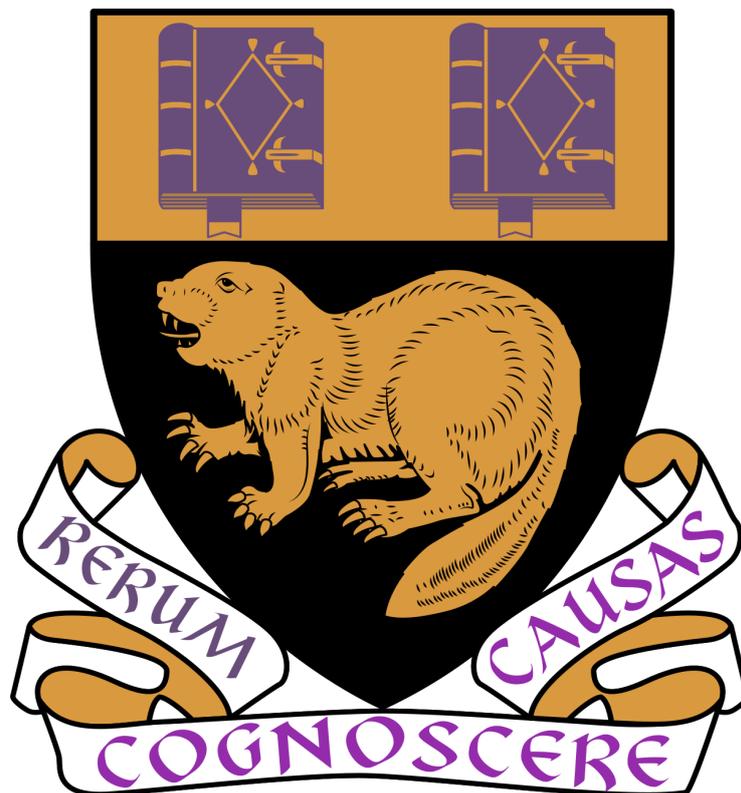


London School of Economics
and Political Science



MEMORANDUM FOR CLAIMANT

On Behalf of:
HydroEN
Rue Whittle 9
Capital City, Mediterraneo
– CLAIMANT –

Against:
TurbinaEnergia
Lester-Pelton-Crescent 3
Oceanside, Equatoriana
– RESPONDENT –

Counsel for CLAIMANT

Diana Stoean · Jacob Mills · Jason J Lin
Su Nahmias · Warren Lampson Suen · Wui Long Wong



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TABLE OF ABBREVIATIONS

Abbreviation	Full Name
¶	Paragraph
%	Percentage
Art.	Article/Articles
BGH	Bundesgerichtshof (German Federal Supreme Court)
Brussels Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl's Ex.	CLAIMANT's exhibit
Cl Memo	CLAIMANT's memorandum
DAL	Danubian Arbitration Law
ECJ	The European Court of Justice
<i>Ex post facto</i>	Out of the aftermath
IBA	International Bar Association



IBA Guidelines on Party Representation	IBA Guidelines on Party Representation in International Arbitration (IBA, 25 May 2013)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICC Expert Rules	The ICC Rules for the Proposal of Experts and Neutrals (ICC, 1 February 2015)
ICC Issues for Arbitrators to Consider Regarding Experts	Issues for Arbitrators to Consider Regarding Experts (ICC International Court of Arbitration Bulletin Vol. 21 No. 1, 2010)
LCIA	The London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules (Effective 1 October 2014)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
OGH	Oberster Gerichtshof (Supreme Court of Justice Austria)
p./pp.	Page/Pages
PICC	The UNIDROIT Principles of International Commercial Contracts
Prof.	Professor



PO1	Procedural Order 1
PO2	Procedural Order 2
Request	Request for Arbitration
Response	Response to the Request for Arbitration
Re's Ex	RESPONDENT's Exhibit
UK CPR	United Kingdom Civil Procedure Rules
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	The United States Dollar



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<i>Brussels Regulation</i>	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	¶18
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980	¶¶79-81, 83-86, 88, 90, 92, 102, 105-106, 109-110, 113, 117-127, 133-134, 138, 148
<i>Dutch CC</i>	The Civil Code of the Netherlands (Burgerlijk Wetboek)	¶27
<i>FRE</i>	United States Federal Rules of Evidence	¶41
<i>German CC</i>	The German Civil Code (Bürgerliches Gesetzbuch)	¶27
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<i>ICC Expert Rules</i>	The ICC Rules for the Proposal of Experts and Neutrals (International Chambers of Commerce, 1 February 2015)	¶40
<i>ICC Issues for Arbitrators to Consider Regarding Experts</i>	Issues for Arbitrators to Consider Regarding Experts (ICC International Court of Arbitration Bulletin Vol. 21 No. 1, 2010)	¶¶40, 41, 48
<i>LCIA Rules</i>	LCIA Arbitration Rules (2014)	¶¶11, 41, 43, 61, 62, 77
<i>NYC</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958	¶¶5, 6, 10
<i>PICC</i>	UNIDROIT Principles of International Commercial Contracts	¶¶14, 16, 22, 27, 30, 34, 79, 86, 87, 101, 106, 107, 109
<i>UK CPR</i>	United Kingdom Civil Procedure Rules	¶41

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<i>ICC Case No. 13009</i>	ICC Case No. 13009 Undated < http://www.unilex.info/principles/case/1661 >	¶16
ICC Case No. 16655	ICC Case No. 16655/ 2011 23 December 2011	¶42

ICSID:



<i>ICSID Arb/06/18</i>	Arbitral Award (<i>Joseph Charles Lemire v Ukraine</i>) ICSID case no. ARB/06/18, IIC 424 (2010) 14 January 2012 Unilex	¶87
<i>Bridgestone v Panama</i>	<i>Bridgestone Licensing Services v Panama</i> ICSID Case No. ARB/16/34 13 December 2018	¶42
<i>Hrvatska v Slovenia</i>	<i>Hrvatska Elektroprivreda d.d. v. Republic of Slovenia</i> ICSID Case No. ARB/05/24 17 December 2015	¶¶58, 59
LCIA		
<i>LCLA Ref. 142683</i>	LCIA Challenge Decision, Reference No. 142683 < https://www.lcia.org/challenge-decision-database.aspx >	¶62
Netherlands Arbitration Institute		
<i>Condensate Crude Oil Mix Case</i>	Condensate crude oil mix case Case No. 2319 Netherlands Arbitration Institute 15 October 2002	¶¶95, 102



SUMMARY OF FACTS

1. HydroEN plc (“**CLAIMANT**”) is a company which provides pump hydro power plants conforming to the highest environmental standards. It operates in over 100 countries, including Mediterraneo. TurbinaEnergia Ltd (“**RESPONDENT**”) is a well-known producer of premium water turbines.
2. Greenacre is a city in Mediterraneo which is committed to becoming a sustainable community. For this purpose, in 2010, the Council of Greenacre (the “**Council**”) adopted a “no carbon” energy-strategy. They decided to construct a pump hydro power plant to ensure the availability of renewable energy.
3. In **January 2014**, the Council invited tenders for the construction and operation of a pump hydro power plant. CLAIMANT participated in the tender and submitted a bid.
4. In **March 2014**, CLAIMANT contacted RESPONDENT for the first time and enquired about the potential delivery of two R-27V Francis Turbines (the “**Turbines**”) if the contract were to be awarded to CLAIMANT.
5. On **22 May 2014**, CLAIMANT and RESPONDENT (the “**Parties**”) signed a Sales Agreement (“**SA**”). The SA stated that if the Council awarded the contract to CLAIMANT (“**Council Contract**”), RESPONDENT was to deliver and install two Turbines at the Greenacre Plant. Art. 21 SA provides for dispute resolution and includes an arbitration agreement.
6. On **15 July 2014**, the Council awarded the contract to CLAIMANT, in particular because their design used RESPONDENT’s newly developed turbine. This is marketed as being far more durable and requiring less frequent inspection than its competitors.
7. On **15 July 2014**, CLAIMANT began the construction of the pump hydro power plant. Construction was completed in less than 4 years.
8. On **3 August 2014**, CLAIMANT and Greenacre Councillor, Mr. Crewdson agreed on an availability guarantee which included a penalty clause (the “**Availability Guarantee**”). The relevant penalty clause was included as Art. 8 of the Council Contract.
9. In **late spring 2017**, RESPONDENT delivered and installed the two Turbines.
10. On **19 September 2018**, the power plant started operating.
11. On **29 September 2018**, the Renewable Daily News published a report which mentioned that Trusted Quality Steel, one of RESPONDENT’s main steel suppliers, had forged their quality control documentation. Trusted Quality Steel had delivered uninsured steel to RESPONDENT, who most likely used this steel in their turbine production. The turbines at the Riverhead Tidal Power Plant were heavily damaged after only two years of operation and they had to be replaced in order to avoid further damage to the turbine and the plant itself. There is a high likelihood that they were made with uninsured materials, because Trusted Quality Steel supplied 70% of RESPONDENT’s steel at the time.



12. On **3 October 2018**, Ms. Faraday, CLAIMANT's CEO, contacted Mr. Gilkes, RESPONDENT's chief negotiator, to inquire whether the Turbines produced for the Greenacre Plant could be affected by Trusted Quality Steel's fraudulent behaviour.
13. On **4 October 2018**, Mr. Fourneyron, RESPONDENT's CEO, suggested that the Parties wait until the first inspection to assess whether the Turbines could be affected. It was also suggested that the first inspection be moved from September 2021 to September 2020. RESPONDENT was unable to determine the quality of steel used for the production of the turbines because of a fault in its own internal system.
14. Ms. Faraday contacted Mr. Crewdson, to discuss the issue and it was concluded that the only acceptable solution would be for the first inspection to be brought forward and used to directly replace the Turbines with turbines that definitively conformed with the terms of SA.
15. On **6 October 2018**, Mr. Fourneyron was informed of CLAIMANT's request.
16. On **1 December 2018**, the Parties met to discuss possible solutions. However, no agreement could be reached as RESPONDENT was unwilling to agree to the required replacement of the Turbines. Instead, RESPONDENT was merely willing to pull forward the scheduled inspection by one year.
17. On **11 December 2018**, Mr. Fourneyron suggested that the Turbines could be repaired in RESPONDENT's nearest factory if any issues were to be found during the inspection. However, the repair of the Turbines was unacceptable. The power plant would be out of operation for at least four months, in the case of minor repairs, or at least one year, for major repairs. If the turbine causes the rest of the plant to break, it would take several years to repair. Any of these scenarios would jeopardise the Council Contract as it would trigger the penalty clause under Art. 8.
18. On **31 July 2019**, CLAIMANT submitted the Request for Arbitration, nominating Ms. Burdin as its arbitrator and requesting that RESPONDENT perform its contractual obligations. Firstly, CLAIMANT asked RESPONDENT to deliver two substitute Turbines that conform to the terms of the SA. Secondly, CLAIMANT asks that RESPONDENT to be held liable for any damages resulting from any operational delays caused by the replacement of the Turbines.
19. On **20 August 2019**, RESPONDENT instructed Prof. John as its expert for the arbitration.
20. On **30 August 2019**, RESPONDENT submitted the Response and nominated Mr. Deriaz as its arbitrator. RESPONDENT challenged the validity of the arbitration agreement and argued that CLAIMANT has no claim for the replacement of the Turbines.



SUMMARY OF ARGUMENTS

1. **ISSUE 1:** The arbitration agreement is valid, and the Tribunal has jurisdiction to hear the case. First, Art. 21(2) SA constitutes a valid arbitration agreement as it does not violate the principle of party autonomy, and is not null and void. In particular, there is no violation of equal treatment of parties, nor is there gross disparity of power. Second, even if it is found invalid, it can be adapted so as to constitute a valid bilateral arbitration agreement. Finally, given the validity of Art. 21(2) SA, any award rendered by this Tribunal would be enforceable as the public policy of equal treatment of parties has not been violated.
2. **ISSUE 2:** The Tribunal should order the exclusion of RESPONDENT's expert, Prof. John. First, the Tribunal has the power to order the exclusion of an expert who has failed their duty to be independent and impartial. Second, Prof. John's behaviour and conflict of interests show that he lacks independence and impartiality. Therefore, his exclusion is necessary and justified. Third, RESPONDENT has acted in bad faith in appointing Prof. John unlike CLAIMANT who has acted in good faith throughout the proceedings. Finally, despite RESPONDENT's unfounded assertions, the exclusion of Prof. John does not cause harm to RESPONDENT's right to properly represent its case nor its right to equal treatment.
3. **ISSUE 3:** RESPONDENT breached their obligation under Art. 35 CISG to provide conforming goods. The goods did not conform either with the SA or with the purpose which was emphatically communicated by CLAIMANT. Further, the goods are not even fit for ordinary use. RESPONDENT is not exempt from liability because CLAIMANT did not know of the defects at the time of contracting.
4. **ISSUE 4:** CLAIMANT is entitled to substitute turbines under Art. 46(2) CISG. First, Art. 19 SA did not restrict or exclude CLAIMANT's right to substitute goods. Second, RESPONDENT and CLAIMANT lowered the standard of fundamental breach under Art. 25 CISG by Art. 20 SA. The non-conformity satisfies this contractually lowered standard of fundamental breach. Third, in the alternative, the gravity of the non-conformity is so great that it also satisfies the default standard of fundamental breach under Art. 25 CISG. Finally, the detriments suffered, or which will be suffered by CLAIMANT are foreseeable.



