350R

FOURTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOULUTION MOOTING COMPETITION

28 JULY – 3 AUGUST 2013

HONG KONG

MEMORANDUM FOR RESPONDENT

In the arbitration between

Energy Pro Inc.	**AND**	**CFX Ltd.**
Claimant		**Respondent**

TEAM NO. 350

Table of Contents

LIST OF ABBREVIATIONS

C. Ex.	Claimant Exhibit
¶	Paragraph
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
v.	versus
p.	page
R. Ex.	Respondent Exhibit
UNCISG	United Nations Convention on International Sale of Goods

A. ENERGY PRO INC. CANNOT BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS NOT A THIRD PARTY

1. On 1 January 2013, Energy Pro Inc. requested Future Energy Inc. to join as a third party to the arbitration between Energy Pro Inc. and CFX Ltd.[1] On 3 January 2013, Future Energy Inc. had agreed to participate in the arbitration proceedings.[2]

I. Future Energy cannot join the arbitration proceedings as a third party

2. In arbitral proceedings third parties may not become parties to them unless specific legislation provides otherwise. The contractual nature of arbitration further prevents arbitral proceedings used by third parties who are not party to the arbitration agreement.[3]
3. The Arbitration Clause provides that arbitration shall be conducted in accordance with the CIETAC rules.[4] The Arbitration Law and the CIETAC rules are silent concerning these questions.[5] As such, unless the parties expressly confer on the tribunal the power to join third parties to an existing proceeding, a party to a CIETAC arbitration will not have the possibility to join a third party to the arbitration.[6]
4. Due to inherent conflict between the consensual nature of arbitration and a statutory joinder not based on consent, the different arbitration laws in general do not contain provisions dealing with the joinder of third parties or their intervention. The drafters of the Model Law saw no need to include a specific provision.[7] The underlying rationale

[1] See C. Ex. No. 9
[2] See ¶ 19, Application for Arbitration
[3] See Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, Limited, 2004)
[4] See Application for Arbitration
[5] See Loukas A. Mistells, *Concise International Arbitration,(*Kluwer Law International, 2010)
[6] *China: Arbitration In China — Progress And Challenges* Nicholas Song Vinson & Elkins LLP (2013)
[7] Holtzmann and Neuhas, *Model Law,* 311-312

was that either parties agree on a joinder so that no further regulation is necessary or there will be no joinder.[8]

5. The better view is nonetheless that the New York Convention is applicable to questions of consolidation, joinder and intervention. The Convention does so with regard to both the recognition of arbitration agreements and arbitral awards. In the context of enforcing arbitration agreements, the Convention addresses consolidation and/or joinder/intervention in Articles 11(1) and 11(3), by requiring national courts to recognize and give effect to the material terms of international arbitration agreements - an obligation that readily extends to agreements regarding consolidation, joinder and intervention in arbitral proceedings. If a party has a contractual right to arbitrate in a non-consolidated proceeding, or without the presence of additional parties, Articles 11(1) and 11(3) again safeguard these rights.[9]

6. In almost all cases, the approach taken by national law is that consolidation and joinder/intervention may be ordered by an arbitral tribunal or a national court, but only pursuant to the parties' (unanimous) agreement thereto. If the parties have not so agreed, both the tribunal and local courts will lack the authority under national law to order either consolidation or joinder/intervention. This approach is consistent with that prescribed by the New York Convention and more general respect for the parties' procedural autonomy in international arbitration.[10]

[8] Supra note 3
[9] Gary B. Born, *International Commercial Arbitration,* Volume II (Kluwer Law International, 2010)
[10] Ibid

7. In the instant facts, neither the arbitration agreement nor does the governing rules provide for joinder of third parties. Moreover, Respondent has given no consent and even the consent of Future Inc. has been obtained through duress Thus, it can be concluded that Future Energy cannot join the arbitration proceedings as a third party.

