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STATEMENT OF FACTS

In order to develop its business in Catalan, Energy Pro Inc. ('Energy Pro') based in Syrus, approached TurboFast Ltd ('TurboFast'), a leading international wind turbine manufacturer based in Andelstein, in June 2010 to discuss a possible co-operation in manufacturing gearboxes for TurboFast's 1.5 MW wind turbines. After this discussion, Energy Pro learned that TurboFast had already granted CFX Ltd ('CFX'), a new company established and registered in Catalan only months prior, a technology licensing agreement (the 'Licensing Agreeement').

Upon TurboFast's recommendation, Energy Pro approached CFX in mid 2010 to make the same offer. After months of discussions, both CFX and Energy Pro (the 'Parties') agreed to a joint venture agreement, "Syrus-Catalan Wind Turbine Gearbox Joint Venture Company" (the 'JV').[1] The JV was considered to be comprehensive and all inclusive such that Clause 17.1 ensured that the Agreement contained all terms and conditions agreed to and superseded all previous correspondence, undertakings, agreements and arrangement between the parties with respect to the subject matter, whether written or oral.[2] The principal terms of the JV agreement provided that:

a) The JV's main business would include the manufacture and assembly of the 1.5 MW wind turbine gearboxes for the Catalan market.[3]

b) Energy Pro would supply raw materials to the JV for the manufacturing of the gearboxes and would subsequently own all gearboxes produced by the JV.[4]

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[1] Record, page 8: "Claimant's Exhibit No. 1"
[2] Record, page 9: "Claimant's Exhibit No. 1"
[3] Id.
[4] Id.

c) The Parties would enter into an exclusive purchase contract.[5]

d) The Parties each had an equity stake in the JV. Energy Pro, the majority equity holder, owned 80%, and CFX owned 20%.[6]

By 10 April 2011, the Parties concluded extensive negotiations over an exclusive purchase contract (the 'Purchase Contract') where Energy Pro would sell gearboxes manufactured under the JV exclusively to CFX.[7] The essential features of the Purchase Contract (Exhibit No. 2) are:

a) CFX committed to purchasing a minimum of 500 (100 per year) 1.5 MW wind turbine gearboxes from Energy Pro at a fixed price of USD 10 million over 5 years[8]:

   i. In the 1st year, payment is divided into 3 payments of USD 2 million for a total of USD 6 million 2012 Dates include: March 13, June 20, & August 20

   ii. For the next 4 years, payments of USD 1 million will be made yearly

b) CFX obligation to purchase was subject to Energy Pro meeting the established quality, technical and qualification requirements.[9]

c) Energy Pro had a right to suspend/terminate the Purchase Contract if CFX *"substantially breaches a material obligation, representation or warranty including the failure to make any payment when it is due provided that the Seller issues Buyer a written notice of the breach and the Buyer has failed, Within 30 days after receipt of the notice to either; (i) commence and diligently Pursue cure of the breach, or (ii) provide reasonable evidence that the breach*

[5] Record, page 8: "Claimant's Exhibit No. 1"
[6] Id.
[7] Record, page 10: "Claimant's Exhibit No. 2"
[8] Record, page 10-11: "Claimant's Exhibit No. 2"
[9] Record, page 11: "Claimant's Exhibit No. 2"

has not occurred."[10]

d) The Purchase Contract also provided for termination penalty, as follows:

"In the event Seller terminates the Purchase Contract as provided: (a) Seller shall be entitled to retain any part payment(s) made by Buyer; and (b) the Buyer shall pay the Seller a termination penalty equal to the difference Between the total value of this Purchase Contract and the value of Gearboxes Already delivered to the Buyer as of the termination date."[11]

e) Clause 20 (the 'Dispute Resolution Clause'), states that it is agreed between the parties that *"Any dispute rising from or in connection with this Purchase Contract shall be submitted to the China International Economic and Trade Commission arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Beijing, China… in English.*[12]

On February 10, 2012, CFX purchased 100 gearboxes and made the first payment of USD 2 million to Energy Pro on March 13, 2012.[13] On April 18, Future Energy wrote to the Parties explaining that its engineer had wrongly certified the gearboxes based on the GH 2653 model.[14] As such, the gearboxes shipped did not have the proper certification and would not meet the requirements for the GJ 2635 turbine.[15] CFX then wrote a letter to Energy Pro on May 16, 2012 requesting that the situation be remedied.[16] Energy Pro

[10] Id.
[11] Id.
[12] Id.
[13] Record, page 5: "Application for Arbitration"
[14] Record, page 13: "Claimant's Exhibit No. 3"
[15] Id.
[16] Record, page 14: "Claimant's Exhibit No. 4"

responded two days later explaining that they were willing to agree to another certification company picked solely by CFX, but that they were not responsible for correcting the error caused by Future Energy's negligence.[17]