ARGUMENTS ON PROCEDURE

ISSUE 1. The arbitration agreement is valid and the Tribunal has jurisdiction

1. CLAIMANT has the right to refer the current dispute to arbitration pursuant to Art. 21(2) SA. UNDER Art. 21(2) SA, the seat of the arbitration is Danubia, and the governing law of the contract is the law of Danubia [*Cl's Ex. C2*]. Art. 21(1) SA clearly states that the Mediterraneo Courts' exclusive jurisdiction is subject to CLAIMANT's right to refer the case to arbitration under Art. 21(2) SA. In its relevant part, Art. 21(2) SA provides that CLAIMANT "has the right to refer any dispute arising out of or in connection with this contract including any question regarding its existence, validity or termination, to arbitration under the LCIA Rules" [*Cl's Ex. C2*]. Art. 21(2) constitutes a valid arbitration agreement, providing the Tribunal with jurisdiction to hear this case.
2. The DAL is a verbatim adoption of the UNCITRAL Model Law [*PO1 ¶4*]. Art. 16(1) DAL embodies the principle of "kompetenz-kompetenz", enabling the Tribunal to decide on its own jurisdiction [*Art. 16(1) DAL; Redfern/Hunter, ¶5.99; Moses pp. 96-100; Born pp. 52-54*].
3. RESPONDENT challenges the Tribunal's jurisdiction on two grounds. First, RESPONDENT contends that Art. 21(2) SA is null and void under DAL because asymmetric dispute resolution clauses (so-called "**Asymmetric Arbitration Clauses**") are invalid [*Response ¶¶12-14*]. Second, RESPONDENT argues that Art. 21(2) SA violates the requirement to treat the parties equally, contrary to the public policy of Equatoriana [*Response ¶13; PO2 ¶52*].
4. The Tribunal has jurisdiction because Art. 21(2) SA constitutes a valid arbitration agreement (**A**), or can, alternatively, be adapted so as to constitute a valid bilateral arbitration agreement (**B**). Given the validity of Art. 21(2), any award rendered by this Tribunal would be enforceable (**C**).

A. Art. 21(2) SA constitutes a valid arbitration agreement

5. A valid arbitration agreement is essential to provide the Tribunal with jurisdiction [*Hobér, p. 126, ¶3.128; Lachmann, p. 1, ¶3*]. Under the applicable laws, there are limited grounds for challenging an arbitration agreement [*Arts. II(2)-(3), VII(1) NYC; Arts. 7(1)-(2), 8(1)-(2), 34(2)(b), 36(2)(b)(i) DAL; Moses pp. 21-37; Born pp. 55-58; Redfern/Hunter ¶2.12*]. RESPONDENT might challenge the validity of Art. 21(2) SA on the ground that it is null and void. CLAIMANT submits the Asymmetric Arbitration Clause contained in Art. 21(2) is valid because there is a presumption of validity (**I**); it does not violate the principle of party autonomy (**II**); and it is not null and void (**III**).

I. Art. 21(2) SA is presumptively valid

6. The starting point is that arbitration agreements are presumptively valid. Art. 16(1) DAL embodies the "kompetenz-kompetenz" principle, enabling this Tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement [*Binder*



p. 253]. Art. II(3) NYC and Art. 8 DAL set out very limited bases for challenging the validity of an arbitration agreement. In this case, to succeed, RESPONDENT would need to show Art. 21(2) is “null and void, inoperative or incapable of being performed”. Both Art. 8 DAL and Art. II NYC set forth a general rule that international arbitration agreements are presumptively valid and enforceable [*Born, p.* 375]. This general rule is not an *ex post facto* rationalisation because rational businessmen must have intended for the arbitration agreement to be operative [*Miles/Gob; Born SALJ (2014)*]. As a result, various national courts have emphasised NYC’s “pro-arbitration” treatment of arbitration agreements and have interpreted NYC’s enumerated exceptions narrowly [*Born, p.* 642]. Thus, Art. 21(2) is presumptively valid and must be upheld unless RESPONDENT discharges its burden and demonstrates the contrary.

II. Art. 21(2) SA does not violate the principle of party autonomy

7. Agreeing to an Asymmetric Arbitration Clause is normal practice in international commercial contracts and there is no general rule against the validity of such clauses. Various national courts have held that Asymmetric Arbitration Clauses accord with the principle of party autonomy and should be upheld. This is the common position across England [*NB Three Shipping v Harebell v Harebell; Law Debenture Trust v Elektrim Finance*], Italy [*Giustizia Civile Mass. 1103*], Australia [*PMT Partners v ANP*], Germany [*III ZB 06/02*], and France [*Angers Appeal Judgment*].
8. For example, in *NB Three Shipping v Harebell*, the relevant dispute resolution clause was similar to the one in the present case. It reserved only one party’s right to refer a dispute to arbitration. The English High Court upheld the clause as it was held not to violate the principle of party autonomy. The Court emphasised that invalidating the clause would run counter to the parties’ autonomy over their choice of forum [*NB Three Shipping v Harebell*]. Here, the Asymmetric Arbitration Clause was negotiated by both parties autonomously [*Re’s Ex. R2 ¶6; PO2 ¶2*]. Without evidence demonstrating the contrary, Art. 21(2) SA is in itself valid.

III. Art. 21(2) SA is not null and void

9. RESPONDENT may challenge the validity of Art. 21(2) SA by alleging that it is null and void on one or more of the following grounds: violation of public policy, gross disparity in bargaining powers, bad faith, and/or surprise term. CLAIMANT will demonstrate that Art. 21(2) SA is valid because: it does not violate public policy (1); there is no gross disparity in the Parties’ bargaining powers (2); it was negotiated in good faith (3) and does not constitute a surprise term (4).

1. Art. 21(2) SA does not violate Danubian public policy

10. RESPONDENT claims Art. 21(2) SA is null and void because it is contrary to Danubian public policy which requires equal treatment of the Parties [*Response ¶14; Art. 34 DAL; Redfern/Hunter ¶¶2.129-2.130; Moses, p.* 88; *Art. V(2)(b) NYC*]. This is misconceived.



11. RESPONDENT has referred to the case of *Siemens v Dutco* to argue that Art. 21(2) contravenes the principle of equal treatment of the parties [*Response ¶14*]. However, *Siemens v Dutco* is irrelevant to the present case as it concerned an entirely different set of circumstances. In *Siemens v Dutco*, the French Cour de Cassation refused to enforce an award on the basis that the claimant could appoint its own arbitrator, while the respondents were only able to agree among themselves to appoint one single joint arbitrator. As such, each of the respondents were only able to agree among themselves to appoint one single joint arbitrator. As such, each of the respondents was denied the right to appoint an arbitrator of their choice. This was held to violate the requirement to treat the parties equally. *Siemens v Dutco* is thus distinguishable because it dealt with equal treatment in terms of both parties having an equal right to appoint an arbitrator after the Tribunal had been established. The present case is not about the appointment of arbitrators. In any event, RESPONDENT has already exercised its right to appoint its own arbitrator [*Art. 21(2) SA; Art. 5 LCLA Rules*], Mr. Deriaz [*Letter 30 Aug 2019*]. Therefore, Art. 21(2) conforms with the principle of equal treatment of the parties.
12. RESPONDENT is not being treated unequally with regard to the arbitral procedure. The fact that one party is granted an additional advantage cannot render the clause invalid: many contractual provisions confer advantages to only one of the parties [*Law Debenture Trust v Elektrim Finance; Nesbitt/Quinlan*]. In fact, asymmetric dispute resolution clauses are a commonplace commercial mechanism, such as in financing agreements, where one party wishes to be sued only in its forum of choice (such as its home jurisdiction), but conversely wants the flexibility to enforce security and pursue assets against the other party wherever possible [*Nesbitt/Quinlan; Petit/Chung et. al.*]. Similarly, Art. 21 SA merely gives CLAIMANT more flexibility in resorting to an alternative forum.
13. Furthermore, to the extent that RESPONDENT seeks to rely on Art. 18 DAL, such submissions should be disregarded. Art. 18 DAL provides that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case”. However, this is a *procedural* requirement applicable *during* the arbitral proceedings. For example, it governs issues such as the appointment of arbitrators, and ensures each party is afforded sufficient time to present its case. All that Art. 18 DAL requires is that the parties are treated equally in the present proceedings [*Holtzmann/Neubaus, p. 552*]. It does not govern matters *prior to* the arbitral proceedings. Here, the issue concerns whether the parties were given the same rights *prior to* the arbitral proceedings. Hence, any allegations CLAIMANT has violated Art. 18 DAL are unfounded.

2. There is no gross disparity in the Parties’ bargaining powers

14. RESPONDENT may seek to rely on Art. 3.2.7(1) PICC, which provides that “a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract term unjustifiably gave the other party an excessive advantage”. RESPONDENT would therefore need to prove first, that CLAIMANT received an excessive advantage and, second, that the excessive



advantage was unjustifiable. These requirements impose a high threshold and, accordingly, such challenges rarely succeed. For instance, the Florida District Court rejected an Art. 3.2.7 challenge to the validity of an arbitration agreement because “it is doubtful that there exists a precise, universal definition of the unequal bargaining power that may be applied effectively across the range of New York Convention signatories” [*Koda v Carnival Corp*].

15. There is no gross disparity because Art. 21(2) SA does not provide CLAIMANT with an excessive advantage **(a)**. Alternatively, any advantage enjoyed by CLAIMANT is justifiable as RESPONDENT is not in a weaker bargaining position **(b)**.

a. Art. 21(2) SA does not provide CLAIMANT with an excessive advantage

16. RESPONDENT bears the burden of proving that CLAIMANT has received an unjustifiable benefit [*Vogenauer Art. 3.2.7 ¶¶10, 19*]. This requires demonstrating a disequilibrium which “is in the circumstances so great as to shock the conscience of a reasonable person” [*Vogenauer Art. 3.2.7 ¶7*]. Even a considerable disparity in the value and the price of some other element which upsets the equilibrium of performance and counter-performance is not sufficient [*Off Cmt 1 Art. 3.2.7 p. 108-109; Vogenauer Art. 3.2.7 ¶7; ICC Case No. 13009*]. Additionally, “[s]uperior bargaining power due to market condition alone is not sufficient” [*Vogenauer Art. 3.2.7 ¶11; Off Cmt 2(a) Art. 3.2.7, p 109; Krstic v Princess Cruise Lines*].
17. RESPONDENT may rely on *X v Rothschild* in support of its argument to invalidate Art. 21(2) SA. Undoubtedly, *X v Rothschild* is a leading case where the French Cour de Cassation held that a unilateral dispute resolution clause was invalid. In that case, Madam X, a private consumer in a weaker bargaining position, could only sue in the bank’s jurisdiction; however, the bank could refer any dispute to any court of competent jurisdiction. The Court held that there was a significant discrepancy in the parties’ rights in choosing the forum. *X v Rothschild* is, however, inapplicable on the facts of the present case and must be distinguished.
18. First, *X v Rothschild* concerned a situation with a significant power imbalance: an ordinary consumer against a commercial bank. By contrast, the Parties in the present case are sophisticated business entities. Second, the court held the clause invalid largely because it violated Art. 23 of the Brussels Regulation concerning choice-of-court agreements. The Brussels Regulation, however, is not applicable in any of the jurisdictions involved here. Third, the asymmetric clause in *X v Rothschild* was incorporated as a standard term by the bank which was undoubtedly in a privileged position. Here, Art. 21(2) is a mutual agreement drafted and negotiated between both Parties [*PO2 ¶2*].
19. Additionally, in *Rothschild*, the consumer could only bring proceedings in the bank’s jurisdiction, which in essence gave the bank a home advantage. By contrast, the bank could ‘shop’ for the most suitable forum to sue the consumer. In the present case, Art. 21(2) SA merely provides CLAIMANT



with the option to arbitrate in Danubia, which is a neutral forum to both Parties. There is no reason to believe that arbitration in Danubia will provide CLAIMANT with any significant advantage.

