TWENTY SEVENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

4 APRIL – 9 APRIL 2020

VIENNA, AUSTRIA

MEMORANDUM FOR CLAIMANT

University of Maribor

Faculty of Law

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

Counsel for CLAIMANT

Dora Klančnik • Ana Krajtner • Leon Lah • Petra Zupančič

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

§/§§	paragraph/paragraphs
AA	Arbitration Agreement
Art. /Arts.	Article/Articles
CIArb	Chartered Institute of Arbitrators
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
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
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.	versus

INDEX OF AUTHORITIES

CITED AS		CITED IN
Achilles	**Achilles, W. A.** *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* Hermann Luchterhand Verlag, 2000	§ 106
Babiak	**Babiak, A.** *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods* Temple International and Comparative Law Journal, 1992 Available at: https://www.cisg.law.pace.edu/cisg/biblio/babiak.html?fbclid=IwAR1ewUShvqJNnl6rjqCnBfrorNksUs_XsjA4khi03bdIN18qWMpipKapBHU#v (05. 12. 2019)	§ 108
Berger/Kellerhals	**Berger, B.; Kellerhals, F.** *International and Domestic Arbitration in Switzerland* Stämpfli, Berne 2015	§ 37
Bianca/Bonell	**Bianca, C. M.; Bonell, M. J.** *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* Giuffere, Milan, 1987	§ 78
Bonell	**Bonell, M. J.** *The UNIDROIT Principles and CISG* Published in An International Restatement of Contract Law, Transnational: Irvington, New York, 1997 Available at:	§ 89

	https://www.cisg.law.pace.edu/cisg/biblio/bonell.html (05. 12. 2019)	
Born	**Born, G.B.** *International Commercial Arbitration Volume I: International arbitral procedures, 2nd edition* Kluwer Law International, 2014 *International Commercial Arbitration Volume II: International arbitral procedures, 2nd edition* Kluwer Law International, 2014	§§ 3, 6, 37, 38
Böckstiegel	**Böckstiegel Karl-Heinz** *Taking Evidence in International Commercial Arbitration, Legal Framework and Trends in Practice* Berger Klaus Peter/Böckstiegel Karl-Heinz et al. (editors), Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit, Ger- man Institution of Arbitration, Volume 26, Carl Heymanns, Cologne 2010, pp. 1–8	§ 37
Bygum	**Bygum, M.** *Extension and Limitation of the Buyer's Right To Avoid the Contract Under the CISG* Available at: https://law.au.dk/fileadmin/Jura/dokumenter/forskning/rettid/2010/afh21-2010.pdf?fbclid=IwAR1YvNRdeuFOZSy-rZj8WvK-iSgJQmvY4B3yUsAPhGARJs6Sst647tpBr3s (05. 12. 2019)	§§ 104, 106
CISG Opinion no. 5	**CISG Advisory Council** *Opinion No. 05* *The buyer's right to avoid the contract in case of non-conforming goods or documents* Available at:	§ 90

	https://journals.aau.dk/index.php/NJCL/article/view/3051/2577 (05. 12. 2019)	
CISG Opinion no. 19	**CISG Advisory Council** *Opinion No. 19* *Standards and Conformity of the Goods under Article 35 CISG* Available at: https://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_19b.pdf (05. 12. 2019)	§§ 74, 82-84
Craig	**Craig, W. L.** *International Ambition and National Restraint in ICC Arbitration* Arbitration International, Volume 1, 1 April 1985, pp. 49–81	§ 21
Cremades/Cairns	**Cremades, B.M.; Cairns, D.J.A.** *Expertise in International Arbitration* Transnational Dispute Management May 2013 Available at: https://www.cremades.com/pics/contenido/CREMADES%20&%20CAIRNS%20-Expertise%20in%20International%20Arbitration.tdm(2013)-arti....pdf (05. 12. 2019)	§ 46
Dasteel	**Dasteel, H. J.** *Experts in Arbitration* Available at: https://www.lacba.org/docs/default-source/section-documents/international-law-section/newsletter-files/dasteel-article.pdf	§ 36

	(05. 12. 2019)	
De Berti	**De Berti, G.** *Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?* Published in Austrian Yearbook International Arbitration, Volume 53, 2011 Available at: https://www.dejalex.com/wp-content/uploads/2017/12/pubb_11_AYIA.pdf (05. 12. 2019)	§ 47
Derains/Schwartz	**Derains, Y.; Schwartz, E. A.** *A Guide to the ICC Rules of Arbitration* Kluwer Law International, 2005	§ 21
Digest Model Law	*UNCITRAL Digest of Case law on the Model Law on International Commercial Arbitration*, United Nations (2012)	§ 18
Draguiev	**Draguiev, D.** *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability* Journal of International Arbitration 31, no. 1 (2014): 19–46 Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542591 (05. 12. 2019)	§§ 11, 18
Drahozal	**Drahozal, C. R.** *Nonmutual Agreements to Arbitrate* Journal of Corporation Law Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=380040 (05. 12. 2019)	§ 10
Enderlein/Maskow	**Enderlein, F.; Maskow, D.**	§ 114

	International Sales Law, United Nations Convention on Contracts for the International Sale of Good Oceana Publications, 1992 Available at: http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html (05. 12. 2019)	
Enderlein/Maskow/Strohbach	**Enderlein, F.; Maskow, D.; Strohbach, H.** *Kaufrechtskonvention der UNO (mit Verjährungskonvention) – Kommentar* Staatsverlag DDR, Berlin, 1985	§ 75
Eörsi	**Eörsi, G.** *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* Published in Galston & Smit ed., 1984, Ch. 2, pp. 2-36 Available at: https://cisgw3.law.pace.edu/cisg/biblio/eorsi1.html#205 (05. 12. 2019)	§ 75
Erdem	**Erdem, M.** *Soft Law in International Arbitration* Erdem & Erdem, 2016 Available at: http://www.erdem-erdem.av.tr/publications/newsletter/soft-law-in-international-arbitration/ (05. 12. 2019)	§ 49
Farnsworth	**Farnsworth, A.** *Commentary on the International Sales Law - Article 8*	§ 76

	Published in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan, 1987, pp. 95-102 Available at: https://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb8.html (05. 12. 2019)	
Flechtner	**Flechtner, H.** *Buyers' remedies in general and buyers' performance-oriented remedies* Published in Journal of Law and Commerce, Vol. 06, 2005, pp. 339-347 Available at: https://www.uncitral.org/pdf/english/CISG25/Flechtner.pdf	§ 114
Gaffney/O'Leary	**Gaffney, J.; O'Leary, G.** *Tilting at Windmills? The Quest for Independence of Party-Appointed Expert Witnesses in International Arbitration* Asian Dispute Review, Volume 13, Issue 3, 2011, pp. 82-85	§§ 48, 49, 51, 53, 55
Gardiner	**Gardiner, J.; Haber Kuck, L.; Bedard, J.** *Discovery* In: Carter James, Fellas John, *International Commercial Arbitration in New York* Oxford University Press, 2010	§ 42
Graffi	**Graffi, L.** *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention* Published in International Business Law Journal, No. 3, 2003, pp. 338-349 Available at: https://cisgw3.law.pace.edu/cisg/biblio/graffi.html	§ 108

	(05. 12. 2019)	
Heilmann	**Heilmann, J.** *Mängelgewährleistung im UN-Kaufrecht: Voraussetzungen und Rechtsfolgen im Vergleich zum deutschen internen Kaufrecht und zu den Haager Einheitlichen Kaufgesetzen* Berlin, Verlag Duncker & Humblot, 1994	§ 83
Henschel	**Henschel, R. F.** *The Conformity of Goods in International Sales – An Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods (CISG)* Thomas, Copenhagen, 2005	§ 70
Honnold	**Honnold, J. O.** *Uniform Law for International Sales under the 1980* United Nations Convention, 3rd edition Kluwer Law International, 1998	§§ 70 74, 77, 84
Honsell	**Honsell, H.** *Kommentar zum UN-Kaufrecht* Springler, 2010	§§ 69, 76
Huber/Mullis	**Huber, M.; Mullis, A** *The CISG: A new textbook for students and practitioners* Sellier European law publ., 2007	§§ 79, 82, 84, 94, 96, 103, 104, 107
Hunter/Conde e Silva	**Hunter, M.; Conde e Silva, G.** *Transnational Public Policy and its Application in Investment Arbitrations* The Journal of World Investment & Trade, Volume 4, Issue 3, 2003	§ 26
Hyland	**Hyland, R.** *Conformity of Goods to the Contract under the United States Sales Convention and the Uniform Commercial Code*	§ 80

	In: Schlechtriem, Einheitliches Kaufrecht und nationales Obligationenrecht Baden-Baden, 1987, pp. 305-341	
Ireton	**Ireton, O. J.** *The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence* 30(1) ICSID Review, 2015	§ 42
Jain	**Jain, N.** *Can an Arbitral Tribunal Admit Evidence Obtained through a Cyber-Attack?* Kluwer Arbitration Blog Available at: http://arbitrationblog.kluwerarbitration.com/2019/01/27/can-an-arbitral-tribunal-admit-evidence-obtained-through-a-cyber-attack/ (05. 12. 2019)	§ 41
Jenkins/Stebbings	**Jenkins, J.; Stebbings, S.** *International Construction Arbitration Law (Arbitration in Context Series)* Construction Law International 3, no. 2 June 2008	§ 7
Kantor	**Kantor, M.** *A Code of Conduct for Party-Appointed Experts in International Arbitration – Can One be Found?* Arbitration International, Volume 26, Issue 3, September 2010, pp. 323-380 Available at: http://arbitrateatlanta.org/wp-content/uploads/2013/04/Code-of-Conduct-for-Party-Appointed-Experts.pdf (05. 12. 2019)	§§ 47, 48
Karollus	**Karollus, M.** *UN-Kaufrecht*	§ 70

	Springer, New York, 1991	
Kaufmann-Kohler	**Kaufmann-Kohler, G.** *Soft Law in International Arbitration: Codification and Normativity* Journal of International Dispute Settlement, Volume 1, Issue 2, August 2010, pp. 1-17 Available at: https://lk-k.com/wp-content/uploads/Soft-Law-in-International-Arbitration-Codification-and-Normativity.pdf (05. 12. 2019)	§ 49
Koch	**Koch, R.** *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)* Published in Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International, 1999, pp. 177 - 354. Available at: https://cisgw3.law.pace.edu/cisg/biblio/koch.html (05. 12. 2019)	§§ 90, 106
Kritzer	**Kritzer, A. H.** *ICM-Guide to Practical Applications of the UN Convention on Contracts for the International Sale of Goods* Deventer, Kluwer, 1994	§§ 70, 114
Kröll	**Kröll, S.** *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary* Beck/Hart, 2011	§ 69
Kuitkowski	**Kuitkowski, D.** *The Law Applicable to Privilege Claims in International Arbitration*	§ 42

	32 Journal of international Arbitration, 2015	
Lautenschlager	**Lautenschlager, F.** *Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG - The Reasonable Third Person, Language Problems and Standard Terms and Conditions* Published in Vindobona Journal of International Commercial Law & Arbitration, 2007, pp. 259-290 Available at: http://www.cisg.law.pace.edu/cisg/biblio/lautenschlager.html#iii (05. 12. 2019)	§ 74
Leisinger	**Leisinger, B.** *Fundamental Breach Considering Non-Conformity of the Goods* Published in Sellier European Law Publishers, 2007 Available at: https://www.cisg.law.pace.edu/cisg/biblio/leisinger.html (05. 12. 2019)	§ 92
Lew	**Lew, J.** *Applicable Law in International Commercial Arbitration* Oceana Publications, 1978	§ 26
Liu	**Liu, C.** *The concept of fundamental breach: Perspectives from the CISG, UNIDROIT Principles and PECL and case law* Available at: http://www.sisudoc.org/cisg/en/pdf/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu.landscape.a4.pdf (05. 12. 2019)	§§ 94, 114

Lookofsky	**Lookofsky, J.** *Article 35: Conformity of the Goods* Published in J. Herbots/R. Blanpain: International Encyclopaedia of Laws - Contracts, Suppl. 29 Kluwer Law International, 2000 Available at: https://www.cisg.law.pace.edu/cisg/biblio/loo8.html (05. 12. 2019)	§ 70
Lookofsky I	**Lookofsky, J.** *Article 8: Interpretation of Statements by Parties* Published in J. Herbots/R. Blanpain: International Encyclopaedia of Laws - Contracts, Suppl. 29 Kluwer Law International, 2000 Available at: https://www.cisg.law.pace.edu/cisg/biblio/loo8.html (05. 12. 2019)	§ 77
Lookofsky II	**Lookofsky, J.** *Article 25: Avoidance and Fundamental Breach* Published in J. Herbots/R. Blanpain: International Encyclopaedia of Laws - Contracts, Suppl. 29 Kluwer Law International, 2000 Available at: https://cisgw3.law.pace.edu/cisg/biblio/loo25.html (05. 12. 2019)	§ 91
Lorenz	***Lorenz, A*** *Fundamental Breach under the CISG* Available at: https://cisgw3.law.pace.edu/cisg/biblio/lorenz.html?fbclid=IwAR27bJii2JTok0U_hL9e5hlwWHFl9bYQLtUGLxPfWv10Bnas8yBYL2hSmdU (5. 12. 2019)	§§ 92, 96, 103

Marghitola	**Marghitola, R.** *Document Production in International Arbitration* International Arbitration Law Library, Volume 33 Kluwer Law International, New York 2015	§ 37
Marshall	**Marshall, J.** *Use of Experts in Arbitration: An Arbitrator's Perspective* Available at: https://adric.ca/adr-perspectives/use-of-experts-in-arbitration-an-arbitrators-perspective/ (05. 12. 2019)	§ 34
Meyer	**Meyer, O.** *Time to Take a Closer Look: Privilege in International Arbitration* 24(4) Journal of International Arbitration, 2007	§ 42
Morrissey/Graves	**Morrissey, J. F.; Graves, J. M.** *International Sales Law and Arbitration – Problems, Cases and Commentary* Kluwer Law International, 2008	§ 7
Moses	**Moses, M. L.** *The Principles and Practice of International Commercial Arbitration, 2nd edition* Cambridge University Press, 2012	§§ 6, 21-23, 27
Moses on IBA Guidelines	**Moses, M. L.** *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges* Kluwer Arbitration Blog, November 2017 Available at: http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/ (05. 12. 2019)	§ 49
Mullerat	**Mullerat, R.** *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of*	§§ 50, 51

