TWENTY SEVENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

4 APRIL – 9 APRIL 2020

VIENNA, AUSTRIA

MEMORANDUM FOR RESPONDENT

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

Counsel for RESPONDENT

Dora Klančnik • Ana Krajtner • Leon Lah • Petra Zupančič

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TABLE OF ABBREVIATIONS

§/§§	paragraph/paragraphs
AA	Arbitration Agreement
Art. /Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
e.g.	exempli gratia (for example)
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID Rules	ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ibid.	ibidem (in the same place)
LCIA	The London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules
MfC	Memorandum for Claimant
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006
no.	number

NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p. /pp.	page/pages
PO1	Procedural order No. 1
PO2	Procedural order No. 2
Prof.	Professor
RfA	Request for Arbitration
RRfA	Response to the Request for Arbitration
SA	Sales Agreement
supra	above
Tribunal	Arbitral Tribunal
Turbines	R-27V Francis Turbines
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
USD	United States Dollar
v. / vs.	versus

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STATEMENT OF FACTS

The parties to the arbitration are HydroEN plc (hereinafter: **CLAIMANT**) and Turbina Energia Ltd (hereinafter: **RESPONDENT**), collectively '**Parties**'. **CLAIMANT** is a market leader in providing pump hydro power plants registered in Mediterraneo. **RESPONDENT** is a world-renowned producer of premium water turbines in Equatoriana.

In **2010** the Council of Greenacre adopted a no-carbon energy-strategy. The construction of a pump hydro power plant was a cornerstone in that strategy. The main purpose was to guarantee a consistent power supply and to ensure the availability of renewable energy, independent from the weather conditions.

In **January 2014**, the Council of Greenacre invited tenders for the construction of the power plant. **CLAIMANT** participated in the process and submitted a bid. On **15 July 2014** it was awarded the contract. **CLAIMANT**'s bid was successful mainly because its design incorporated **RESPONDENT's** newly developed, innovative and powerful R-27V Francis Turbine, which provided for a more environmentally friendly design of the plant and were to produce the needed power of 600 MW.

In **early March 2014**, **CLAIMANT** contacted **RESPONDENT** to enquire about a potential delivery of two Turbines to be included into the plant if the contract is awarded to **CLAIMANT**. On **22 May 2014** **CLAIMANT** and **RESPONDENT** signed the Sales Agreement. On **15 July 2014**, **CLAIMANT** was awarded the contract and immediately starts with the construction of the power plant. In **late spring 2018**, **RESPONDENT** delivered and installed two R-27V Turbines and the power plant started operating on **19 September 2018.** The Greenacre Power plant is currently continuously producing energy for the whole Greenacre Community.

On **29 September 2018** the leading daily newsfeed on renewable energy published a report about the start of a major fraud case against one of the **RESPONDENT**'s main suppliers Trusted Quality Steel. On **3 October 2018** **CLAIMANT**'s CEO, Michelle Faraday, was informed about the article and she immediately contacted **RESPONDENT**'s chief negotiator to enquire to what extent the Turbines in the Greenacre Power Plant could be affected by the fraud. The next day, on **4 October 2018**, **RESPONDENT**'s CEO Benoit Fourneyron suggested to wait until the first inspection and offered to pull it forward, since that was the only way to determine with certainty which charge of steel had been used to produce the two Francis Turbines in the Greenacre Power Plant.

Following unsuccessful discussions between **the Parties**, **CLAIMANT**'s attorney submitted the Request for Arbitration on **31 July 2019** and the LCIA Registrar acknowledged the receipt. On **30 August 2019**, **RESPONDENT**'s attorney filed the Response to the Request for Arbitration.

SUMMARY OF ARGUMENTS

RESPONDENT's willingness to compromise in order to conclude the contract and its good faith resulted in unequal position as CLAIMANT benefited greatly from the contract, on account of its settled practice of including asymmetrical clauses. With CLAIMANT being the only party to gain advantage from the concluded arbitration agreement, the arbitration agreement cannot be enforceable or found anything else but invalid since the requirements for validity and enforceability are not met. Public policy presents impediment to the validity of asymmetrical dispute resolution clause as well. Violation of public policy of Danubia creates ground for challenge of the arbitral award. Further, invalidity of such clause in Equatoriana is considered part of public policy and thus enforcement and recognition of the final award would be challenged (**ISSUE I**).

Appointment of Prof. John does not serve as the purpose of creating a ground for challenge of the arbitrator nominated by CLAIMANT. Prof. John is nominated as an independent and impartial expert and is not in any way RESPONDENT's legal representative. Although the Arbitral Tribunal has the power to decide on the exclusion of Prof. John under the applicable law, said exclusion would present a violation of RESPONDENT's right to be heard and right to a fair trial (**ISSUE II**).

RESPONDENT fulfilled its contractual obligations as it delivered conforming Turbines under Art. 2 SA and Art. 35(1) CISG to CLAIMANT. Since the particular usage of the Turbines was not expressly or implicitly known to RESPONDENT, the Turbines were fit for their ordinary purpose under Art. 35(2) CISG. Consequently, RESPONDENT could not have fundamentally breached its contractual obligations, especially when those Turbines are currently and continuously producing energy for the whole Greenacre Community (**ISSUE III**).

The prerequisites for a fundamental breach under Art. 25 CISG are not fulfilled. There is no substantial deprivation for CLAIMANT, since the Greenacre Power Plant is operating normally without any complications and interruptions of energy availability. Moreover, even in case of potential and not proven defects of the steel that the Turbines are made of, the detriment alleged by CLAIMANT was not foreseeable as RESPONDENT could not have foreseen the fraudulent actions of Trusted Quality Steel or prevented its consequences. Consequently, CLAIMANT is not entitled to request substitute Turbines under Art. 46(2) CISG (**ISSUE IV**).

ISSUE I: THE TRIBUNAL LACKS JURISDICTION

1 The Arbitration Agreement (hereinafter: AA) is invalid as it is one-sided and only favours CLAIMANT. Asymmetrical dispute resolution clauses are controversial in practice and numerous jurisdictions have considered them invalid as they unduly favour one of the parties. Admittedly, arbitration proceedings must be conducted through the lens of the principle of party autonomy, which is however limited with certain conditions to be met in regard to asymmetrical arbitration clauses. Namely, mutuality, unconscionability, and equal treatment of the parties. As the courts in Danubia have demonstrated that they consider equal treatment of the parties to be of crucial importance [*RRfA, p. 28, § 14*], RESPONDENT respectfully requests the Arbitral Tribunal (hereinafter: Tribunal) to find the AA invalid.

2 Contrary to CLAIMANT's submission, the Tribunal lacks jurisdiction to hear the case. RESPONDENT will establish that, first, the AA is invalid under DAL (**1**) and second, it violates the public policies of Equatoriana and Danubia (**2**).

1. The Arbitration Agreement is invalid under DAL

3 Validity of the unilateral dispute resolution clause must be established under the governing law. As it was already pointed out by CLAIMANT in the present case, the governing law of the AA is DAL [*MfC, pp. 4-5, §§ 4-7*]. In case of a dispute, the AA provides CLAIMANT with a unilateral option to initiate proceedings before arbitration or the national courts in Mediterraneo. On the other hand, RESPONDENT can merely rely on courts of Mediterraneo while it is being deprived of an option to refer to arbitration [*Ex. C2, Art. 21, p. 13, §§ 1,2*].

4 RESPONDENT will establish that the AA is invalid under DAL, since, first, there is lack of mutuality (**a**), second, the AA is unconscionable (**b**), and third, the principle of equal treatment of the parties is violated (**c**).

a. Arbitration Agreement is not mutual

5 During the conclusion of the Sales Agreement (hereinafter: SA), RESPONDENT was the only Party that attempted to propose a balanced AA, however the proposition was flatly rejected by CLAIMANT. After numerous unsuccessful efforts to agree on a balanced arbitration clause, the Parties agreed on the main commercial terms [*Ex. R2, p. 32, § 6*]. CLAIMANT then submitted a first draft of the SA which included the asymmetrical AA [*PO2, p. 47, § 2*]. As CLAIMANT was not willing to negotiate on different terms, RESPONDENT was left with no other option than to agree to the proposed AA in order to fulfil its obligation of delivery of two newly developed, innovative and powerful R-27V Francis Turbines (hereinafter: Turbines)

[*SA, Ex. C2, Art. 2.1(b), p. 11*]. RESPONDENT therefore accepted the AA, which led to the formation of the final SA, favouring CLAIMANT.

6 To begin with, RESPONDENT acknowledges the importance of the principle of party autonomy as stated by CLAIMANT [*MfC, p. 4, § 3*], but doctrine of mutuality of obligation states that either both parties must be bound, or neither is bound [*Drahozal, p. 357*]. The arbitration agreement is *prima facie* imbalanced if it serves the interests of only one party [*Nassar, § 13*]. In both civil and common law jurisdictions, case law has considered jurisdictional clauses that put parties in unequal positions as invalid on grounds of lack of mutuality [*Draguiev, p. 40; Hull vs. Norcom case; Stevens case; Cored Panels case; Arcata Graphics case; Kaye Knitting Mills case; Hull dye case; R.W. Roberts case; Martinez case; Gonzalez case; Independence County case; Wisconsin Auto case; Tyson Foods case; Richard Harp case*]. It follows that the agreement must always be reciprocal to be considered valid. If the agreement does not provide mutual obligations, it is therefore void for its lack of mutuality [*Ustinov, p. 15*]. The lack of mutuality means lack of consideration renders a contract null [*Draguiev, p. 40*].

7 Furthermore, despite the fact that the lack of mutuality means lack of consideration, strict mutuality with identical rights and obligations for each party is not required for the validity of the agreement [*Ustinov, p. 15*]. However, the agreement between the parties containing an arbitration clause with an alternative right to refer to the arbitration, that was provided only by one party, should and must contain consideration, that is, promises on both sides [*Hull vs. Norcom case*]. RESPONDENT never had any other option but to sign the AA proposed by CLAIMANT. The AA only provided CLAIMANT with the right to refer disputes to arbitration under the LCIA Rules and left RESPONDENT deprived of its basic rights [*SA, p. 13, § 21*].

