art. 2(1)(d) Sales Agreement stipulating that inspections of the plant shall take place during the summer vacation when other sources are sufficient to provide a carbon free energy supply [*Exhibit C 2, p. 12*]. Thus, the requirements set out in the tender match the prerequisites within the Sales Agreement.
- 28 Hence, the Greenacre tender determined the requirements regarding the performance of the turbines RESPONDENT installed in the Greenacre power plant, which have been included into the Sales Agreement. Therefore, a reasonable person would, in the light of the Sales Agreement and the tender, conclude that the particular purpose of the turbines was to reliably produce energy, so that Greenacre would not have to resort to other non-renewable energy sources.

II. The Entire Agreement Clause in Art. 22(2) of the Sales Agreement Does Not Preclude an Interpretation in Accordance with Art. 8 CISG

- 29 The entire agreement clause in Art. 22(2) of the Sales Agreement does not preclude the aforementioned interpretation. In that provision, the Parties included a so called “entire agreement clause”, which states that “*this document contains the entire agreement of the Parties*” [*Exhibit C 2, p. 13 Art. 22(2)*]. The CISG does not deal with entire agreement clauses explicitly [*CISG-AC, Op. 3 (Hyland) para. 4.5*]. Yet, it is established that extrinsic evidence can only be excluded for purposes of contract interpretation in case it is expressly stated [*ibid.*; *Schlechtriem/Schwenzer-Schmidt-Kessel, Art. 8 para. 35; Murray 8 J. Law & Comm. (1988), p. 11, 45*]. The CISG Advisory Council also refers to the UNIDROIT Principles of International Commercial Contracts [*hereafter “PICC”*] when determining how entire agreement clauses should be treated under the CISG [*CISG-AC, Op. 3 (Hyland) para. 4.2 et seq.*]. According to the comment on Art. 2.1.17 of the PICC the effect of such clauses “*is not to deprive prior statements or agreements of any relevance*” but to declare a certain document the final agreement between two parties after preceding negotiations. Art. 22(2) of the Sales Agreement does not expressly exclude Art. 8 CISG and can therefore not be understood as a preclusion of extrinsic evidence for purposes of contract interpretation. Rather, the entire agreement clause indicates the conclusion of the Parties' negotiations. Hence, Art. 22(2) of the Sales Agreement does not preclude an interpretation taking into account extrinsic evidence.



30 In conclusion, the particular purpose of the turbines was to reliably produce energy for Greenacre. The entire agreement clause in Art. 22(2) of the Sales Agreement does not exclude such an interpretation.

B. The Turbines Are Not Fit for Their Particular Purpose

31 The suspicion that steel of inferior quality was used in the manufacture of the turbines renders them unfit for their particular purpose, *i.e.* to reliably produce energy for Greenacre. It is generally accepted that a suspicion of defect can render goods non-conforming [BGH (*Germany*), 2 Mar 2005; HG Aargau (*Switzerland*), 5 Nov 2002; FS Canaris-Magnus, pp. 257, 261 et seq; Magnus, ZEuP 2006, pp. 96, 115, 116; Schwenzler/Tebel 19 Unif. L. Rev. (2014), pp. 152, 155, 156]. This is the case if the relevant market for the goods attributes a lesser value to them because of the suspicion [I]. The fact that Greenacre as the intended customer of the energy produced by CLAIMANT has threatened to terminate the contract with CLAIMANT proves that the turbines are unfit for their particular purpose [II]. Even if the Tribunal were to hold that this is not sufficient to render the turbines non-conforming, the suspicion of defect in the present case is substantial enough to make them unfit for their particular purpose [III].

I. The Fitness for the Contractual Purpose Is Determined by the Relevant Market

- 32 In case of a suspicion of defect, the fitness of the goods for their particular purpose depends on whether the relevant market considers the goods less valuable because of the suspicion.
- 33 This has been established in cases where the contractual purpose was the resaleability of goods. In the so-called frozen pork case, for example, which was decided by the German Federal Court of Justice [BGH (*Germany*), 2 Mar 2005], frozen pork, which was suspected to be contaminated with dioxin, was sold from Belgium to Germany. Due to the suspected contamination it was impossible to offer the meat for sale on the relevant market. This was due to the fact that the risk of potential contamination with dioxin was considered sufficiently high so that the market-value of the pork meat declined to zero.
- 34 This rule has also been approved in cases where the contractual purpose of the goods was not their resaleability. In the triumphal arch case of the Swiss Commercial Court in the canton of Aargau [HG Aargau (*Switzerland*), 05 Nov 2002], three triumphal arches were supplied for the particular purpose of being used as an advertisement above a racetrack. One of the triumphal arches collapsed, causing the race management to remove the other two arches. Therefore, in this case, not a market but rather the relevant client who was intended to buy the goods from the seller assessed the goods not fit for their purpose to be used as advertisement. Hence, the value of the



good can depend on a relevant client and his intent concerning the use of the goods. Thus, the fitness of the goods for their particular purpose depends on whether the relevant market considers the goods less valuable because of the suspicion.