	Interest in International Arbitration Dispute Resolution International, Volume 4, No. 1, May 2010	
Murray	**Murray, J.** *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods* Published in Journal of Law and Commerce, 1988, pp. 11-51 Available at: https://cisgw3.law.pace.edu/cisg/text/murray8.html (05. 12. 2019)	§ 76
Nappert	**Nappert, S.** *International Arbitration as a Tool of Global Governance: The Use (and Abuse) of Discretion* The Oxford Handbook on International Governance, Forthcoming Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994914	§ 41
Nassar	**Nassar, Y.** *Are Unilateral Option Clauses Valid?* Kluwer Arbitration Blog Available at: http://arbitrationblog.kluwerarbitration.com/2018/10/13/are-unilateral-option-clauses-valid/ (05. 12. 2019)	§§ 10, 11
Naumann	**Naumann, H.** *Der Regelungsbereich des UN-Kaufrechts im Spanungsfeld zwischen Einheitsrecht und Kollisionsrecht* Peter Lang, Frankfurt am Main, 2000	§ 80
Nazzini	**Nazzini, R**.	§ 3

	Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context American Journal of Comparative Law, Vol. 20, 2018 Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249060 (05. 12. 2019)	
Nessi	**Nessi, S.** *Expert Witness: Role and Independence* Published in Muller, Besson, Rigozzi: New Developments in International Commercial Arbitration 2016 Available at: https://www.swlegal.ch/media/filer_public/bd/97/bd97437d-e8dc-4bd8-ba34-1490f32070ef/161114_sebastiano-nessi_expert-witness-role-and-independence-sw-05049646.pdf (05. 12. 2019)	§ 47
O'Malley	**O'Malley, D.** *Rules of Evidence in International Arbitration, An Annotated Guide* Informa Law, New York 2012	§ 60
Ozumba	**Ozumba, O.** *Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?* CEPMLP Annual Review 13, University of Dundee, July 2017 Available at: https://uod.app.box.com/s/swl5xiswonvyb6wi3q1539p7l78linla	§ 27
Paulsson/Petrochilos	**Paulsson, J.; Petrochilos, G.** *Uncitral arbitration* Kluwer Law International, 2010	§ 42

Piltz	**Piltz, B.** *Neue Entwicklungen im UN-Kaufrecht* Neue Jurustische Wochenschrift, 1996	§ 78
Platte	**Platte, M.** *An Arbitrator's Duty to Render Enforceable Awards* Journal of International Arbitration, Volume 20, 2003, pp. 307-313	§§ 21, 22
Pryles	**Pryles, M.** *Reflections on Transnational Public Policy* Journal of International Arbitration, Volume 24, Issue 1, Februar 2007	§ 26
Queen Mary Survey	*International Arbitration Survey: Improvements and Innovations in International Arbitration* Queen Mary University of London, 2015 Available at: http://www.arbitration.qmul.ac.uk/research/2015/ (05. 12. 2019)	§ 41
Rajoo	**Rajoo, S.** *Law, Practice and Procedure of Arbitration, 2nd edition* LexisNexis, 2017	§ 6
Ralston	**Ralston, J.** The law and procedure of the International tribunals, 1926	§ 42
Ramberg	**Ramberg, C.** *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct* Available at: http://www.christinaramberg.se/Download/21a949e8-5dec-4f31-83eb-4d724b50a852 (05. 12. 2019)	§ 83

Redfern/Hunter	**Redfern, A.; Hunter, M.; Blackaby, N.; Partasides, C.** Redfern & Hunter on International Arbitration 6th Edition Oxford University Press, Oxford, 2015	§ 17
Roney/Müller	**Roney, D. P.; Müller, A. K.** *The Arbitral Procedure* In: Kaufmann-Kohler, Gabrielle and Stucki, Blaise (eds.), *International Arbitration in Switzerland: A Handbook for Practitioner* Kluwer Law International, Zurich	§ 62
Rowine	**Rowine, A. W.** *Contemporary Issues in International Arbitration and Meditation* The Fordham Papers, 2010 Martinus Nijhoff Publishers, Leiden, Boston, 2011	§ 37
Saidov	**Saidov, D.** *Chapter 5. Foreseeability of Damages* The Law of Damages in International Sales: The CISG and other International Instruments, 2008 Available at: https://www.cisg.law.pace.edu/cisg/biblio/saidov5.html?fbclid=IwAR1Yt0psIJEJc2fv38HPRxfZY4FqjGrkqe7rQ01hJ-jxontAdAFL-9-JMZ0 (05. 12. 2019)	§ 107
Salger	**Salger, H. C.; Wolfgang, W.; Lorenz, M.** *Internationales Einheitskaufrecht, Schriftenreihe Recht der internationalen Wirtschaft* Heidelberg: Verlag Recht und Wirtschaft, 2000	§ 106
Sanchez	**Sanchez, C.** *Commentary on CISG Articles 25-29 and 53-60* La compraventa internacional de mercaderías, Díez-Picazo y Ponce de León ed., Madrid: Civitas, 1998	§ 106

Schäfer/Verbist/Imhoos	**Schäfer, E.; Verbist, H.; Imhoos, C.** *ICC Arbitration in Practice* Kluwer Law International, The Hague 2005	§ 37
Scherer	**Scherer, M.** *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004-2009* Dispute Resolution International, Volume 4, 2010, pp. 5-53 Available at: https://www.lalive.law/data/publications/The_IBA_guidelines_on_conflicts_of_interest_in_international_arbitration.pdf (05. 12. 2019)	§ 49
Schlechtriem	**Schlechtriem, P.** *Schuldrecht. Besonderer Teil.* Mohr Lehrbuch, 2003	§ 75
Schlechtriem/Butler	**Schlechtriem, P.; Butler, P.** *UN Law on International Sales, 2nd ed.* Springer, Berlin Heidelberg, 2016	§§ 70, 81, 86
Schneider	**Schneider, M.** *Technical experts in international arbitration* Available at: https://www.lalive.law/wp-content/uploads/2017/07/mes_technical_experts.pdf (05. 12. 2019)	§§ 34, 64
Schwarz/Konrad	**Schwarz, F. T.; Konrad, C. W.** *The Vienna Rules, a commentary on international arbitration in Austria* Kluwer Law International, Alphen aan den Rijn 2009	§§ 60, 62
Schwenzer Commentary	**Schlechtriem, P.; Schwenzer, I.** *Commentary on the UN Convention on the International Sale of Goods (CISG)*	§§ 70, 78, 79, 81,

	3rd ed, Oxford University Press, 2010	84, 86, 91, 92, 107, 114
Schwenzer II	**Schwenzer, I.** *Avoidance of the Contract in Case of Non-Conforming Goods (Article 49(1)(a) CISG)* Published in Journal of Law and Commerce, Vol. 25, Issue I, 2005, pp. 437-442 Available at: https://cisgw3.law.pace.edu/cisg/biblio/schwenzer2.html?fbclid=IwAR25_9Ix3PIvETAAofqAfUmnIRfHmqRZO1gzY899laXBePXQzuwJI0qkhlg (05. 12. 2019)	§§ 91, 92
Schwenzer/Tebel	**Schwenzer, I.; Tebel, D.** *Suspicions, mere suspicions: non-conformity of the goods?* Published in Uniform Law Review, Vol. 19, 2014, pp. 152–168 Available at: https://edoc.unibas.ch/32419/4/20140401143242_533ab1ea2e7eaPDFA10.pdf (05. 12. 2019)	§§ 98, 102
Simpson/Fox	**Simpson, J. L.; Fox, H.** *International arbitration – Law and Practice* London, 1959	§ 42
Sussman	**Sussman, E.** *The Arbitrator Survey: Practices, Preferences and Changes on the Horizon* The American Review of International Arbitration, Volume 26, No. 4, December 2015 Available at: https://ssrn.com/abstract=2824441 (05. 12. 2019)	§ 64

Timmerbeil	**Timmerbeil, S.** *The Role of Expert Witnesses in German and U.S. Civil Litigation* Annual Survey of International & Comparative Law, Volume 9, Issue 1, 2003 Available at: https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1076&context=annlsurvey (05. 12. 2019)	§ 47
Trakman	**Trakman, L. E.** *Aligning State Sovereignty with Transnational Public Policy* Tulane Law Review, Volume 93, No. 2, December 2018, pp. 207-267	§ 26
Ustinov	**Ustinov, I.** *Unilateral Arbitration Clauses: Legal Validity* Available at: http://arno.uvt.nl/show.cgi?fid=142526 (05. 12. 2019)	§ 16
Weigand	**Weigand, F.** *Practitioner's Handbook on International Commercial Arbitration* Second Edition, Oxford University Press, 2009	§ 18
de Witt Wijnen/Voser/Rao	**de Witt Wijnen, O. L. O.; Voser, N.; Rao, N.** *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration* Business Law International, Volume 5, No. 3, September 2004	§§ 49-51
Working Group Report "Contract Parties"	A/CN.9/216 – Report of the Working Group on International Contract practices on the work of its fifteenth session, New York February 16–26, 1982	§ 37
Yang	**Yang, F.** *CISG, CIETAC Arbitration and the Rule of Law in the P. R. of China: A Global Jurisconsultorium Perspective*	§ 74

	Available at: http://www.cisg.law.pace.edu/cisg/biblio/yang3.html (05. 12. 2019)	
Zeller	**Zeller, B.** *Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis* European Journal of Law Reform, Volume 4, no. 4, 2002, pp. 629-643 Available at: http://www.cisg.law.pace.edu/cisg/biblio/zeller8.html (05. 12. 2019)	§§ 74, 94
Zeller II	**Zeller, B.** The Remedy of Fundamental Breach and the United Nations Convention on the International Sale of Goods (CISG) - A Principle Lacking Certainty? Available at: https://cisgw3.law.pace.edu/cisg/biblio/zeller15.html?fbclid=IwAR0KQepe_NqpgAMHemSXiOBJHu7eyMODzUHC4s9rYA5WG8uoCRT6jHTdNFE (5. 12. 2019)	§§ 96, 103

TABLE OF ARBITRAL AWARDS

CITED AS		CITED IN
	China International Economic and Trade Arbitration Commission	
Automobile case	*Unknown parties* 2005 Case No. CISG/2006/03 Available at: http://cisgw3.law.pace.edu/cases/061200c1.html#iv (05. 12. 2019)	§ 92
Water pump case	*Unknown parties* 3 August 2006 Case No. CISG/2006/15 Available at: http://cisgw3.law.pace.edu/cases/060803c1.html (05. 12. 2019)	§§ 92, 97
	Court of Arbitration of the International Chamber of Commerce	
Chemical fertilizer case	Unknown parties 1995 Case no. 8128 of 1995 Available at: http://cisgw3.law.pace.edu/cases/958128i1.html (05. 12. 2019)	§ 74
	International Centre for Settlement of Investment Disputes	
Glamis Gold v. U.S.	*Glamis Gold, Ltd. v. The United States of America* 8 June 2009	§ 41

	Available at: https://www.italaw.com/cases/487 (05. 12. 2019)	
Noble Ventures v. Romania	*Noble Ventures Inc. v. Romania* 12 October 2005 ICSID Case No. ARB/01/11 Available at: https://www.italaw.com/cases/887 (05. 12. 2019)	§ 41
Railroad Development v. Guatemala	*Railroad Development Co. v. Republic of Guatemala* 15. October 2008 ICSID Case No. ARB/07/23 Available at: https://www.italaw.com/cases/887 (05. 12. 2019)	§ 41
Tidewater v. Venezuela	*Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela* 23 December 2010 Case No. ARB/10/5 Available at: https://www.italaw.com/cases/1096 (05. 12. 2019)	§ 42
	International Chamber of Commerce	
ICC Case No. 16655	Award in ICC Case No. 16655 2011 International Journal of Arab Arbitration, Volume 4, 2012, Issue 2, pp. 125–215	§ 41
	Vienna International Arbitral Centre	
VIAC Award No. 5243	Award in VIAC Case No. 5243, 2013 Selected Arbitral Awards, Volume 1, 2015, pp. 312–324	§ 41

TABLE OF COURT DECISIONS

CITED AS		CITED IN
	Australia	
Roder case	*Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd et al* Federal Court, South Australian District, Adelaide 28 April 1995 Case No. SG 3076 of 1993; FED No. 275/95 Available at: http://cisgw3.law.pace.edu/cases/950428a2.html (05. 12. 2019)	§ 76
	Austria	
Auto case	*Unknown parties* Oberster Gerichtshof (Supreme Court) 4 July 2007 Case No. 2 Ob 95/06v Available at: http://cisgw3.law.pace.edu/cases/070704a3.html (05. 12. 2019)	§ 76
Chinchilla furs case	*Unknown parties* Oberster Gerichtshof (Supreme Court) 10 November 1994 Case No. 2 Ob 547/93 Available at: http://cisgw3.law.pace.edu/cases/941110a3.html (05. 12. 2019)	§ 74

Frozen fish case	*Unknown parties* Oberster Gerichtshof (Supreme Court) 27 February 2003 Case No. 2 Ob 48/02a Available at: https://cisgw3.law.pace.edu/cases/030227a3.html (05. 12. 2019)	§ 86
Mountain bikes case	*Unknown parties* Oberster Gerichthof 11 March 1999 Case No. 2 Ob 163/97b Available at: http://www.cisg.law.pace.edu/cases/990311a3.html (05. 12. 2019)	§ 77
Case OGH, 18 OCg 3/15p	*Unknown parties* OGH / Supreme Court of Justice 23 February 2016 Case No. 18 OCg 3/15p Available at: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20160223_OGH0002_018OCG00003_15P0000_000 (05. 12. 2019)	§ 61
Propane case	*Unknown parties* Oberster Gerichtshof 6 February 1996 Case No. 10 Ob 518/95 Available at: http://cisgw3.law.pace.edu/cases/960206a3.html (05. 12. 2019)	§ 74