CFX responded on May 21, 2012 in writing, informing Energy Pro that it would "suspend" its performance of the Purchase Contract until Energy Pro has "discharged [its] legal obligations."[18] In response to CFX's refusal to tender payment, Energy Pro issued default notices to CFX on August 20, 2012 in accordance with the Purchase Contract.[19] On September 25, 2012 Energy Pro served CFX with a pre-action demand letter demanding payment, lest arbitration be initiated against them. More than four months after Energy Pro issued default notices, CFX had yet to perform its obligations, and so on December 28, 2012, Energy Pro sent a Termination Notice to CFX stating that it was left with no choice by to terminate th[e] Purchase Contract pursuant to Clause 15 of the Purchase Contract.[20]

On January 1, 2013, Energy Pro requested that Future Energy participate in the proceedings given their negligent involvement.[21] Two days later, Future Energy agreed to participate.[22] Thereafter, Energy Pro submitted a formal application for arbitration on February 12, 2013.[23]

Ms. Arbitrator 1 has sent CFX and the President of the arbitral tribunal an email saying that she will resign after the completion of the oral hearings on the disputed issues

[17] Record, page 15: "Claimant's Exhibit No. 5"
[18] Record, page 16: "Claimant's Exhibit No. 6"
[19] Record, page 17: "Claimant's Exhibit No. 7"
[20] Record, page 18: "Claimant's Exhibit No. 8"
[21] Record, page 19: "Claimant's Exhibit No. 9"
[22] Record, page 6: "Application for Arbitration"
[23] Record, page 2: "Application for Arbitration"

and will not remain on the panel in determining the issue of quantum.[24] Having already accepted her appointment for a 2-day quantum, Energy Pro refused to pay the additional fees in case the tribunal takes 5 days.[25] Rather, Energy Pro is willing to nominate another arbitrator to hear the issue of quantum and will not contest her resignation.[26] CFX contests the resignation of Ms. Arbitrator 1 alleging that the subsequent new appointment will result in a great loss of time and money.[27] CFX further requests that the Tribunal rule that Ms. Arbitrator cannot resign and that Energy Pro must pay it additional fees.[28]

[24] Record, page 22: "Statement of Defence"
[25] Id.
[26] Id.
[27] Id.
[28] Id.

ARGUMENT

I. In accordance with Clause 29.1 of the Purchase Contract, the PICC, supplemented by the CISG, is the applicable law that governs the purchase contract and the present arbitration.

Clause 29.1 of the Purchase Contract provides that the Purchase Contract "shall be governed by and construed in accordance with the UNIDR[OI]T Principles of International Commercial Contracts 2010, supplemented by matters which are not governed by the UNIDROIT Principles by the United Nations Convention on Contract for the International Sale of Goods 1980."[29]

The United Nations Convention on Contract for the International Sale of Goods 1980 (hereinafter the "CISG") applies to contracts for sale of goods between parties whose places of business are in different Contracting states.[30] Both Syrus and Catalan, where Claimant and Respondent respectively are based, are party to the CISG.[31] As such, the CISG prima facie governs this dispute.

However, the CISG's application is nonetheless subject to party autonomy since the parties may exclude and/or derogate from the application of the CISG.[32] Whether the parties have legally done so is determined by a case-by-case analysis of the parties' intent.[33] For example, where the parties have agreed that their contract shall be governed by the UNIDROIT Principles of International Commercial Contract (hereinafter the "PICC"), the contract is no longer limited by the mandatory rules of domestic laws,

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[29] Record, page 12: "Claimant's Exhibit No.2".
[30] *See* Art. 1(1)(a) CISG 2010.
[31] *See* Record, page 6: "Application for Arbitration".
[32] *See* Art. 6 CISG 2010; *see also* Art. 12 CISG 2010.
[33] *See* Peter Huber and Alastair Mullis, *The CISG: A new textbook for students and practitioners* (2012), at page 63; Article 1(1)(a) CISG 2010; Article 8(3) CISG 2010.

including those laws that would otherwise provide for the application of the CISG.[34]

It is clear from the explicit and unequivocal language of Clause 29.1 of the Purchase Contract that both parties intended the PICC to govern the contract, notwithstanding the "UNIDRIOT" typo.[35] Hence, the parties have excluded the application of the CISG to the extent that the CISG only supplements matters not initially governed by the PICC. Moreover, given the parties' intention that their contract shall be governed by the PICC, any mandatory rules domestic to Syrus and Catalan become ineffective, including any that would otherwise compel the application of the CISG.

