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STATEMENT OF FACTS

Mr. Yuen has been running CFX Ltd ('CFX') since February 2010. In April of that year, CFX entered into a technology licensing agreement (the 'Licensing Agreement') with TurboFast Ltd ('TurboFast'), a leading international wind turbine manufacturer based in Andelstein, to work specifically with 1.5 MW wind energy turbine. Future Energy Inc ('Future Energy') developed this specific wind energy turbine was responsible for certifying it. A few months after, in mid-2010, Energy Pro Inc ('Energy Pro') approached CFX directly to discuss a possible co-operation in manufacturing gearboxes for 1.5 MW wind turbines. Although Energy Pro was based in Syrus, their goal was to develop its business in Catalan.

On December 17, the Energy Pro and CFX (the 'Parties') signed a joint venture agreement, "Syrus-Catalan Wind Turbine Gearbox Joint Venture Company" (the "JV"), dealing with the manufacture, assembly and the general sale of the 1.5 MW wind turbines in Catalan market. In addition to this specification, the JV (Exhibit 1)[1] also provided that Energy Pro supply raw materials to the JV for the manufacturing the gearboxes and would subsequently own all gearboxes produced by the JV. This was to be under an exclusive purchase contract in which Energy Pro was the seller and owner, while CFX was the buyer. Each Party was an equity holder.

The exclusive purchase contract ('Purchase Contract') was executed on April 10, 2011.[2] In this contract, CFX committed to buying at least 100 gearboxes per year over a 5-year period for a total of USD 10 million dollars so long as Energy Pro met the established quality, technical and qualification requirement specified under Clause A of

[1]Record, page 8: "Claimant's Exhibit No. 1"
[2] Record, page 10: "Claimant's Exhibit No. 2"

the Purchase Contract requiring gearboxes agreed by the Parties: 1) For use in 1.5 MW wind turbine developed by Future Energy, 2) Model No. GJ 2635, 3) Rotor speed of 360 rpm, 4) Grey color.[3] The contract also provided that:

a) *"Before the gearboxes are delivered to CFX Ltd, purchase orders need to be issued by CFX and then upon receiving confirmation from CFX that the gearboxes have been delivered in conformity with this Purchase Contract would then CFX Ltd be required to make the requisite payment.*[4]

b) "*Before the gearboxes are delivered to CFX Ltd, Energy Pro must obtain from Future Energy certified approval that the shipped gearboxes are in conformity with the standards required under Clause (A) of this Purchase Contract.* [5]

c) "*Energy Pro has a right to suspend/terminate the Purchase Contract if CFX Ltd substantially breaches a material obligation, representation or warranty including the failure to make any payment when due….*"[6]

d) *"In the event Energy Pro Inc. terminates the Purchase Contract as provided: (a) Energy Pro Inc. shall be entitled to retain any part payment(s) made by CFX Ltd; and (b) CFX Ltd shall pay to Energy Pro Inc. a termination penalty equal to the difference between the total value of this Purchase Contract and the value of Gearboxes already delivered to CFX Ltd as of the termination date."*[7]

On September 17, 2011 and January 16, 2012 a manufacturing review was conducted. Although, CFX made no objections, it also made no confirmation that the gearboxes were

[3] Id. page 11
[4] Id.
[5] Id.
[6] Id.
[7] Id.

delivered in conformity as in accordance with the Purchase Contract.[8] In fact, on May 16 2013, after receiving Future Energy's letter explaining that the gearboxes Future Energy delivered were "not in conformity with the specified technical requirements," CFX wrote a letter to Energy Pro requesting that the situation be remedied because it had tendered payment of 2 million USD yet received useless equipment in return.[9] Nonetheless, Energy Pro still claimed to have fully performed its obligations under the Purchase Contract, despite not obtaining proper certification from Future Energy that the gearboxes met the requirements of the 1.5 MW Wind Turbine.[10]

Upon receiving legal advice that Energy Pro was fully responsible under the Purchase Contract, CFX suspended the Purchase Contract pending satisfactory proof that Energy Pro discharged its legal obligation under Purchase Contract.[11] Rather than provide such proof, Energy Pro sent default notices to CFX, which threatened "more drastic action" on its part.[12] And indeed, on December 28, 2012 Energy Pro stated that it was terminating the Purchase Contract.[13] Two days later but months before Energy Pro formally applied for arbitration, Energy Pro threatened Future Energy to join the arbitration or it would bring suit against Future Energy to recover damages.[14] This was done despite the fact that Future Energy not a signatory to the arbitration clause in the Purchase Contract.[15]

Thereafter, Ms. Arbitrator 1 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

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[8] Record, page 24: "Respondent's Exhibit No.1"
[9] Record, page 13: "Claimant's Exhibit No. 3"; Record, page 14: "Claimant's Exhibit No. 4"; Clarifications, page 2: Question 3
[10] Record, page 14: "Claimant's Exhibit No. 4"; Record, page 15: "Claimant's Exhibit No. 5"
[11] Record, page 16: "Claimant's Exhibit No. 6"; Record, page 14: "Claimant's Exhibit No. 4"
[12] Record, page 17: "Claimant's Exhibit No. 7"
[13] Record, page 18: "Claimant's Exhibit No. 8"
[14] Record, page 19: "Claimant's Exhibit No. 9"; Clarifications, page 1: Question 4; Record, page 12: "Application for Arbitration"
[15] Record, page 11-12: "Claimant's Exhibit No. 2"

issues and will not remain on the panel in determining the issue of quantum.[16] While the time allocated for quantum was originally 2-days when she accepted her appointment, it is now likely that quantum will require 5 days.[17] Energy Pro has expressed its refusal to pay the additional fees required for a longer quantum and wishes to nominate another arbitrator to hear the issue of quantum.[18] CFX objects to the resignation of Ms. Arbitrator 1 on grounds that her resignation and any subsequent new appointment will result in a great loss of time and money for CFX.[19] It thereby requests the Tribunal to rule that Ms. Arbitrator cannot resign and Energy Pro must pay her additional fees.[20]

