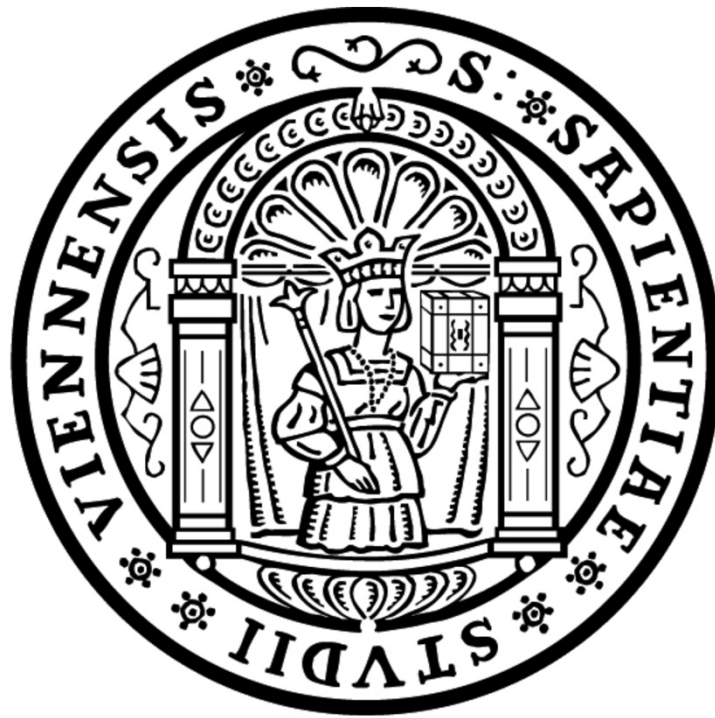


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TWENTY-SEVENTH ANNUAL  
WILLEM C. VIS INTERNATIONAL ARBITRATION MOOT  
2019/20 ■ VIENNA

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# UNIVERSITY OF VIENNA



## MEMORANDUM FOR RESPONDENT

*on behalf of*  
**TurbinaEnergia Ltd**  
RESPONDENT

*against*  
**HydroEN plc**  
CLAIMANT

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**INDEX OF ABBREVIATIONS AND DEFINITIONS**

§, §§	Paragraph, paragraphs (of this memorandum)
%	Per cent
&	and
Art, Artt	Article, Articles
A/S	Aktieselskab (Danish); Danish public limited company
ASA	Swiss Arbitration Association
CEO	Chief executive officer
cf	Confer
CFR	Charter of Fundamental Rights of the European Union
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (2017)
CISG, CVIM	United Nations Convention on Contracts for the International Sale of Goods, Convention des Nations Unies sur les contrats de vente internationale de marchandises (1980)
Co	Company
Corp	Corporation
DD	Dioničko društvo (Croatian); Croatian public limited company
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DIS Rules	DIS Arbitration Rules (2018)
Dr	Doctor



ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
EU	European Union
EWHC	High Court of Justice of England and Wales
ed, eds	Editor, editors
et al	et alii (Latin); and others
Exh	Exhibit
GmbH	Gesellschaft mit beschränkter Haftung und Co Kommanditgesellschaft (German); German, Swiss and Austrian limited partnership
GmbH & Co KG	Gesellschaft mit beschränkter Haftung und Co Kommanditgesellschaft (German); German, Swiss and Austrian limited partnership with limited company as general partner
HKCFI	Court of First Instance of Hong Kong
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules (2018)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICC Rules	ICC Arbitration Rules (2017)
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICDR Rules	ICDR International Dispute Resolution Rules and Procedures (2014)
ICESBA	International Conference on Economics, Sciences and Business Administration
ICSID	International Centre for Settlement of Investment Disputes



ICSID Rules	ICSID Convention Arbitration Rules (2006)
Inc	Incorporated
IUSCT	Iran-US Claims Tribunal
JILP	New York University Journal of International Law and Politics
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules 2014
LetLang	Letter by Langweiler (23 September 2019)
LLC	Legal Limited Company
LP	Limited partnership
Ltd	Limited
MC	Memorandum for Claimant by Emory University
ML	UNCITRAL Model Law on International Commercial Arbitration
Mr	Mister
Ms	Miss
No, nos	Number, numbers
NSWSC	Supreme Court of New South Wales (Australia)
NV	Naamloze vennootschap (Dutch); Dutch public limited company
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Oy	Osakeyhtiö (Finnish); Finnish limited company
p, pp	Page, pages



para	Paragraph, paragraphs
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
plc	Public Limited Company
PO1	Procedural Order No 1
PO2	Procedural Order No 2
Pty Ltd	Proprietary limited company
Pvt	Private limited company
RequArb	Request for Arbitration
RespArb	Response to Arbitration
SA	Société anonyme (French); public limited company in the francophone world
SARL	Société à responsabilité limitée (French); limited company in the francophone world
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	SCC Arbitration Rules (2017)
SchiedsVZ	Zeitschrift für Schiedsverfahren
S de R L de C V	Sociedad de Responsabilidad Limitada de capital variable (Spanish); limited company with variable capital in the hispanophone world
seq	Et sequens (Latin); and the following
SIAC	Singapore International Arbitration Centre
SIAC Rules	Investment Arbitration Rules of the Singapore International Arbitration Centre (2017)
SpA	Società per Azioni (Italian); Italian public limited company
Sr	Señor (Spanish); mister



Srl	Società a responsabilità limitata (Italian); Italian limited company
SSRN	Social Science Research Network
Swiss Rules	Swiss Rules of International Arbitration (2012)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules (2013)
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
v	Versus (Latin); against





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**Higher Regional Court of Hamm**  
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Cited in: § 72

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**Federal Court of Justice**  
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Cited in: § 82

*Pollution Case*

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Cited in: § 69

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*Textiles Case*

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**Supreme Court of New Mexico**

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Cited in: § 2

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**International Centre For Settlement of Investment Disputes**

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**International Centre For Settlement of Investment Disputes**

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Cited in: § 47

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**International Centre For Settlement of Investment Disputes**

16 November 2012

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Cited in: § 47

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Cited in: § 33

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5 October 2012

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Occidental Petroleum Corporation/Occidental Exploration and Production Company v The Republic of Ecuador

Cited in: § 47



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15 October 2008

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Cited in: § 33

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Decision of the Tribunal on the Participation of a Counsel

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6 July 2012

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Sedco, Inc v National Iranian Oil Company/The Islamic Republic of Iran

Cited in: § 47

*Sylvania v Iran***Iran–US Claims Tribunal**

27 June 1985

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Sylvania Technical Systems, Inc v The Government of the Islamic Republic of Iran

Cited in: § 47

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2009

Reference No 81079

Cited in: § 47

*LCIA Reference No  
111947***London Court of International Arbitration**

4 September 2012

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Cited in: § 39





## STATEMENT OF FACTS

TurbinaEnergia Ltd (“RESPONDENT”) is a producer of water turbines, located in Equatoriana. HydroEN plc (“CLAIMANT”) is a market leader in providing pump hydro power plants, based in Mediterraneo with operations in over 100 countries.

In **March 2014**, CLAIMANT participated in the tender process for the construction of a pump hydro power plant for the Community of Greenacre. Whilst preparing the bid for the tender process, CLAIMANT approached RESPONDENT regarding the delivery of two of their newly developed Francis R-27V turbines.

On **22 May 2014**, CLAIMANT and RESPONDENT (“**the Parties**”) concluded a written agreement (“**Sales Agreement**”) providing for RESPONDENT’s obligation to deliver and install two R-27V Francis turbines (“**Turbines**”). The qualities which these Turbines needed to possess were set out in detail in Annex A to the Sales Agreement. Shortly after the conclusion of the Sales Agreement, CLAIMANT was awarded with the contract by Greenacre on **15 July 2014**.

In accordance with the Sales Agreement, RESPONDENT delivered and installed the Turbines in **late spring 2018**. The installation was completed on **20 August 2018**. The Turbines passed their one-week acceptance test. No irregularities were detected, and the Turbines were assessed as fit for operation. The Turbines started to operate on **19 September 2018**.

On **3 October 2018**, CLAIMANT contacted RESPONDENT and enquired about a newspaper article concerning the shutdown of a power plant in Riverhead and its possible negative implications for the Greenacre plant. This story had been published on **29 September 2018** and mentioned the standstill of the plant due to defective turbines which were also supplied by RESPONDENT. CLAIMANT was concerned that the low-quality steel – which seemed to be the reason for the standstill in Riverhead – was also used for the Greenacre Turbines. In reply, RESPONDENT informed CLAIMANT that these two plants were not comparable and operated in vastly different environments: Greenacre operates in freshwater, whereas Riverhead is a saltwater plant. Turbines exposed to saltwater corrode at a faster rate than those exposed to freshwater. Hence, the Turbines in Greenacre have a low likelihood of corrosion when compared to Riverhead. RESPONDENT set out that even in the worst-case scenario – that the Turbines were actually made from steel by the same supplier – Greenacre would therefore not be affected as much as Riverhead.



Despite RESPONDENT's clarification, CLAIMANT remained concerned about possible damage to the Turbines. In order to maintain good business connections with CLAIMANT, RESPONDENT offered to push the first maintenance inspection forward by one year to **autumn 2020**.

However, CLAIMANT asked for even further concessions. On **11 December 2018**, RESPONDENT offered the full repair of the Turbines in the unlikely event that any damage should be found at the inspection. However, without any concrete damage being established, CLAIMANT requested substitute turbine runners. In response to CLAIMANT's unreasonable request, RESPONDENT offered to produce two new turbine runners at a preferential rate and to bear CLAIMANT's costs, should an exchange actually become necessary at the inspection. Yet, despite RESPONDENT's proposal, CLAIMANT submitted a Request for Arbitration to the London Court of International Arbitration ("LCIA") on **31 July 2019**, nominating **Ms Claire Burdin** as their arbitrator.

CLAIMANT based their initiation of the arbitration on a purported unilateral right to refer a dispute to arbitration under Art 21(2) Sales Agreement. The text of Art 21 Sales Agreement denies RESPONDENT such a right and restricts RESPONDENT to referring disputes to CLAIMANT's home courts in Mediterraneo. During the negotiations, CLAIMANT had insisted on the inclusion of this unilateral procedural right, while RESPONDENT's request to have a balanced clause had been rejected. RESPONDENT accepted the unilateral clause in order to salvage the Parties' commercial agreement.

After receiving CLAIMANT's Request for Arbitration, RESPONDENT decided to submit an expert report by Prof Tim John on the differences between the Greenacre and Riverhead power plants and the risk of a complete loss of the Turbines. Prof John is one of only four internationally renowned experts on corrosion and cavitation damage who are proficient in English, the language of this arbitration. On **20 August 2019**, RESPONDENT signed an official retainer with Prof John. Ten days later, on **30 August 2019**, RESPONDENT submitted their Response to the Request for Arbitration, nominating their own arbitrator, Pravin Deriaz. On **15 September 2019**, the LCIA appointed the arbitral tribunal including Prof Kaplan, Ms Burdin and Mr Deriaz ("**Tribunal**"). On **21 September 2019**, Ms Burdin disclosed that her husband, Mr Burdin, is presently engaged in a lawsuit against Prof John. On 23 September 2019, CLAIMANT requested to exclude Prof John as party-appointed expert from the arbitral proceedings, invoking an alleged conflict of interest of Ms Burdin.



## **SUMMARY OF ARGUMENTS**

### **I. The Tribunal does not have jurisdiction to adjudicate any dispute between the Parties**

The Tribunal does not have jurisdiction to hear the case, since CLAIMANT's unilateral right to initiate arbitral proceedings renders the arbitration agreement invalid. First, the unequal distribution of procedural rights is contrary to the mandatory principle of party equality. Second, the arbitration agreement contradicts Danubian substantive law as it creates gross disparity. If the Tribunal were to accept jurisdiction nevertheless, any award would be subject to annulment and not be recognisable or enforceable.

### **II. The Tribunal should allow the party-appointed expert, Prof John**

RESPONDENT has a fundamental right to present evidence given by a party-appointed expert. A party's right to present evidence may only be limited under exceptional circumstances, which do not exist in the dispute at hand. Moreover, Prof John cannot be excluded for an alleged lack of impartiality and independence. If Prof John were removed, RESPONDENT would be deprived of their fundamental procedural right to submit evidence in support of their position maintained in the present arbitral proceedings.