II. Future Inc.'s participation has been obtained through duress

8. Energy Pro Inc. has threatened Future Energy Inc. to initiate legal proceedings against Future Energy Inc. should it choose not to participate in the arbitration between Energy Pro Inc. and CFX Ltd.[11]
9. It is submitted that this is sufficient cause to bar the participation of Future Energy Inc. as Energy Pro Inc. has obtained its participation through duress.
10. Article 52 of the Contract Law of PRC which deals with Invalidating Circumstances provides that a contract is invalid in any of the following circumstances: (i) one party induced conclusion of the contract through fraud or duress.[12]
11. "Duress" exists where one, by unlawful act of another, is induced to make a contract or perform or forego some act under circumstances that deprive him of the exercise of free will.[13] The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realization that there is no practical choice open to him.[14]
12. In the instant facts, the Claimant threatened Future Energy Inc. to initiate legal proceedings. This amounts to duress and it vitiates the consent given by Future Energy.

[11] See C. Ex. 9
[12] See Contract Law of People's Republic of China
[13] *Bell Bakeries, Inc. v. Jefferson Standard Life Ins.* C., 96 S.E.2d 408
[14] *Universe Tankships of Morovia v. I.T.W.F,* [1983] 1 A.C 366

Thus, it can be concluded that Future Inc.'s participation has been obtained through duress.

B. MS. ARBITRATOR 1 CANNOT RESIGN DURING THE ARBITRATION PROCEEDINGS

I. Duty to perform contractual obligation

13. The arbitrators cannot be said to be performing the arbitration in a purely judicial capacity. The parties and the arbitrators have entered into a contract and the arbitrators are thus bound by law to perform their part of the contract. The arbitrator does not have a status resulting directly from law and comprising rights and obligations assumed in public interest.[15]

14. It is widely recognized that the relationship between an arbitrator and the parties is based on contract.[16] The appointment of the arbitrator and his acceptance is seen as the conclusive phase of a contract originating from an arbitration clause or submission agreement.[17]

15. Such a contract is classified as a contract for services.[18] Further, it is important to note that even though the power of appointment may lie with one party, the contract is concluded with all parties involved. The appointing party acts as an agent for all the parties when concluding the contract with the arbitrators. The same shall apply if the arbitrators are appointed by an appointing authority or the courts.[19]

[15] Michael J. Mustill, Stewart C. Boyd, *Commercial Arbitration,* (LexisNexis Butterworth, 2010)
[16] Clay, *L' arbiter,* 499 *et seq*; ICC (ed), "Final report on the Status of the Arbitrator
[17] Clay, *L' arbiter,* 499 *et seq*; ICC (ed), "Final report on the Status of the Arbitrator
[18] *Schiedsrichtervertrag* (Contract to arbitrate), *Arbitration Law in Europe, ICC,* Paris, 1981, at 20
[19] Lachmann, *Handbuch*, ¶ 1747

II. UNIDROIT Principles govern performance of the parties and the arbitrators

16. UNIDROIT is applicable for "international commercial contracts".[20] The contract in undisputedly international in nature, as the arbitrators and both the parties are from different countries. A commercial contract is one which contains supply of goods or services.[21] As mentioned already, an arbitrator's contract is considered a contract of service.

17. The contract entered into between Ms. Arbitrator and the parties is binding and can only be terminated in accordance with its terms or an agreement.[22] As the respondent is objecting to her resignation, the contract cannot be validly terminated. Ms. Arbitrator 1 has an obligation to adjudicate upon matters in the case and render an award under contract. There is an implied obligation on her part to adjudicate and produce an award under the contract, stemming from the nature and purpose of the contract, and reasonableness.[23] Ms. Arbitrator 1 must co-operate with the other parties, since such co-operation may be reasonably expected for the performance of her obligations.[24] Furthermore, Ms. Arbitrator's obligation involves a specific duty i.e. to adjudicate. Hence, she is bound to achieve that result.[25]

18. The contract between the arbitrator and the parties is conclusive due to a meeting of minds. Hence, a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.[26] In the present case, the respondent was informed that Ms. Arbitrator 1 shall