Software case	*Unknown parties* Oberster Gerichtshof 21 June 2005 Case No. 5 Ob 45/05m Available at: http://cisgw3.law.pace.edu/cases/050621a3.html (05. 12. 2019)	§ 92
Tantalum case	*Unknown parties* Oberster Gerichtshof 31 August 2005 Case No. 7 Ob 175/05v Available at: http://cisgw3.law.pace.edu/cases/050831a3.html (15. 12. 2019)	§ 75
	Belgium	
Steel plates case	*Unknown parties* Appellate Court Antwerpen 16 December 2002 Case No. 2001/AR/1737 Available at: http://cisgw3.law.pace.edu/cases/021216b1.html (05. 12. 2019)	§ 70
	Canada	
White Burgess case	*White Burgess Langille Inman v. Abbott and Haliburton Co.* Supreme Court of Canada 30. 04. 2015 Case No. 2015 SCC 23 Available at: https://scc-csc.lexum.com/scc-csc/scc-	§ 35

	csc/en/item/15328/index.do (05. 12. 2019)	
	European Union	
Dombo Beheer B.V. vs. The Netherlands	*Dombo Beheer B.V. v. the Netherlands* European Court of Human Rights 27 October 1993 Application No. 14448/88	§§ 18,60
	France	
Duarib v. Jallais	*Societe Duarib v. Societe Nouvelle des Etablissements A. et G. Jallais* Court of Cassation of France 10 November 1998 Case No. 96-21.391	§ 60
	Germany	
Cobalt sulphate case	*Unknown parties* Bundesgerichtshof (Federal Supreme Court) 3 April 1996 Case No. VIII ZR 51/95 Available at: http://cisgw3.law.pace.edu/cases/960403g1.html (05. 12. 2019)	§ 77
Globes case	*Unknown parties* Landgericht (District Court) München 27 February 2002 Case No. 5 HKO 3936/00 Available at: http://cisgw3.law.pace.edu/cases/020227g1.html (05. 12. 2019)	§ 82

Hygenic tissues case	*Unknown parties* Bundesgerichtshof 3 November 1999 Case No. VIII ZR 287/98 Available at: http://cisgw3.law.pace.edu/cases/991103g1.html (05. 12. 2019)	§ 116
Egg case	*Unknown parties* District court LG Oldenburg 28 February 1996 Case no. 12 O 2943/94 Available at: http://cisgw3.law.pace.edu/cases/960228g1.html (05. 12. 2019)	§ 76
Machinery case	*Unknown parties* Bundesgerichtshof 31 October 2001 Case No. VIII ZR 60/01 Available at: http://cisgw3.law.pace.edu/cases/011031g1.html (15. 12. 2019)	§ 75
New Zealand mussels case	*Unknown parties* Bundesgerichtshof 8 March 1995 Case No. VIII ZR 159/94 Available at: http://cisgw3.law.pace.edu/cases/950308g3.html (05. 12. 2019)	§ 102
Powdered milk case	*Unknown parties* Bundesgerichtshof	§ 70

	9 January 2002 Case No. VII ZR 304/00 Available at: http://cisgw3.law.pace.edu/cases/020109g1.html (05. 12. 2019)	
Rubber sealing parts case	*Unknown parties* Oberlandsgericht Düsseldorf 25 July 2003 Case No. 17 U 22/03 Available at: http://cisgw3.law.pace.edu/cases/030725g1.html (05. 12. 2019)	§ 76
Shoes case	*Unknown parties* Appellate Court Koblenz 21 November 2007 Case No. 1 U 486/07 Available at: http://cisgw3.law.pace.edu/cases/071121g1.html (05. 12. 2019)	§ 92
Vine wax case	*Unknown parties* Bundesgerichtshof 24 March 1999 Case No. VIII ZR 121/98 Available at: http://www.cisg.law.pace.edu/cases/990324g1.html (05. 12. 2019)	§ 81
	Italy	
Mitias v. Solidea case	*Mitias v. Solidea S.r.l.* Tribunale di Forli 11 December 2008	§ 92

	Case No. n.2280/2007 Available at: http://cisgw3.law.pace.edu/cases/081211i3.html *(05. 12. 2019)*	
	Netherlands	
Movable room units case	*G. Mainzer Raumzellen v. Van Keulen Mobielbouw Nijverdal BV* Appellate Court Arnhem 27 April 1999 Case No. 97/700 and 98/046 Available at: http://cisgw3.law.pace.edu/cases/990427n1.html (05. 12. 2019)	§ 84
	New Zealand	
Smallmon case	*RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* Court of Appeal of New Zealand 22 July 2011 Case No. C A545/2010 [2011] NZ C A 340 Available at: http://cisgw3.law.pace.edu/cases/110722n6.html (05. 12. 2019)	§ 74
	Slovakia	
Elastic fitness clothing case	*Unknown parties* Regional Court Zilina 25 October 2007 Case No. 15 Cb 10/2004-64 Available at: http://cisgw3.law.pace.edu/cases/071025k1.html	§ 92

	(05. 12. 2019)	
Health care products case	*Unknown parties* Supreme Court of the Slovak Republic 19 June 2008 Case No. 6 Obo 15/2008 Available at: http://cisgw3.law.pace.edu/cases/080619k1.html (05. 12. 2019)	§ 76
	Spain	
Sunprojuice case	*Sunprojuice DK, Als v. San Sebastian, S.c.A.* Appellate Court Madrid 20 February 2007 Case No. 683/2006 Available at: http://cisgw3.law.pace.edu/cases/070220s4.html (05. 12. 2019)	§ 92
	Switzerland	
Case 4A_526/2011	*Unknown parties* Bundesgericht, Swiss Federal Tribune 23. January 2012	§ 61
Case 4A_528/2011	*Unknown parties* Bundesgericht, Swiss Federal Tribune 23. January 2012	§ 61
Case 4A_550/2009	*Unknown parties* First Civil Law Court 29 January 2010 Case no. 4A_550/2009	§ 61
Catalogue case	*Unknown parties*	§ 83

	Commercial Court Zürich 21 September 1998 Case No. HG 960527/O Available at: http://cisgw3.law.pace.edu/cases/980921s1.html (05. 12. 2019)	
CNC machine case	*Unknown parties* Appellate Court Valais 21 February 2005 Case No. C1 04 162 Available at: http://cisgw3.law.pace.edu/cases/050221s1.html (05. 12. 2019)	§ 92
Model locomotives case	*Unknown parties* Cantonal Court of Schaffhausen 27 January 2004 Case No. 11/1999/99 Available at: http://cisgw3.law.pace.edu/cases/040127s1.html (05. 12. 2019)	§§ 69, 116
Soyprotein products case	*Unknown parties* Civil Court Basel 1 March 2002 Case No. P 1997/482 Available at: http://cisgw3.law.pace.edu/cases/020301s1.html (05. 12. 2019)	
	United Kingdom	
Commerzbank case	*Commerzbank Aktiengesellschaft v. Pauline Shipping and Liquimar Tankers Management Inc.*	§ 6

	England and Wales High Court (Commercial Court) 03. 02. 2017 Case No. [2017] EWHC 161 (Comm) Available at: http://www.bailii.org/ew/cases/EWHC/Comm/2017/161.html (05. 12. 2019)	
Dallah Real Estate Case	*Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* The Supreme Court of the UK 03 Nov 2010 Case No. [2010] UKSC 46 Available at: https://www.supremecourt.uk/cases/docs/uksc-2009-0165-judgment.pdf (05. 12. 2019)	§ 6
Gbangbola/Lewis v. Smith Sherriff	*Kye Gbangbola & Lisa Lewis v. Smith Sherriff Ltd.* Technology and Construction Court 20 March 1998 Case No. 3 All ER 730	§ 60
Law Debenture Trust Case	*Law Debenture Trust Corp. plc v. Elektrim Fin. BV* England and Wales High Court (Chancery Division) 14 September 2005 Case No. [2005] EWHC 1999 (Ch) Available at: https://www.casemine.com/judgement/uk/5a8ff76a60d03e7f57eac4b8 (05. 12. 2019)	§§ 6, 7, 11
NB Three Shipping Ltd case	*NB Three Shipping Ltd v. Harebell Shipping Ltd.* England and Wales High Court (Commercial Court) 13 October 2004	§§ 6, 10

	Case No. [2004] EWHC 2001 (Comm) Available at: https://www.casemine.com/judgement/uk/5a8ff70e60d03e7f57ea6da0 (05. 12. 2019)	
RGE Ltd case	*RGE (Group Services) Ltd. v. Cleveland Offshore Ltd* 1986 Case No. 11 Con LR 78	§ 11
	United States of America	
Barker case	*Charles S. Barker, Express Golf, Inc. v. GOLF U.S.A., INC.* United States Court of Appeals, Eighth Circuit 20 August 1998 Case No. 97-4243 Available at: https://caselaw.findlaw.com/us-8th-circuit/1115859.html (05. 12. 2019)	§ 10
Cedar Petrochemicals Inc. case	*Cedar Petrochemicals inc vs. Dongbu Hannong Chemical Ltd.* U.S. District Court, Southern District of New York 28 September 2011 Case No. 06 Civ. 3972 (LTS)(JCF). Available at: http://cisgw3.law.pace.edu/cases/110928u1.html (05. 12. 2019)	§ 74
CSS case	*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GMBH* U.S District Court, District of Maryland 8 February 2011 Case No. CCB-09-2008	§ 75

	Available at: http://cisgw3.law.pace.edu/cases/110208u1.html (05. 12. 2019)	
Delchi Carrier v. Rotorex case	*Delchi Carrier, S.p.A. v. Rotorex Corporation* Federal District Court New York 9 September 1994 Case No. 88-CV-1078 Available at: http://cisgw3.law.pace.edu/cases/940909u1.html (05. 12. 2019)	§ 114
Filanto case	*Filanto S.p.A. v. Chilewich International Corp.* U.S District Court, Southern District of New York 14 April 1992 Case No. 92 Civ. 3253 (CLB) Available at: http://www.cisg.law.pace.edu/cases/920414u1.html (05. 12. 2019)	§ 77
Karaha Bodas case	*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* U.S. Court of Appeals, Fifth Circuit 23. 03. 2004 Case No. 364 F.3d 274	§ 22
M.A. Mortenson case	*M.A. Mortenson Co. v. Saunders Concrete Co., Inc.* Court of Appeals for the Eighth Circuit 30. 04. 2012 Case No. 676 F.3d 1153	§ 11
MCC-Marble Ceramic Center case	*MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A.* U.S. Circuit Court of Appeals (Federal Appellate court) 29 June 1998	§ 77

	Case No. 97-4250 Available at: http://www.cisg.law.pace.edu/cases/980629u1.html (05. 12. 2019)	
Parsons/Whittemore Overseas Co., Inc. case	*Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier* U.S. Court of Appeals, Second Circuit 23. 12. 1974 Case No. 508 F.2d 969 Available at: https://casetext.com/case/parsons-wh-ov-v-societe-g-de-l-du-p (05. 12. 2019)	§ 22
Pittalis case	*Pittalis v. Sherefettin* Court of Appeal 1986 Case No. 1 QB 868	§ 11
Pridgen case	*Pridgen v. Green Tree Financial Servicing Corp* United States District Court, S.D. Mississippi, Jackson Division 22 March 2000 Case No. 88 F. Supp. 2d 655	§ 10
Sablosky v. Edward	*Sablosky v. Edward S. Gordon Co.* Appellate Division of the Supreme Court of New York 25 October 1988 Case No. 139 A.D.2d 416	§ 10
Willis Flooring case	*Willis Flooring, Inc. v. Howard S. Lease Constr. Co.* Supreme Court of Alaska 07. 01. 1983 Case No. 656 P.2d 1184	§ 11

TABLE OF LEGAL SOURCES

CIArb Arbitration Rules	CIArb Arbitration Rules, London, 1 December 2015
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, London, 23 October 2014
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, London, 29 May 2010
LCIA Rules	LCIA Arbitration Rules, London, 1 October 2014
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10 June 1958
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 21 June 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome, 2010

TABLE OF OTHER SOURCES

CITED AS		CITED IN
Brekke	**Brekke, H.** *Design, Performance and Maintenance of Francis Turbines* Published in Global Journal of Researches in Engineering Mechanical and Mechanics Engineering, Vol. 13, Issue 5, 2013 Available at: https://globaljournals.org/GJRE_Volume13/3-Design-Performance-and-Maintenance.pdf (05. 12. 2019)	§ 86
Corà/Fry/Bachhiesl/Schleiss	**Corà, E.; Fry, J.; Bachhiesl, M.; Schleiss, A.** *Hydropower Technologies: the state-of-the-art* Available at: https://consultation.hydropower-europe.eu/assets/consultations/2019.08.13%20HydropowerTechnology_State%20of%20the%20Art%20FINAL.pdf (05. 12. 2019)	§ 75
Safi/Prasad	**Safi, H.; Prasad, V.** *Design and permance analysis of Francis turbine for hydro power station on Kunar River using CFD* Published in International Journal of Advanced Research, Vol. 5, 2017, pp. 1004-1012 Available at: https://www.researchgate.net/publication/317610369_DESIGN_AND_PERMANCE_ANALYSIS_OF_FRANCIS_TURBINE_FOR_HYDRO_POWER_STATION_ON_KUNAR_RIVER_USING_CFD (05. 12. 2019)	§ 86

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 is 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 and 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. According to information provided by **RESPONDENT**, the new Turbines, due to its design and materials used, allowed for longer inspection and maintenance intervals.

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** is 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.** On **29 September 2018** the leading daily newsfeed on renewable energy publishes 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, **4 October**, **RESPONDENT**'s CEO Benoit Fourneyron tried to dispel all concerns and suggested to wait until the first inspection and offered to pull it forward.

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 files the Response to the Request for Arbitration.

SUMMARY OF ARGUMENTS

The Parties mutually set their own conditions during the negotiations and agreed on the law governing the Arbitration Agreement. While making the Arbitration Agreement, there was no lack of mutuality and equal treatment of the Parties was ensured. Arbitration Agreement is valid under the applicable law and therefore the final award will be enforceable. Thus, the Arbitral Tribunal has jurisdiction to hear the case (**ISSUE I**).

When RESPONDENT appointed Prof. John as an expert, arbitrator Ms. Burdin made a disclosure that Prof. John and her husband are engaged in a lawsuit against each other. Appointment of the expert created a conflict of interests and therefore potential ground for the challenge of the arbitrator. As the exclusion of the expert would not violate RESPONDENT's right to present its case, the Arbitral Tribunal has the power to decide on the exclusion of the expert (**ISSUE II**).

Since the high-quality steel standard used in the manufacturing process of the Turbines, was expressly included into the contract, RESPONDENT breached its obligations under Art. 35(1) CISG by delivering non-conforming Turbines to CLAIMANT. Additionally, the delivered Turbines were not in compliance with the implicitly agreed premium quality requirements. Even in the case that Art. 35(2) CISG was applicable, the Turbines would have been non-conforming as they were not fit for their particular and ordinary purpose (**ISSUE III**).

