FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

28TH JULY TO 3RD AUGUST

HONG KONG

MEMORANDUM

FOR

RESPONDENT

ON BEHALF OF:	**AGAINST:**
CFX LTD.	ENERGY PRO INC.
26 Amber Street	28 Ontario Drive
Circus Avenue	Aero Street
Catalan	Syrus
RESPONDENT	**CLAIMANT**

TEAM CODE - 590

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TABLE OF ABBREVIATIONS

§	Article of UPICC
¶/¶¶	Paragraph/paragraphs of moot Problem
AAA	American Arbitration Association
ABA	American Bar Association
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
Claimant	Energy Pro Inc.
Clause	Clause of the Agreement
Eg.	Example
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
ICA	Indian Council of Arbitration
ICC	International Chamber of Commerce
LC	Law Commission
NYC	United Nations Convention on the Recognition and Enforcement of

	Foreign Arbitral Awards
Off Cmt	Official Comment to the PICC (UNIDROIT, 2004)
p.no.	Page number
P.O	Procedural order
PC	Purchase contract
Res.	Respondent
Respondent	CFX Ltd.
SOD	Statement of defence
Third Party	Future Energy Inc.
UML on arbitration	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UPICC	UNIDROIT Principles of International Commercial Contracts of 2004

TABLE OF AUTHORITY

TREATIES, CONVENTIONS AND LAW

CIETAC RULES	Arbitration Rules of the China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
ICC rules	International Chamber Of Commerce Rules of Arbitration (Revised on 1st January 2012)
ICSID	International Center for Settlement of Investment Disputes
MODEL LAW	UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006)
NEW YORK CONVENTION	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 2004
UNIDROIT commentary	UNIDROIT Principles of International Commercial Contracts of 2004, Commentary

BOOKS AND COMMENTARIES

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Giuditta Cordero Moss	International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards, such as good faith, Global Jurist: Vol. 7: Iss. 1 (Advances) (Cited as *Giuditta*)	**4**
Greenberg, Simon	Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective 7(2) Transnational Dispute Management 1, 2010 (Cited as *Greenberg*)	**13**
Henschel, René Franz	The Conformity of Goods in International Sales, Forlaget Thomson A/S, Copenhagen, 2005 (Cited as *Henschel*)	**17**
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Lookofsky	Understanding the CISG(2008) p.no 73 seq.; Gillette/Walt, Sales Law(2009) Ch.8-III p.361 (Cited as *Lookofsky*)	**16**
Maley,	The limits to the conformity of Goods, 12 International Trade and Business Law Review, (2009) 82 (106 seq.) (Pace) (Cited as *Maley*)	**25**
Neumayer, Karl Ming, Catherine	Convention de Vienne sur les Contrats de Vente Internationale de Marchandises – Commentaire CEDIDAC Lausanne 1993 (Cited as *Neumayer*)	**17, 20**
P.Scholdstrom,	The Arbitrator's Mandate-A Comparative Study of Relationships in Commercial Arbitration under the laws of England, Germany, Sweden and Switzerland, 346(1998) (Cited as *Scholdstrom*)	**11**
Poudret, Jean-François and	Comparative Law Of International Arbitration, Sweet	**2, 15**

Sébastien Besson	& Maxwell, London 2007 (Cited as *Poudret/Besson*)	
R. Caivano	Dispute Settlement, UNCTAD, p.no 22, ¶ 3.4 (Cited as *Caivano*)	**4**
Schlechtriem, Peter and Ingeborg Schwenzer (eds.)	Kommentar Zum Einheitlichen Un-Kaufrecht Verlag C.H. Beck, Munich 2004 (Cited as *Schwenzer*)	**20,** **21,** **38**
Schlechtriem, Peter and Schwenzer	Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd ed., Oxford University Press, 2005 (Cited as *Schlechtriem*)	**20,** **21,** **28,** **34,** **36**
Simon Greenberg, Christopher Kee and J. Romesh Weeramantry	International Commercial Arbitration: An Asia Pacific Perspective, Cambridge University Press (Cited as *Simon/Christopher/Romesh*)	**2**
Stefan Kroll,Loukas Mistelis,Pilar Perales Viscasillas	UN Convention on Contracts for the International Sale of Goods commentary, C.H Beck/Hart/Nomos publishing, 2011 (Cited as *Kroll*)	**17,** **20,** **29,** **30**