[20] UNIDROIT Principles, 2010
[21] UNIDROIT commentary, p. 2
[22] Article 1.3, UNIDROIT Principles, 2010
[23] Article 5.1.2, UNIDROIT Principles, 2010
[24] Article 5.1.3, UNIDROIT Principles, 2010
[25] Article 5.1.4, UNIDROIT Principles
[26] Article 1.8, UNIDROIT Principles, 2010

be a member of the tribunal, and participated in the arbitration proceedings with the belief that she will be present throughout the trial and be responsible in part for the award rendered. Her withdrawal midway through the proceedings will have serious repercussions on the arbitration and lead to considerable losses of time and money.

19. It follows from the contractual nature of the relationship that the arbitrator shall not be allowed to resign without good cause.[27] It has been stated that the claimant is a much bigger entity than the respondent economically.[28] It is not economically viable, and neither does it make business sense for any of the parties to appoint another arbitrator midway through the proceedings. Yet, the claimant can better cushion the financial impact of a delay in the arbitration proceedings that the respondent cannot, and this is the reason for their ready acceptance of Ms. Arbitrator's resignation. If Ms. Arbitrator is allowed to resign, proceedings may have to be repeated and the delay involved may even lead to further damages. The claimant's act of not contesting the resignation is purely a delaying tactic. As a check on such practices, an arbitrator should not be allowed to resign too hastily.[29]

III. Issue of Remuneration

20. Regarding the dispute between the claimant and Ms. Arbitrator, pursuant to Article 72 of the CIETAC Rules, CIETAC has the power to decide the quantum of remuneration to be accorded to the arbitrators. If the agreed fee proves to be insufficient during the arbitration, the arbitrators may approach the parties for an augmentation.[30] In the present case, there is merit in giving Ms. Arbitrator the extra remuneration, as she was previously

[27] Lachmann, *Handbuch*, ¶ 1968 *et seq*
[28] *Statement of Defense*, ¶ 2
[29] *Laker Airways Inc v FLD Aerospace Ltd* (1999) 2 Lloyd's Rep 45, 48
[30] M. R. Sammartino, *International Arbitration Law and Practice*, Kluwer Law International, (2nd Edition)

informed that determination of quantum would take 2 days, whereas it will take 5. Her demand for payment for the 3 extra days is reasonable and must be enforced by the tribunal.

C. THE CLAIMANT DID NOT VALIDLY TERMINATE THE PURCHASE CONTRACT

I. Claimant did not fulfill their contractual obligation

21. Obligation of the buyer to purchase was subject to two conditions[31]
    (a) The seller being able to meet the established quality, technical and qualification requirements specified under clause (A) of the Purchase Contract.
    (b) Seller to obtain from the third party an approval that shipped gearboxes are in conformity with the standards required under clause (A) of the Purchase Contract.
22. A plain reading of the clauses might lead to the interpretation that the seller's responsibility was restricted to obtaining approval, certifying goods of model no. GJ 2635, but the true essence and underlying objective of the Purchase Contract puts the onus on the seller to provide goods as per the quality standards agreed upon, to which, approval is merely an addition.
23. It can be reasonably claimed that under clause 10.2 of the Purchase Contract 'certified approval' means 'right' and 'accurate' approval stating that the goods delivered 'actually' conform to the agreed standards and not one which wrongly certifies, leading to non-conformity with specified technical requirements.[32]

[31] See Clause 10, C.Ex.2
[32] See C.Ex.3

24. Irrespective of what the third party declares, under the Purchase Contract it is the seller's obligation to deliver goods that conform to quality standards.[33] It would be pertinent to note that buyer had, on two occasions, raised apprehensions of serious manufacturing flaws vis-à-vis goods [34] and had also dutifully notified the seller regarding non-conformity.[35]