- 35 This view is also supported by scholarly writing [*Schwenzer/Tebel 19 Unif. L. Rev. (2014), pp. 152, 155, 156*]. Therefore, the fitness of goods for their contractual purpose is determined by the valuation of the relevant market.

II. Greenacre Considers the Turbines Supplied by CLAIMANT Less Valuable Due to the Suspicion Which Is why They Are Unfit for Their Particular Purpose

- 36 Since Greenacre considers the turbines supplied by CLAIMANT less valuable because of the suspicion, the turbines are unfit for their particular purpose. Unlike the frozen pork in the case cited above, the purpose of the turbines in the present case is not to be resold, but to produce energy for the benefit of Greenacre [*Request for Arbitration, p. 5 para. 5*]. For this reason, it is not the value of the turbines on the resale market which is decisive in determining the conformity of the goods, but rather their value to Greenacre as the ultimate recipient of the energy produced by the turbines. Greenacre, however, is deeply troubled by the news that the turbines might be made of inferior quality steel, so much so that they have threatened to exercise their right to terminate the contract with CLAIMANT for cause [*Request for Arbitration, p. 7 para. 15; Exhibit C 6, p. 18 para. 2*]. This shows that the suspicion of defect, in the eyes of Greenacre, renders the turbines valueless. Therefore, the suspicion that inferior steel was used in the turbines renders them unfit for their contractual purpose to reliably produce energy for Greenacre.

III. Even if a Stricter Standard Was Applied, the Suspicion of Defect Would still Be Substantial Enough to Render the Turbines Not Fit for their Purpose

- 37 Even if the tribunal were to hold that this is not sufficient to render the turbines non-conforming, the suspicion of defect in the present case is substantial enough to make them unfit for their particular purpose. Some scholars require that, in order for a suspicion to render goods non-conforming, the suspicion has to be based on concrete facts and has to lead to severe consequences in case it is verified [*FS Canaris-Magnus, p. 257, 262 et seq.; FG Bern-Koller/Jost, p. 35, 45-48; Magnus, ZEuP 2006, pp. 96, 115, 116*]. Further, the seller has to be unable to dispel the suspicion [*FS Picker-Faust, p. 185, 196; Magnus, ZEuP 2006, pp. 96, 115, 116*]. In the present case, the suspicion of inferior steel quality is based on concrete facts [1] and would lead to severe consequences if it is confirmed [2]. Further, RESPONDENT cannot dispel the suspicion [3].



1. The Suspicion Is Based on Concrete Facts

- 38 The suspicion of inferior steel quality is based on concrete facts. Concrete indicators justify a suspicion rendering the defect reasonably probable [*FG Bern–Koller/Jost*, p. 35, 45].
- 39 First, it is certain that Trusted Quality Steel as RESPONDENT’s main supplier delivered steel to its customers with forged documentation concerning the quality control of the steel [*Exhibit C 3*, p. 14 para. 2, 6]. Therefore, there is a significant risk that steel from Trusted Quality Steel has been used in the production of the turbines delivered to CLAIMANT. It is not yet finally determined whether the steel used in the delivered turbines is of inferior quality, but the probability of findings of unusual corrosion and cavitation damage of the turbines is 75 % [*PO No. 2*, p. 55 Appendix, Table 10, Scenarios 3-5; p. 52 para. 35]. The corrosion and cavitation resistance of the turbines is conditioned by the composition of the steel used and the allocation of the blades in the turbines [*Response to Request for Arbitration*, p. 26 para. 3; *Request for Arbitration*, p. 8 para. 23; *Exhibit R 1*, p. 30 para. 3]. Due to this connection a reasonable person in terms of Art. 8(2) CISG would conclude that the probability of the steel being of inferior quality is closely related to the probability of findings of corrosion on the blades. Therefore, it is reasonably probable that the suspected defect actually exists.
- 40 Second, the suspicion is justified, since RESPONDENT as the supplier in the case at hand, delivered defective turbines of the same type to another power plant. In the aforementioned triumphal arches case, the court found the fact that one arch was defective sufficient to justify the suspicion that the two other arches of the same type were defective as well [*HG Aargau (Switzerland)*, 5 Nov 2002]. This was based on the fact that they were produced by the same supplier [*ibid*]. This reasoning should be applied at hand. The Riverhead Tidal Plant contained turbines which were produced with steel of inferior quality [*Exhibit C 3*, p. 14 para. 6]. Just like the turbines delivered for CLAIMANT the turbines in Riverhead were Francis Turbines produced by RESPONDENT [*Exhibit C 5*, p. 16 para. 3; *PO No. 2*, p. 49 para. 15; *Request for Arbitration*, p. 6 para. 12; *Exhibit C 3*, p. 14 para. 6]. Hence, the Riverhead and the Greenacre power plant featured turbines of the same type and were produced by the same supplier [*Exhibit C 3*, p. 14 para. 6]. On the basis of the triumphal arches case this connection renders the suspicion that the turbines in Greenacre’s plant contain defective steel sufficiently justified.