8 In case at hand, it is CLAIMANT's settled practice to include asymmetrical clauses in its contracts in order to maintain the option to go to the arbitration. That remains a great benefit for CLAIMANT since it may decide if advantages of arbitration outweigh the benefits of court proceedings in the particular dispute and accordingly choose the model of proceedings [*PO2, p. 47, § 2*]. Consequently, CLAIMANT rejected RESPONDENT's request to have a symmetrical dispute resolution clause. Although both Parties had their own conditions before concluding the SA, the fact that RESPONDENT agreed to the asymmetrical AA does not mean that it was acceptable for both Parties. It only indicates RESPONDENT's willingness to compromise in order to conclude the contract. RESPONDENT's good faith is evidenced through its acceptance of the unequal position from which CLAIMANT achieved greatly beneficial contract terms.

b. The Arbitration Agreement is unconscionable

9 When concluding the SA, the Parties established a certain dispute resolution mechanism which was, as mentioned above, only beneficial for CLAIMANT. Further, the SA was negotiated in a manner that Respondent was not left with any other option than to include unfavourable dispute resolution clause in the final contract, making such provision unconscionable.

10 To begin with, when determining the validity of unilateral arbitration clauses, the doctrine of unconscionability must also be taken into consideration along with the doctrine of mutuality [*Kaufman, p. 101; Stempel, p. 812*]. Unconscionability is a degree of unreasonableness of an agreement that may force a court to modify or nullify it [*Ustinov, p. 15*]. The doctrine refers to contractual terms that are extremely unjust and one-sided in favour of one party possessing more bargaining power. Thus, it is regarded unconscionable for a party to exploit its economic power and urge the other party to accept a unilateral arbitration clause without clear understanding of the unfair advantage it gives [*ibid.*]. Courts have demonstrated a trend basing their decisions on the doctrine of unconscionability [*Lopez case; U.S. Maverick case; Iwen case; Showmethemoney case*]. The doctrine is relevant in international arbitration and is taken into account by arbitral tribunals as well [*Dixon, p. 1*].

11 In addition, unconscionability may be procedural or substantive. Procedural unconscionability refers to the formation process of the contract, it concerns the manner in which the contract was negotiated and the circumstances of the parties at the time of negotiating. Substantive, on the other hand, focuses on undue harshness or one-sided results in the contract terms [*Dixon, p. 320; Reicker/Pfau, § 4*]. While discussing whether an arbitration agreement can be found to be so unconscionable as to preclude enforcement, both procedural and substantive unconscionability must be present [*Prince v. Pletcher case*].

12 Further, procedural and substantive unconscionability do not need to be present in the same degree for arbitration agreements with unconscionable terms to be unenforceable [*Wood, § 7*]. The broad principle of enforceability is subject to additional limitations under state law that are generally applicable as contract defences of fraud, duress, or unconscionability [*Levine, § 4*]. When evaluating procedural unconscionability, arbitration agreements are almost always presented in the "take it or leave it" fashion. That means that if the arbitration agreement is concluded in a said manner, that makes it procedurally unconscionable. On the contrary, the paramount consideration in assessing substantive conscionability is mutuality [*Reicker/Pfau, § 5*].

13 Additionally, agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability [*Armendariz case*]. An arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if only one party is allowed to arbitrate all claims arising out of the same dispute [*ibid.*]. That means, that when only one party's claims are subject to arbitration and there is no reasonable justification for that lack of symmetry, the agreement lacks the requisite degree of mutuality.

14 In case at hand, both procedural and substantive unconscionability are present in the concluded AA. Firstly, as CLAIMANT was not open to any negotiations in the contrast to RESPONDENT, grounds for procedural unconscionability arise. Secondly, presence of the substantial unconscionability is evidenced through the fact that CLAIMANT is the only party benefiting from the concluded AA. To conclude, the AA cannot be enforceable or found anything else but invalid since all requirements for its invalidity and unenforceability are met.

c. Equal treatment of the Parties is not ensured

15 RESPONDENT strongly objects to CLAIMANT's allegations that the principle of equal treatment of the parties is irrelevant [*MfC, pp. 8-9, §§ 24-27*]. CLAIMANT submitted a first draft of the SA with the asymmetrical AA and was not willing to negotiate [*PO2, p. 47, § 2*]. Consequently, RESPONDENT had to agree to it in order to fulfil its obligation of delivery of the Turbines [*SA, Ex. C2, Art. 2.1(b), p. 11*]. That made the final SA far more favourable to CLAIMANT, which shows that the Parties were not mutually engaged in the formation of the AA. Additionally, the equal treatment of the Parties was not guaranteed.

16 To start with, equality of treatment is a fundamental principle of international commercial arbitration and its importance is not questioned [*ibid., p. 32; Scherer, p. 1, Asadinejad, p. 7314*]. Imbalance between the parties is often rooted in the very essence of the drafting of unilateral arbitration clause [*Draguiev, p. 33*]. The asymmetrical distribution of rights and duties under such clauses is reflected in the unequal position of the parties [*Ustinov, p. 9*]. This follows the natural lack of balance between the parties, especially regarding their bargaining power. In effect, one of the parties to the clause has to adhere to the unfavourable terms of that clause [*Draguiev, p. 33*]. That means that a unilateral clause puts one of the parties in a far more favourable position in terms of choice of dispute resolution body [*ibid., p. 34*].

17 In the first place, imbalance is often rooted in the very essence of the drafting of unilateral arbitration clause [*Draguiev, p. 33*]. The asymmetrical distribution of rights and duties under such clauses is reflected in the unequal position of the parties [*Ustinov, p. 9*]. This follows the

natural lack of balance between the parties, especially regarding their bargaining power. In effect, one of the parties to the clause has to adhere to the unfavourable terms of that clause [*Draguiev, p. 33*]. That means that a unilateral clause puts one of the parties in a far more favourable position in terms of choice of dispute resolution body [*ibid., p. 34*].

18 In the same light, in order to ensure the equal treatment of the parties, both must have equal access to justice [*Redfern/Hunter et al., p. 315*]. This principle is based on the general concept of fair trial that can also be seen in Art. 18 DAL which stipulates that the parties must be treated fairly and equally. This mandatory rule entails that an arbitral tribunal must apply similar standards to all parties and their representatives throughout the arbitral process [*Digest Model Law, p. 97 § 5; Weigand, §§ 14. 23, 14. 360*]. However, in case at hand, RESPONDENT was denied its right to refer to arbitration as it only had the option to resolve potential dispute through litigation [Ex. C2, Art. 21, p. 13, §§ 1, 2].

19 To conclude, as it was established, mentioned principle is one of the fundamental principles of international commercial arbitration. CLAIMANT's right to arbitration was not agreed upon by the Parties throughout the negotiations as those were not mutual. The principle of equal treatment of the parties was violated and the Tribunal is therefore urged to declare the AA invalid on these grounds.

2. The Arbitration Agreement is not in line with public policies of Equatoriana and Danubia

20 In international commercial arbitration an arbitrator is expected to make every effort to render an enforceable award [*Derains/Schwartz, p. 385; Platte, p. 309*]. For such an award to be issued, arbitrators should ensure that the fundamental requirements of important international conventions, governing enforcement or arbitral awards, are respected [*Craig, p. 49*]. This applies especially to the use of NY Convention in the light of its large number of contracting states [*Platte, p. 312*].

21 According to Art. V NY Convention, national courts are permitted to refuse recognition and enforcement of an award if the arbitration agreement is not valid under the law to which the parties have subjected it or if the recognition and enforcement of the award is contrary to public policy of that country [*Blavi and Vial, p. 57*]. There is no widely accepted general definition of the term "public policy" due to its dynamic nature and subjection to legal order of each contracting state [*Trakman, p. 212*]. However, authors concur on certain aspects of that term. Accordingly, public policy is regarded as a reflection of each country's legal, moral, social,

economic, political and religious standards, as well as each country's character and structure, meaning it protects the most fundamental principles a given country relies upon [*Lew, p. 532; Hunter/Conde e Silva, p. 367; Pryles, p. 24*].

22 CLAIMANT incorrectly alleges that public policy presents no impediment to the validity of asymmetrical dispute resolution clause [*MfC, pp. 9-11, §§ 28-36*]. RESPONDENT shall establish that, first, violation of public policy of Danubia creates grounds for challenge of the arbitral award (**a**), and second, invalidity of such clause in Equatoriana is considered part of their public policy and therefore recognition or enforcement of the arbitral award is likely to be refused (**b**).

a. Arbitration Agreement is invalid and not in line with public policy of Danubia

23 In accordance with Art. 34 DAL, an arbitral award may be set aside, among other, if the AA is not valid under the applicable law or when the award violates the public policy of Danubia. Party can challenge the award before the court at the seat of the arbitration [*Moses, p. 203*]. For the award to survive a motion to vacate, it must comply with *lex arbitri*, relevant mandatory laws and public policy [*Ibid., p. 83, 84*].

24 Firstly, when Tribunal is considering the potential recognition and enforcement of an arbitral award, it is essential to establish whether the AA complies with DAL. RESPONDENT established that DAL is violated due to lack of mutuality, unconscionability of the AA and violation of the principle of equal treatment of the parties. Due to this violation the award may be vacated at the seat of the arbitration. Thus, the essential purpose of arbitral proceedings, which is to resolve the dispute, would not be reached.

25 Additionally, the award could be set aside since it violates the public policy of Danubia. Although in Danubia the issue of asymmetrical dispute resolution clauses has yet to be directly resolved, it is certain the principle of equal treatment of the parties in Danubia is of utmost importance and therefore part of Danubian public policy [*RRfA, p. 28, § 14*]. In case of the breach of equal treatment RESPONDENT would have no other alternative but to challenge the final award, since it would be unenforceable under the relevant law. Accordingly, the Tribunal should keep in mind their duty of best efforts to render an enforceable award.

26 Secondly, courts in Equatoriana consider asymmetrical dispute resolution clauses invalid, since they put parties in unequal positions [*RRfA, p. 28, § 13*]. Both DAL and arbitration law of Equatoriana are based on Model Law [*PO2, p. 54, § 47*]. Equatoriana is also a contracting state to the NY Convention [*PO1, p. 46, § 4*]. Consequently, Danubia and Equatoriana have very similar legal regulation regarding international commercial arbitration. Therefore, those

similarities may also reflect in how Danubia forms public policy and resolves issues deriving from asymmetrical dispute resolution clauses. Courts in Danubia may approach this issue in the same manner as courts in Equatoriana and deem such clauses invalid.

27 To conclude, violation of DAL and public policy of Danubia presents an obstacle to the enforcement of the final award. Art. 34 DAL enables RESPONDENT to file a motion to vacate the award on these grounds. Therefore, the Tribunal's duty to make best efforts to render an enforceable award may be violated, since the main purpose of resolving the dispute would not be reached. The issue of asymmetrical dispute resolution clauses in Danubia has not been directly resolved yet, therefore it creates a legal vacuum that needs to be filled. Due to very similar legal background to Equatoriana, Danubian courts may by analogy approach the issue in the same manner and proclaim such clauses invalid.

b. Arbitration Agreement is not in line with public policy of Equatoriana

28 The AA is invalid, since it violates DAL. The AA is unconscionable, lacks mutuality and violates the principle of equal treatment of the parties. Recognition or enforcement of the arbitral award may be refused in courts of Equatoriana if arbitration agreement is invalid and final award contradicts its public policy.

