



**ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL  
ARBITRATION MOOT**

# **ANALYSIS OF THE PROBLEM FOR THE USE OF ARBITRATORS**

Twenty Seventh Annual Willem C. Vis  
International Commercial Arbitration Moot

Vienna, Austria  
October 2019 – April 2020

Oral Hearings  
April 4 – 9, 2020

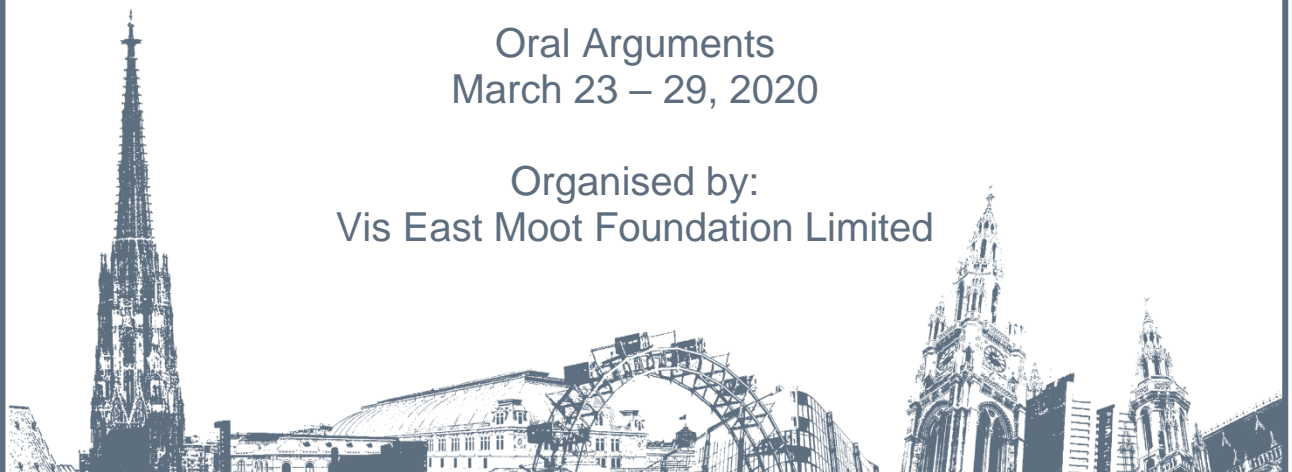
Organised by:  
Association for the Organisation and Promotion of the  
Willem C. Vis International Commercial Arbitration Moot

and

Seventeenth Annual Willem C. Vis (East)  
International Commercial Arbitration Moot  
Hong Kong

Oral Arguments  
March 23 – 29, 2020

Organised by:  
Vis East Moot Foundation Limited



# ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, <https://vismoot.pace.edu/site/27th-vis-moot/the-problem>. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 (PO 2) and subsequent comments.

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for Respondent.

The analysis will be sent to all teams after all Memoranda for Respondent have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

# THE FACTS

## I. The Parties and Contractual History

**CLAIMANT**, HydroEN plc, is a market leader in providing pump hydro power plants. It operates in over 100 countries and has an annual turnover of US\$ 4.3 billion and has more than 25,000 employees. It is well known to realise pump hydro power plants in challenging environments conforming to the highest environmental protection standards.

**RESPONDENT**, TurbinaEnergia Ltd, is a world-renowned producer of premium water turbines. It produces its turbines with 400 employees in Equatoriana and 150 employees in Danubia and has an annual turnover of US\$ 180 million. RESPONDENT's premium product is the R-27V Francis Turbine with a capacity of 300 MW. It has been presented to the general public in 2013 and has at the time been the most expensive turbine in the market. One of the particular features of the R-27V Francis Turbine following from its design and the materials used is an increased corrosion and cavitation resistance which allows for longer inspection and maintenance intervals (**Respondent Exhibit R 1**). For the short inspections, the intervals could be extended from 2 to 3 years and from 12 to 13 years for the interim inspection while a main inspection should be done every 26 years.

The dispute arose out of a Sales Agreement, concluded on 22 May 2014, in which CLAIMANT purchased two R-27V Francis Turbines for its Greenacre Pump Hydro Power Project.

Greenacre is a city of 100,000 people situated among the rolling hills of Western Mediterraneo, a remote part of Mediterraneo. Due to the Terranean mountain range, the region is separated from the rest of the country and only connected to the energy grid of the neighbouring country Ruritania.