2. There Would Be Severe Consequences If the Suspicion Is Verified

- 41 If the suspicion turned out to be true and the steel used in the turbines was of inferior quality, this could radically undermine Greenacre’s energy strategy.



- 42 In the worst-case-scenario, *i.e.* if the turbines inner and outer parts were damaged due to corrosion and cavitation, the whole plant would be affected and water would uncontrollably spill into the turbine house [*PO No. 2, p. 53 et seq. para. 45*]. This would lead to downtimes of the plant of several years. The other green energy sources can if at all supply sufficient energy during the two months of Greenacre’s vacation time, for the rest of the year the supply has to be supplemented with carbon-based energy from Ruritania [*Request for Arbitration, p. 5 et seq. para. 7 et seq.*]. Therefore, during the downtime of several years Greenacre would have to rely considerably on “dirty-energy”.
- 43 This effect is further enhanced by the fact that the storage function of the plant would also cease in case of such a downtime. The Greenacre power plant was not only supposed to produce green energy, but also to store the excess energy produced by other sources of renewable energy [*Request for Arbitration, p. 5 para. 4*]. As a consequence of a prolonged standstill excess energy produced by other renewable energies in times of overproduction would no longer be stored and thus could not be used by Greenacre [*Request for Arbitration, p. 5 para. 4*]. Hence, the possible outcomes if the suspicion turned out to be true would drastically impair Greenacre’s green energy strategy.
- 44 These possible severe consequences can be illustrated by the incident at the Riverhead power plant. Due to the inferior steel quality the Francis Turbines in the Riverhead plant were corroded to such an extent that immediate replacement was necessary and a prolonged downtime ensued [*Exhibit C 3, p. 14 para. 5 et seq.; Request for Arbitration, p. 6 para. 12*]. The standstill of the Riverhead power plant led to serious problems in the energy supply in that region [*Exhibit C 3, p. 14 para. 5*]. As the two plants are comparable, there can be similar consequences in the case at hand if the suspicion is verified. The Riverhead turbines run in salt-water [*PO No. 2, p. 51 para. 27*], whereas CLAIMANT’s turbines run in fresh-water but have to endure stronger water pressure from the waterhead [*PO No. 2, p. 51 para. 32*]. Therefore, the turbines both operate under challenging circumstances and are comparable. Hence, in case the suspicion of inferior steel quality is true the defective steel in the Greenacre plant can lead to severe consequences similar to the Riverhead plant.

3. RESPONDENT Is Not Able to Dispel the Suspicion

- 45 RESPONDENT is not able to dispel the suspicion. For a suspicion to constitute non-conformity the seller has to be given the opportunity to dispel the suspicion [*FS Canarias–Magnus, p. 257, 263; FG Bern–Koller/Jost, p. 35, 47*].
- 46 In 2017, a hack in RESPONDENT’s IT and internal management system led to the loss of most of its data [*PO No. 2, pp. 50 et seq. para. 25; Exhibit C 5, p. 16 para. 2 et seq.*]. As a result, RESPONDENT is unable to provide the documentation concerning which steel charges have been used in which



project, thus to confirm if the steel is of adequate quality [*ibid.*, *Exhibit R 3*, p. 33 para. 1]. The certificates testifying whether the turbines delivered to CLAIMANT were made of steel of inferior quality were also lost [*Exhibit C 5*, p. 16 para. 3]. Accordingly, RESPONDENT cannot dispel the suspicion due to this loss of data. Further, only a laboratory inspection can detect the quality of the steel, which would exceed the vacation time in Greenacre of two months [*PO No. 2*, p. 55, *Appendix 1*, *Table 10*, *scenarios 3-5*, p. 52 para. 35]. This would result in an unplanned downtime of the plant which was not contractually stipulated [*Exhibit C 2*, p.12 Art. 2(1)(d)]. Therefore, RESPONDENT cannot dispel the suspicion that the turbines contain inferior steel.

- 47 In conclusion, the suspicion of inferior steel quality is substantiated as it is based on concrete facts, could lead to severe consequences if verified and RESPONDENT is not able dispel it. Consequently, even if the tribunal were to hold the mere impaired valuation of the relevant market to be insufficient to render the goods unfit for their purpose, the particular purpose in the present case is neither fulfilled under a stricter standard. The turbines are therefore not fit for their particular purpose and are thus non-conforming pursuant to Art. 35(2)(b) CISG.

C. RESPONDENT Bears the Risk for a Lack of Conformity According to Art. 36 CISG

- 48 RESPONDENT carries the risk of lack of conformity caused by the suspicion. According to Art. 36(1) CISG the seller bears the risk of any lack of conformity which exists until the time when the risk passes to the buyer. The general rule under the CISG that the risk passes to the buyer when he accepts the goods does not apply when the defect is hidden [*BGH (Germany)*, 2 Mar 2005; *Schlechtriem/Schwenzler/Schwenzler*, Art. 36 para. 4; *FS Canaris-Magnus*, p. 257, 260; *Stathouli*, p. 72]. The reasoning behind this principle is that the defect already existed before the risk passed but only became apparent thereafter [*Schlechtriem/Schwenzler-Schwenzler*, Art. 36 para. 4]. This exception also applies when the goods are only suspected to be defective [*BGH (Germany)*, 2 Mar 2005; *Schlechtriem/Schwenzler-Schwenzler* Art. 36 para. 4; *FS Canaris-Magnus*, p. 257, 260]. In the present case, the suspicion of inferior steel quality only became public after CLAIMANT had accepted the turbines but finds its origin in the steel used by RESPONDENT to build said turbines. The potential defect, therefore, already existed when the risk of defect passed onto CLAIMANT. Accordingly, RESPONDENT carries the risk for the lack of conformity of the turbines.