### **III. The delivered Turbines are in conformity with the Sales Agreement**

The Turbines that RESPONDENT delivered to CLAIMANT fully conform to all requirements of the Sales Agreement, which provides that only physical defects constitute a non-conformity. The fact that the Parties voluntarily agreed to push the first inspection forward by a year does not establish the Turbines' non-conformity. Neither does the mere suspicion of the use of inferior steel constitute a breach of contract. CLAIMANT has failed to meet their burden of proof regarding the existence of physical defects.

### **IV. CLAIMANT is not entitled to substitute delivery**

Should the Tribunal find that there was a breach of contract, this breach would not entitle CLAIMANT to demand substitute delivery. This remedy is only available in case of a fundamental breach of contract. Art 20 Sales Agreement does not define the relevant threshold for a right to claim substitute delivery. Art 25 CISG exclusively sets out the applicable definition of a fundamental breach. However, the requirements of Art 25 CISG are not met, since CLAIMANT has not suffered a substantial deprivation of what they were entitled to expect under the contract and RESPONDENT could not foresee any of the detrimental effects.

## **I. The Tribunal does not have jurisdiction to adjudicate any dispute between the Parties**

- 1 The Tribunal does not have jurisdiction to adjudicate the dispute initiated by CLAIMANT [*RequArb pp 4 seq*], since the arbitration agreement under Art 21 Sales Agreement is invalid. Art 21 Sales Agreement confers the procedural right to choose between fora only on CLAIMANT [*Exh C2 p 13*], while RESPONDENT is denied such a right. Instead, RESPONDENT is restricted to initiating only litigation before the courts of CLAIMANT's home country, Mediterraneo [*Exh C2 p 13*]. This one-sided nature renders the arbitration agreement fundamentally unfair and thereby contradictory to the principle of equal treatment of parties.
- 2 In the arbitration agreement, the Parties have explicitly agreed on the LCIA Rules to govern the proceedings [*Exh C2 p 13*]. In accordance with the principle of competence-competence, the Tribunal can decide on its own jurisdiction [*Art 23.1 LCIA Rules; Art 16(1) ML; cf CLOUT Case 127; CLOUT Case 147; CLOUT Case 403; CLOUT Case 504; CLOUT Case 1175; ICC 4367/1984; ICC 4402/1983; ICC 4472/1984; Binder p 253; Born II p 1051; Fouchard p 400; Redfern para 5.105; Scherer I Art 23 para 15–18*].
- 3 In the present dispute, the Tribunal is required to reject jurisdiction due to the invalidity of the arbitration agreement [*Born II p 657; Fouchard p 21; Lachmann p 1; Pitkowitz p 5; Redfern para 1.58; Waincymer I p 130*], which derives from the one-sided nature and the fundamental unfairness of the arbitration agreement (A.). In case the Tribunal were to accept jurisdiction, any award on the substance of the dispute would be subject to annulment and be neither recognisable nor enforceable (B.).

### **A. The arbitration agreement is invalid because it is one-sided and fundamentally unfair**

- 4 The grounds for invalidity of an arbitration agreement are set forth under Art 8 Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("ML") with the 2006 amendments [*PO1 p 46 para 4*]. The ML governs the arbitral proceedings since the Parties chose Danubia as the seat of this arbitration [*Exh C2 p 13*]. The asymmetrical arbitration agreement is null and void for violating the fundamental principle of equal treatment of parties (1.). Additionally, the arbitration agreement should be avoided for creating gross disparity between the procedural rights of the Parties (2.).

## 1. The unilateral right to commence arbitration infringes the mandatory principle of equal treatment

- 5 Equal treatment of parties is a fundamental procedural right, not only in arbitration but also in dispute resolution in general [Art 47(2) CFR; Art 20(1) CIETAC Rules; Art 6 ECHR; Art 13.1 HKIAC Rules; Artt 5(2), 22(4), 37(2) ICC Rules; Artt 14.4, 14.5 2014 LCIA Rules; Art V(1)(b) NYC; Artt 17(4), 17(5), 23(2) SCC Rules; Rules 7.1, 9.2, 16.1 SIAC Rules; s 1 English Arbitration Act 1996; *Steel & Morris Case* para 59; *Suda Case* para 26; *Estavillo* p 397; *Kurkela/Turunen* p 189; *Scherer/Prasad/Prokic* pp 1, 5]. This principle is expressly recognised by Art 18 ML which requires that “[t]he parties shall be treated with equality” [Art 18 ML; cf *Binder* pp 330 seq; cf *Holtzmann/Neuhaus* pp 550 seq]. Art 18 ML is mandatory and forms one of the most fundamental principles of the entire ML [Born II pp 1567 seq; *Jenkins* p 159; *ML Digest* Art 18 para 4; *Scherer/Prasad/Prokic* p 4; *UNCITRAL Yearbook* 1985 p 124; *Waincymer I* p 183]. Therefore, it must be complied with not only by arbitral tribunals, but also by the parties [cf *Binder* p 330; *Born II* pp 1567 seq, 2132; cf *Holtzmann/Neuhaus* p 550; *Jenkins* p 159; cf *Lew/Mistelis/Kröll* p 420; cf *Redfern* para 3.64; *Scherer/Prasad/Prokic* p 4; *ML Digest* Art 18 para 5; *UNCITRAL Yearbook* 1985 pp 124 seq; *Waincymer I* p 183]. Since the mandatory provision of Art 18 ML covers “both [...] actions taken by the arbitral tribunal and [...] **procedural agreements reached by the parties**” (emphasis added) [*Holtzmann/Neuhaus* p 550; cf *Koblenz Case*; cf *Born II* p 887], the Tribunal must apply this principle when assessing the validity of the arbitration agreement. Similarly, the parties must also adhere to Art 18 ML when agreeing on an arbitration agreement as this principle cannot be derogated from [*Binder* p 332; cf *Born II* p 3261; cf *Holtzmann/Neuhaus* p 556; *UNCITRAL Yearbook* 1985 p 124]. Therefore, it restrains the freedom of the parties to lay down the rules of procedure [*Born I* p 156; *Born II* p 2164; *Fouchard* p 464; *Redfern* para 6.12; *UNIDROIT Yearbook* p 124; *Waincymer I* p 32]. Consequently, CLAIMANT is incorrect to assert the validity of the arbitration agreement merely on the basis of party autonomy, which CLAIMANT refers to as “*meeting of minds*” [*MC* para 24–28].
- 6 A key aspect of this principle is that no party shall be given an advantage over the other [*Binder* p 331]. The asymmetrical arbitration agreement blatantly contradicts this principle by conferring only on CLAIMANT the advantage of initiating arbitral proceedings at any given time. This unilateral procedural right allows CLAIMANT to overrule any request for litigation by RESPONDENT. Under Art 21 Sales Agreement “[t]he courts in Mediterraneo have exclusive jurisdiction over any dispute arising out of or in connection with this contract [...], **subject to the BUYER’s right to go to arbitration pursuant to paragraph 2**”, which confers on “[t]he BUYER [...] the right to refer any dispute arising out of or in

*connection with this contract [...], to arbitration*” (emphasis added) [*Exh C2 p 13*]. Neither the wording of the clause nor the Parties’ intent provide any indication that CLAIMANT waives their right to choose arbitration even if RESPONDENT commenced litigation.

- 7 In case CLAIMANT invokes their right to arbitrate after RESPONDENT has already initiated litigation, the mandatory provision of Art 8(1) ML precludes any national court from finding itself competent to decide a dispute on the merits [*cf Art II(3) NYC; CLOUT Case 108; Born II p 1271; Cederberg p 62*] and obliges the court to refer the matter to arbitration [*CLOUT Case 9; CLOUT Case 18; CLOUT Case 61; CLOUT Case 387; CLOUT Case 512; Holtzmann/Neuhaus p 313*]. Certainly, this also applies to Mediterranean courts, since their arbitration law is based on the ML [*PO2 p 54 para 47*].
- 8 This effectively deprives RESPONDENT of any legal certainty regarding their involvement in the selection of the forum, which is worsened by the fact that they cannot refer a claim to arbitration. In addition, this has the unwanted effect of frustrating any preparation that RESPONDENT invests into a potential litigation case. Based on exactly those grounds, the German Federal Court held an asymmetrical arbitration agreement invalid [*Jena Case*]. The court held that such asymmetrical clauses impose an unreasonable risk on the other party since all efforts and expenses made with regard to litigation will be frustrated [*Jena Case para 5*]. This approach is also in line with a previous judgement of the German Federal Court [*Wooden Post Case para 27*]. The court held that such a risk can only be prevented if the right to initiate arbitration is restricted to cases where state proceedings were not already pending. The reasoning of these judgements underlines the procedural unfairness provided by Art 21 Sales Agreement, since it enables CLAIMANT to initiate arbitration at any time; either as the claiming party or the responding party. This leads to the unfair result of frustrating any expenses and efforts made by RESPONDENT with regard to litigation.
- 9 At the same time, CLAIMANT has full command over the mechanism through which any arising dispute will be resolved while RESPONDENT is deprived of any involvement in the choice of forum. For these reasons, the mandatory principle of equal treatment is infringed. Therefore, the arbitration agreement is invalid and the Tribunal should reject jurisdiction.
- 10 RESPONDENT’s request for the Tribunal to declare the asymmetrical arbitration agreement invalid for infringing equal treatment is supported by numerous court decisions from both civil and common law jurisdictions [*Arnold Case; Cordova Case; Firedoor Case; Hull Case; Roberts Case; Stevens Case; Taylor Case; Sony Ericsson Case; Rothschild Case; Loan Case*] as well as by various scholars [*Devot p 232; Fedurko p 175; Izzo p 361; Kanae p 379; Kocon p 455; Smit pp 404 seq; Tiborcz p 137; Vaidyanathan pp 321 seq; Wellmann p 299*]. One of the most significant cases holding an arbitration agreement invalid

due to unequal treatment is the *Sony Ericsson Case*, decided by the Russian Supreme Court. While based on Art 6 of the European Convention on Human Rights (“ECHR”), the reasoning of the decision can also be applied to Art 18 ML since both embody the principle of equal treatment [*Archiyan p 2; cf Fouchard p 789*]. The court held the asymmetrical arbitration agreement invalid for creating unfairness, and “because it violates the balancing of the rights of the parties” [*Archiyan p 3*]. The decision of the Russian Supreme Court was criticised for applying Art 6 ECHR to parties’ conduct prior to the proceedings. However, this criticism does not transfer to Art 18 ML which unequivocally applies to procedural agreements (§ 5). The French Supreme Court [*Rothschild Case; Archiyan p 6; Cuniberti I; Draguiev p 29*] and the Bulgarian Supreme Court of Cassation [*Loan Case; Cuniberti II*] have also adopted this position and held asymmetrical arbitration agreements invalid for unfairness and unequal treatment.

- 11 In conclusion, the Tribunal should follow this approach and find the clause invalid on the ground of unequal treatment, as asymmetrical arbitration agreements are “so wholly one-sided and **unfair** that the courts should feel no reluctance in finding it **unacceptable**” (emphasis added) [*Smit pp 404 seq*].

## 2. The gross disparity between procedural rights renders the arbitration agreement invalid pursuant to Art 3.2.7 PICC

- 12 In addition to infringing Art 18 ML, the arbitration agreement is not in line with the substantive law of Danubia. Art 34(2)(a)(i) ML stipulates that the substantive validity of an arbitration agreement must be determined according to the law to which the parties have subjected it [*Binder p 449; Holtzmann/Neuhaus p 304*]. Under Art 21 Sales Agreement, the Parties have agreed that the law governing the contract shall be the substantive law of Danubia [*Exh C2 p 13*]. Similarly, Danubian substantive law applies as the law of the seat pursuant to Art 16.4 LCIA Rules. Therefore, it is evident that Danubian substantive law governs the arbitration agreement.
- 13 The relevant contract law in Danubia consists of the United Nations Convention on Contracts for the International Sales of Goods (“CISG”) and the UNIDROIT Principles of International Commercial Contracts (“PICC”). The CISG applies since the Parties are both located in contracting states to the Convention [*PO1 p 46 para 4*], have their places of business in different states [*RequArb p 4*] and have concluded a cross-border contract for the sale of goods [*Exh C2 pp 11 seq*]. However, the CISG does not apply to claims concerning the validity of contracts [*Art 4(a) CISG; Schwenger/Hachem Art 4 para 38; Siehr Art 4 para 6*]. The PICC are applicable since Danubia has adopted them as their national contract law [*PO1 p 46 para 4*] and govern the issues not dealt with by the CISG as the fallback law [*Cuniberti III*].

Art 1.5 para 1]. Therefore, the PICC are the relevant law when evaluating the substantive validity of the arbitration agreement.

