

**THE INTERNATIONAL ADR MOOTING COMPETITION 2013**

**July-August 2013**

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**MEMORANDUM FOR CLAIMANT**

**TEAM CODE: 281C**

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**ON BEHALF OF**

Energy Pro Inc.,  
28 Ontario Drive,  
Aero Street,  
Syrus

**CLAIMANT**

**AGAINST**

CFX Ltd,  
26 Amber Street,  
Circus Avenue,  
Catalan

**RESPONDENT**

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**LIST OF ABBREVIATIONS**

Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Cl.Ex.	Claimant Exhibit
Contract	Purchase Contract between Energy Pro and CFX
JV	Joint Venture
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration,1985
Off Cmt	Official Commentary
p.	page
PICC	UNIDROIT Principles of International Commercial Contract 2010
ProcOrder	Procedural Order No.
Q.	Question
W.R	Working Report

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CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2010



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## ARGUMENTS

### I. FUTURE ENERGY CAN PARTICIPATE IN THE ARBITRATION PROCEEDING.

1. The Claimant can bring Future Energy into the arbitration proceeding as against the respondent's contention that it is a non-signatory and its consent was obtained under duress. This proceeds from the following arguments:

#### *A. The Tribunal has Jurisdiction to allow a non-signatory to participate*

2. The Contract states that any dispute arising shall be submitted to CIETAC for arbitration, which shall be conducted in accordance with its arbitration rules in effect at the time of applying for arbitration [Contract 20.1]. The CIETAC Rules do not expressly deal with the inclusion of non-signatories of an Arbitration agreement. Law of the seat of arbitration which is PRC law is also silent on this issue.
3. Under circumstances where there is no law on the issue, arbitrators can apply transnational legal principles since they belong to no national legal order [Fouchard p.234]. In this regard, arbitrators may apply any law or rule of law which they consider to be appropriate in determining their own jurisdiction and in discharging their duty to comply with fundamental requirements of justice [Fouchard p.234; Dow Chemical p.899-905].
4. Art.22.1(h) of LCIA Rules, gives the arbitral tribunal the power to order the joinder of a third party upon application of one of the parties to the arbitration, provided that the third party and the applicant have consented to the joinder in writing.
5. Art.4(2) of the Swiss Rules of International Arbitration goes even further: it allows the arbitral tribunal to join third parties without their consent, or even at their request, without the consent of the parties to the arbitration.
6. CIETAC has stated its intention "to internationalize and modernize its services" and that "in 2013, CIETAC will continue to, push forward reform." [W.R 2012]. Thus the

tribunal's inclusion of Future Energy based on the international principles followed by the other international arbitration rules in the case of issues not dealt by the CIETAC, is in line with the CIETAC's intention to reform its rules on an international standard.

7. On participation of the non-signatory, the award will not be unenforceable under New York Convention. Since Legal constructions which lead to the extension of an arbitration agreement to non-signatories do not normally constitute a violation of public policy or lack of arbitrability, which could result in the refusal of recognition under Art.V(2) of the New York Convention[Voser]. Under the international jurisprudence surrounding the application of the New York convention, the mere absence of a party to the text of the agreement in writing under which the arbitration was instigated does not give rise to any problem with the court making orders under the IAA to enforce the award[Thomson].

***B. The Purchase contract and the certification agreement form a composite agreement.***

8. If a non-signatory is sued, as it directly affects a party to the arbitration agreement and there are principal and subsidiary agreements, and the third party is signatory to a subsidiary agreement and not to the principal agreement containing the arbitration clause, it may be possible to say that even such third party can be referred to arbitration [Chloro Controls para.104]. Claimant has been directly affected by the negligent act of Future Energy and thus can validly refer Future Energy to the arbitration.
9. The principle of intertwined agreements allows the court to extend the arbitration clause to non-signatories [Chaval vs Leibherr]. The agreements must be an intertwined agreement or must form a composite agreement. The transaction will be



of a composite nature where performance of principal agreement may not be feasible without aid, execution and performance of the supplementary agreements, for achieving the common object [Chloro Controls]. The delivery of goods under the Contract is only complete when the fit certificate is given by Future energy. If various agreements are deemed to be one composite agreement, instead of separate agreements, then the arbitration clause contained in one agreement may apply to all of the agreements[Lufthansa].

10. A party to an arbitration agreement is held to be “estopped” from refusing to arbitrate with a non-signatory where issues between the parties are “intertwined” with the agreement containing the arbitration provision. [Smith/Enron case]. Hence RESPONDENT cannot deny Future Energy’s participation based on it being a Non-Signatory.