- 49 **Conclusion of the Third Issue:** The particular purpose of the turbines was to use them for a reliable supply of renewable energy. As Greenacre as the relevant recipient considers the turbines invaluable, the turbines are unfit for their particular purpose according to Art. 35(2)(b) CISG. Therefore, RESPONDENT breached the Contract with CLAIMANT by delivering turbines which are non-conforming in the sense of Art. 35 CISG.



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

- 50 RESPONDENT's delivery of non-conforming turbines frustrated CLAIMANT's expectation to receive highly reliable turbines. As a result, CLAIMANT breached its contract with Greenacre through no fault of his own. With regard to this serious situation, only a replacement can avoid a long shutdown of the entire power plant and thus prevent CLAIMANT from significant financial and reputational losses.
- 51 Therefore, CLAIMANT is entitled to request the delivery of replacement turbines under Art. 46(2) CISG. According to Art. 46(2) CISG, the buyer may claim substitute delivery if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made in conjunction with notice under Art. 39 CISG. In its Email of 6 October 2018, CLAIMANT requested delivery of substitute turbines in conjunction with notice of the non-conformity under Art. 39 CISG. First, CLAIMANT is entitled to request substitute delivery under Art. 46(2) CISG, Art. 20(2)(d) Sales Agreement **[A]**. Second, a potential cure pursuant to Art. 48 CISG does not contradict the fundamental nature of the breach **[B]**. Third, in any case, only the delivery of replacement turbines could cure the failure to perform **[C]**.

A. CLAIMANT Is Entitled to Request Substitute Delivery under Art. 46(2) CISG, Art. 20(2)(d) Sales Agreement

- 52 CLAIMANT has the right to demand substitute delivery since the breach committed by RESPONDENT is fundamental in terms of Art. 46(2) CISG in conjunction with Art. 20(2)(d) Sales Agreement. In the latter provision, the Parties lowered the standard for a fundamental breach as set forth in Art. 25 CISG **[I]**. This lower standard also applies to substitute deliveries under Art. 46 CISG **[II]**. The breach of contract committed by RESPONDENT fulfils the standard of Art. 20(2)(d) Sales Agreement **[III]**.

I. The Parties Lowered the Standard for a Fundamental Breach in Art. 20(2)(d) Sales Agreement

- 53 By implementing Art. 20(2)(d) into their Sales Agreement, the Parties lowered the requirements for a fundamental breach under Art. 25 CISG. According to Art. 6 CISG, the parties may derogate from or vary the effect of any of the provisions of the CISG. In order to do so, they must agree to exclude the CISG partially, refer to a replacement law or design legal provisions themselves [*Schlechtriem/Schwenzer-Ferrari, Art. 6 para. 12; Achilles, Art. 6 paras. 3, 6; Kröll-Mistelis, Art. 6 paras. 12 et seq.; MüKoBGB, Art. 6 paras. 3, 7, 17*]. According to Art. 25 CISG, a breach of



contract is fundamental if it results in such detriment that it substantially deprives the affected party of what it is entitled to expect under the contract, unless such a result was not foreseeable. Art. 20(2)(d) of the Sales Agreement, on the other hand, defines a breach as fundamental if it “deprive[s] BUYER of what it is entitled to expect under the contract [i.e. the Sales Agreement]”. Thus, CLAIMANT must neither be substantially deprived of its expectation nor suffer any detriment in order for RESPONDENT to commit a fundamental breach of the Sales Agreement. By omitting the words “detriment”, “substantially” and “foreseeable”, the Parties “intend[ed] to lower the standard for fundamental breach under Art. 25 CISG” [PO No. 2 p. 47 para. 4]. Therefore, by implementing Art. 20(2)(d) of the Sales Agreement in their Contract the Parties lowered the prerequisites for a fundamental breach under Art. 25 CISG.

