Nova University of Lisbon - School of Law

Work Project: 27th Annual Willem C. Vis International Commercial Arbitration Moot

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Work Project submitted for the obtainment of the master's degree in Law:

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Anti-Plagiarism Statement

We declare that the essay presented is of our exclusive authorship and that all use of contributions or texts from others are duly identified. We are aware that the use of extraneous elements constitutes a serious ethical and disciplinary breach.

Lisbon, 11 September 2020.

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Index of Abbreviations and Definitions

¶, ¶¶	Paragraph, paragraphs
Art./ Arts	Article, Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	*Exempli gratia* (for example)
Exh.	Exhibit
IBA Guidelines	IBA Guidelines on Conflict of Interests in International Arbitration (2014)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
Ibid.	*Ibidem* (in the same place)
Id.	*Idem* (in the same source)
i.e.	that is
Ltd.	Limited
LCIA Rules	Rules of the London Centre of International Arbitration (2014)
MfC	Memoranda for CLAIMANT

Model Law	UNCITRAL Model Law on International Commercial
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959
No.	Number
Op. Cit.	*Opere citato* (in the worked already cited)
p., pp.	Page, pages
Plc	Public Limited Company
PO1	Procedural Order No 1
PO2	Procedural Order No 2
RfA	Request for Arbitration
RRfA	Response to the Request for Arbitration
The Case/the Problem	The Twenty Seventh Annual Willem C. Vis International Commercial Arbitration Moot Problem
UNIDROIT Principles	Principles of International Commercial Contracts (2016)
v.	*Versus* (against)

Introduction

This Work Project aims to provide an overview of the progress and experience of the team representing the Nova University of Lisbon – School of Law in the 27th Willem C. Vis International Commercial Arbitration Moot. It aims to focus both on the competition itself and on the work done by the team, both in the written and oral phases.

We shall first analyse the Vis Moot competition itself, in particular the unique way it was carried out this year due to the Covid-19 Pandemic, and the perspective adopted by the team throughout the competition. Then we will proceed to a brief summary of the Problem released in this edition, and an analysis of each of the issues posed by the Problem. Similarly to previous years, our team was composed of three members, and being that there were four issues, each member had to cooperate in order to fairly distribute the workload, including a redistribution of issues between the written and oral portions of the competition. Thus, in this Work Project, each student will individually address the issue that they undertook in the written part, refined with the knowledge acquired during the oral challenges. Finally, the written Memoranda that was submitted by the team can be found in Annexes I and II.

The Willem C. Vis International Commercial Arbitration Moot

Moot courts are very popular exercises in law schools which allow students the opportunity to put their knowledge in practice and acquire oral skills through participation in simulated judicial or arbitral proceedings. A case is created which contains many legal issues and then given to students, who must act as counsels of each of the parties in the mock case by preparing both written submissions and oral presentations.

The Willem C. Vis International Commercial Arbitration Moot is the most renowned international moot court, bringing thousands of students and professionals to Vienna every single year. Founded in 1994, with only 11 teams participating, it now has nearly 400 participating teams in the written portion from a total of 87 countries.

Willem Cornelis Vis, after whom this moot is named, was a Dutch scholar who dedicated his career to the study of international commercial transactions and dispute resolution procedures, so it is fitting that his legacy should be that of a moot court that engages students in this area, and promotes debate and best practices in the field, bringing together the best minds working on commercial arbitration and dealing with issues that are far from settled.

Every year the case is crafted by the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot (hereinafter, "the Case" or "the Problem"). Some characteristics of the Case are fixed, the dispute always involves two companies based in different countries, and the dispute will always require the use of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"). The seat of arbitration is the country of Danubia, a signatory of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "Model Law") and a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"). The parties decide on a particular set of arbitration rules to be applicable, usually a pre-existing set of rules from an arbitration centre around the world, this year's was the 2014 Arbitration rules of the London Court of International Arbitration (hereinafter "LCIA Rules").

1. Organisation of the Moot

The Moot has two main stages, written and oral. In the first stage, participants write a Memorandum for CLAIMANT and another for RESPONDENT. These Memoranda must be concise and present arguments in favour of each of the parties' positions, always supported by the relevant authorities and case-law.

When the case is first published, participants must get acquainted with it, this is essential if they are to make compelling arguments. The case file includes the notice of arbitration, written communications between the parties, witness statements, procedural orders and of course, the sales agreement, among other things. PO1 contains the issues the Tribunal will be focusing on, i.e., the issues to be debated in both the written and oral stages, No other issue may be discussed. After reading and discussing the whole problem, teams must research authorities and draw outlines for the arguments, placing them within a wider strategy of defence of their client's position.

Teams are then given three months to write their first memorandum, which is for CLAIMANT. After that, each team is assigned a Memorandum for CLAIMANT from a different participating team. The teams then have two months to write a memorandum for RESPONDENT that answers to the Memorandum for CLAIMANT they were assigned. This means that teams must start with the perspective of the CLAIMANT and then switch to the RESPONDENT's point of view. Our team was assigned the Memorandum for CLAIMANT written by the team of the University of Aalborg.

With the submission of the written Memorandum for RESPONDENT, the written stage ends and the oral stage begins. At this point most of the research is done and the strategy is laid out, however the practice for oral rounds sharpens the arguments, and these are often reshaped and altered.

During the oral stage, it is imperative to learn to make concise and convincing arguments and to answer the arbitral tribunal's questions. This is when the Coaches, who are experienced lawyers, really take on the role of training the team.

Teams split the issues between their members, with each member creating a speech for the issue for which it is responsible. Once speeches are prepared, it is time to practice their delivery intensively, taking into account the language, deference in addressing the tribunal, tone and

posture. In our case, since there were four issues and three team members, we had to reorganize the issues from the way they had been split in the written pArt. Maria Bernardo, who had written issue II, switched to being responsible for issues III and IV for RESPONDENT, Aurélio Freitas, who wrote issues III and IV, took on issues III and IV for CLAIMANT, whilst Susanna Vickers, who wrote issue I, dealt with issues I and II for CLAIMANT and RESPONDENT.

Although each team member has written their portion separately in this report, it is useful to bear in mind that they have had close contact with some other portions of the Problem throughout the competition, namely, Aurélio Freitas was mainly responsible for issues III and IV; Maria Bernardo was, at different times, responsible for issues II, III, and IV, and Susanna Vickers was responsible for issue I and then, later, issue II as well. This meant that each team member had an additional challenge to face, by having to master a different issue, and whilst also providing assistance to the other team members who took over their previous issue. However, this reorganization permitted the team to have a better overview of the issues, and benefitted the team as a whole especially when an arbitrator asked a question that required knowledge of your team member's part of the case.

Since throughout the various sessions the panel of arbitrators will be asking the team many questions, preparation for the Moot must include listing and answering the possible questions a panel will ask.

One of the most significant ways to practice is through pre-moots, which simulate the oral rounds in Vienna, but on a much smaller scale. They provide excellent practice opportunities, since the panel of judges is composed of lawyers, arbitrators, coaches from other teams, etc. The rules and procedure of the Vis Moot are also simulated, and it is usually in these pre-moots that the most rewarding practice begins, since prior to this the team members write and memorize their speeches, but it is only when confronted with the actual situation that strengths and weaknesses become apparent. The questions and feedback from the arbitrators clarify the main issues at hand and arbitrators' expectations for each member's presentation. From time management to team work, it all becomes extremely important.

This year we were able to attend the Rome Pre-moot, and were set to attend both the Lisbon Pre-moot and the Belgrade Pre-moot, unfortunately the latter two pre-moots were cancelled due to the travelling and hygiene restrictions brought upon by the Covid-19 Pandemic. Despite this, the one pre-moot we attended was instrumental in the team's preparation, and the many

online practice rounds the team participated in afterward complimented it well, especially since these allowed the team to practice in a digital format. In Rome we were able to achieve 3rd place out of 18 participating teams. The experience of presenting our arguments to arbitrators is very different from merely making a speech, it allows speakers to practice flexibility since they must divert from their prepared speech quite often due to the questions and reactions of the arbitrators. It soon becomes clear that although the prepared speeches are fundamental in giving a structure to our oral presentation, these are only tools, since only thorough knowledge of the case and the arguments, as well as good verbal skills, can truly provide a good presentation.

Each team member must present his or her client's arguments in a simple yet logical way. In each oral round two team members present the client's case, each being given 15 minutes for a total of 30 minutes for the team. Within the 15 minutes allowed per team member, ideally 7 minutes should be allotted to each issue and 1 minute allotted to rebuttal or surrebuttal. The team is allowed to split their 30 minutes in a different manner if they so wish, however this format is the norm.

In a normal year, this intense period of preparation through Pre-moots and Skype sessions would lead to teams from all over the world gathering in Vienna for a week of oral rounds. Unfortunately, 2020 is not a normal year, and, after much consideration, the organizers of this competition decided to do it in a virtual format, as the alternatives would be to cancel or postpone. Instead of travelling to Vienna, our team had to prepare for the virtual format, which presents its own very specific characteristics and requires preparation of a different kind. Despite the virtual format, the rounds were set in the typical way. The first stage is the general rounds, in which teams go against each other before a panel of three arbitrators. Each team participates in four sessions during this time, two for CLAIMANT and two for RESPONDENT, after each session arbitrators award a score to each team member ranging from 0 to 100. At the end of the general rounds, team scores are calculated and the 64 teams with the highest scores go through to the second stage, the knockout rounds. In this stage, teams go against each other but rather than award a score, the panel chooses the best team to go forward to the next phase, while the other team leaves the competition, reducing the number of teams to 32, and then 16, and so on until the finals, in which two teams go against each other.

In the general rounds our team competed against the UAE University, the University of Montenegro, the University Center of João Pessoa - UNIPÊ and the University of Leipzig. In the knockout rounds we faced the team from the University of Vienna.

Our team's goal was to get to the top 64, and into the knockout rounds, in which we succeeded, having come 6th place in the general rounds among the 249 teams participating at this stage, with a total of 2196 points. Thus, our team was awarded an honourable mention for the Eric E. Bergsten Award for Team Orals. One of our team members, Susanna Vickers, was further distinguished with an Honourable mention for the Martin Domke Award for Individual Oralists, which means she was in the top 10% of best oralists in the entire competition.

The competition, and the oral rounds in particular, was extremely intense and filled with unknowns, but also very rewarding.

2. Our perspective

The opportunity to participate in the Willem C. Vis Moot in representation of the NOVA University - School of Law, is offered to the best students participating in a Masters level class, "Moot Courts". In this class, chaired by Professor Francisco Pereira Coutinho, we study and prepare the problem released for the current year's Moot and hold an internal competition, judged by lawyers/arbitrators, the previous year's team and the Coaches, who determine whom to select for the next year's competition. Our team participated in the Moot Court class with the goal to win and potentially be offered a place in the team for the next year's Moot. There were several reasons we wished to participate, firstly, Aurélio Freitas and Susanna Vickers had already participated in the Telders International Law Moot Competition, representing NOVA, and therefore knew how rewarding and exciting the Moot could be. Secondly, the Moot provides a unique way to finish one's Masters, through thoroughly developing and researching certain issues of Arbitration and Commercial Law whilst benefiting from the aid of your teammates, under a very structured schedule and within a competitive environment. Thus although each of us had different objectives for our future, we all knew that we wanted to take advantage of this unique opportunity, despite being well aware of the intensive work it implies.

The Moot also offers unique opportunities for professional growth in several areas. Not only does it place a heavy emphasis on teamwork, which is an essential aspect in most legal fields, but it also provides an opportunity to intensely focus on a few key matters within arbitration and commercial law. These are normally hotly debated current issues, and therefore there is no "easy" answer to any of the questions, and each team member must conduct deep research on the issues and other related concepts. Whilst the written stage of the Moot requires many hours of research and analysis, it also requires that each team member learn to write and express themselves not only succinctly but also correctly, convincingly, and in English. On the other hand, the oral stage of the Moot is, if anything, more intensive, since alterations and improvements are made from session to session, and it is possible to see the improvement between sessions.

Like most teams, our team experienced a steep learning curve once we started participating in the oral sessions, especially in the Rome pre-moot. In that pre-moot, the team participated in two days of rounds, in as many as four rounds in one day, making improvements to our speeches in between sessions, and even, for one of the team members, Susanna Vickers, switching sides several times in one day (from RESPONDENT to CLAIMANT and back to

RESPONDENT). We were very impressed with the quality of the participating teams, and their professionalism, and we were thoroughly delighted to be highly placed amongst such competent participants. The Rome pre-moot offered a taste not only of the adrenaline and excitement to come in Vienna, but also of the social networking opportunities and the chances to let off steam by attending the parties and events organised for the Mooties (participants and ex-participants of the Moot are known as Mooties). However, it was not to be, since on the last day of the Rome pre-moot, the Covid-19 Pandemic began in earnest in Europe, with the first few cases being diagnosed in Italy, and rapidly spreading.

When the organisers of the Vis Moot announced that the competition could no longer be held physically in Vienna, the disappointment felt throughout the Moot community was immense. For a while, there was uncertainty as to whether teams would even be able to participate in an online version. 139 teams quit the competition, as they felt it would not be the same, even if there was an online version. Whilst the NOVA team never considered quitting, it was very hard to keep working with the same level of enthusiasm for a potential online-only competition. Several of our online practice partners cancelled sessions, and it was not until the organisers of the Moot at last confirmed that there would be an online version of the competition, rather than cancelling or postponing the finals, that our team was able to resume work.

Knowing we would have to practice twice as hard to make up for lost time, as well as to become accustomed to online mooting, with all its specificities, we set an intensive schedule, with at least two sessions per day in the two weeks leading up to the Vis Moot. We practiced with teams from all over the world, trying to achieve as much diversity as possible, since each country and region tend to have different approaches to the Problem, and different ideas on how to present one's arguments. In order to work around each person's schedule, we practiced both individually and as teams, and provided feedback to each other, often acting as arbitrators in another teammate's session. We learned about many new aspects specific to online presentations, such as how to maintain eye-contact with the camera instead of with the arbitrator's image on the screen, to properly set up the environment we were presenting in, to have the computer placed with the camera at eye-level instead of simply on the table, etc. In fact, since the Covid-19 Pandemic has proven to last a lot longer than anyone could have predicted in its early stages, all these points have proven useful for work and interviewing purposes, which in many cases, continue to be performed online.

There were, of course, many issues with the online Moot itself, but it would be unfair to criticize the organisation on these aspects, since they too were adapting to an unpredictable and new situation. The only issue we feel could have been improved upon, and it is a criticism that follows through from previous years, is that we frequently came across arbitrators that did not seem to know the problem in its entirety, which often forced a participant to spend a large amount of time explaining an underlying fact or concept in order to proceed with the actual argumentation. When one has only 7 minutes to argue an entire issue, it would be better if the Tribunal were already thoroughly familiarized with the contents of the case, especially since, as stated in most international ethical guidelines for Arbitrators, [and in the LCIA rules, paragraph 1.1, subparagraph (vii)], Arbitrators are expected to refuse the appointment unless they have sufficient time to devote to the Arbitration.

3. The Problem

The Problem of the 27th edition of the Vis Moot, released on the first Friday of October 2019, is based on a contract for the sale of two premium R-27V Francis water turbines, to be installed in the Greenacre hydropower plant[1]. The contracting parties are TurbinaEnergia Ltd, the seller, and HydroEn plc, the buyer.

HydroEn plc (CLAIMANT), located in Mediterraneo, is the market leader in projects for the construction of pump hydro power plants and is well known for providing green energy sources in challenging environments[2]. TurbinaEnergia Ltd (RESPONDENT), located in Equatoriana, is a world-renowned producer of premium water turbines[3].

Greenacre is a city located in a remote part of Mediterraneo. The people of Greenacre adopted a Sustainability Bill of Rights with the intent of becoming a fully sustainable community, only resorting to renewable energy sources. These measures were adopted in 2010 and for the following ten years the Greenacre community has pursued a "no-carbon strategy", under which the city's council approved investment in renewable energy sources, from wind, to solar and hydro. The construction of a hydro power plant represented the cornerstone of this project, since it was fundamental for stabilizing the Greenacre power grid, reducing, and possibly eliminating, the volatile character of the energy originating from solar and wind sources. Its purpose was to allow for a largely uninterrupted supply of hydraulic energy, independent from weather conditions, and avoid the need to resort to non-renewable energy sources, such as purchasing energy from the coal power plant in Ruritania, which is, besides two stacks of rechargeable batteries of 50 MW each, the only alternative source of energy available[4].

Following this, in January 2014, the council of Greenacre invited tenders for the construction and operation of the pump hydropower plant, in which CLAIMANT participated, submitting a bid. In order to strengthen its bid, in March 2014, CLAIMANT entered into contact with RESPONDENT to enquire about its newly developed premium water turbines, advertised in the most recent HydroPower Fair, which took place on the 23rd August 2013, and potentially request delivery of said turbines, the R-27V Francis turbines[5]. The turbines were to be included

[1] The Problem, Exh. C2, p. 11, Art. 2(1)(b),(c) "SELLER'S OBLIGATIONS".
[2] The Problem, RfA, p. 4, ¶1.
[3] The Problem, RfA, p. 4, ¶2.
[4] The Problem, RfA, p. 5, ¶¶3-6.
[5] The Problem, Exh. R2, p. 31, ¶1; Exh. C2, p. 11, Art. 2(1)(a) "SELLER'S OBLIGATIONS".

in the Greenacre Pump HydroPower Project, if awarded to CLAIMANT. CLAIMANT's strategy was that these newly developed turbines, advertised as being more resistant to corrosion and cavitation, with a significantly enhanced period of operation, due to the materials used in its manufacturing process and also because of the shape of its blades[6], if included in its bid, would represent an important part in the Greenacre council's decision.

RESPONDENT agreed to this possibility and a Sales Agreement (contract) was signed on the 22nd of May 2014, where RESPONDENT was to deliver and install the two turbines if CLAIMANT were awarded the tendered contract by the council of Greenacre[7].

In this contract, besides the principal obligation, the parties also agreed on a dispute resolution clause[8], a limitation of liability clause[9] and an entire agreement clause[10]. Regarding the dispute resolution clause, the parties established that the courts in Mediterraneo have exclusive jurisdiction over any dispute "arising out of or in connection with this contract", however, CLAIMANT is entitled to submit any dispute arising from the contract or connected with it to arbitration under the LCIA Rules, the seat of arbitration would be Vindobona, Danubia and the governing law of the contract would be the substantive law of Danubia, of which the CISG is considered to be a part. The limitation of liability clause established what damages could result in monetary penalties and the maximum amount due. CLAIMANT would be entitled to liquidated damages in the amount of 40,000.00 US for each day that the Greenacre Pump Hydro Plant is not available to operate with at least 60% of its normal capacity due to reasons related with any non-conformity for which the seller, RESPONDENT, would be responsible. However, it is not entitled to liquidated damages when the reduced production capacity is associated with the first regular inspection and the overall amount of payable damages is of 20 million, and the maximum claim for loss of profits is limited to 10 million US. Lastly, the entire agreement clause dictates that the contract contains the entire agreement between the parties.

On the 15th of July 2014 CLAIMANT was awarded the contract with the council of Greenacre[11] and promptly started with the construction of the HydroPower Plant to provide green energy for the Greenacre community. Because CLAIMANT won the contract with Greenacre and with the conclusion of the construction of the Plant, RESPONDENT on the 20th of May 2018

[6] The Problem, RRfA, p. 26, ¶1; Exh. R1, p. 30, ¶3.
[7] The Problem, Exh. C2, p. 11.
[8] The Problem, Exh. C2, p. 13, Art. 21 "DISPUTE RESOLUTION".
[9] The Problem, Exh. C2, p. 12, Art. 19 "LIMITATION OF LIABILITY".
[10] The Problem, Exh. C2, p. 13, Art. 22 "MISCELLEANOUS".
[11] The Problem, RfA, p. 6, ¶11.

delivered the two R-27V Francis turbines[12] and the installation was finalized on the 20th of August 2018[13]. The turbines were subjected to an acceptance test, which took place on the 12th September 2018[14] and the hydropower plant started operating on the 19th September 2018[15].

Later that month, on the 29th of September 2018, a report from Renewables Daily News denounced ongoing investigations and prosecution conducted against Mr. Steel, the CEO of Trusted Quality Steel, and Ms. Chen, the company's lead quality controller[16]. Both were being prosecuted for the forgery of quality certificates for steel that they supplied or for issuing certificates without the proper testing and examination. It reported also that the lack of quality of the steel used in the fabrication of a set of turbines, manufactured and installed by RESPONDENT for the Riverhead tidal power plant project, in Equatoriana, may have been the reason for the rushed and unplanned substitution of said turbines, since disturbing findings of corrosion and cavitation took place and immediate replacement was deemed necessary to avoid further damages to the power plant.

Because Trusted Quality Steel was RESPONDENT's main steel supplier and they had constructed the turbines in the Riverhead power plant that had to be substituted, CLAIMANT contacted RESPONDENT on the 3rd of October 2018 to enquire about the extent to which the turbines delivered and installed on the Greenacre project could be affected by the fraud at Trusted Quality Steel[17]. RESPONDENT's CEO, Benoit Fourneyron, replied on the following day stating that they had been informed by the Office for Organized Business about the forgery, on the 25th of august 2018[18], and had initiated an internal investigation in order to trace which steel originated from Trusted Quality Steel. However, RESPONDENT informed CLAIMANT that they could not provide the information requested due to a mistake in their internal product management, aggravated by a hacking issue[19], which resulted in the loss of the backup files. Together with the falsification of the documents, RESPONDENT was in a position where it was not able to ascertain if the steel used in the turbines delivered to CLAIMANT was built with steel from Trusted Quality Steel. Nonetheless, RESPONDENT argued that there was no need for immediate action since, even in the worst case scenario, if the turbines were produced

[12] The Problem, PO2, p. 50, ¶19.
[13] Ibid.
[14] The Problem, PO2, p. 50, ¶20.
[15] The Problem, RfA, p. 6, ¶11.
[16] The Problem, Exh. C3, p. 14.
[17] The Problem, Exh. C4, p. 15.
[18] The Problem, PO2, p. 50, ¶20.
[19] The Problem, PO2, p. 50, ¶25.

with substandard steel, the other characteristics of the turbines, namely its design and the manufacturing process, would not allow for the levels of corrosion and cavitation as high as those found in the Riverhead Tidal Power Plant[20], since the excessive corrosion found there was also associated with the turbines operating in a saltwater environment[21]. Therefore, RESPONDENT suggested that the first regular inspection, which was scheduled for September/October 2021, be pulled forward by one year, to September/October 2020[22], in order to examine the turbines in more detail, namely, examine the runner, conduct a detailed metallurgical examination of the blades and then agree, depending on the findings, if replacement would be necessary and, if so, how it should take place.

Immediately after, CLAIMANT entered into contact with the Greenacre Council and reported the situation to the Greenacre councillor responsible for the project, Mr. Gilbert Crewdson. Mr. Crewdson threatened to terminate the contract with CLAIMANT due to the suspicions surrounding the quality of the steel used in the turbines installed. Both parties were concerned that this uncertainty could lead to a prolonged stoppage time where the production of renewable energy would be endangered and there would be a need to resort to the Coal Power plant in Ruritania, jeopardizing Greenacre's green energy policy. However, instead of termination of the contract, the parties reached an agreement. They agreed that the turbines would have to be directly replaced during the scheduled time for the first inspection[23]. RESPONDENT rejected this request and only accepted the pulling forward of the first inspection in order to examine the status of the turbines and the quality of the steel.

On 31st of July 2019, CLAIMANT submitted its Request for Arbitration ("RfA") and RESPONDENT filed its Response to the Request for Arbitration ("RRfA") on the 30th of August 2019. The LCIA proceeded to establish the Arbitral Tribunal, nominating the arbitrator appointed by CLAIMANT, Ms. Claire Burdin. However, when Ms. Burdin became aware of RESPONDENT's intention to submit an expert report by Professor Tim John, who was at the time involved in a lawsuit against her husband, she disclosed this information to the Arbitral Tribunal[24], CLAIMANT and RESPONDENT, on the 21st of September 2019. Professor John was hired, on the 5th of August 2019, by the operators of the Riverhead Tidal Power Plant to

[20] The Problem, Exh. C5, p. 16, ¶6.
[21] The Problem, PO2, p. 51, ¶27.
[22] The Problem, Exh. C5, p. 16, ¶7.
[23] The Problem, Exh. C6, p. 18, ¶8.
[24] The Problem, p. 40.

supervise the replacement of the turbine in the plant[25]. Later on, he signed an official retainer with RESPONDENT, on the 20th of August 2019[26]. On the 23rd of September 2019 CLAIMANT asked the Arbitral Tribunal to exclude the report from Professor John[27].

Given this set of circumstances, described supra, the teams were requested to address, in their memoranda, the following questions[28]:

I. Does the Arbitral Tribunal have jurisdiction to hear the case or is the Arbitration Agreement invalid?
II. Should the Arbitral Tribunal order the exclusion of the expert suggested by RESPONDENT, Professor John?
III. Has RESPONDENT breached the contract by delivering turbines, which are non-conforming in the sense of Art. 35 CISG?
IV. In case of a breach of contract, is CLAIMANT entitled to request the delivery of replacement turbines?

Regarding issue I., rather than CLAIMANT, it is RESPONDENT that alleges that the arbitration agreement is invalid, since it is asymmetrical and only permits CLAIMANT to access arbitration or litigation, whereas respondent is limited to litigation. CLAIMANT's response to this issue is to assert that asymmetrical arbitration clauses are nevertheless perfectly valid clauses, and generally accepted, and given that RESPONDENT gave full consent to the clause, despite being aware of any potential disadvantages, the clause should be upheld by the Tribunal.

Regarding issue II., CLAIMANT requests the exclusion of Professor John, expert witness nominated by RESPONDENT, on the grounds that his presence threatens the integrity of the Arbitral Tribunal. Adding to this is also the doubts over Professor John's independence as he maintains a very close relationship with RESPONDENT. To these allegations, RESPONDENT answers that it is CLAIMANT's arbitrator who is the cause of many issues, not just the alleged conflict of interests but also a lack of impartiality due to her pre-established views on the matter. Besides, Professor John is the most qualified expert and cannot be easily substituted.

[25] The Problem, PO2, p. 49, ¶14.
[26] The Problem, PO2, p. 49, ¶15.
[27] The Problem, p. 41, ¶4.
[28] The Problem, PO1, p. 45, ¶III(1).

Regarding issue III., as CLAIMANT, we allege that the delivered turbines are non-conforming in the sense of the Art. 35 CISG, since in circumstances such as these, strong suspicion is enough to render goods non-conforming. This non-conformity constitutes a breach of contract. As RESPONDENT, we defend that even if suspicion can render goods non-conforming, the circumstances in the present case do not meet a reasonable threshold amounting to a non-conformity and thus, there is no breach of contract.

Finally, on what concerns the last issue, issue IV., CLAIMANT alleges that there is a breach of contract and that breach constitutes a fundamental breach, which entitles CLAIMANT to request the substitution of the delivered turbines. RESPONDENT argues that that there is no breach, much less a fundamental one, however, even if the Arbitral Tribunal decides that a breach exists, then substitution cannot be the remedy because it is not proportional and there are other available remedies, which are more adequate for the circumstances of the case.

Procedural Issues

Issue I: Does the Arbitral Tribunal have jurisdiction to hear the case or is the Arbitration Agreement invalid?

Susanna Vickers

The issue at hand concerns the validity of the arbitration agreement due to the asymmetrical nature of the clause. As stated above, the arbitration clause permitted only one party, the Buyer (CLAIMANT) to access arbitration. Should the Seller (RESPONDENT) wish to litigate, it could only do so in the courts of Mediterraneo, the country of incorporation of the Buyer. It is stated in the facts however, that the reputation of the courts of Mediterraneo is good, and there is no doubt that they would hold a fair trial.

1. The background for the discussion: recent Case-Law

Whilst in the majority of jurisdictions asymmetrical arbitration clauses are held to be valid, the issue of asymmetrical clauses has been widely discussed ever since June 2012, when the Russian Supreme Court invalidated such a clause in the *Sony-Ericsson* case. This came as a surprise to many, since the Russian courts had previously seemed receptive to such unilateral clauses[29]. The debate grew even more heated when the French Supreme Court invalidated an asymmetrical clause (although not an arbitration clause) in September of the same year, in *Mme X. vs. Rothschild*. Asymmetrical clauses were now held to be somewhat risky, as one could not be entirely sure whether they would be upheld, nor that a decision rendered pursuant to such a clause would be enforceable[30].

To further the confusion, these decisions were based on an entirely different reasoning and reflected differently on future developments. On the one hand, in the *Sony-Ericsson* case, the asymmetrical clause was held to be invalid because it violated the balance of the rights of the parties, namely the right to equal procedural treatment (although the decision is brief and does not go into detail on exactly how the right to procedural equality is violated), whilst on the other hand, the French Supreme Court, in *Mme X. vs. Rothschild*, decided that asymmetrical clauses are invalid since they violate the prohibition (in French law) of potestative clauses –

[29] E.g. in 2009, in the Red Burn Capital v ZAO Factoring Company Eurocommerz case.
[30] In Russia at least two cases have held such decisions unenforceable - Piramida LLC v BOT LLC and Novokuznetsky cold-store combine OJSC v UMO LLC.

clauses which depend entirely upon a condition that only one party may cause to occur or prevent.

In 2018, the Russian Supreme Court's Digest confirmed the decision from 2012 and the solution proposed in that case – that the unilateral right of one party to initiate arbitration or litigation be interpreted as a bilateral right. In contrast, in 2015, in the Apple Ebizcuss case, the French Supreme Court seemed to have restricted its position on asymmetrical clauses, deciding that the clause in that case was valid since it met the predictability objective, i.e., that it was possible to predict which courts should be competent.

In light of this international discussion, we returned to the case to find the reasoning behind the alleged invalidity of the clause. It is suggested, in the RRfA, that the asymmetrical nature of the clause is one-sided, favouring the Buyer, and would lead to a violation of the principle of party equality. In essence, the reasoning seems closest to that of the Russian Supreme Court in *Sony Ericsson*. However, as previously stated, there is a general lack of explanation in that decision as to exactly how an asymmetrical clause violates procedural equality. It is a very convincing argument on the CLAIMANT's behalf that there is not and cannot be any violation of procedural equality since proceedings have not yet begun. And, in all procedural matters, once the proceedings have been initiated, nothing in the arbitration clause prevents the parties' enjoyment of the very same procedural opportunities and rights. This was the main problem in Issue I. In every session, and all the way to the Vienna Moot, the RESPONDENT had a hard time justifying this point. It was therefore apparent that strong reasons for invalidation were necessary.

The RESPONDENT had a difficult argument to make on this point, since, when agreeing to the contract, it knew and understood the disadvantages of the asymmetrical arbitration clause suggested by CLAIMANT, as is clear by the fact that it protested against the inclusion of this clause at first, but later, after negotiating to include other clauses favourable to it (an entire agreement clause and a limitation of liability), it validly agreed to the asymmetrical clause[31].

On the other hand, CLAIMANT's argument is very much dependent on what RESPONDENT should choose to say, since there is very little to go on from reading the RRfA. Therefore, in our Memorandum for CLAIMANT, it was important to firstly understand what RESPONDENT might argue, and then present a broad range of counter-arguments, in the form of reasons why the asymmetrical clause should be considered valid.

[31] The Problem, Exh. R2, p. 32, ¶6.

We therefore argued that: the asymmetrical arbitration agreement should be viewed as a legitimate exercise of party autonomy; no actual inequality exists in the arbitration as a result of the asymmetrical clause; asymmetrical arbitration clauses are generally considered valid; the clause is not contrary to Danubian public policy, and the Siemens-Dutco decision referred to is inapplicable; and the principle of equal treatment of the parties is not applicable to negotiations prior to the proceedings.