[16] Record, page 22: "Statement of Defense"
[17] Id.
[18] Id.
[19] Id.
[20] Id.

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."[21]

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.[22] Both Syrus and Catalan, where Claimant and Respondent respectively are based, are party to the CISG.[23] 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.[24] Whether the parties have legally done so is determined by a case-by-case analysis of the parties' intent.[25] 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, including those laws that would otherwise provide for the application of the CISG.[26]

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[21] Record, page 12: "Claimant's Exhibit No.2".
[22] *See* Art. 1(1)(a) CISG 2010.
[23] *See* Record, page 6: "Application for Arbitration".
[24] *See* Art. 6 CISG 2010; *see also* Art. 12 CISG 2010.
[25] *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.
[26] *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.

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.[27] 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.[28] 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. Energy Pro Cannot Bring Future Energy Into The Present Arbitration Proceedings.

Claimant concedes that Future Energy is a third party to the arbitration clause of the Purchase Contract providing the basis for the tribunal's jurisdiction.[29] Yet, under both the CIETAC Arbitration Rules (2012) (A) and the arbitration law of the People's Republic of China (B), Future Energy cannot – as a third party – be joined in the present arbitration. In fact, even in jurisdictions that – unlike China – do allow for the joinder of

[27] *See* Record, page 12: "Claimant's Exhibit No.2"
[28] *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".
[29] Application for Arbitration ¶ 18.

non-signatories to the arbitration agreement, Energy Pro's attempt to join Future Energy to the present arbitration would fail (C). In any event, the joinder of Future Energy to this arbitration would constitute a violation of the due process that is due to Future Energy, and should be resisted on both fairness and efficiency grounds (D). Under such circumstances, allowing the joinder of Future Energy in this arbitration would hurt the legitimacy of any resulting award (E).

A. The CIETAC Rules of Arbitration (2012) do not provide for joinder of third parties

Future Energy cannot be joined to this arbitration because the CIETAC Arbitration Rules (2012) simply do not allow joinder. Nowhere do the CIETAC Arbitration Rules (2012) provide for joinder of third parties in the arbitration proceedings it administers. Because this omission contrasts with other arbitration rules that do provide for joinder, it must be assumed that the CIETAC Arbitration Rules *deliberately* exclude joinder of third parties.

Moreover, because the arbitration clause of the Purchase Contract refers specifically to the CIETAC Arbitration Rules (2012), it must be presumed that the parties agreed to forego joinder of third parties as a feature of their arbitration. Had the parties intended to provide for joinder, they would have either chosen another arbitration institution to administer their arbitration or expressly provided for joinder in the arbitration clause. They did not, however, do any of this.

A. The Arbitration Law of China prohibits third party joinder.

Claimant’s attempt to join Future Energy to this arbitration does not fare better under China’s Arbitration Law. As the IBA Arbitration Committee's Guide to Arbitration in China simply puts it, "[u]nder the Arbitration Law . . ., non-signatory

parties cannot join arbitration proceedings by way of joinder or intervention." [30] Moreover, arbitration agreements do not bind non-signatories, "except in certain situations such as agency, assignment of rights or mergers,"[31] none of which are relevant to the case at hand.

Both the CIETAC Rules and the Arbitration Law of China, therefore, exclude the joinder of third parties to arbitration proceedings. Under such circumstances, Future Energy plainly cannot join this arbitration.

In fact, even in jurisdictions that are less restrictive about joinder than China, the joinder of Future Energy to this arbitration would not be allowed.

B. Even in jurisdictions that – unlike China – allow joinder, the joinder of Future Energy would be prohibited

In the jurisdictions that do – unlike China – provide for joinder of third parties to arbitration proceedings, joinder will only be allowed if it satisfies two cumulative conditions,[32] which echo the conditions under which consolidation will be allowed under the CIETAC Arbitration Rules (2012).[33] First, the third party must expressly give its consent to be bound by the arbitration clause. Second, all parties to the arbitration must consent to the third party joinder. These conditions are cumulative. Yet, neither is satisfied in the present case.

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[30] *IBA Arbitration Committee's Guide to Arbitration in China* 6 (Feb. 2012).
[31] *Id.* at 7.
[32] Gary B. Born, *Chapter 12 : Multiparty and Multicontract Issues in International Arbitration, in* INTERNATIONAL ARBITRATION: LAW AND PRACTICE 221, 221 (2012) ("consolidation and joinder/intervention in international arbitration are generally possible only where all parties have agreed to such a result, typically in their original arbitration agreement. . . . Where the parties have not consented, however, national law generally does not permit consolidation or joinder/intervention – either through orders of an arbitral tribunal or a national court.").
[33] CIETAC Arbitration Rules (2012), art. 17(1) ("At the request of a party and ***with the agreement of all the other parties***, or where CIETAC believes it necessary and ***all the parties have agreed***, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration.") (emphasis added).