29 To begin with, an arbitral tribunal is not compelled to apply any law of the country where the award might be enforced, with the exception of public policy of the enforcing country [*Moses, p. 84*]. Violation of public policy in the enforcing state and invalidity of the parties' agreement under the law to which the parties have subjected it are, among other, grounds for refusing recognition or enforcement [*Moses, p. 206; Model Law, Art. 36; NY Convention, Art. V*]. Grounds to vacate the award listed in Art. 34 DAL are practically identical to those in Art. 36 DAL, which were taken from Art. V NY Convention [*Explanatory Note, p. 35*]. Therefore, reasoning for violation of public policy of Equatoriana is very similar to that of Danubia.

30 Courts in Equatoriana consider asymmetrical arbitration clauses invalid, since one party is in unfavourable position in relation to the other [*RRfA, p. 28, § 13*]. Due to such one-sided nature of the clause in case at hand, courts may refuse recognition or enforcement of the award, as it violates public policy of Equatoriana. Additionally, public policy in Equatoriana also includes equal treatment of the parties [*PO2, p. 54, § 52*]. Since this principle has been violated as well, the court may find that recognition or enforcement of the award would violate public policy of Equatoriana.

31 In conclusion, the Tribunal will not be able to fulfil its duty of making best efforts to render an enforceable award. The recognition or enforcement of the final award may be refused based on the situations set forth in the Art. V NY Convention and Art. 36 DAL. Since the AA is invalid under DAL and the public policy of Equatoriana has been violated, RESPONDENT can successfully claim refusal of recognition and enforcement of the award on these grounds.

CONCLUSION ON ISSUE I

32 With only CLAIMANT gaining the advantage from the concluded arbitration agreement, the arbitration agreement cannot be enforceable or deemed anything but invalid since prerequisites for its validity and enforceability are not met. The arbitration agreement is therefore invalid under Danubian Arbitration Law as it is unconscionable, and it does not ensure equal treatment of the Parties. It furthermore violates public policies of both, Equatoriana and Danubia. Therefore, the Arbitral Tribunal is urged to find that it lacks jurisdiction to hear the case.

ISSUE II: THE ARBITRAL TRIBUNAL SHOULD NOT ORDER THE EXCLUSION OF THE EXPERT SUGGESTED BY RESPONDENT

33 On 31 July 2019, CLAIMANT nominated Ms. Claire Burdin as its arbitrator [*Letter by Langweiler, p. 3*]. Afterwards, on 30 August 2019, RESPONDENT stated that it will submit an expert report prepared by Prof. Tim John [*RRfA, p. 28, § 20; Ex. R2, p. 32, § 8*]. Ms. Burdin made a disclosure that Prof. John and her husband are currently engaged in a lawsuit against each other [*Letter by Burdin, p. 40*]. According to CLAIMANT, that created a potential conflict of interests and grounds for the challenge of the arbitrator.

34 Contrary to CLAIMANT's allegations, the appointment of Prof. John does not create grounds for the challenge of Ms. Burdin [*Letter by Langweiler, p. 41*]. As Prof. John was only given CLAIMANT's Request for Arbitration and subsequently RESPONDENT's response, but not the letter accompanying both submissions, he did not know that Ms. Burdin was the arbitrator nominated by CLAIMANT [*PO2, p. 49, § 16*].

35 Under the Art. 14(4) LCIA Rules, the arbitral tribunal's general duties during the arbitration include a duty to act fairly and impartially. The arbitral tribunal has to adopt procedures suitable to the circumstances of the arbitration and avoid any unnecessary delays. In that matter, the Tribunal should perform its general duties and not exclude the expert appointed by RESPONDENT, Prof. John. Firstly, RESPONDENT will establish that Tribunal has somewhat limited power to decide on the exclusion of the expert (**1**), and secondly, due to all the

circumstances of this case Tribunal should not exercise its power and should not order the exclusion of the expert or any potential evidence given by him (**2**).

1. Tribunal has limited power to exclude Prof. John

36 Disputes submitted to international arbitration often require experts in fields other than law [*Schneider, p. 446*]. Party-appointed experts are very common in arbitration and are recognised in numerous national laws and institutional rules [*Nessi, pp. 81,82*]. Most arbitral tribunals allow the parties to exercise their right to submit expert evidence [*Born, p. 2279*].

37 RESPONDENT concurs with CLAIMANT's conclusions on the fact that the Tribunal has the power to decide on the exclusion of party-appointed expert based upon the law, agreed between the Parties [*MfC, pp. 13,17, §§ 43-44, 59-60*]. If the Tribunal was denied its power to decide on the exclusion, that would mean that it would not attain its obligations to evaluate the evidence. In order for the arbitral tribunal to act fairly and impartially between the parties, it shall have the power to decide on the exclusion of the expert [*White Burgess case*].

38 CLAIMANT further asserts Tribunal has the power to exclude Prof. John by applying IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Rules) and IBA Guidelines on Conflicts of Interest in International Arbitration (hereinafter: IBA Guidelines) [*MfC, pp. 13-16, §§ 45-55*]. RESPONDENT does not argue Tribunal's power to exclude party-appointed expert based on the law the Parties agreed upon, however the use of IBA Rules and IBA Guidelines was never even discussed among them, therefore RESPONDENT strongly disagrees with the application of these international practices.

39 Although tribunals have the power to exclude party-appointed experts by the letter of the law, this option is virtually never exercised. To exclude a party-appointed expert would mean a severe restriction of the appointing party's right to be heard and its right to a fair trial. Therefore, RESPONDENT will establish that firstly, although the Tribunal has the power to exclude party-appointed expert, such power is never exercised in practice (**a**). Secondly, Tribunal does not have the power to exclude Prof. John under the international practice (**b**).

a. The Arbitral Tribunal has the power to decide on the exclusion party-appointed expert, which is de facto never applied

40 An arbitral tribunal has a general authority to determine the admissibility, relevance, materiality and weight of any evidence. Arbitral tribunals are also explicitly eligible to decide whether or not to apply any strict rules of evidence on any issue of expert evidence [*Art 19.2 DAL; Art.*

22.1 (vi) LCIA Rules; Rowine, p. 315]. The decision to include or exclude expert evidence is left to the discretion of the arbitrators under their general authority.

41 To begin with, although arbitral tribunals may have the power to exclude party-appointed experts, they very rarely decide to do so, as this would mean denying party's right to be heard [*Born, p. 2279; Nessi, pp. 96-98*]. It is not completely certain to what extent party-appointed experts are subjected to duty of independence and impartiality, however it is safe to say they are obligated to honesty and to provide unbiased professional opinion. They must not act as party's advocate but remain impartial and stay true to their professional values [*De Berti, p. 53*].

42 Additionally, Arbitral tribunals are very reluctant to exclude experts on grounds of impartiality and lack of independence [*Born., pp. 2280, 2281*]. Not only that, tribunals have upheld expert opinions even in cases where experts' independence and impartiality were highly questionable and much more controversial than in case at hand, *e.g.* tribunals have decided not to exclude experts in cases where they were employed by the appointing party [*Alpha Projektholding case*], formerly employed by the opposing party and now working as part of the appointing party's legal team [*Helnan Hotels case*] and experts who were board members of companies with interest in the resolution of the particular dispute [*Jan de Nul case*].

43 Despite the fact the Tribunal has the power to exclude Prof. John from the arbitral proceedings, it should not exercise its power, since there is no reason to take such a measure. In no way has the expert shown any signs of impartiality or lack of independence, especially at such an early stage of the arbitral proceedings, nor are there any indications that such improper behaviour would appear later on while conducting his professional duty. Therefore, RESPONDENT proposes to the Tribunal not to exclude Prof. John in order to respect RESPONDENT's right to be heard and right to a fair trial.

b. The Arbitral Tribunal does not have the power to decide on the exclusion of the expert suggested by RESPONDENT under the international practice

44 RESPONDENT recognizes Tribunal's power to exclude Prof. John under the law the Parties agreed upon. In addition to the provisions of that law, CLAIMANT attempts to challenge Prof. John by referring to the use of IBA Rules and IBA Guidelines. However, those two practices are not binding in international arbitration and the Parties have never even discussed to use them. Therefore, the Tribunal is urged not apply IBA Rules and IBA Guidelines as mandatory provisions.

45 Firstly, parties and arbitral tribunals may use IBA Rules as guidelines in developing the arbitral proceedings, as they provide further guidance to resolve certain issues that may occur during the procedure [*Nappert, p. 3*]. It must be stressed that IBA Rules are not binding. They may only become mandatory in the case when parties agree to their use [*IBA Rules, Preamble, §§ 1, 2*]. Usually tribunals do not adopt IBA Rules in cases where one of the parties objects to their use [*Born, p. 2212*]. In the present case, Parties have not agreed to apply IBA Rules. What is more, RESPONDENT objects their application and requests the Tribunal to deny their use. These proceedings have no need for any additional guidelines, since all the issues deriving from the SA are resolvable by using the law the Parties agreed upon.

46 Secondly, even if the Tribunal would allow the use of IBA Rules in the present case, RESPONDENT opposes CLAIMANT's argument that rules for tribunal-appointed experts should apply to party-appointed experts by analogy. CLAIMANT is attempting to challenge Prof. John by using IBA Rules provisions that apply exclusively to tribunal-appointed experts. That is unacceptable, since rules for tribunal-appointed experts cannot be simply applied to party-appointed experts. IBA Rules strictly distinguish between those two categories of experts, as each of those categories is governed in separate provisions [*Arts. 5, 6 IBA Rules*]. A different regulation is deliberately used to distinguish the specifics of those two groups of experts. Therefore, RESPONDENT asks the Tribunal to reject any analogous use of tribunal-appointed experts' rules for party-appointed experts.