II. The Lower Standard in Art. 20(2)(d) of the Sales Agreement Applies to Substitute Deliveries in Terms of Art. 46(2) CISG

- 54 Although Art. 20(2) of the Sales Agreement is entitled “*Termination for cause*”, an interpretation of this provision in light of Art. 8(2) CISG shows that this clause also applies to the request for substitute delivery under Art. 46(2) CISG.
- 55 First, the aim of the CISG is to uphold a contract as far as possible and to satisfy the buyer’s legitimate interest with other remedies where possible [Kröll-Bach, Art. 49 para. 2]. Termination of the contract is merely intended to be a last resort, i.e. the *ultima ratio* [BGH (Germany) 3 Apr 1996; Ferrari-Ferrari, Art. 25 para. 9; Schlechtriem/Schwenzer-Müller-Chen, Art. 48 para. 1]. Consequently, as Art. 20(2)(d) of the Sales Agreement entitles the buyer to terminate the Sales Contract, the clause must *a fortiori* give the buyer the right to demand substitute delivery. It would be unreasonable to impose stricter requirements on the less severe remedy, i.e. substitute delivery, in comparison with the most severe remedy under the CISG, the termination of the contract. Therefore, a reasonable person in terms of Art. 8(2) CISG would have understood Art. 20(2)(2) of the Sales Agreement to also refer to other remedies, such as substitute delivery under Art. 46(2) CISG.
- 56 Second, this reasoning is further supported by the systematics of the CISG. The CISG contains a uniform definition of “fundamental breach”, which applies to all provisions requiring such a breach [Brunner, Art. 25 para. 1; Karollus, p. 143; MüKoBGB-Huber, Art. 49 para. 3; Schlechtriem/Schwenzer-Schroeter, Art. 25 para. 42]. In Art. 20(2)(d) of the Sales Agreement, the Parties merely lowered the standard for a fundamental breach under Art. 25 CISG [PO No. 2 p. 47 para. 4]. Therefore, the universal definition of “*fundamental breach*” as set out in the CISG itself stays in effect and is only modified by the omission of the requirement “*substantially*”. Consequently, the Parties



did not derogate from the systematics of the CISG, which supports applying Art. 20(2)(d) of the Sales Agreement to the request for substitute delivery, too.

- 57 Consequently, the lower standard for a fundamental breach in Art. 20(2)(d) of the Sales Agreement is applicable to the request for substitute delivery under Art. 46(2)(d) CISG.

III. The Non-Conformity of the Turbines Constitutes a Fundamental Breach under Art. 20(2)(d) of the Sales Agreement

- 58 The delivery of non-conforming turbines amounts to a fundamental breach of contract pursuant to Art. 20(2)(d) Sales Agreement. Under that provision, a breach is fundamental if it “deprive[s] BUYER of what it is entitled to expect under the contract” [*Exhibit C 2, p. 13 Art. 20(2)(d)*]. Under the CISG, any non-conformity of the goods deprives the buyer of what it is entitled to expect under the contract [*Schlechtriem/Schwenzger-Schroeter, Art. 25 para. 79*]. However, the other fundamental breaches mentioned in Art. 20(2)(a)-(c) Sales Agreement, e.g. delay in delivery of more than 200 days, are particularly severe. Hence, not every non-conformity suffices to constitute a fundamental breach under Art. 20(2)(d) Sales Agreement. Rather, the non-conformity must considerably affect CLAIMANT’s interest in the performance of the Sales Agreement in order to amount to a fundamental breach. As a result of the non-conformity of the turbines, Greenacre has the right to terminate its contract with CLAIMANT and threatened to do so [*PO No. 2, p. 53 para. 42; Exhibit C 6, p. 18 para. 3*]. In case Greenacre exercises its right, CLAIMANT would lose any interest in the Sales Agreement [1]. In case Greenacre instead demands concessions from CLAIMANT, CLAIMANT’s interest in performance of the Sales Agreement would still be considerably affected [2].

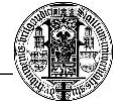
1. Termination Makes CLAIMANT Lose Any Interest In the Sales Agreement

- 59 If Greenacre terminated the contract, CLAIMANT would lose all interest in the Sales Agreement. The only reason for CLAIMANT to purchase turbines from RESPONDENT was to use them in the Greenacre power plant [*Exhibit C 2, p. 11 paras. 4, 7; Response to Request for Arbitration, p. 26 paras. 3 et seq.*]. Since Greenacre Energy is presently CLAIMANT’s only customer, [*PO No. 2, p. 52 para. 40*] CLAIMANT would have no further use for the turbines in case Greenacre exercised its right to terminate the contract. In such a case, CLAIMANT would lose all interest in the Sales Agreement with RESPONDENT.



2. In Case Greenacre Abstains From Terminating the Contract, CLAIMANT's Interest In the Performance of the Sales Agreement Is Still Considerably Affected