The delivered Turbines do not comply with agreed quality requirements, thus RESPONDENT fundamentally breached its contractual obligations. CLAIMANT will establish that due to the unverified quality steel used in the manufacturing process of the Turbines, they are unfit for their particular purpose. As RESPONDENT delivered the non-conforming Turbines to CLAIMANT, its breach resulted in detriment that substantially deprived CLAIMANT of what it was entitled to expect under the contract. CLAIMANT will demonstrate that all criteria under Art. 25 CISG are fulfilled cumulatively, therefore the breach was fundamental. Consequently, CLAIMANT has the right to demand substitute delivery of the Turbines, since all prerequisites under Art. 46(2) CISG are fulfilled cumulatively (**ISSUE IV**).

ISSUE I: THE TRIBUNAL HAS JURISDICTION

1 The dispute between the Parties arises from the contract for the delivery of RESPONDENT's two newly developed, innovative and powerful R-27V Francis Turbines (hereinafter: Turbines) to CLAIMANT [*SA, Ex. C2, Art. 2.1(b), p. 11*]. CLAIMANT requests this Arbitral Tribunal (hereinafter: Tribunal) to deny RESPONDENT's allegations that the Tribunal lacks jurisdiction and its claims on invalidity of the Arbitration Agreement (hereinafter: AA). The jurisdiction of the Tribunal is determined by the AA and mandatory laws of the seat. In this case, the *lex arbitri* is the Danubian arbitration law (hereinafter: DAL), a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (hereinafter: Model Law) [*PO1, p. 46, ∫ 4*]. Moreover, the Parties nominated the LCIA Arbitration Rules as institutional rules (hereinafter: LCIA Rules) [*Ex. C2, Art. 21, p. 13, ∫ 2*]. The Parties chose Danubian law to govern the entire Sales Agreement (hereinafter: SA) [*Ex. C2, Art. 21, p. 13, ∫ 2*] and did not provide for a separate law to govern the AA.

2 RESPONDENT alleges that the Tribunal does not have the jurisdiction to hear the case, based on an erroneous proposition, that the AA is invalid as it is one-sided and only favours CLAIMANT [*RRA, p. 26, ∫ 3*]. Hypothetically the Tribunal would lack jurisdiction if the AA was invalid under the applicable law. However, contrary to RESPONDENT's position, CLAIMANT will establish that the AA is valid under the law governing it, DAL (**1**). Since the AA is valid under the applicable law, the final award will be enforceable (**2**) and RESPONDENT will not be able to raise challenges on these grounds.

1. The Agreement is valid under DAL

3 The Parties are bound by the AA. Determining the correct applicable law is essential in establishing whether the Tribunal has the jurisdiction to hear the case. In theory, there are two different views as to which law is applicable to the arbitration agreement; either the law chosen by the parties to govern their substantive legal relationship or the law of the seat of arbitration [*Nazzini, p. 681*]. Both Parties are located in contracting states of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NY Convention) [*PO1, p. 46, ∫ 4*]. Art. V(1)(a) NY Convention gives effect to the parties' autonomy, providing that the law expressly or impliedly chosen by the parties shall govern their arbitration agreement [*Born, p. 506*]. If there is no express or implied choice of law, Art. V(1)(a) NY Convention prescribes a specialised default rule, pursuant to which the arbitration agreement will be governed by the law of the country where the award was made [*Born, pp. 478, 506–507*]. According to the AA, the Parties expressly agreed that the seat of arbitration

shall be Vindobona, Danubia [*Ex. C2, Art. 21, p. 13, § 2*]. What is more, since the contract is governed by substantive law of Danubia, the only possible conclusion in this case is that DAL governs the AA.

4 AA is justified under DAL for three reasons. First, AA is in line with principle of party autonomy (**a**), second, there was no lack of mutuality while making the AA (**b**) and third, equal treatment of the Parties was ensured (**c**).

a. Arbitration Agreement is in line with the principle of party autonomy

5 When concluding the Sales Agreement (hereinafter: SA) Parties agreed on a certain dispute resolution mechanism. Most importantly, the agreed-upon mechanism provides both Parties with the adequate access to justice. As a result, drawing its rights from the AA, CLAIMANT initiated these arbitration proceedings.

6 Firstly, one of the most fundamental principles of international commercial arbitration is the principle of the party autonomy [*Born, p. 84; Moses, p. 75; Rajoo, p. 368; Dallah Real Estate Case*]. The principle is expressed explicitly in the Art. 19(1) DAL. It is in fact one of the main reasons why parties gravitate towards the arbitration in the first place, as they can tailor procedure in accordance with their own desires and needs [*Model Law, p. 32, § 35; Born. 85*]. What is more, the courts continuously uphold the validity of the asymmetrical dispute resolution clauses based upon the principle of party autonomy [*NB Three Shipping case; Law Debenture Trust case; Commerzbank case*]. Therefore, Parties' decision to provide only CLAIMANT with asymmetrical access to arbitration is precisely that - expression of the party autonomy and an attempt to adequately tailor the procedure in line with their own specific needs.

7 Secondly, it must be stressed that clauses providing only one party with an advantage are not invalid by default [*Law Debenture Trust case*]. Admittedly, party autonomy is not absolute, it is limited by certain limitations imposed by *lex arbitri* and fundamental rules of law [*Morrissey/Graves, p. 344; Jenkins/Stebbings, p. 165*]. However, there are no limitations within the relevant procedural rules that Parties failed to adhere to (see infra, §§ 9-19). In addition, neither DAL nor LCIA Rules do not contain any provisions that would in any sense limit the usage of asymmetrical arbitration clauses. Consequently, the AA is both valid and binding upon the Parties.

8 In conclusion, Parties have exercised their right to tailor the procedure to their own needs. While doing so, Parties have adhered to all the relevant rules, laws, and principles. Therefore,

the Tribunal is urged to declare the AA valid and consequently recognize its jurisdiction over the case at hand.

b. There was no lack of mutuality

9 After numerous unsuccessful efforts to agree on a balanced arbitration clause, the Parties had agreed on the main commercial terms [*Ex. R2, p. 32, § 6*]. CLAIMANT submitted a first draft of the SA which included the asymmetrical AA [*PO2, p. 47, § 2*]. Subject to the condition of including the limitation of liability clause into the SA, RESPONDENT agreed to the proposed AA. This ultimately led to the final agreement mutually acceptable to both Parties.

10 To begin with, arbitration proceedings must be conducted through the lens of party autonomy. Admittedly, certain jurisdictions limit said principle with certain conditions to be met in regard to asymmetrical arbitration clauses. Namely, mutuality and the equal treatment of the parties. Doctrine of mutuality of obligation states that either both parties must be bound, or neither is bound [*Drahozal, p. 357*]. However, the mutuality of obligations should not be required for the arbitration agreement to be enforceable and unequal position of the parties should not be the ground for invalidity of the arbitration agreement [*Sablosky v. Edward; NB Three Shipping case; Barker case; Pridgen case*]. While both parties must manifest assent for a contract to be formed, that manifestation does not need to be symmetric in time, place, or form. Contract provisions do not need to give the parties the same position, since it would be illogical to impose such demands. The contract will be held enforceable as long as there is consideration flowing both ways [*Nassar, § 6*].

11 Therefore, the fact that the option to arbitrate is exercisable only by one party is irrelevant, as the arrangement suited both [*Pittalis case; Law Debenture case; RGE Ltd case; M.A. Mortenson case; Willis Flooring case*]. Although the arbitration agreement is *prima facie* imbalanced if it serves the interests of only one party, it is not invalid if the parties have agreed to such clause [*Nassar, § 13*]. A party may oblige itself to provide a benefit for another party as long as this is a subject of its own volition [*Draguiev, p. 21*]. RESPONDENT accepted CLAIMANT's proposal on the arbitration and the liquidated damages clause, while in return insisted on including CLAIMANT's consent to the limitation of liability [*Ex. R2, p. 32, § 6*].

12 Furthermore, the inclusion of limitation of liability clause was crucial for RESPONDENT, since it deemed that breakdowns are possible in practice and can lead to damages in the amount which could threaten its' economic survival. Additionally, inclusion of one-sided AA had a lesser importance for RESPONDENT while carrying significant importance for CLAIMANT

[*ibid.*]. It was evident that each Party had its individual intent. Since the core of negotiation phase is precisely that the parties try to agree on different views, CLAIMANT was willing to compromise in order to conclude the contract. CLAIMANT therefore accepted the limitation of liability clause in return.

13 Additionally, the Parties were mutually engaged in the negotiations while signing the contract, as both expressed their intentions. RESPONDENT was as much involved in the conclusion of the AA as CLAIMANT. What is more, RESPONDENT had the option to reject the AA, but it did not. Nor did it insist on its right to arbitrate [*ibid.*]. Consequently, the Parties' true intent was to provide CLAIMANT with the exclusive right to initiate the arbitral proceedings.

14 To conclude, during the negotiation of the contract the Parties mutually set their own conditions. It must be stressed that as a result of mutual negotiations RESPONDENT was able to achieve greatly beneficial contract terms. Therefore, mutuality criterion was met and thus declaring AA anything but valid would contradict the Parties' intent.

c. Equal treatment of the Parties was ensured

15 The Parties mutually contributed to the conclusion of the AA in which they have both expressed their intentions. RESPONDENT accepted CLAIMANT's proposal on AA and CLAIMANT agreed to the limitation of liability in return [*Ex. R2, p. 32, § 6*]. That shows that the Parties were mutually engaged in the contract formation. Additionally, the equal treatment of the Parties is guaranteed and thus the validity of the AA is ensured.

16 While drafting an arbitration agreement parties enjoy broad freedom to construct a dispute resolution system of their choice. That is indisputable as the entire arbitration is a paramount expression of the principle of party autonomy [*Ustinov, p. 37*]. While the principle of party autonomy is widely accepted, it has limitations and is not synonymous with unlimited power or complete autonomy (see supra, §§ 5-8). While the significance of the principle of equality of the parties cannot be denied as one of the limitations to party autonomy, the record clearly shows there was no violation in the present case.

17 Firstly, in order to ensure the equal treatment of the parties, both must have equal access to justice. The party must not be deprived of its right to equal access to justice [*Redfern/Hunter et al., p. 315*]. This principle is based on the general concept of fair trial. However, in case at hand, none of the Parties were denied the right to access to justice. Both had the option to resolve their disputes through litigation, since the Parties chose the courts in Mediterraneo to have jurisdiction over any dispute or question regarding the existence, validity or termination of the

contract [*Ex. C2, Art. 21, p. 13, § 1*]. In conclusion, there was no violation of the principle of equal treatment of the parties, since both Parties had the option to resolve their dispute through litigation.

18 Secondly, although Art. 18 Model Law stipulates that the parties must be treated 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*]. It must be noted that the proper meaning of the principle of equal treatment of the parties implies its application to a procedure that has already begun [*Dambo Beheer B.V. vs. The Netherlands*]. Thus, it is questionable to what extent the principle of equality may be applicable to unilateral clauses, since asymmetrical arbitration clauses only influence the designation of jurisdiction and not the development of the proceedings [*Draguiev, p. 35*]. The unilateral choice option is exercisable before the commencement of the arbitral proceedings and does not interfere with the rights of the parties during the course of proceedings [*ibid.*]. Once the arbitration process starts the parties have the same rights and are both treated equally.

19 In conclusion, contrary to RESPONDENT's allegations, the principle of party equality was respected. As demonstrated above, both conditions of equal treatment of the parties were met, meaning that the Parties both had equal access to justice and the same rights once the arbitration started. Additionally, CLAIMANT's right to arbitration was agreed upon by the Parties throughout the mutual negotiations. On these grounds the Tribunal is urged to declare the AA valid.

2. Since the Arbitration Agreement is valid under the applicable law, the final award will be enforceable

20 The Parties complied to the principles of party autonomy and party equality, therefore DAL was certainly not violated. The AA is valid under DAL. To ensure the jurisdiction of the Tribunal in this case, CLAIMANT will establish that there will be no obstacles to the enforcement of the final award.

21 In international commercial arbitration an arbitral tribunal is not obligated to ensure the rendered award to be enforceable, as they bear no liability in case of an unenforced award [*Moses, p. 83*]. Yet, it is expected from an arbitrator 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*].

22 Generally, NY Convention provides high probability of enforcement of the award, since it is very pro-enforcement and provides narrow ground for non-enforcement [*Moses, p. 211; Parsons/Whittemore Overseas Co., Inc. case; Karaha Bodas case*]. 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 in that country. To avoid these grounds and to issue an enforceable award, certain formal and essential requirements must be met [*Platte, p. 312*]. First, final award will be valid under *lex arbitri* (**a**). Second, recognition or enforcement of the award will not violate public policy of the enforcing state (**b**).

a. Final award will be valid under *lex arbitri*

23 To begin with, the arbitral tribunal has the duty to apply *lex arbitri* in order to prevent annulment of the award [*Moses, pp. 83-84*]. A party can bring forth such action if it believes the award was improperly made. According to Art. 34 DAL, an award may be set aside if, among other, the arbitration agreement is invalid or if the award is in conflict with public policy of the country where the seat of the arbitration is located. The same party can challenge the award before the court of the country, which has jurisdiction over the arbitral proceedings to ensure public policy is not violated [*Moses, p. 203*].

24 When Tribunal is considering the potential recognition and enforcement of an arbitral award, it is essential to establish compliance of the AA with DAL. The AA is valid under DAL since it is based on the principle of party autonomy, Parties' considerations and other contributions to the contract have been mutual, and the Parties have been treated equally (see supra, §§ 15-19).

25 Consequently, final award cannot be set aside on the basis of violation of public policy of Danubia, since there is none. First and foremost, RESPONDENT unsuccessfully attempts to draw the parallels between the two cases where no actual similarities even exist. In any case, RESPONDENT states that equal influence of all parties on composing an arbitral tribunal is part of Danubian public policy, therefore same should be applied to issues, regarding asymmetrical dispute resolution clauses [*RRfA, p. 28, §14*]. RESPONDENT is correct in the sense that the only valid conclusion would be that Parties included the valid AA since they both consented to the formation of the asymmetrical dispute resolution clause.

b. Recognition or enforcement of the award will not violate public policy of the enforcing state

26 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*]. Despite the fact the term lacks a bright line definition that can be applied across all contracting states of the NY Convention, invoking public policy to deny enforcement of the arbitral award is undeniably limited. As it will be demonstrated below in case at hand, public policy cannot be used as grounds for refusal of recognition and enforcement of the award.