II. No case of fundamental non-performance on the part of buyer validity of termination

25. The buyer's position arises by virtue of its act of withholding performance. Under Clause 1.2 (b)(3) of the Purchase Contract, the buyer is required to pay only when it has informed the seller that gearboxes have been delivered in conformity with agreed standards. In simple terms, payment is to be made once conforming goods are delivered to the buyer.
26. Under Article 7.1.3 of UNIDROIT Principles, when the parties are to perform their obligations consecutively, the party that has to perform later may withhold its performance until the first party has performed.
27. The buyer merely adhered to its duty of making the first installment when it paid USD 2,000,000 to the seller on March 13, 2012,[36] as until April 18, 2012 it was unaware of the goods' non-conformity.[37] It must be noted that it didn't issue any confirmation to the seller that the goods were in conformity. Further, the buyer was well within its right and limitation period when it gave notice to the seller specifying goods' lack of conformity.[38]

[33] See Art. 35 & 36 CISG
[34] See R.Ex.1
[35] Art. 39(a) CISG
[36] See clause 1.2 (b)(i), C.Ex.2
[37] See C.Ex.3
[38] See C.Ex.4 & Art. 39 UNCISG

28. Keeping in mind the aforementioned provisions, the buyer withheld its future obligations of making scheduled payments and required the seller to fulfill its obligation of delivering conforming goods along with a third party approval.[39]
29. Under Article 71 of UNCISG, the buyer rightfully suspended its obligation of making payments once it became clear that the seller would not perform substantial part of its obligations.[40]
30. To conclude with, the buyer did not fail to carry out its material obligation but merely withheld its performance and asked the seller to cure its non-performance.[41] Keeping in mind the initial payment made by the buyer, it would be reasonable to expect that had the seller fulfilled their obligation properly, the buyer would have dutifully made the remaining payments on time. The buyer's act was essentially a reaction to the seller's non-performance and in no way could be termed as fundamental non-performance for the purposes of termination under Article 7.3.1 of UNIDROIT Principles.

D. CAN THE SELLER VALIDLY CLAIM THE TERMINATION PENALTY?

I. The termination of contract is invalid

31. As proved in the previous issue, the buyer's obligation of payment was in pursuance of seller's delivery of conforming goods along with third party approval. The buyer was fulfilling its obligations, which is evident from payment of 1st installment and it's the seller who failed to perform his. The buyer merely withheld its obligation and later on suspended due to utter disregard of the seller towards its obligations. The buyer hasn't

[39] Art. 7.2.2 of UNIDROIT Principles, 2010
[40] See Ex. C.Ex.5 & 6
[41] Art. 7.1.4(4) of UNIDROIT Principles, 2010

done any act that could be attributed to fundamental non-performance and therefore, the termination of the Purchase Contract is invalid.

II. The seller is not allowed to retain part payment

32. Clause 15.2 (a) of the Purchase Contract categorically states: "Energy Pro Inc. shall be entitled to retain any part payment(s) made by CFX Ltd". In pursuance to clause 15.2 (a), the seller is allowed to retain part payment made by buyer only when the Contract has been terminated in a valid manner.
33. As discussed above, the Contract hasn't been terminated in a valid manner and therefore the seller has no right to retain part payment. It is obliged to restitute the payment on the basis of Article 7.3.6 of UNIDROIT Principles.

III. The seller cannot validly claim termination penalty

34. Clause 15.2 categorically states that the buyer shall pay termination penalty only in the event the seller terminates the Contract as provided in Clause 15.1. As proved earlier, because the Contract wasn't terminated in the manner so prescribed, the said penalty shall not be applicable.

PRAYER FOR RELIEF

In light of the submissions made above, Respondent respectfully requests the Tribunal to declare that:

- The Claimant should be denied the relief requested by them.
- Ms. Arbitrator 1 cannot resign and the Claimant must pay her additional fees.
- Claimant did not validly terminate the Purchase Contract and cannot claim the termination penalty.
- Claimant must return the first part payment of USD 2,000,000 to the Respondent.

Respectfully signed and submitted by counsel on June 21, 2013.