CFX has (1) unambiguously opposed the joinder of Future Energy in this arbitration and (2) Future Energy has not consented to the arbitration. Even if Future Energy is found to have consented (an outcome which is unlikely), (3) such consent is vitiated by the duress through which the alleged consent would have been obtained.

1. CFX has not consented to the joinder of Future Energy in this arbitration.

CFX has never consented to the joinder of any third party in this arbitration. As argued above, neither the arbitration clause in the Purchase Contract nor the CIETAC Arbitration Rules provide for third party joinder. Nor has CFX consented to such joinder after the present dispute arose. Rather, CFX has consistently and expressly opposed the joinder of Future Energy to this arbitration.[34] This is sufficient to render the joinder of Future Energy impermissible. However, for the sake of argument, it is important to point out that Future Energy itself also has withheld its consent to be joined.

2. Future Energy has not consented – impliedly or explicitly – to arbitration.

Future Energy has not given its consent to be joined to the arbitration. It has not given its consent to be joined before the dispute arose, nor has it given its consent to arbitrate disputes related to the transactions at stake here. Indeed, Future Energy is not a party to the arbitration clause contained in the Purchase Contract, and has not given its consent to arbitration in any separate written agreement. While Claimant states in a conclusory fashion that "Future Energy Inc. had [sic] agreed to participate in the arbitration proceedings," Claimant provides no evidence of the existence of such an agreement to arbitrate, even less so of an agreement to arbitration that would satisfy all the validity requirements imposed by China's Arbitration Law. Because such an

[34] Statement of Defense ¶ 5.

agreement cannot be presumed to exist, Claimants request for a joinder of Future Energy must fail.

3. In the alternative, any consent to arbitration given by Future Energy is vitiated by duress.

In any event, even if the tribunal were to find that Future Energy did agree to be joined to the present arbitration, such an agreement would be vitiated by duress. According to article 17 of the Arbitration Law of PRC, an arbitration agreement may be invalidated if "one party coerced the other party to sign the arbitration agreement by means of duress." In the present case, Energy Pro coerced Future Energy to give its alleged consent to join the proceedings. Energy Pro's threat to initiate legal proceedings against Future Energy should it choose not to participate in the arbitration between Energy Pro and CFX is abusive and constitutes duress. Under these circumstances, any alleged agreement to arbitrate given by Future Energy would be invalid.

C. In any event, joining Future Energy to this arbitration would be both unfair and inefficient

In any event, the Tribunal should refuse Energy Pro's request to join Future Energy to the present proceedings on fairness and efficiency grounds.

The requested joinder would be unfair to Future Energy. Future Energy did not, among other things, get a chance to participate in the selection and appointment of the arbitrators in the present dispute. As Gary Born has argued, this "raises important due process concerns. . . . many jurisdictions require that the parties be treated equally in the arbitral proceedings; this principle applies with particular force to the parties' participation in the constitution of the tribunal. It is, however, difficult to ensure equality of treatment in selecting arbitrators in cases involving consolidation or

joinder/intervention."[35]

Moreover, joining Future Energy to this arbitration would be detrimental to CFX's confidentiality and protection of its trade secrets.

Finally, Energy Pro's liability toward CFX is independent from the issue of Future Energy's liability toward CFX. Under such circumstances, joining Future Energy to the present arbitration would only delay the proceedings and make them more costly. In this regard, it is worth noting the irony of Energy Pro's request for joinder at a time when it is also refusing to pay Ms. Arbitrator 1's additional fees relating to the allocation of additional days to hear the issue of quantum.[36]

D. Under such circumstances, joining Future Energy would hurt the legitimacy and enforceability of the award to be rendered in this arbitration.

If the tribunal were to allow the joinder of Future Energy to this arbitration, the legitimacy and enforceability of any resulting award would be jeopardized.

China has signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1986, and ratified it in 1987. The New York Convention provides the grounds on which the Contracting Parties may withhold the recognition and enforcement of an arbitral award. This Convention reaffirms the consensual nature of international arbitration as its quintessential characteristic. For instance, Article V(1)(a) of the New York Convention provides that the Contracting Parties may deny recognition or enforcement of an award if it is based on an invalid arbitration agreement.[37]

Claimant's attempt to join Future Energy to the present arbitration against Future

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[35] Gary B. Born, *Chapter 12 : Multiparty and Multicontract Issues in International Arbitration*, *in* INTERNATIONAL ARBITRATION : LAW AND PRACTICE 221, 228 (2012)
[36] *See* Procedural Order No. 2, ¶ 10.
[37] New York Convention, art. V(1)(a).

Energy's and CFX's will goes against the consensual nature of international arbitration. As a leading practitioner and commentator has argued, joinder under such circumstances "should be seen as contrary to the New York Convention."[38] If Future Energy were to be joined against its and CFX's will, therefore, the legitimacy and enforceability of the resulting award would suffer, rendering it useless for all practical matters.

III. Ms. Arbitrator 1 Has a Duty to Remain on the Panel During the Quantum Phase of this Arbitration.

Ms. Arbitrator 1 must remain on the panel through the quantum phase of this arbitration, as she has a duty (A) to complete her mandate and (B) to fulfill this mandate diligently.