For the last ten years Greenacre has moved towards being a sustainable community, including adopting a Sustainability Bill of Rights. In 2010 the Council of Greenacre, with the support of 82% of the population, adopted a "no-carbon" energy-strategy. It provided for a massive increase of the wind and solar energy production capacity to an extent that the energy generated this way would generally meet the demand. A cornerstone in that strategy was the construction of a pump hydro power plant. Its primary purpose was to make the availability of renewable energy largely independent from the weather conditions which affect the production of wind and solar energy. In times of overproduction the excess energy produced by the wind turbines and the solar panel is used to pump the water from the lower reservoir into the upper reservoir. From there, the water is then released again to the lower reservoir powering the turbines whenever the demand exceeds the supply of green energy produced by the wind parks and the solar panels. By being able to use a considerable amount of excess energy at times of overproduction and to release energy promptly when needed, the power plant also plays an important role in stabilizing the local Greenacre energy grid.

On 15 July 2014, CLAIMANT was awarded the contract for the construction and operation of the pump hydro power plant as the result of a public tender process which the Council of Greenacre had initiated in January 2014. In preparation of its bid CLAIMANT had contacted RESPONDENT already in March 2014 to enquire about a potential delivery of two R-27V Francis Turbines to be included into the plant should the contract be awarded to CLAIMANT (**Claimant Exhibit C 1**). RESPONDENT was very willing to do so and both Parties signed a Sales Agreement on 22 May 2014, according to which RESPONDENT was to deliver and install two R-27V Francis Turbines should CLAIMANT be awarded the tendered contract (**Claimant Exhibit C 2**).

The inclusion of RESPONDENT's newly developed, innovative, and powerful R-27V Francis Turbine were an important factor for the success of CLAIMANT's bid. First, they allowed for a more environmental-friendly design of the plant since only two turbines were needed to guarantee the needed power of 600 MW. Second, they also should have allowed for longer inspection and maintenance intervals. This was an important consideration since generally each inspection and maintenance results in a reduced availability of the plant of approximately 4-6 weeks. The inspection of each turbine takes around 2-3 weeks, during which only the other turbine is available to manage the supply of energy. Furthermore, for the inspection works at the generator and the penstock the whole plant has to shut down. Thus, during the inspection time, the plant is, at best, only 50% available to store the surplus of energy at peak production times and to release it at times when the demand exceeds the energy produced by the other renewable energy sources. As a consequence, such energy needed would have to come from one of the only two other sources available, *i.e.* two stacks of powerful batteries of 50 MW each and the coal fired power plant close to the border in the neighboring Ruritania, which is the only conventional power plant connected to the Greenacre grid.

The local authorities in Greenacre made it clear during the tender process that one of the relevant considerations for the selection of the contractor was to avoid or at least minimise the need to rely on such carbon-based energy. That was already mentioned in the preamble of the model contract contained in the tender documentation which the successful bidder had to conclude with the Council of Greenacre. The councilor in charge of the project, Mr. Gilbert Crewdson, subsequently even insisted on an amendment of the contract to include an express commitment by CLAIMANT to guarantee the availability of the plant for at least eleven months per year for the production of at least 600 MW. Thus, the contract between the Council of Greenacre and CLAIMANT now contains a penalty of US\$ 40,000.00 for each day in which the non-availability of the pump hydro power plant makes it necessary to rely on "dirty energy" from Ruritania to meet an excess of demand which could not be fulfilled by solar or wind energy (**Claimant Exhibit C 6**).

To exclude as far as possible the need to buy any energy from the coal fired plant in Ruritania, CLAIMANT had planned to schedule all necessary inspections during the vacation time in September/October. In normal years, during the vacation time of eight weeks, the other sources of renewable energy could be expected to produce sufficient energy to meet the reduced demand. There are very few hours during night- time when

the demand is likely to exceed the energy produced. In these few hours the two battery stacks should generally be sufficient to provide the required additional quantity of energy. Consequently, if the inspections can be done as planned in September/October, it is very likely that despite the non-availability of the pump hydro power station an actual purchase of energy from the coal fired power plant in Ruritania could be avoided. The latter would only provide reserve energy capacity to guarantee a supply in case of unforeseen events or extreme weather situations. There was, however, the clear expectation that there would be no need to use such reserve capacity.

Unfortunately, July/August and November/December are the months of peak demand and a high volatility of the energy produced by wind turbines and solar panels. During these four months the pump hydro power plant is operating largely at “full speed” due to the extremely volatile production rates of the other sources of renewables. Any standstill of the hydro power plant or a reduction in production during these four months will definitively result in the need to purchase missing energy from the only further available source of energy connected to the grid in Greenacre, the existing old coal fired power plant in Ruritania. Also, in the remaining months, the energy produced by the power plant is generally required to meet the demand so that in a case of a standstill of the plant it would have to be replaced by energy from the coal fired plant in Ruritania.

After winning the contract on 15 July 2014, CLAIMANT immediately started with the construction of the pump hydro power plant and managed to finalise it in less than four years. In late spring 2018, RESPONDENT delivered and installed the two R-27V Francis Turbines. The plant started operating on 19 September 2018, after the inspection and approval by the relevant authority, which had included a test run of the turbines.