47 Thirdly, the reasoning to reject the use of IBA Rules may similarly apply to the use of IBA Guidelines. As the Parties never discussed the use of IBA Guidelines in the first place, RESPONDENT disagrees with the application of this practice and requests the Tribunal to deny their use. Not only does the use of IBA Guidelines seem unnecessary, it is also inappropriate, since those guidelines may be used in international arbitration to assess independency and impartiality of arbitrators [*IBA Guidelines, p. i; de Witt Wijnen/Voser/Rao, p. 434*]. RESPONDENT did not decide to challenge the CLAIMANT nominated arbitrator, Ms. Burdin, but withholds its right to challenge her in the future for lack of independence [*Letter by Fasttrack, p. 42*]. On the other hand, CLAIMANT's reasoning behind the suggestion for the use of IBA Guidelines is to apply the rules for independency and impartiality for arbitrators to party-appointed experts by analogy. It should be emphasized that IBA Guidelines only apply to arbitrators [*de Witt Wijnen/Voser/Rao, p. 434; Gaffney/O'Leary, p. 83*]. CLAIMANT's incorrect conclusions are not a recognised practice in international commercial arbitration. CLAIMANT's reasoning is based completely on a single article that suggested a similar solution. However, this is not established practice, nor does it have any support within any relevant law or authorities.

48 Additionally, even if the Tribunal were to allow the use of IBA Guidelines by analogy, CLAIMANT suggests there are justifiable doubts to expert's impartiality or independence, based on the false facts that Prof. John provided an expert opinion on the possible effects of the steel problems for turbines used in fresh-water environment [*MfC, p. 15, § 54*]. However, CLAIMANT's allegations are misleading, since Prof. John did not provide such an expert opinion. He only gave an assumption during a professional discussion and even stated his assumptions would have to be verified through proper testing [*PO2, p. 49, §15*]. CLAIMANT further states that Prof. John already advised RESPONDENT last year, which indicates expert's lack of independency. Yet again, CLAIMANT's allegations are misinterpretation of past events, since Prof. John was not advising RESPONDENT. During the replacement of the turbine in Riverhead power plant he was advising the operators of the power plant and not RESPONDENT [*PO2, p. 49, § 14*]. Therefore, these facts cannot be used against Prof. John to prove his lack of independency or impartiality.

49 To conclude, RESPONDENT objects the application of IBA Rules and IBA Guidelines in the arbitral proceedings, since all the issues can be resolved using the law the Parties agreed upon. Therefore, the Tribunal should reject any use of these international practices, since none of them were agreed upon. Furthermore, RESPONDENT objects their application and even in the case Tribunal would decide otherwise, CLAIMANT's suggestion to use them by analogy should be rejected.

2. The Arbitral Tribunal should not order the exclusion of Prof. John

50 RESPONDENT urges the Tribunal to dismiss exclusion of the expert as it has no merit. It is merely an attempt to delay the proceedings. CLAIMANT lists several facts that supposedly raise justifiable doubts as to Prof. John's impartiality and independence. However, RESPONDENT denies all of its allegations and asserts that they do not create justifiable doubts as to Prof. John's appointment since they are either inadmissible or irrelevant to the case at hand.

51 Due to the fact that the Tribunal has a limited to no power to exclude Prof. John, it should not exclude the expert and possible evidence provided by him. Firstly, Prof. John satisfies the condition of independency (**a**). Secondly, RESPONDENT's good faith was never in question (**b**). Thirdly, Art. 18(4) LCIA Rules is inapplicable in the present case (**c**) and finally, the exclusion of Prof. John would violate RESPONDENT's right to a fair trial and right to be heard (**d**).

a. Prof. John satisfies the condition of independency and therefore should not be excluded on these grounds

52 CLAIMANT alleges that doubts to Prof. John's impartiality and independency arise due to his previous work with RESPONDENT [*MfC, p. 16, § 56*]. RESPONDENT and the expert have had a relationship prior to this dispute which was however never denied as Prof. John is one of a handful of English-speaking experts world-wide. He has also worked on both issues which are allegedly relevant in the present case, corrosion in steel and cavitation in water turbines [*Letter by Fasttrack, p. 42*].

53 Contrary to CLAIMANT's allegations that the Tribunal should apply the IBA Guidelines to resolve this issue [*MfC, p. 14, § 48*], RESPONDENT submits that they are not applicable in the present case as they only serve the purpose of deciding the arbitrators' partiality. They do not establish the definition of independence for party-appointed experts [*Kantor, p. 329*]. The IBA Guidelines set standard only for arbitrator's independency and impartiality and examples for its practical application [*de Witt Wijnen/Voser/Rao, p. 434*]. They are widely recognised, and arbitrators frequently rely upon them when deciding on the independence and impartiality of an arbitrator [*Moses on IBA Guidelines, §§ 2-3; Scherer, p. 6*]. Since the nature of arbitrator's position in arbitral proceedings in many aspects differs from expert's role, the IBA Guidelines cannot be applied for expert's standard of impartiality and independence [*Gaffney/O'Leary, p. 83*].

54 To conclude, the IBA Guidelines only set standards for arbitrator's independency and impartiality and do not establish the definition of independence for party-appointed experts. However, even if the IBA Guidelines would apply in the present case, CLAIMANT never specifically nor accurately established why they should be used by analogy. What is more, CLAIMANT has never proven that there is any actual and relevant conflict of interest warranting Prof. John's exclusion.

b. There is no lack of good faith

55 CLAIMANT states that RESPONDENT's challenge of the Tribunal's jurisdiction is in bad faith. That is however not true as RESPONDENT's acts are merely an exercise of basic rights [*Letter by Fasttrack, p. 42*]. The fact that RESPONDENT contacted Prof. John after it had received the Request for Arbitration with the nomination of Ms. Burdin is not a sign of bad faith. Following CLAIMANT's actions, RESPONDENT will demonstrate that there is no lack of good faith on its side, while CLAIMANT's actions in fact do indicate the existence of bad faith.

56 To begin with, the principle of good faith appears in the majority of arbitral awards. That is clear evidence of its importance in international arbitration [*Cremades, p. 788*]. The concept of good faith implies the duty to employ honest, loyal and fair behaviour, and that behaviour should be absent of malice or any intention to deceive [*Henriques, p. 517*]. Furthermore, according to Arts. 14(5) and 32(2) LCIA Rules, the parties shall, at all times, do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration.

57 In present case, CLAIMANT makes allegations of bad faith yet behaves itself in a way which raises considerable concerns as to the ethics of its behaviour by appointing Ms. Burdin. She is known as one of proponents of a wide notion of non-conformity in the context of Art. 35 CISG. Ms. Burdin has advocated that the mere suspicion of defects is sufficient in many cases to render the goods non-conforming. It is therefore not surprising that this is exactly the untenable position that CLAIMANT is taking in case at hand [*Letter by Fasttrack, p. 42*]. The fact that CLAIMANT appointed Ms. Burdin hoping to exclude Prof. John as a possible expert, since it was aware of previous relationship between RESPONDENT and Prof. John and also knew about the connection between him and Ms. Burdin's husband, CLAIMANT's bad faith cannot be denied [*Ibid.*]. Contrary to CLAIMANT's position, RESPONDENT's actions were at all times nothing but transparent.

58 What is more, CLAIMANT further states that RESPONDENT appointed Prof. John as its expert only due to his relationship with Ms. Burdin's husband in an alleged attempt to intentionally create a possible ground for the challenge of arbitrator [*MfC, p. 16, § 56*]. That is however not true as RESPONDENT always acted in good faith and in accordance with relevant rules. To conclude, it was in fact acting in best interests of the proceedings in order to provide a smoothly-flowing arbitration and not challenge Ms. Burdin unless signs of a bias were actually indicated. It follows that RESPONDENT respected CLAIMANT's right to be heard, right to fair procedure, and the right to equal treatment.

c. Art. 18(4) LCIA Rules is inapplicable in the present case

59 CLAIMANT asserts that "*legal representatives play more important role in presenting either parties' cases than expert witness, considering their duty to assist tribunal besides presenting the case*" [*MfC, p. 19, § 68*]. According to Art. 18(1) LCIA Rules any party in the arbitration may be represented by one or more authorised legal representatives appearing before an arbitral tribunal. CLAIMANT further states that "*Article 18.4 of LCIA should a fortiori to expert witnesses*" [*MfC, p. 18*]. However, CLAIMANT's statements are clearly made on an erroneous preposition as Prof. John is by no

means a legal representative or RESPONDENT's counsel, meaning that Art. 18 (4) LCIA Rules cannot be applied in the present case.

60 Specifically, Art. 18(4) LCIA Rules states that an arbitral tribunal may withhold approval of any intended change to a party's legal representatives where such change could compromise the composition of an arbitral tribunal or the finality of any award. Aforementioned Tribunal's power was however never disputed, it is merely not applicable in present case as there are no precedents or any authorities supporting CLAIMANT's far-reaching legal interpretation. It is clear that CLAIMANT never properly established why and how Art. 18(4) LCIA Rules should apply to Prof. John.

d. Prof. John's exclusion would violate RESPONDENT'S right to a fair trial and right to be heard

61 Once the Parties drafted the SA, they gave the Tribunal discretion to decide the dispute according to the rules of chosen law. Pursuant to the applicable law, the Tribunal must acknowledge the right to equal treatment of the parties and the right to be heard whilst settling the issue. RESPONDENT agrees with CLAIMANT's statement that reasonableness in regard to the right to be heard is of a great importance [*MfC, p. 20, § 74*]. Thus, RESPONDENT will demonstrate that the exclusion of Prof. John would violate its right to present the case properly, while his inclusion would however not violate CLAIMANT's.

62 Firstly, the principle of equal treatment is fundamental to the idea of justice in international arbitration. Arbitration conventions, rules and national laws unanimously impose a requirement, either express or implied, that the parties shall be treated equally throughout the arbitral process [*Scherer, p. 1*]. The principle of equal treatment intertwines procedural equality with the right to be heard, the right to fair procedure and the eventual outcome of the proceedings. Possible inequality could also impinge on the party's ability to present its case [*Ibid., p. 23*]. Therefore, excluding Prof. John would put RESPONDENT in an unequal position and affect its chance to present the case.

63 Secondly, the right to be heard is a paramount procedural safeguard. The arbitral tribunals must apply similar procedural requirements to all parties [*Roney/Müller, p. 58*; *Schwarz/Konrad, § 20-223*]. Said right also demands that each party must have an appropriate opportunity to present its case without a significant disadvantage to the other party [*Dombo Beheer v. the Netherlands; Schwarz/Konrad, § 20-017*]. It provides the possibility for each party to present the relevant facts, evidence and views of the case [*Gbangbola/Lewis v. Smith Sherriff; O'Malley, §*

9.115]. The right to be heard and the principle of equal treatment are reflected in Art. 14(4) LCIA Rules and Art. 18 DAL. The parties must have the possibility to participate in the taking of evidence [*Duarib v. Jallais; Decision of the Federal Constitutional Court*]. If the Tribunal excluded the expert, that would be a violation of RESPONDENT's right to be heard as RESPONDENT appointed Prof. John only due to his expertise, proficiency and experience.