A. Ms. Arbitrator 1 has a duty to complete her mandate.

Ms. Arbitrator 1 has a duty to complete her mandate in this arbitration, and her resignation without good cause constitutes a breach of her contract of appointment.

Article 31(1) of the CIETAC Arbitration Rules (2012) addresses the issue of arbitrator resignation in CIETAC arbitration. Article 31(1) provides: "In the event that an arbitrator is ***prevented*** de jure or de facto ***from fulfilling his/her functions***, or fails to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office." Although the CIETAC Rules do not expressly address the question of

[38] Gary B. Born, *Chapter 12: Multiparty and Multicontract Issues in International Arbitration*, *in* INTERNATIONAL ARBITRATION : LAW AND PRACTICE 221, 221 (2012) ("a few states diverge from this approach by permitting non-consensual arbitration, citing considerations of efficiency and fairness. These jurisdictions are exceptions to the general recognition of the parties' autonomy (and the approaches they adopt should be seen as contrary to the New York Convention.")

when an arbitrator is allowed to resign from an arbitral tribunal, the wording of Article 31(1) strongly suggests that resignation is contemplated only in extreme circumstances when the arbitrator is "prevented . . . from fulfilling his/her functions," due to reasons beyond his or her control.

In fact, leading commentators agree that there are implied limits to the arbitrator's right to resign, both under the CIETAC Rules and in international arbitration generally. As a leading commentary to Article 27(1) of the 2005 Rules explains, "an arbitrator may not resign from an arbitral tribunal as he wishes, but can only do so where there exist *justifiable reasons that impede him from fulfilling his task as an arbitrator*. In practice, it is rare that arbitrators resign, and where they do, their request *needs to be approved by the Chairman of CIETAC*, who will usually grant such request."[39] As Article 31(1) of the 2012 Rules is for every purpose the same as Article 27(1) of the 2005 CIETAC Arbitration Rules, these observations apply with equal force to the 2012 Rules.[40]

As Gary Born argues in relation to international arbitration generally, *"[a]n arbitrator is . . . contractually obligated to complete the mandate which he or she accepts, and therefore not to resign during the course of the arbitration without good cause. . . .* [F]or the most part, however, national law and institutional rules are silent concerning the circumstances in which an arbitrator may properly withdraw. *Whether or not express provisions dealing with the subject exist, and arbitrator's acceptance of his or her appointment entails an implied undertaking to complete that mandate, by issuing a*

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[39] Jingzhou Tao, *CIETAC Arbitration Rules: Article 27*, *in* CONCISE INTERNATIONAL ARBITRATION 542, 543 (Loukas A. Mistelis ed. 2010) (emphasis added).

[40] Article 27(1) of the CIETAC Arbitration Rules (2005) provides: "In the event that an arbitrator is prevented de jure or de facto from fulfilling his functions, or it fails to fulfill his functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of the CIETAC shall have the power to decide whether the arbitrator shall be replaced. The arbitrator may also withdraw from his office."

final award . . . . An arbitrator's resignation, without good cause, is a breach of this undertaking."[41]

The resignation of Ms. Arbitrator 1 in the case at hand is wrongful for two reasons. First, Ms. Arbitrator 1's resignation is without good cause. Her reason for resigning is Energy Pro's refusal to deposit the additional fees to cover the increase in the time allocated for the oral hearing on quantum. While this could possibly constitute good cause to terminate a traditional bilateral contract, the contractual relationship that is embodied in the terms of appointment of an arbitrator is not merely bilateral. The appointment contract is not binding merely on the appointing party (here, Energy Pro) and the party-appointed arbitrator. Rather, the contract binds the arbitrator to all the parties to the arbitration – here, both Energy Pro and CFX.[42] Moreover, it is arguable that the fees that correspond to an extra three days of hearing are *de minimis* as compared to the global arbitrator fees that will be incurred in this arbitration, and Energy Pro's failure to make a deposit to transfer these fees is a problem that can easily be addressed and solved in the final award, when the tribunal decides on the allocation of arbitration costs and fees. Second, to date, Ms. Arbitrator 1 has not submitted any request to resign for the quantum phase to the Chairman of CIETAC, as required by the CIETAC Arbitration Rules.

Under these circumstances, therefore, Ms. Arbitrator 1's resignation should not be allowed. Ms. Arbitrator 1 has a duty to complete her mandate, which includes issuing an

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[41] Gary B. Born, *Rights and Duties of International Arbitrators: Obligations of International Arbitrators*, *in* INTERNATIONAL COMMERCIAL ARBITRATION 1615, 1633-1634 (2009).

[42] Gary B. Born, *Rights and Duties of International Arbitrators: The Arbitrator's Contract*, *in* INTERNATIONAL COMMERCIAL ARBITRATION 1605, 1605 (2009) ("the focus of the arbitrator's contract is on the arbitrator's obligations to the parties, and the reciprocal obligations of the parties to the arbitrator, and not on the parties' relations with each other.").

award on both merits and quantum.

B. Ms. Arbitrator 1's resignation would breach of her duty to handle the case in a diligent and cautious manner

In addition to breaching her duty to complete her mandate, Ms. Arbitrator 1's resignation would constitute a breach of her duty to handle this case in a diligent and cautious manner.