On 29 September 2018, the leading daily newsfeed on renewable energy, the Renewable Daily News, published a report about the start of a major fraud case against the CEO of Trusted Quality Steel, one of RESPONDENT’s main suppliers (**Claimant Exhibit C 3**). Apparently, Trusted Quality Steel had delivered steel to its customers with forged documentation concerning the quality control of the steel. The report also mentioned that the delivery of untested steel of lower quality was also the most likely reason for a disconcerting finding at a turbine produced by RESPONDENT and used in the Riverhead Tidal Power Plant. The turbine had to be replaced after only two years of operation due to excessive corrosion and cavitation damage. The damage was of such nature that it required immediate action to avoid a complete destruction of the turbine and the threat of further damage to the generator set or the plant itself. The replacement of the turbine took 13 months and led to a standstill of the plant which only restarted energy production at the beginning of June 2019.

On 3 October 2018, after having been informed about this and another article, Ms. Michelle Faraday, CLAIMANT’s CEO, immediately contacted Mr. Eric Gilkes, RESPONDENT’s chief negotiator, to enquire to what extent the two R-27V Francis Turbines in the Greenacre Plant could be affected by the fraud and to query whether their corrosion resistance had been compromised (**Claimant Exhibit C 4**). According to



the information available, it appears that the characteristics of the special alloy had been altered by heat during the manufacturing process. The change in the characteristics would make the blades in the Francis Turbine R-27V more susceptible to corrosion and breakage.

On 4 October 2018, Benoit Fourneyron, RESPONDENT's CEO, replied and tried to dispel all concerns (Claimant Exhibit C 5). He suggested to wait until the first inspection, to be pulled forward from September 2021 to September 2020, to ascertain whether the turbine runner or the blades were produced from steel of inferior quality and then decide upon any necessary action.

Ms. Faraday, who was shocked by the information, immediately contacted the responsible Greenacre councillor, Mr. Gilbert Crewdson, to discuss the issue and possible containment measures. Mr. Crewdson was furious and threatened to terminate the contract between CLAIMANT and Greenacre for the operation of the power plant for cause.

In the end, Mr. Crewdson requested CLAIMANT to ask for the installation of two new R-27V Francis Turbines, *i.e.* the turbine runner, fit for the purpose set out in the contract between the Parties, *i.e.* with the new alloy for the blades. The exchange was to take place in September-October 2020 during the pulled forward first scheduled maintenance (Claimant Exhibit C 6).

Ms. Faraday immediately informed Mr. Fourneyron of the request. After an exchange of emails, the Parties met on 1 December 2018 to discuss and agree on possible solutions for the situation created by the inability of RESPONDENT to guarantee the use of a conforming steel. No agreement could be reached.

RESPONDENT was merely willing to pull forward the scheduled inspection by one year to examine the status of the turbine and the conformity of the steel used. In an email of 11 December 2018, Mr. Fourneyron further offered to make the necessary preparations that upon a finding of corrosion, the blades could be repaired on site or, if necessary, in RESPONDENT's nearest factory (Claimant Exhibit C 7). RESPONDENT was not willing to agree on the replacement which CLAIMANT had requested, which would have excluded the risk of a longer standstill comparable to that of the Riverhead Plant.

In CLAIMANT's view only the requested direct exchange of the turbines or at least of the turbine runners would provide an adequate remedy for the uncertainty created by RESPONDENT. Such an exchange of the Turbines or the turbine runners during the scheduled inspection would take approximately only three months and rule out all risks. As RESPONDENT created the uncertainty, it had to bear the risk that, upon inspection, it may turn out that no replacement was needed. In CLAIMANT's view the repair of the turbine blades offered was unacceptable due to the consequences for the availability of the plant in case the inspection showed corrosion of the blades. Any repair would mean that the turbine, and therewith the plant, would be out of operation for at least four months in case of minor findings or even longer should there be greater damages. At the same time, any repair would only address the symptoms and not the cause, *i.e.*

the inferior steel quality. Furthermore, in CLAIMANT's view, the repair offered is completely inadequate should it turn out at inspection that the turbine has to be replaced immediately, as it happened in the Riverhead Plant. That would close down the Greenacre plant for at least a year, even if RESPONDENT could start constructing the new turbine immediately after the inspection.

In addition to the delivery of the new turbine, CLAIMANT considered itself to be entitled to damages for the loss of electricity production for each day the removal and new installation of the new turbine will take.

## **II. Initiation of Arbitration and Statement of Relief**

On 31 July 2019, CLAIMANT initiated the present arbitration proceedings, asking for the following two orders:

- 1) TurbinaEnergia Ltd is ordered to deliver two substitute R-27V Francis Turbines fit for the purpose set out in the contract between the parties produced;
- 2) TurbinaEnergia Ltd is liable for any damages resulting from the exchange of turbines up to the agreed upon limitation.

