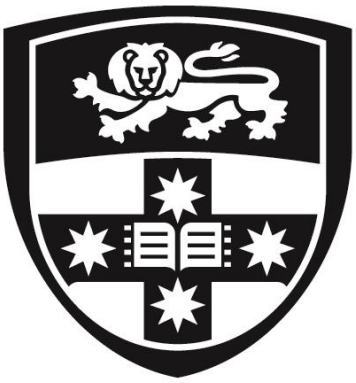
TWENTY-SEVENTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT



THE UNIVERSITY OF SYDNEY

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	**AGAINST**
HydroEN plc	TurbinaEnergia Ltd.
Rue Whittle 9	Lester-Pelton-Crescent 3
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL

Peter Dougherty Benjamin John Anuki Suraweera Calida Tang

INDEX OF ABBREVIATIONS

Abbreviation	Term
¶(¶)	Paragraph(s)
/	And
App.	Appendix
Art(s).	Article(s)
Arbitration Agreement	Article 21(2) Sales Agreement
cf.	Compare
Ch.	Chapter
cl.	Clause
Cl. Memo	CLAIMANT Memorandum (page references included where paragraph numbers are duplicated)
contra.	Against
Entire Agreement Clause	Article 22(2) Sales Agreement
Ex. C#	CLAIMANT's Exhibit Number
Ex. R#	RESPONDENT's Exhibit Number
fn.	Footnote
IBA	International Bar Association
ICC	International Court of Arbitration
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Limitation of Liability and Liquidated Damages Clause	Article 19 Sales Agreement
p(p).	Page(s)
PO No. 1	Procedural Order Number 1, dated 4 October 2019
PO No. 2	Procedural Order Number 2, dated 1 November 2019
Prof.	Professor
§(§).	Section(s)
the Parties	CLAIMANT and RESPONDENT
the Tribunal	The Arbitral Tribunal
the Turbines	Francis Turbines R-27V
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
Vol.	Volume

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EU Renewable Energy Directive	Directive (EU) 2018/2001 of the European Parliament and of the Council (Recast) 11 December 2018	¶82
IBA Guidelines on Conflicts of Interest	IBA Guidelines on Conflicts of Interest in International Arbitration (2014)	¶¶44, 46, 49
IBA Guidelines on Party Representation	IBA Guidelines on Party Representation in International Arbitration 2013	¶39
IBA Rules on Evidence	IBA Rules on the Taking of Evidence in International Commercial Arbitration	¶¶34, 42, 44, 45, 52, 54
Kyoto Protocol	'Kyoto Protocol to the United Nations Framework Convention on Climate Change' Adopted at the 3rd session, Conference of Parties to the United Nations Framework Convention on Climate Change in Kyoto, Japan, on 11 December 1997	¶82
LCIA Rules	London Court of International Arbitration Rules 2014	¶¶1, 33, 34, 38, 39, 43, 46, 49, 50
Model Law	UNICTRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006), 21 June 1985	¶¶5, 33
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959	¶¶8, 55

Paris Agreement	'Paris Agreement' Adopted at the 21st session, Conference of Parties to the United Nations Framework Convention on Climate Change in Paris, France on 12 December 2015	¶82
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STATEMENT OF FACTS

1. TurbinaEnergia Ltd (**RESPONDENT**) is a producer of hydro power turbines incorporated in Equatoriana. HydroEN plc (**CLAIMANT**) is a world-renowned hydro power plant provider incorporated in Mediterraneo which operates in over 100 countries. In early 2014 CLAIMANT contacted RESPONDENT about the delivery of two of RESPONDENT's new Francis Turbines R-27V (**Turbines**). CLAIMANT wanted to include the Turbines in its hydro power plant design, which formed part of its tender bid for constructing and operating a freshwater Pump Hydro Power Plant in Greenacre, a city in Mediterraneo.
2. On 22 May 2014 the Parties signed the Sales Agreement for the purchase of two Turbines. During negotiations, CLAIMANT refused to alter its standard form asymmetric arbitration agreement to give RESPONDENT a balanced right to arbitrate. CLAIMANT was awarded the Greenacre Hydro Power Plant tender on 15 July 2014. It proceeded to construct the plant using its original designs after rejecting two design suggestions it sought from RESPONDENT which would have substantially minimised the risk of downtime. Without informing RESPONDENT, CLAIMANT subsequently agreed with Greenacre Council to receive a higher price for operating the Turbines in return for accepting an onerous penalty clause activated in the event of plant downtime.
3. The two Turbines were delivered and installed on 20 August 2018 and commenced operation in September 2018 after passing the acceptance tests. Less than one month after the plant began operating, CLAIMANT contacted RESPONDENT, seeking to clarify whether the Turbines had been constructed using defective steel. It did so on the basis of a news report about the quality certification fraud of one of RESPONDENT's steel suppliers. While RESPONDENT could not confirm whether the Turbines were affected, the Parties agree that there is at most a 5% risk that the Turbines would need immediate replacement due to corrosion and cavitation damage.
4. RESPONDENT consulted with CLAIMANT on several occasions in late 2018 and provided reasonable solutions to address CLAIMANT's concerns of minimising turbine downtime while still ensuring that there was no corrosion risk. RESPONDENT, in good faith, offered to bring forward the inspection date of the Turbines by two years and manufacture new turbine runners for CLAIMANT at a preferential price. Despite there being no evidence that the turbines require replacement, CLAIMANT refuses all but the last resort remedy of substitute delivery without giving RESPONDENT an opportunity to test the Turbine steel and repair the defect if necessary.
5. On 31 July 2019 CLAIMANT submitted a request for arbitration. On 21 September 2019 Ms Burdin, CLAIMANT's nominated arbitrator, informed the Parties that her husband was involved in a lawsuit against Prof. John, RESPONDENT's expert witness. CLAIMANT now seeks to challenge Prof. John's appointment despite him being one of the few English-speaking experts with relevant expertise.

STATEMENT OF RESPONDENT'S ARGUMENT

1. The Tribunal should decline jurisdiction to hear this dispute. The Arbitration Agreement is invalid because it is asymmetric and violates the principle of equal treatment of the parties. Therefore, it is invalid under Danubian law. Party autonomy does not permit such serious inequality between the Parties. The asymmetric Arbitration Agreement is contrary to Equatorian public policy and accordingly, any award issued under it will be unenforceable in Equatoriana according to the NY Convention. The Tribunal should invalidate the Arbitration Agreement in accordance with international practice (**A**).
2. CLAIMANT has inappropriately objected to the inclusion of RESPONDENT's expert witness, Prof. John. In doing so, CLAIMANT has unfairly accused RESPONDENT of misconduct and Prof. John of failing to meet standards of independence and impartiality. The Tribunal does not have the power to exclude Prof. John. In any event, Prof. John meets all standards of impartiality and independence required of any expert witness. Further, the exclusion of Prof. John would impermissibly infringe on RESPONDENT's right to present its case and would render any award unenforceable (**B**)
3. RESPONDENT delivered Turbines that do not breach the Sales Agreement. All of RESPONDENT's obligations are contained in the Sales Agreement because the Parties intended to exclude all extrinsic evidence by bargaining specifically for an entire agreement clause. The Turbines have been operating as expected since passing the acceptance test in 2018 and conform to the contract as required by Art. 35(1) CISG. CLAIMANT's suspicion that they are manufactured using defective steel is insufficient to establish a breach. Even if the Tribunal could look beyond the contractual terms, RESPONDENT is not in breach by failing to provide Turbines fit for any particular or ordinary purpose. Greenacre's 'no-carbon' energy strategy does not create obligations for RESPONDENT, and in any event, was not appropriately communicated to RESPONDENT (**C**).
4. If the Tribunal finds RESPONDENT has breached the Sales Agreement, CLAIMANT is not entitled to replacement Turbines. This is because the requirements for substitute delivery have not been met. There is no fundamental breach under the CISG or the Sales Agreement as CLAIMANT has not been deprived of what it is entitled to expect, and because the Turbines are reasonably capable of being repaired. The Sales Agreement sets out a regime of damages which adequately compensates CLAIMANT for any loss suffered by reason of any potential downtime. Where CLAIMANT only holds a suspicion that the Turbines are defective, it is inappropriate to award substitute delivery where it would threaten RESPONDENT's economic survival (**D**).

ISSUE A: THE ARBITRATION AGREEMENT IS INVALID

1. The Parties' Arbitration Agreement is asymmetric and, accordingly, invalid. RESPONDENT accepts that Danubian law is the governing law of the Arbitration Agreement because it is the law applicable at the seat of arbitration [*Cl. Memo*, ¶¶8-12; *LCIA Rules,* Art. 16.4; *PO No. 1*, ¶III(4)]. Danubia has adopted the Model Law without amendments [*PO No. 1*, ¶III(4)]. The Tribunal should decline to find jurisdiction and should invalidate the Arbitration Agreement because it gives CLAIMANT a unilateral advantage. The Tribunal has authority to determine its own jurisdiction under the doctrine of *Kompetenz-Kompetenz* [*Karrer*, p. 858; *Carbonnea*, p. 1220; *Nazzini*, p. 684].
2. CLAIMANT contends that asymmetric arbitration agreements are valid because party autonomy overrides the principle of equal treatment of parties in all but the most 'exceptional circumstances' [*Cl. Memo*, ¶37]. On the contrary, many scholars and practitioners caution against the use of asymmetric arbitration agreements because of their fundamental inequality [*Mrad*, p. 3; *Keyes/Marshall,* p. 378; *Draguiev*, p. 45; *Stacey/Tailor*]. They have been invalidated in many jurisdictions, including France [*Rothschild case*], Bulgaria [*Bulgaria No. 1193/2010*], Germany [*BGH 1991*; *BGH 1998; BGH 1989*], Russia [*Sony Ericsson*] and the United States [*US Maverick v Consigli*].
3. This asymmetric Arbitration Agreement is invalid under Danubian law because it violates the principle of equal treatment of parties (**I**), which is a limitation to party autonomy (**II**). In any event, an award under the Arbitration Agreement would be contrary to Equatorian public policy and unenforceable in Equatoriana, where RESPONDENT holds its major assets (**III**). The Tribunal should accordingly invalidate the Arbitration Agreement and decline to find jurisdiction (**IV**).

I. The asymmetric Arbitration Agreement is invalid because it is inherently unequal

4. The Arbitration Agreement is invalid because it violates the principle of equal treatment and unreasonably undermines RESPONDENT's rights. The principle of equal treatment is part of Danubian law (**A**), and extends to the nomination of a forum for resolving a dispute (**B**). Accordingly, the inequality between the Parties created by the asymmetric Arbitration Agreement contravenes Danubian Law (**C**).

A. The principle of equal treatment forms part of Danubian law

5. The principle of equal treatment which forms part of Danubian law is reflected in the Model Law [contra. *Cl. Memo*, ¶¶36-39]. Art. 18 Model Law provides that 'the parties shall be treated with equality'. CLAIMANT is incorrect to argue that Art. 18 carries less weight because it is the only mandatory provision of the Model Law that refers expressly to equality of the parties [contra. *Cl. Memo*, ¶25]. Art. 18 is of paramount importance because it protects the Parties' basic right to equality and justice, which is 'at the heart of any reputable mode of dispute resolution' [*Garnett,* p. 408; *Born,* p. 2165; *Pryles*, p. 3; *Holtzmann/Neuhaus*, p. 583; *Brekoulakis,* p. 878; *Redfern/Hunter*,

p. 356]. Breaches of Art. 18 are recognised as constituting a breach of public policy [*Amasya v Asta*; *Sturzaker*, pp. 19-20]. Equal treatment is considered to be implicit throughout the Model Law as a principle 'so foundational that parties may not derogate from [it]' [*UNCITRAL 2012 Case Digest*, p. 97; *Brekoulakis*, p. 878; *Model Law*, Arts. 24(3)-(4), 26(2)].

6. The principle of equal treatment is also recognised as part of Danubian public policy. The Danubian Court of Appeal has followed the French *Siemens-Dutco* decision [*Response to the Notice of Arbitration*, ¶14], which recognised that the principle of equal treatment is a matter of public policy [*Kröll*; *Scherer/Prasad/Prokic*, fn. 16; *Society of International Law*, p. 98]. While the court in *Siemens-Dutco* specifically considered the right of a party to appoint an arbitrator, its reasoning and adoption by Danubian courts demonstrates that equal treatment of parties is a principle of such fundamental importance that it is part of public policy [contra. *Cl. Memo*, ¶¶29-32]. Equality in appointing arbitrators and equal access to dispute resolution, which is the issue here, are both fundamental safeguards to the administration of justice [*Siemens-Dutco*; *Society of International Law,* p. 99].