64 Thirdly, although there are three other well-known English-speaking experts available in the field of hydro power plants that could work as a substitute for Prof. John [*PO2, p. 49, § 17*], appointing any of them instead of Prof. John would mean a delay in proceedings and unnecessary costs for the Parties. Art. 14(4)(ii) LCIA Rules imposes a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute. Thus, excluding Prof. John would constitute as a violation of them.

65 In conclusion, RESPONDENT's right to equal treatment and therefore the right to be heard and the right to fair procedure would all be violated if Prof. John was excluded from the proceedings. Excluding Prof. John and possible evidence given by him would only mean unnecessary delays and costs, all the while preventing RESPONDENT from presenting its case properly.

CONCLUSION ON ISSUE II

66 Although the Arbitral Tribunal may have the power to decide on the exclusion of Prof. John under the applicable law, tribunals virtually never take such drastic measures, since this would severely interfere with the appointing-party's right to be heard. Prof. John does not work as RESPONDENT's legal representative, but as an independent and impartial expert. RESPONDENT appointed Prof. John without any ill intentions, thereby exercised one of its basic rights to present its case. Therefore, the Arbitral Tribunal is urged not to order the exclusion of Prof. John from these proceedings.

ISSUE III: THE TURBINES ARE CONFORMING UNDER THE SALES AGREEMENT AND ART. 35 CISG

67 CLAIMANT alleges that the delivered Turbines were non-conforming according to Art. 2 SA and Art. 35 CISG due to the suspicion of inferior quality of steel used in their production [*MfC, pp. 21-22, §§ 78-87*]. RESPONDENT will demonstrate that CLAIMANT's allegations regarding the non-conformity of the Turbines are misguided. Under the concluded SA, RESPONDENT has undertaken to deliver and install two Francis type Turbines [*RfA, p. 6, § 10; Ex. C2, p. 11*]. This

advanced model of RESPONDENT's Turbines included special shapes of the blades, which were made with higher quality steel and therefore provided not only a slightly higher efficiency, but also a higher corrosion and cavitation resistance than ordinary turbines [*RRfA, p. 26, § 3*].

68 Shortly after the successful trial launch of the plant, it became apparent that RESPONDENT was defrauded by its main supplier of steel, Trusted Quality Steel [*Ex. C3, p. 14*]. Following the exposure of fraud, RESPONDENT could not confirm with certainty whether the delivered Turbines were produced with the required high-quality standards [*Ex. C5, p. 16, Ex. C2, p. 11; RRfA, p. 27, § 6*]. After the discovery of steel certification scheme, RESPONDENT took immediate action to clarify the situation. It suggested a thorough examination of the Turbines at the first regular scheduled inspection in order to determine whether the anticorrosive features of the steel were affected. RESPONDENT was prepared to cover all costs, directly associated with bringing forward the inspection and the additional metallurgical examinations [*Ex. C7, p. 21; RRfA, p. 27, § 8*]. Meanwhile, the Greenacre Power Plant was generating energy for the whole Greenacre Community from the day it passed the acceptance test without any trouble. Despite RESPONDENT's willingness to clarify the situation, CLAIMANT, who produced no proof that the steel used in the manufacturing process of the Turbines was defective, unjustifiably demanded delivery of substitute Turbines [*Ex. C4, p. 15; Ex. C7, p. 20; RRfA, p. 27, § 9*].

69 The Parties have agreed that the law governing the SA shall be the substantive law of Danubia, which encompasses the CISG and the general contract law of Danubia, which is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (hereinafter: UNIDROIT Principles) [*SA, p. 13, § 21; PO1, p. 46, § 4; PO2, p. 54, § 53*]. Whenever the requirements for the application of CISG exist, CISG will normally take precedence over the UNIDROIT Principles in view of its binding character [*Bonell, § 3a*]. Therefore, the following issues will be discussed in light of the CISG provisions.

70 RESPONDENT will establish that it has never breached its obligations under Art. 2 SA, as the delivered Turbines were of agreed quantity, quality and description pursuant Art. 35(1) CISG (**1.**). In addition, the Turbines were fit for their particular and ordinary purpose (**2.**).

1. RESPONDENT'S Turbines are conforming under Art. 2 SA and Art. 35(1) CISG

71 By delivering Turbines, which comply with all agreed features established in the SA, RESPONDENT performed its obligations pursuant to Art. 35(1) CISG. Under said article, the seller must deliver goods which comply with the specifications the parties agreed upon [*Honsell, Art. 35, § 10; Kröll, Art. 35, § 37; Model Locomotives Case*]. Even if the Tribunal would not follow

the argumentation that the delivered Turbines were of agreed quality and description (**a**), RESPONDENT will nonetheless demonstrate that CLAIMANT's request for substitute delivery of conforming Turbines is unjustifiable since there had not even been an implicit agreement regarding the high quality manufacturing standard of the Turbines (**b**).

a. High quality steel requirement was not expressly agreed in the Sales Agreement

72 CLAIMANT alleges that RESPONDENT delivered non-conforming Turbines pursuant to Art. 35 CISG, as they were not produced with the certified steel [*MfC, pp. 21-23, §§ 79-87*]. On the contrary, RESPONDENT did not breach its obligations under Art. 35(1) CISG, since it delivered Turbines, which confirmed to all agreed characteristics specified in Art. 2 SA. RESPONDENT's obligations under the said article were to deliver and install two Turbines to Greenacre Power Plant and support CLAIMANT's commitment to Greenacre's green energy strategy. RESPONDENT fulfilled all of its contractual obligations.

73 Pursuant to Art. 35(1) CISG, a seller is required to deliver goods of the quantity, quality and description required by the contract [*Honnold, p. 253; Lookofsky, p. 89; Powdered milk case; Steel plates case*]. The agreement between the parties is the primary source for assessing conformity of the delivered goods [*Karollus, p. 116; Kritzer, p. 282; Schwenzer Commentary, p. 571, Art. 35, § 6; Schlechtriem/Butler, p. 133*]. By signing the SA, the Parties were committed to ensure that Greenacre Power Plant would satisfy the demand of uninterrupted availability of renewable energy to Greenacre Community [*Ex. C2, p. 11*]. RESPONDENT undertook the obligation to support CLAIMANT in its participation in the Greenacre Power Plant tender by providing CLAIMANT, if it were to succeed in the tender process, the necessary documentation and delivering and installing its two newly developed Francis Turbines, with the characteristics specified in detail in Annex A. One of the determining factors for awarding the tender to CLAIMANT was its guarantee that the Greenacre Power Plant will have sufficient availability and capacity to provide the additional energy needed to the Greenacre Community, whenever the normal sources of renewable energy would not produce an adequate amount of energy [*Ex. C1., p. 10; Ex. C2, p. 11*]. The aim was to exclude any need to import energy produced by conventional carbon-based methods, in particular, any need to rely on the coal-fired plant in Ruritania [*RfA, p. 5, § 7; Ex. C1, p. 10*]. In order for CLAIMANT to achieve this goal of the Greenacre Community, the delivered Turbines needed to be produced with anticorrosive steel, since mainly this feature grants short maintenance and repair intervals of the plant [*SA, Art. 2, p. 11*].

74 The standard of quality as set out by Art. 35 CISG includes even non-physical attributes like the circumstances of production [*Huber/Mullis, p. 132; Kröll, Art. 35, § 25*]. These attributes must be

determined by the parties' agreement [*Henschel, p. 162*]. In the case at hand, the Parties explicitly determined technical characteristics of the Turbines in Annex A [*SA, Art. 2, p. 11; PO2, p. 47, § 6*]. However, Annex A did not contain an agreement on a certain manufacturing standard that RESPONDENT would have to follow in order to produce Turbines, which would comply to premium quality standards. Contrary to CLAIMANT's allegations [*MfC, p. 22, § 87*], RESPONDENT never guaranteed that the Turbines were manufactured with high-quality steel, it only delivered a statement which confirmed that the Turbines were produced with certified steel [*PO2, p. 48, § 5*]. Moreover, the remote possibility of a defect cannot constitute non-conformity of the delivered products [*Schwenzer/Tabel, p. 155; Grunewald, p. 131*]. CLAIMANT's suspicion that the Turbines are made of defective steel are misguided [*MfC, p. 27, §§ 101-103*], since only the features of the products that can be discerned through a physical examination of the goods by the buyer itself, can give rise to non-conformity [*Grunewald, p. 134*]. However, CLAIMANT has not proven that the Turbines are affected by corrosion or that there is an extraordinary amount of cavitation, since those are the features of the steel, which can be verified only by a metallurgical inspection of the Turbines [*Ex. C5, p. 16; PO2, p. 47, § 3; PO2, p. 52, § 35*].

75 In addition, even if the Tribunal were to find that the delivered Turbines were produced with defective charge of steel, it is up to CLAIMANT to prove that RESPONDENT actually used uncertified low-quality steel in the manufacturing process of the Turbines. Once the buyer has physically taken over the goods, he has to prove their non-conformity pursuant to the principle of proximity of the proof [*Schwenzer Commentary, p. 592; Brunner/Gottlieb, p. 244 § 28; Flechtner, p. 347; Walt, p. 216; Pipes and cables case; Textile cleaning machine case; Crude oil mix case; Chicago Prime Packers Inc. case*]. At most, only part of the charges of steel came from Trusted Quality Steel [*PO2, p. 50, § 24*]. While there is a possibility that some of the steel used in the production process of the Turbines might have been affected and was not corrosion resistant, the exact defect on the Greenacre Power Plant has not been proved with a reasonable degree of certainty. However, without proper metallurgical inspection, it is impossible to verify that the steel used in the manufacturing process of the Turbines was so defective that it lost all of its anticorrosive features. Since all allegedly non-conforming Turbines were properly delivered and installed in the Greenacre Power Plant which is operating without any complications [*PO2, p. 50, § 19*], it is the duty of CLAIMANT to prove whether the Turbines were produced with non-conforming charges of steel.

b. The Parties not even implicitly agreed on a certain high-quality standard

76 Under Art. 35(1) CISG the seller must deliver goods which comply with the standards the parties expressly or impliedly agreed upon [*Honsell, Art. 35, § 10; Kröll, Art. 35, § 37; Saidov, p. 530; Model*

Locomotives case]. Even if the Tribunal concludes that non-physical quality requirements cannot be expressly determined, RESPONDENT will further establish that they were not even implicitly included into the contract. The contract's description of the goods is only the starting point to determine the parties' true intent. The provisions of Art. 8 CISG govern the interpretation of contract and further direct the Tribunal to look to all relevant circumstances of the case [*CISG Opinion no. 19, p. 6, § 1.3*]. Therefore, the Tribunal should consider Art. 8 CISG for the purpose of analysing the scope of contractual obligations through the subjective and objective interpretation of the intent of the parties [*Honnold, p. 116; Lautenschlager, p. 260; Zeller, p. 638; Yang, p. 618; Smallmon case; Propane case; Cedar Petrochemicals Inc. case; Chinchilla furs case; Chemical fertilizer case*].