However, many of the above arguments are only relevant when we first consider RESPONDENT's argument, so much so that in the oral rounds, it is RESPONDENT that speaks first, and CLAIMANT responds. It is therefore perhaps more useful to analyse the issue from the RESPONDENT's point of view, and note the corresponding responses from CLAIMANT.

2. The unconscionability doctrine

In fact, as RESPONDENT, there was firstly a choice to be made as to the law under which to argue the invalidity of the arbitration agreement – the arbitration law of Danubia (the Model Law), or the general contract law of Danubia (the UNIDROIT Principles). Whilst most teams seem to have opted to analyse the issue under the arbitration law, since the main dispute was regarding party equality, a principle laid out in Art. 18 of the Model Law, there were a few teams that held that the issue should be analysed under the general contract law, and the arbitration clause should be held invalid due to unconscionability, under Art. 3.2.7 of the UNIDROIT Principles.

Whilst our team chose to deal with the issue under the Model Law, we decided to also briefly reference unconscionability in our memoranda, and in the oral arguments, we had a prepared response if the issue should be brought up. Thus I will briefly address that argument first, before moving on to the other more relevant arguments.

The doctrine of unconscionability, as laid out under Art. 3.2.7 of the UNIDROIT Principles, states that a contract or term may be avoided if the contract or term unjustifiably gives the other party an excessive advantage. The argument can be made that RESPONDENT, as a much smaller company, having just made a large investment in a new product, was so dependent on the sale of these two turbines (two out of a total of only ten sold so far[32]), that it was unfairly taken advantage of by a much larger company, which forced it into accepting unfair clauses such as the one-sided arbitration clause.

[32] The Problem, PO2, p. 51, ¶29.

This is a fairly weak argument, however, since the standard for unconscionability is understandably high, requiring that "the disequilibrium in the circumstances is so great as to shock the conscience of a reasonable person"[33], which is not the case, as both companies are large companies, and furthermore, the playing field was levelled by the fact that RESPONDENT effectively has the monopoly on the most energy efficient turbine on the market, a turbine that CLAIMANT knew could make the difference in the awarding of the tender[34].

3. Procedural inequality and a violation of Art. 18 of the Model Law

Thus, it seemed preferable to centre the argument on the alleged inequality of the clause itself, and Art. 18 of the Model Law. The main issue here is whether Art. 18 can apply to one-sided arbitration clauses since it only prohibits procedural inequality, and the choice of forum may be considered a pre-procedural issue.

In order to circumvent this issue, as RESPONDENT we attempted to prove that the one-sided arbitration clause was unjust to the point where it affected the proceedings themselves, resulting in inequality within the proceedings – in which case, Art. 18 would undeniably apply.

This argument is tricky to make, and was somewhat unusual in the early stages of the competition, being that most parties would attempt to prove that the (alleged) inequality in the negotiation process, and inequality in the choice of forum was, in and of itself, a violation of Art. 18 (basing themselves essentially on the rationale present in the decision of the Russian Court in *Sony Ericsson* and in some legislation, such as the Polish Civil Code) – in fact, one can observe this argumentation in our Memorandum for RESPONDENT, alongside the argumentation of inequality within the proceedings. However, as the competition progressed, it became notable that there was an increase in arguments that attempted to prove that the one-sided arbitration clause was causing inequality within the arbitration rather than simply prove that the clause itself was unequal.

In order to prove that the asymmetrical clause affected the equality of the proceedings, we relied on a logical three-prong approach to the problem:

1. Firstly, that RESPONDENT was obliged to wait upon CLAIMANT in order to initiate proceedings.

[33] UNIDROIT Principles Commentary to art 3.2.7.
[34] The Problem, Exh. C1, p. 10 ¶2; Exh. C2, p. 11, ¶¶3-7; Exh. R2, p. 31, ¶¶2-5.

2. Secondly, that there are procedural advantages to being CLAIMANT, and, given point no. 1, RESPONDENT could not have ever enjoyed the procedural advantages of being CLAIMANT.

3. Thirdly, in conclusion, this represented inequality within the proceedings, as under the arbitration clause, the advantages of being CLAIMANT were always, necessarily, withheld from RESPONDENT.

To prove the first point, one must analyse the clause itself: the clause permits either party to initiate litigation, "subject to the BUYER's right to go to arbitration"[35] (emphasis added). This can be taken to mean that, even if the Seller (RESPONDENT) initiated arbitration, the Buyer (CLAIMANT) could simply remove the proceedings from litigation and initiate arbitration by invoking the arbitral clause. It is likely that the Court (in Mediterraneo) would have granted this stay since in Mediterraneo the arbitration clause would be considered valid[36]. It is interesting here to analyse a decision from the German Supreme Court[37], that held a similar clause to be invalid since it was unreasonably burdensome for one party to await the choice of the other party.

To prove the second point, we pointed out that the CLAIMANT has certain advantages, such as being able to initiate proceedings whenever they feel prepared, being able to choose between arbitration and litigation, and prepare accordingly, and, interestingly in this case, being able to nominate their arbitrator and any experts before RESPONDENT, which was useful to CLAIMANT since it could then allege that RESPONDENT's nomination (of its expert) was made merely to inconvenience CLAIMANT's choice of arbitrator.

Therefore the conclusion is that the one-sided arbitration clause has caused actual inequality within the proceedings.

In response, CLAIMANT may argue that the "advantages" listed are not real advantages, as they would be attributed to any CLAIMANT in any arbitration, and therefore do not imply inequality. RESPONDENT's response to this is that whilst that is true, what makes them advantages and indicators of inequality, is the fact that under this arbitration clause, RESPONDENT could never have access to them, whilst under a bilateral clause, it could. In most arbitrations, the position of CLAIMANT goes to the one who initiates proceedings first.

[35] The Problem, Exh. C2, p. 13, Art. 21, ¶1.
[36] See also similar decisions such as NB Three Shipping, in countries that consider such clauses to be valid.
[37] Federal Supreme Court of Germany (BGH) decision of 24th September 1998.

In this case, RESPONDENT could never initiate those proceedings and was therefore disadvantaged from the beginning.

Whilst this argument has flaws, it is not as easily dismissed as arguments based on inequality within the negotiation process itself, since, as stated above in the section on unconscionability, it is hard to prove inequality between the parties' such that the negotiation process was manifestly unfair.

4. The Siemens-Dutco decision and its relevance

Regardless of the path chosen by RESPONDENT, the next question invariably was, if the resulting clause is so clearly unfair, then why did RESPONDENT agree to it? And why should the Tribunal invalidate a clause that the RESPONDENT had agreed to? This question was raised in almost every session. To answer this point, we move on to one of the most unusual aspects of this case: the use of the Siemens-Dutco decision. The Siemens-Dutco decision is the only piece of case-law that we know is relevant to this discussion, as it has been referred to by the Danubian Court of Appeal, that rendered a similar decision in a similar case[38]. Therefore the Siemens-Dutco case is the best indicator we have as to the opinion of the Danubian Courts on the issue of inequality within arbitration clauses, which is relevant, as Danubia is the seat of arbitration.

At first, it is puzzling to understand what relevance the Siemens-Dutco case may have, and as CLAIMANT it seems easy to dismiss, since the crux of the dispute in Siemens-Dutco was the right of the parties to each nominate their arbitrator, in a multi-party dispute. The nomination of one's arbitrator is a procedural issue, and any part of the arbitral clause that limits that right in an unequal way may well be perceived to be procedural unfairness, and therefore invalid under Art. 18 of the Model Law. However, in the case at hand, the choice of forum may be seen as a pre-procedural issue, and is not subject to Art. 18, therefore the Siemens-Dutco case may not be applicable to the case at hand.

After much contemplation, we decided that the fundamental aspect of the Siemens-Dutco case might in fact not be the invalidation of an arbitral clause due to the existence of procedural unfairness, but rather, the fact that the clause was considered to be invalid despite the parties having validly consented to such a clause. For RESPONDENT, this is a far more coherent solution, since it allows it to respond to the question described above: why the Tribunal should invalidate the clause when RESPONDENT agreed to it in the first place.

[38] The Problem, RRfA, p. 28, ¶14.

The answer given here by the RESPONDENT is that, although RESPONDENT agreed to the clause, the clause generates inequality, including procedural inequality, and cannot therefore be upheld by the Tribunal. Parties do not have the right to derogate Art. 18 by agreeing upon unequal procedural rules[39], and it is the Tribunal's responsibility to determine if the rules laid down by the parties are valid under the Model Law.

Furthermore, Siemens-Dutco leads us to an interesting point: the fact that even though the clause may abstractly not be unequal, if it creates actual inequality, it may be held invalid. Thus, even though the clause in Siemens-Dutco was perfectly standard and seemingly equal, calling for a total of three arbitrators, one nominated by each side and a third as the presiding arbitrator, when the actual dispute arose, it caused inequality since one of the parties could freely nominate their arbitrator whilst the others had to agree upon one between them.

This may also be applied to the case to RESPONDENT's advantage: even if, on the face of it, it seems that there is no interference in procedural equality, in fact, procedural inequality has been generated due to the fact that there are undeniably certain advantages to the position of CLAIMANT that are withheld from RESPONDENT. Even though this is normal and admissible in arbitration, in this case it represents inequality because RESPONDENT never had the opportunity to be CLAIMANT and enjoy those advantages, due to the asymmetrical arbitration clause.

This highlights the need to argue that inequality has been created within the proceedings themselves rather than that Art. 18 applies even to pre-procedural issues, since without the existence of procedural inequality it would be hard to apply the rationale of Siemens-Dutco to the case at hand.

The counter-argument for CLAIMANT should be that firstly, there is no procedural inequality, unlike in the Siemens-Dutco case, and furthermore, that the right to choose one's arbitrator is a recognised procedural issue, to which Art. 18 undeniably applies, unlike the issues raised by RESPONDENT. Secondly, the fact that RESPONDENT agreed to the arbitral clause is extremely important, as it undeniably demonstrates that both parties wished to submit their dispute to arbitration in the form that they agreed upon. The fact that RESPONDENT initially showed some doubt and then eventually agreed merely serves to demonstrate that they in fact had carefully analysed the clause and its potential advantages or disadvantages.

[39] Howard M. Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 1989, p. 550.

By denying any analogical application of the Siemens-Dutco decision to the present case, CLAIMANT proves that there is no violation of Danubian public policy, since without that case there is no indication that Danubian public policy does not permit asymmetrical arbitration clauses. CLAIMANT may further argue that there is no disrespect of the principle of equality, but rather, should the Tribunal invalidate the parties' agreed-upon arbitral clause, there would be a violation of party autonomy[40].

5. Enforcement of the award

Finally, there may be reference to the fact that should the Tribunal proceed, the practical value of the award it may render may be substantially reduced since in the country of enforcement (Equatoriana, where RESPONDENT has the majority of its assets), asymmetrical arbitration clauses are held to be in violation of public policy, rendering the award unenforceable in Equatoriana. RESPONDENT may continue to mention that it is the arbitrator's duty to ensure that awards rendered should be enforceable[41].

Claimant may respond that there are also assets in Danubia, and that, regardless, the arbitrator's duty to ensure an enforceable award is not a "duty" per se, but rather a general guideline, to make an award as enforceable as possible, otherwise, according to professors Lew, Mistelis and Kröll, in *Comparative International Commercial Arbitration* "Such duty would therefore have the curious effect of harming the party it wants to protect." [42] furthermore, even if such a duty were to exist, it would be unreasonable to expect the arbitrators to ensure enforceability in every jurisdiction that could be relevant.

Issue I can therefore be seen as a delicate balancing of the two principles, party autonomy vs procedural equality.

[40] Even in the Siemens-Dutco case, some scholars feel that such a decision may have overly ignored party autonomy, see *Kroll, S.,* "Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases".
[41] RESPONDENT may base itself on sources such as the LCIA Rules, ¶32.2. and Martin Platte, *Arbitrator's Duty to Render Enforceable Awards*, Journal of International Arbitration, 2003, p. 309.
[42] P. 280, ¶12-14.

Issue II: Should the Arbitral Tribunal order the exclusion of the expert suggested by RESPONDENT, ProfessorJohn?

Maria Bernardo

The second procedural issue relates to the possibility of excluding a party's proposed expert witness. This exclusion is requested on two separate grounds: the first, that this expert's presence is a threat to the constitution of the Tribunal, and the second that the extensive previous relationship between the expert and RESPONDENT compromises this expert's impartiality and independence.

The expert in question is Professor Tim John, a specialist in the field of hydraulic power plant turbines[43]. Professor John is currently in a litigation with Mr. Burdin, Ms Claire Burdin's husband, over patents. Ms. Burdin is CLAIMANT's nominated arbitrator, and upon hearing of the possible inclusion of Professor John in the proceedings, addressed a letter to the Tribunal exposing the possible conflict of interest[44].

According to CLAIMANT, through the introduction of Professor John in the arbitration, RESPONDENT purposefully created a possible conflict of interest so as to later use it as grounds for challenge of Ms. Burdin, or of the arbitral award[45].

Besides the LCIA Rules, chosen by the parties to govern these proceedings, the Tribunal should take the IBA Guidelines on Conflict of Interest in International Arbitration 2014 ("IBA Guidelines") and the IBA Rules on the Taking of Evidence 2010 ("IBA Rules") as a source of inspiration since these are universally accepted and generally regarded as best practice in international arbitration.

1. The authority of the Tribunal to exclude expert witnesses

The Tribunal has the authority to exclude Professor John under Art. 18 or Art. 20.3 of the LCIA Rules. In the written memorandum we chose to privilege Art. 20.3 and use Art. 18 as an alternative, but in the oral rounds we decided to switch them and use Art. 18 as the main defence.

[43] The Problem, PO2, p. 49, ¶14.
[44] The Problem, p. 40.
[45] The Problem, p. 41, ¶4.

Pursuant to Art. 20.3 of the LCIA Rules, the Tribunal has the power to admit or exclude any written or oral testimony of witnesses, both witnesses of fact or expert witnesses. Furthermore Art. 18 of the LCIA Rules was created to preserve the composition of the Tribunal against challenges resulting from parties introducing new elements that may lead to the existence of a conflict of interest. RESPONDENT did not contest that the Tribunal has authority to exclude expert witnesses, but said that Professor John cannot be excluded under Art. 18.4, as it does not apply to experts but to legal representatives. CLAIMANT argued that although Art. 18 is intended to apply to counsels, i.e. legal representatives, it should apply *mutatis mutandis* to the situation in question, since the fundamental rationale is the same, that is, to prevent the introduction of people into the proceedings that would disrupt them.

Initially we established that CLAIMANT's main argument in requesting the exclusion of Professor John would be that his inclusion was part of a bad faith strategy by RESPONDENT to disrupt the arbitral proceedings, however this argument proved somewhat hard to make and though we maintained the portion regarding it being a dilatory manoeuvre it did not equate to bad faith. It is true that RESPONDENT did indeed have an interest in delaying the final decision for as long as possible since CLAIMANT's main request in this arbitration was the delivery and installation of substitute turbines by September 2020. The more the final award was delayed the less chances of RESPONDENT being capable of performing this task, even if the Tribunal were to decide in favour of CLAIMANT. However, bad faith is not only extremely hard to argue, but in this instance, it was not clear whether RESPONDENT knew of the litigation between Ms. Burdin's husband and Professor John. This, coupled with the fact that it held a long relationship with Professor John, making him the natural candidate to be RESPONDENT's chosen expert in a highly technical dispute, indicated that a coincidence might be at the origin of this particular issue. Even if it weren't so, the contrary would be nearly impossible to prove with the facts we were given.

2. Possible conflict of interest

When writing the Memorandum for CLAIMANT we decided that the first matter at hand would be to discern whether a conflict of interest existed. Relevant legal texts like the IBA Guidelines do not have explicit provisions on whether a litigation between a party appointed expert and the relative of an arbitrator is a situation of conflict, so it seemed only logical that there was a need to ascertain the nature of this potential conflict. The Guidelines themselves state that its lists are not meant to be exhaustive, and since they contemplate conflict only between

arbitrators, counsels and parties, one must determine whether this particular situation could still be included, and if so, in which list. This decision needs to be made by the Tribunal when determining whether an actual conflict exists.

However, for the purpose of creating a better argument both in favour of CLAIMANT and RESPONDENT, it became clear that rather than prove the existence or absence of the conflict, parties should make an argument assuming its existence or its nonexistence. In the written portion the discussion of whether this situation could be included by analogy in one of the IBA Guideline's Lists was profitable yet very time consuming, becoming clear in the oral rounds that it was too lengthy a subject, and ultimately not a decisive point in favour of either party. Therefore, parties would have to argue under the assumption of existence of the conflict each making an argument as to why, given the conflict, the arbitrator or the expert should be the one excluded.

Assuming the nonexistence of the conflict is a very different yet interesting strategy we used several times in the oral rounds. When RESPONDENT choose to say that there is no conflict between Professor John and the Tribunal, it seemed to be the surest way to prevent Professor John's exclusion on the grounds of conflict of interest. This line of argumentation allowed us to focus on the accusation of lack of independence and impartiality by Professor John and on the other issues involving CLAIMANT's appointed arbitrator.

3. Arbitrator vs Expert Witness: Which takes precedence?

When examining the situation it was clear that both parties have the right to nominate both an arbitrator and witnesses, including expert witnesses, rights that are assured by the LCIA Rules. However, given the present conflict in which one or the other may have to be excluded, the question was which choice should prevail. CLAIMANT stated that the choice of arbitrator is not only the most fundamental choice made in the course of an arbitral proceeding but also one of the main reasons to choose arbitration as a platform for conflict resolution[46]. The fact that so much time is spent, in the LCIA Rules and other legal documents, dealing with the circumstances in which an arbitrator may be challenged, further demonstrates the importance of the choice over that of an expert witness, who is barely mentioned. Expert witnesses' statements and evidence, on the other hand, may be freely admitted and regarded by the

[46] Margeret L. Moses, *The principles and practices of ICA, Appendix G: IBA Guidelines on Conflict of Interests in International Arbitration*, Cambridge University Press, 2008, p. 112.

Tribunal, or freely rejected[47]. RESPONDENT reiterated that it has the right to present its case in the manner it sees fit, and that the evidence to be presented by Professor John was both material and weighty, since it not only related directly to the matter at hand, but it could also influence the final decision by allowing the Tribunal a clearer picture of what is, understandably, a very complicated and technical matter.

Both parties added further objections to the other party's choices, and these new objections were no longer based on the conflict of interest alone, they were also about the independence and impartiality of Ms. Burdin and Professor John.

4. Due Process and presenting one's case

If on the one hand CLAIMANT stated that Professor John places the composition of the Tribunal in jeopardy, due to a potential conflict of interest, on the other hand, RESPONDENT argued that his exclusion would constitute a violation of due process under Art. 18 of the Danubian Arbitration Law (Model law) which establishes that parties shall be given full opportunity to present one's case, which includes the right to choose its own expert witness when the complexity of the case so demands[48].

CLAIMANT's response to this argument was that RESPONDENT is in no way deprived of presenting its case. CLAIMANT pointed out that Professor John is not a key witness as there are three other experts with comparable qualifications who could present their professional report and therefore aid the Tribunal in the decision making process[49]. A new expert would fulfil the same role without jeopardizing the constitution of the Tribunal.

To this RESPONDENT contraposed that not only is it free to choose its own expert and that it should not be dictated to, but that the experts mentioned, although certainly knowledgeable in the field, do not have the hands on experience with RESPONDENT's products that Professor John does. He has extensive experience with RESPONDENT's innovative products in particular, not only has he been present at fairs and exhibits[50], he has also been hired by the

[47] LCIA Rules, Art. 20 (3) and Art. 22 (1) (vi).
[48] CIArb Guideline 7, p. 3.
[49] The Problem, PO2, p. 49, ¶17.
[50] The Problem, PO2, p. 50, ¶17.

owners of Riverhead power plant as an expert[51]. No other expert on the field has comparable knowledge of RESPONDENT's turbines.

5. Professor John's independence and impartiality

CLAIMANT then used this argument to state that this supposed close knowledge that would mean that Professor John would be the best expert to report on this particular situation, is actually indicative of a lack of independence and impartiality by Professor John, which means the Tribunal cannot rely on him to provide an impartial report. CLAIMANT further argued that Professor John has an extensive and ongoing relationship with RESPONDENT, as is clear by his attendance at fairs at the invitation of RESPONDENT and even the employment of two of his assistants in the latter's company. An expert, even one appointed by a party, should remain independent and impartial in order to be of help to the tribunal in its decision making process. Art. 21.2 LCIA Rules attests to this, despite mentioning only tribunal-appointed experts, party-appointed experts should nonetheless still be considered. Furthermore, the IBA Rules on the Taking of Evidence establish requirements for independence and impartiality of expert witnesses, Art. 5. 2. c) is especially relevant.

RESPONDENT argued that the mere fact that an expert is being paid to provide an expert report cannot be an indicator of lack of independence. The fact that an expert is consulted regularly merely further testifies to his expertise and ability, it does not indicate dependence. The standard of impartiality of a party appointed expert is not made clear, since the IBA Rules merely state that an expert must provide a statement of independence, and Art. 21 applies only to tribunal appointed experts. The tribunal itself must weigh the admissibility of Professor John's evidence, according to Art. 20.3 LCIA Rules.

6. Doubts as to Ms. Burdin's independence

RESPONDENT also casted doubt as to the impartiality and independence of CLAIMANT's arbitrator Ms. Burdin. According to RESPONDENT, the possible conflict of interest between Ms. Burdin and Professor John is not the only instance that makes Ms. Burdin's role as arbitrator problematic. Ms. Burdin has published and defended an extremely minority opinion

[51] The Problem, PO2, p. 49, ¶14.

on suspicion sufficing to determine non-conformance, opinions that CLAIMANT knew very well and from which it would benefit greatly in the current arbitration[52].

One of the cases that may be brought by RESPONDENT is the *CC Devas and others vs India Challenge* in which two arbitrators were challenged, and whilst the challenge against one was dropped, the challenge against the other was upheld, due to that arbitrator's published professional opinions. Whilst the Court recognized that the arbitrator was entitled to his views and academic freedom, it stated that RESPONDENT was entitled to have its case heard and ruled upon by arbitrators with an open mind.[53] RESPONDENT may state that the case at hand is similar to the Devas Challenge since the opinions held by Ms. Burdin are extremely minority opinions, and she may therefore, as argued in the Devas Challenge, have a professional interest in a particular outcome to avoid contradiction.[54]

According to Professor Born, the several issues regarding an arbitrator's impartiality and independence should be considered "cumulatively or in the aggregate"[55], as been upheld in previous cases such as *Sociedad de Valores S. A. v. Banco Santander*. Therefore, RESPONDENT claimed that although one of the aforementioned issues may be disregarded when seen individually, together the issues both of conflict of interest and of lack of independence should be enough to cast justifiable doubt on Ms. Burdin and request her exclusion through a challenge.

CLAIMANT stated that the fact that Ms. Burdin has written an article on the subject does not harm her independence, and further, that the case stated by RESPONDENT is possibly the only case in which an arbitrator was successfully challenged due to academic writings. It is an uncommon challenge, and the situation is not present in any of the IBA Guidelines' Lists, which contain the most important and relevant situations of conflict of interest.

[52] The Problem, Letter by Fasttrack, p. 42, ¶6.
[53] Devas Challenge, ¶64.
[54] Devas Challenge, ¶52.
[55] Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International, 2014, p. 1866.

7. When to challenge and when to waive the right to challenge

Art. 10.3 of the LCIA Rules sets out a limitation of 14 days to challenge the arbitrator, precisely to avoid parties holding a permanent threat over the arbitral tribunal. According to CLAIMANT this limit cannot be avoided by simply claiming to not have enough information at the moment.

The question of why RESPONDENT choose to not challenge Ms. Burdin at the moment and instead keep her under close scrutiny, is much harder to defend. If RESPONDENT has so many doubts as to her capacity to arbitrate in a fair manner it should formalize its objections as a challenge, and if it does not, then, CLAIMANT stated, it should waive its right to challenge her so that the work of the Tribunal can proceed without the threat of a challenge. RESPONDENT was adamant that it does not have enough information as to the conduct of Ms. Burdin to issue a challenge, but this does not mean it has to waive its right to do so in the future. As stated previously, the conflict is hard to define as it is not present in legal documents, however, should it materialize RESPONDENT must be able to act on it. RESPONDENT stated that it is unreasonable to demand that it waive one of its most fundamental rights within these proceedings. Furthermore, RESPONDENT pointed out that if we consider that there is a conflict, the disadvantaged party would be RESPONDENT since Ms. Burdin, theoretically, would be unable to be impartial in relation to the evidence presented, due to her animosity towards the person presenting it, making CLAIMANT's reasoning that RESPONDENT act right now incomprehensible to RESPONDENT.

In conclusion, CLAIMANT asked for the exclusion of Professor John based on his presence being a potential threat to the constitution of the Tribunal and his lack of independence and impartiality. RESPONDENT on the other hand claimed that it will not waive its right to challenge Ms. Burdin, since for RESPONDENT not only is the chosen expert the best choice but Ms. Burdin also has other issues, mainly her opinions and academic writings.

Despite being a fictional case, it has demonstrated a gap in the literature and legal mechanisms concerning the role and duties of party appointed experts in International commercial arbitration.

Substantive Issues

Issue III: Has RESPONDENT breached the contract by delivering turbines which are non-conforming in the sense of Art. 35 CISG?

Aurélio Freitas

This first substantive issue concerns conformity of goods, where we assessed if the delivered turbines could represent a contractual breach, by RESPONDENT, due to a possible non-conformity. In order to fully understand this year's problem, we had to address the elephant in the room by first tackling this controversial issue on the substantive matters: suspicion being (or not) sufficient to constitute non-conformity, because it is on the basis of a suspicion that CLAIMANT argues non-conformity of the delivered goods. We, firstly, focused on the discussion regarding suspicions, if they can render goods non-conforming and, if yes, under which criteria and the threshold that has to be met. Then, we elaborated on how suspicions would fit under Art. 35 of the CISG, regarding non-conformity, in order to determine if the suspicions fall under this scope.

1. Suspicions and non-conformities

One of this year's challenges was to determine if and how a suspicion could result in a non-conformity, if it constituted a contractual breach and to which remedies the injured party was entitled. CLAIMANT's suspicion was that the turbines delivered by RESPONDENT could have been manufactured with substandard or untested steel[56], which prevented CLAIMANT's reasonable reliance on the turbine's performance. This possibility jeopardizes the Greenacre project purpose, since excessive corrosion and cavitation, as discovered on the Riverhead tidal power plant turbines, would create an immediate need for replacement of the damaged turbines[57], and result in an unpredicted and unplanned stoppage time[58]. During that period, the power plant would not be producing energy, thus creating a necessity to purchase energy from non-renewable energy sources, such as the coal power plant in Ruritania, if the available alternative sources could not provide enough for the Greenacre community. Therefore, breaching the Greenacre power plant energy availability demand, jeopardizing its pursuit of

[56] The Problem, Exh. C6, p. 18, ¶2.
[57] The Problem, Exh. C3, p. 14, ¶5.
[58] The Problem, Exh. R2, p. 31, ¶4.

becoming a fully sustainable community, and the penalties associated with the stoppage time were CLAIMANT's biggest concerns.

The discussion on suspicions started because of international cases such as the Argentinian rabbit meat Case[59], the Glycol Wine Case[60] and, more recently, the Frozen Pork Case[61], where it was argued if suspicions can, indeed, render goods non-conforming. However, this discussion is far from settled and, until this moment, does not have an established precedent. There are some authors who endorse the thesis that a suspicion can lead to non-conformity of goods. That thesis is mainly supported by the above-mentioned cases, where state courts resorted to the CISG as the applicable contract law. So far, there are several criteria, some established by state courts, others proposed by legal authors, addressing the validity of arguments based on suspicions[62]. Some argue that the suspicion of a negative feature has to originate from concrete or obvious facts. Others suggest that the suspicion must amount to a fundamental non-conformity, under the threshold of Art. 25 CISG. For some, a suspicion only leads to a non-conformity when there is a danger of adverse health effects, resulting in a threat for public safety, e.g., on the Frozen Pork case public law provisions determined that foodstuff could not be harmful to health. The purchased pork was intended to be resold, however, under said public law provisions, it had to be adequate for human consumption. Since the suspicion, on the pork being contaminated with dioxin, was never dispelled, the tribunal deemed the pork not fit[63]. In the case law above mentioned the decision was also supported on another criteria, together with public health - the usability of the goods (or the lack of it). Because it was suspected that the pork was contaminated with dioxin, which violated the previously mentioned public law provisions, the goods were confiscated and destroyed. On this sense, the tribunal determined that the goods were not conforming[64]. The goods' ordinary purpose, Art. 35(2)(a) CISG, was breached, since the goods' usability (to be resold) was already negatively affected because of the suspicion. Lastly, others opine that if the suspicion can be easily dispelled by the buyer, then there is no grounds for a claim on the basis of suspicion.

[59] Federal Supreme Court of Germany (BGH), 16 of April, 1969.
[60] Federal Supreme Court of Germany (BGH), 23 of November, 1988.
[61] Federal Supreme Court of Germany (BGH), 02 of March, 2005. In this case, the tribunal held that Seller's incapacity to demonstrate that the goods were not contaminated with dioxin, by itself, was already a lack of conformity. It was never established if the pork was in fact contaminated. The suspicion was considered sufficient grounds for the pork to be destroyed.
[62] Ingeborg Schwenzer and David Tebel in *Suspicions, mere suspicions: non-conformity of the goods?*, Uniform Law Review, Volume 19, Issue 1, Pages 152–168, 2014.
[63] Frozen Pork Case, ¶I.
[64] Id., ¶II.(3)(d).

In this sense, we supported CLAIMANT's position, regarding the suspicion as a non-conformity, with authorities such as Professor Ingeborg Schwenzer and David Tebel, being that in their paper on this subject, they state that suspicion of a negative feature, in and of itself, is adequate to render goods non-conforming[65]. In our case, we had to demonstrate that the suspicion was strong and affected CLAIMANT's intended use for the goods to such as extent that a non-conformity, based on a suspicion, could match a traditional non-conformity, based on a hidden defect or an actual defect.

Under the proposed criteria, as CLAIMANT, we argued that the facts leading to the suspicion are well documented and reliable[66]. The prosecution of Trusted Quality Steel CEO, on the basis of forgery of steel certificates, is crucial, since 70% of the steel used by RESPONDENT comes from Trusted Quality Steel[67], which raises concerns that the steel used on the turbines is of inferior quality, which, ultimately, could result in a similar situation as the Riverhead Tidal Power plant, or worse, lead to severe damage to the whole power plant. If the turbines were damaged and replacement were necessary, a prolonged stoppage time could not be avoided even with all due diligence. We argued that RESPONDENT itself could not dismiss this ominous suspicion hanging over the goods it produced[68], delivered and installed, therefore, it was not reasonable for CLAIMANT to support the consequences of having received goods which were significantly different from its legitimate expectations, since it did not agree on a purchase of turbines with a suspicion of a negative feature. Because CLAIMANT paid forty million USD in total, for these premium water turbines, due to their enhanced performance and availability, a price that is 10% more expensive compared to other turbines available on the market[69], CLAIMANT may further argue that the turbines it received are not as valuable as the turbines it purchased, since the market already reacted to this suspicion and, although reselling is not CLAIMANT's purpose for the turbines, it has already suffered negative repercussions from the turbines delivered[70], since the valuation for the R-27V Francis turbines purchased at

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[65] Schwenzer and Tebel – "Today, it is widely acknowledged that non-conformity cannot only be based on the physical features but also on the legal and factual relations of the goods to their surroundings. It may even be argued that non-physical features have become more important […] than their physical counterparts.", Op. Cit. *Suspicions…,* p. 155, ¶2.