20. Scholars have suggested that national rules subjecting international arbitration agreements to special, discriminatory, or idiosyncratic burdens or treatment should not be taken into account [*Born*, p. 558; *Nazzini*; *Ledee v Ceramiche*]. This was also evident in the *X v Rothschild* case, as the court relied specifically on the French doctrine of “potestative” to invalidate the clause, which made performance subject to a condition precedent entirely within the power of the other party to trigger. Such characteristics are idiosyncratic and depart from the general consensus in international contract law [*Born*, p. 558; *Nazzini*; *Ledee v Ceramiche*]. If this Tribunal were to take a similar approach, it would fail to promote uniform treatment of international arbitration agreements [*Nazzini*].
21. Under Art. 21(2) SA, CLAIMANT is entitled to choose arbitration as a mechanism to resolve the dispute rather than initiate proceedings in the Mediterraneo courts. It merely gives CLAIMANT an additional choice of the means for resolving the dispute [*NB Three Shipping v Harebell*]. Art. 21(2) does not amount to an excessive advantage.

b. Any advantage enjoyed by CLAIMANT is justifiable as RESPONDENT is not in a weaker bargaining position

22. Art. 3.2.7(1) PICC provides a non-exhaustive list of factors to be considered when determining whether its requirements are met, including: (a) whether the other party has taken unfair advantage of the first party’s dependence; economic distress or urgent needs; or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract.
23. The onus would be on RESPONDENT to demonstrate the unequal bargaining power [*Vogenauer Art. 3.2.7 ¶16*]. RESPONDENT, however, would face an impossible task if it attempts to rely on any inequality in bargaining power given it would lack evidential foundation. This is for two reasons.
24. First, RESPONDENT is in a stronger bargaining position due to CLAIMANT’s reliance on its market leading and innovative Turbines. To fulfil the Council Contract, CLAIMANT must use RESPONDENT’S product [*Request ¶5*]. A determinative factor in awarding the tender to CLAIMANT was a “guarantee” that the power plant would have sufficient capacity to provide the additional energy needed when the normal sources of renewable energy were insufficient. This is precisely why CLAIMANT contracted for RESPONDENT’S Turbine [*Cl’s Ex. C1*]. The tender documents had been shared with RESPONDENT’S chief engineer and main negotiator, as well as its CEO. This means that there was scope for RESPONDENT to frustrate the Council Contract by not supplying the Turbines. Hence, RESPONDENT was in a stronger bargaining position than CLAIMANT.
25. Second, the Parties are at worst in an equal position. RESPONDENT is a sophisticated commercial entity. It has an annual turnover of USD 180 million and has more than 500 employees across



Equatoriana and Danubia [PO2 ¶1]. Given its market position and experience, it must have been aware of the implications of the terms in the SA. Indeed, an asymmetric arbitration clause is far less likely to fail if the counterparties are sophisticated companies rather than where one of them is a natural person, because they are more likely to be on a levelled playing field [*Draguiev*, p. 33].

26. Even if RESPONDENT were able to demonstrate that CLAIMANT was in a stronger bargaining position, it would need to show that it unjustifiably used that position to gain an excessive advantage. As has been shown, RESPONDENT is unable to do so. Finally, as was held by the Argentinian Commercial Court of Appeal, the mere fact that a party has a greater bargaining power during the negotiations does not automatically amount to an abuse of its contractual position given the high threshold that must be met [*D.G. v P&G*].

3. Art. 21(2) SA was negotiated in good faith

27. RESPONDENT might argue that an Asymmetric Arbitration Clause which is not entered into in good faith can be invalidated. According to Art. 1.7 PICC, “[e]ach party must act in accordance with good faith and fair dealing in international trade”. There is, however, no universal “consensus on the scope, the function, and the content of the standard of ‘good faith and fair dealing’” [*Vogenauer Art. 1.7 ¶¶4, 12*], and domestic standards that are generally accepted among the various legal systems should be taken into account [*Off Cmt 3 Art. 1.7 pp.19-20*]. In fact, Art. 1.7 bears resemblance to the Dutch and German Civil Codes which emphasise good faith and fair dealing [*Dutch CC Art. 6:248; German CC §§157, 242*]. In the application of this principle, the German courts have held that parties will be regarded as dealing in good faith, and fairly, where the parties entered into the contract autonomously. [*Zöller et al. ¶¶35,37; Case III ZR 133/97*]. An objective standard must be adopted [*Vogenauer Art. 1.7 ¶15*].
28. In the present case, Art. 21(2) SA was carefully negotiated by both Parties in good faith. CLAIMANT originally refused to accept RESPONDENT’s suggested inclusion of a limitation of liability clause, and an entire agreement clause. The Parties spent considerable time and effort on the dispute resolution clause. As RESPONDENT’s CEO himself admitted, he accepted the one-sided dispute resolution clause and the liquidated damages clause in return for CLAIMANT’s consent to the limitation of liability clause and the entire agreement clause [*Re’s Ex. R2*]. This was because RESPONDENT saw a limitation clause as crucial to prevent damages that could potentially threaten its economic survival [*Re’s Ex. R2*].
29. On the other hand, CLAIMANT considers that a certain publicity of disputes may be helpful at times in exerting pressure upon suppliers which normally do not want to discuss defects in their products in open court. Meanwhile, CLAIMANT also considers it useful to retain the option to go to arbitration where it has an interest in confidentiality [PO2 ¶2]. As a result, both Parties had



legitimate commercial interests in agreeing to an Asymmetric Arbitration Clause. There was plainly a *quid pro quo*. CLAIMANT has, objectively, negotiated in good faith.

4. Art. 21(2) SA is not invalidated on the ground of surprise terms

30. Art. 2.1.20 PICC provides that “[n]o term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party”. The test is whether a reasonable person, in the same position as the parties, would not have expected the discrepancy in the standard terms involved [*Vogenauer Art. 2.1.20* ¶6; *Off Cmt 2 Art. 2.1.20*, pp. 68-69; *Appendix to ¶211 Restatement 2d Contracts*]. RESPONDENT may argue that Art. 21(2) SA deviates from a standard arbitration agreement, and hence, it should be invalidated because it constitutes a surprise term.
31. However, a party can only rely on this ground if the term is inconsistent with the course of negotiations [*Off Cmt 2 Art. 2.1.20*, pp. 68-69; *Vogenauer Art. 2.1.20* ¶7], materially alters the character of the contract by being contrary to its purpose [*Vogenauer Art. 2.1.20* ¶8; *Tilden v Clendenning*], and is simply bizarre or unexpected in that there is no clear rationale for it [*Vogenauer Art. 2.1.20* ¶10].
32. As extensively discussed above, Art. 21(2) SA represents a carefully negotiated term. RESPONDENT’s CEO agreed to the Asymmetric Arbitration Clause in return for CLAIMANT agreeing to include the limitation of liability and the entire agreement clause [*R’s Ex. R2* ¶6; *PO2* ¶2]. There is no element of surprise in the unilateral nature of Art. 21(2).

B. Alternatively, Art. 21(2) can be adapted as a valid bilateral arbitration agreement

33. Even if this Tribunal finds Art. 21(2) invalid, it does not necessarily mean this Tribunal will have no jurisdiction. Art. 21(2) may be adapted to constitute a valid bilateral arbitration agreement.
34. Art. 3.2.7(2) PICC provides that a party can request a tribunal to adapt a term in a contract in order to make it accord with reasonable commercial standards [*Off Cmt 3 Art. 3.2.7 p. 110*; *Vogenauer Art. 3.2.7* ¶21; *Schwenzer/Hachem/Kee*, ¶¶21.19-21.21]. In *Russkaya v. Sony*, the contract between the parties contained an Asymmetric Arbitration Clause. The Russian Supreme Court of Arbitration found it to violate the balancing of the rights of the parties, and therefore invalid. Rather than declaring the clause void, the Court ordered that the clause be converted into a bilateral arbitration clause. The Court considered that the party who was deprived of the right to invoke the Asymmetric Arbitration Clause should be able to rely on it. As a result, under the adapted clause, the Court provided both parties with the right to refer disputes to arbitration. Adapting Art. 21(2) into a bilateral arbitration clause is consistent with Art. 3.2.7 PICC. It is also of practical benefit given the long-term nature of the contract as future disputes may arise.
35. During the Parties’ negotiations, it was RESPONDENT’s original intention to have a symmetrical arbitration clause [*PO2* ¶2]. Adapting Art. 21(2) would grant RESPONDENT the same right to refer



the dispute to arbitration as CLAIMANT. Thus, in the event this Tribunal decides to adapt Art. 21(2) into a bilateral arbitration clause, no unfairness would be caused to RESPONDENT.

C. An arbitral award under Art. 21(2) SA does not contravene the public policy of equal treatment of parties

36. RESPONDENT contends that this Tribunal must make every effort to render an enforceable award [*Weigand*, 14.158; *Redfern/Hunter*, ¶¶9.14, 11.11; *Art. 32.2 LCLA Rules*]. RESPONDENT further suggests that an award rendered pursuant to Art. 21(2) would contravene the public policy of Danubia and Equatoriana which requires equal treatment of the parties. As a result, RESPONDENT says this Tribunal will be unable to render an enforceable award. Hence, RESPONDENT may suggest that the Tribunal should refuse jurisdiction even in the presence of a valid arbitration agreement.
37. As has been demonstrated above, Art. 21(2) SA constitutes a valid arbitration agreement. Art. 21(2) conforms with Art. 18 DAL, and was agreed through careful negotiations carried out in good faith and involving both parties. In no way has party autonomy been violated [*Cl Memo* ¶¶7-8; *NB Three Shipping v Harebell*]. It follows that this Tribunal will be able to render an enforceable award.

ISSUE 2: The Tribunal should order the exclusion of the expert

38. The expert suggested by RESPONDENT, Prof. John, should be excluded. First, the Tribunal has the power to order exclusion **(A)**. Second, Prof. John's lack of independence and impartiality justifies excluding his evidence **(B)**. Third, RESPONDENT has acted in bad faith in seeking to submit evidence prepared by Prof. John **(C)**. Fourth, exclusion will not harm RESPONDENT's due process rights **(D)**.

A. The Tribunal has the power to order exclusion

39. The fundamental role of an expert is to provide independent and impartial evidence that is of assistance to the Tribunal **(I)**. Therefore, if these fundamental obligations are violated, the Tribunal must hold the expert evidence inadmissible in its entirety **(II)**.

I. The fundamental role of an expert is to be independent and impartial

40. An expert, whether appointed by a tribunal or the parties, must be independent and impartial. This fundamental obligation applies equally with respect to experts and the arbitrators themselves [*Born* p. 2280; *ICC Issues for Arbitrators to Consider Regarding Experts, III(A)(3); 2015 ICC Expert Rules*]. The primary duty owed by a party-appointed expert is to the tribunal. This is confirmed in the case law [*Lew/Mistelis/Kröll* p. 579; *The Ikaría Reefer*].
41. According to Art. 21.2 LCIA Rules, an expert must "be and remain impartial and independent of the parties". This duty is reflected in various national guidelines in both civil and common law countries [*Part 35 UK CPR, Rule 702 FRE, Rule 26.1 and 26.3 ALI/UNIDROIT Principles*]. The test



is one of “apparent bias” - whether a reasonable observer might think the circumstances are capable of affecting the views of the expert so as to make them unduly favourable to that party [*Liverpool v Goldberg*]. The focus is on whether an “appearance of impropriety” is created [*ICC Issues for Arbitrators to Consider Regarding Experts*].

42. In this case, the IBA Rules provide valuable guidance to the applicable test. The IBA Rules reflect international best practice, which is particularly relevant when parties come from different legal traditions [*Marghitola*, p. 34; *Redfern/Hunter*, ¶6.95; *Welser/De Berti*, p. 80; *Born*, p. 2347] and are frequently used [*Born*, p. 2348; *Marghitola*, p. 33; *Müller*, p. 78; *Van Vechten*, p. 321]. The IBA Rules are also frequently applied by tribunals even where the parties have not explicitly agreed to them [*ICC Case No. 16655*; *Bridgestone v Panama*]. When determining the impartiality and independence of an expert, the IBA subcommittee prefers a test of “outward manifestation of partiality” over the state of mind of the expert [*Ashford*, p. 112]. This again supports the “apparent bias” test [*Arts. 5(2)(a), (c), (e), (g), 9.2(6); 9.3 IBA Rules*].