Moreover, while it is true that choosing an incoterm, such as "UNIDROIT", does not generally amount to a complete exclusion of the CISG because the incoterm may not offer a complete sales regime, the parties have avoided such an issue herein by supplementing the PICC with the CISG.[36] Therefore, because the CISG has been validly derogated from, pursuant to Clause 29.1 of the Purchase Contract, the PICC governs the Purchase Contract and the present dispute and the CISG only supplements where the PICC is silent.

II. Future Energy Should Be Joined In This Arbitration

Future Energy should be joined to this arbitration because (A) Future Energy has freely agreed to arbitrate the present dispute and (B) its joinder would promote the fair and efficient resolution of this dispute.

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[34] *See* Michael Bonell, *UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law* (2004) at page 31; *see also* Art 1.4 Comment UNIDROIT Principles 2010.
[35] *See* Record, page 12: "Claimant's Exhibit No.2"
[36] *See* Peter Huber and Alastair Mullis, *The CISG: A new textbook for students and practitioners* (2012), at page 64; *see also* Record, page 12: "Claimant's Exhibit No.2".

A. Future Energy has freely agreed to arbitrate the present dispute

1. The contract between CFX, Energy Pro and Future Energy incorporates the arbitration clause of the Purchase Contract by reference

Future Energy's contract with CFX and Energy Pro incorporates the arbitration clause of the Purchase Contract by reference, which validly provides the consent of Future Energy to arbitrate the present dispute.

The validity of an arbitration agreement by incorporation by reference under Chinese law was unambiguously affirmed by the Supreme People's Court in the *Supreme People's Court Reply on the Manner of Determining Jurisdiction in a Sino-Mongolian Contract that Fails to Provide for Arbitration*.[37]

In the present case, Future Energy has signed a contract with both CFX and Energy Pro pursuant to which the parties have agreed that Future Energy would be the independent certification company for the wind turbines of Model GJ 2635.[38] This contract cannot be taken independently of the Purchase Contract, which specifically mentions Future Energy and provides the required specifications for the wind turbines that Future Energy undertook to certify.[39] Future Energy could not have performed its obligations toward CFX and Energy Pro without knowing about the existence of the Purchase Contract between CFX and Energy Pro and agreeing to its terms, including the arbitration clause.

Future Energy has therefore consented to arbitrate the present dispute, and its position is closer to that of a signatory to the arbitration clause than that of a "third party," as CFX alleges. Under such circumstances, there is no obstacle to the joinder of Future Energy to

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[37] *Fan Han 177* (1996), issued on 14 Dec. 1996, *cited in* Jingzhou Tao, ARBITRATION LAW AND PRACTICE IN CHINA 44 (2nd ed. 2008).
[38] Procedural Order No. 2, para. 13.
[39] Procedural Order No. 2, para. 14. *See also* Record, pp. 10-12, "Purchase Contract Excerpts."

the present arbitration.

2. In the alternative, Future Energy has implicitly agreed to be joined to the present arbitration.

In any event, Future Energy has implicitly agreed to be joined to the present arbitration when it failed to object to Energy Pro's letter of 1 January 2013. Energy Pro's letter of 1 January 2013 clearly and unambiguously requested that Future Energy join the present arbitration.[40] To date, however, Future Energy has not objected to this letter, thus implicitly agreeing to join the arbitration.[41]

As Article 5 of the CIETAC Arbitration Rules (2012) provides:

> 1. An arbitration agreement means an arbitration clause in a contract or ***any other form of a written agreement*** concluded between the parties providing for the settlement of disputes by arbitration.
>
> 2. The arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in the tangible form of a document such as a contract, ***letter***, telegram, telex, fax, EDI, or email. ***An arbitration agreement shall be deemed to exist where its existence is asserted by one party and not denied by the other during the exchange of the Request for Arbitration and the Statement of Defense***. . . .

As such, Energy Pro's letter to Future Energy on 1 January 2013 and Future Energy's failure to object to it constitute such an agreement to arbitrate the present dispute.

3. Future Energy's consent to arbitrate was freely given and is valid

Respondent’s argument that Future Energy’s consent to arbitrate is vitiated by alleged

[40] Record, p. 19, "Claimant's Exhibit No. 9."
[41] Procedural Order No. 2, para. 18.

duress is baseless. Duress refers to a situation where a party is forced to do something against its will due to a wrongful or improper threat. Typically, such wrongful or improper threat will also be unlawful. In the present case, Energy Pro's threat to initiate legal proceedings against Future Energy is perfectly lawful and legitimate. Energy Pro has a legal right to initiate legal proceedings against companies which owe it a contractual debt, and it is only natural that Future Energy should be liable for the injury its negligent conduct has caused. Future Energy's consent to arbitrate the present dispute, therefore, was freely given and is entirely valid.