77 Pursuant to Art. 8(1) CISG it is sufficient if a reasonable seller could discern the purpose of goods from all the relevant circumstances [*Eörsi, pp. 2-19; Enderlein/Maskow/Strohbach, Art. 35, § 11; CSS case; Machinery case; Tantalum case*]. The agreement on these circumstances is usually implied when it comes to particular industry standards or manufacturing practices [*Schlechtriem, § 38*]. In the case at hand, the Parties never specifically agreed on any premium quality standards of the Turbines, not even implicitly. They merely agreed in SA that RESPONDENT was to produce and deliver two Francis Turbines R-27V of 300 MW power each. SA therefore does not give CLAIMANT the right to demand any other specific features of the Turbines, such as the quality of the steel.

78 If Art. 8(1) is not applicable, Art. 8(2) CISG further determines that statements are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Farnsworth, p. 97; Murray, p. 40; Egg case; Health care products case; Rubber sealing parts case; Roder case*]. A reasonable person would consider all the relevant circumstances of the case and would therefore be objective [*Honsell, Art. 18, §§ 28-29; Auto case*]. CLAIMANT, who is a market leader in providing pump hydro power plants [*RfA, p. 4, § 1*], should primarily demand the detailed inspection of delivered Turbines to prove that the blades were affected by unusual corrosion and cavitation problems. Even more, since CLAIMANT's goal was to reduce all types of downtimes of the Greenacre Power Plant to the absolute minimum. CLAIMANT did no such thing. RESPONDENT therefore reasonably assumed that it fulfilled its obligations by delivering the agreed Turbines, fit for the inclusion in an operating power plant.

79 Admittedly, RESPONDENT cannot completely exclude the possibility that the Turbines may be produced from a charge of steel that has not been properly examined, since it has been defrauded by its main supplier of steel. RESPONDENT, who is a world-renowned producer of premium water Turbines [*RfA, p. 4, § 2*], would never risk its good reputation on the market and knowingly sell Turbines, manufactured with defective steel, for a higher price. However, momentarily, it is

impossible to conclude that anticorrosive features of the steel were affected without proper metallurgical inspection [*PO2, p. 51, § 30*]. CLAIMANT is immediately demanding the delivery of substitute Turbines without allowing for the option of a metallurgical inspection, fully knowing that just scheduling the next planned inspection a year earlier would accommodate the common interest in a smooth operation of the plant with as little downtimes as possible. CLAIMANT's allegations that RESPONDENT delivered non-conforming Turbines are based solely on completely irrelevant findings in relation to the Riverhead Tidal Plant. Even in the worst-case scenario, if the two delivered Turbines were produced with the steel of inferior quality, the design and the high quality manufacturing process of the Turbines make it extremely unlikely that they will be affected by corrosion and cavitation damages to the same extent as the turbines in the Riverhead Power Plant, which is exposed to salt water [*Ex. C3, p. 14; Ex. C5, p. 16; PO2, p. 51, § 30; Ex. R2, p. 32, § 8; PO2, p. 51, § 32*].

80 Moreover, in the case at hand, the Parties never specifically agreed on any premium quality standards of the Turbines. CLAIMANT therefore cannot simply allege that RESPONDENT failed to comply with the SA and request a replacement of the Turbines, for which the non-conformity had not yet been proven. RESPONDENT fulfilled its contractual obligations by producing and delivering conforming Turbines that are a vital part in the operating Greenacre Power Plant, which is producing energy with the highest level of efficiency from the day it passed its acceptance test. Hence, there is no legal basis for any non-conformity claim under Art. 35 CISG, which could be grounds for the replacement of the Turbines.

2. RESPONDENT's Turbines were fit for their ordinary purpose

81 If the Tribunal were to find that the description of quality of the Turbines under the SA is not enough to determine conformity under Art. 35(1) CISG, the latter should be evaluated according to Art. 35(2) CISG. Objective criteria for determining the conformity in said article apply only if quantity, quality or description of the goods are not sufficiently detailed [*Huber/Mullis, p. 134; Schwenzer Commentary, p. 571, § 7*]. The delivered Turbines were conforming under Art. 35(2)(b) CISG, as CLAIMANT did make any particular purpose of goods explicitly and impliedly known to RESPONDENT (**a**). Since CLAIMANT did not intend to use the Turbines for any particular purpose, they are conforming as they are fit for ordinary use pursuant to Art. 35(2)(a) (**b**).

a. The particular purpose of the delivered Turbines under Art. 35(2)(b) of the CISG was not known to RESPONDENT

82 A seller is only responsible for the fitness of the goods for their particular purpose, if buyer makes such a purpose known to the seller [*Brunner/Gottlieb, p. 238, § 18; Hyland 321; Schwenzer Commentary, p. 580; Vine wax case*]. Furthermore, it is also required that the buyer relied on the seller's skill and judgement [*Bianca/Bonell, p. 275; Schlechtriem II, p. 21*].

83 Firstly, CLAIMANT never expressly stated that it intended to use the Turbines for any particular purpose. In assessing whether the buyer made the particular purpose at least implicitly known to the seller, a wide range of factors must be considered [*Huber/Mullis, p. 138; Globes case*]. A particular purpose exists, if the parties agreed on certain public or private standards or whether the parties decided to consider certain technical, ethical, environmental, health and safety regulations or give special attentiveness to the process of designing and manufacturing of products [*CISG Opinion no. 19, p. 5, § 1.3; Schwenzer/Leisinger, p. 249*]. In these situations, products can be directly used to reach the desired particular result of the buyer. However, the delivered Turbines produced for the Greenacre Power Plant could easily be used for any other hydro power plant, if the parameters of said plant would be the same [*PO2, p. 52, § 36*]. Therefore, CLAIMANT's anticipated use of the Turbines in the Greenacre Power Plant [*MfC, pp. 25-26, §§ 96-98*] cannot be regarded as a particular purpose under Art. 35(2)(b) CISG. CLAIMANT is mistakenly alleging that the particular usage of the Turbines was precisely their incorporation in the Greenacre Power Plant [*MfC, pp. 24-25, §§ 93,95*], when it is undisputed that RESPONDENT already produced the same type of Turbines, Francis Turbines, for other power plants, specifically the Riverhead Power Plant. Hence, if CLAIMANT wanted to ensure that the delivered Turbines would adhere to certain high-quality manufacturing standard or be produced with certified premium quality steel for the particular use of the Greenacre Power Plant, it should express such desired particular purpose to RESPONDENT. CLAIMANT failed to do so.

84 Secondly, an important indicator of what the buyer can expect of the goods under Art. 35(2)(b) CISG, is also the purchase price of the goods. If the price is much lower than the value of premium products, associated with a particular standard, this points against inferring an implicitly communication of such particular purpose of the products [*CISG Opinion no. 19, p. 17, § 4.17*]. CLAIMANT maintains that the particular purpose was at least implicitly known to RESPONDENT, since it paid a higher price for the delivered Turbines [*MfC, p. 25, § 96*]. In the present case, the price for the delivered products was just above average, since it was only 10 % above the price of other turbines, available on the market [*Ex. R1, p. 30; RfA, p. 8, § 23*]. The main reason for

the higher price, as explained by Prof. Tim John, was the particular innovative shape of the blades [*Ex. R1, p. 30; Ex R2, p. 31, § 2*]. Is was not solely the quality of the steel that was the reason for the higher price, since Francis type turbines are normally made with high tensile strength steel and are not as susceptible to the risk of corrosion and cavitation [*Corà/Fry/Bachhiesl/Schleiss, p. 32*]. The quality of the steel therefore does not represent a feature that constitutes particular purpose in the case at hand.

85 Thirdly, expressly stating the particular purpose is not sufficient where the circumstances show that the buyer did not rely or it was unreasonable for him to rely on seller's skill and judgement [*Bianca/Bonell, p. 275*]. The buyer cannot rely on the seller when it has more experience in a particular area [*CISG Opinion no. 19, p. 15, § 4.11; Schwenzer Commentary, p. 582; Hyland, p. 321; Maley, p. 119*]. Although, RESPONDENT is a world-renowned producer of premium water turbines, it certainly is not a market leader in providing pump hydro power plants all over the globe, such as CLAIMANT [*RfA, p. 4, §§ 1-2*]. RESPONDENT did provide two Turbines, produced with certified steel to CLAIMANT, which are now running full speed, producing energy through Greencare Power Plant for the whole Greenacre Community. Therefore, delivered Turbines are conforming under Art. 35(2)(b) of the CISG, since CLAIMANT did not make its particular purpose known to RESPONDENT and it was unreasonable of CLAIMANT to completely rely on RESPONDENT's skill and judgement when it clearly has more expertise in the field of hydro power plants.

86 In conclusion, RESPONDENT did not breach its contractual obligations according to Art. 35(2)(b) CISG as it delivered the Turbines, which complied with the agreed quality standards. It was unreasonable for CLAIMANT to rely on skill and judgment of RESPONDENT, since the particular purpose of the Turbines was not expressly or implicitly known.

b. The Turbines were fit for their ordinary purpose under Art. 35(2)(a) of the CISG

87 Under Art. 35(2)(a) CISG goods are conforming if they are fit for the purpose for which they would ordinarily be used [*Schlechtriem/Butler, pp. 115-116; Schwenzer Commentary, p. 575*]. Francis turbines, which are not as susceptible to the risk of corrosion and cavitation, are ordinarily chosen when the buyers want to increase the time period between the repair and maintenance and decrease the repair and maintenance periods, therefore ensuring a large uninterrupted supply of hydro energy [*Brekke, p. 29; Safi/Prasad, p. 1005*]. The Turbines, produced by RESPONDENT, are fir for their ordinary purpose and allow for the Greenacre Power Plant to operate and produce energy for the Greenacre Community without any known corrosion and cavitation problems or unplanned interruptions. CLAIMANT's does

not dispute [*MfC, pp. 23-24, §§91-92*] that the Turbines are suitable for their ordinary purpose pursuant to Art. 35(2)(a) CISG.