Article 5 of the CIETAC Rules for Evaluating the Behavior of Arbitrators[43] provides that "[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."[44] More specifically, when addressing the procedure and sanctions to be followed by a party who believes that an arbitrator his not fulfilling her duties in a satisfactory manner, Article 9 of the Code of Conduct for CIETAC and CMAC[45] refers to the situation where "an arbitrator's handling of a case . . . may seriously ***affect the quality*** and impartiality ***of the case and prevent its timely resolution***."[46]

In the case at hand, Ms. Arbitrator 1's decision to resign after the merits phase and before the start of the quantum phase would affect the quality of the arbitration and prevent its timely resolution. Because Ms. Arbitrator 1 would be in the best position to decide on the quantum issues after having heard the merits of the case, her resignation followed by the appointment of a replacement arbitrator risks hurting the quality of the decision-making process and the resulting award.

Moreover, "[t]he resignation of an arbitrator strongly affects the arbitration

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[43] 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.
[44] CIETAC Rules for Evaluating the Behavior of Arbitrators, art. 5 (emphasis added).
[45] Code of Conduct for CIETAC and CMAC, adopted on 6 April 1993, as revised on 6 May 1994.
[46] Code of Conduct for CIETAC and CMAC, art. 9 (emphasis added).

proceedings, as it causes delays and supplementary costs in the case of a replacement."[47] This is particularly true in arbitrations under the CIETAC Rules, which provide, in Article 31(4): After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated." [48] In the event that Ms. Arbitrator 1 resigned, therefore, her conduct would prevent the time resolution of the case, and risk significant inefficiencies.

For the aforementioned reasons, Ms. Arbitrator 1's resignation should not be allowed. Ms. Arbitrator 1 cannot resign from the arbitration proceedings after the merits phase and before the quantum phase.

IV. CFX is entitled to avoid both Clause 15.1 and 15.2 of the Purchase Contract due to "gross disparity" between the parties.

The Purchase Contract, in particular Clause 15.1 and 15.2, was on the whole unreasonable and one-sided that they evince "gross disparity" between the parties and thus CFX is entitled to avoid such clauses pursuant to the PICC. The PICC's provisions on gross disparity are mandatory and cannot be derogated from and thus apply herein.[49] The PICC permits a party to avoid a contract or specific obligations therein, where it gives one party an advantage that is (1) "excessive," such that the disequilibrium is so great as to "shock the conscience of a reasonable person," and (2) "unjustifiable," which is determined upon evaluating all relevant circumstances, including (i) whether a party

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[47] Jingzhou Tao, *CIETAC Arbitration Rules: Article 27*, *in* CONCISE INTERNATIONAL ARBITRATION 542, 543 (Loukas A. Mistelis ed. 2010).
[48] CIETAC Arbitration Rules (2012), art. 31(4).
[49] *See* Art. 3.1.4 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, 295 (1994).

has leveraged an unfair advantage and (ii) the nature and purpose of the contract.[50]

That said, the provisions in Clause 15.1 or 15.2, individually and jointly, are so one-sided that they place an unreasonable burden on CFX while allowing to Energy Pro to escape its obligations without consequences. Indeed, they give Energy Pro an "excessive advantage" that is wholly "unjustified." As such, CFX is entitled to avoid Clause 15.1 and 15.2 of the Purchase Contract because due to "gross disparity" between the parties.

A. CFX is entitled to avoid Clause 15.1 of the Purchase Contract because it unjustifiably gives Energy Pro an excessive advantage and thus the PICC determine whether the contact was validly terminated.

CFX may avoid Clause 15.1 of the Purchase Contract because the obligations contained within Clause 15.1, especially in conjunction with Clause 15.2, would unjustifiably give Energy Pro an excessive advantage.[51] As such, the PICC, and not Clause 15.1, determine whether a contract was validly terminated.

1. Clause 15.1 of the Purchase Contract were so unequal such that they shock the conscience of a reasonable person and gave Energy Pro an excessive advantage.

Clause 15.1 would exclusively benefit Energy Pro to such an extent that it shocks the conscience of a reasonable person. Clause 15.1 would allow Energy Pro to terminate the contract even where, as here, CFX was validly withholding payment pursuant to PICC Article 7.1.3, in response to Energy Pro's own non-performance.[52] What is more shocking is that Clause 15.1 would extend the ability to terminate in this situation only to Energy Pro, but not CFX.[53] As such, Clause 15.1 would provide to Energy Pro, *but not* CFX, means to terminate a contract where the party seeking termination is the initial

[50] *See* Id.
[51] *See* Art. 3.2.7 UNIDROIT Principles 2010
[52] Record, page 11: "Claimant's Exhibit No. 2"
[53] *See* Id.

party in breach.

Effectively, under Clause 15.1 Energy Pro could theoretically refuse to deliver the contracted-for gearboxes and if CFX were then to withhold payment in response to Energy Pro's non-performance, Energy Pro could use this as grounds for terminating the contract pursuant to Clause 15.1.[54] This thereby relieves Energy Pro of its obligation to deliver the gearboxes and potentially allows it to claim the entire value of the purchase contract as a "termination penalty."[55] In effect, Clause 15.1 allows Energy Pro to perform none of its obligations, yet still terminate the contract as the "aggrieved" party and potentially claim 10 million USD under Clause 15.2, all the while putting CFX in a precarious business situation where it has relied upon Energy Pro's performance in order to satisfy its own contract with Turbofast.[56] If Clause 15.1 were given effect, Energy Pro's actions in the above scenario would differ from the current dispute only in that Energy Pro has failed to deliver anything in the former rather than delivering completely useless gearboxes in the latter.[57] As such, Clause 15.1 is clearly shocking and excessive.