27 To begin with, an arbitral tribunal is not compelled to apply any law of the state where the award might be enforced, with the exception of public policy of the enforcing state [*Moses, p. 84*]. Violation of public policy in the enforcing state is one of the grounds for a challenge of an award, which can cause an award to be vacated [*Moses, p. 206; Model Law, Art. 34; NY Convention, Art. V*]. In general, non-enforcement on the ground of violation of public policy in international commercial arbitration rarely succeeds, as pro-enforcement tendency is becoming public policy itself [*Ozumba, p. 9*].

28 Public policy in Equatoriana also includes equal treatment of the parties [*PO2, p. 54, ∫ 52*]. Therefore, it is of utmost importance to emphasize the fact that the principle of equality of the parties was not violated, since RESPONDENT was not deprived of its equal access to justice and receives equal treatment during the process (see supra, §§ 11-15). One cannot speak of violation of equal treatment while being treated equally. Consequently, there is no violation of public policy. Therefore, the enforcement of the final award will not be refused on these grounds.

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

CONCLUSION ON ISSUE I

30 The Arbitral Tribunal should determine that it has jurisdiction to hear and decide present case. Any decision to the contrary would violate Parties' agreement, breach the principle of equal treatment of the parties, and the relevant law. The Parties chose Danubian Arbitration Law, which is based upon the principle of party autonomy, to govern the arbitration clause and its interpretation. Since the Arbitration Agreement is valid under the applicable law the Arbitral Tribunal is enabled to hear the case.

ISSUE II: THE ARBITRAL TRIBUNAL SHOULD ORDER THE EXCLUSION OF THE EXPERT SUGGESTED BY RESPONDENT

31 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 immediately made a disclosure that Prof. John and her husband are currently engaged in a lawsuit against each other [*Letter by Burdin, p. 40*]. Thus, that created a conflict of interests and potential ground for the challenge of the arbitrator.

32 As the appointment of Prof. John primarily serves the purpose of creating a ground for the challenge of the arbitrator nominated by CLAIMANT and thereby delaying the proceedings, RESPONDENT's actions indicate the existence of bad faith. The Tribunal should not allow such behaviour and therefore exclude Prof. John and potential evidence given by him in these proceedings. Alternatively, the Tribunal should order RESPONDENT to provide a different expert that would not create a conflict of interest.

33 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. LCIA Rules grant the arbitral tribunal the discretion to discharge its general duties, subject to the mandatory law or rules of law as it may deem applicable [*Art. 14(5) LCIA Rules*]. In that matter, granting the expert appointed by RESPONDENT would contradict those general duties. The Tribunal therefore has the power to decide on the exclusion of the expert (**1**). Since the Tribunal has the power to decide on the exclusion of the expert, it should exercise that power and exclude the expert and any potential evidence given by him (**2**). Alternatively, if the Tribunal does not decide to exclude the expert, his opinion should not be given any weight (**3**).

1. The Arbitral Tribunal has the power to decide on the exclusion of the expert suggested by RESPONDENT

34 Disputes submitted to international arbitration often require experts in fields other than law [*Schneider, p. 446*]. It is crucial that the experts give impartial and unbiased testimonies. They have to stay independent and refrain from becoming an advocate for the party on whose behalf they have been retained [*Marshall, ∫ 1*]. CLAIMANT objects appointment of Prof. John due to his prior service and relationship with RESPONDENT as that creates the ground for questioning Prof. John's impartiality. In addition, Prof. John is currently engaged in a lawsuit against Ms. Burdin's husband, which creates yet another reason for his exclusion.

35 If the Tribunal was denied its power to decide on the exclusion, that would mean that the Tribunal would not attain its obligations to evaluate the evidence. In order for the arbitral tribunal to act fairly and impartially between the parties, the arbitral tribunal shall have the power to decide on the exclusion of the expert [*White Burgess case*]. Accordingly, CLAIMANT will first establish that the Tribunal has the power under the applicable law (**a**) and second, under the international practice (**b**).

a. The Arbitral Tribunal has the power to decide on the exclusion of the expert suggested by RESPONDENT under the applicable law

36 Initially, an arbitral tribunal has a general authority to determine the admissibility, relevance, materiality and weight of any evidence. Tribunal is also explicitly eligible to decide whether or not to apply any strict rules of evidence on any issue of expert evidence [*Art 19.2 Model Law; Art. 22.1 (vi) LCIA 2014*]. The decision to include or exclude expert evidence is left to the discretion of the arbitrators under their general authority. Unless any other rules in another jurisdiction are expressly incorporated into the parties' arbitration agreement, the arbitrators have broad discretion to accept or reject expert evidence [*Dasteel, p. 4*].

37 Arbitral tribunal's power to order the evaluation of documents may derive from the parties' agreement, the chosen institutional rules, and the *lex arbitri* [*Böckstiegel, p. 2; Marghitola, p. 20*]. The agreement between the parties is the starting point to resolve issues regarding the taking of evidence and regarding the conduct of proceedings [*Working Group Report "Contract Practices", p. 66*]. The institutional arbitration rules and the *lex arbitri* complement and limit such agreement [*Berger/Kellerhals, ∫ 13; Born II, p. 59; Schäfer/Verbist/Imhoos, p. 10*]. Pursuant to Art. 22(1) LCIA Rules and Art. 19(2) DAL, the arbitral tribunal should conduct the arbitration proceedings in accordance with the parties' agreement. Unless mandatory agreement between

the parties provides otherwise, the arbitral tribunal has a wide discretion on how to conduct the proceedings and the power, upon the application of any party or its own initiative, to decide whether or not to apply any strict rules of evidence or expert opinion [*Rowine, p. 315*].

38 Nonetheless, the Parties never concluded any explicit agreement regarding such issues in the present case. Although the AA does not contain any specific provision or agreement on how the Tribunal should conduct the proceedings, it provides the use of the LCIA Rules and DAL [*Ex. C2, Art. 21, p. 13, § 2*]. To that extent, the Tribunal should conduct the proceedings in the manner it deems appropriate. The discretion of arbitral tribunal to determine the arbitral procedure in the absence of agreement by the parties is considered a foundation of the international arbitral process [*Born, p. 148*].

39 Finally, notwithstanding the absence of aforesaid agreement, the Parties agreed that the Tribunal would conduct the proceedings in accordance with the LCIA Rules [*Ex. C2, Art. 21, p. 13, § 2*]. With Danubia as the seat of the arbitration and DAL as the relevant *lex arbitri,* the Tribunal was given a wide discretion in the taking of evidence and the power to decide whether or not to admit such evidence or expert opinion [*Ex. C2, Art. 21, p. 13, § 2*]. It is therefore indisputable by any means that the applicable law allows the Tribunal to decide on the exclusion of the expert appointed by RESPONDENT.

b. The Arbitral Tribunal has the power to decide on the exclusion of the expert suggested by RESPONDENT under the international practice

40 As established above, LCIA Rules and DAL provide the Tribunal with broad discretion regarding admissibility of evidence, but they do not provide any further guidance on exclusion of the expert. Therefore, the Tribunal should make use of international practice, namely the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Rules). Since the Parties did not agree on their use in the AA, RESPONDENT might contest their applicability. However, CLAIMANT will demonstrate that the IBA Rules apply as they share the same approach on taking the evidence as the LCIA Rules.

41 To start with, if there is no specific agreement on how to conduct the proceedings, the arbitral tribunal is bound to determine and adapt the procedure to the specifics of a given case. This position corresponds with international practice [*Art 9(1) IBA Rules; Art 34(1) ICSID Rules*]. While conducting the proceedings, the arbitral tribunal can rely on international practice, specifically on the IBA Rules [*Jain, § 3*]. The IBA Rules are the most highly rated and frequently used rules in international arbitration [*Queen Mary Survey*]. Further, arbitral tribunals consult

them as a reference point for the taking of evidence even without an explicit agreement or reference, as they represent international best practices [*VIAC Award No. 5243; ICC Case No. 16655; Glamis Gold v. U.S.; Railroad Development v. Guatemala; Noble Ventures v. Romania*]. In addition, the IBA Rules Preamble states that parties and arbitral tribunals can use them as guidelines in developing their own procedures, as they provide the arbitral tribunal with guidance in the exercise of its discretion [*Nappert, p. 3; IBA Rules Preamble, § 2*].

42 Furthermore, the IBA Rules, same as the applicable law, provide that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence [*Art. (9)(1) IBA Rules*]. As the Model Law does not provide any specific rules with regards to taking of evidence [*Paulsson/Petrochilos, p. 235; Kuitkowski, p. 65; Meyer, p. 368*], the IBA Rules reflect the current practice in this subject matter [*IBA Rules, p. 3; Ireton, p. 235; Meyer , p. 365; Gardiner , § 248; Tidewater v. Venezuela*]. The tendency has always been to give arbitral tribunals the widest discretion in the admission and assessment of evidence [*J. Ralston, §§ 379-383; J. Simpson/Fox, §§ 192, 193*].

43 According to Art. 5 IBA Rules, party-appointed expert is to be considered as means of evidence and provide a statement of independence. Furthermore, Arts. 8 and 9 empower arbitral tribunal to limit or exclude appearance of an expert and exclude from evidence any document, statement, oral testimony or inspection. Therefore, in case at hand, the Tribunal may base its power to exclude the expert upon IBA Rules.

44 To conclude, the Parties did not agree on the use of IBA Rules, nevertheless, their use corresponds with the international practice. The Tribunal can use them despite the absence of a specific agreement. Hence, the Tribunal has the power, under the international practice, to decide on the exclusion of the expert appointed by RESPONDENT.

2. The Arbitral Tribunal should order the exclusion of the expert suggested by RESPONDENT

45 Since the Tribunal has the power to decide on the exclusion of RESPONDENT-appointed expert it should exercise that power and order the exclusion of Prof. John and any potential evidence given by him. Not doing so would allow RESPONDENT to create grounds for challenge of the CLAIMANT-appointed arbitrator with a purpose to delay the proceedings. Due to the nature of this case, where time is of the essence, a later issuance of the award would clearly be in favour of RESPONDENT, since that could postpone the Tribunal's decision on this case after the date

of first inspection and cause RESPONDENT's inability to produce replacement Turbines in a timely manner.

46 In these proceedings, the issue in question is exclusion of Prof. John, the expert appointed by RESPONDENT, and consequently the admissibility of the expert's opinion. Relationship between prof. John and both RESPONDENT and Ms. Burdin's husband creates conflict of interest and grounds for the challenge of CLAIMANT's arbitrator. The acceptance of the evidence would therefore violate CLAIMANT's right to a fair trial and principle of equal treatment of the parties. Therefore, Tribunal should order the exclusion of Prof. John, since his appointment constitutes a conflict of interest (**a**) and the exclusion would not violate RESPONDENT's right to be heard (**b**).

a. Appointing Prof. Tim John as an expert constitutes a conflict of interest

47 There are certain concerns regarding party nominated experts, as they are often presented as "hired guns" [*Nessi, p. 76; Kantor, p. 327: Timmerbeil, p. 168*]. Selection of an expert, his education on the case at hand and payment by the appointing party creates pressure on expert's independence [*Kantor, p. 374*]. Any experts, including party-appointed ones, must remain honest and they must be able to present an independent professional judgement. They must not act as party's advocate but remain impartial and stay true to their professional values [*De Berti, p. 53*]. *"An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party*" [*Art. 4(1) CIArb Protocol*].

48 According to the IBA Rules, party-appointed expert's report must include affirmation that he genuinely believes in the content of his report [*Art. 5(2)(g) IBA Rules*], and a statement of expert's independence from the arbitral tribunal, the parties and their legal advisors [*Art. 5(2)(c) IBA Rules*]. However, the IBA Rules do not establish the definition of independence for party-appointed experts [*Kantor, p. 329*]. To resolve this issue, the Tribunal should apply the IBA Guidelines on Conflicts of Interest in International Arbitration (hereinafter: IBA Guidelines) [*Gaffney/O'Leary, pp. 82, 83*].

49 The IBA Guidelines set standard for arbitrator's independency and impartiality and examples for its practical application [*de Witt Wijnen/Voser/Rao, p. 434*]. They describe specific circumstances which must be taken into account in cases of challenging an arbitrator. 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*]. Even when parties do not refer to them, arbitrators regularly use them as they provide guidance

in contrast to arbitration laws, which are often very general and vague [*Kaufmann-Kohler, p. 14; Erdem, § 10*]. Since the nature of arbitrator's position in arbitral proceedings in many aspects differs from expert's role, the IBA Guidelines cannot be applied in their full capacity for expert's standard of impartiality and independence. Thus, analogous use of the IBA Guidelines must be applied to experts [*Gaffney/O'Leary, p. 83*].

50 Practical examples from the second part of the IBA Guidelines, which provide guidance as to which situations constitute certain conflicts of interest, are assorted into four lists that are non-exhaustive, therefore more situations may be included [*Mullerat, pp. 56, 66*].

51 Firstly, hypothetical situations deriving from the Non-Waivable Red List are non-curable, which means that even disclosure or parties' express agreement in given situation cannot cure the conflict of interest [*Mullerat, p. 56; de Witt Wijnen/Voser/Rao, pp. 453, 454*]. By analogy, party appointed expert is unable to retain impartial and independent stance to give evidence when the expert or their firm regularly advises the appointing party and receives significant financial income from it [*Gaffney/O'Leary, p. 83; IBA Guidelines, p. 20, § 1.4*].

52 It is clear that RESPONDENT and the expert have had a long-lasting relationship even prior to this dispute. They have been connected at least from 2004, when Prof. John and two of his assistants were working as experts in an arbitration with RESPONDENT as one of the parties. After that, in 2005, RESPONDENT hired Prof. John's assistants, who are now working in high-level management positions with RESPONDENT, right below the board of management [*PO2, pp. 49, 50, § 17*]. In 2013, Prof. John attended the presentation of Turbines at the Hydro Power Fair in Greenacre as RESPONDENT's guest expert to provide his opinion on the quality of Turbines and to justify product's higher price [*Ex. R 1, p. 30*]. Thus, these circumstances result in expert's lack of impartiality and independence, as the relationship between the expert and RESPONDENT is long-lasting and maintained on a regular basis. Consequently, significant income was generated for the expert as a result of their continuous and apparently fruitful cooperation.