CONCLUSION ON ISSUE III

88 RESPONDENT fulfilled its contractual obligations as it delivered conforming Turbines under Art. 2 SA and Art. 35(1) CISG. Furthermore, the Turbines were suitable for their ordinary purpose pursuant to Art. 35(2) CISG, since the particular purpose of the delivered Turbines was never expressly or implicitly known to RESPONDENT. Consequently, RESPONDENT urges the Tribunal to recognize that it never fundamentally breached its contractual obligations, since it delivered conforming Turbines, which are working at full speed and are currently continuously producing energy for the whole Greenacre Community.

ISSUE IV: CLAIMANT IS NOT ENTITLED TO SUBSTITUTE TURBINES

89 CLAIMANT requests the replacement of the delivered Turbines pursuant to Art. 46(2) CISG due to RESPONDENT's supposed fundamental breach of the SA. CLAIMANT's request for substitute Turbines is unfounded. RESPONDENT will establish that CLAIMANT's claim has no legal base since there was no fundamental breach under Art. 25 CISG.

90 Benoit Fourneyron, the CEO of RESPONDENT, assured CLAIMANT that it started investigating the matter immediately after it was informed about the fraud. RESPONDENT confirmed to CLAIMANT that due to the falsified documents from its supplier of steel and a mistake in its internal product management, it is impossible to determine whether the delivered Turbines were produced from defective steel [*Ex C5, p. 16*]. RESPONDENT promised to investigate potential cavitation and corrosion damages to the Turbines and reassured CLAIMANT there is no need for immediate action. After the completed investigation, when it became evident that RESPONDENT was frauded by its steel supplier, RESPONDENT immediately reassured CLAIMANT, that even in the worst scenario, if it would be discovered that the Turbines were potentially produced from inferior steel, the design and manufacturing process would make it extremely unlikely that they will be affected by corrosion and cavitation damages to the same extent as the Riverhead power plant, which is exposed to salt water [*Ex C5, p. 16; RRfA, p. 27, §§ 7-8*].

91 RESPONDENT suggested to pull forward the scheduled inspection by a year and was willing to pick up the costs for all the additional work on the Turbines, irrespective of its outcome [*RRfA, p. 27, § 8*]. Shortly after, CLAIMANT made an unreasonable request to replace the delivered turbines with completely new turbines or at least replace the blade runners although no signs of corrosion and cavitation were discovered [*Ex. R3, p. 33*]. RESPONDENT informed

CLAIMANT that its request cannot be fulfilled, as the total cost of the production of just one turbine is 20.000.000,00 USD and RESPONDENT will certainly not bear such costs, if there is a miniscule possibility that the Turbines were produced with the defective charge of steel which does not possess the promised anticorrosion features [*Ex. R4, p. 34*].

92 CLAIMANT's claim for replacement Turbines is groundless for several reasons. Firstly, since the Turbines are conforming under the SA and are producing energy since the day they passed the acceptance test, RESPONDENT did not fundamentally breach its obligations and did not substantially deprive CLAIMANT of what it was entitled to expect under the contract (**1**). Secondly, since the prerequisites for fundamental breach are not fulfilled, CLAIMANT is not entitled to request substitute Turbines (**2**). Lastly, even if the inspection was to reveal an unusual amount of corrosion and the damage of the blades of the Turbines, CLAIMANT would only be entitled to a repair under Art 46(3) CISG (**3**).

1. There was no substantial deprivation that constitutes a fundamental breach

93 The provisions of Art. 25 CISG govern the scope of the fundamental breach, which is fundamental if it substantially deprives the buyer of what it was entitled to expect under the contract and the detriment is foreseeable [*CISG Opinion no. 5, p. 2, § 1.2; Zeller II, p. 224; Koch, p. 263*]. Two main criteria for the fundamental breach test are the substantial deprivation requirement and the foreseeability requirement [*CISG, Art. 25; Huber/Mullis, p. 782; Liu, p. 121; Zeller II, p. 224*]. RESPONDENT will demonstrate there was no substantial deprivation since no damage was discovered on the Turbines and the Greenacre Community does not need to rely on carbon-based energy from Ruritania.

94 Firstly, for a breach to be considered fundamental by virtue of Art. 25 CISG, it must cause a detriment that substantially deprives the injured party of what it was entitled to expect under the contract [*Schwenzer Commentary, p. 409, § 21; Huber/ Mullis, p. 214; Liu, p. 121; Zeller II, p. 224; Koch, p. 263; Lookofsky II, p. 118; Pressure sensors case*]. In other words, as a consequence of the non-performance or incorrect performance of a contractual obligation of the other party, the aggrieved party must lose its interest in the contract [*Magnus, p. 426*]. Furthermore, the breach is argued to be fundamental in cases where the buyer's intended use of the goods becomes impossible or when the interest in receiving performance is lost [*Graffi, p. 339; Ferrari, p. 496; Koch, p. 264; Color concrete block production line case; Dust ventilator case*].

95 It must be stressed that first inspection indicated no problems that could cause damage in the Turbines and the plant was functioning normally [*PO2, p. 47, § 3*]. CLAIMANT's conclusion that the steel used in Greenacre Power plant is most likely of inferior quality is based solely on the fact that Trusted Quality Steel was RESPONDENT's main supplier providing around 70 % of the steel used in the manufacturing process of the Turbines [*PO2, 51, § 24*]. Contrary to CLAIMANT's allegations [*MfC, p. 29, § 112*], each delivered Turbine to CLAIMANT is made of a separate batch of steel and at the time of production there was also sufficient charges of steel available from other suppliers [*PO2, 51, § 31*]. Therefore, it is completely possible that Turbines used in the Greenacre Power Plant were produced without using any steel from Trusted Quality Steel [*PO2, p. 51, § 31*]. What is more, CLAIMANT cannot base its claim on the findings in relation to the turbines used at the Riverhead Tidal Plant [*MfC, p. 29, § 112*]. The fact that the turbines in that case showed corrosion and cavitation damage and had to be replaced after two years of operation bears no weight for the Greenacre Turbines [*RfA, p. 6, §* 12*; RRfA, p. 28, § 16*]. Primarily that is due to the fact that Turbines were originally constructed for use in freshwater hydro power stations [*PO2, p. 51, § 27*]. Despite the fact that Greenacre Turbines must handle a much higher pressure from the waterhead when in use, metal used in turbines will be submitted to lesser amount of corrosion in freshwater in comparison to saltwater [*PO2, p. 51, § 32*]. Therefore, the situation in Riverhead Tidal Plant is not applicable to the Greenacre Power Plant. CLAIMANT's allegations are based solely on suspicion, as corrosion damages can only be discovered through an inspection, which has not yet been conducted.

96 Secondly, the concept of fundamental breach depends on how important proper performance would have been for the buyer. The focus is therefore on the importance of interest for proper performance and not on the extent of damage caused by the breach itself [*Huber/Mullis, p. 215; Lorenz, § 50; Zeller II, p. 226*]. When assessing a fundamental breach regard shall be given only to express stipulations of the parties and the purpose for which the goods are bought [*Schwenzer Commentary, p. 409, § 21-22; Graffi, pp. 339-340; Ferrari, p. 499*]. When deciding whether the contract is frustrated by the breach, due regard must also be given to general purpose of the contract [*Lorenz, § 50*]. In the present case, the sole purpose of the contract was to ensure the Greenacre Power Plant would guarantee constant availability with minimum interruptions for maintenance and independence from carbon-based energy sources [*SA, Arts. 2, 19*]. RESPONDENT delivered the Turbines that comply with the express terms of the contract [*RfA,*

§ 11, p. 6]. CLAIMANT is falsely stating that RESPONDENT has not fulfilled its contractual obligations [*MfC, p. 31, § 119*].

97 Moreover, when assessing whether a breach of contract is fundamental, it must be determined whether the circumstances of non-conformity affect the usability of the goods [*Schwenzer Commentary, p. 573, § 9; Automobile case; Sunprojuice case*]. In that regard, non-conformity of the delivered products is fundamental in cases where the delivered goods are improper for the intended particular use by the buyer [*Leisinger, p. 130; Software case; Shoes case; CNC machine case; Elastic fitness clothing case; Mitias v. Solidea case*]. In the present case the particular use of the Turbines was not expressly or at least implicitly known to RESPONDENT (see supra §§ 81-86). What is more, the Turbines are producing energy since the day they passed the acceptance test without any known inadequacies, which is a clear indicator that the usability of the Turbines was not affected at all and they are fir for their ordinary use. Therefore, CLAIMANT's claim regarding the fundamental breach of RESPONDENT's contractual obligations is completely implausible [*MfC, p. 29, §§ 110-115*].

98 Thirdly, the concept of detriment comprises all actual negative consequences of any possible breach of contract, including actual and future financial loss [*Ferrari, p. 495; Koch, p. 263; Lorenz, § 50; Zeller II, p. 226*]. RESPONDENT offered to pull forward the first inspection by a year and then examine the Turbines and in particular its' runners in detail and perform a thorough metallurgical examination of the blades. Due regard must be given to the fact that the only way to prove there are any damages on the Turbines is the metallurgical examination, which would determine whether CLAIMANT' s request for substitute Turbines is justified [*PO2, p. 47, § 3*]. RESPONDENT has also offered CLAIMANT to cover all the additional costs of such comprehensive examination irrespective of the outcome of the investigation [*Ex C5, p. 16; RrA, p. 27, § 8*]. Therefore, CLAIMANT will suffer no financial loss in case of potentially finding any defects of the Turbines.

99 Additionally, easy reparability of defects excludes any fundamentality of the breach [*Saltwater isolation tank case*]. In cases where the defect is curable and seller offers a repair without any inconvenience to the buyer, the breach of conformity is not fundamental [*CISG Opinion no. 5, p. 8, § 4.4; Huber/Mullis, p. 214; Ferrari, p. 502; Bygum, p. 3; Marques Roque Joachim v. Manin Rivi case; Industrial furnace case*]. RESPONDENT offered CLAIMANT the repair of the Turbines if corrosion damage on the blades or an extreme amount of cavitation are confirmed in a metallurgical inspection [*Ex. C7, p. 20; Ex. R2, p. 31; RfA, p. 28, § 18*]. Since it is impossible to determine if

there is a need to repair the potentially defective Turbines without a detailed metallurgical inspection, RESPONDENT also keenly offered to pull forward the next planned inspection by a year and perform it immediately, so any potential inconvenience for CLAIMANT is minimized.