[66] The Problem, PO2, p. 50, ¶23.

[67] The Problem, PO2, p. 50, ¶24.

[68] The Problem, Exh. C5, p. 16, ¶4.

[69] CISG Advisory Opinion N.º 19, ¶4.17. – "The price can be a powerful indicator of what can be expected of the goods from the perspectives of tests in Art. 35(2). If the contract price corresponds to high quality or premium goods that are associated with a particular standard, this price points in favour of an implicit communication of a particular purpose that requires compliance with this standard (Art. 35(2)(b))."

[70] The Problem, PO2, p. 53, ¶42.

the time of the Sales Agreement is not the same as for the R-27V Francis turbines that were delivered for the Greenacre project, over which there exists a suspicion of a negative feature.

On the other hand, on RESPONDENT's behalf we argued the dominant opinion where prevails the idea that it is dangerous for international commerce that mere suspicions can lead to actual contractual breaches, upholding that, in our case, a mere suspicion could not outweigh an actual non-conformity[71]. It supported this argument on the fact that, out of the remaining available steel, 30% originated from other sources, which represented enough steel that it could have been used to produce both turbines. In addition, we argued that the turbines were built from separate batches of steel[72], therefore, there was also a strong possibility that only one turbine could have traces of steel originating from Trusted Quality Steel, cutting the 70% probability by half. Hence, a contract amounting to forty million USD cannot be affected by probabilities that may well not satisfy the tribunal's balance of probabilities criteria[73]. Regarding the connection with the Riverhead incident, RESPONDENT argued that there is only a 5% chance for the same amount of damage to happen on the Greenacre power plant turbines, since the environment conditions are substantially different[74]. RESPONDENT's turbines were designed to function in freshwater pump power plants, like the one in Greenacre, not saltwater tidal power plant such as the one in Riverhead. Whilst the turbines from Riverhead were working in saltwater, which increases abrasion and corrosion, in the Greenacre the turbines are operating in a freshwater environment, therefore, the suspicion does not amount to relevant criteria to determine non-conformity. Taking into consideration case law in which suspicion was considered to be enough grounds for non-conformity, RESPONDENT argues that one would only need to the other if the goods were rendered unusable by the suspicion, such as when authorities cease goods for considering that they may pose a threat to public health, as in the Frozen pork case. Ultimately, RESPONDENT did not accede to the proposed substitution of the delivered turbines because no signs of reduced energy availability nor stoppage time occurred or were deemed necessary, from the moment since the power plant started operating until the beginning of the arbitral proceedings. Therefore, CLAIMANT's turbines were not,

[71] Schwenzer and Tebel, – "[…] the mere suspicion of a negative feature cannot render the goods non-conforming. It is argued that only the features of the goods that can be discerned through a physical examination of the goods by the buyer can give rise to non-conformity.", Op. Cit. *Suspicions…,* p. 155, ¶1.
[72] The Problem, PO2, p. 51, ¶31.
[73] Alan Redfern and Martin Hunter – "The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the test of the 'balance of probability'(that is, 'more likely than not')."*, International Arbitration*, 6th edition, Oxford, 2015, ¶6.85.
[74] The Problem, Exh. C7, p. 21, ¶10; PO2, p. 49 of the problem, ¶15.

and are not, affected in their usability, since, for a full year, they have been operating at maximum capacity[75].

If the suspicion could be easily dispelled, then CLAIMANT's concerns would be dismissed, however, CLAIMANT argued that it is not in the position to conduct the test necessary to ascertain the quality of the steel. The only way to dispel the suspicion is through a thorough metallurgical examination in order to ascertain the quality of the steel used on the production of the delivered turbines. For that examination to take place, the power plant would have to stop production and some parts of the turbines would have to be destroyed for further laboratory analysis[76]. This process would result in a stoppage time that could not be supported by CLAIMANT, at least six months[77], going completely against the reason why these particular turbines were purchased in the first place, which was in order to minimize the stoppage time associated with maintenance and repairs. RESPONDENT was aware of this fact, however it argued that, even though it could not assure CLAIMANT if steel originating from Trusted Quality Steel was used in the turbines delivered, it suggested that the first scheduled inspection could be pushed forward. Even then, the metallurgical tests that could potentially destroy some parts of the turbines would only need to be performed if abnormal levels of corrosion were found[78]. Then, if no excessive abrasion or corrosion is found, then there would be no reason for major concern, since there is a very low probability of findings to the same extent as the turbines in Riverhead, plus, there is a very low probability that the turbines would have to be replaced immediately.

2. The CISG

The Convention for International Sale of Goods, CISG for short, is the applicable contract law[79]. All of the jurisdictions involved[80], including the seat of arbitration, Danubia, are contracting parties of this international convention. Under the CISG, in Art. 35, the conformity of goods is determined by a threshold of several alternative criteria. Therefore, the discussion this year was focused on whether a suspicion falls under the scope of Art. 35 CISG, in order to determine non-conformity, and if the facts given in the problem were relevant or strong enough

[75] The Problem, Exh. C4, p. 15, ¶2.
[76] The Problem, PO2, p. 52, ¶35.
[77] The Problem, PO2, appendix I, p. 55.
[78] The Problem, PO2, p. 52, ¶34.
[79] The Problem, Exh. C2, p. 13; Art. 21(2); PO2, p. 54, ¶53.
[80] The Problem, PO1, p. 46, ¶(III)4.

for a suspicion to result in non-conformity, consequently, allowing for CLAIMANT's argument for the existence of a contractual breach and consequent request for the delivery of replacement goods.

The first criterion deals with conformity as regards the obligations undertaken in the contract Art. 35(1) CISG. It determines that "the seller must deliver goods which are of the quantity, quality and description required by the contract […]". In our case, it is undisputed that the problem does not regard quantity, but instead can be related to quality and description.

As CLAIMANT, we argued that, even though Art. 35 CISG does not include suspicion in its wording, the quality, a fundamental element of the goods, is suspected to be less than what was legitimately expected. Therefore, through Art. 8(3) CISG[81], we argued that, even though the specifics of the steel that should have been used on the delivered turbines were not expressly agreed upon in the contract, it was only reasonable that the delivered goods should not be under suspicion[82], since RESPONDENT participated in the tender process and was completely aware that the delivered turbines had to be able to comply with the energy and availability demands. On the other hand, RESPONDENT counters by firstly, stating that the turbines are and have been complying with demand, and secondly, referring to the entire agreement clause[83] agreed upon by the parties and included in the contract, which protects RESPONDENT from being held to any agreement or statement beyond those set out in the contract, to be used in order to determine the parties' intent when contracting. Under this entire agreement clause, only the contract can be used to determine the parties' obligations, therefore, we argued that there is no non-conformity since a suspicion regarding the quality of the steel used in the fabrication of the turbines does not meet the threshold of the Art. 35(1) CISG.

The second set of criteria is found in Art. 35(2) CISG, and is applicable when the parties did not establish, in the contract, what would be a conforming compliance. It determines that "the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

[81] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd Edition Oxford University Press, Oxford 2005, Art. 35, ¶2.
[82] Id., Art. 35, ¶32.
[83] UNIDROIT Principles, Art. 2.1.17; CISG Advisory Opinion N. º 3, ¶4.

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show 'that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

Here, CLAIMANT's best argument was to allege a breach of the particular purpose, under Art. 35(2)(b) CISG. Because the particular purpose was to "minimize the risk of having to rely on energy produced by non-renewable sources by providing a largely uninterrupted supply of hydro energy"[84], it was argued that a non-conformity exists if the turbines are under suspicion of a negative feature, that ultimately threatens the energy availability of the plant. Not only was RESPONDENT aware, it was directly informed, since it was included in the tender process[85]. In the contract itself, the particular purpose was a common objective, since RESPONDENT's obligations regarding inspection were agreed upon a basis of minimal downtime and coordinated with the availability of the other renewable alternative sources[86]. However, the delivered turbines are suspected not being of the premium quality which would allow that mostly uninterrupted energy supply to the Greenacre community, therefore, not conforming.

However, on RESPONDENT's side, there is no basis for a claim based on a breach of contract arising from a breach of the particular purpose because the turbines were operating at full capacity and the energy requirements were being met. Nonetheless, RESPONDENT argued that the particular purpose might not be as important as CLAIMANT asserts, because, during the negotiations, CLAIMANT rejected RESPONDENT's suggestions to improve the power plant. RESPONDENT's suggestions could have improved power plant energy availability by reducing downtimes associated with inspections and maintenance[87]. RESPONDENT also pointed out that, after CLAIMANT expressed concern over the quality of the steel, it offered to deliver and install new turbines at CLAIMANT's expense, and if, upon inspection, the

[84] The Problem, Exh. C2, p. 11, whereas 5.
[85] The Problem, Exh. R2, p. 31, ¶4, 5.
[86] The Problem, Exh. C2, p. 11, Art. 2(d), (e).
[87] The Problem, Exh. C1, p. 10, ¶3.

turbines were considered defective it would reimburse CLAIMANT's expenses[88]. Not only RESPONDENT was acting in good faith, but CLAIMANT's refusal demonstrated that it was not available to take the measures needed to fulfil particular purpose it claimed. Nonetheless, both parties were aware that providing as almost uninterrupted supply of energy was a difficult bet, that being the reason for several instances in the contract pointing to the fact that both parties were conscious that downtimes could happen to be longer than initially hoped, pointing to Art. 2(1)(e) or Art. 19 of the Sales Agreement[89] as examples. CLAIMANT's particular purpose, as stated in the preamble, was do minimize downtime not to remove any possibility of it happening. So far, it did not happen. Therefore, by not having relied on Seller's skill and judgement[90], CLAIMANT cannot argue that the particular purpose was breached.

[88] The Problem, Excb. C7, p. 21, ¶2, 3.
[89] The Problem, Exb. C2, p. 12.
[90] Richard Hyland, *Conformity Of Goods To The Contract Under The United Nations Sales Convention and The Uniform Commercial Code*, 1987, Art. 35, ¶3; Karl H. Neumayer and Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises : commentaire,* CEDIDAC, 1993, Art. 35, ¶9.

Issue IV: In case of breach of contract, is CLAIMANT entitled to request the delivery of replacement turbines?

Aurélio Freitas

In order to advance to the last issue, it must be assumed that there was, in fact, a breach, and that the turbines were non-conforming. This last issue regards the available remedies in case of contractual breaches, and if, in our case, CLAIMANT is entitled to request the substitution of the turbines.

Under the CISG, substitution can be found in Art. 46(2) CISG. Substitution takes place: "(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter."

In order for a party to request substitution of goods, firstly, a fundamental breach of contract has to exist, secondly, the request for substitution must be made within a reasonable period of time[91]. Thus, the first threshold that has to be met in order to determine the available remedies is a fundamental breach of contract. There were two possible approaches to demonstrate the fundamentality of the breach created by the delivery of non-conforming goods: using the definition of fundamental breach in the contract, or the general provision in Art. 25 of the CISG.

1. Fundamental Breach

CLAIMANT argued that the definition of the threshold that should be taken into account is the one that the parties agreed to, which can be found in Art. 20 of the contract. This argument is possible because[92] under Art. 6 CISG the parties "may […] derogate from or vary the effect of any of its provisions." Thus, excluding the application of Art. 25 CISG, which constitutes the general threshold to determine the fundamentality of contractual breaches. CLAIMANT's argument is supported by Art. 20(2)(d) of the contract, wherein the parties have established, *"*For the avoidance of doubt*"* (emphasis added), what contractual breaches can constitute a fundamental one. Under subparagraph (d), a breach that deprives BUYER of what it is entitled to expect under the contract results in a fundamental breach. In this sense, CLAIMANT bases

[91] CISG Advisory Opinion N. º 2, ¶5.8.
[92] The problem, PO2, p. 47, ¶4.

its argument on the fact that it expected turbines with no suspicion that they had been built with steel of inferior quality, compromising the safety and performance of the Greenacre project.

Subsidiarily, it was argued that if the Tribunal were to find Art. 20 of the contract not applicable, then, the general provision of the CISG should apply. Under Art. 25 of the CISG, a fundamental breach occurs when a contracting party is "substantially" deprived of its legitimate expectations under the contract and the breaching party could have foreseen[93] that fundamentality. On CLAIMANT's behalf, the breach was fundamental and it supported its argument with case law, namely, FCF SA v. Adriafil Commerciale S.r.l[94]. This decision was deemed relevant for our case because the state court based its decision on Art. 25 of the CISG in order to determine if there was a fundamental breach, to support the party's claim for avoidance of the contract and request for damages. The court held that, under the definition of Art. 25, "The breach must concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties"[95]. In this sense, CLAIMANT presents the argument that the suspicion affects the goods since there is a serious threat that the Greenacre authorities would terminate the contract with CLAIMANT or, if not, then they may decree other economic measures.

RESPONDENT countered these arguments by stating that the breach does not deprive CLAIMANT of its legitimate expectations since the turbines have been operating for a whole year, with no problems, hence, CLAIMANT did not lose interest in the performance of the obligations on the contract[96] as the economic goal pursued through the purchase of the turbines is being fulfilled, until the beginning of the arbitral proceeding, with no signs of slowing down or being negatively affected because of said suspicion. According to Franco Ferrari, "Rather, it depends upon the impairment of the justified contractual expectations of the damaged party. This impairment must be so serious that it suppresses the damaged party's interest in the performance of the contract or that said party can no longer be expected to be satisfied with

[93] Karl. H. Neumayer and Catherine Ming - "[…] the damage must be foreseeable by the breaching party or by any other reasonable person of the same kind in the same circumstances at the time the breach of contract is committed. The contract determines if there existed a risk of a substantial detriment to the reasons and interests of the affected party, which had encouraged that party to conclude the contract", Op. Cit., *Convention de Vienne…,* Art. 25 ¶8.
[94] Federal Supreme Court of Switzerland, decision of the 15th of September 2000.
[95] FCF SA v. Adriafil Commerciale S.r.l, ¶C.(2.)(c.)(a)(aa.).
[96] Christoph Brunner and Benjamin Gottlieb – "[…] the deprivation must be of such extent that the interest of the party adhering to the contract in the full contractual performance by the other party has essentially lapsed.", *Commentary on the UN Sales Law (CISG)*, Kluwer Law International, 2019, p. 66, ¶9.

less drastic remedies such as damages, price reduction or repair."[97] At the moment no action seems to be necessary, due to the current condition of the turbines. Nonetheless, if necessary, repair is the adequate remedy, as we argued on RESPONDENT's interest, and it being possible means that CLAIMANT was not deprived of its legitimate expectations, since the performance is still possible and allows the fulfilment of the parties' legitimate expectations.

Regarding the foreseeability criteria, RESPONDENT acknowledged CLAIMANT's opposition to a prolonged standstill of the power plant, however, neither by the time of the conclusion of the contract nor by the time it was informed about the forgery was in a position where it could have predicted, or it was reasonable for it to have foreseen the consequences from the forgery of the quality certificates since that situation resulted from criminal actions practiced by the CEO of Trusted Quality Steel and its lead quality controller. According to Prof. Yasutoshi Ishida, "That is to say, the breaching party is not liable or culpable (and hence the breach is not egregious or "fundamental") where the breaching party "did not foresee" substantial detriment to the other party. Put in the terminology of criminal law, the breaching party did not have mens rea in bringing about such serious results from his breach. If asked, he would say, "Little did I dream of my breach causing such a ruinous situation." […] In contrast, the breaching party is culpable—and hence the breach is fundamental—if the breaching party foresaw the injured party's substantial detriment because in that case the breaching party did have mens rea. The breaching party, if explaining the situation candidly, would say, "I knew well my breach would produce such a ruinous situation, and I dared do it."[98] In addition, it was argued that RESPONDENT always demonstrated interest in cooperating in order to reduce any possible negative consequences, from suggesting that the first inspection be pushed forward[99], to offering to pay for the additional costs arising from the opening of the turbines in order to perform an inspection[100]. However, we must assume that a fundamental breach exists in order to address the available remedies.

[97] Franco Ferrari, *Fundamental Breach of Contract Under the UN Sales Convention, 25 Years of Article 25 CISG*, 2006, p. 495, ¶II.(2).
[98] Yasutoshi Ishida, *Identifying Fundamental Breach of Articles 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects - The Good Faith Duty of Collaborative Efforts to Cure Defects - Make the Parties Draw a Line in the Sand of Substantiality Make the Parties Draw a Line in the Sand of Substantiality*, Michigan Journal of International Law, Volume 41, Issue 1, 2020, pp. 67-68.
[99] The problem, Exh. C5, p. 16, ¶7.
[100] The Problem, Exh. C7, p. 21, ¶7.

2. CISG Remedies

CLAIMANT prefers the remedy of substitution, and therefore layed out a number of reasons why the tribunal should decide in favour of such a remedy. Firstly, it argues that substitution is the only remedy that allows for the parties' full performance, since the other available remedy, repair, would not solve the root of the problem. Repair would only addresses the symptoms and not the cause, which means that if repair takes place, it may solve the corrosion and cavitation problems existent at the time of the inspection, but the problem would persist.

Secondly, CLAIMANT argued that any other remedy would result in more onerous consequences[101], thus, substitution should be the designated remedy for the case at hand. The parties agreed on a table of probabilities, regarding time and monetary costs associated with the suspicion of the turbines having been built with substandard steel, and its consequences[102]. In this table, both parties agreed that if immediate substitution takes place, it would result in a total of three months stoppage time and the total costs would amount to 10.700.000 USD. For CLAIMANT, this option is preferable, since repair or unplanned substitution would require more time and therefore constitute a bigger hardship, as well as potentially costing more.

RESPONDENT's answer by stating that repair is not only possible, but the most probable solution, as demonstrated by the aforementioned table. It is also in fact more adequate because it would be unreasonable to produce, deliver and install a new set of turbines, when there is a low probability of interruption of the power produced by the plant[103]. Regarding the costs, RESPONDENT argued that the actual costs would not amount to such high numbers as the "Total Cost" column states, since part of the total costs are associated with a clause agreed upon by CLAIMANT and the counsel of Greenacre, establishing a penalty clause for each day that the power plant was not producing energy. RESPONDENT was not part of that agreement nor was that agreement included in the contract for the purchase of the R-27V Francis turbines. Due to the low probability that there would be need to stop the power plant and the inferior costs associated with repair, RESPONDENT argues that substitution would not be a reasonable nor a proportional remedy for the case. Furthermore, substitution is excluded as a solution when it is too onerous and could jeopardize a party's financial survival, as is argued by

[101] Joseph Lookofsky – "[…] the right to require performance should be interpreted in conjunction with an injured party's Convention obligation to mitigate damages", *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Art. 46 Buyer's Right to Require Specific Performance*, 2000, ¶214.
[102] The Problem, PO2, appendix I, p. 55.
[103] UNIDROIT Principles, Art. 7.2.3; CISG Advisory Opinion N. º 5, ¶4.4.

RESPONDENT. RESPONDENT has the right to cure the non-conformity under Art. 48 of the CISG, unless it causes the buyer undue burden. In this regard, RESPONDENT argued that it cannot be expected to perform in a specific manner which would put undue strain on its situation when the alternatives through which it could cure the non-conformity would not only be enough but actually cheaper for CLAIMANT as well, and lead to smaller period of downtime. Furthermore, since the suspicion, and not actual defect, is the basis for non-conformity its right to cure is simply the right to conduct an inspection, a relatively easy, low cost procedure, which it has offered to do at its own expense since before the arbitral proceedings were initiated.

Conclusion

Some students tend to learn better in academia, others need the practical input from live experiences, and through the moot court, participants must learn to excel in both. A lawyer's life is not as straightforward as exercises in practice books, hence the moot court, a competition that allows for a series of complex challenges, requiring skills from law interpretation to soft skills. A problem where there is not an obviously correct party, where facts are never limited to a single interpretation, tangled in a two-way standoff, where the applicable law is only limited by the story we choose to tell. Such a balanced problem demands the ability to persist, capacity for a systematic interpretation of the legal framework and peerless storytelling proficiency.

We strongly believe that a team is as strong as its "weakest link", thus, we have always worked in pursuit of a common goal, disregarding individual egos, embracing feedback, which, through individual openness to criticism and will to improve, created a stronger and more united team. In order to progress in the competition, the highest average scores were considered, therefore, only through a team effort it was possible to advance. This year's achievement is also greatly due to the multiple practice sessions against teams from around the world, which, in the end, were more than mere opposing counsels, but people interested in discussing the matters and helping each other, despite the shared desire to win. A community invested in improving themselves and their future professional selves.

We take pride in our results, however, we did not make this journey alone. We take this opportunity to thank NOVA School of Law for believing in its students and investing in their talents. This university is setting a precedent of excellence in the international panorama. We are also very grateful to our coaches, André da Fonseca Pereira and Rute Alves, who, with unwavering motivation, demanded nothing less than our best, individually and as a team. Providing feedback, challenging us to improve, always ready with a pep talk, before and after every session, but, most importantly, always believing in what we were yet capable of doing, guiding us through this, exhausting, but very rewarding, competition.

We also wish to thank our families and friends, who had to put up with many confusing discussions on the new aspect of the case we had discovered, late nights, and several days of being strictly told that there must be absolute silence and no, they could *not* use the internet whilst we were in a session.

Bibliography

Twenty Seventh Annual Willem C. Vis International Commercial Arbitration Moot Problem, available at: https://vismoot.pace.edu/media/site/previous-moots/27th-vis-moot/po2.pdf (consulted on 5th September 2020);

Authorities

Born, Gary B. - *International Commercial Arbitration*, 2nd ed., Kluwer Law International (2014);

Brunner, Christoph; Gottlieb, Benjamin – *Commentary on the UN Sales Law (CISG)*, Kluwer Law International, 2019 (consulted on 30th July 2020);

CISG Advisory Opinion N.º2, available at: http://www.cisgac.com/cisgac-opinion-no-2/ (consulted on 13th August 2020);

CISG Advisory Opinion N.º3, available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html (consulted on 13th August 2020);

CISG Advisory Opinion N.º5, available at: http://www.cisgac.com/cisgac-opinion-no-5/ (consulted on 13th August 2020);

CISG Advisory Opinion N.º 19, available at: https://www.cisgac.com/Opinion-no19-standards-and-conformity/ (consulted on 13th August 2020);

Ferrari, Franco - *Fundamental Breach of Contract Under the UN Sales Convention, 25 Years of Article 25 CISG,* Reproduced with permission of 25 Journal of Law and Commerce (Spring 2006), available at: https://cisgw3.law.pace.edu/cisg/biblio/ferrari14.html#104;

Holtzmann, Howard M.; Neuhaus, Joseph - *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 1989, available at: https://www.kluwerarbitration.com/book-toc?title=A+Guide+to+the+UNCITRAL+Model+Law+on+International+Commercial+Arbitration%3a+Legislative+History+and+Commentary (consulted on 23rd July 2020);

Hyland, Richard - *Conformity Of Goods To The Contract Under The United Nations Sales Convention and The Uniform Commercial Code*, published in Peter Schlechtriem ed., Einheitliches Kaufrecht und nationals Obligationenrecht, Baden-Baden: Nomos,1987, pp. 305-341, available, at: https://www.cisg.law.pace.edu/cisg/biblio/hyland1.html (consulted on 21st August 2020);

Kroll, Stefan - *Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, available at: http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/?doing_wp_cron=1598221350.4849729537963867187500 (consulted on 21st July 2020);

Lew, Julian D. M.; Mistelis, Loukas A.; Kröll, Stefan M., - *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague 2003 (consulted on 23rd May 2020);

Lookofsky, Joseph - *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Art. 46 Buyer's Right to Require Specific Performance*, available at: https://cisgw3.law.pace.edu/cisg/biblio/loo46.html#214-1 (consulted on 15th August 2020);

Moses, Margaret L. - *The principles and practices of ICA, Appendix G: IBA Guidelines on Conflict of Interests in International Arbitration*, Cambridge University Press, 2008 (consulted on 15th August 2020);

Neumayer, Karl H.; Ming, Catherine - *Convention de Vienne sur les contrats de vente internationale de marchandises : commentaire,* CEDIDAC, 1993 (consulted on 30th August 2020);

Platte, Martin - *An Arbitrator's Duty to Render Enforceable Awards*, Journal of International Arbitration 20(3):307–313 (2003) (consulted on 5th September 2020);

Redfern, Alan; Hunter, Martin - *International Arbitration*, 6th edition, Oxford, 2015 (consulted on 5th September 2020);

Scherer, Maxi - *Conduct of Legal Representatives under the 2014 LCIA Arbitration Rules: How to Apply the New Provisions*, Kluwer Arbitration Blog, March 23 2015, available at: http://arbitrationblog.kluwerarbitration.com/2015/03/23/conduct-of-legal-representatives-under-the-2014-lciaarbitration-rules-how-to-apply-the-new-provisions/ (consulted on 21st July 2020);

Schlechtriem, Peter; Schwenzer, Ingeborg, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd Edition Oxford University Press, 2005 (consulted on 20th August 2020);

Schwenzer, Ingeborg; Tebel, David, *Suspicions, mere suspicions: non-conformity of the goods?*, Uniform Law Review, Volume 19, Issue 1, Pages 152–168, 22 March 2014 (consulted on 24th July 2020);

UNIDROIT Principles commentary, available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

Ishida, Yasutoshi, *Identifying Fundamental Breach of Articles 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects - The Good Faith Duty of Collaborative Efforts to Cure Defects - Make the Parties Draw a Line in the Sand of Substantiality Make the Parties Draw a Line in the Sand of Substantiality*, Michigan Journal of International Law, Volume 41, Issue 1, 2020, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1964&context=mjil.

Case-Law

Apple Ebizcuss Arrêt n° 1053 du 7 octobre 2015 (14-16.898) - Cour de Cassation - Première chambre civile, available at: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1053_7_32739.html (consulted on 23rd August 2020);

Argentinian Rabbit Meat Case, German Supreme Court (BGH), 16 April 1969, NJW 1969, 1171–2; BGH, 14 June 1972, NJW 1972, 1464, available at: https://research.wolterskluwer-online.de/document/110a3383-f569-46aa-a623-831c857544d5 (consulted on 22nd July 2020);

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09 (consulted on 30th August 2020);

Frozen Pork Case, Bundesgerichtshof (BGH), 2 March 2005, available at: http://cisgw3.law.pace.edu/cases/050302g1.html (consulted on 14th July 2020);

FCF SA v. Adriafil Commerciale S.r.l, Federal Supreme Court of Switzerland, 15 of September 2000, available at: http://cisgw3.law.pace.edu/cases/000915s2.html (consulted on 20th July 2020);

German Supreme Court (BGH), 24 Sept. 1998, File number: III ZR 133/97, available at: https://www.judicialis.de/Bundesgerichtshof_III-ZR-133-97_Beschluss_24.09.1998.html (consulted on 23rd August 2020);

Mme X v. Banque Privée Edmond de Rothschild Europe, 26 September 2012, No. 11- 26.022 French Court of Cassation, 1st Civil Chamber, available at: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/983_26_24187.html (consulted on 30th June 2020);

NB Three Shipping Ltd v Harebell Shipping Ltd 'The Arctic Trader' and 'The Arctic Voyager' (UK), available at: https://www.casemine.com/judgement/uk/5a8ff70e60d03e7f57ea6da0 (consulted on 5th September 2020);

Presidium of the Supreme Court of the Russian Federation, Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration, 26 December 2018, available at: http://www.supcourt.ru/documents/all/27518/ (consulted on 14th July 2020);

Sociedad de Valores S. A. v. Banco Santander AP Madrid (ESP), 30 June 2011 Sociedad de Valores, S.A. v. Banco Santander, S.A. Madrid Court of Appeals 30 June 2011 Case No. 3/2009;

"Sony-Ericsson" - Russian Telephone Company v. Sony Ericsson Mobile Communications Rus LLC, Russian Supreme Commercial Court (Arbitrazh), 19 June 2012, CJSC No.1831/12, Resolution (19 June 2012), available at:

http://www.arbitrations.ru/userfiles/file/Case%20Law/Enforcement/Sony_Ericsson_Russian_Telephone_Company_Supreme_Court%20eng.pdf (consulted on 23rd August 2020);

Glycol Wine Case, BGH, 23 November 1988, NJW 1989, 218–20 https://research.wolterskluwer-online.de/document/e6a2d222-78c3-4651-810a-afe452111454 (consulted on 5th September 2020).

Annexes

Memorandum for CLAIMANT (I) and Memorandum for RESPONDENT (II) written by the team of the NOVA School of Law.

Twenty Seventh Annual Willem C. Vis International Commercial Arbitration Moot

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR CLAIMANT

On behalf of:		**Against:**
HydroEn plc		**TurbinaEnergia Ltd**
Rue Whittle 9		Lester-Pelton-Crescent 3
Capital City	v.	Oceanside
Mediterraneo		Equatoriana
(CLAIMANT)		(RESPONDENT)

Counsel for CLAIMANT

Aurélio Freitas | Maria Bernardo | Susanna Vickers

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INDEX OF ABBREVIATIONS AND DEFINITIONS

¶, ¶¶	Paragraph, paragraphs
Art.	Article
CIArb Protocol	Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	Exempli gratia; for example (Latin)
et. al.	Et alii (and others)
Exh.	Exhibit
IBA Guidelines	IBA Guidelines on Conflict of Interests in International Arbitration (2014)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce

in casu	in the case at hand (Latin)
	Below (Latin)
Ltd.	Limited
LCIA Rules	Rules of the London Centre of International Arbitration (2014)
Model Law	UNCITRAL Model Law on International Commercial
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959
No.	Number
RfA	Request for Arbitration
RRfA	Response to the Request for Arbitration
p., pp.	Page, pages
per se	By or in itself or themselves; intrinsically (Latin)
PICC	UNIDROIT Principles of International Commercial Contracts (2016)

plc	Public Limited Company
PO1	Procedural Order No 1
PO2	Procedural Order No 2
prima facie	Upon initial examination (Latin)
Principles of Transnational Procedure	UNIDROIT Principles of Transnational Civil Procedure
	Above (Latin)
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
v.	Versus; against (Latin)

INDEX OF AUTHORITIES

Private Dispute Resolution - Negotiation, Mediation, Arbitration, Vol. II Handbook,

Ed. 3 (2015)

Bianca/Bonell Caesare M. Bianca/ Michael J. Bonell

Commentary on the international Sales Law: the 1980 Vienna Sales Convention Giuffrè

Milan 1987

¶46

Black's Law Dictionary ***Black's Law Dictionary***

9th Edition

Thomson Reuters (2009)

Born Gary B. Born ,

International Commercial Arbitration,

2nd edition

Kluwer Law International (2014)

¶ 54, 65

Brunner/Wagner Christoph J.H. Brunner and Philipp K. Wagner

'Article 7 [Interpretation of the Convention and Gap-Filling]', in Christoph J.H. Brunner and Benjamin Gottlieb (eds), Commentary on the UN Sales Law (CISG)

Kluwer Law International (2019) pp. 83 - 88

Ferrari Franco Ferrari

Interpretation of statements: Article 8
in Franco Ferrari / Harry Flechtner / Ronald A. Brand

The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention

European Law Publishers (2003)

Fouchard et al. Philippe Fouchard, Emmanuel Gaillard ,Berthold Goldman

‘***International Commercial Arbitration’***

Kluwer Law International (1999)

¶46

Friedland Paul Friedland and Loukas Mistelis,

'2015 International Arbitration Survey: Improvements and Innovations in International Arbitration'

White & Case (2015)

Available at: https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf

¶76

Gabriel Henry Gabriel

Practitioner's Guide to The Convention on Contracts for the International Sale of Goods (CISG) and The Uniform Commercial Code (UCC), Oceana Publications

New York 1994

Gridasov/Dolotova Alexander Gridasov, Maria Dolotova,

'Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion',

Kluwer Arbitration Blog (2019)

Available at:
http://arbitrationblog.kluwerarbitration.com/2019/05/07/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/

Henriques Duarte Gorjão Henriques

'The role of good faith in arbitration: are arbitrators and tribunal institutions bound to act in good faith?'