ARGUMENT ON JURISDICTION

I. ENERGY PRO. CANNOT BRING FUTURE ENERGY AS A THIRD PARTY TO THE ARBITRATION PROCEEDINGS.

1. In the present case Future Energy has (i) neither consented to the written arbitration agreement, nor (ii) it is in any defined legal relationship so established, therefore it is not a party to the arbitration proceedings [*Emilia, Art. II NYC*]

1.1 Lack of consent and exclusivity of legal relationship

2. The consent of the party is essential for all aspects of arbitration [*Simon/Christopher/Romesh; UN Conference on TD; Poudret/Besson*]

(A) Interpretation of Agreement between the Parties.

3. Where the arbitration agreement is contained as a clause in another contract, the wording in the clause will refer to the same parties covered by the main contract [*Emilia*]. When the word *"BETWEEN"* (*PC, Cl. Ex. 2*) is interpreted, along with "*NOW IT IS HERE BY AGREED ….Sale and purchase.."* it indicates there are only two parties, to the contract vis., CLAIMANT and RESPONDENT. The purchase contract as well as the JV agreement was made between the said two parties. In interpreting the agreements, the intent is important [*Art. 8(1) CISG*] and both mutually knew that the seller-buyer relationship was the essence of the agreement.

(B) "All disputes" here relates to the dispute between the CLAIMANT and RESPONDENT.

4. An arbitration agreement written in terms too ambiguous or generic, which does not restrict its scope to the disputes arising from a particular juridical relation, is questionable [*Caivano*]. Firstly it is contested that great majority of the Contractual terms of the JV as well as the Purchase Contract were proposed and adopted by the CLAIMANT. Thus, the principle of

Good faith is marred [*Cysteine*] if the words "any dispute arising out of" in the arbitration agreement are interpreted so wide as to include any dispute which may not even be related to an established legal relationship. In interpretation of Contracts, the main goal of interpreting is the establishment of the objective intention of the parties; and the interpreter will be heavily influenced by the purpose of the contract, and the provisions will be interpreted in the way that is most consistent with the function of the contract [*Giuditta*].

(C) Contract Rules are applicable here.

5. In commercial transactions parties agree to the liability only when they breach an enforceable promise in the contract, and this is the basic rule of predictability [*Tae*]. Applying the rule of privity of Contract, which stipulates that a contract cannot confer rights or impose obligations on any other person expect the party to the Contract, Future cannot be imposed with a liability it had not consented to [*Julia*]. As the obligation to sell the correct model of gearboxes to the RESPONDENT rested on the CLAIMANT. The CLAIMANT was the sole obligor and on failing such obligation, only the CLAIMANT could be held liable.

(D) Future Energy Inc. is not within the Defined legal Relationship

6. A defined legal relationship arises when a contract contains an arbitration clause that applies to all disputes arising out of that contract [*OLG Hanseatisches*]. CLAIMANT and RESPONDENT consummated a defined legal relationship by entering into the Purchase Contract, thus the concrete specific legal link is formulated only between the present CLAIMANT and RESPONDENT.