53 Secondly, not only has the expert met the conditions for exclusion on the grounds of aforementioned argument listed on Non-Waivable Red List, justifiable doubts to his impartiality and independence arise also in accordance with Waivable Red List. The latter lists situations that provide grounds for arbitrator's exclusion, unless parties are familiar with the conflict of interest and they expressly agree with preserving such an arbitrator [*General Standard 4(c) IBA Guidelines*]. By analogy, party-appointed expert is not deemed independent or impartial

when he regularly advised or gave evidence on behalf of the appointing party without significant income deriving therefrom [*Gaffney/O'Leary, p. 83; IBA Guidelines, p. 22, § 2.3.7*].

54 Lack of impartiality and independence of expert in the case at hand is given as Prof. John has been working closely with the RESPONDENT long before this dispute. Due to their ongoing relationship existing from at least 2004, expert's perspective regarding the dispute is easily compromised. As this situation is listed on Waivable Red List, Parties must give their express consent to allow RESPONDENT-appointed expert to give evidence. CLAIMANT explicitly disagrees with Prof. John to remain the expert in this case due to his lack of impartiality and independence, therefore grounds for expert's exclusion are established.

55 Thirdly, justifiable doubts to arbitrator's independence and impartiality may be raised from situations listed in the Orange list that are subjected to mandatory disclosure [*General Standard 3(a) IBA Guidelines*]. Accordingly, if parties do not object to such disclosed situations in proper time, they are deemed to have accepted the arbitrator [*IBA Guidelines, p. 18*]. By analogy, an expert is under duty to disclose situations that parties may wish to investigate further to establish whether there are justifiable doubts as to the expert's impartiality or independence. Therefore, in case expert had given evidence for the appointing party in the past three years or had been consulted by that party while they had no ongoing relationship, he is under the duty of disclosure [*Gaffney/O'Leary, p. 84; IBA Guidelines, p. 22, § 3.1.1*].

56 In addition to Prof. John's long-lasting relationship with RESPONDENT, there are indications of the expert advising RESPONDENT in regard to corrosion and cavitation of the turbine in the Riverhead Tidal Power Plant. Prof. John was hired by the operators of the Riverhead Tidal Power Plant to supervise the replacement of the turbine in the plant, performed by RESPONDENT [*PO2, p. 49, § 14*]. During this cooperation, Prof. John even gave his estimation whether there is any possibility of recurrence of this issue on other power plants [*PO2, p. 49, § 15*]. This is a clear sign of the expert consulting RESPONDENT and therefore may give rise to justifiable doubts to the expert's independence and impartiality.

57 Furthermore, the Orange List provides another situation applicable to the case at hand, since there is enmity between an arbitrator and the expert [*IBA Guidelines, p. 25, § 3.4.4*]. As CLAIMANT-appointed arbitrator Ms. Burdin disclosed, her husband and Prof. John are currently engaged in a lawsuit concerning the ownership of a patent [*Letter by Burdin, p. 40*]. This situation applies to both Ms. Burdin and Prof. John, since they are both part of this controversial relationship, but unlike Prof. John, there is no other indication of Ms. Burdin's lack of independence or impartiality. She transparently performed her duty by disclosing this

information and, as conveyed by RESPONDENT, there are no reservations regarding her appointment at this time [*Letter by Fasttrack, p. 42*] On the other hand, for Prof. John this is another indication in a plethora of circumstances that gives rise as to his impartiality and independence.

58 All factors considered, applying the IBA Guidelines by analogy provide firm grounds to prove justifiable doubts of expert's impartiality and independence. Conflicts of interest that arise in this case cannot be simply overlooked. Excluding the expert from giving evidence is appropriate, since the Tribunal has the power to decide on the exclusion of the expert and the relationship between the expert and both RESPONDENT and Ms. Burdin presents an unacceptable situation for CLAIMANT, as the condition of expert's independence and impartiality is not met.

b. The exclusion of expert would not violate RESPONDENT's right to present its case

59 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 while settling the issue. CLAIMANT will demonstrate that the exclusion of expert Prof. John would not violate RESPONDENT's right to present its case properly, while his inclusion would violate CLAIMANT's.

60 Firstly, the right to be heard 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*]. 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; Haugeneder/Netal I, § 17*]. If the Tribunal excluded the expert, there would be no violation of RESPONDENT's right to be heard. RESPONDENT would not be deprived of its right, since 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*]. It can be concluded that it was RESPONDENT's intent to appoint Prof. John on account of their prior relationship and for its own benefit.

61 Additionally, the right to be heard is not unlimited [*Case 4A_526/2011; Case 4A_528/2011*]. Rather, right to be heard is only violated when party has not been granted the right to present its case at all [*Case OGH 18 OCg 3/15p*] and arbitral tribunal is not obliged to consider every single piece of evidence [*Case 4A_550/2009*]. Therefore, if the Tribunal excludes prof. John, RESPONDENT could not argue violation of right to be heard just because its preferred expert was not admitted, as long as it has other ways of presenting its case.

62 Secondly, CLAIMANT acknowledges that the right to be heard is a paramount procedural safeguard. Nevertheless, the arbitral tribunal must apply similar procedural requirements to all parties [*Roney/Müller, p. 58*; *Schwarz/Konrad, § 20-223*]. It is worth noting, while RESPONDENT's right to be heard would in no way be limited, CLAIMANT's right to fair procedure, if Prof. John is not excluded most certainly would be. RESPONDENT's appointment of Prof. John portrays its act in bad faith as CLAIMANT was first to nominate the arbitrator, Ms. Burdin. Since RESPONDENT was aware of the relationship between Ms. Burdin's husband and Prof. John [*Letter by Langweiler, p. 41*], allowing the appointment of Prof. John would give RESPONDENT the opportunity to challenge Ms. Burdin if it so desired. Thus, providing RESPONDENT with an essential and unfair advantage, violating CLAIMANT's right to the equal treatment and fair proceeding.

63 In conclusion, RESPONDENT's right to be heard would not be breached since there is possibility of appointing other competent experts. Furthermore, it is within the Tribunal's discretion to exclude the expert. Therefore, exclusion of Prof. John is warranted and justified.

3. Alternatively, if the Tribunal does not decide to exclude the expert, his opinion should not be given any weight

64 In international arbitration, the opinion of party-appointed experts is not merely an argument, but it has its own weight, depending on the competence and credibility of the expert [*Schneider, p. 485*]. The same as with other witnesses, the arbitral tribunal has the obligation to evaluate and give such weight to expert evidence as it considers appropriate [*Cremades/Cairns, p. 12*]. Should the Tribunal decide not to exclude the Prof. John, it should at least consider the weight of evidence given by him. Arbitrators have the option to disregard any evidence they do not deem trustworthy [*Sussman, p. 522*]. As already established, there is at least a reasonable doubt about expert's independence and impartiality. Prof. John's strong connection to RESPONDENT suggests firm ground for a biased opinion. Therefore, due to lack of credibility, expert report should have much less, if any, weight when considering all the evidence. CLAIMANT has no issue with RESPONDENT-appointing another expert that has no relationship with any of the

Parties or members of the Tribunal, as long as equal treatment of the Parties is ensured and CLAIMANT's right to present its case is not violated.

CONCLUSION ON ISSUE II

65 Primarily, the Arbitral Tribunal should recognize and exercise its power to exclude Prof. John as the expert. RESPONDENT's appointment of Prof. John constitutes a conflict of interest and consequently allowing the appointment or accepting his opinion would provide RESPONDENT with an unfair advantage. Furthermore, the Arbitral Tribunal should find that the connection between Prof. John and RESPONDENT gives raise to justifiable doubts to his impartiality and independence. Therefore, the Arbitral Tribunal should exclude the expert from the proceedings.

ISSUE III: THE TURBINES WERE NON-CONFORMING UNDER ART. 35 CISG

66 The parties concluded the SA on 22 May 2014. RESPONDENT has undertaken the obligation to deliver and install two advanced models of Turbines to CLAIMANT [*RfA, p. 6, § 10; Ex. C2, p. 11*]. This advanced model 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 [*RRfA, p. 26, § 3*]. Mainly because of these features, the inspection and maintenance intervals of the Turbines were shorter than in comparison with ordinary turbines, which represented a crucial element in CLAIMANT's decision to purchase RESPONDENT's product. CLAIMANT was awarded the contract to build the Greenacre Power Plant primarily because its construction design encompassed the RESPONDENT's advanced and innovative Turbines. CLAIMANT willingly paid a substantially higher price for this higher quality product, since it represented one of the essential elements in the construction of the Greenacre Power Plant [*RfA, p. 8, § 23*].

67 It was only following the successful trial launch of the Greenacre Power Plant, that CLAIMANT became aware of the fraudulent steel certification scheme of RESPONDENT's main supplier Trusted Quality Steel [*Ex. C3, p. 14*]. After an investigation of falsified and forged steel certificates was concluded, RESPONDENT could not confirm, whether the delivered Turbines to CLAIMANT were produced with the guaranteed and expected high quality standards [*Ex. C5, p. 16, Ex. C2, p. 11; PO2, p. 47, § 5*]. Hence, RESPONDENT fundamentally breached its contractual obligations.

68 Although RESPONDENT managed to deliver two Turbines to CLAIMANT as arranged in the SA, the delivered Turbines did not meet the criteria of agreed quality and description pursuant to

Art. 35 CISG. CLAIMANT will establish that RESPONDENT did not fulfil its obligations under the SA by delivering turbines, not produced with the agreed quality of steel, therefore breaching Art. 35(1) CISG (**1**). Even if no such obligation could be derived from the SA, RESPONDENT nevertheless breached its contractual obligations pursuant to Art. 35(2) CISG, since the Turbines were not fit for their ordinary and particular purpose (**2**).

1. RESPONDENT's steel was not of agreed quality and description

69 By delivering Turbines, which do not comply with agreed high-quality standards established in the SA, RESPONDENT breached its obligations Art. 35(1) CISG. Since the high-quality steel standards of the Turbines were expressly included into the SA, the Turbines, which do not comply with the guaranteed standard of quality, cannot be conforming in accordance with Art. 35(1) CISG. Under the stated article, the seller must deliver goods which comply with the standards the parties agreed upon either expressly or impliedly [*Honsell, Art. 35, § 10; Kröll, Art. 35, § 37; Model Locomotives Case*]. Even if the Tribunal would not follow the argumentation that premium requirements for the Turbines were expressly included in the SA (**a**), CLAIMANT will alternatively demonstrate that the said standard was known to RESPONDENT at least implicitly (**b**).

a. High quality steel requirement was expressly agreed in the Sales Agreement

70 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 primary source for assessing conformity of the delivered goods is the agreement between the parties [*Karollus, p. 116; Kritzer, p. 282; Schwenzer Commentary, p. 571, Art. 35, § 6; Schlechtriem/Butler, p. 133*], thus, main consideration must be given to the sole wording of the parties' agreement [*Henschel, p. 162*].

71 The Preamble of the SA clearly states that by signing the SA, the Parties committed themselves to ensuring that Greenacre Power Plant would satisfy the local energy demand exclusively by renewable sources and minimising the risk of Greenacre having to rely on energy produced by non-renewable sources. In order to achieve this goal they would provide a largely uninterrupted supply of hydro energy, which is why the time period between the repair and maintenance interval should be lengthy and the repair and maintenance periods should be short [*Ex. C2, p. 11*]. The delivered Turbines therefore had to be produced with high quality steel, since this exact feature grants the desired short maintenance and repair intervals. The coveted premium quality of the steel, specifically its technical and quality characteristics, were

determined by the Parties in Annex A [*PO2, p. 47, § 6*]. That can be further seen in Art. 2 SA. Pursuant to this article, RESPONDENT was obliged to provide the necessary documentation, make the mandatory statements, confirm its commitment to the Greenacre's Green Energy Strategy project, and, most importantly, deliver two Turbines of the quality, specified in Annex A, to CLAIMANT [*SA, Art. 2*].

72 After the conclusion of the SA, RESPONDENT indeed delivered two Turbines and a statement, that the Turbines were produced with certified steel [*PO2, p. 48, § 5*]. However, due to the fraudulent steel scheme of Trusted Quality Steel, RESPONDENT now cannot confirm the premium quality of the used steel. Hence, the two delivered Turbines deviate from the specification in Annex A in the aspect of the uncertain quality of steel [*PO2, p. 48, § 6; Ex. C5, p. 16*]. As a result of the breach of agreed quality characteristics, the delivered Turbines were not highly corrosion and cavitation resistant, which means that they cannot be used in the Greenacre Pump Hydro Power Plant (see infra, §§ 80-87).

73 Consequently, RESPONDENT failed to deliver the Turbines of the quality and description, required by the SA, and failed to support CLAIMANT in its aim to achieve continuous availability of the Greenacre power plant.

b. The premium quality standard was known to RESPONDENT implicitly

74 If Tribunal were to find that the high-quality standard was not expressly agreed upon in the SA, it should find, that this standard was implicitly included into the contract. The contract's description of the goods is only the starting point to determine the parties' true intent. Art. 8 CISG governs the interpretation of a contract and further directs the Tribunal to look to all relevant circumstances of the case, including the tender process and negotiations [*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 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*].

75 Pursuant to Art. 8(1) CISG it is sufficient to determine that a seller was aware of the buyers intent if a reasonable seller could discern the intended purpose of goods from all the relevant circumstances [*Eörsi, pp. 2-19; Enderlein/Maskow/Strohbach, Art. 35, § 11; CSS case; Machinery case; Tantalum case*]. In the case at hand, Parties specifically agreed on a particular model of Turbines. CLAIMANT ordered the delivery of RESPONDENT's newly developed model of Francis Turbines to CLAIMANT. The high-quality steel standard can be primarily inferred from

the model of the turbines, since Francis Turbines are manufactured with superior stainless steel that bears high pressure and ensures the highest level of efficiency [*Corà/Fry/Bachhiesl/Schleiss, p. 32*]. CLAIMANT relied on these unique characteristics of RESPONDENT's environmentally friendly design of Francis Turbines and also represented them on the Hydro Power Fair [*Ex. R1, p. 30; Ex. R2, p. 31, § 2*]. High quality requirements can also be deduced from the nature of RESPONDENT's business [*RfA, p. 4, § 2*]. When it comes to particular industry standards or manufacturing practices, the agreements are often implied [*Schlechtriem, § 38*]. Thus, a reasonable seller of the same kind as RESPONDENT, in the circumstances as in the present case, could conclude that CLAIMANT's intent was to receive turbines, made out of the high quality steel. The premium quality of steel for Turbines is therefore an implied contractual requirement.