100 In conclusion, the prerequisite of substantial deprivation for a fundamental breach is not fulfilled, since the Turbines were delivered and installed in the Greenacre Power Plant, which is operating normally without any interruptions of its availability. The goal for Greenacre Community to not rely on carbon-based energy purchased from Ruritania is achieved as well. The mere suspicion of inferior quality of steel, provided by Trusted Quality Steel, does not in itself result in such a detriment to CLAIMANT that it deprives CLAIMANT of what it expected from the SA.

2. The foreseeability requirement is not met

101 A breach is considered fundamental only in cases where the party in breach foresaw or was able to foresee the detrimental consequences of a breach. A breach of contract cannot be considered fundamental when the defaulting party did not foresee the detrimental consequences and when a reasonable person of the same kind and in the same circumstances, would not have foreseen these consequences [*Schwenzer Commentary, p. 398; Huber/Mullis, pp. 215, 782; Liu, p. 121; Zeller II, p. 224; Graffi, p. 339-340; Achilles, p. 69; Sanchez, p. 217; Salger, p. 210; Ferrari, pp. 495-499; Babiak, p. 142; Koch, p. 229*]. The main purpose of the foreseeability requirement under Art. 25 CISG is considering the breaching party's knowledge of the harsh consequences of the breach in determining whether or not it is fundamental. On the other hand it is also a burden of proof rule and it serves to exempt the breaching party from his liability for the breach of contract [*Achilles, p. 69; Sanchez, p. 217; Salger, p. 210; Babiak, p. 142; Koch, p. 263; Bygum, pp. 4-7; Lookofsky II, p. 118*]. RESPONDENT will establish that even in a scenario that inferior steel was used due to the fraudulent actions of its supplier, its consequences were unforeseeable.

102 Firstly, CLAIMANT alleges that RESPONDENT was able to foresee the result based on the fact that it kept records of all its suppliers [*MfC, p. 31, §120*]. RESPONDENT's employees accidentally erased a number of back-up files for the years 2015-2017 and consequently RESPONDENT's IT system including its internal product management had been hacked and most of the data had been frozen and could not be retrieved from a back-up [*PO2, § 25, p. 50*]. Admittedly, without the loss of the data, it would have been possible to determine which charges of steel were used for the production of which turbine and thus to determine whether the steel from Trusted

Quality had been used for the construction of the Greenacre power plant or not [*PO2, § 25, p. 50*]. However, the loss of data does not affect the quality of used steel in any way.

103 RESPONDENT was not aware of the steel certification fraud until it was contacted by the authorities on 25 August 2018 [*PO2, p. 50, § 20*]. RESPONDENT relied on information provided by one of its main steel suppliers Trusted Quality and on certificates issued by certified companies such as Techproof [*PO2, p. 50, § 18*]. Even the article, which exposed Trusted Quality for the scheme, describes the company as a well-known quality and certification entity [*Ex C3, p. 14*]. Every reasonable person in RESPONDENT's position would rely on information provided by the company it has worked with for many years and it is unreasonable to expect of it to foresee that the quality certificates will be forged and issued without the necessary examination of the steel. CLAIMANT's claims are therefore completely unaffiliated with the concrete decisions of which charges of steel are to be used in the manufacturing process of the Turbines.

104 Secondly, even if CLAIMANT were to allege that RESPONDENT as an expert in its field could predict the potential power plant shutdown due to the defective steel used in the manufacturing process, such claims are unjustified. RESPONDENT cannot be held accountable for the actions of another fraudulent company, since it dutifully performed all its obligations and conducted all its business with the Trusted Quality Steel in good faith. RESPONDENT produced the Turbines for CLAIMANT carefully and in line with all its professional manufacturing guidelines.

105 In light of all the circumstances, the possible and not proven detriment of steel, alleged by CLAIMANT, was not foreseeable and in light of all circumstances. RESPONDENT could also not have foreseen the fraudulent actions of Trusted Quality Steel or prevented its consequences. Hence, the prerequisites for a fundamental breach under Art. 25 CISG are not fulfilled.

3. CLAIMANT is not entitled to replacement Turbines under Art. 46(2) CISG

106 RESPONDENT fulfilled its contractual obligations under Art. 2 SA when it delivered conforming Turbines to CLAIMANT (see supra §§ 71-80). CLAIMANT has no ground to argue a fundamental breach as no defects were found on the Turbines. Hence, CLAIMANT's demand to request the substitute delivery of newly produced turbines under Art. 46(2) CISG is baseless.

107 The claim for delivery of substitute goods under Art. 46(2) requires fulfilled prerequisites for a fundamental breach under Art. 25 CISG [*Brunner/Gottlieb, p. 344, § 4*]. In other words, the right to demand substitute delivery of goods is granted only when the lack of conformity of

the delivered products constitutes a fundamental breach of a contract [*Enderlein/Maskow p. 181; Ferrari, p. 496; Fitzgerald, p. 295; Flechtner, p. 346; Honnold, p. 307; Kritzer, p. 348; Liu, p. 48; Lookofsky II, p. 118; Will, p. 333*]. In the case at hand, CLAIMANT bears the burden of proof (see supra § 75) and has failed to demonstrate that RESPONDENT delivered non-conforming Turbines under the provisions of the SA and consequently, fundamentally breaching its contractual obligations (see supra §§ 71-80). Hence, CLAIMANT's request for substitute delivery of the Turbines is altogether groundless.

108 Moreover, the seller's possibility to cure the defect excludes the buyers right of requesting substitute goods [*Graffi, p. 344; Ferrari, p. 502; Zeller II, p. 226; Acrylic blankets case*]. Particularly in cases of machinery and their technical components it is often possible to achieve a complete cure of defects that impair their usability. Therefore, the right to demand substitute delivery of the products would be granted only in cases where the seller fails to provide a cure for the defect or refuses to carry out a repair [*Bygum, p. 3; Huber/Mullis, p. 214; Ferrari, p. 502; Schwenzer Commentary, pp. 714-715, § 26*]. The fact that RESPONDENT has the option of curing the potentially defected Turbines and that it offered the CLAIMANT to do so (see supra §§ 98-100), excludes CLAIMANT's possibility to demand the replacement of the Turbines.

109 In addition, pursuant to Art. 46(2) CISG the potentially aggrieved party must request the substitute delivery in conjunction with notice given under Art. 39 CISG. The said article stipulates that the buyer must give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it. The failure to do so results in the loss of right to rely on non-conformity and consequently the buyer can no longer require the seller to cure the lack of conformity and request substitute goods under Article 46(2) CISG [*Sono, p. 304; Honnold, p. 276*]. The main purpose of Art. 39 CISG and specified nature of lack of conformity is to give the seller an opportunity to obtain and preserve evidence of the condition of the goods and to cure the deficiency. A notice that merely describes goods as defective, would not give the seller all the information it needs for the above purposes and would not specify the nature of the lack of conformity in light of Art. 39 CISG [*Honnold, p. 278*]. Consequently, the description of lack of conformity under Art. 39(1) CISG must be detailed and the buyer shall describe the physical condition of goods and present evidence on any defects found. Only in these circumstances, the buyer can succeed with its request for substitute delivery of goods [*CNC machines case; Live sheep case; NV Carta Mundi v. Index Syndicate Ltd case; Trekking shoes case; Pullovers case; Plants case*].

110 It must be stressed that CLAIMANT did not sufficiently specify the nature of non-conformity, as it failed to demonstrate the presumed inadequacy of the Turbines under Art. 35 CISG. CLAIMANT first inquired with RESPONDENT on the quality of steel used in the production of the Turbines in an e-mail on 3 October 2018 [*Ex. C4, p. 15*]. At that time, it has not requested any replacement Turbines. RESPONDENT immediately suggested running the first metallurgical inspection, which could show any potential defects of the steel in an e-mail on 4 October 2018 [*Ex. C5, p. 16*]. CLAIMANT recognized the fact that RESPONDENT was unable to determine with certainty which charge of steel had been used to produce the two Francis Turbines, included in the Greenacre Power Plant, in an e-mail on 6 October, however, it simply suggested pulling forward the first inspection and using that time to replace the Turbines [*Ex. R3, p. 33*]. CLAIMANT never specifically determined the reason for the replacement nor the exact deficiency or inadequacy of the delivered Turbines as it only pointed out the case of the Riverhead Tidal Plant and based the alleged non-conformity on a remote possibility that the situation was the same in the present case. CLAIMANT also failed to provide any evidence on alleged non-conformity, as no defects were ever discovered on the Turbines (see supra §§ 71-75, 97). Therefore, CLAIMANT did in fact make the request for substitute goods, however, this request was not sufficiently specific in terms of Art. 39 CISG. The requirement of a request for substitute delivery, given in conjunction with the notice under Art. 39 CISG, is therefore not fulfilled.

111 In conclusion, Art. 46(2) CISG grants the request for substitute delivery only in cases of established fundamental breach. CLAIMANT has no ground to argue that there was a fundamental breach, let alone that the Turbines were non-conforming. Moreover, CLAIMANT has not made sufficiently specific request for replacement Turbines under Art. 39 CISG.

CONCLUSION ON ISSUE IV

112 The prerequisites for a fundamental breach under Art. 25 CISG are not fulfilled. There is no substantial deprivation for CLAIMANT, since the Greenacre Power Plant is operating normally without any complications and interruptions of energy availability. Moreover, even in case of potential and not proven defects of the steel that the Turbines are made of, the detriment alleged by CLAIMANT was not foreseeable as RESPONDENT could not have foreseen the fraudulent actions of Trusted Quality Steel or prevented its consequences. Consequently, CLAIMANT is not entitled to request substitute Turbines under Art. 46(2) CISG. The Tribunal should deny CLAIMANT's request for substitute Turbines.

REQUEST FOR RELIEF

In light of the submissions made above, Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to:

1. declare that Tribunal has no jurisdiction to hear the case, since the Arbitration Agreement is invalid;
2. find that there are no reasons for the Tribunal to exclude the expert suggested by RESPONDENT;
3. declare that RESPONDENT has not fundamentally breached its contractual obligations;
4. deny CLAIMANT's request to deliver and install two substitute R-27V Francis Turbines;
5. find RESPONDENT not liable for any damages resulting from the exchange of turbines up to the agreed upon limitation;
6. order CLAIMANT to bear costs of this arbitration.

Respectfully signed and submitted by counsel on 23 January 2020.

Dora Klančnik

Ana Krajtner

Leon Lah

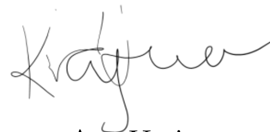
Petra Zupančič

CERTIFICATE

Maribor, 23 January 2020

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

Dora Klančnik


Ana Krajtner

Leon Lah

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