2. Clause 15.1 gave Energy Pro an unjustifiable advantage upon an evaluation of all the relevant circumstances.

Clause 15.1 unjustifiably seeks to construct a situation where CFX is at the mercy of Energy Pro. It is unsurprising that Energy Pro drafted both the Joint Venture Agreement and the Purchase Contract.[58] Energy Pro has drafted terms which are completely outside the bounds of good faith and fair dealing which give Energy Pro the ability to unjustly abuse its rights to the detriment of CFX.

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[54] *See* Id.
[55] *See* Record, page 11-12: "Claimant's Exhibit No. 2"; *See* Art. 3.2.7 UNIDROIT Principles 2010
[56] *See* Record, page 4: "Application for Arbitration"; Record, page 11: "Claimant's Exhibit No. 2"
[57] *See* Record, page 14: "Claimant's Exhibit No. 4"; Clarifications, page 14.
[58] *See* Record, page 21: "Statement of Defence"

There can be no just reason for Energy Pro to be have the sole power to perpetrate the type of abuse illustrated by the above hypothetical or the potential abuse Energy Pro is attempting herein. It certainly does not facilitate the purchase of gearboxes if Energy Pro holds the ability to withhold delivery without consequences and subsequently attempts to claim an egregious "penalty." Energy Pro has taken advantage of its market power to construct terms which are completely at odds with the nature and the purpose of the Purchase Contract. As such, Clause 15.1 unjustifiably gives Energy Pro an excessive advantage and hence CFX is entitled to avoid Clause 15.1. This means that the PICC, and not Clause 15.1 determines whether Energy Pro validly terminated the Purchase Contract.

B. CFX is entitled to avoid Clause 15.2 of the Purchase Contract because it unjustifiably gives Energy Pro an excessive advantage and thus the PICC defines the applicable remedies where the contract is validly terminated.

CFX may avoid Clause 15.2 of the Purchase Contract because the obligations contained within Clause 15.2, especially in conjunction with Clause 15.1, would unjustifiably give Energy Pro an excessive advantage pursuant to PICC Article 3.2.7. As such, the PICC, and not Clause 15.2, defines the applicable remedies if the contract were validly terminated.

1. Clause 15.2 of the Purchase Contract were so unequal such that they shock the conscience of a reasonable person and gave Energy Pro an excessive advantage.

The "termination penalties" provided in Clause 15.2 are so one-sided and unreasonable that they shock the conscious of an reasonable person. Clause 15.2 attempts to furnish Energy Pro, but not CFX, the ability to claim the entire value of the contract all the while being relieved any further contractual obligations and gaining a claim for

restitution for whatever it supplied under the contract.[59] Clause 15.2 would in effect give Energy Pro the ability to claim 10 million dollars from CFX while reclaiming as restitution anything of value rendered to CFX.[60] This provision becomes even more shocking when read in conjunction with Clause 15.1, which has been already been shown to provide Energy Pro with the exclusive means to terminate the Purchase Contract even when CFX was merely validly withholding payment as a result of Energy Pro's breach.[61] But regardless of the means of termination, Clause 15.2 is shocking and clearly excessive.

2. Clause 15.2 gave Energy Pro an unjustifiable advantage upon an evaluation of all the relevant circumstances.

Clause 15.2 unjustifiably seeks to provide an excessive "termination penalty" to Energy Pro if the contract is validly terminated. Again, it is unsurprising that Energy Pro drafted both the Joint Venture Agreement and the Purchase Contract.[62] Energy Pro has drafted terms which are completely outside the bounds of good faith and fair dealing which give Energy Pro the ability to unjustly abuse its rights to the detriment of CFX.

It would give Energy Pro an unjustifiable advantage to have the exclusive power to claim the penalties under Clause 15.2 given that it can concurrently claim PICC's default remedies.[63] Following valid termination, the default remedies of the PICC would relieve Energy Pro from any further contractual obligations while providing it with a claim for restitution for whatever it supplied under the contract.[64] As such, there is no just reason for Energy Pro to be able to claim the entire 10 million USD value of the contract as well

[59] *See* Art. 7.3.5 UNIDROIT Principles 2010; *see also* Art. 7.3.6 UNIDROIT Principles 2010
[60] *See* Record, page 11: "Claimant's Exhibit No. 2"; *See* Art. 7.3.6 UNIDROIT Principles 2010
[61] *See* Record, page 11: "Claimant's Exhibit No. 2"
[62] *See* Record, page 21: "Statement of Defense"
[63] *See* Art. 7.4.1 UNIDROIT Principles 2010
[64] *See* Art. 7.3.5 UNIDROIT Principles 2010; *see also* Art. 7.3.6 UNIDROIT Principles 2010

as restitution, all the while being relieved from any further contractual obligations.