II. The violation of the fundamental obligations of independence and impartiality is a matter of admissibility rather than weight

43. Under the LCIA Rules, the Tribunal may refuse the written and oral testimony of expert witnesses [*Art. 20.3 LCIA Rules*]. The Tribunal may also decide whether to apply any strict rules of evidence as to the admissibility, relevance or weight of any expert opinion [*Art. 22.1(vi) LCIA Rules*]. DAL likewise confers this Tribunal with wide powers to determine the admissibility of any evidence [*Art. 19(2) DAL*]. It is also clear that tribunals have an inherent power to disqualify expert party-appointed witnesses or to exclude their testimony in appropriate cases, in order to safeguard the integrity of the arbitral process. [*Born*, p. 2884; *Burianski/Lang*].
44. Expert evidence is admissible only if it is provided by an impartial and independent expert whose evidence is of assistance to the court. [*Davie v Magistrates*, *R v Turner*; *R v Dean*] Since independence and impartiality are such fundamental principles, their violation cannot be dealt with as a mere matter of weight, where the tribunal assesses the value and importance of the evidence. Case law from a range of jurisdictions demonstrates that if a party-appointed expert does not comply with the recognised duties of a skilled witness to be independent and impartial, the tribunal must exclude that expert evidence as inadmissible [*Armstrong v ERS*; *White v Abbott*; *Smolen v Solon*; *Wang v Toshiba*].
45. A recent Canadian Supreme Court case held that the potential bias of an expert is a factor when deciding the admissibility of evidence. If an expert is found to be biased, then such evidence must be deemed inadmissible [*White v Abbott*]. The reasoning is that if experts fail in their duty to provide impartial and independent evidence, then the evidence they provide no longer has any bearing on



the case. Fundamentally, it loses its primary purpose of providing an objective opinion to aid the tribunal. The position in England is the same [*Armchair v Helical*].

46. It is therefore clear that if an expert is not independent and impartial, the question of weight becomes irrelevant. The expert must be excluded and any evidence they may seek to offer must be deemed inadmissible in its entirety, since allowing such expert evidence would inevitably hinder the truth-seeking function of the tribunal, compromise the fairness of the proceedings, resulting in a potential miscarriage of justice [*Hunt/Neudorf*].

B. Prof. John's lack of independence and impartiality justifies excluding his evidence

47. The appointment of Prof. John violates the fundamental obligations of impartiality and independence that are imposed on all experts. There are three main reasons for this violation; First, Prof. John has prejudged the subject matter of the arbitration **(I)**; second, Prof. John's previous engagement with RESPONDENT disqualifies him **(II)**; third, an outward appearance of bias arises from the relationship between Prof. John and Ms. Burdin **(III)**.

I. Prof. John has prejudged the subject matter of the arbitration

48. If an expert has reached a conclusion on the subject matter of the arbitration prior to providing his or her expert evidence, they have failed to satisfy their duty to be independent and impartial [*ICC Issues for Arbitrators to Consider Regarding Experts*, §III(A)(3)]. Prof. John has prejudged the subject matter of this arbitration. Specifically, during a break at a meeting concerning the replacement turbine for the Riverhead Tidal Power Plant, Prof. John discussed with one of RESPONDENT's representatives that if the Turbines were used in freshwater (as is the case with the turbines used in CLAIMANT's hydro power plant), they would be less likely to be affected by possible corrosion compared with turbines used in saltwater [*PO2 ¶15*]. This clearly demonstrates that Prof. John has already expressed his opinion concerning the precise subject matter of this case. He has done so without any evidence to support his opinion. It is already clear what the opinion he will offer in this arbitration will be. Prof. John lacks impartiality and independence and his opinion cannot assist this Tribunal in its essential fact-finding function.

II. Prof. John's previous engagement with RESPONDENT disqualifies him

49. Prof. John is unable to provide evidence in an independent and/or impartial manner as a result of his previous successful dealings with RESPONDENT. An expert's previous relationships with a party provides grounds for challenging that expert's evidence on the basis of lack of independence or impartiality [*Burianski/Lang*]. The extensive disclosure requirements in arbitration also suggest that previous engagement of the expert by a party form a basis for challenge [*Ashford*, p. 113]. Tribunals and courts have rejected the use of experts as 'hired guns' and have held that where a relationship between a party and an expert is so close that the expert is unable to provide an objective opinion,



such evidence should be inadmissible in its entirety [*Toth v Jarman*]. For instance, in *Liverpool v Goldberg*, the Court refused to admit an expert report because the defendant had had a close personal and professional relationship with the expert for several years. The Court considered that a reasonable observer might view the relationship as capable of affecting the views of the expert and render them unduly favourable to that party.

50. The following factors demonstrate that Prof. John will simply be used as a “hired gun”. Prof. John’s engagement with RESPONDENT dates back 15 years, to 2004, when both Prof. John and two of his former assistants were tribunal-appointed experts in another arbitration involving RESPONDENT. Those same two former assistants now hold managerial positions, having been hired by RESPONDENT in 2015 [PO2 ¶17]. Additionally, Prof. John was invited to the presentation of the new R-27V Turbine at the Hydro Power Fair in 2013 as a result of his “impressive” expert evidence in a previous arbitration case from 2005 [PO2 ¶17]. At the fair, Prof. John praised RESPONDENT’s Turbines for its ability to increase the inspection and maintenance intervals and stated that such features justified the Turbines’ premium price. [*Re’s Ex. R1*].
51. This evidence suggests RESPONDENT and Prof. John’s relationship is both close and long-standing. Prof. John and his former assistants have been involved with RESPONDENT for over a decade since their initial meeting. Each of them has also benefited from the relationship. Prof. John was instructed as an expert, while his former assistants were employed by RESPONDENT and now hold important senior positions. RESPONDENT is now able to rely on Prof. John to support its case in this arbitration. Moreover, Prof. John has already been invited to promote RESPONDENT’s Turbine at a fair. Since Prof. John is being favoured by RESPONDENT and is benefiting from their close relationship, he is more likely to be partial and provide biased evidence to maintain his close and long-standing relationship with RESPONDENT. A reasonable person would suspect that RESPONDENT favours instructing Prof. John due to their close links. RESPONDENT could easily influence the opinion Prof. John will provide.
52. Additionally, the above factors should be viewed in the broader context of this case. RESPONDENT is facing potential insolvency due to its problems with Trusted Quality Steel [PO2 ¶43]. This gives it an additional incentive to instruct an expert over whom they may have a substantial influence. In the present case, there are three other well-known experts who are both suitable and available to give evidence [PO2 ¶17]. Despite this, RESPONDENT appears to have chosen to work with Prof. John due to its close and long standing relationship with him.
53. For completeness, Prof. John’s lack of independence and/or impartiality would become especially evident if he fails to disclose – in its entirety – his previous relationship with RESPONDENT when submitting his report [*EXP v Barker*]. The appointment of Prof. John suggests RESPONDENT is



particularly eager to adduce expert evidence from an expert whom they have had previous dealings with to allow them to influence the expert's position.

III. The relationship between Prof. John and Ms. Burdin creates an outward appearance of bias

54. Prof. John and Mr. Burdin are presently engaged in a lawsuit against each other concerning a patent relating to a production process for turbine steel. Mr. Burdin is the husband of Ms. Burdin. Most people in the energy industry are aware of their marriage [PO2 ¶8]. Mr. Burdin, as a leading engineer for turbine production, receives around USD 5,000 every year from the co-ownership of the challenged patent [PO2 ¶10]. Although Ms. Burdin does not represent him in the case, she discusses the case with her husband. It can reasonably be assumed that she supports his claim as their financial interests are interwoven. The outcome of the case determines who will benefit from the co-ownership of the patent. Since Prof. John's financial interests and reputation are at stake, there is a certain degree of enmity between Prof. John and Ms. Burdin. Since Ms. Burdin is CLAIMANT's party-appointed arbitrator, a reasonable person may conclude that Prof. John is providing evidence in a biased manner against CLAIMANT due to his personal distaste towards Mr. and Ms. Burdin. At the very least, this creates an outward appearance of bias.

C. RESPONDENT acted in bad faith in appointing Prof. John

55. First, RESPONDENT deliberately attempted to compromise the composition of the Tribunal by appointing Prof. John **(I)**. Second, admitting Prof. John's evidence would harm the integrity of the Tribunal **(II)**. Third, the rules applicable to legal representatives apply *a fortiori* to experts **(III)**. Fourth, RESPONDENT unjustly insists it has not waived its right to challenge Ms. Burdin **(IV)**. Finally, CLAIMANT comes with clean hands and acted in good faith in appointing Ms. Burdin **(V)**.

I. RESPONDENT deliberately attempted to compromise the composition of the Tribunal by appointing Prof. John as its expert

56. RESPONDENT aims to use Prof. John's appointment as both a delay tactic and a method to remove Ms. Burdin. The obligation to act in good faith is a general principle in international arbitration. Parties must cooperate throughout the arbitration proceedings, provide truthful responses and not obstruct the proceedings. [*Kotuby/Sobota*]. The good faith principle applies to the admission of evidence [*Preamble IBA Rules* ¶3; *Berger/Kellerhals*, ¶1320]. It is also expressed in the Tribunal's requirement to act fairly and impartially, and adopt procedures suitable fairly, efficiently, and expeditiously to resolve the dispute [*Arts 14.4, 14.5 LCIA, Art. 2A DAL, Art. 9(2)(g) IBA Rules*].
57. Although Prof. John was not initially aware that Ms. Burdin was the arbitrator nominated by CLAIMANT, it is particularly telling that RESPONDENT only contacted Prof. John after it had received the Request for Arbitration with the nomination of Ms. Burdin. In fact, back in November



2018, Prof. John had mentioned the lawsuit against Ms. Burdin's husband in one of the Riverhead Tidal Power Plant meetings to one of his former assistants, who became RESPONDENT's project manager [PO2 ¶13]. Therefore, RESPONDENT must be taken as having acquired knowledge of the lawsuit between Mr. Burdin and Prof. John. Thus, RESPONDENT is intentionally attempting to compromise the composition of the Tribunal through appointing Prof. John, whom it can influence to provide biased evidence against CLAIMANT.

II. Admitting Prof. John's evidence would harm the integrity of the tribunal

58. A tribunal has the inherent authority to exercise such powers as are necessary to preserve the integrity and effectiveness of its proceedings [*Hrvatska v Slovenia*]. Admitting Prof. John's evidence would be contrary to the composition of the Tribunal as RESPONDENT aims to use such evidence in bad faith against CLAIMANT [*Guidelines 5, 6 and 26 of the IBA Guidelines on Party Representation*]. Since RESPONDENT knows there is enmity between Prof. John and Ms. Burdin, they intentionally put Prof. John in a position where he can provide biased evidence in favour of RESPONDENT.

III. The rules applicable to legal representatives apply *a fortiori* to experts

59. Art. 18.4 LCIA allows the Tribunal not to accept any proposed change to a party's legal representatives where this could compromise the composition of the Tribunal or the finality of any award (e.g. on the grounds of possible conflict). Moreover, a legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award [*Annex ¶2 LCIA Rules*]. In *Hrvatska*, the tribunal held that parties were not entitled subsequently to amend the composition of their legal team 'in such a fashion as to imperil the tribunal's status or legitimacy' and refused to allow such change [*Hrvatska v Slovenia*]. Similarly, the IBA Guidelines on Party Representation Rule 5 stipulates that once the Tribunal has been constituted, a person should not agree to represent a party in the arbitration if a relationship exists between the person and an arbitrator that would create a conflict of interest.
60. The same rationale applies in the case of experts. This is because the purpose of these rules is to protect the integrity of the tribunal and prevent parties from effectively benefitting from their own wrongdoing. Through appointing Prof. John as an expert, RESPONDENT has chosen to act against the spirit of these legal rules. Since the rationale is to protect the tribunal and ensure a fair arbitration, such rules should not be disapplied simply because of the particular means used by RESPONDENT to disregard them (i.e., in its instruction of an expert rather than legal counsel). RESPONDENT should not be allowed to nominate Prof. John as it may seek to rely on this very act to compromise the composition of the tribunal or the finality of any award.

IV. RESPONDENT unjustly insists that it has not waived its right to challenge Ms. Burdin



61. On 5 October 2019, RESPONDENT reiterated in a letter to the LCIA that the decision not to challenge Ms. Burdin should not be understood as a waiver of the right to challenge Ms. Burdin [PO2 ¶12]. However, Art. 10.3 LCIA Rules clearly states that a party challenging an arbitrator shall deliver a written statement of the reasons for its challenge to the LCIA Court, the Tribunal, and all other parties within 14 days of becoming aware of any grounds described in Art. 10.1 or 10.2. The LCIA Court construes the 14-day deadline strictly and does not hesitate to reject a challenge on the ground that it is out of time [*Scherer/Richman/Gerbay*, p. 172].
62. In this case, the time started to run - at the latest - when Ms. Burdin made the disclosure on 21 September 2019. The 14 days have now expired. RESPONDENT is no longer able to challenge Ms. Burdin. The LCIA Rules simply do not permit a “wait-and-see approach”, in order to ensure that issues are dealt with promptly and that neither party attempts to “delay bringing a challenge until a strategically convenient moment” [*LCLA Ref. 142683*, ¶268]. RESPONDENT’s very insistence that it was not waiving its right, without any legal foundation, suggests it was seeking to benefit from a strategic delay. This is another indication of bad faith.

V. CLAIMANT comes with clean hands and acted in good faith in appointing Ms. Burdin

63. Throughout the proceedings, CLAIMANT has acted in good faith. First, CLAIMANT did not appoint Ms. Burdin with a view to excluding Prof. John as a possible expert (1). Second, Ms. Burdin is independent and impartial (2). Third, Ms. Burdin has fulfilled her duties as an arbitrator in disclosing the potential conflict promptly and voluntarily (3).

1. CLAIMANT did not appoint Ms. Burdin to exclude Prof. John

64. RESPONDENT asserts that CLAIMANT appointed Ms. Burdin knowing of her relationship to Prof. John and hoping thereby to exclude Prof. John as a possible expert [*Letter 27 Sep 2019*]. This view is entirely misconceived.
65. Ms. Burdin is a well-regarded arbitrator who is frequently appointed in energy disputes. She has been involved in two other arbitrations concerning hydro energy plants and cavitation problems, which have no connection with the present proceedings [PO2 ¶8]. CLAIMANT also nominated Ms. Burdin in July 2019, before Prof. John was retained in 20 August 2019 by RESPONDENT. [*Form of Appointment by LCLA*; PO2 ¶15]. Additionally, CLAIMANT’s management was not aware of Prof. John’s contacts to Ms. Burdin when they appointed her [PO2 ¶8]. RESPONDENT argued that CLAIMANT ought to have been aware of their connection due to a local newspaper report published in December 2018 [PO2 ¶13]. However, the Request for Arbitration was made on 31 July 2019, almost 7 months after the publication of that report. Due to the lapse of time, the publication cannot be construed as having influenced CLAIMANT’s choice of arbitrator.



2. CLAIMANT did not act irregularly as Ms. Burdin is independent and impartial

66. RESPONDENT has implied that they will be challenging Ms. Burdin on the basis that some of her academic articles suggest that she is biased with regards to the subject matter of the arbitration [*Letter by Fasttrack 27 September 2019*]. Art. 12 DAL requires arbitrators to be impartial and independent. An arbitrator can be challenged if circumstances exist that give rise to “justifiable doubts”. According to the IBA Guidelines on Conflicts, an objective/reasonable third-party test is applied in assessing whether the circumstances would be construed as giving rise to justifiable doubts. The IBA Guidelines include Red, Orange, and Green lists which aim to assist in determining if certain facts would objectively give rise to justifiable doubts regarding the arbitrator’s impartiality and independence.
67. Publication of an article by an arbitrator can potentially fall either under the Orange or Green lists [¶¶3.5.2, 4.1.1 *IBA Guidelines on Conflicts*]. However, it falls under the Orange list [¶3.5.2] only when the publicly advocated positions relate directly to the case at hand and involve the same parties, or to cases involving similar facts [*Bühler/Feit*, p. 106; *Ghana v Telekom*]. In contrast, academic articles pertaining to legal issues in the abstract are insufficient to establish bias [*Born* p. 1888; ¶4.1.1 *IBA Guidelines*]. As long as the opinions expressed in the article are not based on the specific facts in the dispute, an arbitrator can remain impartial and independent, even though they may be partial to a certain position in law [*Daimsis/Pavlović*, p. 532; *Jensen v Misner; A v B*].
68. In two of her articles, Ms. Burdin has advocated that in many cases the mere “suspicion of defects” is sufficient to render the goods non-conforming. Neither article refers to the Parties involved in the present proceeding. Ms. Burdin’s articles were also published in 2016 and 2017, well before this arbitration commenced. It is therefore impossible for them to express opinions focused on the case. Moreover, as both an expert in energy disputes and as an arbitrator, it must be accepted that Ms. Burdin can distinguish between her own opinions and the matters of the case unless concrete evidence proves otherwise [*Moore v LAMIT*].
69. Where the circumstances do not fall within the (non-exhaustive) Red, Orange, and Green lists, they should be analysed on a case-by-case basis applying the objective test [*IBA Guidelines on Conflicts*, p. 19; *Luttrell*, p. 108; *Swiss Case no. 4A_506/2007*]. If an arbitrator has published an article demonstrating that he or she has prejudged the case or has a preconception in favour of or against a party, that may raise justifiable doubts as to their impartiality [*Harrison; Díaz-Candía*].
70. Here, however, there is no evidence that Ms. Burdin will prejudge any of the issues. Ms. Burdin solely presented an opinion on a particular legal issue in her articles and addressed the conformity of goods in a general way. Ms. Burdin’s articles and the current proceedings also concern different



subject matters. In her articles, Ms. Burdin referred to high-pressure gas turbines in a thermo power plant. The current proceedings concern a very specific high-pressure hydro turbine in a hydro power plant [PO2 ¶¶9]. It follows that no circumstances in the present case would lead a reasonable third person to have justifiable doubts as to her impartiality.

71. If an appearance of bias was found in the case of Ms. Burdin, this would suggest that any arbitrator would be prohibited from sitting where the case concerned a topic broadly, or indirectly, relevant to the arbitrator's published work. The practical consequences on appointing members of Tribunals would be significant, given the (potentially) limited number of specialist arbitrators.

3. Ms. Burdin disclosed the potential conflict promptly and voluntarily, fulfilling her duties as an arbitrator

72. Prior to the dispute, Ms. Burdin was not aware that RESPONDENT had a relationship with Prof. John. However, after reading the file, Ms. Burdin became aware that RESPONDENT wanted to submit an expert report by Prof. John. In the interest of utmost transparency, on 21 September 2019, she promptly disclosed the particulars of the potential conflict [Letter 21 September 2019]. There was no delay on her part in bringing the matter to the attention of the Parties.

D. Excluding Prof. John will not harm RESPONDENT's due process rights

73. RESPONDENT asserts that excluding Prof. John's expert report would violate its right to equal treatment, as it would be unable to instruct its preferred expert and would be unable to properly present its case. [Letter 27 September 2019] This is misconceived since neither its right to properly present its case (I), nor its right to equal treatment (II) would be harmed. A viable alternative is for the Tribunal to appoint its own expert (III).

I. The exclusion does not harm RESPONDENT's right to properly present its case

74. RESPONDENT's claim that the exclusion of Prof. John would prevent them from properly presenting its case is unlikely to succeed. Even if this Tribunal excludes Prof. John on the ground that he lacks independence, RESPONDENT would, no doubt, instruct another expert and there would be no interference with due process [Waincymer, p. 943]. There are at least three other well-known experts available who speak English and have comparable qualifications and experience in giving evidence in arbitration or litigation proceedings [PO2 ¶17].

II. The exclusion does not harm RESPONDENT's right to equal treatment

75. Art. 18 DAL does not require the Tribunal to ensure that both parties are treated identically. All that is required is that similar standards are applied to all parties [UNCITRAL 2012 Digest, p. 97; Triulziu v Xinyi]. The mere fact that exclusion of Prof. John may be disadvantageous to RESPONDENT's case does not equate to RESPONDENT being treated unequally.



76. RESPONDENT retains its right to appoint any other expert it sees fit, provided that appointment complies with the relevant legal obligations. In particular, the appointment must leave no reasonable doubt as to the absence of an appearance of bias.

III. A viable alternative is for the Tribunal to appoint its own expert

77. Alternatively, under Art. 21.1 LCIA Rules, the Tribunal may, after consultation with the parties, appoint one or more experts to report on specific issues in the arbitration. Tribunal-appointed experts frequently feature in energy arbitrations as objective expert opinions are crucial where such technical issues are involved. For example, tribunals in gas price review arbitrations routinely appoint their own experts, in addition to party-appointed experts [*Asom*].
78. This Tribunal's appointment of its own expert could strike a satisfactory middle ground. Following such measures, RESPONDENT would still retain its right to address the issue of whether the Turbines for the Greenacre Plant can be compared to those of the Riverhead Tidal Plant, while CLAIMANT's justifiable concerns of biased evidence would be resolved. The Tribunal could appoint its own expert in addition to RESPONDENT appointing a new, independent and impartial, expert. Alternatively, both Parties could agree not to appoint their own experts and to rely on the tribunal-appointed expert's evidence. This would ensure that both Parties are on equal terms with each other in terms of access to expert evidence.

ARGUMENTS ON SUBSTANCE

ISSUE 3. RESPONDENT has delivered non-conforming goods under Art. 35 CISG

79. The applicable law of the contract is Danubian law [*Cl's Ex. C2*]. Danubia is a contracting state of the CISG, and its contract law is a verbatim adoption of the PICC [*PO1 ¶4*].
80. Under Art. 35 CISG, the seller is obliged to deliver conforming goods. The characteristics explicitly established in the contract are the starting point for assessing conformity [*Art. 35(1) CISG; Schlechtriem/Schwenzer, Art. 35 ¶6*]. Where the relevant characteristics cannot be ascertained from the contract, Art. 35(2) must be considered [*Schlechtriem/Schwenzer, Art. 35 ¶13*]. The relevant provisions are Art. 35(2)(a) and Art. 35(2)(b), with the latter taking priority over the former [*Schlechtriem/Schwenzer, Art.35 ¶13*]. Any failure of the goods to conform to the agreed upon description will constitute a breach of the seller's obligations [*Delchi v Rotorex*]. Art. 35(3) may be invoked by a seller to excuse liability if the buyer knew, or could not have been unaware of, the defects at the time of concluding the contract.
81. RESPONDENT failed to deliver conforming goods. It did not deliver goods which conform to the contract, under Art. 35(1) CISG **(A)**. In the alternative, RESPONDENT failed to deliver goods that are fit for purpose under Art. 35(2)(b) CISG **(B)**. Additionally, they do not even meet the standard



of fitness for ordinary use under Art. 35(2)(a) CISG **(C)**. RESPONDENT is not exempt from liability under the provisions of Art. 35(3) CISG **(D)**.

A. RESPONDENT failed to deliver conforming goods under Art. 35(1) CISG

82. RESPONDENT claims that the Turbines are conforming since it cannot be proven that they are affected by corrosion or cavitation [*Response* ¶15]. However, the contractual threshold of conformity requires the Turbines to have a lengthy uninterrupted operational life.
83. RESPONDENT's obligation is to deliver goods which are "of the [...] quality and description required by the contract" [*Art. 35(1) CISG*]. The Parties' agreement must be construed broadly under Arts. 8 and 11 CISG, taking into account pre-contractual negotiations and the Preamble to SA **(I)**. Art. 22(2) SA does not exclude the operation of Arts. 8 and 11 CISG **(II)**. Accordingly, RESPONDENT failed to conform with the contractual standard of a lengthy uninterrupted operational life **(III)**.

I. The Parties' agreement must be construed broadly under Arts. 8 and 11 CISG

84. Under CISG, the written contract does not represent the entirety of the agreement between the Parties. Case law on Art. 8 confirms that a liberal interpretation that takes into account the commercial objective of the contract is appropriate [*Hideo v Caterbury*]. Moreover, it is a corollary of the wide ambit of Art. 8 that the parol evidence rule does not operate to bar evidence of negotiations or agreements which vary the contractual terms [*Calzaturificio v Olivieri*]. Therefore, prior negotiations may be considered to determine the Parties' agreement [*Art. 8(3) CISG*]. The contract need not be concluded in, or evidenced by, writing [*Art. 11 CISG*].

II. Art. 22(2) SA does not exclude the operation of Arts. 8 and 11 CISG

85. RESPONDENT may attempt to rely on Art. 22(2) SA to prevent adducing any extrinsic evidence which varies the SA. "Integration clauses" provide that the contract constitutes the entire and final agreement. The relationship between integration clauses and Arts. 8 and 11 is necessarily such that the Articles take precedence [*CISG-AC-3; MCC-Marble v Ceramica*]. Whilst Art. 6 allows Parties to exclude the application of the CISG or of any part thereof, Art. 8 must nonetheless be used to determine the true intentions of the Parties. Accordingly, the written contract is only one of the relevant considerations. This means that there shall be no automatic presumption that a term is intended to be an "integration clause" [*CISG-AC-3; MCC-Marble v. Ceramica*].
86. The PICC may be used to interpret the CISG to the extent that it clarifies the rules therein, particularly where the provisions are sufficiently similar [*Vogenaer, Preamble I* ¶122]. Moreover, Art. 7(2) CISG identifies the PICC as an interpretative aid and an elaboration on the general principles [*Vogenaer, Preamble I* ¶123]. The wording of Art. 8(3) CISG is very similar to that of Art. 4.3 PICC, so the guidance on the latter may elucidate the application of the former.



87. Art. 4.3(a) PICC rejects the parol evidence rule. The parties may therefore bring extrinsic evidence, particularly of preliminary negotiations, to vary, contradict or supplement the writing [*Vogenaue*, Art. 4.3 ¶29]. Where there is an integration clause, the evidence may not, of itself, constitute the basis for an obligation, but any contractual undertaking shall be construed in accordance with the expectations of the parties during negotiations [*ICSID Arb/06/18*, ¶115].
88. Art. 22(2) SA might appear to be an integration clause, but its wording does not support this conclusion. The phrase “entire agreement between the Parties” may equally be construed as the entire agreement at the time the contract was concluded. Unlike traditional integration clauses, Art. 22(2) does not establish any conditions for varying the agreement. In light of the broad view of agreement under the CISG [*CI Memo* ¶84], Art. 22(2) SA cannot be a real integration clause, and thus additional evidence besides the written contract may be considered.

III. RESPONDENT fails to conform with the contractual standard of lengthy uninterrupted operational life

89. The Parties’ expectations during negotiations were clear: CLAIMANT desired minimal downtime during construction and operation of the plant. Indeed, RESPONDENT emphasised that “due to its design and the materials used [the Turbine] allowed for longer inspection and maintenance intervals” [*Re’s Ex. 2* ¶2]. The need for reduced downtime was also communicated to all Parties during the Greenacre tender process [*CI’s Ex. C1* ¶3; Art. 2(1)(e) SA]. These expectations were made abundantly clear during negotiations leading to the conclusion of the SA. RESPONDENT even described the need for smooth operation as a “well understood interest” [*CI’s Ex. C5*]. The SA itself explicitly states that the anticipated lifetime of the plant is 40 years [Art. 2(1)(e) SA]. Additionally, RESPONDENT was shown the tender documents submitted by CLAIMANT to Greenacre, and thus knew of the importance of “lengthy non-interrupted availability of the plant” [*CI’s Ex. C1* ¶3]. In fact, RESPONDENT made suggestions aimed at increasing the length of availability of the plant [*CI’s Ex. C1* ¶3], thus representing that it was keen to achieve the goals expressed by CLAIMANT. These facts are acknowledged by RESPONDENT [*Response* ¶5]. Finally, the Preamble to the SA explicitly refers to the need for compliance with the requirements of the tender and for the time period between the repairs to be lengthy [*Preamble to SA* ¶¶5-7].
90. It follows that the minimum standard of conformity under the SA is such that the possibility of a lengthy period of downtime is unacceptable. Any suggestion that the goods do not meet this threshold must amount to a breach of the standard in light of the importance of continuous operation, which CLAIMANT took numerous steps to convey. Should a turbine break down, this would lead to a period of downtime of at least 4 months, or even of several years if the complete plant is affected by corrosion [*PO2* ¶45]. This is patently inconsistent with the terms of the SA. This



conclusion is also in line with the definition of breach in the CISG, which encompasses any failure to conform to the requisite standards [*Cl Memo* ¶80].

B. RESPONDENT failed to deliver goods that are fit for purpose under Art. 35(2)(b) CISG

91. RESPONDENT suggests that due to the inability of establishing that the Turbines were made with an insured charge of steel, no defect can exist [*Response* ¶15]. RESPONDENT, however, misunderstands the content of its duties. Owing to RESPONDENT's skill and experience in the industry, CLAIMANT relied on it to provide a product whose quality could be guaranteed beyond doubt. Its inability to meet this requirement constitutes the breach.
92. Pursuant to Art. 35(2)(b) CISG, RESPONDENT is under a duty to deliver goods which are fit for the purpose expressly or impliedly made known to it at the time of the conclusion of the contract. Each of Art. 35(2)(b)'s three elements [*Schlechtriem/Schwenzler, p. 606*] have been met. First, RESPONDENT knew the purpose of the goods at the time of contracting **(I)**. Second, CLAIMANT relied on RESPONDENT's skill and judgement in the transaction **(II)**. Third, it was reasonable for CLAIMANT to rely on RESPONDENT's skill and judgement **(III)**. Finally, RESPONDENT breached its obligation **(IV)**.

I. RESPONDENT knew the purpose of the goods at the time of contracting

93. The knowledge requirement will be fulfilled if a reasonable seller could have recognised the purpose of the goods from the circumstances [*Schlechtriem/Schwenzler, Art. 35* ¶23]. While the purpose must be known to the seller, it does not need to be a contractual term [*Schlechtriem/Schwenzler, Art. 35* ¶22]. The particular purpose must be "sufficiently [clear] so that the seller has an opportunity to decide whether or not he wishes to take on the responsibility of selecting goods that are appropriate" [*Huber/Mullis, p. 138*]. The more specific the purpose, the more the seller will be expected to do to ensure compliance [*Huber/Mullis, p.138*].
94. The SA is sufficiently clear to guarantee that RESPONDENT knew of the purpose of the goods it was supplying by its explicit reference to Greenacre [*Art. 1 SA*]. The Preamble reinforces this conclusion, emphasising that "one of the important considerations for awarding the tender will be to minimise the risk of having to rely on energy produced by non-renewable sources by providing a largely uninterrupted supply of hydro energy"; and that a lengthy period between the repair and maintenance intervals, as well as a short maintenance period, were expected [*Preamble to SA* ¶¶5-6].
95. Additionally, any other considerations may be taken into account [*Condensate Crude Oil Mix Case*]. The negotiations, in addition to the SA, reveal significant indicators that would have allowed a reasonable seller to infer the required quality of the goods. RESPONDENT knew CLAIMANT chose to contract with it because of its ability to provide a turbine that was designed to allow for longer inspection and maintenance intervals [*Re's Ex. R2* ¶2]. Further, RESPONDENT made clear that the



material used for the turbine was an important reason for less frequent maintenance periods [Re's Ex. R1]. The price was the highest in the turbine market [Re's Ex. R1]. These factors all suggest that RESPONDENT knew it was taking on a higher threshold of 'fitness for purpose' and that it had to provide a superior product to those offered by its rivals on the market.

II. CLAIMANT relied on RESPONDENT's skill and judgement in the transaction

96. It is evident that CLAIMANT did in fact rely on RESPONDENT's skill and judgement, and on their representations about the quality of the material. Even though CLAIMANT carried out an acceptance test [Cl's Ex. C4], this was an industry standard test and unsuitable for detecting steel quality [PO2 ¶3]. This matter was left within RESPONDENT's purview, as CLAIMANT accepted their guarantee that the steel was certified *as per* the documentation RESPONDENT provided [PO2 ¶5].

III. CLAIMANT was reasonable in relying on RESPONDENT's skill and judgement

97. RESPONDENT is highly regarded in the turbine industry, being the developer and producer of the new turbine [Re's Ex. R1; Re's Ex. R2 ¶3]. They have experience in the manufacturing of these turbines at Riverhead Tidal Power Plan in Equatoriana, as well as 6 other turbines [Cl's Ex. C3; PO2 ¶29]. RESPONDENT signing the SA is sufficient in itself to establish that reliance on their skill and judgement was reasonable [Cl's Ex. C2], because it must be taken to have contract in good faith. Given RESPONDENT's position, it was expected that all the necessary tests were carried out by RESPONDENT. This is confirmed by the fact the particularly onerous tests required to assess the quality of the material can only reasonably be carried out by the manufacturer [PO2 ¶3]. This is a globally accepted practice and the norm in the industry is for RESPONDENT to bear the responsibility for carrying out these tests [*The Second Hand Bulldozer Case*]. Thus, if RESPONDENT cannot trace the source of the material and its quality, it has not complied with its responsibility.
98. Further, in light of RESPONDENT's expertise and the significantly higher contractual price agreed, it was reasonable and even *expected* that CLAIMANT would have relied on their skill and judgement. CLAIMANT had no choice but to rely on the skill and judgment of RESPONDENT as they were unable to test that the turbine material was fit for purpose without destroying and replacing operating parts of the turbine [PO2 ¶3]. This would have led to increased periods of downtime and would have been directly inconsistent with CLAIMANT's commercial objectives.

IV. RESPONDENT breached its obligation to provide goods that are fit for purpose

99. RESPONDENT failed to ensure that the materials were up to standard due to "a mistake in [their] internal product management system" [Cl's Ex. C5]. In light of the standard of conformity and the reliance CLAIMANT placed on RESPONDENT, the failure to check the steel and provide original certification was in itself a breach [PO2 ¶5].



C. The goods delivered by RESPONDENT do not meet the standard of fitness for ordinary use under Art. 35(2)(a)

100. RESPONDENT's argument hinges on the inability to prove that the Turbines were made with an uninsured charge of steel [*Response* ¶17]. However, for the Turbines, a mere possibility of a defect represents a breach of duty. This is especially so since RESPONDENT's faulty records and lack of quality tests are the reasons why verifying the source and quality of the material is impossible.
101. RESPONDENT did not deliver goods which were fit for the same purpose for which goods of the same description would ordinarily be used, as required by Art. 35(2)(a) CISG. The relevant criterion focuses on the justifiable expectations of the buyer, considering all relevant circumstances **(I)**. The circumstances point to a strict conformity standard **(II)**. Moreover, a higher threshold is in line with the PICC and other international instruments **(III)**. Against this standard, RESPONDENT's failure to provide goods that are certainly made with quality materials amounts to a breach **(IV)**.

I. The standard under Art. 35(2)(a) relates to the buyer's justifiable expectations

102. The fitness of the goods must be determined by reference to the objective view of a person in the trade sector concerned [*Schlechtriem/Schwenzler, Art. 35* ¶15], but this should not be taken to mean that the criterion is of 'average quality' [*Schlechtriem/Schwenzler, Art. 35* ¶16]. While there is debate over the threshold, the preferable view is to focus on the justifiable expectations of the buyer, having regard to the contract price and all other relevant circumstances [*Schlechtriem/Schwenzler, Art. 35* ¶16; *Condensate Crude Oil Mix Case*]. This aligns with the international character of the Convention [*Art. 7(1) CISG*] and with the *travaux préparatoires*: 'average quality' was deliberately excluded as a threshold; while the common-law 'merchantability' standard was considered too uncertain [*Condensate Crude Oil Mix Case* ¶118]. Therefore, the relevant question is what would be objectively reasonable for the buyer to expect in light of all the circumstances.

II. The circumstances point to a strict conformity standard

103. CLAIMANT paid a large premium for the Turbines, significantly more than it would have paid for turbines manufactured and supplied by competitors [*Re's Ex. R1*]. RESPONDENT also had specific expertise in all aspects of the manufacturing and installation process. Given RESPONDENT's expertise and the premium contract price, it is reasonable to expect RESPONDENT would aim for the highest possible standard, as it contracted to ensure the Turbines meet their "anticipated 40-year lifetime" [*Art. 2(e) SA*]. The Turbines were also advertised as incorporating the latest technology and the most efficient on the market [*Re's Ex. R1*].
104. Durable goods must remain fit for purpose for a certain period [*Schlechtriem/Schwenzler, Art. 35* ¶15]. In a case concerning engines designed for long-life operation, a German court implied a warranty of long-term operational life (for several years) despite a lack of agreement between the parties to



that effect [*Globes Case*]. The Turbines were expected to have a 40-year lifespan [*Art. 1(e)(i) SA*]. Thus, any suspicion that the Turbines may be faulty after only a few years is unacceptable.

105. A suspicion of defects may also lead to liability under Art. 35(2)(a) CISG [*Schlechtriem/Schwenzer, Art. 35 ¶15*]. In some awards concerning contracts for the sale of food, even a suspicion of contamination which cannot be dispelled may constitute non-conformity [*Frozen Pork Case*]. This is materially similar to the present case insofar as any possible non-conformity may lead to exponentially greater damage: the whole turbine may require full replacement as a consequence of a defect in the steel [*CI's Ex. C7*]. Had this suspicion been disclosed pre-contractually, CLAIMANT would have never entered into the transaction, much less for the agreed price.

III. A higher than average threshold is in line with relevant international legal instruments

106. The PICC may be used as an interpretative aid to similar provisions in the CISG [*CI Memo ¶86*]. Art. 5.1.6 addresses the situation where the quality of performance is not determinable from the contract in an almost identical way to Art. 35(2)(a) CISG. For this reason, it may be used to supplement the latter provision.
107. The minimum threshold established in Art. 5.1.6 PICC is average quality. In highly specific transactions, it may not be possible to identify the average quality, so the relevant standard will instead be reasonableness [*Vogenauer, Art. 5.1.6 ¶6*]. This means that the performance required is of higher than average quality [*Vogenauer, Art. 5.1.6 ¶8*]. Examples of such transactions are where the obligor has specific expertise of the kind of performance provided [*Off Cmt 3 Art. 5.1.6, p. 161*] or where the contract price is particularly high [*Vogenauer, Art. 5.1.6 ¶8*]. Both of these examples are applicable on the facts of this case: RESPONDENT is an expert in the turbine industry and the price is not only the highest in the market [*Re's Ex. R1*], but also represents a substantial sum: USD 40 million in total [*Art. 4(1) SA*]. Accordingly, CLAIMANT is entitled to expect nothing short of the Turbine being constructed and performing to a high standard.
108. The jurisprudence on Art. 2(2)(d) of the EU Directive 99/44/EC has also been identified as an interpretative aid to Art. 35(2)(a) [*Schlechtriem/Schwenzer, Art. 35 ¶15*], since the Directive similarly requires goods to “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller”. In relation to pacemakers, the ECJ noted that a mere suspicion that they may have a defect rendered them non-conforming. There was no requirement to establish actual defects [*C-503/13; C-504/13*]. The possible consequences of a malfunctioning turbine are very serious, and include the potential destruction of the generator or even the entire plant [*Re's Ex. R3*]. For this reason,



the Turbines should be treated in the same way as pacemakers, such that a mere suspicion – which RESPONDENT cannot dispel through its own mistake – is equal to non-conformity.

IV. RESPONDENT did not provide conforming goods

109. RESPONDENT argues that the risk of damage is immaterial and “something completely different than a defect” [*Response* ¶15]. RESPONDENT’s representatives went to great lengths to downplay such risk [*Re’s Ex. R2* ¶8]. However, this fails to grasp the aforementioned CISG and PICC standards. In light of the entire factual background, any suggestion that a product, which has a 70% chance of containing improperly examined steel, will meet the justifiable expectations of the buyer is wholly unacceptable. Had this information about the Turbines been disclosed before contracting, CLAIMANT would have never agreed to purchase the product.
110. Moreover, RESPONDENT is attempting to rely on an uncertainty which cannot be dispelled entirely through its own fault: had RESPONDENT’S records been adequately stored and maintained, it could have provided accurate information about the provenience of the steel. As the situation stands, however, it cannot [*Cl’s Ex. C5; Response* ¶17]. It is clearly against established principles to allow a party to be excused from liability because of its own mistake [*CISG AJCL*]. RESPONDENT’S failure to prove that the Turbines were made with an insured charge of steel should be held against it. Not only did RESPONDENT fail to maintain accurate records of its materials, it also failed to perform any quality checks [*PO2* ¶18]. This manifest carelessness is unacceptable, and it demonstrates why RESPONDENT cannot guarantee the quality of the steel.
111. RESPONDENT argues that the Riverhead accident cannot be used as evidence of a possible non-conformity [*Response* ¶16]. This is patently untrue: the possibility that the accident was caused by defective materials cannot be eliminated [*Cl’s Ex. C3*], and the assertion that the Greenacre Turbines were made from a different charge of steel is unsubstantiated. RESPONDENT admits that it cannot trace the provenience of the steel used at Greenacre [*Cl’s Ex. C5*], so they cannot state for certain that the projects were made with different charges of steel.
112. In light of the above factors, RESPONDENT, by failing to provide a turbine about which any suspicion of non-conformity can be dispelled, has breached its obligations under Art. 35(2)(a).

D. RESPONDENT may not invoke the exemption of liability under Art. 35(3)

113. A seller is only exempt from liability if the buyer knew, or could not have been unaware, of the defects at the time of conclusion of the contract [*Art. 35(3) CISG*]. This only relates to Art. 35(2), and not to an express warranty under Art. 35(1) [*CISG Draft Secretariat Commentary Art. 33, No 14*].
114. Whether the buyer knew or could not have been unaware of the defects requires examining circumstances such as the nature of the goods, the respective skill and experience of each party, and the reasonableness of an examination by the buyer [*Schlechtriem/Schwenzler, Art. 35* ¶38]. There



is a clear imbalance in RESPONDENT's favour with regard to the Parties' skill and experience in building turbines [*Cl Memo* ¶96], and CLAIMANT carried out a reasonable acceptance test in light of the circumstances [*Cl Memo* ¶97].

115. CLAIMANT was clearly unaware at the time of sale, and at the passing of the risk, of the potential non-conformity [*Cl's Ex. C4*]. CLAIMANT performed a standard acceptance test [*PO2* ¶3]. It was only afterwards that CLAIMANT learned of the fraud by Trusted Quality Steel when it was reported in the news [*Cl's Ex. C4*]. Thus, RESPONDENT cannot rely on Art. 35(3) to exempt it from liability.
116. In addition, liability cannot be excused, even if the buyer knew of the lack of conformity, when the buyer insisted on perfect goods [*Schlechtriem/Schwenzer, Art. 35* ¶39]. In light of the circumstances discussed above, CLAIMANT may be said to have insisted on perfect – or close to perfect – goods. RESPONDENT simply cannot escape liability in this case.

ISSUE 4: CLAIMANT is entitled to substitute turbines

117. CLAIMANT is entitled to the manufacture, delivery, and installation of substitute turbines by RESPONDENT. The SA does not restrict CLAIMANT's right to substitute goods under Art. 46(2) CISG in the event of a fundamental breach **(A)**. The non-conformity of the Turbines constitutes a fundamental breach providing CLAIMANT with an entitlement to substitute turbines **(B)**.

A. The limitation of liability clause does not apply

118. The SA does not restrict CLAIMANT's right to substitute goods under Art. 46(2) CISG if the non-conformity is fundamental. First, Art. 19 SA does not exclude or limit remedies under Art. 46 CISG **(I)**. Second, Art. 19 SA does not preclude the replacement of runners **(II)**.

I. Art. 19 SA does not exclude or limit remedies under Art. 46 CISG

119. CLAIMANT's right to substitute goods under Art. 46 CISG is not limited by Art. 19 SA. Under Art. 6 CISG, parties may derogate from or vary the effect of CISG provisions by a contractual term of their contract. It follows that the remedies provided in Art. 46 CISG is exercisable by CLAIMANT unless the SA expressly excludes or limits those remedies. There is clearly no such restriction here.
120. First, Art. 19 SA only applies to monetary damages. The heading of Art. 19 SA is "LIQUIDATED DAMAGES and LIMITATION OF LIABILITIES". The connector "and" indicates the subjects before and after it belong to the *same* category of remedy. Liquidated damages are monetary in nature. Thus, the limitation must refer to limitation of *monetary* liabilities. If the limitation is intended to apply to substitute goods, it would have made more sense to separate liquidated damages and limitation of liabilities into two separate terms. Further, it is notable that Art. 19 SA, being one of the longest and most extensive clauses in the SA, would fail to mention substitute goods if it was to restrict the remedies available under Art. 46 CISG. Art. 19(1)-(3) SA sets out the agreed *monetary* damages payable to CLAIMANT upon breach of certain obligations by



RESPONDENT. Art. 19(4)-(6) provides that CLAIMANT can prove higher monetary damages than the agreed sum, but that it should not exceed USD 20 million. Again, the comparator ‘higher’ would only sensibly have been used to compare the same type of remedy: monetary damages. It makes no linguistic sense to compare monetary damages with the right to substitute goods.

121. Second, the Parties’ negotiation history clearly demonstrates that Art. 19 SA is not intended to restrict any right to substitute goods. In determining the intent of contracting parties, Art. 8(3) CISG provides that consideration is given to all relevant circumstances, including *the negotiations* and *any subsequent conduct*. As RESPONDENT’s CEO Mr. Fourneyron stated, the limitation of liability clause was included at the demand of RESPONDENT in return for agreeing to the liquidated damages clause. For RESPONDENT, it was “crucial” to limit its potential monetary liability in the event of major breakdowns [*Re’s Ex. R2 ¶6*]. Hence, the negotiation history demonstrates Art. 19 SA was included not with a view to exclude or limit the right to substitute goods under CISG.
122. Thus, the limitation under Art. 19 SA does not affect CLAIMANT’s rights under Art. 46 CISG.

II. Art. 19 SA does not preclude the replacement of turbine runners

123. Alternatively, if it is found that Art. 19 SA does limit remedies under Art. 46 CISG for fundamental breaches, it is nevertheless possible to replace the existing turbine runners. Art. 19(6) limits the total liability to USD 20 million. The production cost of each turbine runner is USD 4 million, meaning the cost of two runners is only USD 8 million. Thus, CLAIMANT would nonetheless be entitled to relief in the form of two substitute turbine runners.

B. CLAIMANT is entitled to substitute goods under Art. 46(2) CISG

124. The standard of fundamental breach is contractually defined and lowered by the SA **(I)**. Applying this lowered standard of fundamental breach, the non-conformity of the Turbines is fundamental and provides CLAIMANT with an entitlement to substitute goods **(II)**. In the alternative, CLAIMANT also satisfies the default standard of fundamental breach under Art. 25 CISG **(III)**. Finally, the detriments suffered or that will likely be suffered by CLAIMANT are foreseeable and the request for substitute goods was made within a reasonable time **(IV)**.

I. The threshold of fundamental breach is lowered by the SA

125. Under Art. 6 CISG, parties may derogate from or vary the effect of CISG provisions by a term of their contract. This includes the ability to contractually define the standard of fundamental breach for the purpose of their transactions [*Schlechtriem/Schwenzer, Art. 25, ¶25*]. In this case, the Parties lowered the threshold required to constitute a fundamental breach by including Art. 20 SA.
126. First, Art. 20 SA is intended to modify the standard of fundamental breach under Art. 25 CISG. Art. 20(2)(d) SA defines fundamental breaches as those which ‘deprive the [CLAIMANT] of what it is entitled to expect under the contract’. Notably, Art. 20(2)(d) is almost a verbatim adoption of



Art. 25 CISG. Art. 25 CISG defines fundamental breach as one that “substantially...deprive[s] [CLAIMANT] of what he is entitled to expect under the contract”. The omission of “substantial” in Art. 20(2)(d) is not accidental, as the SA was the product of extensive negotiations where the Parties made both demands and concessions. For instance, CLAIMANT accepted an entire agreement clause in return for a favourable dispute resolution clause [*Re’s Ex. R2 ¶¶6*]. It is indisputable that both Parties intended to lower the standard of fundamental breach under Art. 25 CISG [*PO2 ¶¶4*].

127. Second, while the heading of Art. 20 SA is “TERMINATION FOR CAUSE”, its application is not restricted to terminations. Art. 20(1) SA provides for CLAIMANT’s right to terminate if RESPONDENT commits a fundamental breach. Art. 20(2) SA goes on to define fundamental breach. Notably, Art. 20(2) SA does not restrict its application to the issue of termination. Under Art. 8(3) CISG, it is relevant to consider the negotiation process. In drafting Art. 20(2) SA, the Parties intended to lower the standard of fundamental breach under Art. 25 CISG [*PO2 ¶¶4*]. The contracting Parties must have known that Art. 25 CISG was also relevant to the issue of substitute goods under Art. 46 CISG. If the Parties intended to lower the threshold only with reference to termination, they would have done so expressly. Indeed, it would be have been inconsistent for the Parties to provide a lower standard of fundamental breach for termination while maintaining a higher standard for Art. 46 remedies. This is because termination is considered an “extreme case” for both Parties, particularly for the SA, which is a long-term contract [*PO2 ¶¶4*]. It would be nonsensical if the threshold to bring about the worst outcome - one which is in neither party’s interest - is lower than that which provides a more amicable solution by the provision of substitute goods under Art. 46 CISG.

II. The non-conformity satisfies the lowered contractual threshold of fundamental breach

128. The principles for ascertaining a fundamental breach is uncontroversial. The tribunal is to have regard to all actual *and* potential negative consequences of a breach [*Pracy “A” v MWD*]. The non-conformity of the Turbines delivered by RESPONDENT deprives CLAIMANT of its legitimate expectation under the SA, thus satisfying the (lower) contractual standard of fundamental breach. First, CLAIMANT suffers the detriment of an earlier inspection date **(1)**. Second, there is a high likelihood of frequent future interruption due to increased need for inspections **(2)**. Finally, RESPONDENT failed to adduce authentic certificates that evidenced the quality of the steel **(3)**.

1. CLAIMANT suffers the detriment of an earlier inspection date

129. Firstly, CLAIMANT is unable to benefit from its expectation of long intervals between inspections of the Turbines. This expectation is based on the SA as well the negotiating history. The SA’s preamble is relevant in considering the Parties’ obligation and duties [*Schlechtriem/Schwenzler, Art. 8,*



¶30]. Further, in considering CLAIMANT's legitimate contractual expectation has, it does not matter that the expectation is not part of the main terms of the contract [*Case VIII ZR 394/12*].

130. In the SA, the preamble expressly states "the time period between the repair and the maintenance intervals should be lengthy and conversely the repair and maintenance period should be short". CLAIMANT's expectation that there would be a long initial period of non-interruption after installation is confirmed by Art. 2(1)(d) SA, which provides that RESPONDENT "is to perform the first inspection of the turbines three years after the start of operation". The Turbines started operating on 19 September 2018 [*Request ¶11*]. Due to RESPONDENT's failure to ensure its Turbines were produced with good quality steel and to present quality certificates evidencing the quality of steel used, the first inspection must be pulled forward from September 2021 to September 2020. Notably, RESPONDENT suggested the first inspection be pulled-forward because it likewise has substantial reason to believe its Turbines were produced from defective steel [*Re's Ex. R4*].