RESPONDENT in its Response to the Request for Arbitration of 30 August 2019 requested the Arbitral Tribunal to make the following orders:

- a. To decline jurisdiction;
- b. To reject the claim for the delivery and installation of two replacement turbines;
- c. To order CLAIMANT to bear the costs of this arbitration.

# **THE ISSUES**

## **I. Overview**

Following a telephone conference on 3 October 2019 in which the Parties agreed on some procedural issues, in particular to ensure compliance with possible orders, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 (PO 1) para. III (1).

It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

- a. Does the Arbitral Tribunal have jurisdiction to hear the case or is the Arbitration Agreement invalid?
- b. Should the Arbitral Tribunal order the exclusion of the expert suggested by RESPONDENT, Prof. John?
- c. Has RESPONDENT breached the contract by delivering turbines which are non-conforming pursuant to Article 35 CISG?
- d. In case of a breach of contract, is CLAIMANT entitled to request the delivery of replacement turbines?

While the Parties are in principle free to select the order in which they address the various issues (PO 1 para. III (1) last sentence), it makes sense to start with the Arbitral Tribunal's jurisdiction and the procedural question of excluding the evidence given by Prof. John. In relation to the merits, PO 1 states explicitly that beyond the two questions under c) and d) no further questions referring to the merits of the claims should be addressed, in particular no questions relating to the claim for damages.

## **II. General Considerations**

The broad topics to be discussed by the students are the following:

1. In relation to arbitration:

- a) Whether asymmetric dispute resolution clauses which only allow one party to arbitrate are valid and if not what are the sanctions (invalidity or granting both parties the right to arbitrate).
- b) Whether the Arbitral Tribunal has the power to exclude an expert to prevent potential conflict of interests with an arbitrator which could subsequently justify a challenge.



## 2. In relation to the CISG:

- a) Whether the mere threat that the turbines are not of the expected quality may render them non-conforming pursuant to Art. 35 CISG in light of the special circumstances of the case, in particular the nature of the goods and possible consequences.
- b) Whether the special circumstances of the case justify a request for replacement of the turbines even before their non-conformity has been determined with certainty.

In practice, the two procedural questions have to be addressed first. The decision on the merits pre-supposes the jurisdiction of the Arbitral Tribunal and its content may be dependent on whether the expert evidence is admitted or not. At the same time, the question whether the exclusion of the expert evidence may affect RESPONDENT's right to be heard depends on the importance of the evidence for the decision on the merits. Due to the time (and space) constraints of the Moot, some teams may have decided to address the second procedural question after having dealt with the merits.

The following remarks are merely intended to highlight the legal issues arising from the Problem. They follow the order of the questions posed by the Arbitral Tribunal. It is for the arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

### **III. The Tribunal's Jurisdiction: Procedural Order No 1 para. III (1 a)**

#### **1. Background**

CLAIMANT bases the arbitration on the following dispute resolution clause contained in Article 21 of the Sales Agreement:

*"1. The courts in Mediterraneo have exclusive jurisdiction over any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, subject to the BUYER's right to go to arbitration pursuant to paragraph 2.*

*2. The BUYER has the right to refer any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, to arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*

*The number of arbitrators shall be three. Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by the LCIA.*

*The seat, or legal place, of arbitration shall be Vindobona, Danubia.*

*The language to be used in the arbitral proceedings shall be English.*

*The governing law of the contract shall be the substantive law of Danubia.”*

Paragraph 2 contains a modification of the LCIA Model clause in so far as the right to go to arbitration is a unilateral right for the buyer while the seller may only bring its claims to the courts of Mediterraneo. As the Witness Statement of Mr. Fourneyron (**Respondent Exhibit R 2** para. 6) and PO 2 para. 2 show the clause had been discussed extensively between the Parties. RESPONDENT apparently undertook several unsuccessful efforts to reach a balanced arbitration clause which were rejected by CLAIMANT. In the end, RESPONDENT finally accepted the aforementioned clause in combination with certain changes to the liability regime which are – at least in part – favorable to Respondent (limitation of liability – liquidated damages).

Different jurisdictions adopt different approaches as to the enforceability and validity of such unilateral or asymmetric dispute resolution clauses. While they are considered to be valid in many jurisdictions that view is not shared everywhere. There are a number of jurisdictions where asymmetric dispute resolution clauses have been considered to be non-enforceable or even invalid. On 26 December 2018, the Presidium of the Russian Supreme Court, for example, has confirmed earlier case law of 2012 (*Sony Ericsson*) according to which such asymmetrical clauses violate the principle of procedural equality in a Digest of Court Practice Relating to Judicial Assistance and Control of Domestic and International Arbitration.

## **2. Discussion**

In the present case, the various potentially relevant laws take different positions on the issue. In Mediterraneo, which is the place of business of CLAIMANT and whose courts have been selected alternatively, such asymmetrical clauses are considered to be admissible. By contrast, courts in Equatoriana, where RESPONDENT is based, consider asymmetric dispute resolution clauses to be invalid as they unduly favor one of the parties. In Danubia, where the arbitration is going to be held and the law of which governs the main contract, there is no direct precedent yet on the issue of asymmetric arbitration clauses.

In principle, the question as to the validity of the asymmetric arbitration clause should be governed by Danubian law, as the law applicable to the arbitration agreement (chosen law for the main contract / place of arbitration in Danubia).

In support of its argument, that Danubian courts will follow the approach in Equatoriana and consider the clause to be invalid, RESPONDENT refers to the position taken by the Danubian Court of Appeal in relation to appointment of arbitrators in multiparty situations. Following the position adopted by the French Supreme Court in the famous “Siemens-Dutco decision” the Danubian Court of Appeal had refused the enforcement

of an award from Mediterraneo rendered by a three member tribunal in which claimant had appointed its own arbitrator, while the three respondents had to agree on a joint arbitrator. As they failed to do so, the administering institution appointed their arbitrator. Furthermore, Article 18 of the Danubian Arbitration Law, which is a verbatim adoption of Article 18 of the UNCITRAL Model Law, explicitly stipulates that in relation to all procedural questions, the parties should be treated equally.

To what extent such a conclusion is convincing and how the competing principles of party autonomy on the one hand and equal treatment of the parties on the other should be balanced has to be discussed by the teams. There are good arguments for both sides. CLAIMANT inter alia will have to show that while Article 18 UNCITRAL Model Law mandates an equal treatment during the proceedings it cannot be extended to the question of selecting the proceedings. RESPONDENT has to argue the opposite.

A second issue which may come up in the discussion is whether the asymmetry will necessary result in an invalidity of the whole arbitration clause or whether it can and should be remedied by giving both Parties the right to go to arbitration, which in the present case would then not affect the jurisdiction of the Arbitral Tribunal. As RESPONDENT had made several unsuccessful efforts to agree upon such a balanced clause it may well be argued that it would be unfair to allow CLAIMANT to rely on such an adaptation of the clause now after it had rejected it before.

#### **IV. Exclusion of RESPONDENT's Expert Prof. John: Procedural Order No 1 para. III (1 b)**

##### **1. Background**

In its Response to the Request for Arbitration of 30 August 2019, RESPONDENT announced that it would provide with its next submission an expert report showing that

- a. the two turbines for the Greenacre Pump Hydro Power Plant as well as the whole setting cannot be compared to those of the Riverhead Tidal Plant so that the findings in relation to the latter cannot justify any predictions in relation to the state of the Greenacre turbine; and
- b. even in the unlikely case that the blades were affected by unusual corrosion and resulting cavitation, that would for the next 4 years at most result in the danger of a loss of productivity but not in a complete loss of a turbine or the whole generator set, let alone the alleged scenario of the destruction of the whole plant.

While RESPONDENT did not explicitly mention the name of the expert in its Response, the attached Witness Statement of RESPONDENT's CEO, Mr. Fourneyron, justified the conclusion that the expert would most likely be Prof. Tim John. As a consequence,

on 21 September 2019, the arbitrator appointed upon the nomination of CLAIMANT, Ms. Claire Burdin, disclosed in the interest of “*utmost transparency*” that her husband and Prof. John were presently engaged in a lawsuit against each other concerning the ownership and the validity of a patent relating to a production process for turbine steel. Mr. Burdin receives every year around US\$ 5,000 from the co-ownership of the patent which Prof. John challenges due to an alleged lack of inventive step (PO 2 para. 10). Ms. Burdin considered her independence not to be affected by this litigation as the patent and the dispute had no direct relationship to the present arbitration, the products concerned or other parties involved.

On 23 September 2019, as a reaction to that disclosure CLAIMANT sent a letter to the Arbitral Tribunal requesting the exclusion of Prof. John and his testimony from the proceedings. CLAIMANT submitted that the appointment of Prof. John primarily served the purpose of creating a ground for a subsequent challenge as “*RESPONDENT must have been aware that Prof. John and the husband of Ms. Burdin, who is a leading expert in turbine engineering, have been involved for nine months as opponents in a litigation concerning the ownership of a patent*”. As a minimum, CLAIMANT requested an order from the Arbitral Tribunal that RESPONDENT should provide a statement that it will not challenge Ms. Burdin for her connection to Prof. John.

In its reply of 27 September 2019, RESPONDENT objected to an exclusion of Prof. John, submitting that the Arbitral Tribunal lacks authority to do so, as such an order would affect, *inter alia*, its right to properly present its case. Furthermore, while RESPONDENT did not challenge Ms. Burdin directly, as it could not “determine with certainty whether the existing contacts make a challenge of Ms. Burdin necessary”, it announced that it would closely scrutinise the behaviour of Ms. Burdin to “see whether she is negatively influenced by the contracts”.

Prof. John is one of four English-speaking experts who has worked both in corrosion and cavitation. RESPONDENT knows Prof. John from his expert testimony in a different case in 2004, where he and his team had impressed RESPONDENT. As a consequence, RESPONDENT had hired two of the former assistants of Prof. John in 2005 who had maintained a close contact with him and one of which is now at the second management level of RESPONDENT (PO 2, para. 17). One of these assistants had also invited Prof. John to the presentation of the R-27V FrancisTurbine at the Hydro Energy trade fair in 2013. According to a report in the Greenacre Chronical he also stated that the increased corrosion and cavitation resistance justified the high price for the R-27V FrancisTurbine (**Respondent Exhibit R1**).

The actual appointment of Prof. John as an expert for the present arbitration occurred on 20 August 2019 (PO 2, para. 15). There had, however, been earlier contacts in relation to problems with the R-27V Francis Turbine in the context of the Riverhead Tidal Power Plant. There, the owners of the Plant had retained Prof. John as an advisor from August 2018 onwards to supervise the replacement of the R-27V FrancisTurbine. During a meeting in November 2018, following the confirmation at the end of September 2018 that the substandard steel quality had been the cause for the extreme

corrosion and abrasion of the turbines in the Riverhead Tidal Power Plant, Prof. John had expressed the view that there would have been much less corrosion in fresh water conditions, so that the need to immediately replace turbines would probably not arise there. Furthermore, in January 2018, Prof. John had written an article concerning the decreased likelihood of a major incident due to corrosion induced cavitation in the new generation of turbines which RESPONDENT had invoked during its negotiations with CLAIMANT in autumn 2018.

## 2. Discussion

The issue whether the Arbitral Tribunal should exclude Prof. John involves again a balancing of competing rights and interests of the Parties. On the one hand, CLAIMANT has a right to an effective legal protection and an efficient procedure. On the other hand, RESPONDENT has a right to be allowed to properly present its case and to be treated equally.

Article 14 LCIA Rules addressing the Conduct of Proceedings in general provides in paragraphs 4 and 5 the following general duties for the Arbitral Tribunal:

*14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:*

- (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and*
- (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.*

*14.5 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.*

Articles 18, 20 and 22 of the LCIA Rules list the specific powers for the Arbitral Tribunal to discharge such duties in relation to legal representatives and witness(es) as well as additional powers.

The first question which arises is the possible basis for the exclusion request. CLAIMANT had suggested in its letter of 23 September 2019 to base the exclusion on Article 18.3 and 18.4 of the LCIA Rules according to which the Arbitral Tribunal has the power to refuse the addition of a counsel if that “*could compromise the composition of the Arbitral Tribunal or the finality of the award*”. In its view, that provision should apply *a fortiori* to a nomination of an expert, if the primary purpose of his nomination is exactly that. It is clear that this provision could only be applied by analogy as Prof. John is not a legal representative but an expert witness. Thus, the teams would have to provide a convincing argument that the requirements for such an analogy are met.

While both, legal representatives as well as expert witnesses, are crucial for a party's right to properly present its case, their exclusion may involve different considerations. Other conceivable bases for an exclusion of Prof. John could be Articles 20.3, 22.1 (vi) LCIA Rules or an inherent power to ensure that the proceedings are not compromised. The latter power had been used outside of the LCIA context in cases where counsel was excluded due to its connections with one of the arbitrators.

The second question is whether the requirements for such an order are met and, if there is a discretion, whether the Arbitral Tribunal should exercise its discretion in making such an order. In their relevant submissions of 23 and 27 September 2019 both Parties accused each other of having made the respective appointments of Ms. Burdin and Prof. John for tactical considerations. While that cannot be excluded completely on the basis on the facts known, it is difficult to argue bad faith, in particular taking into account the subsequent cooperative behavior of both Parties. Consequently, the discussion should be primarily about the following facts and considerations, though not all of them have an equal relevance:

- Prof. John's special expertise – availability of other experts
- Expertise of Ms. Burdin;
- Ms. Burdin's articles on "suspicion of defects as a non-conformity under Article 35;
- a possible lack of independence due to connections with RESPONDENT Involvement as advisor in the Riverhead Tidal Power Plant;
- Statement concerning the likelihood of extensive corrosion in fresh-water conditions.

The concerns as to whether Prof. John is sufficiently independent from RESPONDENT may not only be an element in balancing the competing interest in an exclusion based on the threat of compromising the Arbitral Tribunal but can also be raised as a separate ground for excluding him as an expert witness. That requires first a discussion as to the standard of independence to be applied to party appointed experts (Art. 21.2 LCIA Rules – does the rule for tribunal appointed experts also apply to party appointed experts?) and the legal consequences associated with that (exclusion / consideration for the evaluation of evidence) including a possible legal basis for an exclusion. In a second step it has then to be argued that the existing connections between Prof. John and RESPONDENT are sufficiently close to raise concerns as to his independence.

## V. **The Suspicion of Corrosion as a Non-conformity under Art. 35 CSIG: Procedural Order No 1 para. III (1 c)**

### 1. Background

Pursuant to Article 2 (1)(b) of the Sales Agreement RESPONDENT had to

*“produce and deliver to [CLAIMANT] two of its newly developed Francis Turbine R-27V of 300 MW power each, with the further characteristics as specified in detail in Annex A, should the project be awarded to the BUYER”.*



It was known to RESPONDENT and to some extent mentioned in the Preamble of the Sales Agreement that one of the critical features of the turbines was their corrosion resistance allowing for longer inspection and maintenance intervals. While it is uncontested that the two turbines delivered complied with all other requirements specified in Annex A, it is yet uncertain whether they also have the necessary corrosion and cavitation resistance.

Due to a mistake in RESPONDENT's internal product management system and a loss of data following a hack, it cannot be determined with certainty which steel was used for the production of the two R-27V Francis Turbines delivered to CLAIMANT (PO 2 para. 25). There is, however, a considerable likelihood that the turbines were produced with steel from Trusted Quality Steel, which had been involved in a major scandal concerning substandard steel and false quality certificates (Claimant Exhibit C 3). During the relevant time when the turbines were produced, RESPONDENT purchased 70% of the steel required for its production from Trusted Quality Steel (PO 2 para. 24). The latter is known to have encountered problems with the quality of its steel after the installation of its new production line in February 2015. It had to pay high penalties due to a breach of several delivery deadlines after a failed quality test for its steel alloy no. 3456. It seems likely that the quality issues were not limited to the steel alloy no. 3456 but also affected other alloys. However, there is no positive proof for that. While all steel delivered by Trusted Quality Steel to RESPONDENT had the necessary quality certificates from TechProof, a well-known quality and certification entity, there is a 50% likelihood that the certificates were issued without any examination of the steel. It was discovered during a dawn raid in summer 2018 that the main controller at TechProof (Mr. Maddoff) had colluded with Trusted Quality Steel's lead quality controller (Ms. Chen) and had issued at least half of the certificates without any examination (Respondent Exhibit R 1). It is not possible to determine positively whether the certificates for the steel delivered to RESPONDENT were issued on the basis of a proper examination or not, as Mr. Maddoff, who is on the run, had forged the relevant documentation.

Doubts as to the corrosion resistance of the turbines are raised, in particular, through the findings in relation to the R-27V Francis Turbines that RESPONDENT had provided for the Riverhead Tidal Power Plant. They were installed in 2016 and were the first ever installed R-27V Francis Turbines. As they were used in saltwater the first inspection was agreed to take place already after two years. During the inspection in May 2018 it was discovered that the turbine runners had been so badly damaged by corrosion and cavitation that they had to be replaced immediately to avoid the risk of breaking blades which could have damaged the whole turbine. During the following investigations it was discovered that the steel had lost some of its anticorrosion characteristics due to being exposed to extreme heat. It could not, however, be determined whether that had occurred during the production of the steel or the construction of the turbine.

## 2. Requirements for Considering the Suspicion of Defects as a Non-conformity

Pursuant to Art. 35 (1) CISG, RESPONDENT had to deliver R-27V Francis Turbines which are of the “*quality and description required by the contract*”. Furthermore, Art. 35 (2) CISG provides in its pertinent part:

“[...]”

*(2) Except where the parties have agreed otherwise, 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;*

*(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;”*

Irrespective of whether it was explicitly stated in the contract or not, one of the particular and expected features of the turbines is their corrosion resistance resulting from the use of particular steel. Thus, any finding that the turbines lacked the required corrosion resistance will result in a non-conformity pursuant to Art. 35 (1) CISG or at least pursuant to Art. 35 (2) CISG. It is normally for the buyer, *i.e.* CLAIMANT, to prove the non-conformity of the goods if it asks for remedies.

In the present case, CLAIMANT cannot positively establish such a non-compliance of the steel used with the corrosion-standard before September/October 2020. Such a finding could only be made after a thorough inspection of the turbine during the planned inspection in September/October 2020.

Until that time, there is only a reasonable suspicion that the steel used is non-conforming which is based primarily on the corrosion findings at the Riverhead Tidal Power Plant. It is, however, recognised that in exceptional circumstances the mere suspicion of a defect, if it is based on facts, already constitutes in itself a non-conformity of the goods. Beyond the facts which justify the suspicion the possible consequences of a non-conformity are important (Kröll, Art. 35 para. 105, in Kröll/Mistelis/Perales Viscacillas, CISG, 2<sup>nd</sup> ed. 2018).

It is for the Parties to discuss whether the particular circumstances of the case are sufficient to meet the requirements. Factors which may play a role in this context are:

- the findings in relation to the Riverhead Tidal Power Plant taking into account that they concern salt water;
- that RESPONDENT has purchased 70% of its steel at the time from Trusted Quality Steel;
- RESPONDENT's inability to determine with certainty the origin of the steel used due to an internal storage mistake;

- that apparently not all certificates had been issued with an examination by TechProof so that it could not be excluded that the quality certificates were genuine;
- the likely consequences of a non-conformity for the Parties, i.e.
  - danger of further destruction in case the turbines are found to be corroded, or
  - financial consequences for CLAIMANT.

Some teams may also try to approach the issue via a different allocation of the burden of proof, i.e. considering RESPONDENT to be required to prove the conformity of the goods in light of the particular circumstances of the cases. Before a proper examination in September/October 2020 RESPONDENT is not able to prove that the turbines complied with contractual requirements.

Such an approach would require a detailed argument of why the burden of proof is borne by RESPONDENT in the present case. Factors which may play a role in this regard are proof proximity and RESPONDENT's contribution to the inability to determine the origin of the steel used. The contract may also contain additional obligations which RESPONDENT may have been breached through its behavior. The problem with these additional breaches is that they will in the end not constitute a fundamental breach justifying the remedy required.

## VI. Entitlement to Replacement of the Turbines: Procedural Order No 1 para. III (1 d)

### 1. Background

In case the fact-based suspicion as to the compliance of the goods with the contractual standards is considered to constitute a non-conformity (or the burden of proof is allocated to RESPONDENT or another breach of contract is found to exist) the second question arises whether it justifies the remedies requested by CLAIMANT.

The CISG regulates the buyer's rights to specific performance in case of the delivery of non-conforming goods in Art. 46 (2) and (3) which provide:

"[...]"

*(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.*

*(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter."*

As a consequence, a delivery of substitute turbines or at least turbine runners is only possible if the lack of conformity constitutes a fundamental breach. Otherwise only repair may be requested, unless the repair is unreasonable with regard to all the circumstances of the case.

## 2. Requirements of Art. 46 CISG

Discussing whether a possible breach is fundamental, two further contractual provisions may be of relevance. First, Article 20 of the Sales Agreement grants the buyer a right to terminate the contract for cause in case the seller commits a fundamental breach of contract and then defines in subparagraph 2 which breaches shall be considered to be fundamental stating:

*“2. For the avoidance of doubt the following breaches shall be considered to be fundamental*

- a. Inappropriate payments to any employee of Buyer*
- b. Delay in delivery of more than 200 days*
- c. Third failure of the acceptance test*
- d. Other breaches which deprive BUYER of what it is entitled to expect under the contract.”*

At least concerning the termination of the contract, the Parties have in litera d, deliberately lowered the standard of Article 25 CISG for determining what constitutes a fundamental breach by dropping the qualification that it must “*substantially*” deprive a party of what it can expect under a contract. It can be argued that such lower standard should not be restricted to the termination of the contract but also applies to other remedies.

Second, Article 19 of the Sales Agreement contains a detailed and very specific clause granting a right to liquidated damages and providing for a limitation of liabilities. The rules contain a certain contractual allocation of risks which may play a double role. First, it may have a relevance in determining from when onwards the financial consequences of a breach may be considered to be fundamental. Second, it may influence the decision whether despite the fundamental character of the breach RESPONDENT may be entitled to offer repair instead of substitution.

The focal points of the discussion of whether the breach is fundamental or not are the importance of the limited interruption in production for CLAIMANT and the financial consequences thereof. Any evaluation has to deal with the following three problems:

- it is not yet certain whether the turbines actually meet the required corrosion and cavitation standard making the duration of the inspection and thereby the financial consequences unpredictable unless the remedy of replacement is used;
- that the consequences depend on the chosen remedy;
- that the consequences for CLAIMANT depend to a large extent on its relationship and the contract with the Community of Greenacre, in so far as the effects of the reference to the Greenacre project in the Preamble of the Sales Agreements on the one hand and the “entire agreement” clause have to be discussed.

Another separate, but closely related issue, which may be addressed by the teams is to what extent RESPONDENT by offering repair instead of replacement can either prevent the classification of the breach as fundamental, or cure it pursuant to Art. 48 CISG (See Huber, Art. 46 para. 42, in Kröll/Mistelis/Perales Viscacillas, CISG, 2<sup>nd</sup> ed. 2018). In this context the possible financial consequence of the various alternatives and their likelihood may become relevant as well as an eventual contractual allocation and limitation of risks contained in Article 19 of the Sales Agreement. As the internal calculations of the Parties, which are set out as Appendix I to the Procedural Order No 2, show, the overall financial costs for the requested pre-fabrication alternative are only a little higher than those of the repair alternative if only minor defects are found but substantially lower in case considerable repairs are required. At the same time the allocation of the overall financial burden to CLAIMANT and RESPONDENT respectively differs from alternative to alternative.