76 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*]. Since RESPONDENT is a world-renowned producer of premium water Turbines, CLAIMANT reasonably relied on its expertise, knowledge and most importantly, the given statement, that the Turbines are produced with certified high quality of steel [*PO2, p. 48, § 5*]. Moreover, CLAIMANT even payed a 10 % higher price for such a premium product, since it rationally believed that RESPONDENT's Turbines are the only one in the market, which can guarantee its commitment to Greenacre in the aim of reducing standstill of the plant to the absolute minimum. Even in this regard, it is clear, that a reasonable person of the same kind as RESPONDENT could have known of the implied contractual requirement for the quality of steel.

77 Additionally, pre-contractual negotiations are relevant especially when interpreting the parties' intent pursuant to Art. 8(3) CISG [*Honnold, p. 120; Lookofsky I, p. 55; Cobalt sulphate case; Mountain bikes case; MCC-Marble Ceramic Center case; Filanto case*]. Throughout the negotiations, CLAIMANT has highlighted the extreme importance of continuous availability of renewable energy to Greenacre, which could be achieved if the delivered Turbines would adhere to the promised high-quality standards [*Ex. C1, p. 10, § 3; Ex. C6, p. 19, § 7; Ex. R2, p. 31, §§ 2,4*]. RESPONDENT was also fully aware that one of the main reasons why CLAIMANT was awarded the contract to build Greenacre Power Plant, is the incorporation of its Turbines, which can reduce maintenance and inspection intervals and allow Greenacre to achieve its goals, adopted

in the "no-carbon energy strategy" [RfA, *p. 5, § 5; Ex. R2, p. 31, §§ 2, 5*]. These circumstances demonstrate that at least an implied requirement of premium quality for steel was always understood between the Parties.

78 Any deviation from the contractual description constitutes a lack of conformity, irrespective of the importance of the defect [*Bianca/Bonell, Art. 35, § 1.3; Schwenzer Commentary, pp. 572-573, § 9; Piltz, p. 2771*]. Therefore, by delivering Turbines, which were not produced with the guaranteed high-quality steel, RESPONDENT failed to deliver conforming goods under Art. 35(1) CISG.

2. RESPONDENT's turbines were not fit for their ordinary and particular purpose

79 If the Tribunal were to find that the express or implied quality standard of the Turbines under the SA is not sufficient 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 set 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 are non-conforming under Art. 35(2)b CISG, as they are not fit for particular purpose, expressly and impliedly made known to RESPONDENT (**a**). If the Tribunal decides that the particular purpose of the goods was not established under Art. 35(2)b CISG, CLAIMANT will demonstrate that the delivered Turbines were nevertheless unfit for their ordinary use pursuant to Art. 35(2)a (**b**).

a. RESPONDENT's turbines were not fit for their particular purpose according to Art. 35(2)b CISG

80 The particular purpose of goods does not have to be expressly agreed by the parties, it is sufficient if the particular purpose is disclosed to the seller impliedly [*Hyland, p. 320; Naumann, p. 84*]. In the case at hand, particular purpose was made known to RESPONDENT in the SA, throughout the Parties' communication, participation in the tender process and negotiations with Greenacre, constantly emphasized high-quality requirements [*RfA, p. 5 §5; Ex. C1, p. 10 §3; Ex. C6, p. 19 §7; Ex. R2, p. 31 §§2,4*]. It can be also derived from RESPONDENT's reputation on the market. Therefore, RESPONDENT knew that CLAIMANT's particular purpose for the Turbines was to incorporate them in the construction of Greenacre Power Plant and that its Turbines would be used in a project where CLAIMANT was obligated to reduce all possible standstills of the plant to the absolute minimum and consequently, achieve Greenacre's goal to be completely reliant on renewable energy sources.

81 If particular purpose is expressly made known to the seller, it is responsible for the fitness of the goods for that purpose [*Schwenzer Commentary, p. 580, § 19; Vine wax case*]. The buyer's specification of the products' particular purpose puts the seller's duties in more concrete terms [*Schlechtriem/Butler, p. 119*]. RESPONDENT was informed that CLAIMANT's purpose was to install its premium Turbines into the Greenacre Power Plant, since the incorporation of those particular Turbines would lead to adherence with the Greenacre's demand that the plant assures constant power supply for at least 11 months per year [*RfA, p. 6, § 9; Ex. C1, p. 10, § 3; Ex. R2, p. 31, § 4*]. Thus, RESPONDENT was expressly informed of the particular use for the Turbines.

82 RESPONDENT was also impliedly informed of the particular use for the Turbines. 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*]. Firstly, according to CISG Opinion no. 19: "*If the seller represents himself as a supplier of high-quality products, gives assurances that the products will be acceptable in the industry and is further aware of the importance of delivering premium products to the buyer, the seller is already bound to adhere to certain high-quality standards*" [*CISG Opinion no. 19, pp. 11-12, § 4*]. In this case, CLAIMANT shared all the tender process documentation for the construction of the Greenacre Power Plant with RESPONDENT, when it had inquired at RESPONDENT's about a potential delivery of its premium Turbines [*Ex. C2, p. 10, § 3; Ex. R2, p. 31, § 2*]. RESPONDENT was completely aware that these Turbines will be used in a plant, where continuous availability of sustainable energy was of outmost importance. Moreover, RESPONDENT as an expert in its field should infer that the Turbines must at least comply with high-quality steel standards, since this feature is crucial when asserting reduced maintenance and repair intervals of the plant.

83 Further, 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. The branding of goods as being produced in compliance with certain standards allows their producer to increase their price [*Ramberg, p. 3; Heilmann, p. 179; Catalogue case*]. If the contract price corresponds to high-quality goods that are associated with a particular standard, such price points in favour of an implicit agreement of the particular purpose [*CISG Opinion no. 19, p. 17, § 4.17*]. Under Art. 3 SA, CLAIMANT is obligated to pay 20 million USD for each delivered Turbine from RESPONDENT. The main reason for the higher price, as explained by Prof. Tim John, was the particular shape of the blades, made with extremely corrosion resistant steel with the aim to minimise the danger of cavitation and prolong inspection and maintenance intervals [*Ex. R1, p. 30; Ex R2, p. 31, § 2*].

Even though CLAIMANT was aware that the established price of 20 million USD is 10 % above the price of other turbines, available on the market, it eagerly paid this 10 % higher price for a premium product [*RfA, p. 8, § 23*]. By doing so, it wanted to be certain that the incorporated Turbines would remain corrosion resistant and consequently, be fit for the particular purpose of the plant.

84 A supplementary requirement for fitness of goods for particular purpose is that the buyer relied on the seller's skill and judgement, and that it was reasonable to do so [*Schwenzer Commentary, p. 581, § 24*]. As a rule, such reliance exists if the seller is a specialist or an expert in the manufacture of goods fit for the particular purpose intended by the buyer [*Huber/Mullis, p. 139; Honnold, Art. 35, § 226*]. The greater the seller's expertise, the bigger the buyer's expectation that the seller will comply with certain standards. The implicit communication of particular purpose should therefore not be inferred lightly, if the buyer possesses significant expertise [*CISG Opinion no. 19, p. 15, § 4.11; Movable room units case*]. RESPONDENT is a world-renowned producer of premium water turbines with more than 500 employees and annual profit of approximately 180 million USD [*PO2, p. 47, § 1*]. For CLAIMANT, which is a market leader in providing pump hydro power plants all over the globe, these numbers are an indicator that RESPONDENT is a highly respected company in the sector of manufacturing turbines. Furthermore, RESPONDENT even presented its innovative premium Francis Turbines on the Hydro Power Fair. One of the highlights of the Hydro Power Fair was the presentation of RESPONDENT's special and innovative model of Francis Turbines [*Ex. R1, p. 30*]. Since RESPONDENT is an expert in the field of the production of premium turbines and is also promoting its newly developed Turbines in one of the biggest fairs for all products relating to the production of hydro energy, it is therefore apparent that it is capable of manufacturing Turbines, which would adhere to the highest quality standards [*Ex. R1, p. 30*]. It is therefore evident that RESPONDENT is more than competent to produce high quality products and it was reasonable for CLAIMANT to rely on RESPONDENT's skill and judgement.

85 In conclusion, RESPONDENT breached its contractual obligations according to Art. 35(2)b CISG as it did not deliver the Turbines, which would comply to the guaranteed high-quality standards. CLAIMANT reasonably relied on skill and judgment of RESPONDENT, since the particular purpose of the Turbines was expressly or at least impliedly known to both Parties and RESPONDENT could, with its knowledge and expertise, recognize the paramount importance of uninterrupted availability of renewable energy for Greenacre.

b. RESPONDENT's turbines are not fit for their ordinary purpose under Art. 35(2)a CISG

86 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, § 13*]. Based on CISG Advisory Council Opinion no. 19 "*the conformity of goods should in principle be determined not only by their quality, quantity and description, but also by compliance with standards, affecting the use of goods.*" Whenever there is an international usage of particular characteristics or manufacturing standards of goods, those features must be regarded as the minimum quality standards [*Schwenzer Commentary, p. 578, § 16; Frozen fish case*]. Francis turbines are custom designed with fully fabricated structures of high tensile strength steel to meet the most demanding requirements of customers [*Brekke, p. 29; Safi/Prasad, p. 1005*]. Such quality 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 interval and decrease the repair and maintenance periods, therefore ensuring a largely uninterrupted supply of hydro energy.

87 In the present case, the delivered Turbines from RESPONDENT were not as extremely corrosion and cavitation resistant as they should be. Consequently, the minimum quality standards were not met, since the goal of minimizing the length of repair and maintenance periods and maximizing the time interval between them cannot be achieved. Hence, the Turbines were unsuitable for their ordinary purpose pursuant to Art. 35(2)a CISG.

CONCLUSION ON ISSUE III

88 RESPONDENT breached its contractual obligations under Art. 35(1) CISG, as it did not deliver the Turbines that would be manufactured with expressly or implicitly agreed high-quality steel. Thus, the delivered Turbines do not adhere to the premium quality requirements. Furthermore, the Turbines were unsuitable for their particular and ordinary purpose pursuant to Art. 35(2) CISG. Therefore, CLAIMANT urges the Tribunal to recognize that RESPONDENT breached its contractual obligations, when it delivered non-conforming Turbines.

ISSUE IV: CLAIMANT IS ENTITLED TO REQUEST REPLACEMENT TURBINES FROM RESPONDENT

89 Before dealing with the concept of fundamental breach, CLAIMANT will explain the use of CISG in the following chapter. 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 the CISG exist, CISG will normally take precedence over the UNIDROIT Principles in view of its binding character [*Bonell, § 3a*]. Therefore, the following issue will be discussed in light of the CISG provisions.

90 The concept of fundamental breach plays a crucial role within the remedial system of the CISG, since the remedies available to the buyer and seller depend on the nature of the breach. A breach of contract occurs when a party fails to fulfil its' contractual obligations. If one party's failure to perform amounts to a fundamental breach, the other party is entitled to avoid the contract. In addition, fundamental breach is a prerequisite for buyer's right to request delivery of substitute goods [*CISG Opinion no. 5, p. 7, § 4.3; Koch, p. 185*].

91 The definition of a fundamental breach is determined in Art. 25 CISG. It provides that a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party substantially depriving it of what it is entitled to expect under the contract. Additionally, breaching party's liability is only limited in instances where breach could not be foreseen and a reasonable person of the same kind in the same circumstances would not have foreseen such a result [*Schwenzer Commentary, p. 398*]. This presupposes that the defect needs to be of certain objective importance. The lack of conformity must in fact be so severe that it cannot be expected from the buyer to retain the goods [*Schwenzer II, p. 437; Lookofsky II, p. 78*].

92 When assessing whether a breach of contract is fundamental, it must be determined whether the circumstances of non-conformity affect the usability or value of the goods due to their nature and duration [*Schwenzer Commentary, p. 573, § 9; Automobile case; Sunprojuice case*]. Consideration must be given to the fact that the buyer indeed purchased the goods for a particular purpose [*Software 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; Shoes case; CNC machine case; Elastic fitness clothing case; Water pump case; Mitias v. Solidea case*]. The only rational solution for the buyer in cases, when the defect of the delivered products cannot be cured and amounts to a fundamental breach under Art. 35 CISG, is to demand the delivery of substitute goods in order to use them for the intended specific purpose or avoid the contract [*Schwenzer II, p. 439*; *Schwenzer Commentary, p. 590, § 44*, p. 398; *Lorenz, § 34-37*].

93 CLAIMANT already demonstrated that the lack of quality steel used in the manufacturing process of the Turbines, represents a significant non-conformity of the delivered products pursuant to Art. 2 of the SA. Since the delivered Turbines did not meet the criteria of agreed high quality, they were not fit for their particular purpose (see supra, Issue III). CLAIMANT will establish that non-conformity of the delivered Turbines amounts to a fundamental breach under Art. 25 CISG (**1**). Consequently, CLAIMANT is entitled to demand the substitute delivery of the goods under Art. 46(2) CISG, since the defect of low-quality steel used in the manufacturing process of the Turbines cannot be cured otherwise (**2**).

1. Prerequisites for a fundamental breach under Art. 25 CISG are fulfilled

94 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, p. 224*]. RESPONDENT's fundamental breach resulted in detriment that substantially deprived CLAIMANT of what it was entitled to expect under the contract (**a**). It shall be further demonstrated that the breach was fundamental as detriment suffered by CLAIMANT was foreseeable (**b**).

a. RESPONDENT's breach deprives CLAIMANT of what it is entitled to expect under the Sales Agreement

95 CLAIMANT is entitled to terminate the contract in case RESPONDENT commits a fundamental breach pursuant to the termination clause in Art. 20 SA. The stated article explicitly specifies which breaches of contractual provisions are to be considered fundamental [*SA, Art. 20*]. However, even the instances of unspecified breaches are relevant when CLAIMANT is deprived of its legitimate expectations under the contract.

96 First, it must be noted that parties can expressly or implicitly attach a particular weight to certain obligations they consider significant. The consequence of breaching such significant obligations will result in a fundamental breach [*Huber/Mullis, p. 215; Lorenz, § 11-19; Zeller II, p. 226*]. Given the fact the Parties incorporated a specific clause in SA determining that it is crucial for the power plant to operate at all times, with minimum interruptions for maintenance, it is evident that CLAIMANT specified these contractual obligations as significant. The termination clause and penalty clause for liquidated damages included in the contract also strongly indicate that CLAIMANT attached certain weight to proper performance [*SA, Arts. 2, 20*].