- 60 If Greenacre refrains from terminating the contract, CLAIMANT's interest in the performance of the Sales Agreement is still considerably affected. In return for not terminating the contract, Greenacre could force CLAIMANT to make considerable concessions in other areas [*PO No. 2, p. 53 para. 42*]. If this happened, CLAIMANT's interest in performing the Sales Agreement would be considerably impaired due to its financial and reputational consequences.
- 61 First, making concessions to Greenacre would significantly affect the financial interest of CLAIMANT in the Sales Agreement. CLAIMANT profits financially from operating the power plant by selling energy and providing a reserve energy capacity [*PO No. 2, p. 52 para. 40*]. These profits would decrease if CLAIMANT had to concede to demands from Greenacre. The remote location of Greenacre [*Request for Arbitration, p. 5 para. 3*] prevents CLAIMANT from connecting the power plant to another energy grid. Accordingly, Claimant can't afford to lose its contract with Greenacre.
- 62 Greenacre is under immense pressure itself as the power plant is at the heart of significant political controversy. This pressure on Greenacre has already led to the adaptation of the initial contract to include a very unusual penalty clause [*Exhibit C 6, p. 18 para. 5*]. The only thing currently keeping Greenacre from avoiding its contract with CLAIMANT, for which it has legal cause, is the fact that there is no possibility of replacing the Greenacre power plant as a source of energy "at present" [*PO No. 2, p. 53 para. 42*]. Therefore, Greenacre will most likely attempt to mitigate the political pressure it faces by demanding significant concessions. For CLAIMANT this means that it could only retain the contract by conceding to these demands. However, such concessions would strain CLAIMANT's finances and its own financial interest in the performance of the Sales Agreement would decrease considerably due to the concessions.
- 63 Second, CLAIMANT's reputation would suffer severely. CLAIMANT has a reputation for building power plants to the highest environmental standards. [*Request for Arbitration, p. 4 para. 1*]. At present, Greenacre is CLAIMANT's only customer, i.e. the Greenacre power plant is the only project representing CLAIMANT's reliability [*PO No. 2, p. 52 para. 40*]. Further, it was controversial from the beginning and still attracts significant public attention [*Exhibit C 6, p. 18 paras. 4, 8; Response to Request for Arbitration, p. 26 para. 4; Exhibit R 1, p. 30 para. 1; PO No. 2, p. 53 para. 42*]. If CLAIMANT's difficulties of providing a reliable energy supply to Greenacre were to become public, this would most likely prevent future business deals for CLAIMANT. Hence, CLAIMANT will suffer reputational damages.



64 Consequently, Greenacre’s right to terminate the contract, irrespective of whether Greenacre makes use of it, would also considerably affect CLAIMANT’s interest in the performance of the Sales Agreement. Hence, the non-conformity of the turbines, which gave Greenacre the right to terminate, amounts to a fundamental breach of contract under Art. 20(2)(d) Sales Agreement.

B. A Cure Under Art. 48 CISG Does not Contradict the Fundamental Nature of the Breach

65 RESPONDENT cannot remedy its failure to perform under Art. 48 CISG. Art. 48 CISG, on a proper construction, shows that a breach is fundamental under Art. 25 CISG regardless of its curability [I]. Even if a fundamental breach was curable, the Parties excluded this possibility in their Sales Agreement [II].

I. The Interpretation Art. 48 CISG Shows That a Breach Is Fundamental under Art. 25 CISG Regardless of Its Curability

66 Interpreting Art. 48 CISG proves that a breach is fundamental under Art. 25 CISG regardless of its curability. Provisions of the CISG are to be interpreted in consideration of their wording, systematics and legislative history [*MüKoBGB–Gruber, Art. 7 CISG paras. 14, 18; Schlechtriem/Schwenzler-Ferrari, Art. 7 paras. 30, 36, 37*].

67 First, the wording of Art. 48(1) CISG proves that breaches are fundamental irrespective of their curability. Art. 48(1) CISG allows the seller to cure a breach “[s]ubject to article 49”. Thus, the buyer’s right to avoid the contract under Art. 49 CISG overrides the seller’s right to cure under Art. 48(1) CISG [*Neumayer/Ming, Art. 48 para. 4*]. If non-curability were an essential requirement for a fundamental breach, the subordination to Art. 49 CISG would be disregarded [*Graffi, p. 344; Holthausen, RIW (1990), p. 103; Karollus, p. 143; MüKoBGB–Huber, Art. 49 para. 24; Reinhart, Art. 48 para. 4; Schlechtriem-von Hoffmann, p. 299; Staudinger-Magnus, Art. 48 para. 28*]. Hence, making a fundamental breach dependent on incurability cannot be reconciled with the wording of Art. 48(1) CISG which makes cure subject to Art. 49 CISG.

68 Second, requiring a fundamental breach to be non-curable would leave no room for an application of Art. 46(2) CISG. Pursuant to Art. 46(2) CISG, the buyer can only claim substitute delivery in case of a fundamental breach. If a fundamental breach were required to be non-curable, the buyer would only be entitled to require substitute delivery under Art. 46(2) CISG if cure, *i.e.* substitute delivery, was impossible [*Bitter/Bitter, BB (1993), p. 2322; Karollus, p. 143; MüKoBGB–Huber, Art. 49 para. 24; Holthausen, RIW (1990), p. 103; Schlechtriem-von Hoffmann, p. 299*]. This would leave no room



for the application of Art. 46(2) CISG. Therefore, it must be possible for a breach to be fundamental even if it is curable.