2. There is a high likelihood of frequent future interruption due to increased need for inspection

131. Second, it is very likely that CLAIMANT will be deprived of its expectation that intervals between future inspections will be long. In determining whether the non-conformity is fundamental, it is relevant to consider the purpose for which the goods were bought [*ThyssenKrupp v Sinochem*]. CLAIMANT acquired the Turbines for the hydro plant which is intended to be the main energy production unit of Greenacre, so as to eliminate the need for non-renewable energy. RESPONDENT represented that the Turbines cost 10% more than their main competitor, the Gorlov T-9.6.1C, and that they have become the most expensive turbine in the market. RESPONDENT further represented that this higher price was justified because R-27V Francis turbines benefited from increased inspection and maintenance intervals by 1-2 years [*Re's Ex. R1*]. This expectation is further captured by the SA's preamble, which reads RESPONDENT "has recently released its new and innovative Francis Turbine R-27V" which "complies with the requirements and considerations as set out in the tender". This refers to largely uninterrupted supply of hydro energy. Even if the Turbines do not show major corrosion on the first inspection, there remains a significant risk given that no one can be certain of the quality of the steel used without a destruction of the turbine runner by metallurgical examination [*PO2 ¶35*]. Thus, if the Turbines are not replaced, it is likely that inspection will be frequent in the future.

3. RESPONDENT failed to adduce authentic certificates of the quality of steel

132. Third, CLAIMANT is also deprived of its contractual expectation because RESPONDENT failed to prove the quality of steel used for manufacturing the Turbines. RESPONDENT maintains that CLAIMANT has failed to show the Turbines are defective [*Response ¶15*]. The extreme difficulty of ascertaining the quality of the Turbines is, however, attributable RESPONDENT's own mistake in its



internal product management system [*CI's Ex. C5*]. Without such a mistake, it would have been possible to determine whether the steel used to produce the Turbines was affected by the fraud [*PO2 ¶5*]. Since the system was erased in 2017, RESPONDENT has no basis to claim that the Turbines were produced with certified steel when the Turbines were delivered in 2018 [*PO2 ¶5*].

III. Alternatively, the non-conformity is fundamental as it fundamentally deprives CLAIMANT of their contractual expectations

133. In the alternative, the non-conformity of the Turbines is so severe that it fundamentally deprives CLAIMANT of its legitimate expectation under the SA, thus satisfying the default standard of fundamental under Art. 25 CISG. The non-conformity will likely cause the Turbines to breakdown long before the end of their expected lifetime **(1)**. There is also a high likelihood that CLAIMANT will be required to pay heavy penalties to Greenacre for the interruption caused by the non-conformity **(2)**. Finally, the defects cannot be cured without causing further unreasonable interruption to CLAIMANT's business or putting CLAIMANT in serious financial risk **(3)**.

1. The Turbines will likely break down in the near future

134. First, the extent of non-conformity is fundamental. A key factor in considering whether a breach is fundamental under Art. 25 CISG is whether it is sufficiently serious [*Huber/Mullis, p.217*]. In this case, it is likely that the Turbines will break down long before their expected 40 year-lifetime [*CI's Ex. C2*], constituting a serious and fundamental breach. After just two years, the Riverhead turbines had to be replaced due to excessive corrosion [*Request ¶12*]. As RESPONDENT's CEO acknowledged, the probable cause of the Riverhead turbine damage was due to defective steel [*CI's Ex. C5*]. It is highly likely that the Greenacre Turbines will meet the same fate as 70% of steel used by RESPONDENT came from Trusted Quality [*PO2 ¶24*]. Of course, the Riverhead turbines are used in saline water, while the Greenacre Turbines are used in freshwater. However, this would not make a big difference if the steel used to produce the Greenacre Turbines is defective, as the water pressure on the Greenacre Turbines is much higher [*PO2 ¶32*].

2. CLAIMANT will be subjected to heavy financial penalties as a result of non-conformity

135. Second, the pulled-forward inspection date of September 2020 is a detriment that fundamentally deprives CLAIMANT of its contractual expectations. For the reasons discussed above, CLAIMANT is fundamentally deprived of its entitlement to a 3-year period of smooth operation without the interruption of inspection. CLAIMANT has also been fundamentally deprived of its ability to rely on the SA. After entering into the SA, CLAIMANT agreed to amend the Council Contract by inserting an availability guarantee, which included a penalty clause. The penalty clause provides that "HydroEN guarantees an availability of the Greenacre plant of at least *335 days per year* with a



production capacity of 500MW. Every *third year the availability guarantee is reduced*⁷ for the necessary inspection [CI's Ex. C6]. The reduction in the availability of the third year is not a random number. It is of course based on the SA's 3-year first inspection period [CI's Ex. C2] and RESPONDENT's representation that the Turbines *increased* the inspection interval by *1-2 years*.

136. During the pulled-forward inspection period, CLAIMANT will not be protected by the reduced guarantee period in the Council Contract. It takes at least two turbines to produce 500MW of capacity. As inspection of *each* turbine takes 2-3 weeks, this means the 500MW target will not be met for 4-6 weeks, rendering CLAIMANT in breach of its obligations under the Council Contract.
137. While the Council may apply a more lenient standard of 305 days per year to the 2020 inspection [PO2 ¶42], CLAIMANT will still suffer fundamental detriment. RESPONDENT's CEO acknowledged that any repair would take 4-7 months, which would far exceed the grace period [CI's Ex. C7].

3. The non-conformity cannot be reasonably cured by RESPONDENT

138. Third, the breach is incapable of being cured without further irreparable damage to CLAIMANT's existing contractual obligation with the Greenacre Council. As such, the non-conformity is fundamental even under the default Art. 25 CISG standard [Huber/Mullis, p. 217].
139. Repair is not a suitable option for CLAIMANT. CLAIMANT is therefore entitled to substitute goods [Schlechtriem/Schwenzler, Art. 46 ¶35]. CLAIMANT's primary concern is that repairing the Turbines or the runners would cause further unacceptable disturbance to its business, which makes repair an unreasonable option [Huber/Mullis, p. 204]. Any repair would require 4-7 months of non-operation of the plant, and longer if the defects proved to be substantial [CI's Ex. C7]. A 4-7 month interruption will subject CLAIMANT to heavy penalties as well as potential loss of profits that may extend well beyond the limitation of liability under Art. 19 SA. When Art. 19 was negotiated, the Parties considered the risk of prolonged disruption "rare in practice". Thus, CLAIMANT relied on RESPONDENT producing reliable machines built with durable steel. If CLAIMANT had been informed by RESPONDENT that it had no way of substantiating their representation that the steel is of good quality by producing quality certificates, CLAIMANT would not have agreed to Art. 19.
140. Furthermore, RESPONDENT has difficulty organising repairs at the hydro power plant. This is a key factor in the determination of fundamental breach [Huber/Mullis, p.206]. If, at the September 2020 inspection date, it is discovered that the Turbines need repair, those repairs could only be performed off-site [CI's Ex. C5]. The time needed to transport the Turbines to RESPONDENT's closest repair site in Danubia is 10 days, or 24 days if transported to the plant in Equatoriana [PO2 ¶1]. This means a round trip would take, at minimum, 20 days and up to 48 days, *in addition to* the 4-7 months' disruption. It is also more likely that repairs would be carried out in Equatoriana – and that the 48-day period would therefore apply – given RESPONDENT has 400 employees in



Equatoriana and only 150 in Danubia [PO2 ¶1]. This would cause further unacceptable disturbance to CLAIMANT's business. While it is acknowledged that CLAIMANT refused to build a larger turbine house or two penstocks [*Re's Ex. R2*], which may have enabled a shorter repair time, it is unreasonable to expect CLAIMANT would bear such associated increased costs. This is particularly the case given RESPONDENT's repeated representation of the quality of its turbines meant that there is no commercial imperative to entertain those modifications.

141. More fundamentally, defective steel cannot be 'repaired'. The quality of the steel used to produce the Turbines can be examined by metallurgical examination. This would, however, destroy part of the Turbine and would require extensive repair/replacement of parts [PO2 ¶35]. If the test were to show that the steel was defective, that inferiority in quality cannot be 'repaired'. Such defects are not ones of simply broken or missing parts that can be easily replaced, but concerns the entire machine that is used during the production process. Therefore, the only way to remedy the defective steel is to deliver new turbines produced with guaranteed quality steel [PO2 ¶33].
142. In any event, repair is wholly unreasonable for both Parties. The cost to the Parties of minor repair upon inspection would be USD 10.2 million, while the costs associated with considerable repair would be USD 10.7 million. By contrast, the cost of pre-fabrication of turbines for replacement at the pulled-forward inspection date would be USD 10.7 million [PO2 *Appen. I*]. These sums are evidently comparable. However, the likely cost to the Parties would be considerably higher if RESPONDENT only starts to produce replacement turbines after the inspection. In such a case, the cost would be USD 24.2 million [PO2 *Appen. I*]. This therefore represents a considerable financial risk. While RESPONDENT's expert assesses the risk that replacement turbines will be required (which is disputed), there remains a significant risk to the Parties, as the cost is considerably higher than under the other possible scenarios.

IV. The detriments are foreseeable and the request for substitute turbines was made within a reasonable time

143. The importance of the obligation breached and the foreseeability of the detriments suffered or likely to be suffered by CLAIMANT are assessed at the time of contracting [*Schlechtriem/Schwenger, Art. 25, ¶¶32, 33*]. For foreseeability, it is sufficient to show that RESPONDENT *did* foresee, or that a reasonable person in the same circumstances must have foreseen the detriments suffered or that will likely be suffered by CLAIMANT for the non-conformity [*Schlechtriem/Schwenger, Art 25, ¶26*].
144. First, RESPONDENT must have known that Greenacre is not a typical city: it is predominantly concerned with ecological and sustainable business. It has adopted a Sustainable Bill of Rights. In 2010, the population voted for a 'non-carbon' energy plan [*Request ¶¶3-4*]. This context points to the high likelihood that the community of Greenacre will put high political pressure on the Council to penalise and sanction CLAIMANT for any failure to deliver the agreed annual target.



145. Second, as a leading manufacturer of turbines in the renewable energy business [*Request ¶4*], RESPONDENT must have known that solar and wind power would not provide suitable sources of alternative energy should the turbines require (partial) shutdown for extensive repair as a result of non-conformity. Therefore, CLAIMANT is likely to face additional financial consequences as a result of the need to purchase coal-powered electricity [*Art. 19 SA*].
146. RESPONDENT also foresaw, or a reasonable person in the same circumstances would have foreseen, the fundamental importance of product conformity to CLAIMANT [*Schlechtriem/Schwenzer Art. 25, ¶27; Case no. 5 Ob 45/05m*]. RESPONDENT cannot claim it was unfamiliar with the tender process. Clearly, it aided CLAIMANT in submitting the successful tender by making the necessary statements and documents available [*Cl's Ex. C2*]. Furthermore, RESPONDENT's CEO acknowledged that he was informed of the imperative of having minimal interruption [*Re's Ex. R2 ¶¶4-5*]. RESPONDENT must therefore know that minimal interruption was an important criterion in the tender process. Indeed, the importance of minimal interruption caused by the servicing of the Turbines was contractually acknowledged [*Cl's Ex. C2*]. Therefore, RESPONDENT must have known the importance of long intervals between inspections. This is why it charged (and CLAIMANT accepted) a price that was 10% above the market price for a competitor's 300MW turbine [*Re's Ex. R1*].
147. In terms of notice, as soon as CLAIMANT became aware of the potential use of defective steel in the construction of the Turbines, it requested that RESPONDENT provide evidence that the Turbines were not produced from defective steel [*Cl's Ex. C4*]. After RESPONDENT failed to do so [*Cl's Ex. C5*], CLAIMANT made its request for substitute goods known to RESPONDENT. Such request was made promptly on 1 December 2018 [*Cl's Ex. C7*], while the Turbines were delivered and installed in late spring 2018 [*Cl's Ex. C2*]. As a result, it is indisputable that CLAIMANT made its request for substitute goods within a reasonable period of time.

REQUEST FOR RELIEF

148. In light of the above, CLAIMANT respectfully invites the Tribunal to find that:
- a. Art. 21(2) SA constitutes a valid arbitration agreement;
 - b. RESPONDENT's expert, Prof. John, should be excluded in this proceeding;
 - c. RESPONDENT breached the SA by delivering turbines which are were non-conforming under Art. 35 CISG; and
 - d. CLAIMANT is entitled to the delivery of replacement turbines.