97 In the *Water Pump case,* the problem of the materials of the water pumps was the core issue, just as in the present case. The materials provided were not the materials, required by the contract - among other criteria, their anti-erosiveness function was not as specified in the agreement of the parties. The tribunal decided that because the goods provided failed to meet the requirements in the bidding documents and contract and they became unable to be used and could not be fixed or repaired anymore, the purpose of the contract failed. The lack of agreed quality therefore constituted a fundamental breach under Art. 35(1) CISG. Same can be stated in the case at hand.

98 Additionally, whenever the parties agree that the goods must be produced with a certain manufacturing standard and the seller has no documentation to prove that they were, the goods are considered non-conforming, even if they are physically flawless [*Schwenzer/Tebel, p. 155*]. RESPONDENT is relentlessly stating that the chance of the use of defective steel in the manufacturing process of the Turbines is below 5 %. However, that does not change the fact that RESPONDENT cannot prove the adequacy of the used steel, meaning that the Turbines do not comply with the guaranteed and expected high quality steel standards [*Ex. C7, p. 21; Ex. C3, p. 14; PO2, p. 47, § 5*]. The Turbines are therefore non-conforming by default.

99 Due to the steel quality fraud there is a high likelihood that the Turbines do not comply with agreed upon standards. The inferior quality steel, used in the Riverhead power plant, meant that the blades of the turbines, when exposed to heat, were negatively affected by corrosion and had to be replaced after only two years since they were installed. That led to the standstill of the Riverhead plant and caused significant problems in energy supply in the whole region [*Ex. C3, p. 14; RfA, p. 8*]. Example of the Riverhead plant indicates a serious threat to blades in Greenacre power plant as they may become corroded, which would in turn result in breakage. The 80 % of the steel, supplied to RESPONDENT by Quality Steel, was compromised and therefore the steel in the delivered Turbines to CLAIMANT is of lower quality as well. What is more, a most likely consequence would be an unacceptable standstill of the power plant, further jeopardizing power supply for Greenacre, hence the energy would have to be purchased from another town. It is worth noting, that each time the community of Greenacre has to purchase carbon-based energy due to problems regarding the power plant, liquidated damages clause under Art. 19 SA is activated and CLAIMANT is entitled to damages [*RfA, p. 8; SA, Art. 19*]. Therefore, it is not only in the best interest of CLAIMANT and Greenacre to avoid possibility of a standstill at all costs, but also RESPONDENT.

100 Furthermore, the requirement for shorter maintenance intervals was not met, since the maintenance will most likely have to be pushed forward due to compromised steel. The Turbines will have to be thoroughly examined for the risk of blades breaking and destroying the operating parts of the power plant. The examination process would require opening the Turbines and taking samples of steel for a thorough metallurgical examination in order for any defect to be found. This process would require complete dissolution and subsequent replacement of operating parts, which would seriously jeopardize CLAIMANT's obligation to provide energy to Greenacre [*RfA, p. 5-7; PO2, p. 47, § 3*].

101 In light of all the circumstances surrounding the contract, RESPONDENT was aware that the longer inspection and maintenance intervals and the use of high-quality materials in production of Turbines were of utmost importance to CLAIMANT. Under the SA, CLAIMANT is therefore entitled to expect the delivery of two Turbines of a specific model, with the guarantee that they would provide energy during the anticipated 40 years-lifetime for Greenacre and also, that all maintenance and inspection works will be handled in a manner ensuring minimum interruption of the availability of the plant [*SA, Arts. 2, 19*].

102 Moreover, when assessing if the suspected inadequacy of goods could constitute a fundamental breach, the decisive element is whether this suspicion affects the use of goods [*New Zealand mussels case*]. The seller is always liable for the goods' unrestricted usability, regardless of how unfounded suspicions of inadequacies may be [*Schwenzer/Tebel, p. 157*]. After the Riverhead Power Plant incident, CLAIMANT justly became concerned what the implications of the disastrous consequences of extreme corrosion and abrasion problems of the Turbines could mean for the Greenacre Power Plant [*Ex. C3, p. 14*]. As previously explained, installation of Turbines of inadequate quality that are extremely susceptible to corrosion would most likely lead to a complete destruction of the generator or other relevant parts of the Greenacre Power Plant [*Ex. C4, p. 15; PO2, p. 53, § 45*]. CLAIMANT therefore cannot continue operating the power plant using such inadequate Turbines, since there is a constant risk of severe damage.

103 Second, it should be noted that it is not important how drastically the seller disregards its duties. The concept of fundamental breach rather 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 deciding whether the contract is frustrated by the breach, due regard must be given to general purpose of the contract [*Lorenz, § 50*]. In the present case, the sole purpose of the contract was to ensure the 'eco' friendly

power plant would guarantee independence from carbon-based energy sources. RESPONDENT, as an expert in its field should have recognized how significant the proper performance of the contract was, not only for CLAIMANT but for Greenacre as well.

104 Finally, it must be stressed, that while the detriment in form of financial loss to the buyer is not necessarily a decisive factor in determining the fundamentality of the breach [*Huber/Mullis, p. 214; Bygum, p. 3*], CLAIMANT will suffer a considerable loss in case of destruction of the operating parts due to damaged steel. In that case, CLAIMANT will be obliged to pay for the repair of the Turbines or even, in the worst-case scenario, the full price of the replacement turbines. Moreover, in the event of the destruction of the operating parts of the power plant, the production of each turbine would take 12 months and CLAIMANT would be obliged to pay for Greenacre's purchase of the carbon-based energy for that time [*PO2, p. 51, § 28*].

105 To conclude on this point, all the stated facts demonstrate that RESPONDENT deprived CLAIMANT of what it was entitled to expect the SA by fundamentally breaching its contractual obligations and delivering goods that were improper for the particular purpose, intended by CLAIMANT.

b. The detriment suffered by CLAIMANT was foreseeable

106 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 [*Achilles, p. 69; Sanchez, p. 217; Salger, p. 210*]. Foreseeability is only a conditional element that must be proven to prevent the contract from being avoided, substantial detriment and contractual expectation remain the key elements for establishing fundamental breach. Where the parties, expressly or implicitly agreed that strict compliance with the contract terms is essential and any deviation from these terms is to be regarded as fundamental, the party in breach cannot invoke non-foreseeability [*Koch, p. 229; Bygum, pp. 4-7*].

107 Once it has been established that a reasonable person of the same kind as the seller would have understood the importance of certain obligation, the breaching party cannot be excused because of their personal lack of knowledge [*Huber/Mullis, p. 216*; *Schwenzer Commentary, p. 417, § 36; Saidov, pp. 101-105*]. Given the fact that substantial deprivation requirement has been established, RESPONDENT has no ground to argue that the consequence of breach could not have been foreseen.

108 The forseeability test must be conducted on objective grounds, meaning that personal qualities of the party in breach are not essential. It is rather preferable not only to evaluate whether a reasonable person could foresee the event, but also if a person in the same business trade sector would have foreseen the event [*Graffi, p. 340; Babiak, p. 142*]. It has already been established that RESPONDENT is an expert in its field (see supra, *§ 84*). Any other expert in the same sector as RESPONDENT and in the same circumstances would have understood the importance of Greenacre Council's demands to become a sustainable community. Any other expert would also predict that the compromised steel installed in turbines poses a serious threat for the power plant to shut down. Furthermore, there is no doubt that any expert would confirm that if the turbines made out of lesser quality steel are exposed to heat, their essential feature of being corrosion resistant is lost. This would result in breakage of blades, which would have detrimental consequences for the entire plant.

109 The afore established shows that the detriment suffered by CLAIMANT as a result of fundamental breach was foreseeable. Hence, all prerequisites for a fundamental breach under Art. 25 CISG are fulfilled.

2. CLAIMANT is entitled to replacement turbines under Art. 46(2) CISG

110 Due to RESPONDENT's delivery of Turbines, unfit for their particular purpose, which resulted in a fundamental breach of the SA under Art. 25 CISG (see supra, *§ 80-85*), CLAIMANT is entitled to request a substitute delivery of the Turbines under Art. 46(2) CISG. RESPONDENT claims that CLAIMANT is only entitled to the repair of the delivered Turbines, however, CLAIMANT will establish that the only adequate remedy for the RESPONDENT's breach is the substitute delivery.

111 Mr. Fourneyron, CEO of RESPONDENT, offered CLAIMANT in an email of 11 December 2018, to repair the blades on site or, if necessary, in RESPONDENT's nearest factory, upon finding corrosion or cavitation damage [*Ex. C7, p. 20*]. The offered repair of the turbine blades, based on Art. 48(1) CISG, however, is unacceptable for CLAIMANT. Art. 48(1) CISG, which does allow the seller to remedy any failure to perform his obligations at his own expense even after the date for delivery, also requires him to do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of expenses, advanced by the buyer. The stated requirements are not met in the case at hand.

112 Any repair of the blades by RESPONDENT would mean that the turbine, and therewith the Greenacre Power Plant, would be out of operation for at least six months in case of minor

findings or even longer should there be greater damages [*Appendix I, p. 55*]. At the same time, any repair would only address the symptoms and not the cause, the inferior steel quality. Furthermore, the offer is completely inadequate should it turn out at inspection that the turbine has to be replaced immediately, as it happened in the Riverhead Plant. That would close down the Greenacre Power Plant for at least a year, since production of each turbine would take 12 months even if RESPONDENT starts construing the new turbine immediately after the inspection [*PO2, p. 51, § 28; Ex. C7, p. 20*].

113 Furthermore, in cases where the exposure to extreme heat occurs during the production of steel, the whole charge of steel is defective and thus, impossible to cure [*PO2, p. 51, § 30*]. The consequences of repair or replacement of the Turbines would all lead to the same result, since in both cases CLAIMANT would not be able to prevent the prolonged standstill of the Greenacre Power Plant and CLAIMANT would be obligated to pay the penalty clause for several months [*Appendix I, p. 55*]. The following illustrates the unreasonable inconvenience and delay that a repair would cause to CLAIMANT, therefore making RESPONDENT's offer for repair unsuitable. Only by substitute delivery of the Turbines, CLAIMANT could exclude the possibility of future repairs of the Turbines indefinitely. Consequently and most importantly, the termination of the contract with Greenacre would be prevented.

114 By contrast to the ill-fitted offer of RESPONDENT, CLAIMANT's request for substitute delivery of the Turbines meets all the criteria under Art. 46(2) CISG. The stated article allows the buyer, when prompt repair without any inconvenience to the buyer under the requirements set forth in Art. 48(1) CISG is unreasonable, to justifiably demand substitute delivery of the products [*Schwenzer Commentary, p. 718, § 35; Kritzer, p. 348; Flechtner, p. 346; Enderlein/Maskow p. 181; Liu, p. 42; Delchi Carrier v. Rotorex case*]. It requires parties to establish that the delivered goods do not conform with the contract to the point that the lack of conformity constitutes a fundamental breach and that a request for substitute goods is made either in conjunction with notice given under Art. 39 CISG or within a reasonable time thereafter.

115 The first requirement for a justified request for substitute goods is met. The delivered Turbines do not conform with the SA to the point that the lack of conformity constitutes a fundamental breach. CLAIMANT cannot continue operating the power plant using such inadequate Turbines, since there is a constant risk of severe damage (see supra, §§ 94-109).

116 Furthermore, the second requirement for the request for substitute goods is also met. CLAIMANT requested the replacement of the delivered Turbines in 2020 in an e-mail on 6 October 2018 [*Ex. R3, p. 33*]. In this e-mail, it also notified RESPONDENT of its will to object

to the quality of the delivered Turbines and exactly specified the nature of the lack of conformity and explained how should the replacement be made. The request followed the exchange of e-mails about the steel certification scheme that was started by CLAIMANT's CEO, Michelle Faraday, on 3 October 2018, immediately after she was informed of the article that exposed the scheme [*Ex. C4, p. 15*]. RESPONDENT was able to understand the lack of conformity and take the appropriate steps after receiving the e-mail on 3 October 2018, however in an e-mail on 4 October 2018, it only tried to downplay all CLAIMANT's concerns [*Ex. C5, pp. 16-17*]. That led CLAIMANT to immediately request the substitute goods. CLAIMANT therefore made the request for substitute goods in conjunction with notice given under Art. 39 CISG or at least within a reasonable time thereafter, since the entire communication of the Parties in regards to the non-conformity of the Turbines and the substitution request lasted merely three days. The three days timeline is considered reasonable under Art. 39 CISG, since the period of time, extended to parties for notification usually expands over at least one week up to a one-month time period [*Hygenic tissues case; Cafe inventory case; The stolen automobile case; Model locomotives case*].

117 It must be stressed that the requested exchange of the Turbines in 2020, during the scheduled inspection, would take approximately only three months and remove all risks for CLAIMANT [*Ex. C6, p. 19, ∫ 8*]. All the above stated therefore shows that the most prudent course is not to repair the inadequate Turbines but rather to substitute them.

118 In conclusion, RESPONDENT has created the uncertainty and should bear the consequences resulting from it - it should deliver two substitute Turbines, which would conform to all the agreed high-quality requirements.

CONCLUSION ON ISSUE IV

119 As RESPONDENT delivered non-conforming Turbines, its' breach resulted in a detriment that substantially deprived CLAIMANT of what it was entitled to expect. In addition, RESPONDENT should have foreseen the detrimental consequences of the committed beach. The Tribunal is urged to find that all prerequisites under Art. 25 CISG are fulfilled and thus declare RESPONDENT's breach fundamental. Furthermore, since all the prerequisites under Art. 46(2) CISG are fulfilled, CLAIMANT is entitled to substitution and not merely the repair of the Turbines. Therefore, the Tribunal is requested to order RESPONDENT to provide two adequate substitute Turbines.

REQUEST FOR RELIEF

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

1. find that Tribunal has jurisdiction to hear the case, since the Arbitration Agreement is valid;
2. order the exclusion of the expert suggested by RESPONDENT, Prof. John;
3. declare that RESPONDENT has breached the contract by delivering two R-27V Francis Turbines which are non-conforming in the sense of Art. 35 CISG;
4. order RESPONDENT to deliver and install two substitute R-27V Francis Turbines fit for the purpose set out in the contract between the Parties;
5. declare RESPONDENT liable for any damages resulting from the exchange of turbines up to the agreed upon limitation.

Respectfully signed and submitted by counsel on 5 December 2019.

Dora Klančnik

Ana Krajtner

Leon Lah

Petra Zupančič

University of Maribor

CERTIFICATE

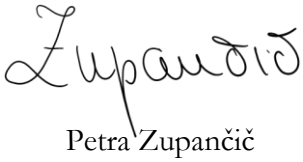
Maribor, 5 December 2019

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



Petra Zupančič