***C. The consent given by Future Energy is not one given under Duress.***

11. It is the contention of the respondent that Future Energy’s consent was obtained by Duress i.e. threat of litigation. It is submitted that recourse to law through litigation provided by law itself can never amount to duress [Beale p.697]. A threat to enforce one's right through competent authority, if the claim is just or legal, is in keeping with the fundamental principle of Rule of law [Regidor v. Medel]. Such threat is not wrongful and does not constitute duress unless the claim is made in bad faith or the right to sue is otherwise used for some purpose that the law considers improper [Bigwood p.310].
12. CLAIMANT has a right to start litigation in the event of it being held liable by the arbitration tribunal due to the fault of Future Energy. Such fault is also accepted by Future Energy [Cl.Ex.3]. Thus there are clear grounds on which such litigation can be initiated. And, even a threat of proceedings where there is no ground of action in law

is prima facie not an unlawful threat, where the threat is bona fide and not frivolous or vexatious [Beale p.697].

## II. Ms. ARBITRATOR1 CAN RESIGN DURING THE PROCEEDINGS

### A. CIETAC and other institutional rules allow resignation of arbitrators

13. Art.31(1) of CIETAC Rules provide for replacement of an arbitrator in case of resignation, validating voluntary resignation. In some circumstances, an arbitrator has the right to resign from his mandate[G.Born p.1612]. Most leading Institutional Rules permit resignation of arbitrators under certain circumstances[ICSID Arbitration Rules-Rule 8(2);UNCITRAL and PCA Rules-Art.13(1)] Some of those circumstances include unforeseen increase in the workload and addition of new parties[G.Born, p.1636]. Since the current situation of addition of three days of oral hearings could be classified as an unforeseen increase in work load, Ms.Arbitrator 1's resignation must be permitted.

### B. Ms.Arbitrator1's resignation should be allowed

14. The resignation of Ms. Arbitrator1 should be allowed taking into account the following reasons:

#### a. Unwilling arbitrator must be permitted to resign:

15. Keeping in mind the best interest of the parties, an unwilling arbitrator must not be prevented from resigning, since forcing him to stay and decide the case may interfere with his impartial and unbiased attitude towards the case. The arbitrator's choice has to be pondered upon before considering what limits the arbitrators' right to resign. An unwilling arbitrator cannot be forced to perform his functions[Holtzmann/Neuhaus p.464,465,473].

16. It would be in the best interest of arbitration and the parties to replace an unwilling arbitrator in order to ensure that the arbitration proceeds in a better atmosphere of

confidence and to minimize the possibility of a recourse against the award when it is passed[*Derains/Schwartz p.195*]

17. No authority grants courts the power to force unwilling arbitrators to continue to serve. [*Florasynth v Pickholz*]

**b. Ms.Arbitrator1's concern about fees affects the impartiality of the proceedings:**

18. Although an arbitrator is morally and legally bound to be impartial and unbiased, it is a common fact that a person's attitude towards another changes when a conflict involving money arises between them. Discussions among the arbitrator and the parties regarding fees during the arbitration may require the vacatur of an arbitral award. Even though bias was not proven, the court found that "the arbitrator's concern about his fees clearly infects the impartiality of the proceeding"[*Jerry v. Queens*]

**C. CLAIMANT can nominate another arbitrator to replace Ms.Arbitrator1**

19. Art.31(1) of CIETAC Rules provide for replacement of an arbitrator who has resigned.

20. Pursuant to Art.31(3), CLAIMANT has the right to nominate a substitute arbitrator as the new party appointed arbitrator to hear the issues of quantum. Whatever the cause of replacement, a substitute arbitrator is appointed or chosen in pursuance of the procedure which governed the appointment or choice of arbitrator being replaced (Art.12(2) and 13 of UNCITRAL Arbitration Rules)[*Fouchard p.540*]

**D. Resignation and replacement of Ms.Arbitrator1 will not cause disruption in the proceedings**

21. Resignation and replacement of Ms.Arbitrator1 will not cause any unnecessary expenditure or undue delay in the proceedings as the CLAIMANT shall immediately

nominate the substitute arbitrator if the panel and the chairman approve of the resignation and replacement. In the recent past, there have been several cases where the arbitral proceedings have taken place efficiently in spite of replacement of one or more arbitrators.

22. In the **Enron case**, the tribunal was reconstituted almost immediately after the resignation of arbitrator H.Grosespiell by replacing him with arbitrator A.Vandenber.

23. Also, upon reference to the case of **Víctor v. Chile**, wherein three different arbitrators were replaced upon resignation at different points of time without undue delay or expenses, it can be understood that resignation and replacement of Ms.Arbitrator1 will not cause disruption in the proceedings.

### **III. CLAIMANT VALIDLY TERMINATED THE CONTRACT**

#### ***A. Non-payment amounts to a fundamental non-performance.***

24. The CLAIMANT has rightfully terminated the Purchase Contract pursuant to Clause (15.1) of the Contract upon the failure of the respondent to fulfill its material obligation of payment for the gearboxes delivered in conformity with the contract. Threat of non-payment amounts to a fundamental non-performance since it: a) deprived the CLAIMANT of its legitimate expectations; b) failed to strictly comply with its obligation; c) was intentional

#### **a) Non-performance deprived CLAIMANT of its legitimate expectations.**

25. The Contract was for a period of five years, wherein a sum of USD 10,000,000 was to be paid by the RESPONDENT in installments [Cl.Ex.2]. The CLAIMANT had supplied Model GJ-2635 gearboxes as per the contract and thus was entitled to its due payment. Moreover, the CLAIMANT is deprived of the benefit of the total value of the Contract which he would have been entitled to had the RESPONDENT performed

its part of the obligation. The loss of profit to the CLAIMANT was foreseeable by the RESPONDENT[Art.7.3.1(2)(a),PICC].

**b) RESPONDENT failed to comply with its obligation**

26. Payment for the gearboxes was expressly stated as a material obligation in the contractual agreement and formed the essence of the contract [Clause (15.1)]. Pursuant to PICC Art.7.3.1(2)(b), strict compliance was required, the failure of which amounts to a fundamental non-performance.

**c) Non-performance was intentional**

27. The CLAIMANT duly performed its obligation by supplying the right gearbox and had also obtained the necessary certification. The RESPONDENT in its e-mail to the CLAIMANT reiterated that the latter's obligation was of obtainment of certification of the gearbox [Cl.Ex.4], which it did obtain. Thus, the non-performance by the RESPONDENT is an intentional one.

28. The non-performance by the RESPONDENT was fundamental since at least three of the criteria laid down in Art.7.3.1(2) were met [30.11.2006, UNILEX].

***B. RESPONDENT cannot rely on alleged lack of conformity***

29. The RESPONDENT'S demand for a remedy is asking for a fresh certification of the gearbox since they have withheld their performance and pursuant to PICC Art.7.2.3 since it has failed to demand performance within a reasonable time after it ought to have become aware of the non-performance [Off Cmt,Art.7.2.2(e)]. RESPONDENT failed to:

a) Examine gearboxes b) Notify non-conformity within reasonable time c) Provide details of non-conformity in notice.

**a) Failure to examine gearboxes**

30. The RESPONDENT had to examine gearboxes it received of Model GJ-2635 and only upon confirmation of the conformity was it required to make the payment [Cl.Ex.2, 1.2(b)(iii)]. Due to error in certification, wind turbines of model GH-2635 were sent to the RESPONDENT. Since the RESPONDENT had not duly examined the goods prior to payment, it cannot rely on lack of conformity of contractual obligation. Also, the RESPONDENT further failed to rely on the lack of conformity by failing to satisfy the requirements of CISG Art.38 [*Bianca-Bonell*, p.425], pursuant to which the RESPONDENT should have performed a test run at the least [*Fabrics* case; 05.12.2000 UNILEX]. The RESPONDENT'S examination of the goods after the delivery would have revealed that the gearboxes are not in conformity with the 1.5MW wind turbines. Moreover, the RESPONDENT cannot rely on the certificate of inspection alone since the examination by a third party was conducted before the delivery. [*Live fish* case]

**b) Notification not within reasonable time**

31. Pursuant to CISG Art.39, the RESPONDENT failed to send: i) Notice within reasonable time; ii) Notice specifying nature of lack of conformity.

**i) Notice not within reasonable time**

32. Lack of conformity ought to have been discovered by the RESPONDENT at the time of delivery of the gearboxes [*Tiller case*], i.e. prior to 13 March 2012. But the RESPONDENT discovered the non-conformity only on 18 April 2012, but even then it waited for almost a month more to send a notice of non-conformity on 16 May 2012. Thus, notice was sent two months after non-conformity ought to have been discovered and almost a month later than it had actually been discovered.

**ii) Notice specifying nature of lack of conformity**

33. Notification should be as prompt, complete and accurate as possible [*Marble slab case*]. Art.39 CISG states that the notice must contain sufficient detail of the nature of non-conformity [Schlechtriem/Schwenzer, p.609]. Notice merely stating the goods are of “defective quality” does not suffice [Schwenzerin Schlechtriem/Schwenzer, p.626]. The RESPONDENT has in its e-mail in very vague and unclear terms stated that the “gearboxes...are completely useless” and that “you must obtain the certification”. Both, leading to a misleading interpretation that wrong gearboxes have been received and that the certification of the gearboxes was not received at all. PICC Illustration 7 of Art.1.7 also suggests that the RESPONDENT loses the right to rely on lack of conformity for the same reason.

***C. RESPONDENT cannot claim restitution***

34. As per Clause (15.2) of the Contract, the CLAIMANT is entitled to retain a part payment of USD 2,000,000 on termination. Moreover, pursuant to PICC Art.7.3.7, a party is not entitled to claim restitution of what it had supplied [28.07.2000, UNILEX] and the part already performed should not be affected by termination [24.04.2009, UNILEX]

**IV. THE CLAIMANT IS ENTITLED TO THE TERMINATION PENALTY**

***A. The RESPONDENT had agreed for payment for non-performance***

35. The CLAIMANT is entitled to the termination penalty of USD 8,000,000 pursuant to Clause 15.2 of the Contract since: a)RESPONDENT had agreed for payment for non-performance b) penalty valid irrespective of harm; c) amount is not ‘grossly excessive’

**a) RESPONDENT had agreed for payment for non-performance**

36. On non-performance by the RESPONDENT of its obligation and pursuant to Clause 15.2 of the Purchase Contract, a specified sum of USD 8,000,000 was imposed as

derived from the difference between the contract price of USD 10,000,000 and the value of gearboxes delivered of USD 2,000,000. This formula of ascertaining the damages constituted a penalty clause falling under PICC Art.7.4.13 [Vogenauer/Kleinheisterkamp,p.920].

**b) Termination penalty valid irrespective of actual harm**

37. Art.7.4.13 states that it is irrelevant whether the harm is greater or smaller than the sum specified in the clause. [Vogenauer/Kleinheisterkamp,p.924] Despite this, it is pertinent to note that the CLAIMANT has suffered considerable losses in the form of loss of profit amounting to USD 8,000,000. Hence, the CLAIMANT can rightly claim the penalty.

**c) Damages is not grossly excessive**

38. The Tribunal shall while determining whether reduction of penalty pursuant to PICC 7.4.13(2) be made have regard to the loss suffered by the CLAIMANT as a consequence of the RESPONDENT'S breach [04.04.2003, UNILEX]. The CLAIMANT has suffered a loss of profit amounting to USD 8,000,000 and the damages claimed are equivalent to the harm sustained. Moreover, the Tribunal should uphold the freedom of contract and provide greater measure of certainty in commercial transactions [Vogenauer/Kleinheisterkamp,p.924]. Thus, the set amount should not be reduced.

***B. Interest on damages allowed***

**a) Accrual of interest from the date of expenditure**

39. Since PICC does not explicitly deal with interest-on-damages for monetary obligation, reliance can be placed on CISG Art.78 where interest can be imposed on “any other sum”, i.e. damages [15.6.1994, UNILEX; *Delchi v. Rotorex*]. Art.78



provides that the creditor is entitled to interest ‘without prejudice to any claim for damages.’ The purpose is to make a distinction between interest and damages to give a compensation for the financial loss [ICC Award,7585]

40. Since Art.78 doesn’t state the starting point for the accrual of interest, it shall be taken as the date of the occurrence of the harm [*Chengwei, Liu*]. The harm occurred when the CLAIMANT incurred expenditure and the RESPONDENT declared the contract suspended, thereby, leaving the CLAIMANT in loss due to expenses already incurred with the denial of reimbursement by the RESPONDENT of the expenses by purchase.

**b) Interest to be paid even if non-performance excused**

41. For every non-payment per installment if the contract had been duly performed by the RESPONDENT, the CLAIMANT suffered loss of profit. The purpose of interest is to indemnify the loss of profit of the creditor who has been deprived of revenues that could have been generated out of the amount due had it been paid sooner [ICC award No.2375 of 1975]. Thus, even if the RESPONDENT contends that it rightfully withheld performance [Art.7.1.3, PICC] it has to pay interest on damages.

**C. CLAIMANT mitigated losses by terminating the contract in a timely manner.**

42. CLAIMANT’s act of terminating the contract is an attempt in mitigating losses. Idleness or the speculative delay of action amount to failure to mitigate [*Lookofsky, Art 77; Electric heaters case*]. In the instant case, CLAIMANT was not idle and terminated the contract soon after the lapse of the 30-days period post default notices. Termination is considered sufficient to mitigate losses [*Enderlein, p.307*]

**RELIEF REQUESTED**

43. In light of the arguments advance, CLAIMANT respectfully requests the Tribunal to find that:

- I. Claimant can successfully bring Future Energy into Arbitration proceedings.
- II. Ms. Arbitrator 1 can resign during the arbitration proceeding.
- III. Claimant validly terminated the contract.
- IV. Claimant can claim termination penalty along with interest on damages.