It certainly does not facilitate the purchase of gearboxes if Energy Pro is given the perverse incentive to terminate the contract because it would stand to gain more from termination than from the completion of the contract. This is because under the terms of Clause 15.2, Energy Pro would not only obtain (1) the pecuniary value of the contract but also (2) restitution of whatever it had supplied since the contract would be terminated, while only being able to secure the former if the contract were performed.[65] Indeed, Energy Pro has taken advantage of its market power to construct terms which are completely at odds with the nature and the purpose of the Purchase Contract: to facilitate the purchase of gearboxes. As such, Clause 15.2 unjustifiably gives Energy Pro an excessive advantage and hence CFX is entitled to avoid Clause 15.2. That said, this means that not only does the PICC determine whether the contract was validly terminated, as demonstrated above, but it also determines what remedies are applicable where termination is valid.

V. Energy Pro did not validly terminate the contract because CFX's actions do not constitute the fundamental non-performance that is required for valid termination.

Since the PICC determines whether termination was valid herein, pursuant to PICC Article 7.3.1, Energy Pro did not validly terminate the contract because CFX's actions do not constitute the "fundamental non-performance" required in order for a contract to be validly terminated by Energy Pro. CFX was entitled to withhold payment pending Energy Pro's remedy of its own non-performance of its obligation to deliver goods in

[65] *See* Record, page 11: "Claimant's Exhibit No. 2"; *See* Art. 7.3.6 UNIDROIT Principles 2010.

conformance with the purchase contract in accordance with PICC Article 7.3.1.[66]

A. Pursuant to the PICC, Energy Pro did validly terminated the contract because CFX's valid withholding of payment did not constitute "fundamental non-performance."

Since Clause 15.1 may be avoided, hence PICC Article 7.3.1 on the "Right to Terminate the Contract" determines whether termination was valid.[67] As such, Energy Pro did not validly terminate the contact because CFX's actions did not constitute the "fundamental non-performance" required for termination under the PICC.[68] The PICC provides: "a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance."[69] Whether one party's actions constitute fundamental non-performance depends upon the weighing of a number of relevant considerations, five of which are enumerated in Article 7.3.1 (2).[70]

The PICC also provides: "where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."[71] Therefore, rather than "fundamental non-performance," CFX's suspension of further payments constituted withholding performance pending proof that Energy Pro had performed its own contractual obligations. [72]

Energy Pro admitted in its letter to Future Energy, dated 1 January 2013, that Energy Pro "had the burden to make sure that the gearboxes met the requirements" under Clause

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[66] *See* Art. 7.3.1 UNIDROIT Principles 2010
[67] *See* Id.
[68] *See* Id.
[69] *See* Art. 7.3.1(1) UNIDROIT Principles 2010
[70] *See* Art. 7.3.1(2) and Comments UNIDROIT Principles 2010
[71] Art. 7.1.3 UNIDROIT Principles 2010
[72] *See* Record, page 16: "Claimant's Exhibit No. 6".

(A) of the contract.[73] However, the gearboxes that CFX received did not meet these requirements, a fact which was admitted by Energy Pro.[74] As such, pursuant to PICC Article 7.1.3 (2), CFX was entitled to withhold performance until Energy Pro had performed its contractual obligations to deliver conforming gearboxes.

As such, CFX's valid withholding of payment could not have constituted "fundamental non-performance" pursuant the factors elucidated in PICC Article 7.1.3 subsection (2). First, Energy Pro could not have been "substantially deprived" of what it was "entitled to expect under the contract" when it was the party that first failed to perform its contractual obligations.[75] Second, strict compliance fails to become "of essence" where both parties reciprocally perform their obligations.[76] Third, CFX's withholding of payment was "intentional" only insofar as it was exercising a valid right pursuant to the PICC.[77] Fourth, CFX's withholding of payment does not give Energy Pro reason to believe that it cannot rely on CFX's in the future.[78] Therefore, in light of these factors, Energy Pro did not validly terminate the contract pursuant to the PICC.

1. CFX's valid withholding of payment could not have substantially deprived Energy Pro of what it expected under the contract.

Energy Pro could not have been "substantially deprived" of what it was "entitled to expect under the contract" pursuant to PICC Article 7.3.1 (2)(a). While Energy Pro expected payment, it could not have expected to have received payment where it rendered gearboxes that were completely useless. For Energy Pro to claim otherwise, namely that it expected to be paid whether or not CFX received goods that conformed to the contract

[73] *See* Record, page 19: "Claimant's Exhibit No. 9"; *See* Record, page 10: "Claimant's Exhibit No. 2".
[74] *See* Record, page 13: "Claimant's Exhibit No. 3"; *See* Record, page 19: "Claimant's Exhibit No. 9".
[75] *See* Art. 7.3.1(2)(a) UNIDROIT Principles 2010
[76] *See* Art. 7.3.1(2)(b) UNIDROIT Principles 2010
[77] *See* Art. 7.3.1(2)(c) UNIDROIT Principles 2010
[78] *See* Art. 7.3.1(2)(d) UNIDROIT Principles 2010

or provided any value to CFX whatsoever would quite simply be a violation of the requirements of good faith and fair dealing.[79] As such, CFX's valid withholding of payment could not have substantially deprived Energy Pro of what it expected under the contract, unless what Energy Pro expected was inherently unreasonable and in violation of good faith and fair dealing.

2. "Strict compliance" was not "of essence" since Energy Pro had not performed its obligations in conformance with the contract.

Strict compliance of the unperformed obligation cannot be "of essence" pursuant to PICC Article 7.3.1 (2)(b) because CFX was validly withholding performance in response to Energy Pro's initial breach of its contractual obligations. The main point of the contract was undoubtedly the exchange of money for GJ 2635 gearboxes. While payment itself, just like delivery of conforming goods, is "of essence" under the contract, timely payment cannot be of essence when payment is being validly withheld pending the delivery of conforming goods. While it would be different if CFX completely refused to pay Energy Pro, but herein CFX merely refused to make further payments until it was shown that Energy Pro had fulfilled its contractual obligations.[80] As such, "strict compliance" in the sense of timely payment is not "of essence" herein given the context of the dispute.

3. CFX's withholding of payment was "intentional" only insofar as it was exercising a valid right pursuant to the PICC.

CFX's non-payment was "intentional," under PICC Article 7.1.3 (2)(c), only insofar as it was exercising a valid right pursuant to the PICC. Since CFX was validly withholding payment pursuant to PICC Article 7.1.3, it would be inconsistent and

[79] *See* Art. 1.7 UNIDROIT Principles 2010
[80] *See* Record, page 16: "Claimant's Exhibit No. 6"

unreasonable to hold the intentionality of such actions as indicative of "fundamental non-performance" that would allow Energy Pro to terminate the contract.[81] Surely Section 3 (Termination) of the PICC could not have been intended to deter a parties' valid exercise of its rights in Section 2 (Right to Performance). Hence, because CFX was exercising its rights pursuant to the PICC, CFX's actions were necessarily intentional, but such a valid exercise of rights cannot and should not be counted against CFX in a determination for "fundamental non-performance."

4. CFX's valid withholding of payment did not give Energy Pro reason to believe that it could not rely on CFX in the future.

Energy Pro cannot use CFX's reasonable and understandable response to its own breach as reason to believe that it cannot rely upon CFX in the future. While it is true that future payments were still outstanding, it is not true that Energy Pro cannot rely upon CFX to make the outstanding payments.[82] Again, while it would be different if CFX completely refused to pay Energy Pro, herein CFX merely refused to make further payments until it was shown that Energy Pro had fulfilled its contractual obligations.[83] As such, there is no reason for Energy Pro to believe that once it cures its own defective performance, CFX would not perform its contractual obligations.

As such, after reviewing the factors enumerated in Article 7.3.1 (2), it is clear that CFX's valid withholding of payment does not constitute "fundamental non-performance." The only factor that does not weigh against finding "fundamental non-performance" is PICC Article 7.1.3 2(e): CFX would not suffer "disproportionate loss" if the contract is terminated because it adamantly denies the validity of Clause 15.2 and

[81] *See* Art. 7.3.1 UNIDROIT Principles 2010
[82] *See* Record, page 10: "Claimant's Exhibit No.2"
[83] *See* Record, page 16: "Claimant's Exhibit No.6"

would be entitled to restitution pursuant to PICC Article 7.3.6 if the contract were validly terminated. But since the weight of the factors clearly demonstrate that CFX's valid withholding of performance did not constitute "fundamental non-performance," Energy Pro did not validly terminate the contract.

VI. Energy Pro cannot claim the termination penalty because the contract was not validly terminated; but even if it were validly terminated, the gross disparity between the parties entitles CFX to avoid Clause 15.2 of the contract.

Energy Pro cannot claim the termination penalty provided by Clause 15.2 because the contract was not validly terminated. But even assuming that the contract were validly terminated, the gross disparity between the parties entitles CFX to avoid Clause 15.2 of the contract and thus Energy Pro would nonetheless not be able to claim the termination penalties therein.[84]

Moreover, even assuming that (1) the contract were validly terminated and (2) Clause 15.2 was valid, Energy Pro could still not claim the "termination penalties" therein. This is because even if it were the case that the contract were validly terminated pursuant to the PICC, Clause 15.2 would then not be applicable as it only applies if Energy Pro terminates the contract pursuant to Clause 15.1 of the Purchase Contract.[85]

A. Energy Pro cannot claim the termination penalty because the contract was not validly terminated.

Clause 15.2 of the Purchase Contract applies only "in the event Energy Pro Inc.

[84] *See* Art. 3.1.4 and Comments UNIDROIT Principles 2010
[85] Record, page 11: "Claimant's Exhibit No.2"

terminates the Purchase Contract."[86] As such, because Energy Pro did not validly terminate the Purchase Contract, Energy Pro cannot claim the "termination penalty" provided in Clause 15.2.

B. Even if the contract was validly terminated, since CFX is entitled to avoid Clause 15.2 of the Purchase Contract, Energy Pro cannot validly claim the "termination penalty."

However, even assuming for the sake of argument that the Purchase Contract were validly terminated, Energy Pro cannot claim the termination penalty because, as shown above, gross disparity between the parties allows CFX to avoid Clause 15.2 of the Purchase Contract.[87] As such, even if the contract were validly terminated, the PICC, and not Clause 15.2, determine the applicable remedies for contract termination and consequently Energy Pro cannot validly claim the "termination penalty."

[86] Id.
[87] *See* Art. 3.2.7 and Comments UNIDROIT Principles 2010

REQUEST FOR RELIEF

Respondent respectfully requests that the tribunal find that:

1. Energy Pro may not bring Future Energy Inc. into the arbitration proceedings as a third party.
2. Arbitrator 1's resignation during the arbitration proceedings was improper.
3. Energy Pro did not validly terminate the contract.
4. Energy Pro may not claim the termination penalty provided in Clause 15.2 of the Purchase Contract.