- 14 Under the mandatory provision [*Du Plessis Art 3.1.4 para 1*] of Art 3.2.7 PICC “a party may avoid an individual term of a contract, if the term **unjustifiably** giv[es] the other party an **excessive advantage**” (emphasis added). The one-sided arbitration agreement contained in Art 21 Sales Agreement creates gross disparity since it gives CLAIMANT an excessive advantage (a.) that is also unjustified (b.).

a. The asymmetrical arbitration agreement provides an excessive advantage

- 15 For an advantage to be excessive, the “*disequilibrium in the circumstances needs to be so great as to shock the conscience of a reasonable person*” [*UNIDROIT Commentary Art 3.2.7 p 110; cf Du Plessis Art 3.2.7 para 7*]. Under Art 21 Sales Agreement, CLAIMANT enjoys the excessive advantage to unilaterally decide upon the forum in which a dispute between the Parties will be resolved. Even though Art 21 Sales Agreement generally provides both Parties with the right to initiate litigation, this is only possible in front of Mediterranean courts [*Exh C2 p 13; RequArb p 4*]. This constitutes an additional procedural advantage for CLAIMANT since it can be inferred that, compared to RESPONDENT, they are better acquainted with both their national procedural law and the legal practice in front of their national courts. Furthermore, RESPONDENT’s right to litigate is restricted by CLAIMANT’s unilateral option to initiate arbitration, which also provides them with the power to overrule RESPONDENT’s choice for litigation (§§ 6–7). Therefore, the choice of the forum rests **solely** in the hands of CLAIMANT. It is upon their unrestricted discretion whether the dispute will be resolved in a neutral forum or in front of the courts in their home country. For all these reasons, the unilateral arbitration agreement provides an excessive advantage that shocks the conscience of a reasonable person.

b. The excessive advantage of the asymmetrical arbitration agreement is unjustified

- 16 Additionally, this excessive advantage is unjustified because of the underlying purpose of the asymmetrical arbitration agreement. Furthermore, CLAIMANT abused their superior bargaining position to pressure RESPONDENT into consenting to the arbitration agreement.
- 17 First, an advantage is unjustified where the nature and **purpose** of the contract exclude any justification [*Art 3.2.7(1)(b) PICC; Brödermann Art 3.2.7 para 1; Du Plessis Art 3.2.7 para 15; UNIDROIT Commentary Art 3.2.7 pp 110 seq*]. CLAIMANT tries to include such advantageous clauses in all of their contracts for the following purpose:
- 18 “[...] to put some **pressure** upon suppliers which [...] do not want to discuss defects in their products in open courts [and] to maintain the option to go to arbitration if it has either an interest in confidentiality



*itself or the perceived other advantages of arbitration outweigh the benefits of court proceedings in the particular dispute” (emphasis added) [PO2 p 47 para 2].*

- 19 This demonstrates that CLAIMANT uses these one-sided clauses for the unjustifiable purpose of pressuring their contracting partners while maintaining both options – litigation and arbitration – available to themselves. At the same time, RESPONDENT made numerous efforts to include a balanced arbitration agreement which would guarantee both Parties’ equal rights [*Exh R2 p 32 para 6; PO2 p 47 para 2*]. However, CLAIMANT refused this suggestion without hesitation and submitted a draft of the contract including an asymmetrical arbitration agreement in order to preserve its unjustified purpose [*PO2 p 47 para 2*].
- 20 Second, the exploitation of the other party’s **weaker bargaining position** similarly points towards an advantage being unjustified [*Art 3.2.7(1)(a) PICC; Du Plessis Art 3.2.7 para 10; UNIDROIT Commentary Art 3.2.7 p 110*]. Contrary to CLAIMANT’s allegations [*MC para 25*], the Parties’ bargaining positions are not equal. This derives from the different financial standings of the Parties. CLAIMANT generates an annual turnover of USD 4.3 billion, which is 23 times more than RESPONDENT’s turnover of USD 180 million [*PO2 p 46 para 1*]. This superior financial standing allowed CLAIMANT to demand the asymmetrical arbitration agreement in return for consenting to the limitation of liability clause. As the insurance of RESPONDENT’s economic survival was dependent on this limitation of liability clause [*Exh R2 p 32 para 6*], they had no other choice but to accept the fundamentally unfair arbitration agreement. This illustrates the inequality of the Parties’ bargaining positions, which CLAIMANT exploited.
- 21 As the asymmetrical arbitration agreement unjustifiably provides an excessive advantage for CLAIMANT, it creates gross disparity under Art 3.2.7 PICC. The consequence of breaching Art 3.2.7 PICC is RESPONDENT’s right to avoid Art 21 Sales Agreement.
- 22 Concluding (A.), the arbitration agreement is invalid for providing procedural unfairness and unequal treatment. Additionally, it is not in line with Danubian contract law for creating gross disparity. The Tribunal must recognise this invalidity of the arbitration agreement pursuant to Art 8 ML and thus should reject jurisdiction.

**B. An award on the substance of the dispute would be subject to annulment and would be neither recognisable nor enforceable**

- 23 Arbitral tribunals should strive to render a valid award [*Lew/Mistel/Kröll p 279; Waincymer I p 102*]. Nevertheless, if the Tribunal were to assume jurisdiction, an award based on the one-sided arbitration

agreement (§ 5, 12) would be subject to annulment under the ML, which applies as the law of the seat [Art 34(2)(a)(i) ML; *Born II* p 1532; *Redfern para 10.04*; *Waincymer I* p 168].

- 24 In addition, it is widely accepted that arbitral tribunals should endeavour to render an award that is ultimately recognisable and enforceable [*M&C Corp Case*; *Böckstiegel* p 50; *Derains* p 385; *Philip* p 67; *Waincymer I* p 97]. This is also recognised under Art 32.2 LCIA Rules which stipulates that the Parties and the Tribunal shall make every reasonable effort to render a recognisable and enforceable award [Art 32.2 LCIA Rules; *Scherer I* Art 32.2 para 10; *Wade/Clifford/Clanchy* Art 32 para 1; *Waincymer I* p 97]. In the case at hand, the Parties' assets are located in Equatoria, where RESPONDENT is domiciled, and Danubia, where one of their affiliates is located [*cf PO2* p 47 para 1]. Therefore, these are the relevant countries for the enforcement of an award. Both countries are member states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") [*PO1* p 46 para 4] which is the relevant law for the enforcement procedure. Under the NYC, an award rendered on the basis of this one-sided arbitration agreement not be recognisable or enforceable in RESPONDENT's home country, Equatoria (1.). Additionally, an award would not be enforceable at the seat of arbitration, Danubia (2.).

### 1. An award would not be recognisable and enforceable in Equatoria

- 25 In Equatoria, an award based on the asymmetrical arbitration agreement would not be recognisable or enforceable. First, RESPONDENT could successfully invoke Art V(1)(a) NYC [*Paulsson* p 180; *Wilske* Art V para 92; 108], since the asymmetrical arbitration agreement is invalid under the relevant arbitration law (§ 5) and the relevant substantive law (§ 12). Second, the asymmetrical arbitration agreement leads to procedural unfairness and thus infringes the principle of equal treatment of parties. In Equatoria, the principle of equal treatment is predominant and thus forms part of their public policy. Unilateral arbitration agreements thus contradict Equatoria's public policy, where they are consequently not recognised [*PO2* p 54 para 52]. Therefore, an award rendered on the basis of this arbitration agreement would not be enforceable and accordingly, RESPONDENT could successfully resist enforcement in Equatoria pursuant to Art V(2)(b) NYC [*Wolff* Art V para 480].

### 2. An award would not be recognisable and enforceable in Danubia

- 26 CLAIMANT further omits that any award rendered on the basis of the asymmetrical arbitration agreement would not be enforceable in Danubia, the seat of arbitration. Thus, the Tribunal would infringe one of the "guiding principles behind the [LCIA] rules to ensure that the award is ultimately susceptible of enforcement" [Art 32.2 LCIA Rules; *cf M&C Corp Case*; *Scherer I* Art 32.2 para 10]. The invalidity of



the arbitration agreement similarly constitutes a ground to refuse recognition and enforcement in Danubia (§ 24). The one-sided arbitration agreement is invalid due to its procedural unfairness (§ 5) and for contravening Danubian substantive law (§ 12).

27 Alternatively, conducting the procedure on the basis of an arbitration agreement which creates unequal procedural rights, renders any subsequent award challengeable on grounds of unequal treatment pursuant to Art V(1)(b) NYC [*Paklito Investment Case; Born II pp 3494, 3499; Scherer II Art V para 171; Redfern para 11.73; cf van den Berg p 306*]. In Danubia it is generally recognised that gross disparity in procedural rights constitutes a ground to refuse recognition and enforcement. This is based on Danubian case law wherein recognition and enforcement of an award was denied by virtue of unequal treatment. The Danubian Court of Appeal therein based its reasoning on the *Siemens-Dutco* decision of the French Supreme Court [*RespArb p 28 para 14*].

28 Concluding (B.), any award rendered on the basis of the arbitration agreement would be subject to annulment in Danubia. Additionally, an award would not be recognisable and enforceable in all relevant countries.

\* \* \*

29 In conclusion to submission I., the Tribunal does not have jurisdiction to hear the case, since the asymmetrical arbitration agreement is invalid under both Danubian procedural law and Danubian contract law. The asymmetry renders the agreement fundamentally unfair and contrary to the mandatory principle of equal treatment of parties. Additionally, the arbitration agreement is not in line with Danubian substantive law, since it creates gross disparity between the procedural rights of the Parties. If the Tribunal were to accept jurisdiction regardless of this invalidity, any subsequent award would be subject to annulment and would be neither recognisable nor enforceable. For all these reasons, the Tribunal does not have jurisdiction to hear the present dispute.

## II. The Tribunal should allow the party-appointed expert, Prof John

30 Contrary to CLAIMANT's request [*MC para 29–44*], the Tribunal should allow the party-appointed expert, Prof John, and the submission of his expert report. The Parties have a fundamental right to present expert evidence (A.). This fundamental right can only be limited under very exceptional circumstances, which do not exist in the dispute at hand (B.). Moreover, Prof John cannot be excluded for an alleged lack of impartiality and independence (C.). By excluding Prof John, RESPONDENT's mandatory procedural rights of presenting their case and equal treatment would be violated.

Consequently, an award rendered by the Tribunal would be subject to annulment and be neither recognisable nor enforceable (D.).

### A. RESPONDENT has a fundamental right to present expert evidence

- 31 The Parties' right to present their case is a universally accepted principle which is also recognised by all the rules and laws relevant to the dispute at hand [*Art 14.4 LCIA Rules; Art 18 ML; Art V(1)(b) NYC*]. This principle is mandatory and restricts the Tribunal's power to manage the conduct of the proceedings [*cf Art 14.5 LCIA Rules; cf Arroyo p 207; Bédard p 751; Bernardini p 117; Born I p 159; cf Echeverria p 533; Fortier p 396; Landau/Weeramantry p 524; cf Nairac p 122; Redfern para 5.15; Scherer I Art 14 para 21; Wachter p 76*]. Furthermore, the Parties' right to present their case entails the general right to present evidence. In international arbitration, it is undisputed that party-appointed experts are a means of evidence [*cf Born II pp 2277 seqq; cf Fouchard p 684; Lew/Mistel/Kröll p 564; Redfern para 6.133; Waincymer I p 886*]. Therefore, the Parties have the **right to appoint an expert**, which derives from their fundamental right to present evidence [*cf Born II p 2278; CI Arb Practice Guideline Preamble; cf de By p 2; cf Gómez; cf Gritsch/Riegler/Zollner p 10; Klötzl/Pörnbacher Art 23 para 27; cf Poudret/Besson p 561; cf Schwarz/Konrad Art 21 para 15; Smiley p 362; Waincymer I p 936*]. This is confirmed by the vast majority of arbitration laws and rules, which permit evidence given by party-appointed experts [*Art 26(2) ML; Art 27 DIS Rules; Art 23.5 HKIAC Rules; Art 25.4 ICDR Rules; Rule 32.1 ICSID Rules; Art 33 SCC Rules; Rule 25 SIAC Rules; Art 25 Swiss Rules; Art 27.2 UNCITRAL Rules; Born II pp 2278 seq; Kreindler p 88*].
- 32 Contrary to CLAIMANT's allegations [*MC para 31 seq*], the LCIA Rules also explicitly permit the use of party-appointed experts [*Art 20 LCIA Rules; cf Redfern para 6.139*]. By allowing **both** party-appointed and tribunal-appointed experts, the LCIA Rules combine common and civil law approaches [*Brown p 82; de Berti p 56; LCIA Expert Article para 11–17*]. The predominance of party-appointed experts in international arbitration [*cf Altenkirch/Raheja p 2; cf Cazier-Darmois/Rosen p 4; Daly/Poon p 335; Goddard/Goddard p 55; Greineder p 4; LCIA Expert Article para 11; Moloo p 292; Redfern para 6.139; Sachs/Schmidt-Ahrendts I para 34; Samaras/Strasser p 314; Waincymer I p 932*] and the fact that the LCIA has a common law background, where the use of party-appointed experts was developed [*cf Abrahamson p 538; cf Born II pp 2278 seq; cf Emanuele/Molfa/Jedrey p 120; cf Fenton p 281; Hodgson/Stewart p 457; cf Houghton p 12; cf Kent p 1; LCIA Expert Article para 12; cf Waincymer I p 886*], confirm that the rationale of the LCIA Rules cannot be to prohibit party-appointed experts. Thus, CLAIMANT misinterpreted the LCIA Rules when stating that “*there is no rule either expressly declaring [...] nor impliedly suggesting that the parties may appoint experts*” [*MC para 32*].