1.2 Alternatively, rule of separability is applicable.

7. The existence of both parties' consent to submit the dispute to arbitration is clearly a necessity [*Adam*].

8. Future energy cannot be made a party to the arbitration proceedings even if we assume that it was a major party to the contract. The rule is, even if a party was part of the contract it does not mean that such non-signatory has accepted the arbitration clause. [*ICC Award 2138*].
9. A third party should in general only be bound by an arbitration agreement if it has agreed to be so bound in which case it becomes a true contracting party to the agreement and is no longer a third party to it [*LC Report 242*]. As per the doctrine of separability, the arbitration agreement is presumptively distinct and independent from the Parties' underlying contract and is supported by the separate consideration of the parties exchange of promises to arbitrate(*UML Art. 16 (1); Gary B. Born p.no. 6 ¶ 3*),and thus this requires separate consent.
10. Nonetheless, it is a matter of fact that the subsequent consent shown by Future Energy Inc. is only claimed and there are no evidences for the same. The consent even if assumed exists, is solely due to threats by CLAIMANT [*Cl. Ex. No 9*]. Since arbitration is a matter of Consent and not Coercion [*Tang, Edward Ho Ming*], the third party cannot be compelled to be a party to the arbitration proceedings.

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

2.1 CLAIMANT has to pay additional fees to Ms. Arbitrator 1 for a further period of 3 days

(A) Ms. Arbitrator 1 is entitled to additional fees

11. It is indisputable that an arbitrator is entitled to financial compensation for his or her services; this is an obvious consequence of the contractual relationship between the parties and the arbitrator, as well as customary practice and expectations in international arbitration [*Scholdstrom*]. Considering the contractual nature of relationship between Ms. Arbitrator 1 and CLAIMANT, CLAIMANT is bound to pay the fees for 3 additional days. Arbitration fee

is to be paid in advance to CIETAC according to its arbitration fee schedule though any other extra and reasonable costs may be charged by CIETAC [*Art. 12(3) and 72(1) CIETAC*]. The tribunal is aware that considering the complexities of the present case, it is impossible to render an award within 6 months [*P.O 1, ¶ 2, Art. 46(1) and 46(2) CIETAC; SOD ¶ 2, P.O 2 ¶ 5*].

2.2 Ms. Arbitrator 1 cannot withdraw without reasonable grounds

12. Arbitrators may not withdraw once their proceedings have commenced or once he has accepted his functions, the arbitrator cannot resign without serious grounds for doing so [*Portuguese law on voluntary arbitration Art 9(3), See also ICSID Convention,Arts.56(1), 56(3) French New Code of Civil Procedure, Art 1462; Belgian Judicial Code, Art 1689*]. The only reason Ms. Arbitrator 1 is resigning is because she is not being paid additional fees for 3 extra days of work. [*CIETAC has on several occasions mentioned advance payment to arbitrators: See Art 72(2) and Art 72(3)*]. Furthermore, Ms Arbitrator 1 has an obligation to complete her mandate since there is no sign of bad faith [*Gary B. Born*].

2.3 Ms. Arbitrator 1 would be in the best position to arbitrate on the issue at hand

13. An arbitrator should only resign in circumstances where the integrity or efficiency of the arbitral process would be compromised by the arbitrator's continued involvement [*Greenberg*]. Ms. Arbitrator 1 would be present for the arbitration hearings on merit and procedure as well as 2 days of quantum and would therefore be in the best position to deliver an award impartially [*P.O 2 ¶ 5*].

(A) <u>Appointing a substitute arbitrator would not be in the best interest of the parties</u>

A.1 The process of appointing a replacement arbitrator would lead to a loss of time and money

14. The Arbitral Tribunal has the power to decide whether and to what extent the previous proceedings are to be repeated [*Art. 31(4) CIETAC*]. The parties have an obligation to proceed with the arbitration in bona-fide cooperation [*Art. 9 CIETAC*]. Such repetition is both time consuming and expensive. It is in the interests of both the parties to avoid it. Finding and appointing a replacement, and allowing the new arbitrator to become familiar with the case invariably causes delay [*Gary B. Born*]. The process of nomination from the panel of arbitrators or outside would be time consuming [*Art. 24(1) and 24(2) CIETAC*].Moreover, the court is generally wary of creating an unfettered right to alter the composition of an arbitration panel as such a right would enable parties to endlessly delay the arbitration process [*Gary .B. Born*].