ASA Bulletin, Volume 33 (2015) pp. 514-532

¶46

Hyland Robert Hyland

Conformity Of Goods To The Contract Under The United Nations Sales Convention and The Uniform Commercial Code

in: Schlechtriem, Peter, ***Einheitliches Kaufrecht und Nationales Obligationenrecht: Referate und Diskussionender Fachtagung Einheitliches Kaufrecht Nomos***

Baden-Baden 1987

IBA Working Group	1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee
	'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration'
Kantor	Mark Kantor
	'A Code of Conduct for Party Appointed Experts in International Arbitration- Can one be Found?'
	26 Arbitration International, No. 3, (2010) pp. 323-380
Kaufmann-Kohler	Grabielle Kaufmann-Kohler
	'Soft law in International Arbitration: Codification and Normativity'
	1(2) Journal of International Dispute Settlement (2010), pp. 283-299
	¶296
Kritzer	Albert H. Kritzer
	Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods Kluwer Law and Taxation

Boston 1989

Kröll Stefan Kröll

'Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases'

Kluwer Arbitration Blog (2010)

Available: http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/

LCIA LCIA

'LCIA Facts and Figures - Costs and Duration 2013-2016'

LCIA I LCIA

'***Experts in International Arbitration***'

Available at: https://www.lcia.org/News/experts-in-international-arbitration.aspx

LCIA II	LCIA ***'Challenge Decision Database'*** Available at: https://www.lcia.org/challenge-decision-database.aspx
Lew, Mistelis, Kröll	Lew, Julian D. M. / Mistelis, Loukas A. / Kröll, Stefan M., ***Comparative International Commercial Arbitration,*** Kluwer Law International, The Hague (2003)
Lookofsky	Joseph Lookofsky ***The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 46 Buyer's Right to Require Specific Performance*** Available at: https://cisgw3.law.pace.edu/cisg/biblio/loo46.html#214-1

Moses Margaret Moses

'The Principles and Practice of International Commercial Arbitration'

Cambridge University Press

¶65

Nairac Charles Nairac,

'Due Process: Considerations in the Constitution of Arbitral Tribunals' in Andrea Menaker
(ed), International Arbitration and the Rule of Law: Contribution and Conformity,

vol 19 (Kluwer Law International 2017), p. 120 et seq.

¶76

Neumayer/ Ming Karl H. Neumayer/ Catherine Ming

Convention de Vienne sur les Contrats de Vente Internationale de Marchandises CEDIDAC

Lausanne 1993

Onyema/Mistelis Emilia Onyema, Loukas Mistelis,

International arbitration: Corporate attitudes and practices 2006

PriceWaterhouseCoopers (2006)

Available at:
http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf

Redfern/Hunter Nigel Blackaby/ Constantine Partasides/ Alan Redfern/ Martin Hunter, et al.,

Redfern and Hunter on International Arbitration

6th edition

Oxford University Press (2015)

¶ 43, 54, 76

Schlechtriem Peter Schlechtriem

Internationales UN-Kaufrecht, 3rd Edition Mohr Siebeck

Tübingen 2005

Schlechtriem/ Schwenzer Peter Schlechtriem/ Ingeborg Schwenzer

Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd Edition Oxford University Press

Oxford 2005

Schwenzer/Tebel Ingeborg Schwenzer/ David Tebel

Suspicions, mere suspicions: non-conformity of the goods? ***Uniform Law Review***, Volume 19, Issue 1, Pages 152–168, 22 March 2014

Available at: https://doi.org/10.1093/ulr/unt042

Veeder V. V. Veeder

'The Lawyers Duty to Arbitrate in Good Faith'

in Laurent Lévy / V. V. Veeder

Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law, Volume 2

Kluwer Law International; International Chamber of Commerce (2004) pp. 115-141

¶46

Waincymer Jan Waincymer

'Procedure and Evidence in International Arbitration'

Kluwer Law International (2012)

Wilske/Stock Steohan Wilske, Michael Stock

‘ ***Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration – The Enlargement of the Usual Shortlist?’***

23 (1) ASA Bulletin (2005), pp.45-52

INDEX OF CASES

Siemens-Dutco	Siemens A.G. & BKMI Industrienlagen GmbH v. Dutco Constr. Co

Germany

New Zealand Mussels Case	Bundesgerichtshof, 8 March 1995 Available at: http://cisgw3.law.pace.edu/cases/950308g3.html

Russia

Sony Ericsson	Russian Telephone Co. v Sony Ericsson Mobile Communications Rus, Case No. 40-49223/ 11-112-401, 19 June 2012 Available at: http://www.arbitrations.ru/userfiles/file/Case%20Law/Enforcement/Sony_Ericsson_Russian_Telephone_Company_Supreme_Court%20eng.pdf

Singapore

Sumito	Tjong Very Sumito v. Antig Invs. Pte Ltd, [2009] SGCA 41

	Available at: https://www.yumpu.com/en/document/read/37156024/tjong-very-sumito-and-others-v-antig-investments-singapore-law
Dyna-Jet	Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017] SGCA 32 Court of Appeal Available at: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/s1234---gd-final-(ps-checked-and-ready-to-issue)-pdf.pdf
UK	
ASM v TTMI	ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm) (19 October 2005) Available at: https://www.trans-lex.org/311990/_/asm-shipping-ltd-of-india-v-ttmi-ltd-of-england-%5B2005%5D-ewhc-2238-/
NB Three Shipping	NB Three Shipping Ltd v Harebell Shipping Ltd 'The Arctic Trader' and 'The Arctic Voyager' (UK)

	Available at: https://www.casemine.com/judgement/uk/5a8ff70e60d03e7f57ea6da0
Law Debenture Trust	Law Debenture Trust Corp. plc v. Elektrim Fin. BV [2005] EWHC 1412 (Ch) (English High Ct.)
	Available at: https://www.casemine.com/judgement/uk/5a8ff74c60d03e7f57eab013
Mauritius Commercial Bank	Mauritius Commercial Bank Ltd. v. Hestia Holdings Ltd. & Sujana Universal Industries Ltd.
	Available at: https://www.bailii.org/ew/cases/EWHC/Comm/2013/1328.html
USA	
Ometto v ASA	US Supreme Court
	Adriano Giannetti Dedini Ometto, et al., petitioners, v. ASA Bioenergy Holding A.G., et al. 30 June 2014 Case No. 13-1194; 134 S.Ct 2877

Schmitz-Werke GMBH & CO. v. Rockland Industries Inc.	U.S. Circuit Court of Appeals (4th Circuit) [federal appellate court], 21 June 2002 Available at: http://cisgw3.law.pace.edu/cases/020621u1.html
Willis Flooring	Willis Flooring, Inc. v. Howard S. Lease Constr. Co., 656 P.2d 1184, 1185 (Alaska 1983) Available at: https://www.casemine.com/judgement/us/59149079add7b049345772c3

Switzerland

FCF S.A. v. Adriafil Commerciale S.r.l.	Schweizerisches Bundesgericht, 15 September 2000 Available at: http://cisgw3.law.pace.edu/cases/000915s2.html
Soyprotein products case	ZG Basel-Stadt, 1 March 2002 Available at: http://cisgw3.law.pace.edu/cases/020301s1.html

(Arbitral Decisions - por ordem alfabética de instituição)

International Chamber of Commerce	*Computer hardware case,* Award No. 7754, 1 January 1995 Available at: http://cisgw3.law.pace.edu/cases/957754i1.html
International Centre for Settlement of Investment Disputes	
Hrvatska case	Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw6289.pdf ¶ 75

STATEMENT OF FACTS

HydroEN plc ("Claimant") is a company based in Mediterraneo, leader in the market of pump hydro power plants, operating in over 100 countries with more than 25,000 employees, under the highest environmental standards.

TurbinaEnergia Ltd ("Respondent") is a renowned producer of premium water turbines based in Mediterraneo. Its newest R-27V Francis Turbines ("Turbines") are famous for their durability and reduced downtime for inspection.

January 2014 Greenacre, a city in Mediterraneo that wishes to be fully sustainable, invited tenders ("tender") for the construction and operation of a pump hydro power plant ("Greenacre Plant") that would allow it to rely solely on renewable sources of energy.

22 May 2014 Claimant and Respondent ("Parties") signed a sales agreement, wherein Respondent was to produce and install two R-27V Francis Turbines, known for being highly resistant to corrosion and cavitation due to the materials used, thus being able to operate for longer periods of time without the need for inspection.

15 July 2014 Claimant was awarded the tender, in which the characteristics of the Turbines played a relevant role.

28 July 2014 Opponents of the project at Greenacre launched a politically charged misinformation campaign. In order to dispel doubts about the project, a Greenacre Councillor, Mr. Crewdson, approached Claimant to add an amendment to the original tender contract to include an "availability clause" with the purpose of keeping downtimes to a reasonable minimum by increasing the penalty to be paid by Claimant for abnormal downtime periods.

January 2018 Claimant informed Respondent of the availability clause between Claimant and Greenacre.

20 May – 20 August 2018 Respondent delivered and installed the turbines to the Greenacre Plant, with documentation, including a statement from Respondent that the turbines were produced with steel of certified quality.

May 2018 Incident with other Francis R-27V Turbines at Riverhead Tidal Power Plant related to issues with the quality of the steel used in the manufacturing of the turbines.

26 June 2018 Raid at Trusted Quality Steel, Respondent's main steel supplier, revealed forgery of quality certificates, resulting in the sale of substandard steel.

25 August 2018 Respondent was informed of the Trusted Quality Steel fraud by the authorities. Respondent did not inform Claimant of the issue.

12 September 2018 Turbines at Greenacre Plant passed the acceptance test, and Claimant paid the remainder of the price. The plant started operations the following week.

2 October 2018 Following news of the fraud at Trusted Quality Steel, linked to problems with the Turbines at Riverhead Power Plant Claimant became aware that the steel from the turbines installed by Respondent could be of substandard quality and therefore prone to corrosion. The following morning, Claimant contacted Respondent to inquire whether the steel from which Claimant's turbines are made originated from Trusted Quality Steel.

4 October 2018 Respondent answered that it was not able to determine the origin of the steel as internal errors and forged quality certificates made such assurance impossible.

6 October - 11 December 2018 Various contacts between the parties in order to resolve the issue, to no avail. Respondent refused to replace the Turbines, suggesting however that the inspection planned for Sept/Oct 2021 be brought forward by a whole year to Sept/Oct 2020.

31 July 2019 Claimant submitted a Request for Arbitration ("RfA"), appointing Ms. Claire Burdin as arbitrator.

20 August 2019 After receiving the RfA, Respondent concluded a retainer agreement with Professor Tim John ("Prof. John"), an expert in the field of corrosion in steel and cavitation in water turbines, with whom Respondent had often collaborated.

30 August 2019 Respondent submitted the Response to the RfA ("RRfA"), revealing its intent to submit an expert report by Prof. John and nominating Mr. Pravin Deriaz as arbitrator.

21 September 2019 Ms Burdin submitted a letter in which she disclosed that her husband was involved in a litigation, pending judgement, with Prof. John regarding patent rights.

23 September 2019 Claimant wrote to the Tribunal requesting that it refuse the appointment of Prof. John as expert witness in order to safeguard the already constituted Tribunal and avoid a challenge by Respondent.

27 September 2019 Respondent also contacted the Tribunal noting that despite having contacted Prof. John only after knowing of the appointment of Ms. Burdin by Claimant, it would not abdicate the right to challenge the arbitrator.

SUMMARY OF ARGUMENTS

Issue I: The Tribunal has jurisdiction to hear the case, as the Arbitration clause is valid.

1. The Arbitration clause is valid because the parties agreed on its inclusion, exercising their autonomy. It is not contrary to Danubian public policy, in fact, sole option clauses are generally considered valid. The principle of equal treatment and the Danubian Court of Appeal ruling based on the *Siemens-Dutco* decision are not applicable. Finally, denying the Tribunal's jurisdiction would lead to an unreasonable level of interference in the parties' autonomy.

Issue II: The Arbitral Tribunal should order the exclusion of Prof. John, expert suggested by Respondent.

2. Through the introduction of Prof. John in the arbitration, Respondent purposefully creates a possible conflict of interest so as to later use it as grounds for challenge of Ms Burdin, arbitrator appointed by Claimant, or of the arbitral award. Prof. John is not a key witness, and it is preferable to exclude an expert witness than to exclude an arbitrator. The Tribunal has the power, under the LCIA Rules, to exclude witnesses from the proceedings, whether witnesses of fact or expert witnesses. This is aligned with the duty to produce enforceable awards.

Issue III: Respondent breached the contract by delivering turbines which are non-conforming in the sense of Article 35 CISG.

3. Respondent breached the contract by delivering turbines which do not conform to Claimant's legitimate expectations as defined in the sales agreement. Following article 35(1) of the CISG the Turbines are not fit for the purpose for which they were purchased. Furthermore, under article 35(2)(b) of the CISG, the delivered Turbines do not match the goods which would be fit for the particular purpose made known by Claimant to Respondent. Lastly, the suspicion surrounding the steel's quality deems the turbines non-conforming with the contract.

Issue IV: Claimant is entitled to request the delivery of replacement turbines

4. Claimant was substantially deprived of what it was entitled to expect under the contract, therefore, the breach of contract committed by Respondent constitutes a fundamental breach. Thus, Claimant is entitled to the substitution of the Turbines under PICC, Art. 7.2.3 and Art. 46(2) of the CISG (1). The replacement of the turbines is the only way to guarantee the full performance of Respondent's obligations and the least onerous solution to the case (2).

ARGUMENTS

ISSUE I: The Tribunal has jurisdiction to hear the case, as the Arbitration clause is valid.

5. The Tribunal has jurisdiction to hear the case, as there is a valid arbitration clause contained in Clause 21 of the Sales Agreement [Exh. C2, p. 13 ¶21]. The Parties chose the LCIA Rules to be applicable [PO1, p. 52]. In conformity with the widely acknowledged principle of *kompetenz-kompetenz* [Born, p. 1051], Art. 23(1) LCIA Rules states that the Tribunal has the power to "rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement".

6. The Arbitration clause is valid (A) The Arbitration clause is not contrary to Danubian public policy (B) Sole option clauses are generally considered valid, both in doctrine and in case law (C) Denying the Tribunal's jurisdiction would lead to an unreasonable level of interference in the parties' autonomy (D).

A) The Arbitration clause is valid because the parties agreed on its inclusion (1) and parties are free to negotiate the right to dispute forum selection (2). In any case, if this clause were bilateral, the current dispute would not be significantly altered and no actual unfairness has resulted from the sole option clause (3).

1) The Arbitration clause is valid because the parties agreed on its inclusion.

7. The parties, both being sophisticated and experienced parties [PO2, ¶1, p. 47], that have certainly previously concluded sales agreements [Exh. C3, ¶¶ 6-7, p. 14], expressly agreed on the inclusion of the sole option clause. As stated by Respondent's CEO, Benoit Fourneyman, it agreed to the sole option clause in exchange for other benefits [Exh. R2, ¶6, p. 32]. Thus, both parties clearly comprehended the intent and scope of the clause upon which they finally agreed. By accepting the sole option clause, Respondent thereby acknowledged that in aspects related to or arising from the Sales Agreement it would not have a right to initiate arbitration.

2) Parties are free to negotiate the right to select the dispute forum.

8. Parties are free to limit the right to initiate arbitration. Parties do not have an inherent right to initiate arbitration, in fact, the right to initiate arbitration depends upon a prior agreement by the parties that one or more of such parties may arbitrate. Furthermore, the right to initiate arbitration is waivable, both expressly and implicitly (such as by appearing in litigation proceedings initiated by the other party). Thus, this is not in any sense an inalienable right but instead a right that parties may freely waive [Born, p. 870 et seq.].

9. In the case at hand, the parties both agreed that arbitration would be a valid dispute resolution forum in relation to any disputes arising out of or in connection with the Sales Agreement, should Claimant elect to initiate arbitration. Thus, if the right to initiate arbitration is not inherent, and if it is waivable, then surely it is permissible for one of the parties to agree to give only the other party the right to initiate arbitration. As will be further analysed below, the right to initiate arbitration is interlinked with party autonomy, in this case, exercised to give the right to initiate arbitration to one of the parties in exchange for other benefits. The Tribunal should respect party autonomy in this respect, as it would in any other disposition in the contract.

3) In any case, if this clause were bilateral, the current dispute would not be significantly altered and anyway, no actual unfairness has resulted from the sole option clause.

10. Respondent claims that its rights in the current arbitration are somehow affected by the unilateral nature of the arbitration agreement, in such a way as to render the arbitration agreement void. However, a simple analysis reveals that if the arbitration clause were bilateral, and even if Respondent had had the right to initiate arbitration, the current situation would be identical. This is because Respondent has no reason to initiate litigation or arbitration against Claimant, as Respondent has been fully paid, and has nothing further to receive from Claimant under the contract [Exh. C2, p. 12, article 4(4); Exh. C4, p.15, ¶ 2]. Therefore, regardless of the unilateral nature of the clause, it would always be Claimant initiating arbitration proceedings.

11. Even supposing that there were effectively a situation wherein Respondent wished to initiate arbitration against Claimant (which there is not), and were not be able to do so due to the arbitration clause, that would no longer be an issue since Claimant has already initiated

proceedings, thus pre-empting any possible wish Respondent may have had to resolve this dispute in arbitral proceedings. According to the Russian perspective, as laid out by the Supreme Court's Digest, following the *Sony Ericsson* case, a sole option clause can be made valid if its scope is extended to permit either party to benefit from its dispute resolution forums [Gridasov/Dolotova]. In this case, even if that logic were applied, the current arbitration proceedings would continue in the same terms. Therefore Respondent cannot claim that any actual unfairness has resulted from the clause.

B) The Arbitration clause is not contrary to Danubian public policy (1). Furthermore, where there are doubts about the validity of the Arbitration Agreement, there is a general principle in favour of upholding the validity of the clause (2).

1) The arbitration clause is not contrary to Danubian public policy.

12. Respondent wrongfully raises the question of public policy [RRoA, ¶14, p. 28], claiming that, despite both parties agreeing on the drafting of the arbitration clause, it may, nonetheless, be in violation of Danubian public policy.

13. Firstly it must be said that what is considered as part of Danubian public policy is "an equal influence of all parties on the composition of the arbitral tribunal". This is a completely different issue to the one currently discussed, as in the present case, both parties have equal influence on the composition of the Arbitral Tribunal. Respondent is trying to adapt this rule to signify that parties should have equal access to remedies, which is an entirely different issue. Indeed in the few cases where sole option clauses have been considered invalid due to public policy, they tended to be clauses that violated several principles of Arbitration. For example, an arbitration clause providing (amongst other things) one party with the exclusive right to decide on the composition of the Tribunal and that parties were not be represented by legal counsel [Bas van Zelst I, p. 377], or else clauses contained in standard contracts or contracts where one of the parties was a consumer, or an employee of the other party, none of which are applicable *in casu*.

14. Secondly, when public policy is invoked in International Commercial Arbitration one must be aware that it is not the public policy of the seat that is invoked, but rather the international public policy of the seat [Bas van Zelst I, p. 376]. This is a far narrower concept

than public policy. In general, a sole option clause will not violate international public policy "In this context, international public policy is construed as a narrow concept. In view thereof, the lack of balance in (the negotiations leading up to an) the arbitration agreement should not per se be considered as a violation of such international public policy." [Bas van Zelst II, p. 81]. In light of this, there should not, *prima facie*, be any issue between a sole option clause and public policy, especially not international public policy.

15. Finally, as will be further shown below, most jurisdictions and scholars have no issue with sole option clauses, and do not consider that they violate public policy *per se*.

2) In any case, where there are doubts about the validity of the arbitration agreement there is a general principle in favour of upholding the validity of the clause.

16. Where there are doubts about the validity of the arbitration agreement, as long as the issue is not one of whether the parties intended to agree to an arbitration clause, there is a general principle in favour of upholding the validity of the clause "In most modern jurisdictions it is generally acknowledged that the principle of presumptive validity of international arbitration agreements ('in favorem validitatis)' must be applied to the interpretation of an international arbitration agreement. According to this principle, an arbitration agreement should be construed in good faith and in a way that upholds its validity." [Berger, ¶¶ 20-76. See also Lew, Mistelis, Kröll, ¶¶7-61 and 7-62]. The reason behind this principle is twofold. On one hand, it combats the "traditional suspicion with which the common law traditionally regarded arbitration agreements" [*Dyna-Jet*, ¶ 46]

17. On the other hand, it is generally acknowledged that if parties did not intend arbitration to be a valid forum for resolving disputes, they would not have included an arbitration agreement. Therefore, the Arbitral Tribunal must assume, as with any other contractual disposition, that when parties have included a certain clause or concluded a contract they generally intend it to be valid. It is not possible for Respondent to allege (and it did not) that it was unaware of the possible outcome of the sole option clause.

18. Moreover, it must be noted that Respondent at no point questioned whether the parties intended to agree to this arbitration clause - it is very clear, from the witness statement issued by Respondent's CEO [Exh. R2, ¶6, p. 32] that there is no doubt the parties truly intended to

agree to this arbitration clause, whilst being fully aware of its effects. Although the arbitral clause only permits Claimant to initiate proceedings, the arbitration agreement nonetheless exists and is valid, thereby fulfilling its "most important function" by "making it plain that the parties have indeed consented to resolve their disputes by arbitration" [Redfern/Hunter, ¶1-53], albeit at the election of Claimant.

19. All in all, at the time of conclusion of the contract, Respondent was aware of the sole option clause and its possible effects, as well as intending that the clause should be valid. Respondent would factually have gained nothing by having had the option to initiate arbitration proceedings, and arbitration proceedings have since been initiated, redressing any potential desire by Respondent to resolve issues in arbitration. Therefore, it should be said that it is not admissible for Respondent to allege the invalidity of the clause now merely to delay proceedings.

C) Sole option clauses are generally considered valid, both in doctrine and in case law (1). Furthermore the Danubian Court of Appeal decision based on the *Siemens-Dutco* decision, which is cited by Respondent, is not applicable to this case (2). The principle of equal treatment of parties, as crystallized in Art. 18 Model Law does not render the arbitration clause invalid, because it is not applicable to negotiations prior to the proceedings (3).

1) Sole Option Clauses are generally considered valid, both in doctrine and in case law.

20. Contrary to what Respondent stated in the RRfA [p. 28, ¶13], sole option arbitration clauses are currently fairly non controversial, as has been noted by several authorities - "In general, there will be little basis for concluding that asymmetric arbitration agreements are unconscionable." [Born, p. 197, ¶1269]; "The English courts have consistently ruled that sole option clauses are valid and enforceable under English law (...) The courts of many other jurisdictions have also confirmed that sole option clauses are valid and enforceable under their domestic laws." [Redfern/Hunter, p. 13 ¶¶2.95 and 2.96].

21. Case law has also generally considered sole option clauses valid, from decisions in the USA to decisions in the UK, Singapore, Australia, and most of Europe.

22. A brief comparative analysis would help to understand this (alleged) issue:
In the US, for instance, whilst some early decisions held sole option clauses to be invalid based on the doctrine of mutuality, this trend was later reversed, such that now most sole option clauses are held to be valid. As stated in *Willis Flooring*, "(...)Arbitration is not so clearly more or less fair than litigation that it is unconscionable to give one party the right of forum selection." [¶7]. This represents the view taken by most USA courts, with some exceptions, such as if the clause is contained in a standard contract or between an employer and employees.
23. In the UK, case-law has consistently been in favour of upholding sole option clauses [see e.g. *Law Debenture Trust*, ¶44; *Mauritius Commercial Bank,* ¶42]. In the case of *NB Three Shipping*, Morison J. declared that "Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties' autonomy over their choice of forum. On my view of the contract, once Owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay the court would not be according to them their autonomy." [¶12].

24. In Singapore, sole option clauses have consistently been upheld by courts, as exemplified in *Dyna-Jet* wherein Justice Coomaswaramy stated "It is my view that the overwhelming weight of modern Commonwealth authority, which I analyse at [64] to [113] below, has established the following five propositions of law: (a) The mutuality argument is discredited. A contractual dispute resolution agreement which operates asymmetrically is nevertheless an arbitration agreement." [¶61] thereby confirming that this view applies to common law jurisdictions in general [see also, in Australia, *PMT Partners*, ¶11].

25. In Europe, most countries consider sole option clauses to be valid, such as in Portugal [see, e.g. Ac. TRL, 12 de Julho de 2012 Proc. nº 7328/10.0TBOER.L1-1], Italy [Draguiev, p. 28; Perella, ¶4], Spain [Draguiev, p. 28], Germany, subject to certain exceptions already mentioned, such as in contracts with consumers, in contracts that violate procedural equality, etc. [Bas van Zelst I, p. 376].

2) The Danubian Court of Appeal decision based on the Siemens-Dutco decision, which is cited by Respondent, is not applicable to this case.

26. The *Siemens-Dutco* case, and subsequently the Danubian Court of Appeal's decision, referred to by Respondent, are not applicable to this case, as both the facts and the underlying rationale have nothing to do with the case at hand. In *Siemens-Dutco*, there was an issue of party inequality because whilst the claimant appointed its own arbitrator, both the respondents had to agree on a single arbitrator, despite their interests not being completely aligned. The Arbitral Tribunal proceeded with the arbitration, but after the arbitration ended, the award was challenged in the French Courts. The French Supreme Court determined that procedural inequality such as parties not having an equal influence on the composition of the Arbitral Tribunal was contrary to public policy, and therefore the award was annulled.

27. Firstly, the facts of the case differ immensely to the ones in the current case, as the issue in *Siemens-Dutco* was an instance of procedural unfairness, where the right of one party to select their own arbitrator was limited, since they were forced into a joint nomination with their co-respondent. In this case, both parties have an entirely equal standing in the procedure, both having a full right to nominate their arbitrator and influence the constitution of the Tribunal.

28. Secondly, even the rationale behind *Siemens-Dutco* is not applicable, as there is no indication of any procedural unfairness, and there is no procedural inequality between the parties. As has been stated above, all procedural rights, including the right to influence the constitution of the Arbitral Tribunal, are identical between the parties. The only difference is that Claimant was entitled to initiate arbitration whilst Respondent was not, which, as analysed above, does not constitute procedural unfairness, being a pre-procedural issue that cannot influence the current proceedings.

29. Furthermore, in this case, the parties explicitly agreed to the arbitration clause, fully foreseeing its application, and negotiated such a clause, being that Respondent received other business advantages in exchange for the "unequal" arbitration clause, as stated by Mr. Benoit Fourneyron [Exh. R2, p. 32, ¶ 6]. Therefore we are not faced with the same situation as in *Siemens-Dutco*, where the parties may not have foreseen a two vs one situation arising.

30. Additionally, in a recent decision with very similar facts to the *Siemens-Dutco* decision, the Higher Regional Court in Frankfurt decided that it was not necessary for the Court to appoint all the arbitrators, as there was no factual inequality (due to the peculiar circumstances of the

case [Kröll]) and the parties had expressly foreseen the possibility of having to jointly nominate an arbitrator, and made such a provision in their contract.

31. This decision has led some leading scholars to question "whether it may not be time to revisit Siemens vs. Dutco at least for those cases where the parties have expressly provided for appointment in multiparty situations. It appears doubtful that parties negotiating at arms' length require protection by public policy when they decide to waive their right to strict equality in the appointment process before the dispute has arisen. In these cases there are good arguments to protect the claimant's right to appoint its own arbitrator." [Kröll].

32. In this case, the parties may be said to be negotiating at arm's length, seeing as they are independent and do not have a close relationship with each other [Black's Law Dictionary, p. 123]. Thus, these parties have equal bargaining power and are not subject to undue pressure or influence from the other party. Considering all this and also the lack of procedural inequality and the fact that arbitration proceedings have already been initiated, thus pre-empting any actual unfairness, the parties do not require the Tribunal or a Court to protect their interests by overruling what they have expressly negotiated and agreed between themselves. In fact, as is argued below, if the Tribunal should find the arbitration clause invalid, that may in itself constitute a violation of public policy.

3) The principle of equal treatment of parties, as crystallized in Art. 18 Model Law does not render the arbitration clause invalid, because it is not applicable to negotiations prior to the proceedings.

33. Whilst it is generally acknowledged that party autonomy is the guiding principle of determining procedure, and a principle that has been wholly accepted by the Model Law [Redfern and Hunter, ¶6.07 p. 355], one of the few limits on party autonomy is the principle of equal treatment of the parties. This principle, laid out in Art. 18 Model Law states "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". This ensures that the parties do not have any unfair procedural advantages over each other, and each is treated equally, having the same opportunity to present their case, and the same rights to choose their arbitrators, etc.

34. However, contrary to what is alleged by Respondent, this principle does not apply to the negotiation proceedings before the arbitration. There is no demand that parties should be on an equal playing field as regards negotiation, this would be manifestly impossible to enforce, a large professional entity such as a bank could never make a valid agreement with a single person if the principle of equal treatment were interpreted thus. Even if it were applicable to the negotiations prior to the proceedings, which it is not, the principle of equal treatment could never be construed to mean that parties must have exactly the same rights and obligations under the contract. As stated by Prof. Born, in relation to the doctrine of mutuality which was at one stage applied in precisely this sense, this doctrine "was not properly or sensibly applied to require that the terms of contractual dispute resolution provisions grant precisely identical rights and remedies to all parties." All contracts are the result of both sides trying to maximise their possibility of gain, and therefore represent a give and take. In this case, the arbitration agreement is an integral part of the contract, and is a result of a long negotiation process, by which Claimant obtained the right to initiate arbitration, and Respondent obtained other benefits, as stated by Respondent's CEO [Exh. R2, ¶6, p. 32].

35. Furthermore, even if the Tribunal were to find this principle applicable to the negotiations, the principle of party equality does not apply to every difference in the treatment of the parties, but only to relevant differences, for example "the fact that a party was not given exactly the same amount of time as the other party, but was nevertheless given enough time to present its case, would not mean that the principle of equality has been violated" [Brekolakis, Ribeiro et al., in Mistelis, p. 878].

36. Finally, article 18 is designed to protect parties from serious egregious conduct from an Arbitral Tribunal, and "not to protect a party from its own failures or strategic choices" [Brekolakis, Ribeiro et al., in Mistelis, p. 879]. Thus, even if article 18 were applicable to the negotiations prior to the proceedings, which it is not, the situation under analysis is not included in the scope of article 18, as there is no manifest procedural unfairness, and any perceived unfairness results purely from the parties own strategic choices during the negotiations of the contract.

D) Denying the Tribunal's jurisdiction would lead to an unreasonable level of interference in the parties' autonomy.

37. As stated by Prof. Born "an asymmetrical arbitration clause is ordinarily best considered an appropriate exercise of the parties' autonomy with regard to the mode of resolving their disputes, which is entitled to full effect, save where unconscionable under applicable law." [p. 867]. Claimant submits that there should be no question about the validity of the arbitration agreement, for all the reasons set out above. However, if the Tribunal should find the arbitration clause invalid, thereby ignoring what the parties have expressly agreed upon, that may be considered an unreasonable level of interference in the parties' autonomy, which may in itself constitute a violation of public policy.