- 69 Third, this reasoning is confirmed by the legislative history of Art. 48(1) CISG. At the Vienna Conference, it was proposed to delete the reservation “subject to article 49” from the wording of Art. 48(1) CISG. This was meant to strengthen the seller’s right to remedy its failure to perform, but the proposal was finally withdrawn [*Official Records*, pp. 114 et seq.]. Accordingly, the right of avoidance, which requires a fundamental breach, must take precedence over the seller’s right to cure [*Holthausen, RIW (1990)*, p. 103]. Thus, the legislative history of Art. 25 CISG confirms that a breach is fundamental under Art. 25 CISG regardless of its curability.
- 70 Consequently, interpreting Art. 48(1) CISG shows that breaches are fundamental under Art. 25 CISG even if they are curable.

II. In Any Event, the Parties Excluded the Possibility of Curing a Fundamental Breach

- 71 The Parties impliedly excluded the possibility of curing a fundamental breach. In case of non-conformity of the goods, the defect can be remedied by repair or substitute delivery [*Schlechtriem/Schwenzer/Schroeter-Müller-Chen, Art. 48 para. 5*]. As shown above, the entire agreement clause does not preclude interpreting the Sales Agreement in light of extrinsic documents. Thus, shared documents between the Parties can be used in order to interpret the Sales Agreement. During the tender process, Greenacre emphasised the objective to have their community supplied with renewable energy by a permanently available power plant only. This objective was laid down in the tender documents, which were shared with RESPONDENT [*Exhibit C 1, p. 10 para. 3; Exhibit C 6, p. 19 para. 7; Response to Request for Arbitration, p. 26 et seq. para. 5; Exhibit R 2, p. 31 paras. 2, 4*]. Therefore, the Parties defined as little downtimes as possible as their aim with regard to the power plant. However, the whole plant has to shut down for six to twelve months when repair or replacement works take place [*PO No. 2, Appendix I, p. 55, Table 1, Scenarios 3, 4, 5*]. Thus, in case the turbines require repair or replacement, this objective cannot be achieved. Therefore, the Parties agreed not to consider unscheduled repair or replacement works an option. Yet, as these works are the remedies needed for cure in the present case, the Parties also impliedly excluded the possibility to cure in general.

C. In Any Case, Only the Delivery of Prefabricated Turbines Could Cure the Breach

- 72 Even if curability could affect the fundamental nature of a breach, RESPONDENT could only cure its failure to perform by delivering prefabricated turbines as substitutes. According to Art. 48(1) CISG, the seller may remedy at his own expense any failure to perform his obligations,



insofar as it does not cause the buyer unreasonable delay, unreasonable inconvenience or uncertainty of reimbursement of expenses. Cure is unreasonable if it causes the buyer more than negligible inconvenience [*Brunner-Akikol/Bürki, Art. 48 para. 4; Honsell-Schnyder/Straub, Art. 48 para. 21; Schlechtriem/Schwenzer-Müller-Chen, Art. 48 para. 9; Standinger-Magnus, Art. 48 para. 15*]. In the present case, the turbines are non-conforming as they are not able to reliably produce green energy for Greenacre. Hence, in order to remedy its failure to perform under Art. 48(1) CISG, RESPONDENT would have to amend the turbines in a way that renders them suitable to reliably produce green energy. However, none of RESPONDENT's offers would reasonably cure its breach.

- 73 RESPONDENT suggested to conduct an examination after opening the turbines. If the turbines show no signs of unusual corrosion, it will check them with a handheld device [*PO No. 2, p. 52 para. 35*]. This cannot restore the capability of the turbines to reliably produce green energy for Greenacre [I]. If the turbines are unusually affected by corrosion, a laboratory examination will be conducted followed by repair or replacement of the turbines [*PO No. 2, p. 52 para. 3; PO No. 2, p. 52 para. 35*]. Such proceedings would definitely result in the failure to provide a green energy supply of Greenacre [II]. RESPONDENT's suggestion to produce new turbines at CLAIMANT's expense is unreasonable as it would cause CLAIMANT uncertainty of reimbursement [III].

I. RESPONDENT's Offer to Cure by Inspection Cannot Restore the Capability of the Turbines to Reliably Produce Green Energy [Appendix I, Scenario 2]

- 74 RESPONDENT's offer to cure by means of an inspection with a handheld device cannot restore the capability of the turbines to ensure a green energy supply. The seller has no right to cure under Art. 48(1) CISG if the failure to perform cannot be cured entirely [*Achilles, Art. 48 para. 2; Schlechtriem/Schwenzer-Müller-Chen, Art. 48 para. 6*]. In case the turbines show no signs of unusual corrosion during the opening, RESPONDENT will examine the steel with a handheld device [*PO No. 2, p. 52 para. 35*]. However, no conclusions regarding the steel quality can be drawn from the external visibility of corrosion during the opening [*cf. Exhibit C 5, p. 16 para. 5*]. In order to conclusively examine the quality of the steel, a thorough laboratory metallurgical examination of samples of the steel is required [*PO No. 2, p. 47, para. 3*]. Therefore, the suspicion will not be dispelled by the inspection with a handheld device, since it will not conclusively determine whether the turbines are made of defective steel. Thereby, the capability of the turbines to reliably produce green energy will not be restored. Thus, RESPONDENT will not cure its failure to perform.