B. The joinder of Future Energy to this arbitration would promote the efficient and fair resolution of the present dispute

The joinder of Future Energy to this arbitration would promote the efficient and fair resolution of the present dispute. It would prevent the waste of time and additional costs that would be associated with the separate suit that Energy Pro would otherwise have to initiate against Future Energy to hold it responsible for its negligent actions. Moreover, it would provide the arbitrators with a fuller picture of the events at stake in the present dispute, which would allow them to reach a fair and just decision.

For the aforementioned reasons, Energy Pro respectfully requests that the tribunal join Future Energy to the present arbitration proceedings.

III. Ms. Arbitrator 1's Withdrawal From The Quantum Phase Is Proper.

Ms. Arbitrator 1 should be allowed to withdraw from the quantum phase of this arbitration, as (A) she has a right under the CIETAC Rules and China's Arbitration Law to withdraw from the proceedings for any reason and (B) CFX has received advance notice of her withdrawal.

A. Ms. Arbitrator 1 may voluntarily withdraw from the quantum phase of this arbitration for any reasons

Ms. Arbitrator 1 may withdraw from the arbitration at any time and for any reason. Article 31(1) of the CIETAC Arbitration Rules (2012) plainly states that an "arbitrator may . . . voluntarily withdraw from his/her office."[42] Nothing in Article 31(1) or in other provisions of the CIETAC Arbitration Rules suggests that there are limits to an arbitrator's freedom to resign under this provision. Likewise, nothing in the Code of Conduct for CIETAC and CMAC suggests that Ms. Arbitrator 1's resignation is improper in any way.[43]

CFX's objection to the resignation of Ms. Arbitrator 1 also does not find any support in the Arbitration Law of the People's Republic of China, which simply does not address the conditions under which an arbitrator may resign.[44]

The absence of any limits to an arbitrator's voluntary withdrawal in the positive law is only logical, as it would be highly undesirable for an arbitration to proceed before an arbitrator who has been forced to sit on the case. Under such circumstances, the risk of an arbitrator not fulfilling his duty to hear the case with the required due diligence, timeliness and impartiality would simply be too high.[45]

In light of the foregoing, there is no reason why the Ms. Arbitrator 1 should not be allowed to withdraw from the quantum phase of this arbitration.

B. CFX has received advance notice of Ms. Arbitrator 1's intention to withdraw from hearing the quantum phase of this arbitration

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[42] CIETAC Arbitration Rules (2012), art. 31(1).
[43] Code of Conduct for CIETAC and CMAC, adopted on 6 April 1993, as revised on 6 May 1994.
[44] Arbitration Law of the People's Republic of China.
[45] *See* CIETAC Rules for Evaluating the Behavior of Arbitrators, passed in December 2003, revised by the Chairman's Council of the Arbitration Commission on January 8, 2009, effective as from March 1, 2009, art. 5 ("[a]rbitrators shall handle cases in an independent, impartial, diligent and cautious manner. They shall treat both parties equally and shall not represent the interests of either party.").

Moreover, CFX has received advance notice of Ms. Arbitrator 1's intention to withdraw from the quantum phase of this arbitration. As CFX itself concedes, Ms. Arbitrator 1 has announced her decision to withdraw from the quantum phase to the President of the arbitral tribunal, who forwarded her email to the both parties.[46] Even before the oral hearing on the merits have started, therefore, both parties are notified of the fact that Ms. Arbitrator 1 will not sit on the panel of arbitrators during the oral hearings relating to the issue of quantum. In light of this, CFX cannot claim to be unfairly surprised by this development, and will be able to prepare its defense on the issue of quantum accordingly. Ms. Arbitrator 1's withdrawal from the quantum phase will thus be in accordance with due process and should be allowed.

IV. The Purchase Contract is valid in its entirety and cannot be avoided, including Clauses 15.1 and 15.2, since neither the record nor the terms of the Purchase Contract evince any "gross disparity" between the parties.

The foremost Principle of the PICC is that "the parties are free to enter into a contract and to determine its content."[47] Moreover, a valid contract is binding upon the parties and "can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles."[48] Indeed, the parties are free to derogate from the Principles' default rules, with limited exceptions, which are non-derogable, i.e. mandatory rules.[49] One exception is where "gross disparity" exists between the parties: "a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive

[46] Record, p. 22, "Statement of Defense."
[47] Art. 1.1 and Comments UNIDROIT Principles 2010
[48] Art. 1.3 UNIDROIT Principles
[49] *See* Art. 1.5 UNIDROIT Principles 2010; *See also* Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review* in FORDHAM LAW REVIEW 281, 314 (1994).

advantage." PICC Article 3.2.7 (1). However, even a "considerable disparity" which upsets the equilibrium of performance and counter-performance is not sufficient to permit avoidance or adaptation. PICC Article 3.2.7 Comments. What is required is that the disequilibrium is "so great as to shock the conscience of a reasonable person." Id. Not only must the advantage be excessive, but also unjustifiable upon an evaluation of all the relevant circumstances of the case, including (i) whether a party has leveraged an unfair advantage and (ii) the nature and purpose of the contract. Id.

A. The Purchase Contract was on the whole reasonable and did not give Energy Pro an "excessive advantage."

The Purchase Contract was on the whole reasonable and was not so unequal so as to shock the conscience of a reasonable person. Neither the provisions in Clause 15.1 or 15.2 of the Purchase Contract (hereinafter "Clause 15.1" and "Clause 15.2" respectively) were vast departures from the default rules of the PICC such that they gave Energy Pro an "excessive advantage. The contractual provisions merely refined, clarified or reinforced similar principles as found within the default rules of the PICC.

1. Clause 15.1 is similar enough to the default rules of the PICC such that its provisions would not "shock the conscience" of a reasonable person.

Clause 15.1 is not a vast departure from the default rules of PICC Article 7.3.1, but rather further refines and clarifies sufficient grounds for termination.[50] In the same spirit as PICC Article 7.3.1, Clause 5.1 allows for termination only where there is an egregious dereliction of contractual obligations, but in slightly different words: "fundamental non-performance" in the former and "substantially breaches a material obligation" in the latter.[51]

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[50] *See* Record, page 11: "Claimant's Exhibit No.2".
[51] *See* Record, page 11: "Claimant's Exhibit No.2"; *see also* Art. 7.3.1(2) UNIDROIT Principles 2010

Clause 15.1 also defines particular circumstances in which Energy Pro may claim breach.[52] In particular, failing to make timely payment without cure or evidence of performance within 30 days is grounds for termination.[53] As will be demonstrated, this is not only sufficient grounds for termination under the contract, but the PICC as well. Indeed, what is sufficient to constitute "substantial breach" under Clause 15.1 would generally also be sufficient to constitute the "fundamental non-performance" required for termination under PICC Article 7.3.1. As such, Clause 15.1 is does not "shock the conscience" of a reasonable person given the significant overlap between the default rules of the PICC and Clause 15.1.

2. Clause 15.2 provides similar remedies as the PICC such that its provisions would not "shock the conscience" of a reasonable person.

Clause 15.2 merely ensures that Energy Pro is adequately compensated for any losses that it may incur as a result of CFX's breach. Since Energy Pro is the manufacturer of the gearboxes in that it supplies all the raw materials required for its production, it incurs significant costs in preparing to perform prior to the completion of the contract. Ex. 8. As such, Clause 15.2, just like the default remedies of the PICC, merely protects Energy Pro against CFX's failure to perform its obligations, namely to make timely payments. Since payments are to made in installments over the course of several years, whereas delivery of all the goods may be rendered before all installments are paid, there is a significant risk that Energy Pro will have rendered performance of all the goods, yet CFX refuses to make timely payments after it has received the goods.[54] Indeed, this became the situation

[52] *See* Record, page 11: "Claimant's Exhibit No.2"
[53] *See* Id.
[54] *See* Record, page 10 and 11: "Claimant's Exhibit No.2"

herein.[55]

Without Clause 15.2, Energy Pro could only resort to default damages contained within the PICC following termination.[56] By comparison, Clause 15.2 is not so beyond the scope of the default remedies so as to shock the conscience of a reasonable person. In particular, PICC Article 7.4.2 provides for "full compensation" such that the aggrieved party is entitled to recoup "any loss which it suffered and any gain of which it was deprived."[57] The terms of Clause 15.2 provide Energy Pro with the same remedies because it would allow Energy Pro to (a) retain any part payment(s) made and (b) recoup the difference in value of between what has been delivered and the purchase contract.[58] In essence, Clause 15.2 provides Energy Pro with "full compensation" similar to PICC Article 7.4.2, by recouping (a) any loss it suffered and (b) any gain of which it was deprived.

Indeed, Clause 15.2 and the PICC default remedies are not so dissimilar, though Clause 15.2 does, by setting out the terms in the contract itself, provide clarity and certainty to the parties regarding the consequences of termination. As such, Clause 15.2, just like Clause 15.1, is a reasonable provision that merely serves to clarify the remedies Energy Pro is legally entitled to following termination. While they both reinforce the legal protections that Energy Pro is entitled to under the PICC, it certainly does not make the terms of the agreement so unequal such that it shocks the conscience of a reasonable person. As such, neither Clause 15.1 or 15.2 provide Energy Pro with an "excessive advantage."

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[55] *See* Record, page 16: "Claimant's Exhibit No.6"; *see also* Record, page 18: "Claimant's Exhibit No.8"
[56] *See* Art. 7.3.5(2) UNIDROIT Principles 2010
[57] Art. 7.4.2(1) UNIDROIT Principles 2010
[58] *See* Record, page 11: "Claimant's Exhibit No.2"

B. Any advantage that Energy Pro does gain from Clauses 15.1 and 15.2 is justified by Energy Pro's need to protect its legitimate business interests in light of the circumstances surrounding this transaction between two sophisticated business entities.

Procedurally, any implication that Energy Pro somehow unjustly leveraged an unfair advantage is simply unfounded. While Energy Pro approached CFX in hopes of expanding its business, this is certainly insufficient to prove duress or coercion.[59] It was CFX that held the key licensing agreement with Future Energy.[60] Thus, if anyone held advantageous bargaining power, it was CFX and not Future Energy.

Indeed, unlike Energy Pro, CFX could have walked away from the deal and either found another partner or manufactured the gearboxes itself. Instead, CFX agreed to form a Joint Venture with Energy Pro.[61] Regardless of which party drafted the Purchase Contract, CFX must have found the terms of the transaction advantageous for itself, or else it would not have formed the Joint Venture and entered into the exclusive Purchase Contract with Energy Pro.[62] It is revealing that at no point during the course of the parties dealings with each other *prior* to the commencement of arbitral proceedings did CFX allege any sort of duress or unfair dealing; it was only *after* Energy Pro requested arbitration did CFX imply that Energy Pro leveraged its power to obtain favorable contractual terms.[63]

Substantively, the terms of Clauses 15.1 and 15.2 were justified because it was necessary for Energy Pro to protect itself from the risk of CFX's breach. In many ways, these clauses act akin to a so-called "liquidated damages provision," a concept

[59] *See* Record, page 4: "Application for Arbitration".
[60] *See* Record, page 3: "Application for Arbitration".
[61] *See* Record, page 8-9: "Claimant's Exhibit 1".
[62] *See* Record, page 8-11: "Claimant's Exhibit 1" and "Claimant's Exhibit 2".
[63] *See* Record, page 21: "Statement of Defense".

exemplified by Article 7.4.13 of PICC: "agreed payment for non-performance."

Liquidated damages serve to protect a party, especially manufacturers and sellers, from losses resultant from another's non-performance. Manufactures and sellers, such as Energy Pro, are particularly vulnerable because they must costs into preparing to perform, while risking the possibility of being duly paid by the buyer, which indeed became the case herein.[64] Hence, like liquidated damages, these Clauses 15.1 and 15.2 clarify at the outset, not only what is expected from both parties, but also what will result from breach, which solidifies expectations, eliminates uncertainty and deters breach, albeit unsuccessfully herein. As such, Clauses 15.1 and 15.2 were included to protect Energy Pro in case CFX fails to perform its contractual obligations. Indeed, CFX's non-performance herein clearly demonstrate the rationale and need for such clauses.

Accordingly, the type of protection given by Clauses 15.1 and 15.2 were integral to the nature and the purpose of the contract: to sell goods. Energy Pro, or any seller of expensive equipment, would be reluctant to enter into a long-term supply contract without ensuring that it will be duly compensated if the buyer fails to render prompt and complete payment. As such, the provisions within Clauses 15.1 and 15.2 are clearly justifiable and not excessive. Consequently, the purchase contract is valid in its entirety and cannot be avoided by CFX as there is no "gross disparity" between the parties.

V. Energy Pro validly terminated the contract because CFX had substantially breached the contract, which also amounted to "fundamental non-performance."

Energy Pro validly terminated the contract because CFX had refused to perform its

[64] *See* Record, page 16: "Claimant's Exhibit No.6".

contractual obligations, namely render timely payment.[65] These actions constituted both substantial breach pursuant to Clause 15.1 of the Purchase Contract, as well as "fundamental non-performance" pursuant to PICC Article 7.3.1. As such, since Clause 15.1 of the Purchase Contract cannot be avoided, Energy Pro validly terminated the contract following CFX's substantial breach. Moreover, even assuming Clause 15.1 could be avoided, termination was nonetheless valid pursuant to the PICC given CFX's fundamental non-performance.

A. Since Clause 15.1 cannot be avoided, CFX's refusal to make timely payments constitutes sufficient grounds for termination pursuant to Clause 15.1 of the Purchase Contract.

Energy Pro validly terminated the Purchase Contract pursuant to Clause 15.1, which provides that Energy Pro has a right to suspend or terminate the Purchase Contract if CFX Ltd "substantially breaches a material obligation."[66] Substantial breach includes where CFX fails to make any payment when it is due, and then subsequently fails within 30 days following notice by Energy Pro, to either (i) cure the breach or (ii) prove that the breach has not occurred.[67] In this present case, CFX failed to make its second and third part payments as required under the Purchase Contract.[68] Moreover, CFX has failed to either cure the breach or prove that the breach has not occurred within 30 days of receiving notice from Energy Pro on 20 August 2012.[69] As such, CFX has substantially breached a material obligation, thus entitling Energy Pro to validly terminate the Purchase Contract pursuant to Clause 15.1.

B. Even assuming Clause 15.1 could be avoided, CFX's refusal to tender timely

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[65] *See* Record, page 16: "Claimant's Exhibit No.6".
[66] *See* Record, page 11: "Claimant's Exhibit No.2"
[67] *See* Id.
[68] *See* Record, page 16: "Claimant's Exhibit No.6".
[69] *See* Record, page 16 and 17: "Claimant's Exhibit No.6".

payments nonetheless constitutes "fundamental non-performance" sufficient to terminate the contract pursuant to PICC Article 7.3.1.

Even assuming that Clause 15.1 could be avoided, CFX's refusal to render payment would nonetheless be sufficient to terminate the contract. CFX cannot claim that its refusal was a "suspension" of the contract.[70] Quite simply, "suspension" is not a recognized course of action pursuant to the PICC. As such, there is no way of determining the legal validity or effects of this "suspension." Moreover, any claim this "suspension" was a valid response to Energy Pro's own failure to perform its "legal obligations" is inapposite.[71] The record clearly shows that "the gearboxes produced by the JV were in conformity with Clause (A)" of the Purchase Contract.[72] As such, Energy Pro has discharged its contractual obligations.

But regardless of CFX's own views on the legality of its actions, CFX must seek proper legal recourse in response to a perceived breach — something that Energy Pro has done.[73] Otherwise, CFX runs the risk that its refusal to perform its contractual obligations constitutes "fundamental non-performance." Indeed, even assuming that the PICC and not Clause 15.1 applies, it is clear that CFX actions in this regard constitute "fundamental non-performance" pursuant to the factors enumerated in PICC Article 7.3.1(2).

1. **CFX's refusal to tender payment "substantially deprived" Energy Pro of what it expected under the contract.**

Energy Pro was "substantially deprived" of what it was "entitled to expect under the contract" under PICC Article 7.3.1 (2)(a). Specifically, Energy Pro was entitled to expect

[70] *See* Record, page 16: "Claimant's Exhibit No.6".
[71] *See* Id.
[72] Clarifications, page 2: Question 8
[73] *See* Record, page 3-7: "Application for Arbitration".

to be paid on time in accordance with the Purchase Contract.[74] After all, the entire purpose of the Purchase Contract, as well as the Joint Venture, for Energy Pro was to be paid for its provision of goods.[75] As such, CFX's refusal to tender payments beyond the first installment substantially deprives Energy Pro of its expectation that it would be paid in accordance with the Purchase Contract.

2. Strict compliance was "of essence" since the entire point of the contract was the purchase of gearboxes, i.e. the exchange of goods for money.

Strict compliance of CFX's unperformed obligations were "of essence" under the contract under PICC Article 7.3.1 (2)(b). Given that it is a "Purchase Contract" that is in dispute, one that was created mainly for the purpose of exchanging goods for money, CFX's most important obligation pursuant to said contract was to tender the correct and timely payment in accordance with the contract.[76] As such, strict compliance of CFX's obligations under the "Sale and Purchase" provisions, which CFX refused to perform, were indeed "of essence" under the Purchase Contract.

3. CFX's refusal to tender payment was clearly intentional.

There can be no doubt that CFX's refusal to tender the second and third payment installments was "intentional" under PICC Article 7.3.1 (2)(c). In its letter to Energy Pro dated 21 May 2012, CFX expressed its intention to "suspend" its performance pursuant to the Purchase Contract.[77] Indeed, there is no doubt that this was not a case where CFX negligently or accidentally forgot to pay or through some misfortune failed to pay. Rather, CFX blatantly refused to fulfill its contractual obligations to pay after the first

[74] *See* Record, page 10: "Claimant's Exhibit No.2"
[75] *See* Record, page 9 and 10: "Claimant's Exhibit No.2"
[76] *See* Record, page 10: "Claimant's Exhibit No.2"
[77] *See* Record, page 16: "Claimant's Exhibit No.6".

installment.[78] As such, CFX's refusal to tender payment was clearly international.