- 33 The Parties' right to present expert evidence is also recognised by the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), which constitute best practice in international arbitration [*cf Noble Ventures Case; Railroad Development Case; cf Ali/Wessel p 37; Born II pp 2211 seq; Demeyere p 249; El Ahdab/Bouchenaki p 90; Helmer p 60; Hodges p 216; Horne/Mullen p 120; cf Jones I p 141; Kreindler/Dimsey pp 160 seq; Marghitola p 33; C Müller p 85; Redfern para 6.95; Reisman/Crawford/Bishop p 1086; Rivkin p 213; Sachs/Schmidt-Ahrendts II p 218; cf M Scherer p 195; Schumacher para 20; cf Veeder p 441; Welser/de Berti p 80*] and should therefore be taken into account by the Tribunal. According to Art 5 IBA Rules, "[a] Party may rely on a Party-Appointed Expert as a means of evidence". This not only entails that parties can rely on expert evidence irrespective of the arbitral tribunal's consent, but also that tribunals cannot "*interfere with the submission of reports by party-appointed experts*" [*Zuberbühler Art 5 para 5; cf Houghton p 15*].
- 34 The Parties' right to present expert evidence, which is recognised under all rules and laws relevant to the dispute at hand (LCIA Rules, ML, IBA Rules), constitutes a **fundamental right** [*Waincymer I p 936*]. Therefore, the threshold for excluding expert evidence is very high: It may only be excluded on a limited number of grounds such as lack of relevance, legal privilege [*cf Art 9.2(a-b) IBA Rules*], or for endangering the integrity of the proceedings. The latter, however, demands the existence of **exceptional circumstances** for exercising this authority. Contrary to CLAIMANT's allegations, such exceptional circumstances do not exist in the dispute at hand.
- 35 Concluding (A.), RESPONDENT has a fundamental right to appoint an expert, which derives from the mandatory principle to present one's case and can only be limited under exceptional circumstances.

### B. No exceptional circumstances support the exclusion of Prof John

- 36 CLAIMANT alleges that RESPONDENT primarily nominated Prof John to create a reason to challenge Ms Burdin, thereby endangering the Tribunal's impartiality and independence, as well as the integrity of the proceedings [*LetLang p 41*]. The notion of 'endangerment of the integrity of the proceedings' in this specific context derives from Art 18 LCIA Rules, which stipulates that: "*The Arbitral Tribunal may withhold approval of any intended change or addition to a party's **legal representatives** where such change or addition could **compromise the composition** of the Arbitral Tribunal*" (emphasis added) [*Art 18.4 LCIA Rules*]. Evidently, Art 18.3 and Art 18.4 LCIA Rules are not directly applicable to party-appointed experts (1.). Not even a potential application of the rationale of Art 18.3 and Art 18.4 LCIA Rules supports the exclusion of Prof John. A closer assessment of this notion demonstrates that only

exceptional circumstances would warrant the exclusion of Prof John, which are not present in the dispute at hand (2.).

### 1. Art 18 LCIA Rules does not apply to party-appointed experts

- 37 Art 18 LCIA Rules **exclusively** deals with legal representatives [ *Wade/Clifford/Clanchy Art 18 para 6*]. Thus, Art 18.3 and Art 18.4 LCIA Rules do not apply to party-appointed experts, since they are by definition not party representatives [ *cf Burianski/Lang p 276; cf Cremades/Cairns p 12; Zuberbühler Art 5 para 20*]. Moreover, an analogous application of these provisions to experts is not apt:
- 38 First, the roles, privileges, ethical obligations and interests of party-appointed experts are fundamentally different than those of legal representatives [ *cf Cremades/Cairns p 12*]. Contrary to counsel, party-appointed experts have to meet certain standards of objectivity when assessing a case [ *cf Born II p 2281; Zuberbühler Art 5 para 20*]. They must neither act as a party's advocate nor have a financial interest in the outcome of a dispute [ *cf Nessi pp 75 seq; Zuberbühler Art 5 para 20–22*]. Second, Art 18.3 and Art 18.4 were included into the LCIA Rules after the controversial decisions in the cases of *Hrvatska* and *Rompetrol* [ *Rau p 466; cf Wade/Clifford/Clanchy Art 18 para 14*], which solely dealt with the exclusion of counsel who endangered the integrity of the proceedings. Third, compared to experts, the number of qualified counsel in international arbitration is much higher [ *cf Waincymer II p 611*]. This makes it easier for a party to find a fitting replacement for a counsel while the replacement of an expert – especially in highly technical cases – is far more challenging. Therefore, the exclusion of counsel does not constitute as much of an inconvenience as the exclusion of an expert. Art 18 LCIA Rules supports this approach by providing a legal basis to replace counsel in a swift manner. For these reasons, Art 18.3 and Art 18.4 LCIA Rules are not applicable to party-appointed experts.

### 2. Alternatively, Prof John should not be excluded for endangering the integrity of the proceedings

- 39 Even if the Tribunal were to find that the rationale of Art 18.3 and 18.4 LCIA Rules is applicable to party-appointed experts, it would not support the exclusion of Prof John. According to this notion, two of the most decisive factors when considering the removal of either counsel or arbitrators are the **stage of the arbitration** and the resulting **efficiency**. The further the proceedings have advanced, the more procedural steps would have to be retaken in order to remove an arbitrator, and thus the exclusion of counsel is more efficient and therefore more likely [ *cf Hrvatska Case; cf LCIA Reference No 111947; Rau p 475; Scherer I Art 18 para 17*]. Contrastingly, at such an early stage of the proceedings, the arbitrator and not a party's legal representative should be removed [ *cf Rompetrol Case; cf Fillers p 5*;



*cf Scherer I Art 18 para 17; cf Wade/Clifford/Clanchy Art 18 para 20*]. This especially applies prior to an arbitral tribunal's constitution: A conflict of interest between counsel and a party-nominated arbitrator will lead to the arbitrator not being appointed rather than the counsel being excluded [*cf LCIA Reference No 111947*]. Accordingly, the LCIA would have taken different procedural steps, if it had been aware of the connection between Ms Burdin and Prof John before the confirmation of the Tribunal. Instead of questioning the admissibility of RESPONDENT's expert, the LCIA would not have confirmed Ms Burdin's appointment. This would have been the orderly course of proceedings regarding the same fact pattern with counsel.

- 40 The importance of the stage of arbitration is further emphasised by the decision of *Hrvatska*, which constituted the initial basis of the rationale underlying Art 18.3 and Art 18.4 LCIA Rules. In that case, the party's legal representative, who was a member of the same barristers' chambers as the presiding arbitrator, was added two years after the tribunal's constitution and only **a few days before the final hearing** [*Hrvatska Case para 3; Florescu p 83*]. Moreover, the party consciously refused to disclose the connection between their counsel and the presiding arbitrator "*until the very last minute*" [*Rompetrol Case para 25; cf Wade/Clifford/Clanchy Art 18 para 14 seq*]. Considering the very advanced stage of the proceedings as well as the party's breach of its duty to arbitrate in good faith and **both parties' desire not to disqualify the presiding arbitrator**, the arbitral tribunal saw no other option than to exclude the new counsel [*Hrvatska Case para 31–34; Rau p 472*].
- 41 In the dispute at hand, the proceedings are at a **very early stage**. Therefore, maintaining the Tribunal's composition would not be more efficient. The Tribunal has neither read the Parties' written submissions, nor heard any oral submissions, nor examined witnesses or experts and thus none of these procedural steps would have to be retaken [*PO1 pp 45 seq; cf Scherer I Art 18 para 17*]. Consequently, the potential removal of Ms Burdin would not disrupt or prolong the proceedings in a way that outweighs the fundamental right to appoint the chosen expert. In this regard, the Tribunal should also consider that under the LCIA Rules, arbitrators can be replaced in a swift manner, since the rules allow for an expedited replacement procedure [*Art 9C LCIA Rules; Scherer I Art 18 para 17*]. Contrastingly, the exclusion of Prof John would delay the proceedings, since a new expert would first have to get acquainted with the customised R-27V Francis Turbines of the Riverhead Plant, before being able to provide useful evidence on the **comparability** of the two plants [*cf RespArb pp 28 seq; cf PO2 p 52 para 36*]. Prof John, who has been dealing with the turbines at Riverhead for over a year, could provide such evidence without delay. Thus, his exclusion would likely result in a delay of the proceedings.



- 42 Furthermore, CLAIMANT is wrong when alleging [*LetLang* p 41], that RESPONDENT abused their right to appoint an expert by intending to provoke a challenge of Ms Burdin. In fact, RESPONDENT communicated their intent to submit an expert report at the **very first opportunity** [*RequArb* p 28 para 20] and simultaneously disclosed the identity of Prof John [*Exh R2* p 32 para 8], even before the Tribunal had been constituted [*LetLang* p 41]. Similarly, the decision of *Hrvatska*, is not apt to support this argument. Unlike the appointing party in the *Hrvatska Case*, RESPONDENT did not breach their duty to arbitrate in good faith.
- 43 Rather, RESPONDENT appointed Prof John due to his crucial importance to present their case, exercising their fundamental right to present evidence. This right has practical and not only theoretical implications: It is very common for parties and lawyers to have their preferred experts who are regularly instructed to act in litigation or arbitration [*Bridgestone Licensing Case* para 19]. In the dispute at hand, RESPONDENT appointed Prof John because they know that Prof John can provide competent expert evidence which can be trusted [*PO2* p 50 para 17] and therefore, their choice must be respected. Considering the facts at hand, it must be concluded that RESPONDENT's fundamental right to present expert evidence (§§ 31–35) **outweighs** the procedural inconvenience in case of Ms Burdin's potential resignation.
- 44 Concluding (B.), no exceptional circumstances warrant an exclusion of Prof John. Contrary to CLAIMANT's allegations, Art 18 LCIA Rules is not applicable to party-appointed experts. Even if the rationale of Art 18 LCIA Rules were applicable, Prof John must not be excluded for endangering the integrity of the proceedings. Similarly, the decision of *Hrvatska*, which “*might better be seen as an ad hoc sanction for the failure to make proper disclosure in good time than as a holding of more general scope*” [*Rompetrol Case* para 25], does not support the exclusion of Prof John.

### **C. Prof John cannot be excluded for his alleged lack of impartiality and independence**

- 45 Contrary to CLAIMANT's allegations [*MC* para 37 seq], the party-appointed expert Prof John cannot be excluded for his alleged lack of impartiality and independence. The Tribunal does not have the competence to exclude a party-appointed expert on those grounds. Rather, arbitral tribunals should consider a perceived partiality or dependence when weighing the expert evidence (1.). In any case, Prof John undoubtedly meets the required standards of impartiality and independence (2.).



## 1. The Tribunal does not have authority to exclude a party-appointed expert for a lack of impartiality and independence

- 46 The Tribunal does not have the authority to exclude a party-appointed expert based on a potential lack of independence or impartiality because of their connection to one of the parties. Instead, the Tribunal can only consider this presumed lack, which may be effectively determined through pre-hearing meetings, cross-examination or expert conferencing, when **weighing** the expert's evidence.
- 47 This is in line with the approach taken by numerous **scholars** [*cf* *Ambrose/Naish pp 3 seq*; *Ashford Art 5 para 9 seq*; *Baker/Davis pp 114 seq*; *Bienvenu/Valasek p 269*; *cf Blackaby/Wilbraham p 657*; *Blanke/Eilmansberger p 272*; *cf Böckstiegel p 8*; *Born II pp 2279 seq*; *cf Bühler/Dorgan pp 17 seq*; *Burianski/Lang p 274*; *Cremades/Cairns pp 14 seq*; *Dasteel p 15*; *de By p 2*; *Ehle p 78*; *cf Elsing p 120*; *Harris p 213*; *cf Hunter p 352*; *IBA Review Subcommittee p 19*; *cf ICC p 36*; *ICC Expert Article pp 37 seq*; *Jenkins pp 204 seq*; *Kamya-Lukoda/Morgan p 79*; *Lachmann p 384*; *cf Lew/Mistelis/Kröll p 561*; *Lotz p 205*; *cf McIlwrath/Savage p 306*; *O'Malley pp 144 seq*; *cf Parlett pp 449 seqq*; *Paulsson/Petrochilos p 243*; *cf Sachs/Lörcher § 1049 para 20*; *Schwarz/Konrad Art 21 para 16*; *Smiley p 366*; *Zuberbühler Art 5 para 20*] as well as various court **decisions** and arbitral awards [*Alpha Projektholding Case*; *Brandeis Brokers Case*; *Bridgestone Licensing Case*; *Cala Homes Case*; *cf Duty Free Case*; *Elsamex Case*; *cf Enron Creditors Case*; *EXP v Barker*; *Field v Leeds*; *cf Flughafen Zürich Case*; *Helnan Hotels Case*; *Jan de Nul Case*; *LCIA Reference No 81079*; *cf Methanex Case*; *cf Occidental Case*; *Sedco v Iran*; *cf Swisslion Case*; *cf Sylvania v Iran*; *Toth v Jarman*; *cf Trevino Hernandez Case*]. This also holds true where a party-appointed expert is employed by or otherwise connected to a party [*Alpha Projektholding Case*; *cf Elsamex Case*; *cf Field v Leeds*; *Helnan Hotels Case*; *Jan de Nul Case*; *cf LCIA Reference No 81079*; *Born II p 2281*; *O'Malley p 145*].
- 48 This approach is confirmed by the IBA Rules: Even though Art 5.2(c) emphasises each party-appointed expert's duty to evaluate the case in an independent and neutral manner, this provision is not intended "to exclude experts with some connection to the participants or the subject-matter of the case" [*IBA Review Subcommittee p 19*; *cf Nessi p 89*; *cf Zuberbühler Art 5 para 20*]. Therefore, it is evident that the Tribunal does not have the authority to exclude a party-appointed expert based on a potential lack of independence or impartiality.

## 2. Alternatively, Prof John meets the required standards of impartiality and independence

- 49 Even if the Tribunal were to find to have the authority to exclude a party-appointed expert for a lack of impartiality of independence, it should refrain from removing Prof John. Contrary to CLAIMANT's allegations, Prof John does meet the required standards of impartiality and independence. By misinterpreting Art 21 LCIA Rules, CLAIMANT wrongly subjects party-appointed experts to the standards of tribunal-appointed experts [*MC para 36–38*], who are required to be at all times “*impartial and independent of the parties*” [*Art 21.2 LCIA Rules*].
- 50 In fact, the standards of impartiality and independence which party appointed-experts have to meet under the LCIA Rules are **considerably lower** than those of tribunal-appointed experts. The LCIA Rules subject party-appointed experts only “*to the [impartiality and independence] requirements of Article 20, but not of Article 21 [LCIA Rules]*” [*Scherer I Art 20 para 20; cf Wade/Clifford/Clanchy Art 21 para 2*]. According to Art 20 LCIA Rules, which deals with both witnesses of fact and expert witnesses, even “*an officer, employee, owner or shareholder of any party*” may be treated as a witness [*Art 20.6 LCIA Rules*]. In contrast, such a person could not act as a tribunal-appointed expert, because they would certainly not meet the strict criteria of Art 21.2 LCIA Rules. Thus, it is evident that party-appointed experts are not subject to the high impartiality and independence standards of tribunal-appointed experts, which are similar to the ones applying to arbitrators [*cf Art 5.3 LCIA Rules*]. This approach is confirmed by the IBA Rules [*Artt 5, 6 IBA Rules; Bridgestone Licensing Case para 19; Burianski/Lang p 274; Gaffney/O’Leary p 83; Jones II p 7; O’Malley pp 143 seq*] which only allow for the challenge of tribunal-appointed experts due to a lack of independence. Thereby, they make the appointment of tribunal-appointed experts dependent on the Parties’ consent [*Art 6.2 IBA Rules*]. In comparison, such a mechanism does not exist for party-appointed experts, underlining that their appointment is not subject to the Parties’ consent.
- 51 This is due to the fact that the role of party-appointed experts is **fundamentally different** from that of tribunal-appointed experts, since they are appointed, instructed and paid by a party to support their case [*Bridgestone Licensing Case para 16; cf Harris p 212; O’Malley p 144*]. It would be naive to assume that a party would submit a costly expert report that would not help their case [*cf Bridgestone Licensing Case para 17; cf Blum p 587; cf de By p 2; cf Kantor p 335; cf Waincymer I p 943*]. However, reports reflect experts’ sincere beliefs and experiences, especially since they intend to adhere to their professional or academic ethical code of conduct [*cf Nessi p 86*]. Every expert is well aware of the fact that any conduct

contrary to those standards would inevitably result in a loss of reputation, which is neither in their nor in the parties' interest [*cf* *Blanke/Eilmansberger* p 271; *de By* p 2; *cf* *Kamya-Lukoda/Morgan* p 79].

52 However, CLAIMANT does not only misinterpret the standards of impartiality and independence that a party-appointed expert has to meet [*MC para 36*], but also the connection between RESPONDENT and Prof John. First, CLAIMANT wrongly submits that “*RESPONDENT has retained Prof John in another arbitration in 2004*” [*MC para 37*]. Rather, RESPONDENT has merely been involved in an arbitration where Prof John acted as tribunal-appointed expert [*PO2 p 50 para 17*], which does not imply the existence of any relationship between the expert and RESPONDENT. Second, CLAIMANT alleges the existence of a “*continuous, pecuniary connection*” between Prof John and RESPONDENT [*MC para 37*] since RESPONDENT invited Prof John to the presentation of their new turbines [*Exh R1 p 30*]. However, it is common ground that companies invite experts to presentations of their technical innovations for publicity reasons. The only pecuniary connection between RESPONDENT and Prof John stems from the retainer they signed on 20 August 2019 [*PO2 p 49 para 15*], which does not preclude an expert from being independent [*IBA Review Subcommittee p 19*; *Zuberbühler Art 5 para 22*]. In addition, Prof John's assumptions relating to the potential effects of the steel problems for turbines not used in saltwater do not raise doubts regarding his impartiality or independence, since he already stated that his opinion requires verification by proper testing [*PO2 p 49 para 15*]. Thus, CLAIMANT has not only failed to demonstrate that Prof John actually has to meet the requirement of impartiality and independence of a tribunal-appointed expert, but also stretches the facts of the case. Thereby they fail to sufficiently prove that Prof John lacks impartiality or independence.

53 Concluding (C.), Prof John cannot be excluded for his alleged lack of impartiality or independence, since the Tribunal does not have the authority to exclude him on those grounds. In any case, Prof John fulfills the required standards of impartiality and independence.

#### **D. If Prof John were excluded, the award would be subject to annulment and would be neither recognisable nor enforceable**

54 The exclusion of Prof John – without being warranted by exceptional circumstances – would violate RESPONDENT's fundamental procedural rights to present their case and to be treated equally. Accordingly, the award would be subject to annulment in Danubia pursuant to Art 34 ML [*Artt 34(2)(a)(ii), 34(2)(a)(iv) ML; Binder p 332*]. Furthermore, the recognition and enforcement of the award could successfully be refused under Art V(1)(b) NYC.

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55 In conclusion to submission II., the Tribunal should allow Prof John's participation in the proceedings as a party-appointed expert in accordance with the Parties' fundamental right to present expert evidence. This right may only be limited under very exceptional circumstances, which do not exist in the dispute at hand. Moreover, Prof John cannot be excluded for his alleged lack of impartiality and independence. If Prof John were nevertheless removed, RESPONDENT's mandatory procedural rights of presenting their case and equal treatment would be violated. Consequently, an award rendered by the Tribunal would be subject to setting aside proceedings and be unenforceable.

### III. The Turbines are in conformity with the Sales Agreement

56 RESPONDENT delivered Turbines that fully conform with all requirements of the Sales Agreement to CLAIMANT. As the record shows, the Turbines satisfy all conformity requirements set forth by Annex A [PO2 p 48 para 6]. The quality of steel does not deviate from Annex A since a mere uncertainty cannot constitute a breach of contractually agreed qualities [*cf Hachem Art 35 para 30; Kröll I Art 35 para 105; Magnus I Art 35 para 25; Magnus III Art 35 para 13*]. In the case at hand, the non-conformity would therefore need to be established by proof for the presence of physical defects in the Turbines (A.). This proof must be provided by CLAIMANT (B.). CLAIMANT has not been able to submit any proof for the presence of physical defects and therefore, their claim fails.

#### A. There is no evidence for lack of conformity

57 Proof for the non-conformity of the Turbines in Greenacre must be provided through the means of proof for physical defects, because the Sales Agreement only establishes conformity requirements of a physical nature (1.). Contrary to CLAIMANT's allegations, bringing forward the first maintenance inspection does not render the Turbines non-conforming. (2.). As the suspicion that inferior steel was used does not impede the Turbines' ordinary purpose either, the Turbines remain in conformity with the Sales Agreement (3.).

#### 1. The Sales Agreement establishes only physical conformity requirements

58 Contrary to CLAIMANT's allegation [MC para 55], the Sales Agreement only sets out physical conformity requirements. All requirements pursuant to Art 35(1) CISG are established exhaustively in Annex A (a.) and non-physical conformity requirements pursuant to Art 35(2) CISG have not been established (b.).

##### a. Annex A exhaustively defines the quality requirements pursuant to Art 35(1) CISG

59 Pursuant to Art 35(1) CISG, parties are free to agree on quality requirements that the goods need to possess [*Bianca Art 35 para 2.1; Brunner/Schifferli Art 35 para 6; Kröll I Art 35 para 25; Magnus III*

*Art 35 para 10; Maley p 88; Piltz para 5-30; Schwenzer I Art 35 para 6].* The wording of the Sales Agreement shows that the Parties intended to describe the Turbines' quality requirements **exhaustively in Annex A**. Art 2(1)(b) Sales Agreement obliges the seller to produce and deliver two "*Turbine[s] R-27V of 300 MW power each, with the further characteristics as specified in detail in Annex A*" [Exh C2 p 11]. By the explicit reference to Annex A, the Parties' intention was to establish all quality requirements of the Turbines in Annex A and define RESPONDENT's obligations as clear as possible.

- 60 This aim is also confirmed by the inclusion of the merger clause in Art 22(2) Sales Agreement stating that the "*document contains the entire agreement between the Parties*" [Exh C2 p 13]. The inclusion of this clause shows the Parties' intention to make all obligations arising from the contract as clear as possible [cf *A Müller p 178 para 4.2; Schlechtriem p 419*]. This intention must have also been the same when drafting Art 2(1)(b) Sales Agreement. Accordingly, the reference in Art 2(1)(b) Sales Agreement has to be seen to confer exhaustive effect to Annex A.

**b. There are no conformity requirements pursuant to Art 35(2) CISG**

- 61 Subsection two of Art 35 CISG is not applicable in the case at hand, as Annex A to the Sales Agreement sets out the detailed quality requirements of the Turbines [Exh C2 p 11]. Art 35(2) CISG is a default provision that only applies if the parties have not agreed on any quality requirements [*Bullet-proof Vests Case; Carpeting Case; Cistern Case; Cotton Twilled Fabric Case; Frozen Pork Liver Case; GMS Modules Case; Machine Case; Mainz Case; Model Locomotives Case; Schwenzer I Art 35 para 12; Schwenzer II Art 35 para 12*]. Therefore, a particular purpose of the Turbines cannot be established, since the legal base for it, Art 35(2)(b) CISG, is not applicable.
- 62 Even if Art 35(2)(b) CISG applied, a particular purpose must be "*expressly or impliedly made known to the seller at the time of the conclusion of the contract*" [Art 35(2)(b) CISG]. The Sales Agreement does not achieve this, as its **wording is too vague**. A reasonable person in the position of RESPONDENT would not have understood that the Turbines should be able to serve a specific purpose [cf *Gruber Art 35 para 11; Kröll I Art 35 para 117; Magnus I Art 35 para 28; Schwenzer I Art 35 para 23*]. The negotiations and the tender documents do not contain enough information to establish a particular purpose that goes beyond the ordinary purpose of turbines either [cf *RequArb p 6 para 9; Exh C1 p 10 para 3; Exh C6 p 19 para 7; Exh R2 p 31 para 2, 4*]. Even if they did establish a particular purpose, they could not be used because of the **merger clause** in Art 22(2) Sales Agreement. This clause prohibits additions to the Sales Agreement through extrinsic evidence for prior agreements such as the negotiations and the tender documents [*Brödermann Art 2.1.17 para 1; UNIDROIT Commentary Art 2.1.17 p 65; Vogenauer*



Art 2.1.17 para 5]. A particular purpose would constitute such an addition, since it cannot be drawn from the Sales Agreement alone. Therefore, their use is prohibited and no particular purpose has become part of the contract. Hence, only physical defects can render the Turbines non-conforming.

## **2. Pushing forward the first maintenance inspection does not breach any conformity requirements**

- 63 Contrary to CLAIMANT's allegation [*MC para 64*], moving the first maintenance inspection of the Turbines forward by one year is not a breach of contract. Art 2(1)(d) Sales Agreement talks about performing the first maintenance inspection of the Turbines after three years [*Exh C2 p 12*]. However, this is only an ancillary obligation for RESPONDENT to perform this maintenance inspection and not one of the Turbines' quality requirements. All of these requirements are set out exhaustively in Annex A (§ 59). This is also demonstrated by the wording of Art 2(1)(d) Sales Agreement, which states that "1. The SELLER undertakes [...] d. to perform the first inspection of the turbines three years after the start of operation at a date to be agreed between the Parties" [*Exh C2 p 12*]. The clause merely mentions the inspection as an obligation of RESPONDENT and not in connection with the Turbines' conformity. It is also contained in the separate subpoint (d), while subpoint (b) is the only subpoint of Art 2 Sales Agreement that governs the Turbines' conformity requirements.
- 64 Even if it had become part of the contract that the Turbines need to be fit for three-year maintenance intervals, there has not been a breach of contract. The Turbines are in good condition and do not require this earlier inspection, as CLAIMANT's concerns are completely unreasonable and unfounded (§ 71). RESPONDENT only offered to push forward the first inspection by a year as a good-will gesture in order to ease CLAIMANT's mind and maintain the good business connections between them. RESPONDENT's offer to push forward the first maintenance inspection must have been intended to alter the contract to that respect. Otherwise, RESPONDENT would have offered to breach the contract out of their own initiative, which is inconceivable. Therefore, the intent behind RESPONDENT's offer must have been clear to CLAIMANT, which is why it needs to be interpreted as an offer to also change their obligation [*cf Art 8(1) CISG; cf Ceramic Tiles Case; Office Furniture Case; Textiles Case; Toluene Case; cf Zuppi Art 8 para 8*]. CLAIMANT consequently agreed to this proposal [*Exh R3 p 33*] and the Parties have jointly altered the requirements of the contract. Hence, a maintenance inspection after two years operating time does not constitute a breach of contract.

### 3. The Turbines' ordinary purpose is not impeded by the suspicion in question

65 One of RESPONDENT's main steel suppliers was Trusted Quality Steel. Media reports about a quality testing scandal at Trusted Quality Steel gave rise to a suspicion that the steel supplied to RESPONDENT might be of inferior quality. However, this suspicion does not render the Turbines in Greenacre non-conforming. It is argued that a suspicion might in exceptional circumstances be able to constitute a breach of contract under the CISG. This is based on the view that the suspicion can render the goods unfit for their ordinary purpose [*Piltz para 5-47; Schwenzer/Tebel p 154*]. However, in the present case, the conformity of the Turbines does not depend on them being fit for their ordinary purpose, since this has not become a conformity requirement. Only the subsidiary rule of Art 35(2)(a) CISG requires them to be fit for their ordinary purpose. However, the Parties have explicitly agreed on the qualities that the Turbines need to possess in Annex A to the Sales Agreement, and thus Art 35(2) CISG is not applicable (§ 61). Therefore, Turbines' conformity is not affected by the mere suspicion of inferior steel.

66 However, even if the Turbines' ordinary purpose had become a conformity requirement, it is not impeded for the following reasons: First, the Turbines' ordinary purpose is the production of electricity, which they are perfectly fit to do (a.). Second, this particular suspicion is insufficient to constitute a breach because it is not based on concrete facts and does not entail severe consequences (b.). Third, the suspicion only arose after the passing of the risk for defects in the goods and can therefore not constitute a breach of contract (c.).

#### a. The Turbines' ordinary purpose lies in the production of electricity

67 Even if the Tribunal found that Art 35(2) CISG were applicable, the Turbines are fit for their ordinary purpose. The ordinary purpose of goods that is normally impeded by a suspicion is their resalability, which can be affected by a suspicion diminishing the goods' market value [*Schwenzer/Tebel p 156*]. This only applies to goods that are generally intended to be resold, as resalability only then forms part of the goods' ordinary purpose. Turbines, however, are to a large extent **custom-made** and tailored exactly to the local conditions of the particular power plant in which they are inserted [*PO2 p 52 para 36*]. This individual design makes it unusual for turbines to be resold. Thus, resalability does not form part of the Turbines' ordinary purpose [*cf Schwenzer I Art 35 para 14*].

68 The ordinary purpose for turbines is to be included in a power plant and to **produce electricity** by powering the generator. The Turbines are perfectly fit to fulfil this purpose, which can be seen by the fact that they have successfully passed the acceptance test and that there is a stable energy supply for

Greenacre [Exh C4 p 15]. This shows that the Turbines are still in full conformity with the contractual requirements, even if the ordinary purpose were a conformity requirement.

**b. The suspicion in question is unfounded and does not entail severe consequences**

- 69 Additionally, the suspicion in the particular case at hand – that inferior steel might have been used for the Turbines – cannot constitute a breach of contract. A suspicion may only constitute a breach of contract in cases where the suspicion regards negative health effects [*Austrian Wine Case; Contamination Case; Magnus II p 262*], is based on concrete facts [*Contamination Case; Glycol Wine Case; Pollution Case; Rotten Meat Case; Salmonella Case; Müggenborg p 2810; von der Horst p 387*] and the suspected breach is fundamental [*Detached House Case; Magnus II p 262; cf Piltz para 5-47; Rusch p 47*]. Therefore, the threshold for a breach of contract caused by a suspicion is high and strictly limited to circumstances which are not given in the present case.
- 70 Only where human health might be affected by the goods, the suspicion is considered to be a severe enough reason to constitute a breach of contract [*Austrian Wine Case; Contamination Case; Magnus II p 262*]. In the present case, the suspicion, however, would not entail negative health consequences if it turned out to be true. Solely the generator and the turbine housing would be affected [Exh C7 p 21].
- 71 Furthermore, the suspicion is **not justified by a concrete factual base**. CLAIMANT bases the suspicion on the incident in Riverhead, but no inferences can be drawn from the plant at Riverhead to the steel in the Greenacre Turbines [MC para 63]. First, it is unlikely that both sets of Turbines are made from the same steel [cf Exh C5 p 16]. Even if both Greenacre Turbines were made from steel supplied by Trusted Quality Steel, the batches of steel used are not necessarily affected by the inferior quality, since it is unknown which of the certificates are incorrect [Exh C3 p 14]. Second, it is not even proven whether the fault in the Turbine in Riverhead is due to a fault in the production of the steel or if it stems from a mistake in the manufacturing of the Turbines [Exh C3 p 14]. In the second case, an inference to the Greenacre Turbines is even less adequate, as the two sets were manufactured completely separately [cf PO2 p 51 para 29]. It is therefore highly unlikely that this mistake would have repeatedly happened in both cases. Third, Riverhead, a tidal power plant, is exposed to saltwater [Exh C5 p 16]. Steel that could be used in less corrosive freshwater like in Greenacre without problems will oxidise in saltwater, which is known to cause substantial corrosion damage [*Alcántara para 2.2; Yu/Zheng/Yao p 711; PO2 p 51 para 32*]. Therefore, this suspicion could only be justified if the plant in Greenacre were run in salt water too. Finally, the suspected breach would **not be fundamental** either (§ 86).





**c. The suspicion cannot constitute a breach of contract, as it was not present at the time of the passing of the risk**

- 72 Even if the Tribunal were to find that the suspicion of inferior steel being used could possibly constitute a breach of contract, this is not the case in the current situation. Pursuant to Art 69(2) CISG, the risk for defects in the Turbines passed to CLAIMANT with the delivery on 20 May 2018 [*PO2 p 50 para 19; cf Erauw pp 214 seq; Raymond Art 69 para 1*]. However, the suspicion on which CLAIMANT is basing their claim only arose on 29 September 2018 [*cf Exh C3 p 14*]. Therefore, RESPONDENT cannot be held liable for a suspicion that only arose after CLAIMANT had assumed the risk [*cf Painting Case*]. Otherwise the seller could be held accountable for any change of the market situation within the absolute period of two years under Art 39(2) CISG. This would contravene the high threshold of Art 36(2) CISG for a liability for a deficiency which occurs after the passing of the risk, requiring a “*guarantee that for a period of time the goods will remain fit for their ordinary purpose*” [*Schwenzer/Tebel p 161*].
- 73 Even those scholars that argue for a wide view of non-conformity in case of suspicions consequently support a relatively strict application of this temporal limitation of liability [*Schwenzer/Tebel p 160*]. At the time when the risk passed, the fact that the Turbines were produced by RESPONDENT – who acquires 70 % of their steel from Trusted Quality Steel [*PO2 p 50 para 24*] – was completely unproblematic. Therefore, the suspicion can, contrary to CLAIMANT’s assertion [*MC para 65–72*], under no circumstances be considered a breach of contract.
- 74 Concluding (A.), proof for the Turbines’ non-conformity must be given by showing that the Turbines have a physical defect. However, the Turbines conform to all the physical requirements set out in Annex A to the Sales Agreement, which exhaustively sets out the conformity requirements for the Turbines. Additionally, the pushed forward maintenance inspection was just a good-will gesture to CLAIMANT and does not constitute a breach of contract. Furthermore, the suspicion of the use of inferior steel is insufficient to constitute a breach of contract. This is due to the fact that fitness for the ordinary purpose has not become a conformity requirement of the Turbines. Even if this were the case, the suspicion does not impede the Turbines’ ordinary purpose, which lies in the production of electricity. Additionally, this particular suspicion is not based on concrete facts and does not entail severe consequences. Finally, the suspicion about the inferior steel quality was not present at the time of the passing of the risk. Therefore, the suspicion does not constitute a breach of contract.

**B. CLAIMANT bears the burden of proof**

- 75 CLAIMANT has to prove that the Turbines are not in conformity with the Sales Agreement by proving the existence of physical defects (§ 57). This derives from the general principle that the person who

asserts a fact also bears the burden of proof for it (1.). The burden of proof is not shifted to RESPONDENT in the present case (2.).

### 1. It is universally accepted that the party asserting a fact needs to prove it

- 76 The CISG provides that the person who asserts a fact also has to prove this assertion. Although there is no explicit rule in the CISG, the distribution of the burden of proof is implicitly governed by the Convention, which is widely recognised in numerous jurisdictions [*Antweiler p 33; Djordjevic Art 4 para 34; Ferrari I p 4; Kröll I Art 35 para 178; Linne p 32; Siehr Art 4 para 14*] including Mediterraneo, Equatoriana and Danubia [*PO2 p 54 para 48*]. Implicitly regulated questions are to be determined “*in conformity with the general principles on which [the Convention] is based*” [*Art 7(2) CISG*].
- 77 Contrary to CLAIMANT’s allegation [*MC para 57–60*], it is widely accepted that it is one of the Convention’s general principles that the person asserting a fact has to furnish full proof for this assertion [*Antweiler p 77; Ferrari II Art 4 para 50; Kröll I Art 35 para 178, 185; Magnus IV p 498*]. Numerous court decisions have confirmed the application of this principle [*Agricultural Products Case, Chocolate Case; Garden Flowers Case; Porcelain Tableware Case; Saltwater Isolation Tank Case; Vulcanised Rubber Case*]. CLAIMANT asserts the Turbines’ non-conformity and therefore it is also on them to provide proof to back up this allegation.