II. Repair or Replacement of the Turbines Would Result in the Failure to Reliably Provide Green Energy [Appendix I, Scenario 3, 4, 5]

75 Both replacement of the turbines without prefabrication and repair, depending on what turns out to be necessary after the inspection, cannot cure the breach. In case the turbines show signs of unusual corrosion, RESPONDENT will undertake a laboratory examination and thereafter repair or replace the turbines [*PO No. 2, p. 52 para. 3; PO No. 2, p. 52 para. 35*]. However, while these measures could restore the functionality of the turbines, they would cause downtimes of the power plant for at least half a year up to 12 months. This would result in the need to purchase carbon-based energy for four up to ten months [*PO No. 2, Appendix I, p. 55, Table 1, Scenarios 3, 4, 5; Exhibit C 6, p. 19 para. 5*]. Therefore, replacement of the turbines without prefabrication and repair will result in the failure to provide a green energy supply. Thus, RESPONDENT cannot cure its failure to perform through these measures.

III. RESPONDENT'S Offer to Produce Turbines at CLAIMANT'S Expense Would Cause CLAIMANT Uncertainty of Reimbursement

- 76 RESPONDENT'S offer to produce turbines at CLAIMANT'S expense is unreasonable as it causes CLAIMANT uncertainty of reimbursement.
- 77 First, RESPONDENT does not provide any assurance for reimbursement. If the buyer has to advance considerable sums of money, cure means uncertainty of reimbursement unless the seller provides security for these costs [*Brunner, Art. 48 para. 7; Ferrari-Saenger, Art. 48 para. 6; Herber/Czerwenka, Art. 48 para. 3; Honsell-Schnyder/Straub, Art.48 para. 26; Schlechtriem/Schwenzer Müller Chen, Art. 48 para. 8; Staudinger Magnus, Art. 48 para. 16*]. In the present case, RESPONDENT does not provide any security for the expenses arising from the production of the turbines. Thus, the offer causes uncertainty of reimbursement and is therefore unreasonable.
- 78 Second, by offering CLAIMANT to produce new turbines at CLAIMANT'S expense, RESPONDENT shows that it is unwilling to bear costs which it is in fact obliged to bear. As shown above, repair would result in the need to buy carbon-based energy and therefore cannot remedy RESPONDENT'S failure to deliver turbines which reliably produce green energy. Thus, even it were technically possible to restore the functionality of the turbines by repair, RESPONDENT is nevertheless obliged to replace the turbines at its expense. However, RESPONDENT refuses to pay for the replacement turbines in case only repair work turn out to be technically necessary at the inspection [*Exhibit C 7, p. 20 para. 3*]. Consequently, as RESPONDENT has neither provided assurance for a refund nor is willing to bear costs which it is obliged to bear, the proposal is unreasonable.



- 79 The turbines delivered by RESPONDENT deprived CLAIMANT of its expectation to receive turbines which reliably produce green energy for Greenacre. In order to remedy this failure to perform, RESPONDENT would have to amend the turbines in a way that renders them capable of reliably producing green energy. However, since only replacement with prefabricated turbines could restore this capability, none of RESPONDENT's offers can reasonably cure the breach. As anything else would cause CLAIMANT uncertainty of reimbursement, RESPONDENT must bear the costs for prefabricating new turbines.
- 80 **Conclusion of the Fourth Issue:** In Art. 20(2)(d) of the Sales Agreement, the Parties lowered the standard for a fundamental breach under Art. 25 CISG. Pursuant to this modified provision, the non-conformity of the turbines constitutes a fundamental breach. RESPONDENT's breach is fundamental regardless of its curability. Even if the Tribunal were to come to a different conclusion, RESPONDENT could only cure its breach by delivering substitute turbines. Hence, CLAIMANT is entitled to request the delivery of replacement turbines.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- The Arbitration Agreement is valid, and the Arbitral Tribunal has jurisdiction to hear the case **[First Issue]**.
- The Arbitral Tribunal should order the exclusion of the expert appointed by RESPONDENT from the Arbitral Proceedings because he is not impartial and could compromise the composition of the Tribunal **[Second Issue]**.
- RESPONDENT breached the contract by delivering turbines which are non-conforming in the sense of Art. 35 CISG **[Third Issue]**.
- THE BREACH COMMITTED BY RESPONDENT IS FUNDAMENTAL AND THEREFORE ENTITLES CLAIMANT TO REQUEST SUBSTITUTE DELIVERY **[Fourth Issue]**.

On these grounds, the Arbitral Tribunal is respectfully requested to order RESPONDENT to deliver two substitute R-27V Francis Turbines fit for the purpose set out in the contract between the Parties in accordance with Article 46(2) CISG.

Freiburg im Breisgau,

5 December 2019

Anton Augenstein • Eloise Bliesener

Maximilian Burger • Severin Burkart • Leander Funck

Rafaela Haid • Gabriella Kinefss • Gideon Wheeler

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team. Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.



Anton Augenstein



Eloise Bliesener



Maximilian Burger



Severin Burkart



Leander Funck



Rafaela Haid



Gabriella Kinefss



Gideon Wheeler