38. Party autonomy has always been a fundamental principle in International Arbitration. Since the Geneva Protocol of 1923 party autonomy has been consecrated in various conventions and guidelines to International Arbitration [Born, p. 66]. Moreover, with increasing importance, given that while in the Geneva Protocol party autonomy was not given priority over the law of the arbitral seat as regards procedural matter specified in the agreement, but currently, under the New York Convention (Art. V(1)(d)), and under the Model Law (Art. 19) party autonomy takes precedence [Redfern/Hunter, ¶6-07; Born, p. 103].

39. The importance of the principle of party autonomy is also cited as one of the main reasons for businesses to choose international arbitration [Onyema/Mistelis, p. 6 ¶2.2; Born, p. 84]. Thus, Born submits that "Taken together, Articles II and V(1)(d) prescribe a basic rule of party autonomy for regulation of the arbitral procedures. Under the Convention, Contracting States (and arbitral tribunals) are mandatorily required to give the parties' procedural agreements effect, subject to only limited exceptions to protect the fundamental fairness of the arbitral process." [p. 112]. As discussed above, in the current case, the matter under scrutiny is the result of an agreement between the parties at a pre-procedural level, not relating to the proceedings of the Arbitral Tribunal but to the initiation of such proceedings. However, the text cited above is still relevant, as it demonstrates that even in matters which are procedural agreements by the parties, and therefore subject to the limitations imposed by article 18 Model Law, among others, the fundamental principle to attend to is party autonomy, a rule which has limited exceptions relating to the fundamental fairness of the process. If that is true, than it should be true also for the agreement on the remedy itself, which is subject to fewer limitations,

especially since in this case it does not interfere at all with equality and fairness within the arbitral process.

40. In the same sense, see the decision in *Sumito* [¶28], wherein Justices Leong and Rajah state "More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration." This quote clearly sets out two points of great importance: firstly, the emphasis on party autonomy, and secondly, the distinction between two moments: the decision on the method of dispute resolution and the procedural rules to be applied, without prejudice to the fact that party autonomy is fundamental in both of these aspects.

41. Thus, and in conclusion, party autonomy is the cornerstone of international arbitration, and as such, it should be accorded great respect. If, as has been shown, the parties have agreed to submit their disputes to arbitration (whether at the election of one of the parties or both), then this agreement should be respected by the Arbitral Tribunal. This is the general consensus in both doctrine and in jurisprudence world-wide, with very few and limited exceptions, most of which are based on specific circumstances (see , ¶13) which are not relevant in the present case. Furthermore, as has also been shown, the limitations on party autonomy should be reduced to a minimum, only being justified if they are necessary to correct a major unfairness within the proceedings themselves, which has been shown to not be the case. The forum choice clause in these proceedings in no way impacts the constitution of the Arbitral Tribunal or the fairness of the proceedings, both parties being on equal footing as regards the arbitral process.

42. For these reasons and all others explained above, Claimant submits that the arbitration agreement is valid and should be upheld by this Arbitral Tribunal.

ISSUE II: PROFESSOR JOHN MUST BE EXCLUDED

43. The Tribunal is requested to exclude Prof. John as an expert witness. Pursuant to Art. 20(3) of the LCIA Rules, the Tribunal has the power to admit or exclude any written or oral testimony of witnesses, be they witnesses of fact or expert witnesses. This Tribunal should take as source of inspiration the IBA Guidelines on Conflict of Interest in International Arbitration 2014 ("**IBA Guidelines**"), since these are universally accepted [Kaufmann-Kohler, p. 296; WIlske/Stock, p. 45; ASM v. TTMI; Ometto v. ASA; Applied Materials case]. The IBA Rules on the Taking of Evidence 2010 ("**IBA Rules**") should also be used by this Tribunal as they are generally regarded as best practice in international arbitration [Redfern/Hunter, p. 381, Preamble IBA Rules].

44. Prof. John was appointed by Respondent with the intention of creating a possible conflict of interests which may lead to a challenge of the composition of the Arbitral Tribunal or even of the award itself by Respondent. In order to preserve the integrity of the arbitral proceedings and ensure that the proceedings go smoothly, the Tribunal must not accept Prof. John as an expert. As Claimant will demonstrate in this section, the exclusion of Prof. John is the only solution to guarantee the enforceability of the award, as otherwise the conflict of interests between Prof. John and Ms Burdin could constitute ground for challenge **(A)** and the exclusion of Prof. John would not impair Respondent's defence **(B)**.

A) The Arbitral Tribunal should order the exclusion of Prof. John because Respondent suggested Prof. John as expert in bad faith, as part of a strategy to delay the arbitral proceedings (1), by creating a conflict of interest (2) to then challenge Ms Burdin or even the arbitral award itself (3).

1) Respondent acted in bad faith when it appointed Prof. John as its expert

45. The appointment of Prof. John is part of Respondent's strategy to delay the issuance of the final award. This would not only undermine the arbitral proceeding itself, but also the effects of the award. Respondent does have the right to challenge arbitrators, like any other party, [Art 10.1, LCIA Rules], but when it uses this right to undermine the current arbitration proceedings hostage, it incurs into an abuse of right, breaching therefore the principle of good faith.

46. The obligation to act in good faith constitutes a general principle not only in international arbitration [Fouchard et al., ¶1479; Henriques, p. 526, Veeder, p. 124], but also in

the applicable substantive laws, i.e. PICC and the CISG [PO1, p. 46, ¶4]. In fact, Art. 1.7 PICC requires parties to act in accordance with good faith and fair dealing in international trade, whilst the notion of good faith provided by Art. 7(1) CISG applies to the parties' conduct in contractual relationships [Brunner/Wagner, p. 83: Ferrari, Art. 7 ¶26]]. Therefore, the Tribunal shall take the good faith obligation into account when deciding the case [Bianca/Bonell Art. 7 ¶ 2.4.1]. The facts are crystal clear in demonstrating Respondent's intentions.

47. Respondent signed Prof. John's retainer on August 20th 2019 [PO2, p. 49, ¶15] almost a month after it received Claimant's RfA [Letter by LCIA, p. 22, ¶1] containing the appointment of Ms. Burdin as arbitrator [RfA, p. 3]. By the time Prof. John was suggested as its expert witness, Respondent was well aware of the existence of a litigation between Prof. John and Mr. Burdin regarding patents [Letter by Burdin, p 40 & PO2, p. 48, ¶10; Letter by Fasttrack, p. 42, ¶4]. This timeline indicates *per se* that the appointment was designed since the beginning by Respondent to deliberately create a conflict of interest that could later serve as grounds for challenge the arbitrator appointed by Claimant or of the arbitral award, thus delaying the process and the issuance of a final award and, also, jeopardizing the entire arbitration procedure.

48. Furthermore, Respondent refuses to take any action that could resolve the conflict, either by excluding Prof. John or waiving its right to challenge Ms. Burdin as arbitrator [Letter by Langweiler, p. 41, ¶3]. Respondent not only stated that Prof. John is essential to its defense [Letter by Fasttrack, p. 42, ¶2], but also refused to waive its right to challenge Ms. Burdin on two separate occasions [Letter by Fasttrack, p. 42, ¶5 & PO2, p. 48, ¶12]. Since the proceedings have only just started, issues such as conflicts of interest should be resolved now rather then allowed to become a shadow hanging over the entire proceedings. However, it is by this far already clear that Respondent intends to maintain this potential conflict of interest, in case, should the award not be in its favor, it can retain the grounds to challenge that award. This refusal to remove a pending threat to the proceedings is further proof of Respondent's bad faith.

49. Respondent has always been firm in its unwillingness to take any action regarding the Turbines until the inspection of September 2020 [Claimant Exh. C 7, p 20, ¶3, 8, look for more]. The challenge of an arbitrator would naturally cause a delay in the arbitral proceedings, as the Tribunal would have to pause the process in order to assess the challenge and decide on it, before being able to continue.

50. If an award is issued after a significant delay, it undermines the usefulness of Claimant's main request for pre-production and delivery of two substitute Turbines [RfA, p.8 & 9, ¶ 26. 1) & 2)]. As stated by Respondent , there is only a small window of time in which Respondent would be able to produce these turbines, as their other project was delayed [Claimant Exh. C 7, p 21, ¶ 7; RRfA, p 27, ¶ 11]. In light of this, if the issuance of the award is substantially delayed, in particular after the inspection in September of 2020, it could make Claimant's request for the timely production of the Turbines impossible.

51. Respondent's intention is simple: to use this potential procedural issue to benefit its substantive position and stall the proceedings as much as possible. If Respondent did not interfere, the award would most likely be issued well before September 2020.

2) Respondent introduces a possible conflict of interest between Prof. John and Ms. Burdin

52. Ms. Burdin, the arbitrator appointed by CLAIMANT, within the fulfilment of her duty of disclosure, recently revealed that there are ongoing litigation proceedings between her husband, Mr. Burdin, and Prof. John, the expert that Respondent has appointed [Letter by Burdin, 21 of September, p 40]. Were Mr. Burdin to not prevail in the litigation with Prof. John, he would no longer be co-owner of the patent and would, subsequently, loose the US$ 5000 that he receives every year because of it [PO2, p. 48, ¶ 10].

53. This conflict between Ms Burdin's husband and Prof. John may naturally color her view of Prof. John, his character and abilities, leading her to question his reliance and trustworthiness, which could cause her to disregard the expert report provided by Prof. John. Were this to occur, it might indeed harm Respondent's defense, by influencing Ms Burdin's examination of the evidence provided by Prof. John.

54. The LCIA Rules [article 5.3] and the Model Law [article 12 (2)], which is the law of Danubia (the seat of arbitration), both require that an arbitrator be independent and impartial. "Independence" is understood to relate to the objective relationships between arbitrators and parties, or affiliates of such parties [Born, p. 1776; Preamble of IBA Guidelines]. Arbitrator's independence and impartiality are assessed by determining whether a reasonable third person could have reasonable doubts over these two factors [Redfern/Hunter, p. 254; General Standard 2 (b), IBA Guidelines].

55. The IBA Guidelines provide for different lists ("Lists"), which contain various situations in which a conflict of interest could be said to exist. The situation of conflict between arbitrator and expert witness is not explicitly included in these Lists. It should be noted, however, that these Lists are not exhaustive [Introduction to the IBA Guidelines, p. 3, ¶7] and there are many other situations that could constitute a conflict of interest which are absent from them. The Red and Orange lists contain those situations where there are justifiable doubts about an arbitrator's independence or impartiality [IBA Guidelines, pp 17-18]. The Green lists, on the other hand, provides for situations which would not constitute justifiable doubt [IBA Guidelines, p. 18].

56. The guidelines consider the involvement of a close family member of an arbitrator with one of the parties, or its affiliates to be relevant, as this kind of situation is mentioned several times under List 2, the Waivable Red List [IBA Guidelines, pp 20 & 21, 2.1 -2.3]. In the present case, Ms. Burdin's husband certainly has a strong, albeit negative, link to Prof. John, due to the litigation proceedings that are underway. Aside from the emotional hardship that being involved in a dispute carries, there could also be financial implications, as if Mr. Burdin were to win, he would have a financial gain, and if he were to lose, he would be deprived of at least 5.000$ annually. These financial and emotional aspects necessarily affect Ms. Burdin, and, as stated above, may color her perception of Prof. John's evidence.

57. If Ms. Burdin's view of Prof. John is not completely impartial, it may be problematic for the arbitration as a whole, particularly for Respondent, as their expert's evidence would be of questionable value to at least one of the arbitrators. In light of all the above, the situation described should be included in the Red List, as it could be a serious issue, not only during the arbitration but also during the enforcement of the award, particularly if the award is not to Respondent's taste.

58. For all this, Claimant has reasons to believe that Respondent may derail the arbitral proceedings by alleging this possible conflict of interest later on, despite having already been informed of the situation [Letter by Fasttrack, ¶4 & 5]. This would be consistent with Respondent's strategy of attempting to delay the issuing of the award, perhaps to make it harder to produce replacement Turbines, as seen by Respondent's attempt to invoke the nullity of a carefully negotiated arbitration clause.

59. It is also important to note that Ms Burdin's disclosure does not mean that there is an actual conflict, or that the arbitrator is partial or dependent, as the standards for disclosure are not the same as those for challenge [Preamble of the IBA Guidelines]. Nonetheless, since it seems that Respondent will use this situation as a triumph card, and the Tribunal must try to avoid having either an arbitrator or the award challenged, under its obligation to render an enforceable award [Art. 32(2) LCIA Rules], the Tribunal should exclude Prof. John.

3) Respondent intends to use this possible conflict of interest as grounds for challenge of the arbitrator or of the arbitral award

60. As mentioned above RESPONDENT intends to challenge Ms Burdin. This is made clear in the Letter by Fasttrack, p. 42 ¶5, in which Respondent says it will closely monitor Ms Burdin's behavior to determine whether she is being biased. In order to be effective, the proceedings cannot be subject to such a lingering threat to the composition of the Tribunal. The possibility of challenge should not be dismissed or minimised by this Tribunal, since, should Prof. John be accepted as an expert, Respondent would have a case in favor of dismissal of the arbitrator. Furthermore, as described above, this situation would fit within the Red List, which means this risk would remain throughout the entire proceedings, as the possibility for Respondent to challenge an arbitrator cannot be tacitly waived, even though more than 14 days have passed since Respondent was aware of the conflict [Art. 10(3) LCIA Rules; General Standard 4, IBA Guidelines].

61. Article 10(1) of the LCIA Rules clearly states that an arbitrator may be challenged on the basis of "justifiable doubts as to that arbitrator's impartiality or independence", which, as has been shown above, could be argued by Respondent.

62. The conflict of interest described previously could be waived in accordance with General Standard 4 (a) and (c) of the IBA Guidelines, which provide for the possibility of waiving the right to challenge an arbitrator under the Waivable Red List. In order to allow the arbitrator to remain in the arbitration procedure despite the conflict of interest, both parties would have to be aware of the conflict of interest and both would have to explicitly waive their right to challenge the arbitrator.

63. It is clear that both parties are aware of the possible conflict [Letter by Burdin, p. 40], however, Respondent refuses to either challenge Ms. Burdin or to waive its right to such a challenge [Letter by Fasttrack, p 42, ¶ 4; PO2, p. 48, ¶12]. Respondent therefore aims to hold

the entire proceedings "hostage" of its "guerrilla tactics", since at any given moment, it may initiate a challenge, even if its only ground be the mere suspicion that the results not to be in its favor, or otherwise wishes to delay the proceedings.

64. Even if Respondent's challenge were eventually denied, it would still entail an in depth analysis which means that even the mere introduction of a challenge would be enough to delay the proceedings, which is precisely Respondent's intention.

65. As stated, the Tribunal has a duty to guarantee that the award is enforceable, according to Art. 32(2) of the LCIA Rules. The New York Convention, which is applicable since Danubia is a contracting state [PO1, p. 46, ¶ 4], allows for refusal of recognition or annulability based on issues within the composition of the Tribunal or the arbitral procedure itself [Art. V (1) (d), New York Convention; Born, p. 1762; Moses, p. 202], when these were not in accordance with the agreement of the parties or with the lex fori (Danubia). As seen above both legal documents contain specific provisions on the independence of the arbitrators, and therefore can be used for arguing against the award through the claim of conflict of interests.

66. Thus, even if Respondent chooses not to challenge Ms. Burdin at this stage, it may still use the same line of argumentation to have the arbitral award annulled or not recognized. The presentation of an expert report by Prof. John and the subsequent issues discussed above could lead to a conflict of interest and therefore to dismissal of evidence by one of the arbitrators, could be used as grounds for a challenge of the award by Respondent.

67. It becomes apparent that, unless the Tribunal excludes Prof. John, both the proceedings and the award may be fatally flawed.

B) Prof. John's exclusion will not impair Respondent's right to present its case since Prof. John's expertise is not essential to Respondent's defense (1), and it is preferable to exclude Prof. John, than to exclude Ms Burdin (2).

1) Prof. John's expertise is not essential to Respondent's defense

68. Contrary to what Respondent claims, Prof. John's testimony is not essential and his exclusion will not impair Respondent's defense, nor violate its right to equal treatment [Letter by Fasttrack, p 42, ¶ 2].

69. According to the LCIA guidelines on party appointed experts, all experts, even party-appointed experts, should be unbiased [LCIA I]. This can be seen throughout the guidelines, such as when it is suggested that party-appointed experts should as a rule collaborate and present a unified report. Party-appointed experts are not present to argue for the position of their employer but rather to present their factual, unbiased opinion, based on their experience.

70. International Practices and standards support the notion of independence of the party-appointed expert [Principles of Transnational Civil Procedure Art. 22.4.3; CIArb Protocol Art. 4(1)]. Art. 5 of the IBA Rules focuses specifically on party-appointed experts, determining that an expert must disclose any relationships that they may have with any of the parties, counsels or members of the Tribunal [5(2)(b), IBA Rules], and must furthermore be independent [5(2)(c), IBA Rules], "in the sense that he or she has no financial interest in the outcome" [Commentary to IBA Rules, p. 19]. In this case, it is important to note that Prof. John is not just an expert that occasionally works with Respondent but actually works for Respondent, having signed a retainer agreement just before this arbitration [PO2, p 49, ¶15]. Thus, it is at least arguable that these proceedings will financially affect Prof. John, since he clearly has an interest in the company's long-term survival and success.

71. Given that there are a total of three other experts who are available, speak English and have the necessary expertise, Respondent cannot claim that their defense is only assured if Prof. John is allowed as their expert [PO2, p. 49, ¶ 17]. Respondent's insistence on this matter leads to the question of why apparently only Prof. John's report will suffice, despite the availability of other experts, who although equally competent, perhaps have less ties to Respondent, seeing as they are not currently under contract with it. Seeing as the expert report is based on technical, objective facts, a different expert with the same skill set should be able to provide the expertise necessary to clarify said technical facts to the Tribunal.

72. Furthermore, it is important to differentiate an expert from a witness of fact. According to the IBA Rules, a witness statement is a "written statement of testimony by a witness of fact", and a party-appointed expert is a "person or organization appointed by a Party to report on specific issues determined by the Party". The Commentary to the IBA rules [p. 14] states "In arbitration, the facts of the case are often established through witnesses, who testify about events of which they have personal knowledge. This personal knowledge distinguishes the witnesses of fact from experts, who provide opinions based on their expertise in a particular

field." A witness of fact may be preponderant in clarifying intentions, actions and procedures taken by the parties which may determine the result of the arbitration.

73. The witness of fact often cannot be substituted, as they may be the only person who knew a certain fact or saw a certain event. For this reason, there is no requirement that a witness of fact be unbiased. However, the expert is not presented to the Tribunal to speak of his personal experiences, but rather to report clearly and directly on technical aspects that would allow the arbitrators to have a better understanding of the issue, and as a consequence, to be in a better position to decide on matters which often are outside their own field of expertise, as in the present case where a knowledge of hydro power plants is important to determine such things as conformity. In this sense, unlike a witness of fact, the expert's function can be performed by another equally qualified expert, such as in the case at hand, where Prof. John can be effectively replaced, as there are at least three other experts who possess all the requisite requirements to explain the necessary technical aspects.

74. Even if Prof. John is excluded, Respondent can still appoint a qualified expert and benefit from his expertise, thus safeguarding its right to present its defense and remain on equal footing with Claimant. Indeed, the removal of Prof. John would precisely establish equality among the parties as it would eliminate any conflict of interest which could potentially impair Respondent's defense and jeopardise the proceedings or even the final award.

2) It is preferable to exclude Prof. John rather than Ms. Burdin

75. The composition of the Tribunal and its preservation is key, so much so that the Arbitral Tribunal has the duty to withhold approval of legal representatives which may compromise not only the composition of the Tribunal but also the enforceability of the award [Art. 18.4 LCIA Rules]. The rationale behind this article is precisely to allow the Tribunal to deal with situations like the present one. It is not the first time that an appointment from one of the parties is used as a strategic tactic to endanger the constitution of the panel, thereby delaying proceedings or even aiming to remove an Arbitrator from the Tribunal [see Hrvatska case; Waincymer 290-291]. In order to oppose this sort of bad faith tactics, the LCIA included a specific article in its 2014 Rules that allows the Tribunal to restrict the party's choice of legal representative if that choice would endanger the Tribunal's composition. Although in the present case the issue is not between Counsel and an arbitrator but rather an expert and an arbitrator, the same logic applies, bad faith tactics such as these cannot be rewarded with either the ungrounded change

of the Tribunal or a trump card to undermine the enforceability of the award. Therefore it is only adequate that any appointment that threatens the Tribunal shall be excluded.

76. Furthermore, Prof. John should be removed from the proceedings instead of Ms. Burdin, as the challenge and removal of an arbitrator is much more serious than that of an expert. The right to choose one's Arbitrator is a well known principle of arbitration emanating from the principle of party autonomy [Born, p. 1654], and, to quote a well-known maxim, "arbitration is only as good as the arbitrator" [Nairac, p. 124]. The choice of arbitrator is recognised by various authors as being a very important moment [Redfern/Hunter ¶ 4.16] and is quoted as being one of the top reasons for parties to choose arbitration [Friedland, p.6]. The LCIA further confirms this importance by rejecting most challenges [LCIA II]. Thus, any challenge should not be taken lightly.

77. Ms. Burdin has shown good faith in disclosing the existing issues between her and Prof. John. She also has experience with energy litigations and arbitrations relating to hydro power plants [PO2, p. 48, ¶8], thus making her an excellent and valuable asset as an arbitrator, as she already understands many of the questions regarding the functioning of this particular sector.

Conclusion on Issue II

78. For these reasons, Claimant urges the exclusion of Prof. John, as the best possible solution to preserve the composition of the Tribunal and ensure the recognition and enforceability of the arbitral award. Respondent may have the right to choose how to conduct its defense, but this does not include the right to obstruct and delay the process.

ISSUE III - RESPONDENT HAS BREACHED THE CONTRACT BY DELIVERING TURBINES WHICH ARE NON-CONFORMING.

79. On 22 May 2014 a contract of sale, between Claimant and Respondent, for the production and delivery of two newly developed Francis Turbine R-27V, of 300 MW power each, at a price of US$ 20 million each [Exh. C2, pp. 11-13] was agreed upon.

80. Under the contract, Claimant was entitled to expect turbines that, due to their characteristics, namely, the high quality steel used ensuring greater resistant to corrosion and cavitation, were able to perform for a three year period before any need for inspection [Exh. C2, p. 12, article 2(1)(d)]. In that respect, these turbines were unique within the market, as other turbines available had only a two year period before the first inspection part of the reason for the turbines to be 10% more costly than other comparable turbines [Exh. R1, ¶ 2, p. 30; Exh. R2, ¶ 2, p. 31].

81. What Claimant received were turbines that, due to uncertainty about the quality of the steel used in the production process, an uncertainty that Respondent is unable to dispel, do not fit the purpose for which they were bought, requiring that an inspection be performed a whole year earlier than expressly agreed in the Sales Agreement [Exh. C 2, p. 11-12, Art. 2(1)(d)].

82. Thus, it will be demonstrated that Respondent breached the contract, by delivering turbines which do not conform to Claimant's legitimate expectations as defined in the sales agreement [A], firstly, under article 35(1) of the CISG [1], secondly, under article 35(2)(b) of the CISG [2], lastly, the suspicion of around the steel's quality deems the turbines non-conforming with the contract [3].

83. Furthermore, Claimant will prove that the non-conformity, caused by Respondent, constituted a fundamental breach of contract [B], since Claimant was substantially deprived of what it was entitled to expect under the contract [1], entitling Claimant to request for the replacement of the turbines under Art. 46(2) of the CISG [C].

A) Respondent breached the contract by delivering turbines which do not conform to Claimant's legitimate expectations as defined in the sales agreement

1) Respondent breached the contract under article 35(1) CISG

i. The contract called for turbines that would be able to run for a three period without interruptions

84. According to article 35(1) of the CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract. The contract is considered to be breached if the goods do not conform to the contractual requirements [PICC, art. 7.1.1]. The contract required turbines that would be able to endure longer periods of use, with lengthier periods between inspections than the other options available on the market. The delivered turbines do not conform since there are serious doubts on whether lesser quality steel was used during the production process. This uncertainty affects the overall performance of the power plant because the only way to determine which steel was used is by performing an early inspection, thus anticipating the first inspection by one year, resulting in a unexpected period of time under which the plant will be operating under 60% of its capacity [Exh. C6, p. 19, ¶8].

85. The seller's obligations under article 30 of the CISG are defined by the parties agreement [*Computer hardware case*; Schlechtriem, p. 94]. Therefore, in order to fully understand the parties' agreement, article 8(2) of the CISG considers the understanding of a reasonable third person in the same type of business under the same circumstances decisive [Schlechtriem/Schwenzer, article. 8, ¶2]. The conduct of the parties during the negotiation process and after, during the fulfilment of its obligations, is also a determining factor for a reasonable person to understand the intent under what's being negotiated, article 8(3) of the CISG. Thus, regarding these circumstances, a reasonable third person would have concluded that the expectations developed during the negotiation process fall under what is expected under the contract.

86. The delivered goods, according to article 35(1) of the CISG, must meet all the contractual specifications [Gabriel, article 35, ¶1].

87. As previously stated, Claimant and Respondent agreed on the purchase of two newly developed Francis Turbine R-27V, of 300 MW power each, at a price of US$ 20 million each [Exh. C2, p. 11, 12, article 2-3.]. The turbines are supposed to be fabricated to meet specific requirements, in fact, they are customized for the particularities of each plant [P.O. 2 p. 52, ¶36] and therefore, there should be no problem in building them in accordance with Claimant's specifications [Exh. C2, p. 11, *Whereas* no. 6 and 7]. In fact, in more than one occasion during the negotiation process, Claimant made clear the importance of the special endurance

characteristics of the turbines as being fundamental [Exh. C1, p 10, ¶3; Exh. C2, p. 11, *Whereas* no. 7; Exh. R2, p.31, ¶2].

88. The turbines that Respondent should have delivered under the contract, according to Claimant's expectations, should be able to perform for longer periods of time with less interruptions [Exh. C2 p. 11, *Whereas* no. 7], due to the more resistant steel used in the turbines, that allows for higher resistance to corrosion and cavitation.

ii. The delivered Turbines constitute a breach of the contract by Respondent

89. However, Claimant received turbines that, possibly due to faulty production processes, are not fit for the purposes as expressed in the sales agreement. Claimant expected to have turbines fit to supply energy for at least three years straight [Exh. C1, p 10, ¶3; Exh. C2, p. 11, *Whereas* no. 7; Exh. R2, p.31, ¶2], without interruption. The uncertainty surrounding the quality of the steel used, specifically the possibility that steel of lesser quality may have been used in the building process of the turbines, resulted in a need to bring forward the first inspection [Exh. C5, p. 16, ¶7; Exh. C6, p. 19, ¶8; Exh. C7, p. 20, ¶4], one year before what was expected, resulting in an operating period equal to what other, cheaper, turbines on the market are able to deliver [Exh. R2, p. 31, ¶2].

90. The reasonable understanding of the seller's obligations under the contract would be for it to deliver suitable turbines that would allow the plant to produce energy with minimal stoppage periods. Due to uncertainty surrounding the turbine's quality of the steel, an anticipation was deemed necessary to ascertain if the turbines actually are fit, or not, for their purpose.

91. This inspection would not be necessary if Respondent were able to ascertain which steel was used in the construction of the Turbines. However, Respondent could not dissipate the doubts surrounding the quality of the used steel due to an internal error [Exh. C5, p. 16, ¶4; P.O. 2, p. 50, ¶25].

92. Any deviation between the factual condition/qualities of the goods and what was contractually stipulated constitutes a lack of conformity [Schlechtriem/Schwenzer, article 35, ¶32].

93. The deviation of the delivered turbines are as material as deviations can be. The delivered turbines should rather have been built with the qualities that would make them fit for their purpose. Those qualities meant a level of resistance to corrosion and cavitation and the purpose they should have been fit for was to be able to supply energy for the first three years before the first inspection, therefore avoiding the need to resort to non-renewable energies, namely, the coal burning plant in Ruritania [RfA, p. 5, ¶7].

94. Respondent was aware of the purpose of the purchase. Not only was it informed, more than once, about the particular needs for the turbines [Exh. C1, p. 10, ¶3], but also such needs were directly reflected on the higher pricing. Respondent cannot argue the suitability of a good/asset when itself has to conduct a deep inspection in order to ensure that it indeed conforms to the characteristics under which it was sold. Respondent cannot have been unaware of the fact that it was of crucial importance to Claimant to obtain turbines that would be able to endure not only the stress of producing the amount of energy required, but also to endure longer periods without the need for inspections.

95. Therefore, the non-conformity affecting the turbines represents a breach of Respondent's contractual obligations, falling under article 35(1) of the CISG.

2) Furthermore, Respondent breached the contract under Article 35(2)(b)

96. If this Tribunal finds that the delivered turbines do not breach the contract under the general preposition enshrined in Article 35(1) CISG, Respondent still entered into a breach under article 35(2)(b) CISG. Indeed, according to this provision, the seller is obliged to deliver goods fit for the particular purpose made known to it by the buyer. In our case, Claimant made known the particular purpose of the purchase for this particular turbines [a]. Furthermore, Claimant reasonably relied on Respondent'S skill and judgement [b].

i. Claimant made known the particular purpose for the purchase of the turbines

97. It is considered that the use is made known when the buyer informs the seller about the intended use of the goods, expressly or impliedly, when negotiating and concluding the contract [Bianca/Bonell, article 35, ¶2.5.2; Kritzer, p. 282-283].

98. The German Supreme Court, in the "New Zealand Mussels Case", held that when the buyer expressly made known the requirements for performance, any deviation from the established standards constitutes a non-conformity with the contract, under the CISG [*New*

Zealand Mussels Case]. It has to be considered that the requirements or standards referenced to during the negotiation process as a constituting part of the contract. Claimant and Respondent agreed, under the contract, that the first inspection would take place three years after the start of operations [Exh. C2, p. 11, article 2(1)(d)]. Nevertheless, it is of most relevance to address the negotiation process, under which the circumstances behind the reason of the three years is made known [Exh. C1, p. 10, ¶3]. Thus, when the contract was concluded Claimant had expressly made known the particular purpose for the purchase of the turbines.

99. Even if this Tribunal considers that the specific characteristics were not expressly made known, Claimant still implicitly made known the purpose for the turbines to be built according the specificities of the project. Respondent cannot argue that it was unaware of the particular purpose.

100. There is non-conformity when the goods do not comply with the agreed standards which directly influence their usability. Given that the seller could not have been unaware of those standards made known, it should have been able to deliver turbines that would be able to perform as agreed [*New Zealand Mussels Case*]. Respondent cannot argue its unawareness relating the standards made known and their decisiveness for the usability of the turbines.

101. Concluding, Claimant made known the particular purpose of the purchase of the two newly developed Francis Turbine R-27V.

ii. Claimant reasonably relied on Respondent's skill and judgement

102. Article 35(2)(b) of the CISG requires the buyer to reasonably rely on the seller's skill and judgment [*Schmitz-Werke GMBH & CO. v. Rockland Industries Inc.*; Neumeyer/Ming, Article 35, ¶9]. The buyer may reasonably rely on the seller's skill and judgement as long as it is no more knowledgeable than the seller [Schlechtriem/Schwenzer, Article. 35, ¶23; Hyland, p. 322]. When there is doubt, it is only reasonable to assume that the seller, who manufactures the product, has the adequate skill and judgment [Neumeyer/Ming, article. 35, ¶9].