4. CFX's refusal to tender payment gave Energy Pro reason to believe that it could not rely on CFX in the future.

Under PICC Article 7.3.1 (2)(d), Energy Pro could not rely on CFX's future performance after it blatantly refused to fulfill its contractual obligations.[79] Indeed, how could Energy Pro, or any seller for that matter, have faith that a buyer will perform its contractual obligations in the future when said buyer refuses to tender payment for goods already delivered? As such, CFX's blatant disregard for its contractual obligations gave Energy Pro reason to believe that it could not rely on CFX's future performance.

5. CFX would not suffer "disproportionate loss" if the contract is terminated because it's obligations simply involve tendering payment.

Given that CFX is the buyer whose only obligation is to tender payment, it would not suffer disproportionate loss under PICC Article 7.3.1 (2)(e) if the contract were terminated. Pursuant to Paragraph 2(e), "non-performance is less likely to be treated as fundamental if it occurs late, after the preparation of performance, than if it occurs early before such preparation.[80] Further, "whether a performance tendered or rendered can be of any benefit to the non-performing party if it is refused or has to be returned to that party is also of relevance."[81]

CFX's non-performance herein did not occur "late, after the preparation of performance" since there was no "preparation" required on the part of CFX, the buyer.[82] Unlike Energy Pro, who had to take preparatory steps to perform its obligations as the manufacturer and seller, CFX's obligation to simply tender payment required essentially

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[78] *See* Record, page 16: "Claimant's Exhibit No.6".
[79] *See* Id.
[80] *See* Article 7.3.1 Comments UNIDROIT Principles 2010
[81] *See* Id.
[82] *See* Record, page 10: "Claimant's Exhibit No.2"

no preparation. Moreover, the performance to be tendered by CFX is cash, which is would undoubtedly still be of benefit if it were refused or has to be returned to CFX. Therefore, CFX would not suffer "disproportionate loss" if the contract is terminated.

Given this, CFX's refusal to perform its contractual obligations is "fundamental non-performance" pursuant to the factors enumerated in PICC Article 7.3.1 (2). As such, even assuming that Energy Pro could not terminate the contract pursuant to Clause 15.1, Energy Pro still validly terminated the contract pursuant to the PICC.

VI. Energy Pro can claim the termination penalty because the Purchase Contract was validly terminated.

Since Clause 15.2 is valid and cannot be avoided, as demonstrated above, its provisions have binding effect herein. As such, Energy Pro can claim the termination penalties under Clause 15.2 because the contract was validly terminated under Clause 15.1 of the contract, and also because the contract would also have been validly terminated pursuant to Article 7.3.1 of the PICC, regardless of Clause 15.1's applicability.

A fundamental principle of the PICC is the Freedom to Contract: "the parties are free to enter into a contract and to determine its content."[83] Indeed, the parties may "exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles."[84] In the present case, the parties have explicitly varied the effect of the default damages provided by the PICC through the inclusion of Clause 15.2.[85] As such, pursuant to the Freedom of Contract

[83] Art. 1.1 UNIDROIT Principles 2010
[84] Art. 1.5 UNIDROIT Principles 2010
[85] *See* Record, page 11: "Claimant's Exhibit No.2"

principle and because it cannot be avoided, Clause 15.2 is to be given binding effect under the PICC.[86]

In particular, Clause 15.2 unequivocally provides enumerated remedies "in the event Energy Pro terminates the Purchase Contract…"[87] As such, given that Energy Pro has validly terminated the contract pursuant to Clause 15.1, Energy Pro is now entitled to claim the termination penalties provided in Clause 15.2. Moreover, even assuming Clause 15.1 of the Purchase Contract could be avoided, because the Contract would be validly terminated pursuant to PICC Article 7.3.1, Energy Pro could nonetheless claim the termination penalty provided in Clause 15.2. In conclusion, regardless of how the contract was terminated, Energy Pro can nonetheless claim the termination penalty.

[86] Art. 1.1 UNIDROIT Principles 2010; Art. 1.3 UNIDROIT Principles 2010
[87] *See* Record, page 11: "Claimant's Exhibit No.2"

REQUEST FOR RELIEF

Claimant respectfully requests that the tribunal find that:

1. Energy Pro may bring Future Energy Inc. into the arbitration proceedings as a third party.
2. Arbitrator 1's resignation during the arbitration proceedings was proper.
3. Energy Pro validly terminated the contract.
4. Energy Pro may claim the termination penalty provided in Clause 15.2 of the Purchase Contract.