B. The principle of equal treatment extends to jurisdictional issues

7. The principle of equal treatment is fundamental to all aspects of an arbitration, including jurisdictional issues such as the nomination of a forum [*Brekoulakis*, p. 878; *Born,* pp. 2164-2165]. Contractual terms, including arbitration agreements, may be invalid if they create substantive inequality between the parties and are contrary to public interest [*Tang,* pp. 58-59]. CLAIMANT relies on the English Commercial Court decision *Mauritius v Hestia* to argue that equality of the parties is limited to procedural issues. The Tribunal should not follow that decision. That decision considered an asymmetric jurisdiction agreement, not an arbitration agreement, where one party was given the option to commence proceedings in any court in any jurisdiction. The Court did not consider arbitration whatsoever, let alone that parties having an equal opportunity to access the jurisdiction of the arbitral tribunal is important for a tribunal's legitimacy.

8. The jurisdiction of arbitral tribunals derives from the consent of the parties to exclude the otherwise natural jurisdiction of courts over disputes [*Bernardini*, p. 46; *Tang*, p. 3]. The effectiveness of arbitration depends upon it being perceived as fair and certain. The willingness of parties to consent to arbitration is jeopardised when parties are not treated fairly and equally, resulting in awards that are open to challenge [*Scherer/Prasad/Prokic*, fn. 136; *NY Convention*, Art. V(2)(b); *Wolff*, p. 429; Below, ¶¶25]. International arbitration has the creation of final and binding awards as one of its core objectives [*Maurer*, p.14; *Kurkela,* p.1; *Garnett,* p. 408]. Awards based on asymmetric arbitration agreements are not equal, fair or certain.

9. The principle of equal treatment extends to jurisdictional issues in other jurisdictions which have invalidated arbitration agreements on the basis that they conflict with public policy. The French

Cour de Cassation and the Bulgarian Supreme Court of Cassation have invalidated asymmetric arbitration agreements for their inherent inequality, relying on domestic rules against 'potestative' conditions [*Rothschild case*; *Bulgaria No. 1193/2010*; *Scherer/Lange*]. American courts have also invalidated asymmetric arbitration agreements because of their 'unconscionable' nature [*U.S. Maverick v Consigli*; *Armendariz v Foundation Health Psychcare*]. Despite CLAIMANT's contention that the principle of equal treatment is not relevant to jurisdictional issues, international practice reflects the acceptance of equal treatment as a right within public policy.

C. The Arbitration Agreement violates the principle of equal treatment

10. The asymmetry of the Arbitration Agreement contravenes the principle of equal treatment by giving CLAIMANT a significant and unfair advantage. The Arbitration Agreement infringes on RESPONDENT's fundamental right to dispute resolution (**1**), and is contrary to the rule against grossly unfair contractual terms in the UNIDROIT Principles (**2**).

1. The Arbitration Agreement infringes on RESPONDENT's right to dispute resolution

11. The only party with a meaningful right to dispute resolution in the Arbitration Agreement is CLAIMANT. The Arbitration Agreement permits CLAIMANT to remove a dispute commenced by RESPONDENT from a Mediterranean court by making a unilateral election to commence arbitration and obtaining a stay of court proceedings [*NB Three Shipping v Harebell*; *WSG Nimbus v Board of Cricket*; *City of Louisa v Newland*; *Deutsche Bank v Asia Pacific*]. This is because under the Arbitration Agreement RESPONDENT's right to litigate is '<u>subject to</u>' (emphasis added) CLAIMANT's 'right to refer any dispute… to arbitration' [*Sales Agreement*, Arts. 21(1)-(2)]. Such an option cannot be read down to prevent CLAIMANT staying proceedings commenced by RESPONDENT [e.g. *Canadian Railway v Lovat*, ¶12; *Anzen v Hermes*; *City of Louisa v Newland*].

12. This advantage permits 'severe abuse' that would unfairly affect RESPONDENT's rights [*Draguiev*, p. 24 fn. 12; *BGH 1998*]. RESPONDENT risks losing access to litigation and its time and costs incurred in litigation already commenced if CLAIMANT elects to stay proceedings, which it can do at any time [*BGH 1998*]. CLAIMANT would be able to use this power unfairly if RESPONDENT had achieved success in early procedural or interlocutory stages of litigation. This is particularly unreasonable where there is no obligation for CLAIMANT to provide notice before staying proceedings [*Mrad*, p. 23]. RESPONDENT's inability to know whether and when CLAIMANT will refer the dispute to arbitration creates instability and uncertainty about the forum where the dispute will be resolved [*Draguiev*, p. 20; *Keyes/Marshall,* p. 377; *Clifford/Browne*].

2. The Arbitration Agreement is grossly unfair under the UNIDROIT Principles

13. As conceded by CLAIMANT, the Tribunal can have regard to the UNIDROIT Principles because the validity of a contractual term is not covered by the CISG [*Cl. Memo*, ¶51; *CISG*, Art. 4(a);

Schroeter, p. 60; *Schwenzer/Hachem*, p. 90]. Gross disparity can invalidate individual terms [*Kramer*, p. 283]. The Arbitration Agreement is grossly unfair under Art. 3.2.7 UNIDROIT Principles because it gives CLAIMANT an excessive advantage [*Du Plessis*, p.511; contra. *Cl. Memo*, ¶¶51-58].

14. The Arbitration Agreement was included as a result of CLAIMANT's dominant bargaining position in the negotiation process. CLAIMANT includes an asymmetric arbitration agreement in every contract it enters into and was unwilling to negotiate with RESPONDENT over its inclusion [*Ex. R2*, ¶6; *PO No. 2*, ¶2]. The Arbitration Agreement is a standard term to which the concept of gross disparity applies [*Kramer*, p. 284; *Du Plessis*, p. 516]. Commentators accept that the gross disparity provisions of the UNIDROIT Principles apply to the weaker parties in international commercial agreements [*Kramer*, p. 282; *Du Plessis*, p. 511]. RESPONDENT is significantly smaller than CLAIMANT, with an annual turnover less than $1/20^{th}$ of CLAIMANT'S, and its chief negotiator was not involved in negotiating the Sales Agreement [*PO No. 2*, ¶1; *Ex. R2*, ¶¶5-6].
15. This Arbitration Agreement is invalid having regard to its 'nature and purpose', which is to determine the rights of the Parties in dispute resolution [*UNIDROIT Principles*, Art. 3.2.7(1)(b); *Du Plessis*, p. 516]. It is irrelevant that RESPONDENT benefitted from the limitation of liability and entire agreement clauses in the Sales Agreement [*Ex. R2*, ¶6]. The effect of the asymmetric Arbitration Agreement is to wholly deny RESPONDENT of its fundamental right to settle its dispute, at CLAIMANT's sole discretion. This cannot be compared to the limitation of liability and entire agreement clauses which only reduce the scope of the Parties' contractual obligations. RESPONDENT cannot fairly bargain away its right to settle a dispute by assenting to the asymmetric Arbitration Agreement because there is no other provision which can reasonably compensate it for losing such a fundamental right. The asymmetric Arbitration Agreement gives such preferential treatment to CLAIMANT that it evinces gross disparity in obligations [*Franchiser v Franchisee*].
16. CLAIMANT erroneously relies on Art. 4.4 UNIDROIT Principles as authority for determining the fairness of the Arbitration Agreement by reference to the balance of rights and obligations in the contract as a whole. Art. 4.4 governs the interpretation of words in a contract, not the effect of a clause on the substantive rights of the parties [*UNIDROIT Principles*, Art. 4.4]. In any event, considering the Sales Agreement as a whole, the asymmetric Arbitration Agreement is not, as CLAIMANT contends, balanced against the limitation of liability and entire agreement clauses [contra. *Cl. Memo,* ¶¶40-46; *PO No. 2*, ¶2]. The limitation of liability and entire agreement clauses only limit some of CLAIMANT's rights, whereas the Arbitration Agreement deprives RESPONDENT of the ability to enforce any of its rights under the Sales Agreement.

II. The principles of freedom of contract and party autonomy do not preserve the validity of the Arbitration Agreement

17. The principles of party autonomy and freedom of contract do not preserve the validity of the Arbitration Agreement [contra. *Cl. Memo*, ¶¶13, 16-17]. Limitations are placed on these principles to uphold minimum standards of fairness and protect the enforceability of awards (**A**). Further, the asymmetric Arbitration Agreement is not necessary to protect CLAIMANT'S interests (**B**).

A. Party autonomy cannot preserve the validity of the Arbitration Agreement

18. Limitations on party autonomy must be recognised to ensure the enforceability of awards and the legitimacy of arbitration [*Livingstone*, p. 531; *Brekoulakis,* pp. 879-880; *Mayer,* p. 284]. These limitations are fundamental standards that cannot be excluded simply because the Parties bargained for the asymmetric Arbitration Agreement [*Born,* p. 2164; contra. *Cl. Memo* ¶¶40-46].

19. CLAIMANT argues that the only limit on party autonomy is Art. 3.2.7 UNIDROIT Principles which prohibits unfairness that 'shock[s] the conscience of a reasonable person' [*Cl. Memo* ¶¶51-58]. This is not correct. In addition to public policy, the Tribunal must consider the requirements of the LCIA Rules and the Model Law [*Pryles*, pp. 2-3; *Bernardini*, p. 46]. This includes the fundamental Model Law provision dealing with equal treatment, Art. 18 [*Pryles*, p. 3; *Holtzmann/Neuhaus*, p. 583].

20. CLAIMANT relies on *Volt v Leland* to argue that parties have unlimited autonomy in structuring an arbitration agreement. However, in that case, the US Supreme Court was interpreting the US Federal Arbitration Act, which has no bearing on the validity of this Arbitration Agreement [*Cl. Memo*, ¶16; *Feldman*, pp. 691-693; *Ling*, p. 193]. CLAIMANT further relies on Art. 19(1) Model Law and cites Dr Pryles as authority for party autonomy being paramount [*Cl. Memo*, ¶¶14-15]. However, these sources relate to party autonomy in determining arbitral procedure rather than jurisdiction. More importantly, Art. 19 Model Law is subject to the other provisions of the Model Law, whereas Art. 18 is absolute, which indicates that mandatory standards override party autonomy [*Born,* p. 2164]. Courts and tribunals have recognised limits to party autonomy [*Livingstone*, pp. 531-534] including on the grounds of 'unconscionability' [*Armendariz v Foundation Health*], public policy [*Bockstiegel*, p. 124], uncertainty [*Turkey No. 2013/16901*] and other applicable mandatory laws [*Mrad*, p. 6; *JP Morgan v Primacom*; *Mitsubishi v Soler*].

B. The Arbitration Agreement is not necessary to protect CLAIMANT from financial risk

21. This asymmetric Arbitration Agreement is not saved by CLAIMANT's argument that it is the party bearing greater financial risk [contra. *Cl. Memo*, ¶¶39-46]. CLAIMANT does not bear disproportionate financial risk under the Sales Agreement. CLAIMANT relies on *Red Burn Capital v ZAO Factoring Company* where the Russian Federal Arbitrazh Court upheld the validity of an asymmetric arbitration agreement between a lender who bore significant financial risk and a

borrower who bore none [*Keyes/Marshall,* p. 364]. This is not comparable to the arrangement between CLAIMANT and RESPONDENT because both parties carry significant risk, but only CLAIMANT has the benefit of the Arbitration Agreement. RESPONDENT bore the risks of constructing and transporting the Turbines [*Sales Agreement*, Art. 2.1(b)]. RESPONDENT must also inspect and maintain the Turbines over their 40-year expected lifetime [*Sales Agreement*, Art. 2(1)(e)].

22. CLAIMANT erroneously argues that the penalty clause in its contract with Greenacre means that it bears greater risk than RESPONDENT under the Sales Agreement [*Cl. Memo*, ¶49]. CLAIMANT agreed with Greenacre to pay a penalty of US$40,000 for each day that the power plant operated below a 500MW production capacity, in exchange for a higher price for its services [*Ex. C6*, ¶¶5-7]. CLAIMANT'S contract with Greenacre was concluded on 3 August 2014 [*Ex. C6*, ¶5]. The Sales Agreement was concluded more than two months before this, on 22 May 2014 [*Request for Arbitration*, ¶10]. RESPONDENT was only made aware of the penalty clause in January 2018 and so could not have foreseen or bargained for the possibility that CLAIMANT would be exposed to the penalty [*PO No. 2*, ¶26]. RESPONDENT also does not share the benefit of the higher price which CLAIMANT received [*Ex C6*, ¶7]. CLAIMANT assumed the risk of the penalty clause in exchange for a higher contract price from Greenacre [*Ex. C6*, ¶7]. CLAIMANT cannot hold RESPONDENT liable for its failure to assess the risk of Greenacre invoking the penalty, particularly where CLAIMANT rejected two options for 'considerably improv[ing] the availability of the plant' [*Ex. R2*, ¶5].

III. The Arbitration Agreement violates Equatorian public policy and is unenforceable

23. Even if the Arbitration Agreement were valid under Danubian law, any award made under the agreement would not be enforceable in Equatoriana. When determining whether to accept jurisdiction under the Arbitration Agreement, the Tribunal can consider the mandatory rules of jurisdictions outside the governing law of the Arbitration Agreement, including the laws of the state where enforcement may be sought [*Bermann*, pp. 4-5; *Platte*, p. 311]. Doing so is consistent with the Tribunal's duty to render an enforceable award [*Platte,* pp. 307-313; *Horvath*, pp. 135, 147-148; *Lozada*, p. 80; *Waguih Elie v Egypt*; *Mayer,* p. 280; *Redfern/Hunter*, pp. 506, 608; *Bank Mellat v GAA Development*, p. 48]. The Tribunal fulfils this duty by making every reasonable effort to make an award which conforms to the NY Convention and mandatory laws of the likely places of enforcement [*Platte*, p. 312; *Lozada*, pp. 72-74; *Mayer,* p. 284; *Kurkela*, p. 2; *Wolff*, pp. 429-430].

24. Enforcement of this award must be sought is Equatoriana. RESPONDENT only has plants and assets in Equatoriana and Danubia [*PO No. 2*, ¶1]. However, RESPONDENT is incorporated and based in Equatoriana with the vast majority of its staff employed there [*Letter by LCIA (First Letter to the Parties)*, ¶12; *PO No. 2*, ¶1]. It is unclear whether RESPONDENT would be able to produce the replacement turbines by September 2020 without the Equatorian production lines [*PO No. 2*,

¶¶37-38]. Enforcing the award in Danubia against RESPONDENT's minor assets would not allow CLAIMANT to obtain the replacement Turbines it demands.

25. An award by the Tribunal would not be enforceable in Equatoriana. Equatoriana is a member state of the NY Convention and would set aside an award rendered under the Arbitration Agreement pursuant to Art. V(2)(b) NY Convention [*Response to the Request for Arbitration*, ¶13; *PO No. 1*, ¶III(4); *Mayer/Sheppard*, p. 255; contra. *Cl. Memo*, ¶¶36-39]. Asymmetric arbitration agreements violate the domestic public policy of Equatoriana because the equal treatment of parties under arbitration clauses is viewed as being of 'crucial importance' [*PO No. 2*, ¶52; *Wolff*, pp. 407, 409]. If the Tribunal assumes jurisdiction, it would be exposing the parties to unnecessary costs of arbitration by risking the delivery of an unenforceable award [*Hovarth*, p. 148].

IV. The Tribunal should invalidate the entire Arbitration Agreement

26. Were the Tribunal to find the Arbitration Agreement invalid, it only has the power to invalidate the Arbitration Agreement in its entirety and decline jurisdiction [*BGH 1989*, ¶19]. The Tribunal should not follow the Russian Supreme Arbitrazh Court's decision in *Sony Ericsson*, relied upon by CLAIMANT, to argue that the Tribunal should rewrite the Arbitration Agreement [contra. *Cl. Memo*, ¶70]. Invalidating the Arbitration Agreement as a whole is consistent with the dominant international approach [*Bulgaria No. 1193/2010* (Bulgaria); *Egypt No. 15530* (Egypt); *BGH 1998* (Germany); *Emmsons Intl v Metal Distributors* (India)]. This is because tribunals do not have the power to adapt contractual terms contrary to the will of the parties [*Momberg*, p. 232; *Lorfing* p. 42; *Redfern/Hunter*, p. 524; *Aminoil case*, p. 1004; *ICC Award 2216/1974*]. This power is not provided under the Arbitration Agreement [*ICC Award No. 7544*] or the Model law [*Berger 2001*, p. 7; *UN A/CN.9/245*, ¶21]. Further, CLAIMANT relies on the power to adapt a contract under the UNIDROIT Principles provision on gross disparity [*Cl. Memo*, ¶71]. In conformity with this international approach, the Tribunal should not exercise this power.

27. The Tribunal should not override the will of the parties by rewriting the Arbitration Agreement [*Lorfing*, pp. 42-43]. Invalidating the whole Arbitration Agreement appropriately places the parties in the position they would have been in, had it not existed. Here, the Parties would be restricted to the courts of Mediterraneo to settle their disputes [*Sales Agreement*, Art. 21].

Conclusion

28. The Tribunal lacks jurisdiction to hear this dispute. The asymmetric Arbitration Agreement is invalid under Danubian law and it is not saved by the principles of party autonomy and freedom of contract. Any award made under it will be unenforceable in Equatoriana. The Tribunal should invalidate the entire Arbitration Agreement, rather than transform it into a symmetric agreement, and decline jurisdiction to hear this proceeding.

ISSUE B: THE TRIBUNAL SHOULD NOT EXCLUDE PROF. JOHN

29. RESPONDENT has engaged Prof. John as an expert witness because he is the only expert with a deep knowledge of both corrosive-resistant steel and the impact of corrosion on the Turbines. Prof. John's evidence is crucial to this arbitration and RESPONDENT's right to present its case.

30. CLAIMANT has made an unmeritorious objection to the inclusion of Prof. John in this proceeding [*Cl. Memo*, ¶75]. The Tribunal does not have the power to exclude party-appointed experts from proceedings (**I**). Even if the Tribunal did have the power to exclude Prof. John, it would not be appropriate to exercise it here (**II**). Excluding Prof. John would impact RESPONDENT's right to present its case so significantly that any award made by the Tribunal would be unenforceable under the NY Convention (**III**).

I. The Tribunal does not have the power to exclude Prof. John

31. Neither the *lex arbitri* nor the LCIA Rules give the Tribunal the power to exclude a party-appointed expert witness (**A**), nor is such a power within the inherent jurisdiction of the Tribunal (**B**).

A. The LCIA Rules and Model Law do not give the Tribunal power to exclude party-appointed experts

32. The LCIA Rules and Model Law do not contain an express power to exclude expert witnesses for breaching standards of independence and impartiality. The LCIA Rules, chosen by the Parties, provide the 'most comprehensive set of rules on witnesses among institutional rules' [*Koepp/Farah/Webster*, p. 261; *Turner/Mohtashami*, pp. 129-130]. Despite this, they do not contain a power allowing for a party-appointed witness to be challenged or excluded. This is consistent with the Model Law which also does not provide a power to exclude experts. The Parties have chosen arbitral rules that grant them considerable freedom to appoint their witnesses, consistently with the approach in the Model Law. The power to determine the admissibility of particular evidence does not grant the Tribunal competence to exclude Prof. John [contra. *Cl. Memo*, ¶77; *Burianski/Lang*, p. 274; *Garcia,* p. 25].

33. Neither the LCIA Rules nor the Model Law grant power to exclude a particular witness. Art. 20.3 LCIA Rules states that the Tribunal may 'allow, refuse or limit the written and oral testimony of witnesses' (emphasis added). Similarly, the LCIA Rules and Model Law allow the Tribunal to determine the admissibility of 'any issue of fact or expert opinion' [*LCIA Rules,* Art. 22.1(vi)] and of 'any evidence' [*Model Law*, Art. 19(2)]. Both instruments simply grant a discretion to assess the weight or admissibility of evidence by reference to its probative value in the proceeding [*Nessi*, p. 99; *Scherer/Richman/Gerbay,* p. 249]. This can be contrasted with 'fundamentally penal sanctions' such as personal disqualifications, which determine whether evidence will be allowed according to factors irrelevant to the quality of the evidence, but tied to the identity of the person

presenting it [*Coffey*, p. 200; *Garcia*, p. 25]. While the Tribunal does not have power to wholly exclude an expert, the LCIA Rules and Model Law would, for example, allow the Tribunal to refuse or limit specific parts of the evidence because they are not relevant to the dispute [*LCIA Rules,* Art. 20.3; *Turner/Mohtashami*, p. 131].

34. Further, Art. 20.4 LCIA Rules implicitly acknowledges that the LCIA Rules do not include a general power to exclude expert witnesses. Art. 20.4 provides the power to entirely exclude a witness' written testimony. This arises only where a witness refuses to appear for questioning before the Tribunal [*LCIA Rules,* Art. 20.4]. If the LCIA Rules included a general power to exclude evidence of a particular expert, Art. 20.4 would be redundant [*Garcia,* p. 274 for similar analysis applied to IBA Rules on Evidence].

35. The reasoning of the few tribunals that have found the jurisdiction to exclude experts under ICSID Rule 34(1), which grants a similar power to Art. 22.1(vi) LCIA Rules and Art. 19(2) Model Law, does not apply here. Those tribunals based their decisions on the evidence itself and not their power to exclude the evidence, assuming that they could do so 'without significant reasoning' [*Garcia*, pp. 24-25; *Burianski/Lang*; p. 276; *Flughafen Zürich v Venezuela*; *Italba v Uruguay*; *Bridgestone v Panama*]. Such a conclusion is controversial, especially considering that 'there is little or no authority' that ICSID Rule 34(1) gives a tribunal jurisdiction to exclude experts [*Garcia*, p. 25].

B. The Tribunal does not have an inherent jurisdiction to exclude expert witnesses

36. The Tribunal cannot have recourse to an inherent power to exclude a party-appointed expert witness. RESPONDENT agrees with CLAIMANT that tribunals have some inherent powers including to disqualify counsel [*Cl. Memo*, ¶80; *Hrvatska v Slovenia*, ¶33]. However, there is little guidance defining the scope of the Tribunal's inherent powers [*ILA Report*, p. 3]. It is inappropriate for the Tribunal to find the exclusion of experts within its scope of inherent powers for two reasons.

37. *First*, there is no known instance of a tribunal excluding an expert witness on the basis of inherent power [*Burianski/Lang,* p. 276; *Garcia*, p. 25]. Extending the scope of inherent powers in the absence of explicit authority carries 'a greater risk of running afoul the parties' expectations' [*ILA Report*, p. 3]. This applies even more so where it will prevent the presentation of expert evidence in a 'highly specialized area where only a limited number of qualified experts exist', such as Prof. John's evidence [*Burianski/Lang,* p. 276; *Letter by Fasstrack (27 September 2019)*].

38. *Secondly,* the exclusion of an expert witness is not <u>required</u> to 'ensure the fulfilment of [the Tribunal's] jurisdiction' [*Iran v United States*, ¶59 citing *Brown*, p. 228; *ILA Report*, p. 17]. Tribunals can satisfy due process requirements without excluding expert witnesses. It is common to hear party-appointed experts and weigh their evidence once they have been cross-examined, as opposed to an '*a priori* exclusion' [*Flughafen Zürich v Venezuela*, ¶38; *Chevron v Ecuador*, ¶520; *Kantor,* p. 327;

Redfern/Hunter, p. 394]. The Tribunal cannot imply inherent powers for convenience or expediency. To do so would circumvent the authority of the Parties' chosen arbitration rules which provide for the weighing of evidence [*LCIA Rules*, Art. 22.1(vi)].

39. The Tribunal is empowered to protect its integrity other than by pre-emptively excluding an expert witness [contra. *Cl. Memo*, ¶116]. Not only does the Tribunal have the power to limit the admissibility of evidence found to be untruthful or unreliable, RESPONDENT's legal counsel bears responsibility for the presentation of Prof. John's evidence. The LCIA Rules and IBA Guidelines on Party Representation, as well as many domestic bar rules, impose a duty on legal representatives not to allow false and misleading evidence [*LCIA Rules*, Annex ¶4; *IBA Guidelines on Party Representation*, Guideline 11; *Scherer/Richman/Gerbay*, pp. 302-303; *Australian Solicitor Rules*, Rule 19 (Australia); *BSB Handbook*, Guideline rC16 (Great Britain); *Dutch Rules of Conduct,* Rule 8 (Netherlands); *ABA Rules*, Rule 3.3 (United States)].

II. Prof. John has not breached any standard of impartiality or independence

40. Even if the Tribunal finds that it does have the power to exclude Prof. John, it would not be appropriate to exercise that power here because Prof. John has not breached an applicable standard of impartiality or independence. Party-appointed experts are not required to abide by strict standards of independence or impartiality (**A**). In any event, CLAIMANT has failed to establish that Prof. John breached any standard of independence or impartiality (**B**).

A. Party-appointed experts are not subject to strict requirements of independence or impartiality

41. Imposing a strict obligation of independence on party-appointed expert witnesses is inconsistent with the nature of a party-appointed expert in international commercial arbitration. One reason parties elect to arbitrate is for the freedom to choose rules of evidence, including the ability for parties to appoint experts [*Hong Kong Report*, p. 32; cf. *French Code of Civil Procedure 2007*, ¶232]. An expert is 'objectively not independent' the moment they are paid by a party [*NAI Case No. 3702*]. The relevant question is not one of a witness' independence or impartiality, but the reliability of their evidence [*O'Malley,* p. 151; *NAI Case No. 3702*]. Although CLAIMANT relies on O'Malley's *Rules of Evidence* to prove the contrary view, O'Malley confirms that RESPONDENT's position is consistent with 'the approach widely adopted in modern arbitration practice' [*O'Malley*, p. 151; e.g. *LCIA Case No. 81079*, ¶138; *Sedco v Iran*, ¶75]. Even national courts, which generally impose stricter standards of evidence, do not evaluate the initial admissibility of party-appointed experts by reference to their independence. Rather, their evidence is assessed after it is heard by reference to their expertise and methodology supporting their findings [*Daubert v Merrell*; *US Federal Rules of Evidence,* Rule 702; *Sydneywide v Red Bull*].

42. CLAIMANT erroneously cites O'Malley's *Rules of Evidence* as support for its contention that tribunal-appointed and party-appointed experts are bound by the same requirements of independence and impartiality [contra. *Cl. Memo*, ¶83; *O'Malley*, p. 144]. In fact, O'Malley makes clear that it would be 'inconsistent for a tribunal to consider the independence of an expert who is paid and instructed by a party' in the same manner as a tribunal-appointed expert [*O'Malley*, p. 144]. It is also inconsistent with the separate treatment of party-appointed and tribunal-appointed experts under the IBA Rules on Evidence [*IBA Rules,* Arts. 5-6; *Burianski/Lang*, p. 283].

43. CLAIMANT submits that Art. 21.2 LCIA Rules imposes strict obligations of independence and impartiality on party-appointed experts [*Cl. Memo*, ¶83]. However, Art. 21.2 only deals with the evidence of tribunal-appointed experts. It is tellingly silent on party-appointed experts. The reference to 'such expert' in Art. 21.2 is a reference to tribunal-appointed experts. This distinction between party-appointed and tribunal-appointed experts is maintained throughout the LCIA Rules [e.g. *LCIA Rules,* Arts. 20.1, 21, 22.1(iv)]. Previous versions of the LCIA Rules have also consistently made this distinction [*1998 LCIA Rules*, Art. 21.1(a); *1985 LCIA Rules*, Art. 12; *Turner/Mohtashami*, p. 135]. The inclusion in the LCIA Rules of clear and express obligations of tribunal-appointed experts, but not of party-appointed experts, confirms that the Rules expect parties to have freedom to determine which experts they appoint. It would undermine the Parties' bargain to create an obligation on party-appointed expert evidence where the Parties have adopted the LCIA Rules without amendment.

B. Prof. John has not breached any standard of independence or impartiality

44. In any event, CLAIMANT has failed to establish that Prof. John falls short of the standards of independence and impartiality required of an expert witness. If there are standards for assessing the impartiality required by expert witnesses, they are contained in the IBA Rules on Evidence and the IBA Guidelines on Conflicts of Interest (**1**). Even applying those standards, Prof. John has no conflict with Ms Burdin (**2**), nor is his impartiality compromised by his relationship with RESPONDENT (**3**). Finally, Prof. John has not failed to meet disclosure requirements (**4**).

1. The IBA Rules on Evidence and IBA Guidelines on Conflicts of Interest should be applied by the Tribunal

45. RESPONDENT agrees with CLAIMANT that if the Tribunal did have the power to exclude an expert, the IBA Rules on Evidence would set the applicable standards of impartiality [*Cl. Memo*, ¶¶85-86; *Trittman/Kasolowsky*, p. 333; *Redfern/Hunter*, p. 381; e.g. *LCIA Case No. 152906*, ¶51; *Italba v Uruguay*, ¶135; *Noble Ventures v Romania*].

46. The IBA Guidelines on Conflicts of Interest are relevant to assessing the purported conflict of interest between Prof. John and Ms Burdin. Commentators have confirmed the international acceptance of these Guidelines [*Born*, p. 1839; *Kauffman-Kohler*, p. 296; *Redfern/Hunter*, p. 258]. International tribunals refer to them regularly to assess conflicts with arbitrators, including LCIA [e.g. *LCIA Case No. 101642*], ICSID [e.g. *Total v Argentina*, ¶98], PCA [e.g. *Perenco v Ecuador*, ¶2] and SCC tribunals [e.g. *SCC Arbitration V (053/2005)*]. LCIA tribunals in particular have widely consulted the IBA Guidelines on Conflicts of Interest because their formulation of 'justifiable doubts as to the arbitrator's impartiality and independence' is the same as that adopted in the LCIA Rules [*LCIA Rules*, Art. 10.3; *IBA Guidelines on Conflicts of Interest*, Guideline (2)(b); *LCIA Case No. 132551*; *LCIA Case No. 91305*, ¶21].

47. By contrast, the CIArb Protocol should not be applied by the Tribunal [contra. *Cl. Memo*, ¶84]. It has not been adopted or considered by the tribunals that have addressed the impartiality of expert witnesses [*Flughafen Zürich v Venezuela*; *Italba v Uruguay*; *Bridgestone v Panama*]. CLAIMANT has not cited one instance of a tribunal or an academic considering the Protocol. Further, it does not reflect an international standard of expert evidence. The CIArb Protocol 'follows English Judicial practice' and is closely related to the UK Civil Procedure Rules 1998[*Kantor*, p. 332, comparing Art. 4 CIArb Protocol to Part 35 UK Civil Procedure Rules 1998].

2. There is no conflict of interest between Prof. John and Ms Burdin

48. CLAIMANT contends that a conflict of interest between Prof. John and Ms Burdin renders Prof. John inappropriately partial [*Cl. Memo,* ¶88]. CLAIMANT also alleges that Prof. John's appointment is an act of bad faith by RESPONDENT to 'create a ground for challenge of Ms Burdin' and thus delay the proceeding [*Cl. Memo*, ¶123]. This is unfounded. The litigation between Ms Burdin's husband and Prof. John does not give rise to a conflict of interest. Therefore, it does not affect Prof. John's impartiality, nor does it create a ground for challenging Ms Burdin.

49. A conflict between arbitrator and expert occurs where 'justifiable doubts as to the arbitrator's impartiality and independence' arise [*LCIA Rules*, Art. 10.3; *IBA Guidelines on Conflicts of Interest*, Guideline (2)(b); *LCIA Case No. 132551*]. 'Justifiable doubts' require that a fair-minded observer would conclude that there is 'a real possibility' of bias [*LCIA Case No. 101689 and 101691*, ¶63]. An objective third party could not reasonably conclude that such an attenuated relationship would create any real possibility of bias. Ms Burdin has no direct personal or business relationship with Prof. John [cf. *World Duty Free v Kenya*, ¶¶43, 50, 163; *Caron/Caplan*, p. 215; *Born*, p. 1888]. The financial implications of the patent dispute between Ms Burdin's husband and Prof. John are small, being at most US$5,000 a year [*PO No.* 2, ¶10]. Any potential animosity between Ms Burdin's husband and Prof. John cannot be vicariously attributed to Ms Burdin. The patent dispute has no

bearing on the present proceeding [*Letter by Burdin (21 September 2019)*; contra. *Cl. Memo*, ¶109] and would not give Ms Burdin any control over Prof. John's business interests [cf. *IBA Guidelines on Conflicts of Interest*, Guidelines 3.4.3, 3.4.4; *Kreindler/Goldsmith*, ¶14.02].

50. RESPONDENT respects the valid appointment of Ms Burdin. Her expertise as a lawyer and in the field of energy disputes make her well qualified to act as arbitrator [*PO No.* 2, ¶8]. RESPONDENT does not intend to challenge Ms Burdin [contra. *Cl. Memo,* ¶123]. RESPONDENT only reserves its right to challenge any arbitrator should they act inappropriately, a right that CLAIMANT shares [*LCIA Rules,* Art. 10.3; *Letter by Fasstrack (27 September 2019)*; *PO No. 2*, ¶12]. For example, if in the course of the proceeding it became clear that Ms Burdin had prejudged the merits, her previous academic writings on the 'suspicion of defects' would be relevant to a challenge on that basis [*LCIA Rules*, Art. 10.1(iii); *LCIA Case No. 132498,* ¶45; *Urbaser v Argentina*; *PO No. 2*, ¶9].

3. Prof. John's impartiality is not compromised by his relationship with RESPONDENT

51. Prof. John's prior relationship with RESPONDENT does not compromise his independence or impartiality. Prof. John has had a limited professional relationship with RESPONDENT. He appeared as a tribunal-appointed expert in 2004 in a matter involving RESPONDENT [*PO No. 2,* ¶17]. He was invited to attend the presentation of the Francis Turbines R-27V nine years later in 2013 and advised RESPONDENT in relation to the Riverhead Tidal Project [*PO No. 2,* ¶17; *Ex. R1*]. This is exactly the kind of relationship that any world leading expert would have with a leading producer, and does not warrant Prof. John's exclusion.

52. The IBA Rules on Evidence require an expert report to contain a statement outlining their present or past relationship with any of the parties, as well as their independence from their legal advisors [*IBA Rules on Evidence*, Arts. 5.2(a), (c)]. These requirements are not, however, intended 'to exclude experts with some connection' to the parties [*IBA Rules of Evidence Commentary*, p. 19]. Tribunals have consistently found that a relationship of employment or past employment with a party is not a ground for excluding an expert witness [*O'Malley*, p. 151; *Born,* pp. 280-281; *Sedco v Iran*, ¶75; *Alpha v Ukraine*, ¶¶155-156; *Helnan v Egypt*, ¶¶39-52].

53. In any event, Prof. John would satisfy any stricter standards of independence and impartiality proposed by CLAIMANT. The CIArb Protocol only stipulates that the opinion of the expert 'be impartial, objective and unbiased' [*CIArb Protocol*, Art. 4.1]. Prof. John has not expressed an opinion upon which CLAIMANT can object to. The only precise content of the prospective report known is that the likelihood of damage to the Turbines that would require replacement is below 5% [*Ex. R2*, ¶8; *PO No. 2*, ¶34]. There is no indication this opinion is partial or biased. In fact, it accords with the agreed estimates of both CLAIMANT and RESPONDENT [*PO No. 2*, ¶41, App. I].

4. Prof. John has not failed to meet disclosure requirements

54. CLAIMANT incorrectly contends that Prof. John has failed to disclose his relationship with RESPONDENT and Ms Burdin [*Cl. Memo*, ¶109]. Prof. John was not required to disclose any relationship for three reasons. First, Prof. John is only subject to disclosure requirements at the time he submits his expert report, which has not yet occurred [*IBA Rules on Evidence*, Art. 5(2); *CIArb Protocol*, Art. 4(2)]. Secondly, there is no conflict of interest that warrants disclosure. Thirdly, even if such disclosure was required and a conflict of interest existed, the breach would not warrant the exclusion of Prof. John. The failure to disclose a relationship by an expert is of relatively little importance when the relationship is not concealed [*Bridgestone v Panama,* ¶21]. Prof. John's relationship with RESPONDENT was advertised in the Greenacre Chronicle [*Ex. R1*]. The patent dispute between Ms Burdin's husband and Prof. John was reported in a Mediterranean newspaper [*PO No. 2*, ¶13]. CLAIMANT is not disadvantaged by the fact that Prof. John has not independently notified the parties of these relationships [*Rompetrol v Romania*, ¶25; cf. *Hrvatska v Slovenia*].

III. Excluding Prof. John would render any award unenforceable

55. If the Tribunal were to exclude Prof. John, it would deprive RESPONDENT of the opportunity to present its case, rendering any award by the Tribunal unenforceable [contra. *Cl. Memo*, ¶¶131-136; *NY Convention,* Art. V(1)(b)]. This would be contrary to the Tribunal's duty to ensure any award is enforceable [*Redfern/Hunter*, p. 506; Above, ¶23].

56. The exclusion of relevant evidence can constitute a denial of due process under Art. V(1)(b) NY Convention [*Born,* p. 3523; *Jana/Armer/Kranenberg*, p. 248; e.g. *Karaha v Perusahaan*, ¶36; *Generica v Pharmaceutical Basics*, ¶6]. This occurs where the evidence excluded could have influenced the outcome of the proceedings [*Scherer,* p. 300; *OLG Bremen 1999*, ¶20; *Karaha v Perusahaan*, ¶36]. Prof. John's evidence is integral to RESPONDENT's case in this highly technical proceeding. Were Prof. John to be excluded, RESPONDENT would be forced to argue the merits of the case without expert evidence, as the procedural and merits portions of the case are being heard on the same date [*PO No. 1*, ¶III(1)]. RESPONDENT would therefore not have any opportunity to adduce alternative expert evidence [cf. *Jorf Lafar v AMCI*; *Trevino v Smart*; *Redfern/Hunter*, p. 628].

Conclusion

57. The Tribunal does not have the power to exclude Prof. John, nor is Prof. John required to meet strict standards of independence and impartiality as a party-appointed expert. In any event, Prof. John meets all standards of independence and impartiality applicable to expert witnesses. His relationships with RESPONDENT and Ms Burdin do not create conflicts of interest. To exclude Prof. John would impermissibly infringe on RESPONDENT's right to present its case and render any award unenforceable.

ISSUE C: RESPONDENT DELIVERED CONFORMING TURBINES

58. The Turbines that RESPONDENT delivered to CLAIMANT conform to the Sales Agreement. The Turbines meet the specifications required by the Sales Agreement and passed the relevant 'acceptance test' [*Ex. C4*]. To date, the Turbines continue to operate and function as envisioned by and set out in the Parties' agreement. CLAIMANT has not suggested in its memorandum and cannot suggest or prove that the Turbines fail to conform to any of the specifications in the Sales Agreement.

59. Rather, CLAIMANT makes premature claims against RESPONDENT due to a mere suspicion that the Turbines are non-conforming. CLAIMANT asserts this non-conformity while rejecting RESPONDENT's good faith offer to conduct necessary metallurgical tests at its own cost [*Ex. C7*].

60. CLAIMANT contends that the Turbines are non-conforming because they are not fit for an implied warranty under Art. 35(2)(b) CISG [*Cl. Memo*, ¶137]. This is incorrect. The Parties carefully negotiated the Sales Agreement to contain all of CLAIMANT and RESPONDENT's obligations (**I**). The Turbines conform to the quantity, quality and description of the Sales Agreement (**II**). Alternatively, the Turbines are fit for any particular purpose made known to RESPONDENT under Art. 35(2)(b) CISG (**III**), as well as their ordinary use under Art. 35(2)(a) CISG (**IV**).

I. All of the Parties' obligations are contained in the Sales Agreement

61. The Sales Agreement contains all of CLAIMANT and RESPONDENT's obligations. CLAIMANT incorrectly relies on an implied warranty under Art. 35(2)(b) CISG. The definitions of conformity under Art. 35(2) do not apply because Art. 35(1) applies to the exclusion of Art. 35(2) under the Sales Agreement (**A**). In any event, the Entire Agreement Clause impliedly derogates from Art. 35(2) CISG (**B**).

A. Art. 35(1) CISG excludes the operation of Art. 35(2) CISG

62. The Sales Agreement leaves no room for Art. 35(2) CISG to operate. The subsidiary definitions of conformity in Art. 35(2) CISG only apply where a contract contains insufficiently detailed requirements to be satisfied by the goods for the purposes of Art. 35(1) CISG [*Schwenzer*, p. 599; *Czech Supreme Court 2006*; *Tribunale di Forli 2009*; *Flechtner 2011*; *Saidov*, p. 530; *de Luca*, p. 184]. This is not such a case. The Sales Agreement provides a detailed description of the quality of the goods which precludes application of Art. 35(2) CISG [*Schwenzer*, p. 599; *Cotton twilled fabric case*]. The Sales Agreement carefully lists RESPONDENT's obligations including the specifications of the Turbines which must meet 'the further characteristics as specified in detail in Annex A' [*Sales Agreement,* Art. 2]. Further, the provisions concerning the quality of the Turbines are clear and unambiguous, and the Tribunal does not need to, and cannot, consider extrinsic evidence in interpreting those

statements because there is an entire agreement clause [*de Luca*, p. 185; Below, ¶¶67-71]. Therefore, only Art. 35(1) CISG is relevant in assessing the conformity of the Turbines.

B. The Sales Agreement derogates from the application of Art. 35(2) CISG

63. In any event, the Sales Agreement derogates from Art. 35(2) CISG. CLAIMANT correctly acknowledges that the Parties may freely contract to exclude the standards of Art. 35(2) CISG [*Cl. Memo*, ¶141; *CISG Digest 2008*, ¶4; *Beijing Light Automobile Co. v Connell*]. Art. 35(2) contemplates this, providing that its standards do not apply 'where the parties have agreed otherwise'.

64. Parties may agree to derogate from specific CISG terms by making contractual stipulations which are inconsistent with them [*Art. 6 Case Digest CISG,* ¶¶5-6; *Boiler case*; *Used car case*]. CLAIMANT erroneously cites Schwenzer/Hachem as authority for the proposition that 'the Parties are required to mention the CISG specifically as excluded' [*Cl. Memo*, ¶141]. This quote concerns derogation from the CISG as a whole in 'choice of law clauses' [*Schwenzer/Hachem*, p. 110]. It does not apply when derogating from specific CISG provisions [*Schwenzer/Beimel*, p. 185; *Auto case*, ¶2.2]. Further, CLAIMANT's reliance upon domestic tests for the exclusion of implied statutory terms in non-Model Law countries is not relevant to derogation from specific CISG provisions, which is solely governed by the CISG [contra. *Cl. Memo*, ¶140; *CISG-AC Opinion No. 16*, ¶2.2].

65. Read as a whole, the Sales Agreement is inconsistent with Art. 35(2) CISG and therefore derogates from it. The Sales Agreement provides not only extensive provisions on the Turbines' quality in Annex A, but also an entire agreement clause excluding further obligations [*Sales Agreement,* Art. 2; *CISG Digest 2008*, ¶5; *Beijing Light Automobile Co. v Connell*]. Art. 35(2) would require recourse to representations and statements made during the Parties' negotiations. Additional obligations derived from these circumstances would be inconsistent with the Entire Agreement Clause and may also conflict with specifications under Annex A of the Sales Agreement [Below, ¶¶67-72].

II. The Turbines conform to the contractual quality as required by Art. 35(1) CISG

66. CLAIMANT has not contended in its memorandum that the Turbines do not conform to the quantity, quality and description required by the Sales Agreement under Art. 35(1) CISG. Should CLAIMANT later argue that the Turbines do not conform to their contractual quality, this would fail. In interpreting the quality required by the Sales Agreement, it is impermissible to use extrinsic evidence because of the Entire Agreement Clause (**A**). The Turbines conform to the quality stipulated in the Sales Agreement (**B**). Even if extrinsic evidence were considered, the Turbines are still conforming (**C**).

A. Extrinsic evidence cannot be used to interpret the Sales Agreement

67. CLAIMANT and RESPONDENT carefully negotiated the Sales Agreement and expressly bargained for an entire agreement clause. This clause bars recourse to extrinsic evidence when interpreting

the contractual quality required of the Turbines. CLAIMANT cannot rely on pre-contractual negotiations, the exchange of tender documents, or any events at the hydro-energy fair to establish the contractual quality of the Turbines. This is consistent with the approach under the CISG (**1**), and reflects the will of the Parties (**2**).

1. Surrounding circumstances cannot modify the Parties' obligations

68. CLAIMANT contends that under the CISG, an entire agreement clause does not generally exclude extrinsic evidence for the purposes of contractual interpretation [*Cl. Memo*, ¶143]. This is incorrect. Schmidt-Kessel confirms that 'by far the predominant view' under both CISG jurisprudence and scholarship is that entire agreement clauses prevent the use of extrinsic materials to add to or modify contractual obligations [*Schmidt-Kessel*, p. 161; *Panhard*, p. 112; *Laurent/Fabrice*, p. 889; *Ho-Chi Minh case*; *MCC-Marble Ceramic Center*]. This is consistent with the Anglo-American approach to entire agreement clauses, which is shared by some civil law countries [*Bernoliel*, pp. 481-482; *Tempo Shain v Bertek*, p. 21 (United States); *ProForce Recruit v Rugby Group* (United Kingdom); *Hope v R.C.A. Photophone of Australia* (Australia); *Strugala*, pp. 16, 20-21 (Poland); *Meyer Europe v Pontmeyer*, ¶¶3.4.1, 3.4.3 (The Netherlands)]. Further, the CISG Advisory Opinion relied on by CLAIMANT has been interpreted to indicate that 'the usual result' of an entire agreement clause will be to limit the circumstances taken into account when interpreting the contract [*Cl. Memo*, p. 23 ¶143; *Schwenzer/Hachem/Kee*, p. 304, fn. 96; *CISG-AC Opinion No. 3*].

69. Art 2.1.17 UNIDROIT Principles does not alter this position [contra. *Cl. Memo*, ¶143]. The CISG takes precedence over the UNIDROIT Principles because there is no gap in the CISG which justifies consideration of the Principles here [*Jacobs/Cutbush-Sabine/Bambagiotti*, ¶5.7]. This aligns with the objective of the CISG to promote its uniform application [*Andersen*, pp. 164-165; *de Luca*, pp. 181-182]. Additionally, the UNIDROIT Principles allow for parties to provide for the exclusion of surrounding circumstances where the parties intended to do so [*Perillo*, ¶f]. The Parties' intention to exclude surrounding circumstances is determined under the principles of interpretation set out in Art. 8 CISG. As outlined in ¶¶70-71 below, the Parties intended to prevent the use of surrounding circumstances, including prior negotiations and representations, when interpreting the obligations under the Sales Agreement.

2. The Parties intended to exclude surrounding circumstances

70. The Parties intended to exclude surrounding circumstances from the interpretation of the Sales Agreement and the Tribunal should give effect to that intention [*CISG*, Art. 8; *CISG-AC Opinion No. 3*, ¶2.8]. The Tribunal may consider surrounding circumstances to interpret the effect of the Entire Agreement Clause [*CISG*, Art. 8; *CISG-AC Opinion No.* 3, ¶¶4.1-4.7].

71. The Entire Agreement Clause is not a standard term. RESPONDENT bargained specifically for its inclusion into the draft contract introduced by CLAIMANT. This establishes the Parties' intention to exclude surrounding circumstances from interpreting the contract [*Ex. R2*, ¶6; *Gorton*, p. 289; e.g. *PECL*, Art. 2:105 and *DCFR*, Art. II. 4:104(3)]. If the Tribunal were to consider surrounding circumstances, it would defeat the purpose of the Parties' agreement to include the clause.

72. As in the case of many commercial transactions, numerous statements, representations and negotiations took place between the Parties before the conclusion of a formal contract. RESPONDENT publicly promoted its turbines at the Greenacre Hydro Power Fair in 2013 [*Ex. R1*]. The Sales Agreement was also preceded by two months of discussions between the Parties regarding the sale of the Turbines [*Request for Arbitration*, ¶10; *Ex. R1*, ¶2]. During this time, RESPONDENT made statements and representations which shaped CLAIMANT's understanding about the performance of the Turbines [*Request for Arbitration*, ¶6]. The Parties, as sophisticated commercial entities, were concerned to protect themselves against unexpected liability by ensuring that the Sales Agreement was the sole source of their contractual obligations. Limiting the use of extrinsic evidence also provides certainty for third parties which may rely on the contract, such as assignees, lenders and shareholders [*Byrne*, p. 63; *Spigelman*, p. 47]. Here, Greenacre Energy and Greenacre Council are relevant third parties because RESPONDENT supplies its Turbines to CLAIMANT, who in turn owes its obligations of building and operating the power plant to them.

B. The Turbines do not breach the quality required under the Sales Agreement

73. The Parties contracted for two Francis Turbines R-27V of 300MW power each with further characteristics as specified in detail in Annex A of the Sales Agreement [*Sales Agreement*, Art. 2(1)(b)]. There is no suggestion by CLAIMANT in its Request for Arbitration or in its memorandum that RESPONDENT's turbines do not meet this specified contractual quality under Art. 35(1) CISG. On the contrary, CLAIMANT confirmed that the Turbines had passed the acceptance test stipulated in the Sales Agreement and continue to function as envisaged [*Ex. C4*]. CLAIMANT's suspicion that the steel used in the Turbines is defective is insufficient to constitute a breach of Art. 35(1) CISG (**1**). RESPONDENT was under no obligation to use certified steel (**2**).

1. Mere suspicion of non-conformity cannot establish a breach of Art. 35(1) CISG

74. CLAIMANT cannot prove that the Turbines do not conform to the Sales Agreement. CLAIMANT bears the burden of proving that the Turbines are non-conforming because it is the party bringing the claim for non-conformity [*Linne*, p. 33; *Kröll 2011*, p. 171; *Schwenzer*, p. 620]. CLAIMANT cannot point to any evidence establishing the Turbines' non-conformity. CLAIMANT's mere suspicion that the steel in the Turbines was affected by the Trusted Quality Steel fraud, without more, does not render the Turbines non-conforming to the contractual quality under Art. 35(1) CISG

[*Schwenzer/Tebel*, p. 162, fn. 71]. The few cases where goods have been found to breach a contract due to unconfirmed suspicions of non-conformity occurred where those goods were always intended to be resold, and those suspicions affected the buyer's ability to resell the goods under Art. 35(2) CISG [*Schwenzer/Tebel*, pp. 156-157, 162; *Maley*, pp. 115-116; *Frozen pork case*; *Mussels case*]. This is not such a case. CLAIMANT never intended to resell the Turbines and they continue to produce power as contemplated by the Sales Agreement.

75. CLAIMANT is the party best-placed to test for the alleged non-conformity of the Turbines because they are within its exclusive possession. The Tribunal should not permit CLAIMANT to allege that RESPONDENT delivered non-conforming Turbines yet deny RESPONDENT an opportunity to test for the alleged non-conformity before raising this dispute. The lack of concrete evidence of the non-conformity lies solely within CLAIMANT's responsibility because it is the party with the greater ability to test for the alleged steel defects [*Kröll 2011*, p. 171; *Cable drums case*, ¶3.3]. CLAIMANT even rejected a good faith offer by RESPONDENT to bring forward the first inspection date to enable it to test, at its own costs, for defects in steel quality [*Ex. C5*; *Ex. C7*]. CLAIMANT cannot now complain that the unknown quality of the Turbines is grounds for a claim against RESPONDENT. Even if RESPONDENT did not suffer its data breach, CLAIMANT would still be unable to satisfy its burden of proof [*PO No. 2*, ¶25].

2. RESPONDENT was not under any obligation to use certified steel

76. The possibility that the certificates for the steel which RESPONDENT used to manufacture the Turbines were forged does not cause them to breach the Sales Agreement. There is nothing in the Sales Agreement which imposes an obligation on RESPONDENT to obtain or provide such certification [*Schwenzer 2012*, pp. 105-106; *Cobalt sulphate case*]. The Sales Agreement does not even mention quality certificates, and no obligation can be implied that RESPONDENT needed to provide goods which had certificates [*Souvenir coins case*]. Implied obligations would, in any event, be barred by the Entire Agreement Clause [Above, ¶¶67-71]. RESPONDENT's obligations are exhaustively set out in Art. 2 Sales Agreement which only require it to deliver and install Turbines conforming to Annex A Sales Agreement, inspect the turbines three years after they commence operating, and maintain them throughout their 40-year expected lifetime according to a separate service contract.

77. Stipulating the turbine model in the Sales Agreement does not import obligations regarding certification of steel on the basis of trade usages. Art. 9 CISG provides that parties are bound by practices they have established between themselves and international trade usages which are regularly observed. However, the Entire Agreement Clause prevents obligations outside the Sales Agreement from arising [Above, ¶¶67-71]. Even if the Entire Agreement Clause does not have this effect, there is no international trade usage mandating steel certification for hydro power

turbines, nor have the Parties dealt together previously to establish a common practice between them [*CISG*, Arts. 9(1)-(2); *de Luca*, p. 186; cf. *Magnesium case*; cf. *Tantalum case*]. This contrasts with ethical and safety standards which may apply either expressly or impliedly to bind sellers to certification obligations even without express reference to such obligations [*Schwenzer 2012*, p. 106; *Organic barley case*; *Directive 2006/42/EC*; *KPCS*, Section II].

C. Even if extrinsic evidence is considered, RESPONDENT is still not in breach

78. Even if the Tribunal uses extrinsic evidence to interpret the contract, RESPONDENT still did not breach the Sales Agreement. At best, the extrinsic evidence shows that CLAIMANT wanted the Turbines to produce a 'largely uninterrupted' power supply to comply with Greenacre's 'no-carbon' energy strategy [*Sales Agreement*, Preamble]. As set out below at ¶¶82-92, the 'no-carbon' energy strategy is not mandatory and does not create obligations for the Turbines.

79. Further, RESPONDENT is not in breach of any obligations of repair or maintenance under the Sales Agreement. The Parties intended that these obligations would be contained in a separate service contract [*Sales Agreement*, Arts. 2(1)(e), 3(1)(c), 22(1)]. The Sales Agreement only concerns the sale, delivery and installation of two Francis Turbines R-27V. Any work on the Turbines after their installation falls within the scope of the separate maintenance and repair contract.

III. Alternatively, the Turbines are fit for a particular purpose made known to RESPONDENT under Art. 35(2)(b) CISG

80. CLAIMANT contends that the Turbines are not fit for the particular purpose of '[ensuring] uninterrupted work of the plant, [and] reducing Greenacre's reliance on coal energy' [*Cl. Memo*, ¶148]. This argument must fail. The Turbines continue to generate power as the Parties intended. CLAIMANT should not be permitted to make premature claims of non-conformity where no defects have materialised and it only holds a mere suspicion that the Turbines are non-conforming. Facilitating uninterrupted operation of the plant in fulfilment of Greenacre's 'no-carbon' strategy is not a particular purpose pertaining to the Turbines themselves, as distinct from the larger hydro power plant project (**A**). Even if it were, this particular purpose was not made known to RESPONDENT (**B**), and the Turbines are fit for this particular purpose (**C**).

A. Ensuring the uninterrupted work of the power plant is not a particular purpose

81. CLAIMANT erroneously asserts that a particular purpose of the Turbines was to ensure the uninterrupted operation of the Greenacre Hydro Power Plant under Greenacre's 'no-carbon' energy strategy [*Cl. Memo*, ¶148]. The Tribunal should not permit CLAIMANT to make RESPONDENT bear the burden of CLAIMANT's contractual obligations to Greenacre where CLAIMANT has failed to protect itself in the Sales Agreement. The Turbines are not required to abide by or facilitate Greenacre's 'no-carbon' energy strategy because this strategy is not a 'local

standard' or 'public law requirement' with any binding force (**1**), and the 'no-carbon' energy strategy only regulates the power plant rather than the Turbines (**2**).

1. The 'no-carbon' energy strategy is not a local standard or public law requirement

82. Greenacre's 'no-carbon' energy strategy is not a public law standard to which the Turbines must conform. The observance of public law standards may be required for goods to be fit for their ordinary or particular use [*Schwenzer*, p. 605; *CISG-AC Opinion No. 19*; *Mussels case*]. However, the 'no-carbon' energy strategy is fundamentally different to the standards enforced in those cases. It is framed in aspirational terms, like most government development strategies [e.g. *London Plan 2016*, Policy 5.7; *Energy Concept (Germany)*], and does not provide a standard to evaluate the Turbines against. Compliance with the strategy is not 'expected' because the strategy merely sets an unenforceable goal for Greenacre to 'switch to renewable energy' [*Notice of Arbitration*, ¶4; *CISG-AC Opinion No. 19*, ¶¶1.1, 4.19; cf. *Swiss Energy Act*, Art. 3]. This is different to mandatory energy targets under international instruments [*Kyoto Protocol*, Art. 3(1) Annex 1; *Paris Agreement*, Arts. 3-4; *EU Renewable Energy Directive 2018*, Art. 3]. The 'no-carbon' energy strategy does not impose positive obligations present in marketing regulations [*Caito Roger v Société française de factoring*], food safety regulations [*Spanish paprika case*; *Mussels case*; *Frozen pork case*] or manufacturing safety standards [*Pressure cooker case*]. It is not binding on Greenacre itself, let alone on companies with which Greenacre contracts, or the suppliers to those companies (like RESPONDENT).

2. CLAIMANT assumed the risk of complying with the 'no-carbon' energy strategy

83. Alternatively, even if the 'no-carbon' strategy could be construed as a mandatory public law requirement, it does not regulate RESPONDENT's obligations as the manufacturer of the Turbines. Compliance with the strategy is a purpose of the plant as a whole for which CLAIMANT is responsible. RESPONDENT is only subject to an obligation to deliver Turbines as specified in the Sales Agreement. CLAIMANT erroneously conflates the characteristics of the Turbines and the goals of the power plant, with the purpose of the Turbines.

84. CLAIMANT's responsibility for the Greenacre Hydro Power Plant is characteristic of a design-build construction arrangement under which Greenacre only provides broad performance criteria, including specified purposes, and leaves CLAIMANT responsible for coordinating the design, execution and sequencing of works [*Klee*, pp. 51, 54]. It is common practice for CLAIMANT, the primary contractor for Greenacre, to assume responsibility for producing a final work that is fit for Greenacre's purpose [*Klee*, p. 55; *Raghavan*, pp. 209-210; *IBA v EMI Electronics*].

85. The 'no-carbon' energy strategy and the associated purpose of constructing a hydro power plant with minimal downtime is a purpose of the project as a whole as distinct from the Turbines themselves. The 'no-carbon' energy strategy is broad and, as acknowledged by CLAIMANT, only

contemplates the construction of a hydro power plant in the context of ensuring that renewable energy is always available regardless of weather conditions [*Cl. Memo*, ¶148; *Request for Arbitration*, ¶¶4, 8]. This capability is a factor within the responsibility of CLAIMANT, as an expert in hydro power plant design and construction, which is owed to Greenacre. It is not the responsibility of RESPONDENT, who is only a turbine manufacturer [*Request for Arbitration*, ¶¶1-2].

86. CLAIMANT has failed to import the obligation to ensure uninterrupted power supply into its contract with RESPONDENT. Mere reference to the purpose in the Preamble of the Sales Agreement is insufficient to do so [*Construction Mortgage Investors v Darrel A. Farr Development*, p. 7]. The Preamble does not have any legal effect because its purpose is to set out the background and context to an agreement [*Fontaine/Ly*, p. 87; *Rennes*, p. 441; *Schwenzer 2005*, p. 799]. Further, under its contract with Greenacre, CLAIMANT is responsible for the overall project and oversees the 'interface' of the separate works, while 'each contractor or participant will only have liability for the discrete project package for which he is responsible' [*Huse*, p. 17]. CLAIMANT bears the risk for all facets of the project, including design and construction [*IBA v EMI Electronics*; *Greaves v Baynham Meikle*, p. 1098]. CLAIMANT received a higher price in its contract with Greenacre in exchange for assuming this risk [*Ex. C6*, ¶5]. Had CLAIMANT chosen to pass this risk onto RESPONDENT, RESPONDENT would have sought a higher price than the market value of the Turbines [*Sales Agreement*, Art 4(4)].
87. The 'no-carbon' energy strategy is not a particular purpose of the Turbines because it does not concern their physical characteristics. Tribunals and courts have held that specifications affect a seller's obligations under Art. 35(2) CISG only where they directly regulate physical characteristics of goods [*Medical Marketing v Internazionale Medico Scientifica*; *Smallmon v Transport Sales Limited*; *Caito Roger v Société française de factoring*]. For example, in cases concerning foreign public law regulations, compliance with specifications on the maximum content of hazardous substances has been regarded as a particular or ordinary purpose of goods [*Mussels case*; *Frozen pork case*].
88. CLAIMANT also erroneously argues that a 'guarantee' of the availability of the plant contained in a subsequent contract between CLAIMANT and Greenacre modifies RESPONDENT's obligations under the Sales Agreement [*Cl. Memo*, ¶148; *Schwenzer,* p. 608]. CLAIMANT assumed the risk of that guarantee, as contained in the associated penalty provision, in exchange for a higher price for the reserve capacity provided by the Turbines in its contract with Greenacre [*Ex. C6*, ¶5]. RESPONDENT should not be made to bear the risk of that bargain. RESPONDENT's obligations derive from the Sales Agreement which was concluded earlier in time.

B. This particular purpose was not made known to RESPONDENT, and CLAIMANT did not reasonably rely on RESPONDENT's skill and judgment

89. In any event, the 'particular purpose' of ensuring the uninterrupted operation of the power plant was not adequately made known to RESPONDENT [*CISG,* Art. 35(2)(b); *Schwenzer*, p. 608]. CLAIMANT relies on tender documents and the reference to the commitment of 'operators' to minimise downtime in the Preambles of the Model Contract and Sales Agreement to argue that the particular purpose was communicated to RESPONDENT [*Cl. Memo*, p. 26, ¶156; *Ex. R2*, ¶¶2, 4; *Sales Agreement*, Preamble]. However, CLAIMANT's actions would indicate to a reasonable seller that ensuring the uninterrupted work of the power plant was not of paramount importance [*Brunner/Gottlieb*, p. 239]. If CLAIMANT wanted RESPONDENT to be bound by such an obligation, it would have set it out in an express term, as is the case in many international standard contracts [*Australian Standard D&C Contract AS4902*, Subclause 2.2(a)(iv)(A); *VOB/B*, §13].

90. RESPONDENT made several building suggestions to facilitate expedient maintenance and minimise interruption to the plant, which CLAIMANT refused to adopt [*Ex. C1*, ¶3; *Ex. R2,* ¶5; *Response to Request for Arbitration*, ¶5]. By doing so, CLAIMANT communicated the lower priority it gave to ensuring the uninterrupted use of the plant. The Parties always contemplated that the Turbines would be taken offline for maintenance throughout their lifetime [*Sales Agreement*, Art 2(1)(e); *Request for Arbitration*, ¶7]. Despite this, CLAIMANT rejected practical construction suggestions offered by RESPONDENT to minimise the risk of prolonged downtime, citing cost saving reasons [*Ex. C1*, ¶3; *Ex. R2,* ¶5; *Response to Request for Arbitration*, ¶5]. CLAIMANT therefore exercised its own skill and judgment and did not rely on RESPONDENT [*Smallmon v Transport Sales*, ¶¶75-76]. Had minimising turbine downtime been of paramount importance to CLAIMANT, it would have accepted at least one of RESPONDENT's suggestions as appropriate precautions.

91. Even if the non-binding 'no carbon' energy strategy could be characterised as a public law requirement, RESPONDENT cannot be expected to be aware of and comply with the particular public law requirements of a foreign state [*Schwenzer*, pp. 604-605; *Mussels case*; *Frozen pork case*; *Smallmon v Transport Sales*; *de Luca*, p. 205]. The 'no-carbon' energy strategy was not present in Mediterraneo, where RESPONDENT is based, and CLAIMANT did not communicate that the Turbines were required to comply with it [*Flechtner 2012*, p. 12; *Scaffold hooks case*; *Medical Marketing v Internazionale Medico Scientifica*]. Knowing that the Turbines would be used in Greenacre does not, without more, bind RESPONDENT to Greenacre's public laws [*de Luca*, p. 205; *Brunner/Gottlieb*, p. 240]. The fact that RESPONDENT previously promoted its turbines in Greenacre does not change this. It could not reasonably have understood that it was bound by a strategy which, as discussed at ¶82, is aspirational rather than mandatory [*Ex. R1*; *Mussels case*; *Brunner/Gottlieb*, p. 237].

C. The Turbines are fit for ensuring the uninterrupted operation of the power plant

92. The Turbines comply with the 'no-carbon' energy strategy. Currently, they are working as intended. Greenacre has not yet had to rely on coal power and continues to comply with its 'no-carbon' energy strategy. Were the Turbines to be removed for repair, the interruption could be managed to avoid periods of peak demand, as was always intended. To the extent that the interruption could not be managed, this is due to CLAIMANT's own rejection of RESPONDENT's prudent design suggestions for the plant. As the New Zealand High Court held in *Smallmon v Transport Sales* when applying the CISG and *Mussels case*, RESPONDENT should not be made to compensate CLAIMANT where RESPONDENT had made recommendations to facilitate the particular purpose and CLAIMANT did not rely on RESPONDENT's expertise [*Smallmon v Transport Sales*, ¶¶75-76; contra. *Cl. Memo*, ¶¶161-164]. The Turbines are fit for ensuring the uninterrupted operation of the plant. It is CLAIMANT's inadequate planning which is not fit for purpose.

IV. Alternatively, the Turbines are fit for their ordinary use under Art. 35(2)(a) CISG

93. CLAIMANT has not argued that the Turbines do not conform to the Sales Agreement on the basis that they cannot be used for their ordinary purpose under Art. 35(2)(a) CISG. Even if CLAIMANT were to later raise this argument, it must fail.

94. The ordinary use of hydroelectric turbines is to extract energy and produce electricity from a flowing water source [*Breeze*, pp. 110-111]. Here, the Turbines are producing and continue to produce electricity within the Greenacre Hydro Power Plant and have neither malfunctioned nor broken down [cf. *Cour d'appel, Grenoble 15 May 1996*]. As discussed at ¶¶74-75, the suspicion that the steel may be defective has not affected and cannot affect their use.

95. Further, CLAIMANT cannot draw an analogy to cases where goods have been found to be unfit for their ordinary purpose because government action directly prevents the goods from operating or being used as intended [*Schwenzer/Tebel*, p. 162; *Schlechtriem 2013*; *Frozen pork case*]. For the reasons set out at ¶82, Greenacre's 'no-carbon' energy strategy is not a mandatory public law regulation and therefore does not affect CLAIMANT's ability to put the Turbines to ordinary use.

Conclusion

96. RESPONDENT has delivered conforming Turbines. The Sales Agreement is the sole source of the Parties' obligations and the Turbines meet the stipulated quality under Art. 35(1) CISG. CLAIMANT's suspicions of defects cannot render the Turbines non-conforming. Further, the Turbines do not breach the particular or ordinary purposes of the Sales Agreement. The 'no-carbon' energy strategy does not apply to the Turbines. CLAIMANT was responsible for designing the hydro power plant and unjustifiably seeks to offload its obligations to Greenacre onto RESPONDENT where it failed to adequately protect itself in the Sales Agreement.

ISSUE D: CLAIMANT IS NOT ENTITLED TO REPLACEMENT TURBINES

97. Even if RESPONDENT did breach the Sales Agreement, CLAIMANT is not entitled to delivery of replacement Turbines. CLAIMANT insists on the last resort, uncommercial remedy of substitute delivery notwithstanding RESPONDENT's reasonable offer of inspection and repair [*Ex. C7*]. CLAIMANT persists with its demand, despite accepting that there is a 95% chance that the Turbines do not need to be immediately replaced [*PO No. 2*, App. I]. While RESPONDENT accepts that a valid request for substitute delivery was made within a reasonable time [*Cl. Memo*, pp. 31-32, ¶¶154-158; *CISG*, Art. 39], CLAIMANT is not entitled to replacement Turbines because RESPONDENT did not commit a fundamental breach under the CISG (**I**), and CLAIMANT is not able to seek replacement Turbines under the Sales Agreement (**II**).

I. RESPONDENT did not commit a fundamental breach under the CISG

98. RESPONDENT did not commit a fundamental breach as required for substitute delivery under Art. 46(2) CISG. RESPONDENT delivered functioning Turbines that do not substantially deprive CLAIMANT of what it is entitled to expect under the Sales Agreement (**A**). RESPONDENT did not nor could it have foreseen the extent of the alleged detriment (**B**). In any event, there is no fundamental breach because the Turbines can be reasonably repaired (**C**).

A. CLAIMANT is not substantially deprived of what it is entitled to expect under the Sales Agreement

99. CLAIMANT is not substantially deprived of what it is entitled to expect under the Sales Agreement, which is a requirement for fundamental breach under Art. 25 CISG. CLAIMANT's contractual expectations are not determined subjectively, but by interpreting the Sales Agreement [*Ferrari*, pp. 496-497; *Brunner/Gottlieb*, p. 166]. Interpretation of the Sales Agreement is further restricted by the Entire Agreement Clause [Above, 6772]. CLAIMANT incorrectly argues that its obligations under the Sales Agreement are modified by reference to its obligations to Greenacre, which arise from a subsequent and separate contract not involving RESPONDENT [*Cl. Memo*, pp. 33-34, ¶166]. CLAIMANT's obligations to Greenacre are irrelevant to the expectations under the Sales Agreement because CLAIMANT's contractual expectations are assessed by determining its objective meaning [*Honsell*, Art. 25, ¶16; *Caemmerer/Schlechtriem*, Art. 25, ¶9; *Lorenz*].

100. Even if the Tribunal finds that CLAIMANT was entitled to expect the uninterrupted availability of the Turbines, RESPONDENT's delivery did not substantially deprive CLAIMANT of this expectation. 'Substantially deprived' refers to the importance of the obligation to CLAIMANT [*Schroeter*, p. 428; *Schwenzer 2005*, p. 799; *Shoe leather case*; *Tools case*]. In assessing the importance of the obligation, tribunals and courts often look to whether the defective goods can still be put to use and the gravity of the consequences of the breach [*Graffi*, p. 339; *Schwenzer 2005*, p. 799; *Koch*, pp. 214-218;

Whittington, p. 435]. Here, these factors do not indicate that CLAIMANT was substantially deprived of its contractual expectations.

101. CLAIMANT cannot be deprived of what it is entitled to expect under the Sales Agreement unless the defect is so serious as to prevent it from using the goods in its ordinary course of business [*Lubbe*, p. 459; *Cobalt sulphate case*; *Furniture case*]. Each Turbine has been producing 300MW since passing the acceptance tests [*Ex. C4*; *OLG Linz 2011*]. The continuing use of the Turbines in the Greenacre Hydro Power Plant Project while repair is possible prevents any breach being fundamental [*Schroeter*, p. 449; *OLG Linz 2011*].

102. Similarly, the consequences of the breach do not frustrate the purpose of the Sales Agreement [*Koch*, pp. 219-220; *Enderlein/Maskow*, p. 113]. The purpose of the Sales Agreement is to provide functioning turbines for CLAIMANT's hydro energy project with Greenacre. The Parties set out in Art. 20 Sales Agreement what breaches were of such importance that CLAIMANT could terminate the Sales Agreement [*Sales Agreement*, Art. 20(2); *Schroeter*, p. 428]. The Parties did not consider the delivery of defective Turbines to be one of these breaches.

103. There are no economic consequences of RESPONDENT's breach that can substantially deprive CLAIMANT of what it is entitled to expect under the Sales Agreement [*Graffi,* pp. 339-340]. The Tribunal can consider the liquidated damages provisions in its calculation of any loss to CLAIMANT [*Enderlein/Maskow*, p. 113]. The losses caused by the breach are alleviated by the liquidated damages available under Art. 19(2) Sales Agreement. CLAIMANT is entitled to a maximum of US$5 million in liquidated damages for downtime by reason of non-conformity, which compensates it for 125 consecutive days of downtime without having to prove any loss [*Sales Agreement*, Art. 19(2)]. If CLAIMANT can prove additional loss, it can seek a further US$15 million in damages [*Sales Agreement*, Arts. 19(4)-(6)]. The total US$20 million in damages available to CLAIMANT, which is half the value of the Sales Agreement [*Sales Agreement*, Art. 4(1)], adequately compensates it for any losses or liabilities it may incur as a result of RESPONDENT's breach [*Sales Agreement*, Art. 19(6)].

104. Further, CLAIMANT does not face a total loss by keeping the Turbines because they still retain value. CLAIMANT accepts that there is only a 5% chance that the Turbines need immediate replacement [*PO No. 2*, App. I]. On a generous estimate to CLAIMANT, if the market value of the turbines were reduced by 50% due to this chance, the Turbines would still be worth US$20 million.

B. RESPONDENT did not nor should have foreseen the detriment

105. For a breach to be fundamental, RESPONDENT, or a reasonable person in the position of RESPONDENT, must have foreseen the importance of the obligation of uninterrupted availability to CLAIMANT [*CISG*, Art. 25; *Schroeter,* p. 431; *OGH 2005*]. CLAIMANT erroneously contends that

RESPONDENT should have foreseen how important the uninterrupted availability of the plant was to CLAIMANT [*Cl. Memo*, p. 28, ¶¶167-168].

106. CLAIMANT's conduct during the negotiation process indicated that the Turbines' uninterrupted use was not of paramount importance. CLAIMANT rejected RESPONDENT's suggestions to amend the design of the plant which would have minimised the risk of prolonged downtime [*Ex. C6*, ¶7; *Ex. R2*, ¶5]. Of course RESPONDENT understood that reliability was of some importance to CLAIMANT, but when RESPONDENT voiced that understanding to CLAIMANT by making design suggestions, CLAIMANT rejected them in favour of a cheaper but less reliable design [*Ex. C6,* ¶7; *Ex. R2*, ¶5]. RESPONDENT was entitled to understand from this that CLAIMANT prioritised economic efficiency over reliability in the construction of the plant.

107. Further, the penalty clause agreed in the separate contract between CLAIMANT and Greenacre could have no bearing on RESPONDENT's understanding of CLAIMANT's interests. The penalty clause was entered into after the Sales Agreement was concluded [*PO No. 2*, ¶26]. The prevailing view among academics and courts is that foreseeability is determined at the time of entry into the contract [*Schroeter*, pp. 434-435; *Huber/Mullis*, pp. 215-216; *Bertrams/Kruisinga*, p. 278; *Bridge*, p. 569; *BGer 2013*, ¶3.1.4; *Café inventory case*]. Even if subsequent events were relevant to interpretation, RESPONDENT only became aware of the penalty clause in January 2018, four years after the Sales Agreement was entered into [*PO No. 2*, ¶26; *Honnold 1999*, p. 125]. It would be unreasonable to modify RESPONDENT's obligations under the Sales Agreement by reference to the separate contract between CLAIMANT and Greenacre when CLAIMANT did not even choose to inform RESPONDENT of it.

C. There is no fundamental breach where the defect can be reasonably repaired

108. CLAIMANT cannot be awarded substitute delivery where reasonable repair is available. RESPONDENT has made good faith and reasonable offers to bring forward the original date for the Turbines' inspection and test the steel at its own cost [*Ex. C7*; *Response to the Request for Arbitration*, ¶8]. The 'predominant opinion' of courts and commentators is that there can be no fundamental breach where a defect is reasonably curable [*Koch*, pp. 224-227; *Lubbe*, p. 461; *Huber*, p. 23; *Brunner/Gottlieb*, p. 350; *Kruisinga*, p. 916]. RESPONDENT can sufficiently remedy the Turbines (**1**), in a manner reasonable to the Parties (**2**). In any case, RESPONDENT has an overriding right to repair the Turbines under Art. 48 CISG (**3**).

1. RESPONDENT can sufficiently remedy the breach

109. RESPONDENT can remedy CLAIMANT's suspicion that the Turbines are defective by inspecting and testing the Turbines [contra. *Cl. Memo*, p. 29, ¶170]. Should it discover that the Turbines need repair, RESPONDENT is willing to do so at its own cost [*Ex. R2*, ¶7]. By demanding the last resort

remedy of substitute delivery, CLAIMANT prevents RESPONDENT from curing any defect [*Ex. R2*, ¶7; *PO No. 2*, ¶35]. The Turbines can be repaired regardless of the extent of corrosion. An inspection can be completed in 2 months [*PO No. 2*, App. I]. If the Turbines are defective, they would require only an additional downtime of 4-7 months to be repaired [*PO No. 2*, App. I]. These repairs will sufficiently remedy any corrosion and ensure that the Turbines can continue to operate at their full capacity, in line with the expectations of the hydro turbine industry [*Brekke*, pp. 37-38; *Finnegan/Bartkowiak/Deslandes*].

110. In the very unlikely situation that replacement is necessary (5%), it is only the runners that would need replacing [*PO No. 2*, App. I; *Ex. C7*]. The runner is the 'heart of the turbine' and its replacement can ensure the Turbines return to full operating capacity [*Canyon Hydro*; *Finnegan/Bartkowiak/Deslandes*].

2. Repairing the turbines is commercially reasonable for CLAIMANT and RESPONDENT

111. RESPONDENT's offer to repair does not cause unreasonable inconvenience to CLAIMANT. CLAIMANT does not have a 'particular and legitimate interest' in immediate substitute delivery [*Huber*, p. 23; *Brunner/Gottlieb*, pp. 170-171]. CLAIMANT's financial obligations under the penalty clause in its contract with Greenacre Council do not render the potential delay unreasonable [contra. *Cl. Memo*, p. 32, ¶161]. It is commercially unreasonable for RESPONDENT to be subject to greater obligations because of a clause it was unaware of, not involved in negotiating, and which it had no opportunity to factor into the contract price. In any event, Greenacre Energy, who has now taken over Greenacre Council's rights, has indicated that it will exercise the penalty clause 'lenient[ly]' against CLAIMANT because 'there is no alternative source of energy supply available at present' [*PO No. 2*, ¶42]. If Greenacre Energy does invoke the full penalty against CLAIMANT for any downtime caused by repair (which is US$20,000-US$40,000 per day), this would be offset by the liquidated damages of US$40,000, payable by RESPONDENT under the Sales Agreement for each day the turbines operate below 60% capacity [*Ex. C6*, ¶5; *PO No. 2*, ¶41; contra. *Cl. Memo*, p. 32, ¶161]. While consequential loss is excluded by the Sales Agreement, this does not affect the liquidated damages automatically payable, which do not require proof of loss [*Sales Agreement*, Art. 19].

112. Repair of the Turbines is the only commercially reasonable remedy having regard to the total costs of substitute delivery [*Graffi*, pp. 341-343]. Substitute delivery always involves significant costs to parties [*Müller-Chen*, p. 744; *Brunner/Gottlieb*, p. 350]. In this case, the two replacement Turbines would cost RESPONDENT US$28,000,000 [*Ex. R2*, ¶8]. The replacement itself would cost both Parties an additional US$10,700,000 [*PO No. 2*, App. I]. The total cost of replacing the Turbines would therefore be US$38,700,000, which is more than twice the cost of the most expensive

inspection and repair required, and almost the entire US$40,000,000 value of the Sales Agreement [contra. *Cl. Memo*, p. 33, ¶162; *PO No. 2*, App. I; *Ex. R2*, ¶8; *Sales Agreement*, Art. 4]. These costs threaten RESPONDENT's economic survival and would compromise its ability to maintain and repair the Turbines in the future [*Ex. R2*, ¶6]. The costs of substitute delivery are disproportionate because there is a 95% likelihood that repair will be sufficient [*PO No. 2*, App. I]. Further, the 5% likelihood that replacement is necessary applies only to the Turbines' runners, whereas the risk of requiring replacement of the entire Turbines is 'extremely small' [*PO No. 2*, ¶34].

3. In any event, RESPONDENT has an overriding right to repair the turbines

113. RESPONDENT has the right to rectify non-conforming goods under Art. 48(1) CISG [*Huber/Mullis*, p. 218; *Art. 46 Case Digest CISG*, pp. 227-228]. CLAIMANT accepts that the right to repair takes priority over the right to substitute delivery, so long as repair is sufficient to remedy the breach and does not cause unreasonable delay or inconvenience to CLAIMANT [*Cl. Memo*, ¶¶159-160; *Schlechtriem 2006*, p. 89; *Kruisinga*, p. 912; *Huber*, pp. 23-24]. As set out above at [¶¶109-110], RESPONDENT's offer to repair meets these requirements. Therefore, even if the Tribunal finds that this defect, while curable, amounts to a fundamental breach, RESPONDENT has an overriding right to repair. RESPONDENT has consistently acted in good faith and is not barred from electing to repair the turbines [*Müller-Chen*, p. 747; *Cobalt sulphate case*].

II. CLAIMANT is not entitled to substitute delivery under the Sales Agreement

114. CLAIMANT is not entitled to substitute delivery under the Sales Agreement. CLAIMANT has not argued but may argue that the Sales Agreement sets a lower threshold of fundamental breach for substitute delivery than in the CISG. It could not do so. The lower threshold of a fundamental breach in the Sales Agreement only applies to the remedy of avoidance (**A**). Even if the lower standard did apply to substitute delivery, RESPONDENT would not have committed a fundamental breach under that standard (**B**). In any event, the Parties intended that CLAIMANT would be restricted to damages and repair of the Turbines in the event that they are non-conforming (**C**).

A. The standard of fundamental breach in the Sales Agreement only applies to avoidance

115. When dealing with fundamental breach under the heading 'Termination for Cause', the Sales Agreement omits the two CISG requirements that a fundamental breach substantially deprive CLAIMANT of its contractual entitlements and that the detriment be foreseeable to RESPONDENT. If this is to be understood as lowering the standard of fundamental breach in the Sales Agreement, it would only do so in relation to the remedy of termination, which is referred to as 'avoidance' in the CISG [*Magnus,* p. 423; *Peacock*, p. 95]. It would not affect the definition of fundamental breach for substitute delivery.

116. The heading of Art. 20 Sales Agreement, 'Termination for Cause', indicates that Art. 20 only applies to the remedy of avoidance. Headings are part of the Sales Agreement and should be used for interpretation under Art. 8 CISG [*Don King v Warren*, ¶302; *Wiggins v New Hope*, ¶90]. The Parties have not taken the common option of expressly excluding headings from interpretation [*Citicorp International v Castex International*, ¶30; *Breakspear v Ackland*, ¶¶104, 307]. Further, the text of Art. 20 only deals with the remedy of avoidance. There is no reference to any other remedy. If the Parties had intended to do something as significant as change the definition of fundamental breach for other remedies, they would have done so expressly.

117. The contract negotiations support this interpretation [*CISG*, Art. 8(3); *Cross*, pp. 146-147]. The Parties considered that if CLAIMANT exercised its right under Art. 20 Sales Agreement, it would face the problem of having 'to look for a new supplier' [*PO No. 2*, ¶4]. The only remedy that could result in CLAIMANT having to look for a new supplier for the Greenacre Project would be avoidance [*Magnus*, p. 423; *CISG-AC Opinion No. 9*, ¶3.2; *Stainless steel wire case*].

B. Alternatively, there is no fundamental breach under the Sales Agreement

118. Even if the lower standard in the Sales Agreement did apply to the remedy of substitute delivery, RESPONDENT still did not commit a fundamental breach. Art. 20(2)(d) Sales Agreement provides that CLAIMANT can terminate the contract if RESPONDENT commits 'other breaches which deprive [CLAIMANT] of what it is entitled to expect under the contract'. Not all breaches meet the Sales Agreement standard of 'fundamental'. CLAIMANT is entitled to expect two Francis Turbines R-27V that can operate at the agreed output of 600MW [*Sales Agreement*, Art. 2(1)(b)]. The Parties created an acceptance test to ensure the Turbines could meet CLAIMANT's contractual expectations. The Turbines passed this test and have been 'producing energy since then' [*Ex. C4*]. The Turbines are operating as agreed under the Sales Agreement.

119. CLAIMANT is not deprived of what it is entitled to expect under the contract merely because the Turbines require repair. The Parties expressly contemplated that the Turbines would have some downtime for repairs and maintenance as they discussed construction measures that could 'considerably improve the availability of the plant' in the event that repair was necessary [*Ex. R2*]. CLAIMANT rejected these measures. Further, as set out above at [¶¶108-113], CLAIMANT cannot be deprived of its contractual expectations where the Turbines are reasonably capable of being repaired.

C. The Parties intended for CLAIMANT to be restricted to damages and repair in the event of a non-conforming breach

120. The clause titled 'Liquidated Damages and Limitation of Liabilities' does what it says, and limits RESPONDENT's liability by restricting access to the remedy of substitute delivery [*Sales Agreement*,

Art. 19(2)]. It does this by setting an agreed damages regime for non-conformity during the guarantee period. Under the principle of party autonomy, the Parties can agree on the remedies available to them under the Sales Agreement by derogating from specific provisions of the CISG [*Koch*, pp. 298-299; *Schwenzer/Hachem*, p. 115]. The Parties have derogated from the remedy of substitute delivery under Art. 46(2) by agreeing that liquidated damages must be paid while RESPONDENT repairs the Turbines [*CISG-AC Opinion No. 6*, ¶1.3; *CISG*, Art. 6].

121. Construing the Sales Agreement as a whole, the Parties chose for liquidated damages to compensate CLAIMANT for non-conformity while RESPONDENT makes any necessary repairs during the guarantee period [*Sales Agreement*, Art. 19(2); *Explanatory Note CISG*, p. 36; *Smythe*, p. 4; *Arnold v Britton*, ¶¶17-20; *ABC v Australasian Performing Right*, ¶109]. Art. 19(2) Sales Agreement states that RESPONDENT 'shall pay liquidated damages in the amount of US$40,000.00' each day the Turbines perform below 60% capacity. The mandatory language of Art. 19(2) requires RESPONDENT to pay liquidated damages for the Turbines' downtime due to non-conformity in their first four years of operation [*Sales Agreement*, Art. 19(2); e.g. *CS Phillips v Baulderstone*]. In contrast, Art. 19(1) provides that 'any delay in delivery will entitle BUYER to liquidated damages'. RESPONDENT is required by Art. 19(2) Sales Agreement to pay liquidated damages for delivery of non-conforming turbines during the guarantee period [*Katz*, p. 385; *Sales Agreement*, Art. 19(2)]. The liquidated damages clause is a genuine pre-estimate of the loss CLAIMANT would suffer for any non-conformity of the Turbines [*Brio Electronic v Tradelink Electronic*; *Cavendish v Makdessi*; *Cubic Electronics v Mars Telecommunications*; *Hon Chin Kong v Yip Fook Mun*; *Paciocco v ANZ*; *BGB*, §307]. There is a separate maintenance contract with CLAIMANT to facilitate any necessary repairs [*Sales Agreement*, Arts. 3(1)(c), 22(1)]. Through these mechanisms, CLAIMANT's loss is minimised and repair is facilitated. It is unnecessary to resort to the remedy of substitute delivery where the Parties have provided for a detailed regime to remedy defects in a commercially reasonable manner.

Conclusion

122. CLAIMANT cannot seek the commercially unreasonable remedy of substitute delivery. The remedy of substitute delivery is not available to CLAIMANT because RESPONDENT did not commit a fundamental breach. CLAIMANT is required to accept liquidated damages for non-conformity of the Turbines. In any case, RESPONDENT's right to repair the breach is superior to CLAIMANT's right to substitute delivery. Where CLAIMANT only holds a suspicion that the Turbines are defective, it is inappropriate to award a remedy that threatens RESPONDENT's economic survival. To award such a drastic remedy runs contrary to the overriding objective of the CISG, which is to facilitate international commerce [*CISG*, Preamble].

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT requests that the Tribunal order that:

(1) the Tribunal does not have jurisdiction to hear the dispute;

(2) Prof. John not be excluded;

(3) RESPONDENT has not breached the Sales Agreement; and

(4) even if RESPONDENT has breached the Sales Agreement, CLAIMANT is not entitled to the delivery of replacement turbines.

CERTIFICATE OF VERIFICATION

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Respectfully submitted

Sydney, January 24, 2020


Peter Dougherty


Benjamin John


Anuki Suraweera


Calida Tang