103. Claimant relied on Respondent's skill and judgment. Claimant is a leader in the market of pump hydro power plants while Respondent is a renowned producer of premium water turbines [PO2, p. 47 & 48, ¶1]. Claimant itself is not an expert in the field of the production of turbines. Claimant rightfully expected to rely on the judgement skills of the Respondent to produce turbines according to the specifications made known. Respondent is an expert in this

field [RfA, p. 4, ¶2]. Its business is based on the production and installation of turbines. It would be expected that if there was to be someone capable of delivering conforming turbines, it would be the Respondent.

104. Claimant's reliance is justified. Reliance is reasonable if the seller is skilled in manufacturing goods for the particular purpose made known by the buyer [Schlechtriem/Schwenzer, article 35, ¶23]. Thus, considering the size of the seller's business and its knowledge of the market [PO2, p. 47, ¶1], it would be only reasonable for Claimant to rely in its expertise. Respondent is a known player in this market. It produces and installs turbines, at a big scale. It is also reasonable to assume its expertise given the suggestions presented to Claimant during the project's discussion [Exh. C1, p. 10, ¶3], since Respondent understood that the construction of buildings containing the turbines and the installation of a fixed crane would facilitate the inspections and maintenance, when they were due. Claimant, however, did not follow these instructions, which did not constitute a necessary addition for the plant's normal operation, only because of the added cost of US$ 2,000,000.00. Nevertheless, it can only be concluded that Respondent has a particular knowledge in the production of the R-27 Francis turbines.

105. Therefore, as Claimant reasonably relied on Respondent's skill and judgement, Respondent breached the contract under article 35(2)(b) CISG.

3) The suspicion around the steel's quality deems the turbines non-conforming with the contract

i. The suspicion falling over the Turbines physical characteristics deems them non-conforming

106. It is generally accepted in the international commercial law community that the physical features of the goods, which can be discerned through a physical examination, are the ones primarily suitable to render the goods non-conform [Schwenzer, pag. 155, ¶1].

107. However, it should be noted that in our case, the suspicion affecting the turbines relates to the quality of the steel used in the production process [See], namely, the use of steel of lesser quality. Under the dominant line of thought, the suspicion affecting the physical characteristics of the turbines would be enough to render the goods non-conform. Since Claimant did not agree to purchase from Respondent turbines carrying suspicions surrounding

the use of substandard steel, during the fabrication of the turbines, it is only reasonable to consider the turbines non-conform to the contract.

108. According to several leading authors, conformity of the goods should be acknowledged in a wider assertion and consider not only the physical features, but also the legal and factual relations of the goods and its surrounding. As stated by Schwenzer, wherever practice guidelines in the manufacturing process of certain goods exist "and the seller has no documents to prove that it adhered to these guidelines, the goods are non-conforming, even if they are physically flawless" [Schwenzer, p. 104, ¶24; artigo p. 155, ¶3].

109. The truth is that Respondent guaranteed, itself, the correspondent quality of the delivered turbines with what was agreed in the contract [PO2, p. 47-48, ¶5], despite not having received the quality certificates from Trusted Quality Steel, assuring the high quality of the steel provided to Respondent [PO2, p. 47 & 48, ¶5].

ii. The suspicion affecting the Turbines market value renders them as non-conforming

110. Another determinant threshold to determine the conformity of the goods is its market value/expectations. It is argued that if the goods cannot be resold for the price which they were purchased for, they are non-conforming. It is true that Claimant's intent is not for reselling the turbines, however, the fact that the suspicion became of public knowledge [Exh. C3, p. 14, ¶2] caused the market evaluation of the turbines built by Respondent to drop, as it is normal behaviour of the market in these situations. Therefore, the turbines are, after the suspicion becoming of public knowledge, for the market, less valuable than when they were first purchased. The market's valuation of the goods features are decisive to determine the goods conformity. As stated, the markets valuation of the goods features is decisive to assert its commercial value.

111. As seen above, Claimant chose to purchase the referred turbines from Respondent and not any other turbine available in the market because of the specific characteristics that made these turbines able to provide for what Claimant was looking for, i.e.: turbines that would be able to endure longer periods of activity with fewer interruptions for inspections. The suspicion falling over the characteristics that made these turbines fit for what Claimant expected under the contract undermines its added value. In addition to this, Claimant purchased these turbines for a higher value when compared to other turbines available in the market [. The higher pricing was justified for the characteristics, namely the use of steel that supposedly would eventuate in

turbines more resistant to corrosion and cavitation. That higher resistance being the reason behind the capacity to operate for longer periods of time with less need for inspection, differentiating these turbine from the competition available in the market.

112. The risk of change in the market due to the suspicion surrounding the qualities of the turbines is sufficient to justify a price drop of the goods, representing an "unjustified windfall profit" [Schwenzer, p. 160, ¶1] for Claimant. Therefore, it is only justified that the risk allocation falls over the seller.

iii. Respondent's is liable for the non-conformity arising from the suspicion affecting the Turbines

113. Therefore, Respondent, under the contract, following Article 36(1) CISG, is responsible for any non-conformity affecting the turbines during the guarantee period, of 4 years [Exh. C2, p. , Article 19.º, ¶2]. Therefore, is only reasonable to hold Respondent responsible for the suspicion affecting the turbines, since what was delivered does not match to what was expected under the agreement.

114. Claimant right after the news reporting the incident at the Riverhead plant and the prosecution process which Respondent's CEO was under, for forging quality certificates of the steel provided by Trusted Quality Steel, contacted Respondent as soon as possible, since Trusted Quality Steel is Respondent's biggest supplier, providing for 70% of the steel used by the previous [PO2, p. 50 , 24 ¶].

115. Claimant fulfilled its obligation of notice under Article 39 CISG. Following the email exchange, Respondent was not able to dispel the suspicions, was not able to ascertain that the purchased turbines by Claimant were not affected by the substandard steel. Respondent alleged that the situation of not being able to determine if the purchased turbines are contaminated with lower quality steel was due to a hacking incident which resulted in the deletion of records. Among the deleted records, supposedly, were the ones that would be able to determine if Claimant's turbines were affected by the steel of lower quality. However, Respondent had been informed of the suspicion before it became public and was in condition of informing Claimant about the situation, but did not do it.

116. The seller is generally under the obligation to bring the buyer's attention to all features that can potentially affect the buyer's decision to buy them. Following this line of thought, the

buyer's decision can also be affected by existing suspicions regarding the goods [Schwenzer, p. 166, ¶2]. From this, a disclosure obligation emerges. Respondent is bound to that obligation. This duty arises from Article 7(2) of the CISG.

117. Thus, Respondent actions, for not being able to dispel the suspicions, for having guaranteed the quality of the turbines without the original certificates from its main steel supplier, Trusted Quality Steel, constitute gross negligence since it did not employed the efforts required to ascertain the quality of the goods it sold to Claimant. Therefore, not being able to dispel nor avoid the suspicions surrounding the goods.

B) The breach of contract committed by Respondent was fundamental.

118. A breach of contract, under article 25 of the CISG, is fundamental when it results in a substantial deprivation of what the other party is entitled to expect under the agreement. Claimant will prove that all requirements to ascertain the fundamentality of the breach are met, namely, Claimant was indeed substantially deprived of what it was entitled to expect under the contract [1].

1)Claimant was substantially deprived of what it was entitled to expect under the contract

119. In order for a breach to be fundamental it is necessary for it to affect the essential content of the contract. Specifically, in the case at hand, the goods. The consequences must be serious enough, affecting the economic goal pursued by the parties [*FCF S.A. v. Adriafil Commerciale S.r.l.*]. The breach must result in a substantial deprivation of what the affected party is entitled to expect to receive under the contract [*Production Line Case*].

120. Following the ratio in the "Soyprotein products case", to the general requirements of soyprotein products, an additional obligation was considered, in particular, that the products should be free from genetic modification. In the said case, the Tribunal considered that there was a substantial breach because the seller did not avoid from the referred modifications, since it rendered the contractual purpose, impossible.

121. Considering our case, the turbines not being able to function for the three years period, contractually agreed, constitutes the substantial deprivation suffered by Claimant. Since Respondent could not guarantee the quality of what it delivered, the need to push forward the first inspection constitutes a burden that Claimant did not want to bear. Purchasing turbines that would be able to run for longer periods of time constituted the fundamental reason for Claimant

purchasing the turbines at hand. Hence, Claimant was not able to fulfil the particular purpose that constituted its will to contract with Respondent. Plus, Claimant's reputation is also at stake since the political controversy surrounding the plant's construction. Indeed, Claimant, having received non-conforming turbines and consequently not being able to guarantee the agreed periods under which the plant will be operational, may not be able to perform as required, and consequently affecting its image in the market.

122. Therefore, Claimant was substantially deprived from what, under the contract, was entitled to expect. Expectations known by Respondent, which cannot allege that the non-conformity of the delivered good, resulting from its failure in complying with the contract's obligations, was unforeseeable. Since the foreseeability is determined in the light of the facts, known at the time of the conclusion of the contract [Bianca/Bonell, ¶2.2.2.1], Respondent knew that the three years period that its turbines would supposedly be able to perform was fundamental for Claimant.

ISSUE IV - Claimant is entitled to request the delivery of replacement turbines

123. Claimant is entitled to the substitution of the turbines under PICC, Art. 7.2.3 and Art. 46(2) of the CISG (A). The replacement of the turbines is the only way to guarantee the full performance of Respondent's obligations and the least onerous solution to the case (B).

A) Claimant is entitled to the substitution of the turbines under PICC, Art. 7.2.3 and Art. 46(2) of the CISG.

124. Respondent has failed to fully perform their obligations pursuant to the Sales Agreement. In order to rectify its defective performance, Respondent must replace the turbines at the new date planned for the inspection, September/October 2020 [Exh. R3, p. 33, ¶3]. This solution is the only way to remedy both the breach described, of anticipating the inspection by a year and the breach described, of potential use of substandard steel in the construction of the Turbines. That these breaches are fundamental has already been described above.

125. As described under Article 46(2) of the CISG, "the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter." In this case, the lack of conformity is a fundamental breach, as described above, and a request for substitution was made on 6th October 2018, a mere two days after Respondent confirmed that, due to an internal error, it could not confirm whether Claimant's turbines were made with defective steel or not [Exh. R3, ¶3, p. 33; Exh. C5, ¶4, p. 16]. Thus, the requirement of a reasonable time is also fulfilled.

126. Under the PICC, Article 7.2.3, Claimant is equally entitled to request replacement: "The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.". The replacement is possible, as Respondent admits that there was a major delay in another project and therefore they have the availability to produce new turbines by September 2020 [Exh. C7, ¶8, p. 21; P.O.2 ¶38, p. 52].

B) The replacement of the turbines is the only way to guarantee the full performance of Respondent's obligations and the least onerous solution to the case.

127. The replacement of the turbines is the only way to guarantee the full performance of Respondent's obligations. Respondent cannot guarantee that the turbines were not made with

substandard steel, and therefore cannot guarantee that the Sales Agreement will be fully performed. There has already been at least one failure to perform, as Respondent has had to anticipate the first inspection, causing damages to Claimant, as will be proven further below.

128. If the turbines are not replaced but merely repaired, it will take between 6 to 9 months [Annex I to PO2, p. 55; PO2 ¶41, p. 53], and therefore the damages incurred will be particularly high, whereas if Respondent were to pre-fabricate the turbines, the downtime would be only three months long, out of which only two months would entail expenses related to the penalty clause.

129. In the latter scenario, the damages would be 2.700.000$, on the other hand, if Respondent were to wait for the inspection and then discover that minor or major repairs were necessary, Respondent would owe between 7.200.000$ and 11.700.000$, respectively. If the worst case scenario were to occur, if Respondent waits for the inspection and then finds out it needs to fully replace the turbines, the damages owed would amount to 16.200.000$ [all calculations according to Appendix I to PO2, as calculated by the parties - PO2, ¶41, p. 53].

130. Therefore, the only way for Respondent to guarantee full performance of the Sales Agreement is to replace the turbines. If this is not possible, then the next best option is the replacement of the turbine runners, which is the part exposed to the most stress [PO2, ¶34, p. 52]. Either option is less costly than if the inspection should reveal a need for a full replacement resulting in the substitution of both turbines, which would cost a total of 16.200.000$. According to Lookofsky, ”the right to require performance should be interpreted in conjunction with an injured party's Convention obligation to mitigate damages” in this sense, Claimant is acting in good faith by requiring an immediate replacement, as that is the only way to be sure that this situation avoids creating huge damages.

131. It follows that the best option is to simply replace the turbines, which is the surest way to avoid the risk of running up extremely high damages, whilst causing many other issues for both Claimant and Respondent in particular damages to reputation. This is also the option mandated by law, as Claimant has a right to request full performance from Respondent as laid out in CISG Art. 46 and PICC Art. 7.2.3.

REQUEST FOR RELIEF:

Claimant respectfully requests the Tribunal to find that:

1. The Arbitral Tribunal has jurisdiction to hear the case as the Arbitration Agreement is valid.

2. The Arbitral Tribunal should order the exclusion of the expert suggested by Respondent, Prof. John.

3. Respondent breached the contract by delivering turbines which are non-conforming in the sense of Article 35 CISG.

4. Therefore, Claimant is entitled to request the delivery of replacement turbines.

Claimant reserves the right to amend its prayer for relief as may be required.

Counsel for Claimant:

Twenty Seventh Annual Willem C. Vis International Commercial Arbitration Moot

NOVA UNIVERSITY OF LISBON, SCHOOL OF LAW

MEMORANDUM FOR RESPONDENT

On behalf of:		**Against:**
TurbinaEnergia Ltd		**HydroEn plc**
Lester-Pelton-Crescent 3		Rue Whittle 9
Oceanside	v.	Capital City
Equatoriana		Mediterraneo
(RESPONDENT)		(CLAIMANT)

Counsel for RESPONDENT

Aurélio Freitas | Maria Bernardo | Susanna Vickers

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INDEX OF ABBREVIATIONS AND DEFINITIONS

¶, ¶¶	Paragraph, paragraphs
Art./ Arts	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	Exempli gratia; for example (Latin)
Exh.	Exhibit
IBA Guidelines	IBA Guidelines on Conflict of Interests in International Arbitration (2014)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
idem	Ibidem; in the same place (Latin)
ICC	International Chamber of Commerce
i.e.	that is
Ltd.	Limited
LCIA Rules	Rules of the London Centre of International Arbitration (2014)

MfC	Memoranda for CLAIMANT
Model Law	UNCITRAL Model Law on International Commercial
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959
No.	Number
RfA	Request for Arbitration
RRfA	Response to the Request for Arbitration
p., pp.	Page, pages
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
plc	Public Limited Company
PO1	Procedural Order No 1
PO2	Procedural Order No 2
UK	United Kingdom
USA	United States of America
v.	Versus; against (Latin)

INDEX OF AUTHORITIES

Available at: https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf

Cited in: ¶65

Commentary on the IBA Rules IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (1999)

Cited in: ¶93

Delvolvé DELVOLVÉ, Jean-Louis - *Multipartism: The Dutco Decision of the French Cour de cassation*, *Arbitration International*, Volume 9, Issue 2, 1 June 1993, pp 197–202

Cited in: ¶32

Gaillard/ Savage GAILLARD, Emanual, SAVAGE, John, FOUCHARD - *Gaillard Goldman on International Commercial* Arbitration, Kluwer Law International (1999)

Cited in: ¶67

Gridasov/ Dolotova GRIDASOV, Alexander, DOLOTOVA, Maria - *Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion*, Kluwer Arbitration Blog (2019)

Cited in: ¶38

Guide to the LCIA Rules TURNER, Peter, MOHTASHAMI, Reza - *A Guide to the LCIA Arbitration Rules*, Oxford : Oxford University Press (2009)

Cited in: ¶63

Hodges HODGES, Paula, *The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?*

in: KLAUSEGGERK, Christian, KLEIN Peter, et al. (eds), Austrian Yearbook on International Arbitration (2015), pp. 205-229

Cited in: ¶97

Holmann and Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (Holtzmann and Neuhaus; Jan 1989)*

Cited in: ¶23

Horvath HORVATH, Günther J., *The Duty of the Tribunal to Render an Enforceable Award* (2001) 18 Journal of International Arbitration, Issue 2, pp. 135–158

Cited in: ¶59

Kluwer Survey MEREMINSKAYA, R*esults of the Survey on the Use of Soft Law Instruments in International Arbitration* (2014)

Available at: http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/

Cited in: ¶97

Kritzer KRITZER, Albert , *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Boston* (1991)

Cited in: ¶164

Lamm LAMM, Carolyn, *Fundamental Rules of Procedure: Whose Due Process is it*.

Available at:
https://www.arbitrationicca.org/media/3/14246917853210/lamm_fundamental_rules_of_procedure_whose_due_process_is_it.pdf

Cited in: ¶69

LCIA I *LCIA Experts in International Arbitration*

Available at:
https://www.lcia.org/News/experts-in-international-arbitration.aspx
Cited in: ¶91

LCIA Notes *LCIA Notes for Arbitrators*

LCIA Website

Available at:

https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx

Cited in: ¶59

Lookofsky LOOKOFSKY, Joseph - *Understanding the CISG, 3rd ed*, (2008)

Cited in: ¶140

Luttrell LUTTRELL, Sam - *Bias Challenges in International Commercial Arbitration; The Need for a "Real Danger" Test in: 20 International Arbitration Law Library*, Kluwer Law International (2009)

Cited in: ¶100

Moses MOSES L. Margaret - *The principles and practices of ICA, Appendix G: IBA Guidelines on Conflict of Interests in International Arbitration*, Cambridge University Press (2008)

Cited in: ¶73

Nesbitt/ Quinlan NESBITT Simon, QUINLAN, Henry - *The Status and Operation of Unilateral or Optional Arbitration Clauses*

in:

Arbitration International, Volume 22, Issue 1, 1 March 2006, Pages 133–150

Cited in: ¶26

Pilkov PILKOV, Konstantin - *Evidence in International Arbitration: Criteria for Admission and Evaluation*

Available at: https://www.researchgate.net/publication/308405085_Evidence_in_International_Arbitration_Criteria_for_Admission_and_Evaluation

Cited in: ¶¶67,85,96

Platte PLATTE, Martin - *An Arbitrator's Duty to Render Enforceable Awards,* Journal of International Arbitration 20(3):307–313 (2003)

Cited in: ¶¶59, 60

Redfern/ Hunter REDFERN, Ian, HUNTER, Martin J. - *Redfern and Hunter on International Arbitration*, Oxford University Press (2009)

Cited in: ¶¶70, 97

Schlechtriem SCHLECHTRIEM, Peter - *Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG),* 2nd ed, Oxford University Press (1998)

Cited in: ¶122

Schwenzer/ Tebel SCHLECHTRIEM, Peter, SCHWENZER Ingeborg - *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd Edition Oxford University Press

Oxford 2005

Cited in: ¶144

Secretariat Commentary *Secretariat Commentary on Article 33 of the 1978 Draft (draft counterpart of CISG Article 35)*, Pace Law School Institute of International Commercial Law, CISG database.

Available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html

Cited in: ¶¶122,133

Semler SEMLER, Franz-Jörg - *German Arbitration Law The 1998 Reform and Recent Case Law* (2001) 18 Journal of International Arbitration, Issue 5, pp. 579–586

Cited in: ¶41

UNCITRAL Digest FERRARI Franco, FLECHTNER, Harry, BRAND Ronald - *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, London (2004)

Cited in: ¶139

UNCITRAL Guide

Cited in: ¶34

van Zelst van ZELST, Bas - *Unilateral Option Arbitration Clauses in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration*

Clauses in the European Contex, Journal of International Arbitration, Kluwer Law International 2016, Volume 33 Issue 4 pp. 365 - 378

Cited in: ¶¶28; 40

Vanto Jarno Vanto

Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 46 of the CISG

Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp46.html#e24

Cited in: ¶162

Waincymer WAINCYMER, Jeffrey - *Procedure and Evidence in International Arbitration,* Kluwer Law International (2012)

Cited in: ¶¶67,73,85

Weigand WEIGAND, Frank-Bernd - *Practitioner's Handbook on International Commercial Arbitration*, 2nd Edition, Oxford University Press (2009)

Cited in: ¶70

INDEX OF CASES

Cheek	Cheek v. United Healthcare of Mid–Atlantic, Inc., 378 Md. 139, 835 A.2d 656 (2003) Available at: https://caselaw.findlaw.com/md-court-of-appeals/1198873.html Cited in: ¶36; 52
Frozen Pork Case	Germany, 2 March 2005, Federal Supreme Court Available at: http://cisgw3.law.pace.edu/cases/050302g1.html Cited in: ¶146
Global Client Solutions	Global Client Solutions, LLC v. Ossello, 382 Mont. 345 (2016); Cited in: ¶36
ICS v. Argentina	ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, Award on Jurisdiction Available at: https://www.italaw.com/cases/documents/553 Cited in: ¶97
Mulcahy v. Whitehill	Mulcahy v. Whitehill, 48 F. Supp. 917 (D. Mass. 1943) Available at: https://casetext.com/case/mulcahy-v-whitehill Cited in: ¶76

Noohi	Noohi v. Toll Bros., Inc., 708 F.3d 599 (2013) Available at: https://casetext.com/case/noohi-v-toll-bros-inc Cited in: ¶36
P & P Indus., Inc. v. Sutter Corp.	P & P Industries, Inc. v. Sutter Corporation, 179 F.3d 861 (10th Cir. 1999) Available at: https://casetext.com/case/p-p-industries-inc-v-sutter-corporation Cited in: ¶76
Powdered Milk Case	Germany 9 January 2002, Supreme Court Available at: http://cisgw3.law.pace.edu/cases/020109g1.html Cited in: ¶126
OLG Frankfurt	OLG Frankfurt, 10 Jan 2008 Oberlandesgericht Frankfurt, 10 January 2008 28 Sch 21/07 Cited in: ¶103
Rothschild	French Court of Cassation, 1st Civil Chamber, 26 September 2012, Mme X v. Banque Privée Edmond de Rothschild Europe, No. 11- 26.022; Cited in: ¶36
Sociedad v. Banco	Sociedad de Valores, SA v. Banco Santander, SA, Case No. 3/2009 (Madrid Audiencia Provincial)

	Cited in: ¶103
Stockholm Chamber of Commerce Arbitration Award	*Beijing Light Automobile Co. v. Connell, 5 June 1998* Cited in: ¶137
Sony Ericsson	Russian Supreme Commercial Court (Arbitrazh), 19 June 2012, CJSC Russian Telephone Company v. Sony Ericsson Mobile Communications Rus LLC, No.1831/12, Resolution (19 June 2012); Cited in: ¶¶30; 36
St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp.	US District Court for the Northern District of New York - 916 F. Supp. 187 (N.D.N.Y 1996) February 26, 1996 Available at: *https://law.justia.com/cases/federal/district-courts/FSupp/916/187/1516796/* Cited in: ¶76
Telekom Case	Telekom Malaysia Berhad v. Republic of Ghana, PCA District Court of the Hague Case No. HA/RK 2004.667 18 October 2004 Available at: https://www.italaw.com/cases/1091 Cited in: ¶100
Three Shipping	NB Three Shipping Ltd v Harebell Shipping Ltd 'The Arctic Trader' and 'The Arctic Voyager' (UK) Cited in: ¶11

Tidewater v. Venezuela	Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5 Available at: https://www.italaw.com/cases/1096 Cited in: ¶84
Tribunale Di Vigevano	Rheinland Versicherungen v. Atlarex, 12 July 2000 Available at: http://cisgw3.law.pace.edu/cases/000712i3.html Cited in: ¶113
Urbaser v. Argentina	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26 Available at: https://www.italaw.com/cases/1144 Cited in: ¶102
Urbaser Challenge	Urbaser et al. v. Argentina, ICSID Case No ARB/07/26, Decision on Claimants' Proposal to Disqualify an Arbitrator Cited in: ¶102
Wire-and-cable Case	Switzerland 11 February 2004 Appelate Court Bern Available at: http://cisgw3.law.pace.edu/cases/040211s1.html

Cited in: ¶126

HG Zurich Saltwater isolation tank case, 26 April 1995

Available at:
https://cisgw3.law.pace.edu/cases/950426s1.html

Cited in: ¶113

STATEMENT OF FACTS

1. HydroEN plc ("CLAIMANT") is a company based in Mediterraneo, leader in the market of pump hydro power plants, operating in over 100 countries with more than 25,000 employees, with an annual turnover of 4.3 billion US$.

2. TurbinaEnergia Ltd ("RESPONDENT") is a renowned producer of premium water turbines based in Mediterraneo that employs 550 people, with an annual turnover of 180 million US$.

3. **January 2014** Greenacre, a city in Mediterraneo that wishes to be fully sustainable, invited tenders ("tender") for the construction and operation of a pump hydro power plant ("Greenacre Plant") that would allow it to rely solely on renewable sources of energy.

4. **22 May 2014** CLAIMANT and RESPONDENT ("Parties") signed a Sales Agreement wherein RESPONDENT was to produce and install two R-27V Francis Turbines ("Turbines"), known for being highly resistant to corrosion and cavitation.

5. **15 July 2014** CLAIMANT was awarded the tender, in which the characteristics of the Turbines played a very relevant role.

6. **28 July 2014** Without previously informing RESPONDENT, CLAIMANT signs an amendment to the tender contract including a penalty clause for any downtime periods outside of the necessary ones for inspections.

7. **20 May – 20 August 2018** RESPONDENT delivered and installed the turbines at the Greenacre Plant, where CLAIMANT accepts them after they pass the acceptance test with no issues on 12 September 2018.

8. **May 2018** Incident with other Francis R-27V Turbines at Riverhead Tidal Power Plant related to issues with the use of said turbines in saltwater conditions.

9. **26 June 2018** Raid at Trusted Quality Steel reveals forgery of quality certificates for their steel. RESPONDENT is informed on the 25th August 2018, returns the potentially affected steel and only purchases from other manufacturers from then on.

10. **2 October 2018** A news article is released relating the fraud at Trusted Quality Steel. The following morning, CLAIMANT contacted RESPONDENT to inquire whether the steel from which CLAIMANT's turbines are made originated from Trusted Quality Steel.

11. **4 October 2018** RESPONDENT replied that although due to the falsified certifications and some internal system errors, it was unable to determine the origin of the steel, there was no need for immediate action as the Turbines, even if produced with steel affected by the fraud, would not be likely to suffer extensive damage.

12. **6 October - 11 December 2018** Various contacts between the parties in order to resolve the issue, to no avail. CLAIMANT refused to wait until the inspection, first planned for Sept/Oct 2021 but now brought forward to Sept/Oct 2020 to see if the turbines were affected, insisting upon immediate substitution.

13. **31 July 2019** CLAIMANT submitted a Request for Arbitration ("RfA"), appointing as arbitrator Ms. Burdin, known for her minority opinions on suspicions of non-conformity.

14. **20 August 2019** RESPONDENT concluded a retainer agreement with Professor Tim John ("Prof. John), an expert in the field of corrosion in steel and cavitation in water turbines, for his services as an expert in the arbitration. Shortly after, on 30th of August, RESPONDENT submitted the Response to the RfA ("RRfA"), nominating Mr. Pravin Deriaz as arbitrator.

15. **21 September 2019** Ms Burdin submitted a letter in which she disclosed that her husband was involved in a litigation with Professor John regarding patent rights.

16. **23 September 2019** CLAIMANT wrote to the Tribunal requesting that it refuse the appointment of Professor John in order to permit Ms. Burdin to remain.

17. **27 September 2019** RESPONDENT also contacted the Tribunal, noting that so far there seemed to not be enough information to challenge Ms. Burdin, but such a conflict may yet arise, depending upon Ms. Burdin's ability to remain impartial.

SUMMARY OF ARGUMENTS:

Issue A:

18. The asymmetric arbitration agreement in clause 21/2 of the Sales Agreement concluded between CLAIMANT and RESPONDENT on 22 May 2014 ("Sales Agreement") is invalid because it violates the principle of party equality, and therefore public policy, as it provides unfair advantage to CLAIMANT. Asymmetrical clauses are highly controversial in practice, for reasons ranging from public policy to unconscionability. On analysis, this arbitration agreement is also unconscionable, and this unconscionability cannot be justified by other alleged concessions in the contract. Furthermore, the unequal nature of the clause may render unenforceable any award issued pursuant to such a clause.

Issue B:

19. Prof. John must be accepted as expert witness in the present arbitral proceedings. Not only does Tribunal have duty to uphold due process and party equality, but Prof. John is also the most qualified expert to report on the present issues, being both independent and impartial. Furthermore, it is CLAIMANT's choice of arbitrator, Ms. Burdin, that poses a problem in terms of independence and impartiality.

Issue C:

20. RESPONDENT did not enter into any contractual breach since the delivered turbines are in conformance with the Sales Agreement under ART. 35(1) of the CISG. Notwithstanding, the delivered turbines are in conformance under ART. 35(2) of the CISG. Furthermore, the mere suspicion of non-conformity does not render the turbines non-conforming.

Issue D:

21. The threshold of fundamental breach, lowered by the parties, is only lowered in regards to the termination remedy agreed by the parties on the Sales Agreement. Even if the Tribunal should find otherwise, CLAIMANT's request for the delivery of replacement turbines must be rejected since RESPONDENT did not incur in a fundamental breach under the Sales Agreement nor under the CISG. In any case, CLAIMANT cannot request substitution since it would be too onerous.

ISSUE A: The Arbitration Agreement is invalid

I. The asymmetric arbitration agreement violates the principle of party equality, as laid out in article 18 of the Model Law, in a similar fashion to the Siemens-Dutco case. Fundamentally, the one-sidedness of an asymmetric arbitration agreement is manifestly unjust, as it is clearly a violation of party equality, and therefore of public policy.

a) The asymmetric arbitration agreement included in clause 22 of the Sales Agreement is invalid, as the principle of party autonomy is not unlimited, and such a clause violates the principle of party equality, as laid out in article 18 of the Model Law

i) The principle of party autonomy is not unlimited.

22. CLAIMANT argues that the arbitration agreement is valid because it is a manifestation of party autonomy. However, party autonomy is only one of several principles that govern international commercial arbitration. Another, equally fundamental, principle is the principle of party equality, as laid out in article 18 of the Model Law (DAL), which states "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.".

23. In fact, Holmann and Neuhaus state that the principle of party equality is designed as a limitation on the principle of party autonomy [p. 550], intended to limit parties' autonomy where it may be used to prescribe one-sided rules of procedure. It is not intended merely as a limit upon the tribunal, but also in relation to procedural agreements reached by the parties themselves.

24. Although CLAIMANT insists that the main point is that the parties agreed to the clause in question [MfC ¶28, 29], the issue is not whether the parties agreed, but instead if the Tribunal is forced to accept and enforce whatever agreement the parties may make, no matter how unequal. To answer this question, we must look at the other guiding principles of international arbitration, especially the principle of party equality.

ii. The Arbitration agreement violates the principle of party equality, as laid out in article 18 of the Model Law.

25. The Arbitration agreement violates the principle of party equality because the right to initiate arbitration is included in the scope of article 18, and the unfair situation created by the clause agreement creates procedural inequality between the parties.

26. The right to initiate arbitration is a procedural issue, as will be further discussed below, this is also the view in several countries, such as Poland and Germany. In fact, Nesbitt and Quinlan state that in Germany "the validity of optional or unilateral clauses has to be considered in light of both procedural and contractual principles" [p. 145].

27. Thus, being also a procedural issue, it falls under the scope of article 18 of the Model Law, which regulates the parties' procedural equality. Furthermore, this issue falls under the scope of the principle laid out in art. 18 as it conditions the parties' standing in the proceedings to follow. It is clear that the procedural position of "claimant" and "respondent" is not the same, given that the claimant will always, necessarily, have the element of surprise over the respondent, and therefore have far more time to prepare their case and organise their strategy.