### 2. The burden of proof is not shifted to RESPONDENT

- 78 CLAIMANT has the burden of proof for the Turbines’ non-conformity because the distribution according to the general principle (§ 77) is not shifted in the case at hand. Contrary to CLAIMANT’s allegation [*MC para 65*], only exceptional circumstances would justify such a shift in the burden of proof to the other party [*cf Magnus I Art 4 para 68 seq; Ferrari I Art 4 para 50 seq*]. Therefore, the present case does not constitute such an extraordinary exception to the general rule.
- 79 Contrary to CLAIMANT’s allegation [*MC para 65 seq*], the email that CLAIMANT sent to RESPONDENT on 3 October 2018 does not provide ***prima facie evidence*** of the Turbines’ non-conformity. In this email, CLAIMANT merely told RESPONDENT about the successful acceptance test and enquired what consequences the findings of the Riverhead incident might have for Greenacre [*Exh C4 p 15*]. It is correct that notifications which are sent within the time period of Art 58(3) CISG and which specify a non-conformity are deemed to have the effect of *prima facie* evidence [*Kröll II p 179*]. However, these requirements are not fulfilled by the above-mentioned email.

- 80 First, Art 58(3) CISG sets out that the buyer may examine the goods before being bound to pay the price for them during a flexible period of time [*Butler/Harindranath Art 58 para 17; Huber I Art 58 para 3; Mohs Art 58 para 33*]. This time period is relatively short and depends on the time which is usually necessary to examine goods of that kind in a **quick and superficial** manner [*Butler/Harindranath Art 58 para 17; Huber I Art 58 para 4; Mohs Art 58 para 33*]. In case a defect is found, the buyer may retain the purchasing price [*Recycling Machine Case; UNCITRAL Digest Art 58 para 9*]. Therefore, only a notification in this period must constitute *prima facie* proof for the goods' non-conformity to justify such a retention. However, CLAIMANT did even conduct a detailed acceptance test of the Turbines which finished on 19 September 2018 [*cf PO2 p 47 para 3; PO2 p 50 para 20*]. Therefore, the short time period of Art 58(3) CISG had **already elapsed** when the notice was sent on 3 October 2018 and thus it does not constitute *prima facie* evidence for the Turbines' non-conformity.
- 81 Second, CLAIMANT's notice was not sufficiently substantiated to constitute *prima facie* evidence for the non-conformity of the Turbines. In order to fulfil this standard, the alleged faults have to be described to a certain level of detail. Not only has CLAIMANT failed to provide such a description of the alleged faults, but they instead stated that the Turbines have successfully passed the acceptance test [*Exh C4 p 15*]. CLAIMANT **merely enquired** whether there might be any similarities between Riverhead and Greenacre. However, they **did not substantiate** any claims that the steel used for the Turbines in Greenacre is indeed of inferior quality or that the Turbines are non-conforming for any other concrete reason [*Exh C4 p 15; cf Kennedy p 326*]. Therefore, this cannot be considered as *prima facie* proof for the non-conformity of the Turbines. Consequently, the burden of proof has not shifted to RESPONDENT.
- 82 A shift of the burden of proof cannot be based on proximity of proof either. A shift for this reason is possible only under very limited circumstances, none of which are given in the present case. The court cases which stated that the burden of proof may be shifted for reasons of equity and a closer proximity of proof do not apply, as they were based on a completely different fact pattern. For example, in the *Paprika Case*, the buyer had already proven the existence of radiation in the paprika and the burden of proof was then only shifted for the question of how this radiation came about. If the rationale of the *Paprika Case* were to apply here, CLAIMANT would have to prove that there actually is a defect in the Turbines. Only in that case, the burden of proof would be shifted to RESPONDENT. For the existence of a defect, CLAIMANT has the closer proximity to proof than RESPONDENT. The Turbines are installed in CLAIMANT's power plant and are therefore in their sphere. Consequently, any proof regarding the existence of defects has to be provided by CLAIMANT [*cf Ferrari I Art 4 para 51; Magnus I Art 4 para 69*].



83 Also the second case on this issue, the *CD Media Case*, does not apply to the dispute at hand. In the *CD Media Case*, the burden of proof for an incorporeal intellectual property right supposedly held by the seller was concerned. However, the steel quality of the Turbines in the present case is a physical feature that can best be examined by the person in possession of the Turbines. Hence, these two cases cannot be compared with the dispute at hand. Therefore, no exceptional situation that would justify a shift in the burden of proof is given and CLAIMANT is obliged to prove possible defects in the steel.

84 Concluding (B.), CLAIMANT has to prove the Turbines' non-conformity to the Sales Agreement in accordance with the general principles of the CISG. The principle that applies for the burden of proof is that a person asserting a fact also needs to prove it. This distribution of the burden of proof is not reversed, since none of the exceptional circumstances in which such a reversal may take place are given.

\* \* \*

85 In conclusion to submission III., the Turbines are in full conformity with the contract. First, proof for the existence of a physical defect in the Turbines would have to be brought forth in order to prove the Turbines' non-conformity. However, all the quality requirements exhaustively set out in Annex A to the Sales Agreement are in fact met. Second, it is CLAIMANT who bears the burden of proof for the Turbines' non-conformity because they base their entire claim on this assertion. Since they have failed to provide such proof, the Turbines are considered to be in conformity with the contract [*cf Garden Flowers Case*]. Therefore, there has not been a breach of contract on the part of RESPONDENT.

#### IV. Claimant is not entitled to substitute delivery

86 Even if the Tribunal finds the Turbines non-conforming, CLAIMANT's demand for substitute delivery [*MC para 82*] is nevertheless unfounded. Art 46(2) CISG requires a fundamental breach for triggering the remedy of substitute delivery [*Butler Art 46 para 10; Huber II Art 46 para 31; Lookofsky p 110; Magnus I Art 46 para 31; Müller-Chen Art 46 para 4; Neumayer/Ming Art 46 para 1; Salger Art 46 para 7; Will Art 46 para 2.2.1.2*]. Since the scope of Art 20 Sales Agreement is limited to termination, its lowered threshold for a fundamental breach is not applicable (A.). Therefore, the threshold of Art 25 CISG has to be applied, which is not met in the present case (B.).

##### A. Art 20 Sales Agreement is not applicable to substitute delivery

87 For establishing the fundamental breach requirement of Art 46(2) CISG, CLAIMANT cannot rely on Art 20(2) Sales Agreement. The definition of a fundamental breach contained therein is only applicable to the remedy of termination. First, the scope of Art 20 Sales Agreement is limited to termination due to

its clear wording and context (1.). Second, the limited scope of Art 20 Sales Agreement is confirmed by the drafting history of the clause (2.).

### 1. The wording of Art 20 Sales Agreement shows that it is only applicable to termination

88 In Art 20 Sales Agreement, the Parties agreed on a termination clause in order to establish an unequivocal ground for when the contract may be terminated [*Exh C2 p 13*]. It states (emphasis added):

#### Article 20: TERMINATION FOR CAUSE

1. BUYER is entitled to terminate the contract in case SELLER commits a fundamental breach of contract.
2. For the avoidance of doubt the following breaches shall be considered to be fundamental
  - a. Inappropriate payments to any employee of Buyer
  - b. Delay in delivery of more than 200 days
  - c. Third failure of the acceptance test
  - d. Other breaches which deprive BUYER of what it is entitled to expect under the contract.

89 In order to determine the applicability of the definition of a fundamental breach contained in Art 20(2), the contract must be interpreted in accordance with Art 8 CISG [*Zuppi Art 8 para 2; Schmidt-Kessel Art 8 para 3–5*]. Under Art 8(1) CISG, statements and conduct made by one party must be interpreted according to their subjective intention where the other party was aware or could not have been unaware of this intent [*cf Jeans Case; Nabati p 249; Witz Art 8 para 5; Zuppi Art 8 para 8*]. For determining this intention due consideration has to be given to all relevant circumstances pursuant to Art 8(3) CISG [*Melis Art 8 para 10; Schmidt-Kessel Art 8 para 32*]. In case the interpretation of the subjective intent is not possible, Art 8(2) CISG recognises the understanding of a reasonable person of the same kind in the same circumstances [*Nabati p 250; Schmidt-Kessel Art 8 para 20; Zuppi Art 8 para 21*].

90 Both Art 20(1) and Art 20(2) Sales Agreement appear under the heading “*Termination for cause*” (emphasis added). Headings introduce and summarise the subsequent text while confining it to a certain issue and are therefore particularly important when ascertaining a provision’s area of application [*cf Building Finance Case; Share Transfer Case para 71; Brödermann Art 4.4 para 1; Vogenauer Art 4.4 para 3*]. Hence, the heading of Art 20 Sales Agreement provides that its content applies only to termination. The structure of Art 20 Sales Agreement also supports this, as paragraph (2) acts as an ancillary provision to paragraph (1). Therefore, it cannot be inferred that the Parties intended for Art 20(2) Sales Agreement to be relevant to other remedies when placing it under the heading “*Termination*”. If the Parties had intended for the definition of a fundamental breach to be a general provision, they would have placed it under a different heading. Art 22 Sales Agreement (“*Miscellaneous*”), serves as a forum for general and wide-ranging provisions. In case the Parties

intended for Art 20(2) Sales Agreement to be a general definition of a fundamental breach, they would have either put it under this heading or devised a separate one.

91 This is confirmed by the wording of Art 20(2) Sales Agreement. Starting paragraph (2) with “[f]or the avoidance of doubt” shows the intent to introduce an explanatory definition of the immediately preceding paragraph. With paragraph (2), the Parties undoubtedly aimed to explain the fundamental breach requirement directly above in paragraph (1). Therefore, Art 20(2) Sales Agreement strictly relates to Art 20(1) Sales Agreement and only defines a fundamental breach in case of termination.

92 Additionally, the **four grounds** contained within Art 20(2)(a–d) Sales Agreement confirm that the Parties only had termination in mind when drafting the clause. In the CISG, a fundamental breach is the requirement for only two remedies: substitute delivery [Art 46(2) CISG] and termination [Art 49(1)(a) CISG]. The three specific subpoints (a)–(c) under Art 20(2) Sales Agreement list breaches for which substitute delivery is not a suitable remedy. Rather, these grounds reflect the Parties’ intent to draft a clause applicable only to termination: The distrust caused by inappropriate payments to employees of CLAIMANT [Art 20(2)(a) Sales Agreement] cannot possibly be remedied by a substitute delivery of the Turbines. Similarly, in the case of a substantial delay in delivery [Art 20(2)(b) Sales Agreement], substitute delivery is logically unthinkable. Moreover, a third failure of the acceptance test [Art 20(2)(c) Sales Agreement] would not only lead to disappointment in the quality of the product, but also to severe distrust due to the seller’s repeated demonstration of incompetence to rectify the deficiency. After three unsuccessful attempts to deliver conforming turbines, it would be unreasonable to expect from the buyer to rely upon substitute delivery and thereby trust the seller to deliver functioning turbines on the fourth try. Since substitute delivery is not a suitable remedy to resolve these three issues (a–c), the Parties must have had only termination in mind when they drafted the clause. Thus, termination was what they also had in mind when drafting Art 20(2)(d) Sales Agreement as a catch-all provision in case something – not foreseen in (a–c) – required termination. Therefore, the joint interpretation of Art 20(2)(a–d) shows that the entire clause was intended to only apply to termination.

93 The heading, positioning, wording and internal coherence of Art 20(2) Sales Agreement all confirm that it contains a definition of a fundamental breach only applicable to termination.

## 2. The drafting history of Art 20(2) Sales Agreement confirms that it only applies to the remedy of termination

94 The wording of the termination clause is confirmed by the Parties’ intent to have Art 20 Sales Agreement apply to termination only. Both Parties were aware that they lowered the standard for a fundamental



breach of Art 25 CISG when drafting the clause [PO2 p 47 para 4]. This was acceptable for RESPONDENT only because the clause was intended to apply just to **termination**. Both Parties considered it “*unlikely*” that Art 20 Sales Agreement was ever going to be exercised [PO2 p 47 para 4]. This is because termination would lead to substantial disadvantages for both Parties, especially for CLAIMANT:

- 95 The inclusion of RESPONDENT’s R-27V Turbines in their design for the plant allowed CLAIMANT to be the prevailing contender in the tender process for the construction of the Greenacre plant [RequArb p 5 para 5]. The technical specifications of the Turbines effortlessly complied with the requirements set out by the tender. The Turbines enabled CLAIMANT to meet the required reserve capacity of 600 MW [cf Exh C2 p 11 Preamble; RequArb p 5 para 5]. Furthermore, the required availability throughout most of the year [cf Exh C1 p 10 para 2; RequArb p 5 para 7] could be easily met, since the R-27V turbine allows for “*longer inspection and maintenance intervals*” [Exh R2 p 31 para 5; RequArb p 5 para 6]. If contract was avoided, CLAIMANT would be faced with the difficulty of finding a manufacturer of equally sophisticated turbines. Furthermore, new turbines usually take about a year to be fabricated which would cause a lengthy downtime of the plant [cf Exh C7 p 20]. These facts confirm that the availability of RESPONDENT’s Turbines in the Greenacre plant was essential to CLAIMANT and remains so.
- 96 Contrary to termination, the Parties must have considered the scenario of substitute delivery very likely since it leads to a substantially better result for CLAIMANT. The remedy of substitute delivery would allow CLAIMANT to keep the old Turbines until the new ones are delivered. RESPONDENT, on the other hand, would have to bear the additional cost of substitute delivery. Consequently, the drafting history of the clause confirms the Parties’ intention that Art 20(2)(d) Sales Agreement only applies to termination.
- 97 Concluding (A.), CLAIMANT cannot rely on Art 20 Sales Agreement for the remedy of substitute delivery. Rather, the definition of a fundamental breach only applies to the remedy of termination. The heading, positioning, wording, internal structure and context of the clause clearly demonstrate that the Parties intended for Art 20(2) to only apply to termination. This is confirmed by the drafting history of the clause. Consequently, CLAIMANT cannot base their claim for substitute delivery pursuant to Art 46(2) CISG on Art 20 Sales Agreement.

### **B. There is no fundamental breach pursuant to Art 25 CISG**

- 98 As demonstrated above (§ 87), the definition of a fundamental breach in Art 20 Sales Agreement only applies to the remedy of termination. Hence, the fundamental breach requirement for substitute delivery [Art 46(2) CISG] has to be assessed in light of Art 25 CISG [cf Huber II Art 46 para 31; Müller-Chen Art 46 para 17 seq]. RESPONDENT has not committed a fundamental breach of contract under



Art 25 CISG, as CLAIMANT has not suffered any foreseeable substantial deprivation. Consequently, CLAIMANT is not entitled to demand substitute delivery.

99 A breach of contract is fundamental under Art 25 CISG if it substantially deprives a party of what they were entitled to expect under the contract. Therefore, a breach by the seller is fundamental, if the caused deficiency is so severe that it is unreasonable for the buyer to keep the goods in spite of the defect. Hence, their **interest in the flawed performance ceases to exist** [*Shoe Case*; *Björklund Art 25 para 17*; *Huber II Art 46 para 32*; *Müller-Chen Art 46 para 24*; *Schroeter Art 25 para 79*]. In addition, the substantial deprivation must have been **foreseeable** at the time of the conclusion of the contract [*Björklund Art 25 para 26*; *Magnus I Art 25 para 16*; *Schroeter Art 25 para 131 seq*]. Both requirements – substantial deprivation and foreseeability – are not given in the present case: Neither the penalties that CLAIMANT potentially has to pay (1.), nor the threat of termination by Greenacre (2.), nor the possible loss of reputation (3.) constitute a foreseeable substantial deprivation for CLAIMANT. Hence, CLAIMANT's interest in the performance has not ceased to exist. Therefore, neither of the conditions set out by Art 25 CISG are met and CLAIMANT's request for substitute delivery needs to be dismissed.

### 1. The potential liability of CLAIMANT under their contract with Greenacre does not constitute a fundamental breach

100 Subsequent to the conclusion of the Sales Agreement between CLAIMANT and RESPONDENT, CLAIMANT and Greenacre agreed on an availability guarantee with a penalty clause [*Exh C6 p 18 para 5*; *PO2 p 51 para 26*]. In case of a breach, this penalty clause obliges CLAIMANT to pay USD 40,000 for each day where non-renewable energy has to be procured due to the non-availability of the Pump Hydro Power Plant [*Exh C6 p 19 para 5*]. However, even significant monetary harm does not necessarily equate to a fundamental breach [*Björklund Art 25 para 12*; *cf Schroeter Art 25 para 67 seq*]. Even if CLAIMANT had to pay penalties, their interest in the contract would not automatically cease to exist. Therefore, the potential penalties would not constitute a substantial deprivation (a.). Furthermore, the penalty clause was not foreseeable for RESPONDENT (b.).

#### a. The potential penalties do not constitute a substantial deprivation

101 First, CLAIMANT has a **significant commercial interest** in the Pump Hydro Power Plant despite the penalties. However, the plant would not be able to produce energy without the Turbines and therefore, their interest in the Turbines does not cease to exist. CLAIMANT receives a monthly fee of USD 300,000 from Greenacre for providing the energy reserve capacity of 600 MW [*cf Exh C2 p 11 Preamble*; *RequArb p 5 para 5*]. Additionally, Greenacre pays CLAIMANT for the consumed energy. Therefore, the



average revenue for running the Power Plant amounts to USD 600,000 per month and consequently USD 7.2 million per year [*PO2 p 53 para 40; PO2 App1 p 55*]. Thus, even in the worst-case scenario – a required replacement of the Turbines leading to penalties of USD 9 million [*cf PO2 App1 p 55 scenario 5*] – they would be able to compensate for these losses in due time. As CLAIMANT can still pursue their economic interests in the Greenacre Pump Hydro Power Plant, their interest in the performance of the contract does not cease to exist. The penalties that CLAIMANT will possibly have to pay thus do not substantially deprive them of what they were entitled to expect.

102 Second, according to the predominant view, there is no substantial deprivation if the party affected by a breach can reasonably be expected to be satisfied by the award of **damages** [*Björklund Art 25 para 12 seq; Ferrari III pp 495 seq; cf Schroeter Art 25 para 67 seq*]. CLAIMANT's losses would be fully covered by RESPONDENT and thus would be satisfied by the award of damages. Under the liquidated damages clause of the Sales Agreement [*Exh C2 p 13 para 19*], CLAIMANT may only be entitled to invoke damages to the amount of USD 20 million. However, even in the worst-case scenario (12-month standstill due to a required replacement) CLAIMANT would only suffer a total loss of USD 16.2 million, considering the above-mentioned penalties (USD 9 million) and all other factors (USD 7.2 million) [*PO2 App1 p 55 scenario 5*]. Hence, the award of damages would be perfectly suitable for CLAIMANT to mitigate their losses. Consequently, CLAIMANT's interest in the performance of the contract does not cease to exist.

**b. The potential penalties were not foreseeable**

103 A breach of contract is only fundamental pursuant to Art 25 CISG if the substantial deprivation was foreseeable for RESPONDENT or a reasonable merchant in the same circumstances [*Björklund Art 25 para 9; Schroeter Art 25 para 111 seq*]. However, neither of these conditions are fulfilled. The majority of CLAIMANT's potential losses (§ 100) is linked to the penalty clause in their contract with Greenacre [*Exh C6 p 19 para 5; PO2 App1 p 55*]. This penalty clause, however, was not foreseeable for RESPONDENT, as it was inserted into their contract subsequent to the conclusion of the Sales Agreement [*Exh C6 p 18 para 5; PO2 p 51 para 26*]. As the foreseeability has to be assessed at the time of the conclusion of a contract [*Björklund Art 25 para 26; Magnus I Art 25 para 16; cf Schroeter Art 25 para 131 seq*], the penalty clause could not have been foreseen by RESPONDENT.

104 Similarly, a reasonable merchant in the same circumstances as RESPONDENT could not have foreseen the subsequent insertion of the penalty clause in the contract between CLAIMANT and Greenacre. First, CLAIMANT readily admits that their penalty clause is highly unusual [*Exh C6 p 18 para 5; Exh C7 p 20*]. Without a doubt, the penalty clause is excessive: It obliges CLAIMANT to pay extremely high penalties –

ranging up to USD 40,000 per day [*Exh C6 p 19 para 5*] – whereas Greenacre only suffers immaterial damage. Consequently, the total amount of penalties could be reduced to a reasonable extent as it is grossly excessive in relation to the harm that Greenacre would suffer [*cf Art 7.4.13 PICC; cf Graves p 172; McKendrick Art 7.4.13 para 16; UNIDROIT Commentary Art 7.4.13 p 290*]. In many jurisdictions, this clause would simply be invalid [*cf Graves pp 167 seq*]. However, no reasonable person can be expected to foresee an excessive or even invalid penalty clause. Consequently, RESPONDENT could not have foreseen the penalty clause.

## **2. The threat of termination by Greenacre does not constitute a fundamental breach**

105 CLAIMANT may allege that the threat of Greenacre to terminate their contract substantially deprives them of what they were entitled to expect under the contract with RESPONDENT. However, the threat of termination alone cannot constitute a substantial deprivation. This would only be the case if Greenacre had actually terminated their contract with CLAIMANT, which they have not done [*cf PO2 p 53 para 42*]. As long as CLAIMANT's contract with Greenacre is upheld, CLAIMANT is dependent on RESPONDENT's Turbines to fulfil their contractual obligations towards Greenacre. Hence, their interest in RESPONDENT's performance of the contract has not ceased to exist (§ 101). Furthermore, it is highly unlikely that Greenacre will terminate the contract with CLAIMANT, since Greenacre is dependent on the Pump Hydro Power Plant for their energy supply, as no alternative source of energy is available [*PO2 p 53 para 42*]. The unlikelihood of Greenacre terminating the contract therefore renders termination unforeseeable. As there is no foreseeable substantial deprivation, the high threshold of Art 25 CISG is not met.

## **3. A potential loss of reputation for CLAIMANT does not constitute a fundamental breach**

106 Further, a possible loss of reputation does not constitute a substantial deprivation in the present case. First, CLAIMANT has not suffered a loss of reputation. None of the newspaper articles published in regard to this matter mention CLAIMANT in connection with RESPONDENT's Turbines produced from the possibly faulty steel [*cf Exh C3 p 14; Exh R1 p 30*].

107 Second, even if there was a loss of reputation for CLAIMANT, this loss would not be grave enough to meet the high threshold for a substantial deprivation. CLAIMANT is the market leader in providing pump hydro power plants [*RequArb p 4 para 1*]. The public knows that the problems with the Turbines were not caused by CLAIMANT, but by the fraud committed by Mr Steel, the CEO of Trusted Quality Steel,



and Mr Maddoff, the lead quality controller for steel alloys at TechProof [*Exh C3 p 14*]. CLAIMANT has sufficiently and duly inspected and tested the Turbines before putting them into operation [*PO2 p 47 para 3*]. Moreover, as Trusted Quality Steel was one of the leading producers of high-quality steel, many other companies are certainly also affected by their fraud [*Exh C3 p 14*]. Hence, CLAIMANT will not suffer a comparative disadvantage which could damage their economic standing. Taking all these facts into account, the business interests of CLAIMANT will not be affected by any possible link to the quality testing scandal: No fault could ever be found on CLAIMANT's side, therefore further business opportunities are not impeded at any rate. CLAIMANT did not make a mistake in selecting RESPONDENT as a supplier either, since there was no reason to believe that their steel would be of poor quality.

108 Concluding (B.), CLAIMANT was not substantially deprived of what they were entitled to expect under the contract. Even if they were, this was not foreseeable for RESPONDENT. Thus, neither of the preconditions set out by Art 25 CISG are met. Consequently, CLAIMANT cannot base their claim for substitute delivery pursuant to Art 46(2) CISG on Art 25 CISG.

\* \* \*

109 In conclusion to submission IV., CLAIMANT's demand for substitute delivery is unfounded, as RESPONDENT has not committed a fundamental breach of contract. First, the claim cannot be based on Art 20 Sales Agreement, as said provision only applies to termination. Second, the requirements of Art 25 CISG – the applicable default provision – are not fulfilled, as CLAIMANT is not substantially deprived of what they were entitled to expect under the contract. Furthermore, the detriment that CLAIMANT could possibly suffer was not foreseeable for RESPONDENT. Even if the Tribunal found that there was a breach of contract, the claim for substitute delivery should therefore be dismissed.

## REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

- 1) it does not have jurisdiction to hear the case;

in the alternative that:

- 2) the evidence given by Prof John is admissible in the arbitral proceedings;
- 3) CLAIMANT's request for the delivery of two substitute R-27V turbines is dismissed;

and in any event that:

- 4) CLAIMANT bears the costs of this arbitration.

**CERTIFICATE**

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. Only those sources were used, which are listed in indices.



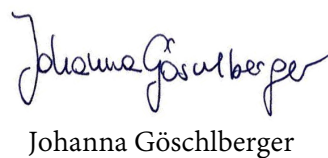
Lukas Brunner



Andreas Cooke



Paul Eichmüller



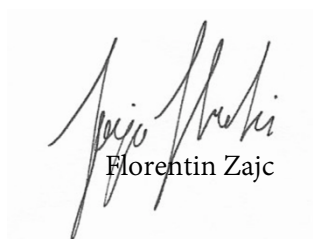
Johanna Göschlberger



Fabian Pollitzer



Lukas Scheidl



Florentin Zajc

Vienna, 23 January 2020