A.2 The Tribunal proceeding as a 'truncated tribunal' will not be in the interest of the RESPONDENT

15. CIETAC provides for majority continuation of arbitrators but only upon approval of the Chairman of CIETAC [*Art. 32 CIETAC*]. It seems clear that the option of proceeding as a truncated tribunal rather than as a reconstituted full tribunal will remain as an exceptional measure to be adopted only where the arbitration is nearing its end and where there is clear evidence that the arbitrator concerned, voluntarily or involuntarily has been associated with the abuse of the process [*Poudret/Besson*]. Ms. Arbitrator 1 has not abused the process, but has only asked for additional fees to be paid. This power is in the hands of the CLAIMANT since they have nominated her [*SOD, ¶ 2*].

ARGUMENT ON MERITS

III. ENERGY PRO INC DID NOT VALIDLY TERMINATE THE CONTRACT

3.1 CLAIMANT has breached the contract therefore suspension by RESPONDENT is valid

(A) The goods delivered by the seller did not comply with the contract

16. According to the concept underlying the CISG, the seller undertakes an obligation (and not only a warranty) to actually deliver the kind and quality of goods as agreed [*Lookofsky p.no. 361*].

A.1 *The gearboxes were not of the quality and description*

17. The seller must deliver goods which are of the "quantity, quality and description required by the contract" [*Art. 35(1) CISG*]. The seller must respect the particularities of each sale and do all that is necessary to make the goods usable and conform to the parties' agreement [*Neumayer p.no. 275-6*]. The agreement between the parties is the primary source for assessing conformity [*Henschel, §7.1.1*]. Moreover, the seller's liability for his obligations under Art 35 is not dependent on any knowledge concerning the non conformity of the goods. The CISG is generally based on non-fault liability [*Kroll*]. The gearboxes were to conform to certain quality descriptions according to the purchase contract [*Cl. Ex. 2, Clause A*]. But instead of model no GJ 2635, gearboxes of model No GH 2635 were delivered to the RESPONDENT [*Cl. Ex.3, 4*]. Moreover, Parties negotiations and their subsequent conduct indicate an agreement for gearboxes of type GJ 2635[*Cl. Ex. 2, Clause 1.1*].

A.2 *The machine was not fit for the particular purpose made known to the CLAIMANT*

18. Goods do not conform with a contract unless they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract" [*Art. 35(2) CISG*]. Even if the goods otherwise conform to the letter of the contract, they will be considered non-conforming if they do not fulfil a particular purpose made known to the seller, especially if the seller has made express assurances that the goods are fit for this known purpose [*Schmitz-Werke (U.S.A.)* ;*Res. Ex 1; "..given your word"..*]

A.2.1 RESPONDENT made the purpose expressly known to the seller

19. Once CLAIMANT became aware of the purpose to which the goods would be put, Art. 35(2)(b) and the principle of fairness required him to conform to that purpose [*Enderlein/Maskow p.no 144; Bianca in Bianca/Bonell p.no 275*].

A.2.2 RESPONDENT relied on the seller's skill and judgment

20. The crux of Art. 35(2)(b) CISG is the buyer's reliance on the seller to provide goods which satisfy the buyer's stated purpose [*Comm. to Art. 35, ¶ 7; Honnold 257; Schwenzer in Schlechtriem 2005 p.no 421*]. Even in borderline cases, where it seems the buyer and seller have equivalent knowledge of and experience with the goods in question, the seller is held to a higher standard and considered to know the goods better [*Neumayer 280*] A lack of skill cannot normally be argued by a party producing the goods [*Kroll*]. CLAIMANT was the one who approached RESPONDENT for a possible cooperation in manufacturing the 1.5 MW wind turbine gearboxes to develop its business in Catalan [*Application for Arbitration, ¶ 2*] CLAIMANT further made the purchase contract a pre-condition to entering the JV which shows its confidence and expertise in the field [*SOD, ¶ 2*]. RESPONDENT's company was fairly new in the market, having been established only in February 2010 [*Application for Arbitration, ¶ 1*].

A.2.3 RESPONDENT's reliance was reasonable

21. Reliance would be unreasonable if the buyer selected goods by brand name, if the seller did not claim to have any particular knowledge in respect of the goods in question, or if such skill is not common in the seller's trade branch [*Bianca/Bonell 27; Section 21 Cmt to Art. 35, ¶ 9; Enderlein p.no 145; Hyland/Freiburg p.no 321; Schwenzer in Schlechtriem2005 422*]. RESPONDENT'S reliance was reasonable as CLAIMANT was a powerhouse in the Energy Sector in Syrus.

A.3 *CLAIMANT did not incorporate the changes as pointed out in the design review*

22. The goods needed to conform to all the characteristics of the sample under Article 35(2) (c) of the CISG [*HKO*].CLAIMANT had ensured the RESPONDENT that manufacturing flaws in the 1st Review would be mended by the 2nd Review. Subsequently, things did not improve in the 2nd review and RESPONDENT notified and asked the CLAIMANT to fix such problem. [*Res. Ex.1*]

(B) <u>CLAIMANT is liable for delivery of non-conforming goods under art 36 CISG</u>

23. Seller is liable in accordance with the contract and this Convention for any non-conformity which exists at the time when the risk passes to the buyer, even though the non-conformity becomes apparent only after that time [*Art. 36 CISG; Enderlein/Maskow p.no 149*].

B.1 Goods non-conforming in nature

24. In case of blatant discrepancies, the buyer is generally substantially deprived "of what he is entitled to expect under the contract" and thus has the right to avoid the contract or to ask for delivery of substitute goods under Art. 46(2) and 49(1) (a) [*Lambskin coats*].

B.2 Defective certification

25. If the contractual description of the goods requires the certification or classification of the goods by a public authority or a third party, the mere absence of such a certification or classification leads to their non-conformity. Whether the goods actually fulfil the quality requirements and the certification or classification was wrongly denied or made is normally irrelevant. In general, the mere lack of the required stamps negatively affects the use of the goods [*In re Siskiyou 3; Maley*].

(C) Cure provided by CLAIMANT not appropriate in these circumstances

26. CLAIMANT has proposed that RESPONDENT should pick another certification company but this cure is not appropriate for the situation at hand [*Cl.Ex.5*]. The factors to be considered in determining the appropriateness of cure include whether the proposed cure promised to be successful in resolving the problem [*§7.1.4, Off com ¶ 3*]. RESPONDENT also has a legitimate interest in refusing cure [*§7.1.4 Off cmt ¶ 4*]. The gearboxes delivered to the RESPONDENT are completely useless and no modifications of the same are possible [*Cl. Ex. 4, P.O 2 ¶ 9 and 11*]. The proper form of cure would have been replacement of the non-conforming gearboxes by the CLAIMANT.

3.2 Termination is not valid as RESPONDENT has not breached contractual terms

(A) RESPONDENT made his intention clear

27. The information about the purpose must have been passed by the time of contract conclusion [*Condensate crude oil mix.*].

(B) RESPONDENT's right to rely on the lack of conformity since it complied with its obligations

B.1 RESPONDENT duly inspected the delivered goods and notified CLAIMANT about the non-conformity within reasonable time

28. Buyers of complex technological goods are not bound to undertake a thorough examination of every single part of the goods [*Bianca/Bonell p .no 297; Schwenzer in Schlechtriem 2005 p.no 452*]. Furthermore, the time within which inspection was conducted was reasonable since in such situations the Tribunal should take into account the uniqueness of the goods involved, the method of delivery, and the familiarity of the buyer's employees with the goods [*DiMatteo p.no 360; Shuttle Packaging (U.S.A.)*].

B.2 Alternatively, CLAIMANT is not entitled to rely on Art. 38 and 39 CISG

29. A seller who could not have been unaware of the non-conformity of the goods does not require any protection through examination and notification duties of the buyer. It would be contrary to good faith to allow such a seller to rely on the buyer's failure to comply with such obligations under Art. 38 and 39 [*Art. 40, CISG; Pamesa Ceramica*]. The second requirement for an application of Art 40 is that the seller has not informed the buyer about the non-conformity [*Kroll*]. CLAIMANT already had constructive knowledge of the lack of conformity of goods delivered to the RESPONDENT as Future Energy Inc. had notified the parties [*Cl. Ex. 3*].

B.2.1 RESPONDENT has reasonable excuse for not giving required notice

30. "Required Notice" in the sense of Art. 44 is a notice which complies with the exigencies of Art 39(1) and 43(1) in relation to timing and content [*Kroll; Art 44 CISG*]. Even though the notice to CLAIMANT by RESPONDENT may not give the seller enough information, it at least passes on the most crucial information i.e. that the goods are non-conforming and some action is required [*Cl. Ex 4; OG Oldenburg 2000*].

3.3 Alternatively, such breach does not amount to fundamental non performance

31. Future reliance on RESPONDENT is not governed by its conduct [*§7.3.1 2(d) Off cmt; §7.1.2, Art 80 CISG*]. Moreover, RESPONDENT will suffer disproportionate loss as a result of performance.[*[§7.3.1 Off Cmt ¶ (2)(e)*]

IV. THE CLAIMANT CANNOT CLAIM THE TERMINATION PENALTY.

32. There has not been Fundamental Non performance by the buyer and hence termination is invalid. Where the termination is invalid, the question of claiming termination penalty does not arise.
33. The RESPONDENT has with all other remedies kept intact [*Art. 81(1) CISG*], rendered the contract avoided.

4.1 RESPONDENT validly avoided the contract

34. The 'notice' of avoidance is to be made in order for it to be effective [*Art. 26 of CISG*]. However, notice need not satisfy any formal requirements and can be conveyed by letter [*Schlechtriem p.no 61*]. The RESPONDENT gave a notice [*Cl. Ex.4*] of the same intention to avoid.
35. With the facts clearly stating that the CLAIMANT had failed to fulfil its contractual obligation and the whole lot of 100 Gearboxes were useless for being sold in Catalan for the 1.5 Mw wind turbines [*Cl. Ex.3*], the RESPONDENT had valid grounds to believe that the subsequent instalments would be defective, thereby fulfilling the requirements under Art. 73 of the CISG.
36. The seller's right to cure is 'subject to Art. 49' of the CISG, namely the buyer's right to avoid the contract [*Art. 48 CISG*]. The right to cure after delivery under Art. 48(1) is subject to such cure not causing unreasonable delay or inconvenience [*Schlechtriem p.no 565*]. Since the

offer for cure was not reasonable, the contract has been avoided by the RESPONDENT (*Cl. Ex. 6*).

4.2 RESPONDENT claims damages from the CLAIMANT

37. As discussed in the 3rd submission, CLAIMANT did not fulfil its obligations and RESPONDENT has therefore claimed suitable damages [*Explainatory Note by the UNCITRAL on CISG*].
38. Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach [Art. 75 CISG]. Therefore, the RESPONDENT claims from the CLAIMANT an amount equal to the amount paid for the 100 gearboxes, i.e. USD 2,000,000, as this is the loss suffered directly [*§7.4.3 Off cmt 3*] by the buyer. Further, the RESPONDENT claims for all expenses related to the arbitration and the arbitration fee [*Steel*].
39. Alternatively, the RESPONDENT is claiming the amount of USD 2,000,000 as the restitution of performance from the party, in pursuance to Art. 81(2) of the CISG.

PRAYER FOR RELIEF

RESPONDENT respectfully requests that the Arbitral TRIBUNAL find that:

1. Ms. Arbitrator 1 cannot resign and CLAIMANT must pay her additional fees.
2. CLAIMANT did not validly terminate the purchase Contract and cannot claim the Termination Penalty
3. CLAIMANT must return the first part payment of USD 2,000,000 to RESPONDENT