28. Therefore, reserving the possibility of being claimant in the arbitral proceedings for only one of the parties certainly impacts the whole proceedings, creating an imbalance. This would not be so if RESPONDENT had also had the opportunity to become the claimant, as then it would be a matter of who decided to act first. However, in this case, RESPONDENT had their hands tied. RESPONDENT could not even choose to initiate their case in the Courts of Mediterraneo as provided by clause 21 of the Sales Agreement [S.A., p. 13, ¶21], given that CLAIMANT could, at any time, cause that suit to be dismissed, by claiming the existence of an arbitration agreement and requesting that the law suit be dismissed. Courts in several countries, such as Germany have found such clauses to be invalid due to the uncertainty created [van Zelst, p. 376], as shall be further discussed below.

a) <u>Fundamentally, the one-sidedness of an asymmetric arbitration agreement is manifestly unjust, as well as being a violation of party equality, and therefore violates public policy.</u>

29. RESPONDENT submits that this asymmetric arbitration agreement is manifestly unjust, as it gives CLAIMANT far more power than RESPONDENT, which furthermore, it may use entirely at its discretion. Notably, even proponents of asymmetric arbitration agreements admit that such clauses can be unjust and imbalanced, such as Justice Morison, who stated that the

purpose of an asymmetrical clause within the contract under scrutiny was to give "'better' rights" to one party than to the other [Three Shipping, ¶11].

30. That an asymmetrical arbitration agreement is demonstrative of a lack of procedural equality is further demonstrated by the fact that, when transposing the Model Law into its own national law, Poland saw fit to include the following provision: "Provisions of an arbitration agreement in breach of the principle of equality of the parties, in particular provisions entitling only one party to bring a case before the arbitral tribunal indicated in the arbitration agreement or before a court, shall be ineffective." [Art. 1161 §2 of the Polish Civil Procedure Code]. By the same token, we find the view expressed by the Supreme Court of Moscow, in the decision of *Sony Ericsson*, wherein the Court decided that the agreement "creates for Sony Ericsson a preference against RTC since it is the only party granted the right to choose the venue for dispute resolution (arbitration or state judicial system) and, as a result, violates the balance of interests of the parties." [¶ 22]

b) <u>In the same vein as the Siemens-Dutco decision, the arbitration agreement is invalid despite the parties' agreement, due to the principle of party equality.</u>

31. As explained above, the relevant issue in this case is whether the Tribunal is forced to apply a one-sided agreement, regardless of the harmful effects it may have on the arbitration.

32. To answer this question, one can analyse a series of relevant cases, including the landmark *Siemens-Dutco* decision, which has been referred to by the Danubian Court of Appeal [RRfA, p. 28, ¶14]. In the *Siemens-Dutco* case the parties had concluded an arbitration agreement that provided for three arbitrators. However, once the case began, those procedural rules that had previously been agreed upon were revealed to be unjust, since one party could choose its arbitrator but the other side (which consisted of three separate respondents) was forced to agree upon a joint arbitrator. Due to the unfairness of this situation, the Cour de Cassation held that the arbitration agreement was null, since "the principle of equality of the parties in the designation of the arbitrators is a matter of 'ordre public', no derogation therefrom is permissible until after the dispute has arisen" [Delvolvé, p. 200].

33. Following the decision in this seminal case, it seems inequality in the arbitration agreement, even if expressly negotiated and agreed by all parties, is a matter of public policy, and the agreement of the parties prior to the dispute does not suffice as a waiver of the right to party equality.

34. Thus, both in case-law and in doctrine, the consensus appears to be that if the parties should agree upon an unjust and unequal procedure, then the arbitral tribunal may not accept this arrangement under the cloak of party autonomy, as it violates the equally fundamental principle of party equality. As stated in A Guide to the UNCITRAL Model Law on International Arbitration: Legislative History and Commentary, "(…) it may be ventured that rules that violate Article 18 would be invalid and awards rendered in arbitrations conducted under such rules would not be enforced." [p. 551]

35. Thus, RESPONDENT submits that the arbitration agreement in question is clearly a violation of party equality, and therefore of public policy, given that the principle of party equality forms part of Danubian Public Policy [RRfA, p.28, ¶14] and should therefore be considered invalid.

II. Asymmetric arbitration agreements are held to be invalid in many jurisdictions, both in case-law and by the relevant authorities.

36. CLAIMANT mentions several cases in which asymmetric arbitration agreements are held to be valid [MfC, ¶22, 27, 31], which may create the impression of a generally held consensus. However, asymmetric arbitration agreements are by no means generally accepted clauses.,In fact, there is extensive case-law that holds these clauses to be invalid, in many jurisdictions all over the world, such as in France, Germany, Russia, Bulgaria, the US, Poland, among others [See e.g. France: *Rothschild* (2012)*;* Germany: *BGH 1998*, and *BGH 1989*; Russia: *Sony Ericsson* (2012)*;* Bulgaria: *Case 1193/2010* (2011)*;* US (Montana): *Global Client Solutions* (2016)*;* US (Maryland): *Cheek* (2003); *Noohi* (2013)], for reasons ranging from unconscionability to the violation of public policy due to violation of the principle of party equality.

a) <u>In a similar case, *Sony Ericsson*, the clause was invalid due to violation of party equality.</u>

37. Perhaps most relevant is the recent *Sony Ericsson* case, in which the arbitration agreement foresaw the possibility for either party to initiate arbitration, yet only one of the Parties, Sony Ericsson, was permitted to initiate Court proceedings. The other Party, RTK, had initiated court proceedings despite the Arbitration Agreement. The Supreme Court concluded

that such an agreement was in violation of the principle of equality, as it violated the balance of party rights: "Combined with the provisions of the dispute resolution agreement set forth in the arbitration clause, such prorogation agreement creates for Sony Ericsson a preference against RTC since it is the only party granted the right to choose the venue for dispute resolution (arbitration or state judicial system) and, as a result, violates the balance of interests of the parties."

38. In the wake of this decision, the Russian Supreme Court, in its' Digest, further clarified its position: "In its Digest the court determined that a unilateral option clause violated the principles of competitiveness and equality of the parties, breached the equality of the parties' rights and was therefore invalid to the extent that such clause provided for inequality in forum choice options." [Gridasov/Dolotova, ¶27]. Thus, Russia has clearly placed itself on the map as a staunch supporter of party equality.

b) Asymmetric arbitration agreements may be in violation of public policy: German case-law.

39. It is important to understand that asymmetric arbitration agreements can be indicative of an imbalanced negotiation process, as it is unusual for a party to willingly agree to have less rights than the other party, especially as regards dispute resolution clauses. In this sense, many jurisdictions either regard asymmetric clauses as invalid ab initio [see e.g., article 1161 no. 2 of Polish Civil Procedure law above, ¶30], or scrutinize them very carefully to verify the true will of the parties.

40. In this vein, German case-law determines that asymmetrical option clauses may violate "boni more" due to their content or the circumstances in which they were agreed, and if this should be the case, they become invalid [BGH 1991]. As stated by Professor van Zelst "German law requires that agreements to arbitrate do not violate German public policy. (…) German law requires that any agreement to arbitrate does not put an unfair burden on one party which would be contrary to the principle of good faith." In the case in question, the arbitration agreement was an asymmetric clause that permitted only one side to commence arbitration. The German courts found the clause void due to its unfairness [van Zelst, p. 376]. Furthermore, although that clause was included in a standard form contract, negotiated one-sided arbitration agreements have also been found to be invalid [idem, p. 377].

41. In conclusion, German case-law shows a tendency to limit asymmetrical arbitration clauses, closely scrutinizing their origins and effects, and declaring void those that violate

principles of equality or fairness. German case-law is a good study, as its arbitration law is closely based on the Model Law [Semler, p. 579]

III. The arbitration agreement is null and void due to a lack of mutuality and unconscionability.

42. The arbitration agreement is unconscionable. As has been shown above, this arbitration agreement falls into that category, as if RESPONDENT wished to pursue legal action against CLAIMANT, it would have to initiate judicial proceedings in Mediterraneo, with all the costs associated to initiating legal proceedings in a country other than its own, and then run the risk that all the costs expended be futile, since CLAIMANT could simply invoke the arbitration agreement and thereby remove the case from judicial jurisdiction to arbitral jurisdiction, which would cause further costs to RESPONDENT.

43. In the US, there has been a recent trend towards considering asymmetric arbitration agreements to be unconscionable based on a lack of mutuality. Unconscionability is a generally applicable standard of substantive validity which US courts apply to the interpretation of arbitration agreements. To consider a clause invalid under this standard there must be unfair terms within an agreement, which may or may not be coupled with an imbalance in bargaining power, or other factors demonstrative of contractual inequality, such as, amongst others, if the clauses "limit the weaker party's access to legal representation, grant the stronger party undue procedural advantages (…)" [Born I p. 862].

44. Decisions have also held arbitration agreements invalid on unconscionability grounds where, they "create significant financial disincentives for a party to pursue its legal rights" [Born I p. 862].

a) <u>The arbitration agreement is unconscionable.</u>

i. The arbitration agreement is unjust.

45. As CLAIMANT itself admits, "an arbitration agreement can be found void and thereby invalid if the agreement is unconscionable". However, then CLAIMANT proceeds to say that the agreement in question is not unconscionable since "there exist no grossly unfair substantive terms in the arbitration agreement". CLAIMANT offers no proof to back up this frankly astounding claim, given that the arbitration agreement gives, as CLAIMANT itself admits, "one party a better position than the other".

46. If we analyse the arbitration agreement, it is clearly in favour of CLAIMANT, since CLAIMANT may choose between arbitral proceedings or judicial proceedings, which provide it with far more strategic options: for example, if CLAIMANT wishes to bring publicity to a matter, they may choose Court proceedings, whereas if they wish to keep a dispute confidential, they may choose arbitral proceedings. If they so desire, they may opt for the cheaper or the more expensive option, they select their arbitrator first, and so on and so forth. It is thus undeniable that the arbitration agreement provides unfair substantive terms.

ii. The asymmetry of the arbitration agreement cannot be justified by other advantages that RESPONDENT allegedly obtained in the rest of the contract.

47. However, CLAIMANT brings a second argument to the table, by suggesting that any unfairness in the arbitration agreement itself is justified by other advantages that RESPONDENT allegedly obtained in the rest of the contract. CLAIMANT states that the arbitration agreement is not unfair or one-sided as the overall contract provides both parties with an advantage, and therefore there is overall no lack of mutuality [MfC, pp. 5, 6, ¶25 and 28].

48. CLAIMANT'S position is misleading. Firstly, CLAIMANT has not proven that the contract is balanced, and RESPONDENT submits that it is not, since RESPONDENT's demands, which were a limitation of liability clause and the inclusion of an entire agreement clause, are common contractual terms, and thus do not represent a special concession on CLAIMANT's part.

49. Furthermore these terms did not represent an advantage to RESPONDENT, but instead were simply necessary to guarantee RESPONDENT's financial survival [Exh. R2, p. 32, ¶6] when faced with the staggering amount of damages that might become owed should a claim be brought against it. This is a fact that CLAIMANT was clearly aware of, since it states "a major breakdown could threaten the economic survival because of the amount of the damages" [MfC, p.7, ¶32].

50. Thus, the very fact that CLAIMANT managed to insist upon such high damages in the first place, and still push through other one-sided clauses despite RESPONDENT making it clear that they wished for a bilateral arbitration agreement [Exh. R2, p. 32, ¶6] goes some way to show the influence that CLAIMANT had in the negotiations.

b) Even if the Tribunal were to find that there was an underlying mutuality throughout the contract, such a mutuality does not suffice to balance the inequality of an asymmetric arbitration agreement.

51. Nonetheless, even if the Tribunal should find that the overall contract were balanced, which it is not, the requirement of mutuality (i.e. that both sides receive mutual advantage from the contract) would still not be fulfilled, as it does not require simply that there be balance in the overall contract, but rather, according to recent case-law from the US, that there be balance in the arbitration agreement itself.

52. According to the *Noohi* case, it is necessary for "the arbitration provision to be supported by its own consideration (i.e., mutuality) in order to be enforceable". This means that there must be some gain for each side within the arbitration agreement itself, and not just some gain for each side from the contract in general. In another US decision, the Court stated "If we were to conclude that consideration from the underlying agreement was sufficient to support the arbitration agreement, we would be precluded from ever finding an arbitration agreement invalid for lack of consideration when performance of a contract has already occurred, no matter how illusory the arbitration agreement was." [*Cheek*] – In other words, if the mere fact that there was some gain from the overall contract for both sides were sufficient to provide mutuality, no arbitration agreement would ever be found to lack mutuality, since all contracts provide some gain for each side. That a clause be wholly unjust and one-sided is certainly more common than that a whole contract be unjust, but the fact that the rest of the contract may be balanced certainly does not reduce the injustice of the arbitration agreement itself.

c) The arbitration agreement, being unconscionable, is null and void.

53. Since the arbitration agreement is unjust, providing unfair advantage to CLAIMANT, which is not supported by mutuality in the overall contract, the arbitration agreement is unconscionable. Unconscionability is frequently cited as a condition which fulfils the "null and void" exception set out in Article II (3) of the NY Convention [Born I, p. 841]. Thus, should an arbitration agreement be found unconscionable, it would render the arbitration agreement null and void under the aforementioned article. As has been shown, the arbitration agreement is unjust and there are indicators that the bargaining power between the parties was unequal. In this light, CLAIMANT submits that the arbitration agreement is unconscionable, and thereby null and void under Article II (3) of the NY Convention.

IV. In any case, there is a high probability that the award shall be considered invalid at the enforcement stage.

a) Unenforceability under article V/2/b) of the NY Convention.

54. There is a high probability that the award shall be considered invalid at the enforcement stage, under article V/2/b) of the New York Convention, which states "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (…) The recognition or enforcement of the award would be contrary to the public policy of that country.".

55. Article V/2/b) exists to permit the courts of the country of enforcement, which in this case would be Equatoriana, since RESPONDENT is domiciled in Equatoriana and most of its assets are there [PO2, p. 47, ¶1], to "satisfy themselves that there is nothing in the award that would infringe the fundamental values of that State".

56. In Equatoriana, the equal treatment of parties as regards asymmetrical arbitration agreements is part of public policy [PO2, p. 54, ¶52], leading to courts in Equatoriana holding that such clauses are invalid [RRfA, p. 28, ¶13].

57. The assessment that is made under article V/2/b) of the NY Convention permits the country of enforcement to "refuse to recognize or enforce an award where the procedure followed by the arbitral tribunal contradicts the understanding of basic procedural fairness in the State where recognition and enforcement is sought". In light of this, any award rendered pursuant to the arbitration agreement in question would be unenforceable in Equatoriana.

b) Unenforceability under article V/1/a) of the NY Convention.

58. Furthermore, the award might even be considered unenforceable under Danubian Law as the law to which the parties have subjected the agreement, as set out in Article V/1/a) of the New York Convention. RESPONDENT has shown that the arbitration agreement violates the principle of party equality as laid out in article 18 Model Law. The Danubian Court of Appeal has stated that an equal influence of all parties on the composition of the arbitral tribunal forms part of Danubian public policy, in reference to the Siemens-Dutco case [RRfA, p. 28. ¶14]. As discussed above, the reasoning behind that case and the one at hand is very similar, and the importance of party equality is emphasized in both. Thus, the agreement could be considered invalid under Danubian law.

c) The Tribunal has a duty to render an enforceable award.

59. The Tribunal has a duty to render an enforceable award [LCIA Rules, ¶32.2, Horvath, p. 135, Platte, p. 309], as has been reinforced by the LCIA "Parties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award." [LCIA Notes to Arbitrators, ¶6].

60. The Tribunal should be aware that the award should comply not only with the lex arbitri (Danubian Arbitration Law) and with the requirements of the NY Convention, but also, "If and when the parties draw the tribunal's attention to a specific jurisdiction as a likely place of enforcement, the tribunal should consider the law of this place as well." [Platte, p. 313]. Furthermore, "At the very heart of this duty is the requirement to treat the parties fairly and equally, and give both (or all) parties a fair and equal opportunity to present their case." [Platte, p. 313]

61. Hence, RESPONDENT highlights the need for extreme caution regarding the enforceability of this award, not only due to the public policy of Equatoriana and possibly, even Danubia, as discussed above, but also in regards to the fair and equal opportunity for parties to present their case, as will be discussed below.

V. Conclusion of Issue A:

62. The asymmetric arbitration agreement in clause 21/2 of the Sales Agreement is invalid because it violates the principle of party equality, and therefore public policy, as it provides unfair advantage to CLAIMANT. Asymmetrical clauses are highly controversial in practice, for reasons ranging from public policy to unconscionability. On analysis, this arbitration agreement is also unconscionable, and this unconscionability cannot be justified by other alleged concessions in the contract. Furthermore, the unequal nature of the clause may render unenforceable any award issued pursuant to such a clause.

ISSUE B: The Tribunal must include Prof. John

63. There is no doubt that this Tribunal has the power to limit, allow and refuse testimonies [Art 20.3 LCIA Rules], therefore it is perfectly within its mandate to decide on the present matter. In the course of this decision, the Tribunal must also observe structuring principles such as those present in Art.14.4 of the LCIA Rules, according to which the Tribunal has the duty to act impartially towards both parties, allowing both a fair chance to present their cases [Guide to the LCIA Rules, ¶ ¶5.104-5.105].

64. The exclusion required by CLAIMANT is part of a strategy to weaken RESPONDENT's capacity of defense, and must therefore be repudiated. This Tribunal should indeed allow for the participation of Prof. John in the present arbitral proceedings due to the following reasons: I. The exclusion of Prof. John would be a violation of due process and grounds for challenge of the final award II. Prof. John does not meet the criteria which must be fulfilled in order to exclude him from the present proceedings III. Additional circumstances cast justifiable doubt over Ms. Burdin's impartiality.

I. The exclusion of Prof. John would lead to a) a violation of due process and b) grounds for challenging the final award. Since, c) the right to choose an expert witness is equal to that of choosing an arbitrator

a) <u>The exclusion of Prof. John would lead to a violation of due process</u>

65. The principle of due process states that each party must have a "full opportunity of presenting their case" [Art. 18 Model Law]. This right includes not only the freedom to choose arbitrators and legal representatives, but also the capacity to present one's case fully, namely through the submission of pertinent evidence, which can be defined as the evidence that each party "views as essential on the issues" [Lamm, p. 4]. In this sense, witness testimonies, be they witnesses of fact or expert witnesses, are an integral part of the freedom to present one's case as one considers most appropriate. As stated in CIArb's International arbitration practice guideline on Party-appointed and Tribunal-appointed Experts, "(...) it is widely accepted that a party's right to be given a fair opportunity to present their case includes a right to call independent experts to give evidence in appropriate circumstances when such evidence is necessary for the resolution of an issue or issues in dispute." [CIArb, p. 3].

66. RESPONDENT's reasons for selecting Prof. John are perfectly legitimate. Firstly, Prof. John has been especially selected by RESPONDENT for his extensive knowledge, skills and trustworthiness, and secondly, the case at hand is a complex issue, which cannot be decided without recourse to expert evidence in order that the Tribunal may fully understand the facts. Thus, RESPONDENT has requested to be permitted to present expert evidence in order to aid the Tribunal with its decision by providing insight into highly technical issues.

67. Even though the Tribunal has as an objective to avoid undue delays [Gaillard/Savage, p. 513], upholding due process and impartiality is far more important [Born I, p. 1760, Brekoulakis et al., p. 878]. With this in mind, a general principle of admissibility of evidence is established [Pilkov, p. 150, Waincymer, p. 793].

68. In light of the above, RESPONDENT's request for the inclusion of Prof. John should be granted by the Tribunal, as it is both necessary and was requested in a timely manner, and therefore is in conformity with the right to present one's case, a right protected by the principle of due process.

b) <u>The violation of the principle of due process constitutes grounds for the challenge of the final award</u>.

69. As has been seen above, RESPONDENT's request to present expert evidence is within the bounds of the principle of due process. To refuse RESPONDENT's request would be to refuse RESPONDENT the opportunity to adequately present its case, and thereby harm its defense. The principle of due process is one of the most fundamental principles, not just of arbitration, but of adversarial proceedings in general [Lamm, p. 5].

70. As a result of the high level of importance that this principle holds, the NY Convention, inArt. V, 1. paragraph d), provides that if the principles of due process should be breached, the award should be set aside. Many other commentators have stressed [Weigand, ¶ 14.158, Redfern/Hunter,¶¶ 9.14-11.11], that the Tribunal must do everything in its power to ensure an enforceable award, which includes guaranteeing the principle of due process is respected and enforced throughout the proceedings.

71. If RESPONDENT is denied the opportunity to fully present its case, it may impact the enforceability of the award, both in Equatoriana and Mediterraneo, as both are Contracting States to the Model Law and the NY Convention. The provisions on enforcement and recognition of an award are drafted in much the same way in both the Model Law and the NY Convention, making the Model Law provisions applicable *mutatis muntandis* [Born I, p. 3436].

c) The right to choose an expert witness is equal to that of choosing an arbitrator

72. CLAIMANT wishes to see its right to choose its arbitrator held above RESPONDENT's right to present evidence, thereby creating an unequal standard [MfC, p. 10, ¶47]. On the other hand, RESPONDENT is not attempting to have its right to present evidence supersede CLAIMANT's right to an arbitrator of its choice, but merely wishes the Tribunal to recognise that those rights are of equal importance, which according to art. 22.1 (vi) LCIA is perfectly within its powers.

73. Both the right to choose an arbitrator and the right to choose an expert witness are fundamental rights in arbitral proceedings. Whilst the choice of arbitrator is fundamental in ensuring a fair decision [Moses, p. 121], the choice of an expert witness is fundamental to the organisation of one's defense, [Waincymer, p. 930, IBA Rules on the Taking of Evidence].

74. CLAIMANT asserts that selecting an arbitrator is a legal counsel's most important task [MfC, p. 10, ¶47]. However, CLAIMANT is once again wrong: the first task of a counsel is to defend its client's interests by organizing a strong defense, which naturally includes the right to produce evidence. In the same argument, CLAIMANT points out that RESPONDENT could choose between at least three other experts (a choice which is merely illusory, since, as will be shown below, Prof. John is the most qualified), seemingly ignoring the fact that CLAIMANT could also choose another arbitrator.

75. Whilst RESPONDENT does not contend that the selection of an arbitrator is undoubtedly an important moment in the proceedings, it cannot be said to be the only relevant moment. It stands to reason that the selection of witnesses, the choice of counsel, etc, are all extremely sensitive moments during arbitration [Born I, p. 2856]. The choice of arbitrator cannot be said to supersede all other considerations within an arbitration.

i. The Arbitration Agreement contemplates both the right to choose an arbitrator and the right to choose an expert witness

76. CLAIMANT further alleges that the right to choose an arbitrator supersedes that of choosing an expert, as the former right is explicit in the Arbitration Agreement [MfC, p. 10, ¶49]. The truth is that the Arbitration Agreement also contains the right of both parties to present an expert witness. This is because the Arbitration Agreement contains the explicit choice of Rules selected by the Parties to govern the proceedings, and therefore, the content of these rules form part of the Arbitration Agreement itself [Preamble to the LCIA Rules; Born I, pp. 836-

838; P & P Indus., Inc. v. Sutter Corp; St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp.; Mulcahy v. Whitehill].

77. Thus, for guidance we should turn to the Rules chosen by the parties, which in this case, are the LCIA Rules. These Rules explicitly allow for the presenting of expert witnesses, in Art. 20, and therefore, contrary to what CLAIMANT wrongfully states [MfC, p. 10, ¶49], the Arbitration Agreement cannot be used to determine which of the two rights in question, if any, supersedes the other.

ii. Professor John cannot be excluded under Art. 18.4 of the LCIA Rules.

78. When addressing this matter, CLAIMANT refers to Arts. 18.3 and 18.4 of the LCIA Rules [MfC, pp. 11-12, ¶¶55-59], which govern the possibility to exclude Counsel when there may be a conflict of interest. However, further analysis of these articles reveal several limitations that the Tribunal should take into account.

79. Firstly, the Tribunal should account for the general principle that a party may choose their legal representative, which is an offshoot of the right to organise one's defense as one sees fit, and, as we have seen, applies equally to the right to present expert evidence.

80. Secondly, the stage which the arbitration has reached, which in this case, is as yet an extremely early stage. RESPONDENT first requested the inclusion of Prof. John as witness in its RRfA, i.e., at the earliest opportunity possible. The fact that CLAIMANT had already chosen its arbitrator at that point cannot be helped, it is a result of CLAIMANT's position as the party who initiated arbitration, and, as has been discussed above, this opportunity was never available to RESPONDENT, due to the asymmetric arbitration agreement. Thus, RESPONDENT cannot be disadvantaged merely because CLAIMANT had the first opportunity to nominate its arbitrator. Furthermore, the wording of Art. 18.4 implies a change or addition, and not the limitation of the parties' first choice of Counsel (or, in this case, expert witness).

81. Thirdly, "the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration)" [18.4 LCIA Rules]. This point will be further discussed below, however it should be noted that should the Tribunal exclude Prof. John to avoid a possible conflict of interest and allow Ms. Burdin to remain as arbitrator, this may not be sufficient to guarantee Ms. Burdin's impartiality with regards to this arbitration.

82. Thus, if we apply the criteria as set forth in Art. 18.4 of the Rules, it seems clear that Prof. John cannot be excluded under this article.

II. Prof. John does not meet the criteria which must be fulfilled in order to exclude him from the present proceedings, as a) Expert evidence is both relevant and material b) Prof. John is the most qualified expert to report on the turbines. c) Prof. John is neither partial nor dependent. d) In any case, the information currently available is insufficient to determine whether a conflict of interest exists between Ms. Burdin and Prof. John.

83. As a rule, and as already stated above, all parties in an arbitration have the right to choose both an arbitrator and an expert witnesses. However, there are exceptional instances when one or the other may be excluded. RESPONDENT will show that Prof. John cannot be excluded.

a) Expert evidence is both relevant to the case and material to the outcome

84. Reports and oral testimonies provided by experts are often referred to as expert evidence. The fact that this is evidence, despite being based on opinion rather than fact, is proved by its inclusion in the IBA Rules on the Taking of Evidence ("IBA Rules"), widely regarded as essential guidelines in arbitration [IBA Rules, p. 3; Born II, p. 485; Tidewater v. Venezuela].

85. Evidence should be relevant and material, as mandated by art. 12.1 (iv) LCIA, which gives the Tribunal power to apply rules of evidence, and by Art. 9.2 (a) IBA Rules. Evidence is considered relevant when it has a connection to the case and material when it is related to the outcome of the case [Pilkov, pp 148-149; Waincymer, pp. 858-859].

86. Given the highly technical nature of the matters discussed in the present arbitration, and Prof. John's expertise in those matters, his expert opinion is both relevant, since it connects to the case, and material since its aim is to furnish the Tribunal with information necessary to fully understand and evaluate substantive evidence, therefore having the capacity to influence the outcome of the case.

b) Prof. John is the most qualified expert to report on the turbines

87. RESPONDENT has selected Prof. John in good faith, basing this choice on his specific knowledge and expertise. Furthermore, Prof. John has previous experience with these specific turbines [PO2, p. 49, ¶14].

88. Prof. John is currently an advisor supervising the replacement of a turbine at the Riverhead Tidal Power Plant [PO2, p. 49, ¶14], having been hired by this Plant's operators after

an accident occurred in May of 2018 [Exh. C3, p. 14, ¶6]. The Turbine in question is of the same model as the ones used at the Greenacre Plant. CLAIMANT wrongly considers that Prof. John's previous experience in the handling the Francis Turbine R-27Vs is a disadvantage to his quality as an expert [MfC, p.13, ¶¶65-66]. However, it is this very fact that makes Prof. John more qualified as an expert, as he has been provided with the opportunity to develop extensive knowledge and experience of the Turbine in question.

89. Even if, in theory, one could say that the market offers at least three other experts with comparable skills [PO2, p. 49, ¶17], the truth is that they would not have comparable hands-on experience and knowledge of RESPONDENT's products.

90. It is demonstrative of Prof. John's professionalism and impartiality that his opinions regarding the turbines, since before he had even signed the retainer with RESPONDENT [Exh. R2, p. 30, ¶3; P.O.2, p. 49, ¶15], have been consistent throughout time. In fact, he has never changed his views on the matter, which shows that he is not merely saying what he thinks will please RESPONDENT, but has, from the outset, openly expressed his views on the turbines.

c) Prof. John is neither partial nor dependent.

91. Although a party appointed expert must be impartial and independent [LCIA I; IBA Rules, Art.5.2 (b)], this independence and impartiality is not of the same kind as that of an arbitrator. In fact, by definition, it is desirable to choose an expert who has ample knowledge of the facts of the case and whose profession is tied to the matter at hand, so he can offer the best report possible, whereas an arbitrator is considered partial when he has a close relationship, even if only professional, with the facts, such that the less he knows a priori the better [Born I, p. 1762].

92. In other words, what may be considered as features of an appropriate expert, i.e. knowledge of the case, are considered flaws in an arbitrator, serious enough that they may impede that arbitrator's appointment. This rationale is sensible, since whilst an expert is often fundamental in assisting in the making of arbitral decisions, ultimately, he is not the one making them. It is only natural, then, that the limits according to which arbitrators are deemed to be impartial or independent will be more stringent.

93. RESPONDENT submits that Prof. John is independent and impartial. He has no financial interest in the outcome of the present arbitration, since his retainer has already been paid, regardless of the outcome [PO2, p. 49, ¶15]. He is also independent from both parties, as he does not own, employ nor is employed by either of them, simply being a contractor hired by

RESPONDENT for the specific purpose of producing an expert report and testimony. Furthermore, payment of this retainer does not preclude independence of the expert [Commentary on IBA Rules on the Taking of Evidence, Art. 5.2 (b), p. 19].

94. In light of the above, Prof. John must be found to be independent and impartial, and the fact that he happens to be very well positioned to offer expert insight into the specific product discussed in the present arbitration cannot be held against him as an expert witness.

d) The current information is not enough to determine whether a conflict of interest between Ms. Burdin and Prof. John exists.

95. RESPONDENT's decision not to challenge Ms. Burdin at the present moment, whilst still reserving the right to do so at a later time is neither a sign of bad faith nor of a wish to disrupt the proceedings, as suggested by CLAIMANT [MfC, p.11, ¶51], but instead a choice legitimately based on the fact that, whilst as yet RESPONDENT does not have sufficient evidence to be sure there is a conflict of interest, Ms. Burdin may still undertake certain actions in the course of the present proceedings which may reveal her partiality.

96. An arbitrator has discretionary power when it comes to regarding or disregarding evidence [Pilkov, p 147], the present issue is that Ms. Burdin may disregard the evidence, not because she finds it irrelevant or unreliable, but simply because she takes issue with the person that produced it.

97. Challenges to arbitrators are initiated when circumstances exist that give rise to justifiable doubts over an arbitrator's impartiality and independence [Art.10.1 LCIA, Art.12.2 Model law]. This justifiable doubt is an objective test [Born I, p.1779] defined by the IBA Guidelines on the Conflict of Interest in International Arbitration ("IBA Guidelines"), which are widely accepted and used in international arbitration [Born I, p.1839; Hodges, p. 602; Redfern/Hunter, p.254, ¶4.76; ICS v. Argentina; Kluwer Survey], as the justifiable doubts a reasonable third person with knowledge of the facts would have regarding an arbitrator's independence and impartiality [IBA Gen. St. 2(c)]. Alas, the present situation is contemplated which makes a challenge much harder, though not impossible, since the Guidelines are non-exhaustive.

98. RESPONDENT has no wish to cause difficulties in the proceedings, and therefore does not intend to delay the proceedings by challenging Ms. Burdin when, at the current time, RESPONDENT does not have enough information to determine whether a conflict of interest

exists. It would be remiss of RESPONDENT to hamper the proceedings if there is no real danger of favoritism and conflict.

99. Hence, RESPONDENT will carefully examine Ms. Burdin's conduct throughout these proceedings, in order to guarantee that no instance of partiality or dependence arises, and if it becomes obvious that Ms. Burdin chooses to ignore evidence presented by RESPONDENT, or to favor CLAIMANT due to her issues with RESPONDENT's choice of witness, then RESPONDENT will be fully prepared to take appropriate action to address the issue.

III. If the Tribunal finds there is no conflict of interest, Ms. Burdin should still be excluded because additional circumstances cast justifiable doubt over Ms. Burdin's impartiality.

100. Even disregarding the possibility of a conflict of interest between Ms. Burdin and Prof. John, one may not forget that there are other circumstances which raise doubts about Ms. Burdin's capacity to produce an unbiased decision. A strong preference for one party's arguments, if not for the party itself, can still be considered as lack of impartiality [Luttrell, p. 18; Telekom Case]. Ms. Burdin has published several scholarly opinions on the application of Art. 35 CISG, in which she advocates a wide notion of non-conformity [Letter by Fasttrack, p.42, ¶6]. Since one of the main questions in these arbitral proceedings is precisely whether the turbines sold to CLAIMANT conform under Art. 35 CISG [PO1, III, 1. c.], this makes Ms. Burdin's role as arbitrator problematic, as she has already prejudged this issue.

101. Though it is generally considered that an arbitrator is impartial even when it has expressed opinions on legal issues in dispute [Born I, p.1888], if the bias is "deeply held", it may preclude an objective assessment of the legal and factual aspects of the case by an arbitrator [Born I, p.1783]. Firstly, that Ms. Burdin would publish her controversial opinion in support of a minority position, on more than one occasion [Letter by Fastrack, p.42, ¶6] , reflects how fixed her doctrine of suspicion is. Secondly, in her articles Ms. Burdin uses turbines in power plants as examples to draw conclusions regarding suspicion of non-conformity [PO2, p.48, ¶9]. Thirdly, Ms. Burdin's opinion on non-conformity is so fixed and favorable to CLAIMANT, that CLAIMANT wishes to secure Ms. Burdin's presence in this Tribunal at the cost of RESPONDENT's right to present its case. By requesting the exclusion of Prof. John in order to guarantee that its chosen arbitrator is kept, CLAIMANT reveals the depth of Ms. Burdin's conviction.

102. CLAIMANT wrongly states that the Urbaser v. Argentina case makes challenging an arbitrator on grounds of legal viewpoints impossible [MfC, p.11, ¶53]. The decision on the

challenge in this case points to the same conclusion stated above, that a legal opinion is grounds for challenge only when it is "of such force as to prevent the arbitrator from taking full account of the facts, circumstances, and arguments presented by the parties in the particular case." [Urbaser Challenge, p. 49].

103. The several issues regarding an arbitrator's impartiality and independence do not have to be taken separately and in isolation [Born I, p.1866], these issues can be considered "cumulatively or in the aggregate" [Born I, p.1866]. In fact, in previous cases where one individual instance of doubt was not enough to remove an arbitrator, the aggregation of multiple instances of doubt were decisive [OLG Frankfurt; Sociedad v Banco].

104. When this, alongside her negative relationship with RESPONDENT's appointed expert, is taken into account, Ms. Burdin's presence becomes truly problematic, and indicative in fact of CLAIMANT's bad faith and lack of transparency.

IV. Conclusion on Issue B

105. In light of the above, it is RESPONDENT's submission that Prof. John must be accepted as expert witness in the present arbitral proceedings. Besides the Tribunal's duty to uphold due process and party equality, Prof. John is the most qualified expert to report on the present issues, being very knowledgeable on the subject and both independent and impartial. Furthermore, it is CLAIMANT's choice of arbitrator, Ms. Burdin, that poses a problem in terms of independence and impartiality.

ARGUMENTS ON MERITS

ISSUE C: RESPONDENT DID NOT ENTER INTO ANY CONTRACTUAL BREACH

106. CLAIMANT erroneously argues that the turbines are not in conformance, firstly under the Sales Agreement, and secondly, under Art. 35(2) of the CISG. In short, CLAIMANT considers that since there is a possibility that the turbines have been built with steel whose quality certificates were forged, the turbines cannot be considered fit.

107. However, **I**. RESPONDENT will show that the turbines are indeed in conformance with the Sales Agreement, and also, **II. III.** under Art. 35(1) and Art. 35(2) of the CISG. Lastly, **IV**. RESPONDENT will demonstrate why a mere suspicion of non-conformity does not render the turbines non-conforming.

I. The Turbines are in conformance to the Sales Agreement under Art. 35(1) of the CISG

108. After the report published by Renewable Daily News [Exh. C 3, p.14, ¶1], relating the prosecution of Trusted Quality Steel's CEO for forgery of quality certificates, CLAIMANT addressed RESPONDENT requesting clarifications on the subject [Exh. C 4, p.15, ¶3]. RESPONDENT answered and suggested that the first inspection should be pushed forward in order to ascertain if the turbines were or were not affected by the forgery [Exh. C 5, p. 16, ¶7]. CLAIMANT was not fully satisfied with the proposal, however, it stated it would accept if RESPONDENT used that time to substitute the turbines [Exh. R 3, p.33, ¶3]. RESPONDENT refused that option [Exh. R 4, p.34, ¶3] since it would not only be very costly, but also, there is no reason to require such a grievous measure based on a mere suspicion. As far as RESPONDENT is concerned, the turbines do conform under the Sales Agreement resulting in RESPONDENT's compliance with its obligations.

109. The fact is that the media report relating the prosecution of Trusted Quality Steel's CEO with the forgery of quality certificates is not relevant for the purpose of assessing the conformity of the turbines [a.], nor does RESPONDENT's suggestion to push forward the first inspection render the turbines non-conforming [b.]. The turbines RESPONDENT delivered conformed to the "quantity, quality and description" required by the Sales Agreement under Art. 35(1) [c.], and RESPONDENT did not fail to comply with its social obligations [d.].

a) The media report relating the prosecution of Trusted Quality Steel's former CEO for forgery of quality certificates is not relevant for the conformity of the turbines

110. In a report published by the Renewable Daily News [Exh. C 3, p.14, ¶1], it was disclosed that RESPONDENT's main steel supplier was under backlash, since its former CEO was being prosecuted for the forgery of quality certificates. Steel of lower quality was being certified as being of superior quality. The report also addressed the incident at the Riverhead Tidal Power Plant associating it with unusual occurrence of corrosion and cavitation damage.

111. CLAIMANT argues that the turbines delivered by RESPONDENT are "likely" to have been built using steel of inferior quality [MfC, p.15, ¶72], since Trusted Quality Steel is RESPONDENT's main supplier [PO2, p.50, ¶24], providing around 70% of RESPONDENT's steel at the time. However, this percentage leaves wide open the possibility that the turbines could have been built without using steel affected with the forgery [PO2, p.51, ¶31], and therefore, built in conformity with the Sales Agreement. What is certain is that CLAIMANT is not able to provide proof about a specific non-conformity affecting the turbines.

112. CLAIMANT's "probability" argument cannot prevail. Indeed, the conformity of the goods cannot be affected by mere speculations, since this would open the door for any simple and vague suspicion to give rise to non-conformity issues, questioning the goods' fitness for its purposes without a real threshold.

113. To avoid controversy arising from mere rumours, CLAIMANT has to provide evidence of the facts that corroborate the non-conformity [Tribunale Di Vigevano, 12 July 2000, ¶27; HG Zurich, 26 April 1995, ¶6]. The mere suspicion cannot shift the burden of proof to the seller.

114. CLAIMANT did not provide evidence confirming its assertion. Therefore, CLAIMANT's assessment is no more than mere speculation since the suspicion itself does not render the turbines non-conforming under the Sales Agreement, as RESPONDENT will further demonstrate.

b) Pushing forward the first inspection does not render the turbines non-conforming

115. Following the media report about Trusted Quality Steel's former CEO, involving forgery of quality certificates, CLAIMANT contacted RESPONDENT in order to ascertain if the metal used in the delivered turbines had been affected by the forgery. RESPONDENT was

not in condition to provide that information, despite its best efforts, since, due to a hacking problem the files with the documentation were lost [Exh. C 5, p.16, ¶4]. Nonetheless, RESPONDENT ensured that it would be unlikely that the delivered turbines would be affected and that no immediate action would be necessary [Exh. R 2, p.32, ¶8].

116. RESPONDENT, to assuage CLAIMANT's concerns, suggested that the first inspection could be pushed forward in order to conduct a thorough examination of the turbines to ascertain the quality of the steel used [Exh. C 5, p.16, ¶7]. RESPONDENT further volunteered to support the costs associated with the examination of the turbines since the ordinary acceptance test was not suitable to reach such a conclusion [Exh. C 7, p.21, ¶7; PO2, p.47, ¶3].

117. Although RESPONDENT suggested pushing forward the first inspection, this was done merely to reassure CLAIMANT, and was by no means absolutely necessary. Indeed, according to professor's John understanding, there is only a 5% chance that turbines of those characteristics, not used in salt water, even if built with deficient steel, (which is not the case), would be affected by corrosion and abrasion at a level enough to stop the turbines from producing energy [Exh. C 7, p.21, ¶4; Exh. ; PO2, p.49, ¶15].

118. The first inspection was due three years after the installation of the turbines [Exh. C 2, p.12, Art. 2(1-d)], at September/October 2021. RESPONDENT suggested that the first inspection could be pushed forward by one year, to September/October 2020, in order to address CLAIMANT's nebulous worries. Pushing forward the first inspection, constituting an alteration of the RESPONDENT's obligations under the Sales Agreement, results from an agreement between the contracting parties, thus, cannot be interpreted as a breach of contract, and therefore, it cannot be understood as confirmation from RESPONDENT of the non-conformity of the turbines.

c) <u>The turbines that RESPONDENT delivered conformed to the "quantity, quality and description" required by the contract under Art. 35(1)</u>

119. A Sales Agreement was concluded on 22nd of May 2014 [Exh. C 2, pp.11-13] when RESPONDENT accepted CLAIMANT's offer, under Art. 23 CISG [RfA, p.6, ¶10]. CLAIMANT ordered two of RESPONDENT's newest model of turbines, Francis Turbine R-27v, for US$ 20.000.000,00 each. Under the Sales Agreement, RESPONDENT would also be responsible for the installation of the turbines at the power plant, with which RESPONDENT complied [Exh. C 4, p.15, ¶2].

120. The purchased turbines, due to the special shape of the blades, the way they are allocated, and the steel alloy used, are slightly more efficient than ordinary turbines [RRfA, p.26, ¶3; Exh. R 1, p.30, ¶2]. Also, they have a higher resistance to corrosion and cavitation. This set of characteristics allows for longer intervals between inspections and maintenance, namely, the R-27v turbines allow for 3 years, instead of 2, for short inspections, 13 years, instead of 12, for the interim inspections, while the main inspection should be done every 26 years.

121. CLAIMANT argues that due to the uncertainty surrounding the quality of the steel used, the delivered turbines do not conform to the Sales Agreement. CLAIMANT considers that the turbines are non-conforming because, at the moment and despite RESPONDENT best efforts, it is not possible to ascertain the quality of the steel used [Exh. C 5, p.16, ¶4] in the fabrication process of the turbines [MfC, p.21, ¶100]. However, this argument cannot prevail.

122. Conformity, under Art. 35 of the CISG, is determined by fulfilment of the obligations to which parties are bound at the time of the conclusion of the contract [Secretariat Commentary, Art. 35, ¶4; Schlechtriem, p.276]. For the turbines to conform under the contract, they must be of "the quantity, quality and description required by the contract".

123. To ascertain conformity it is necessary to determine what RESPONDENT was required to perform and in what terms. The contract required RESPONDENT to deliver and install its newest turbine model, Francis Turbine R-27v, under the specifications of the Annex A of the contract for the power plant which CLAIMANT would be building in Greenacre.

124. The turbines delivered and installed by RESPONDENT conformed to the contractual requirements under Art. 35(1) of the CISG. The delivered turbines do not deviate from the specified characteristics on Annex A, under the Sales Agreement [Exh. C 2, p.11; PO2, p.48, ¶6].

125. As far as RESPONDENT is able to know, there are no indications, much less certainties, that the referred turbines are, at this moment in time, unable to perform for longer periods of time with less downtime when compared to other turbines currently available in the market, as agreed by the parties.

126. To the contrary, CLAIMANT did not provide definitive proof that the turbines were affected by steel of lesser quality, much less that the turbines are unable to perform as required in the Sales Agreement. It is up to CLAIMANT to provide evidence that shows in fact that the delivered turbines were built with uncertified steel. It is accepted that the burden of proof of non-conformity lies with CLAIMANT after acceptance of the goods [Powdered Milk case,

Chicago Prime Packers Inc. case, Wire-and-cable case]. Indeed, in the Wire-and-cable Case, the Swiss Supreme Court reversed a judgment which sustained that the seller had not been discharged of his burden of proof. The Supreme Court held that with the acceptance of the goods, the burden of proof for their non-conformity shifted to the buyer.

127. Whilst CLAIMANT argues that the turbines are non-conforming, since the possible use of lesser quality steel can put the performance of the turbines at stake, under the same assumptions it is also viable to consider that the turbines were not built with faulty steel since RESPONDENT around 30% of the steel available at the time the turbines were built was not supplied by Trusted Quality Steel [PO2, p.50, ¶24; PO2, p.51, ¶31].

128. However, what is certain and cannot be denied is that that the turbines have passed the acceptance test and have been working well ever since the installation, revealing no problems whatsoever [Exh. C 4, p.15, ¶2]. Thus, there is no reason to believe that the turbines will not be able to perform in the expected conditions.

d) RESPONDENT did not fail to comply with its public commitment

129. Before the Sales Agreement was signed on the 22nd of May 2014, RESPONDENT presented its newly developed turbines at the Hydro Power Trade Fair, on the 24th of August 2013 [PO2, p.48, p.13]. At this trade fair, Prof. John pronounced that the specific set of characteristics of these turbines allowed for increased inspection and maintenance intervals by one, or two, years in comparison to other turbines on the market [Exh. R 1, p.30]. CLAIMANT also participated in the trade fair [PO2, p.48, ¶13].

130. CLAIMANT now argues that RESPONDENT's turbines do not comply with the public commitment made at the trade fair [MfC, p.18], since it featured, to the public knowledge, enhanced efficiency and resistance to corrosion. CLAIMANT therefore alleges that such statements constitute a public commitment on the standard features of the presented turbines, thus, impliedly agreed upon, on the Sales Agreement.

131. However, RESPONDENT asserts that the features presented at the trade fair have not been jeopardized. Indeed, the turbines, even if they had been built with steel of lesser quality, which is unlikely and unproven, are still able to perform to a higher standard than other turbines in the market [PO2, p.49, ¶15].

II. The delivered Turbines are in conformity under Art. 35(2)(a) of the CISG

132. The turbines are also in conformance under Art. 35(2)(a) CISG since they are "fit for the purposes for which goods of the same description would be ordinarily be used". In this regard, RESPONDENT will demonstrate that [a] the turbines are able to perform all ordinary purposes expected of machines of that description, [b] and the turbines were of the quality expected for the performance of the contracted purposes.

a) The turbines are able to perform all ordinary purposes expected of machines of that description

133. When it comes to determine the fitness of the goods, it is not expected that goods of this nature should be able to fulfil all possible purposes [Secretariat Commentary, Art. 35, ¶5], since every turbine is, to a certain extent, customized for the particularities of each plant.

134. It can be expected from turbines of this nature that they be able to perform ordinary tasks. If the plants accommodating them are fit to receive the turbines in question with these characteristics, they would be able to perform ordinary tasks [PO2, p.52, ¶36], and in similar conditions to the Greenacre Power Plant, they would be able to provide the same output.

135. The features that distinguish in the Turbines in question in relation to others available on the market, namely the longer time frames between inspections, as described above, are present in the product delivered by RESPONDENT. In fact, whether the turbines have been produced with lower quality steel or not, since they will be used in freshwater, their durability is not compromised and the turbines will be able to perform according to the standard that was expected [PO2, p.49, ¶15]. Therefore, RESPONDENT delivered turbines that were built to comply with this standard.

b) The turbines were of the quality expected for the performance of the contracted purposes

136. For CLAIMANT, reasonable expectations would be for the turbines to be able to provide enough energy to avoid downtimes and the need to resort to Ruritania's Coal Plant, in order to fulfil the Greenacre's sustainability Bill of Rights [Exh. R 2, p.31, ¶5].

137. Therefore, in order to ascertain the conformity of the turbines it is necessary to look at the productivity that the referred turbines would be able to provide. Even though there are others, the preferred threshold used to determine the "fitness" of the goods for ordinary purposes, under Art. 35(2)(a) is the reasonable quality approach [Bernstein/Lookofsky, p. 59-

60; Stockholm Chamber of Commerce Arbitration Award, 5 June 1998]. Under this criteria, the goods are of reasonable quality if their productivity meets CLAIMANT's reasonable expectations.

138. Thus, the turbines did not fail to perform according to what was expected from them. In fact, at the moment the plant is working well: there has been no need to resort to fuel based energy, and CLAIMANT is complying with its environmental objectives. Therefore, there can be no finding of a non-conformity [Rijn Blend Case, NAI, 15 October 2002, ¶100].

III. The delivered turbines are in conformance under Art. 35(2)(b) of the CISG

139. Under Art. 35(2)(b) the goods are conforming when they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract". This particular purpose must be communicated to the seller before the conclusion of the contract [UNCITRAL Digest, Art. 35, ¶10].

140. However, every so often, a buyer's particular purpose will overlap with the ordinary purpose [Lookofsky, p.81]. The particular purpose that CLAIMANT argues [MfC, p.25, ¶121] is no different from the standard characteristics made known with regards to the turbines. The premise on which the turbines were purchased was that, with their environmentally-friendly design, they were built to last longer since they are more resistant to corrosion and cavitation. [Exh. R 2, p.31, ¶5].

141. CLAIMANT argues that the uninterrupted availability of the plant constituted the particular purpose, however, due to the turbines' characteristics, the particular purpose is identical to the ordinary purposes of such goods. Considering that the particular and the ordinary purpose overlap in this case, the fitness for one must mean fitness for the other. The goods were therefore fit for the particular purpose communicated by CLAIMANT.

IV. The mere suspicion does not render the turbines non-conforming

CLAIMANT argues that a mere suspicion is enough to render the turbines non-conforming with the Sales Agreement, stating that "RESPONDENT delivered turbines which may have been manufactured with low-quality steel." [MfC, p.21]. CLAIMANT also argues that in that scenario "[...] the turbines will be extremely susceptible to corrosion and cavitation [...]" even though it has not yet been shown, and cannot be established [MfC, p.22, ¶107].

142. RESPONDENT will show that a mere suspicion is not enough to render the turbines non-conforming.

143. If there is a suspicion of a defect, the fundamental question is whether that suspicion, *per se*, is enough to render the goods nonconforming. It is widely recognized by the international community that the suspicion of a negative feature cannot render the goods non-conforming [Schwenzer/Tebel, p.155]. Only under a test that, through physical examination of the goods, determines that the quality of the goods is subpar can render such goods non-conforming. The delivered turbines have been, so far, only subjected to the acceptance test and, even though it is not the proper examination to determine the quality of the steel [PO2, p.47, ¶3], it revealed no problems whatsoever in its performance [Exh. C 4, p.15, ¶2].

144. Furthermore, case law on this subject, such as German case-law, sustains that not every suspicion leads to non-conformity. The threshold established by the German courts requires an objective analysis based upon concrete or obvious facts [Schwenzer/Tebel, p.156]. Looking at the case at hand, there is also a legitimate possibility that the turbines have not been built using steel of inferior quality since RESPONDENT's main supplier is not its only supplier [PO2, p.50, ¶25; PO2, p.51, ¶31] and RESPONDENT had, at the time, enough steel not originating from Trusted Quality Steel, to build the turbines in question. Therefore, the suspicion is not at all obvious and does not exist to a degree that meets the threshold required by the existing case-law.

145. CLAIMANT brings up the Belgian Pork Case [Frozen Pork Case; MfC, p.22]. In this case, the Court of Appeals decided that the pork delivered did not conform to the contract. The court held that in international wholesale an important part of being fit is the goods' ability to be resold (tradeability). Being foodstuff, intended for human consumption, tradeability requires that the goods are unobjectionable as to health, due to the need to comply with public regulations in the buyer's country. The court concluded that the pork had to be destroyed because it was suspected of being contaminated with dioxin.

146. For CLAIMANT, the court considered that the fact that the suspicion constituted an impediment to the buyer's intended use was decisive [MfC, pp.22, ¶112-113]. However, CLAIMANT is not hindered from keeping the power plant functioning until the scheduled inspection to ascertain the quality of the steel used, which will eventually dissipate the suspicion. RESPONDENT's position is also supported by the statements of Prof. John, asserting the lack of necessity for immediate intervention [Exh. R 2, p.32; PO2, p.49, ¶15].

147. Consequently, as stated above, the suspicion did not prevent the goods' usability since the goods did not fail to perform as expected. Hence, the suspicion itself does not render the turbines non-conforming.

V. Conclusion on issue C

148. RESPONDENT is not to be held liable for any contractual breach. CLAIMANT failed to provide evidence - as it was its burden - showing that the turbines are not adequate to fulfil the contractual purposes and, therefore, rendering them non-conforming, under the Sales Agreement and under Art. 35 of the CISG. Furthermore, the suspicion that the turbines were built with steel of inferior quality is not enough to render the turbines non-conforming. Therefore, RESPONDENT did not breach the Sales Agreement by delivering non-conforming goods.

ISSUE D: CLAIMANT IS NOT ENTITLED TO THE DELIVERY OF REPLACEMENT TURBINES

149. CLAIMANT requested that the court decide in favour of the substitution of the turbines. Substitution of the Turbines is only permissible if RESPONDENT has fundamentally breached the Sales Agreement [Art. 46 CISG]. Therefore, CLAIMANT argues that the breach of the Sales Agreement is fundamental, according to the parties' intended threshold or, alternatively, under Art. 25 of the CISG.

150. However, RESPONDENT will demonstrate that CLAIMANT is not entitled to the request for the delivery of replacement turbines since the threshold of Art. 25 CISG was lowered only for termination [I.] and there was no "fundamental breach" under Art. 25 of the CISG. Subsidiarily, there also was no fundamental breach under Art. 20 of the Sales Agreement [II.]. In any case, CLAIMANT cannot request substitution under Art. 7.2.2 PICC [III.], as substitution is too onerous [a.], and indeed, most likely costs more than repair [b.].

I. There was no "fundamental breach"

151. The Sales Agreement governs the issue of "fundamentality" in what concerns termination as a remedy [Exh. C 2, p. 13, ART. 20(2)], however, the parties are not interested in that solution since that remedy would create problems for CLAIMANT, namely, it would need to find a new supplier which would delay the whole operation [PO 2, p. 47, ¶4].

152. CLAIMANT argues that since the parties have regulated the threshold of fundamental breach in the Sales Agreement, it is under this definition that the fundamentality of the breach will be ascertained. The parties agreed to lower the threshold of this concept compared to Art. 25 of the CISG [Exh. C 2, p. 13, ART. 20(2); PO 2, p. 47, ¶ 4] by not including the word "substantially" in the Sales Agreement.

153. CLAIMANT argues that under Art. 20(2) of the Sales Agreement, the parties intended that it should be easier for CLAIMANT to enforce remedies that require fundamental breach. However, the parties willingly lowered the threshold for one remedy only, i.e., the termination of the contract. The same does not apply when addressing different remedies, like the substitution of the delivered goods. Therefore, this tribunal should analyse deprivation under Art. 25 of the CISG.

154. In order for a fundamental breach to be met under Art. 25 CISG, it is necessary for one party to be substantially deprived of what it expected under the Sales Agreement [Kritzer, p. 205]. As has been shown, CLAIMANT was not deprived of what it expected under the Sales Agreement, much less substantially deprived.

155. In any case, to obtain fundamentality under Art. 25 of the CISG, the breach must result in a detriment that it substantially deprives CLAIMANT to such an extent that "[...] the interest of the party adhering to the contract in the full contractual performance by the other party has essentially lapsed" [Brunner/Gottlieb, p. 166]. CLAIMANT cannot argue it lost interest in maintaining the Sales Agreement, since CLAIMANT's tender was attributed to it due to RESPONDENT's newly developed turbines. If CLAIMANT had used any other turbines on the market, it may not have been attributed the tender, therefore, CLAIMANT cannot claim it has no interest in maintaining the contract.

156. Therefore, CLAIMANT's argument, that the defects "not yet shown" [MfC, p. 32, ¶ 153] can be considered a fundamental breach of the Sales Agreement cannot prevail since CLAIMANT has not been substantially deprived of its expectations under the Sales Agreement.

II. CLAIMANT has not been deprived of its expectations under the Sales Agreement

157. In any case, there was no fundamental breach of CLAIMANT's expectations under the Sales Agreement, therefore, Art. 20(2)(d) is not fulfilled.

158. CLAIMANT has based its argument on the assertion that the turbines are not conforming, therefore, depriving the buyer of its intended use [MfC, p. 28]. However, this argument must fail to convince, as previously stated by RESPONDENT [see supra. ¶147]. In fact, nothing so far presented by CLAIMANT shows the non-conformity of the turbines, much less the preclusion of CLAIMANT's intended use for the turbines.

159. CLAIMANT also argues that RESPONDENT's suggestion to pull forward the first inspection deprives CLAIMANT of what is entitled to expect under the Sales Agreement [MfC, p. 29, 139]. That suggestion does not alter the quality of said turbines nor their performance. RESPONDENT only suggested that the first inspection to be pushed forward in order to reassure CLAIMANT, however, RESPONDENT stands by the fact that no immediate action was necessary, as previously stated [See supra. ¶115].

160. Therefore, CLAIMANT has failed to prove its alleged deprivation of what it was entitled to expect under the Sales Agreement.

III. In any case, CLAIMANT cannot request the substitution of the Turbines pursuant to article 7.2.2. of the PICC

161. Even if the breach of contract were fundamental, which it is not, CLAIMANT could not request the substitution of the Turbines pursuant to Art. 46 of the CISG, as specific enforcement is excluded in situations of impossibility, which may include situations where specific enforcement "would cause the seller unreasonable effort or expense" [Vanto, ¶h)]. This view is reflected in Art. 7.2.2. of the PICC, which states "Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless: (…) (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;". In the case at hand, substitution is too onerous [a.], and in any case, most likely would cost more than the repair [b.].

a) Substitution is too onerous

162. For the standard of "unreasonable burden", we resort to the Commentary to the PICC, wherein it is defined as: "so onerous that it would run counter to the general principle of good faith and fair dealing". In the present case, substitution of the turbines would threaten RESPONDENT's economic survival, in fact, RESPONDENT may even be forced to file for insolvency [Exh. R2, p. 32, ¶6; PO2, p. 53, ¶43], a fact that CLAIMANT is well aware of [MfC, p. 7, ¶32].

163. Thus, it is unreasonable for CLAIMANT to demand specific enforcement, since not only would RESPONDENT have no profit from the transaction, it would actually suffer losses, to a point where its economic survival is threatened. It is contrary to the principle of good faith that CLAIMANT should demand specific enforcement when they have not even proved that there is a non-conformity. Even if there were a non-conformity, it would be contrary to good faith to require specific performance when mere repair would suffice.

b) Substitution would most likely cost more than repair

164. Furthermore, CLAIMANT argues that the total costs for substitution are less than the costs for repair. This is untrue, as CLAIMANT's calculations are skewed since it is relying on the existence of the penalty clause in its contract with Greenacre, and it is relying on the existence of liquidated damages under Art. 19(2) of the Sales Agreement, without allowing for the limitation set out in Art. 19(3) RESPONDENT will show that [i.] CLAIMANT cannot

demand the damages resulting from the penalty clause from RESPONDENT, and [ii.] the liquidated damages are erroneously calculated.

i. CLAIMANT cannot demand the damages resulting from the penalty clause from RESPONDENT

165. RESPONDENT is not liable for the damages resulting from the penalty clause included in CLAIMANT's tender. CLAIMANT agreed to add this clause to the tender after having won the said tender, and without consulting RESPONDENT, and now expects RESPONDENT to pay the damages resulting from this unexpected and completely needless clause. Fortunately, there is an exclusion clause in the Sales Agreement to safeguard just such a possibility [S.A., p. 13, ¶19.5].

166. This exclusion clause provides that any indirect or consequential damages are excluded. Indirect or consequential damages are those that, at the time of the contract, are not foreseeable to the non-performing Party. Art. 7.4.1 of the PICC also excludes any harm which is not foreseeable. Therefore, damages resulting from a clause included in another contract, to which RESPONDENT is not a party, that was concluded after the Sales Agreement, and which, furthermore, was added to that contract, without any information to RESPONDENT, cannot be requested by CLAIMANT. RESPONDENT could not have foreseen these damages since, at the time of the conclusion of the Sales Agreement, even CLAIMANT did not know that this clause would be included.

167. Thus, RESPONDENT cannot be liable for the damages resulting from the penalty clause included in the tender, as these are excluded both under Art. 7.4.1 PICC and Art. 19.5 S.A.

ii. The liquidated damages are erroneously calculated.

168. CLAIMANT's calculations are skewed since, as shown above, RESPONDENT is not responsible for the payment of the penalty clause, in the amount of 900.000US$. Furthermore, CLAIMANT does not take into account that RESPONDENT should pay no damages for the first 50 days of downtime, as stipulated in Art. 19(3).

169. Article 19(3) states that RESPONDENT shall pay no damages for the first 50 days of downtime associated to the "first regular inspection". The inspection to be performed in September/October 2020 is the first inspection, which has simply been pulled forward by one year in order to assuage CLAIMANT's concerns. As has been discussed, this alteration results

from an agreement between the parties, and therefore cannot be attributed solely to RESPONDENT, but rather should be seen as an alteration of the Sales Agreement.

170. CLAIMANT states that substitution will cost only 10.700.000US$ [MfC, p. 30, ¶144], whereas repairs would cost "an average" of 13.450.000 [MfC, p. 30, ¶145]. However, in reality, repairs would cost a total of between 8.300.000 US$ and 14.800.000 US$, depending on the nature of such repairs. Thus, even if repairs are required, they most likely (60% likelihood) will be below the cost of the substitution of the Turbines [PO 2, Appendix I, p. 55].

IV. Conclusion on issue D

171. The threshold of fundamental breach, lowered by the parties, is only lowered in regards to the termination remedy agreed by the parties on the Sales Agreement. Even if the Tribunal should find otherwise, CLAIMANT's request for the delivery of replacement turbines must be rejected since RESPONDENT did not incur in a fundamental breach under the Sales Agreement nor under the CISG. In any case, CLAIMANT cannot request substitution since it would be too onerous.

REQUEST FOR RELIEF:

RESPONDENT respectfully requests the Tribunal to find that:

1. The Arbitral Tribunal does not have jurisdiction to hear the case as the Arbitration Agreement is invalid.

2. The Arbitral Tribunal should not order the exclusion of the expert suggested by RESPONDENT, Prof. John.

3. RESPONDENT did not breach the contract and did not deliver turbines which are non-conforming in the sense of Article 35 CISG.

4. Therefore, CLAIMANT is not entitled to request the delivery of replacement turbines.

RESPONDENT reserves the right to amend its prayer for relief as may be required.

Counsel for RESPONDENT: