607C

THE FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDA FOR

CLAIMANT

On Behalf of	**Against**
Energy Pro Inc.	CFX Ltd
28 Ontario Drive	26 Amber Street
Aero Street	Circus Avenue
Syrus	Catalan
"CLAIMANT"	**"RESPONDENT"**

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TABLE OF ABBREVIATIONS

Art.	Article
Ex.	Exhibit
CIETAC	China International Economic and Trade Arbitration Commission
PICC	Principles of International Commercial Contracts
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UNCITRAL	United Nation Commission on International Trade Law

TABLE OF AUTHORITIES

Primary Sources

China International Economic and Trade Arbitration Commission Arbitration Rules

(Cited: *CIETAC Arbitration Rules*)

Singapore International Arbitration Center

(Cited: SIAC)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(Cited: New York Convention)

UNCITRAL Model Law on International Commercial Arbitration (2010)

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UN Convention on the Contracts for the International sale of Goods (2010)

(Cited: CISG)

UNIDROIT Principles of International Commercial Contracts 2004

(Cited: *PICC*)

Secondary Sources

Frank-Bernd Weigand, Practitioner's handbook on international commercial arbitration, Oxford University Press

Jeff Waincymer, Procedure and evidence in international arbitration, Kluwer Law International

Julian D M Lew, Loukas A Mistelis, Stefan M Kroll, Comparative international commercial arbitration, Kluwer Law International

Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on international arbitration, Oxford University Press

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JURISDICTION

I. The Tribunal constituted under CIETAC Rules has jurisdiction

A. The ADR Clause included in the Purchase Contract (Ex.2) is the binding Arbitration Agreement between the parties

1. The ADR Clause in the Purchase Contract satisfies the conditions of a valid Arbitration Agreement because it was written in form and concluded by the parties as required by UNCITRAL Model Law. [UNCITRAL Model Law Art. 7.2] Also, a valid arbitration "agreement" in writing shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties, and such signatures are to be found in the Purchase Contract. [New York Convention Art. 2.2] (*Ex*.2)

B. Holding the Arbitration Hearing at a different place (Hong Kong) from the designated seat of arbitration (Beijing, China) is allowed

2. Art. 20(2) of the Model Law provides that regardless of where the seat of arbitration is, the arbitral tribunal may be held at any location, unless otherwise agreed to by the parties. In this case, the parties did not explicitly limit the only allowable place of hearing and other arbitration processes to be in Beijing, China. Redfurn and Hunter's *Law and Practice of International Commercial Arbitration* clarifies a possible confusion between the concepts of seat and venue:

> "There is only one 'place' of arbitration. This will be…designated in the arbitration agreement…as the 'seat' of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration."

Such flexibility arises from the need to accommodate the international commercial environment. Often, people of many different nationalities and from many different

countries are involved, and in these circumstances, holding arbitration processes at places other than the designated seat may be efficient and convenient for the parties and their witnesses. [*Greenberg, Kee, Weeramantry. International Commercial Arbitration. P. 57-58*] But just because an arbitral tribunal is held at a place different from the seat of arbitration doesn't mean that the location of the seat of arbitration has changed. The seat of the arbitration remains in the place initially agreed to by the parties.

II. Future Energy Inc., a third party, may be involved in this arbitration

A. UNCITRAL Arbitration Rules permit joinder, such as Future Energy Inc.

3. The UNCITRAL Model Law Art. 17(5) and SIAC Rule 24(b) permit joinder by specifying that at the request of any party, an arbitral tribunal may issue the joinder of a third party, provided that the party to be joined is a party to the arbitration agreement, a written consent of the third party exists, and existing parties have had an opportunity to object on the basis of prejudice. The dispute that necessitated this arbitration arose because of Future Energy's mistake, and as a responsible party, Future Energy is an interested party to the arbitration. The interest of Future Energy in clarifying its role in the Purchase Contract does not pose any danger of affecting the arbitration to favor one party over the other. Future Energy should be permitted as a joinder to this arbitration.

B. Future Energy did not join this arbitration under Duress, and its participation is rather *ipso facto*, given its original contribution as the developer of engines for Turbo Fast and its continued involvement in the Joint Venture and Purchase Contract.

4. A possible argument that may arise is that Future Energy joined the arbitration under duress based on the last paragraph in the correspondence between Claimant and Future Energy. [*Ex*.9] However, the term "duress" describes a situation in which a party uses

coercion to force another party to act or refrain from acting. The Claimant explains that if it were to be held liable by the arbitral tribunal, then it would have no choice but to bring litigation against Future Energy to "recover the damages." [*Ex*.9] Since Future Energy's mistake was the source of dispute, the Claimant can rightfully bring a lawsuit against Future Energy. Therefore, there was no duress forcing Future Energy's participation in the arbitration. The letter further supports the position that Future Energy is a legitimate third party that should actively participate in this arbitration.

5. In fact, Future Energy was the developer and original provider of the 1.5MW wind energy turbine to Turbo Fast as mentioned in Paragraph 1 of the Application of Arbitration. Without Future Energy, neither the contractual object nor all the consequent contracts between the parties of this arbitration would have existed at all. . Regardless of its intentions, Future Energy is an interested party to the subsequent contracts to manufacture and sell the wind energy turbines.

6. Future Energy was further involved as the quality certification company, as found in the Purchase Contract Paragraph 10.2.[*Ex*.2] Future Energy was negligent when one of its engineers shipped the wrong gearboxes to the Respondent. [*Ex*.3] Although the Respondent claims that the Claimant is responsible for that mistake, all the evidence points to Future Energy as the responsible party.

7. By participating in the arbitration, Future Energy will have a chance to clarify its involvement in the contracts, as well as provide any justification for its actions. In order to prevent the inevitable litigation that would follow if the arbitral tribunal held the Claimant liable, Future Energy should join this arbitration as an interested third party.

III. Ms. Arbitrator 1 should resign, and Claimant should be permitted to submit a nomination for a replacement arbitrator

A. In principle, 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.

8. Although Ms. Arbitrator 1's continued involvement does not forecast any compromise of integrity, her resignation is highly recommended for reasons of efficiency. It is for the greater good that the Claimant wishes for her to resign, despite an apparent absence of justifiable reasons. If Ms. Arbitrator's absurd claim that she should receive extra payment is allowed to continue, then both parties to this arbitration will suffer the loss of time and money.

B. Contractual nature of a party and an arbitrator's relationship

9. (a) Contractual Relationship

The agreement between Claimant and Ms. Arbitrator 1 is a legitimate contract. Although there is no document in written form, the very existence of an arbitration and a designated arbitrator proves certain arrangements existed. [*Notice on the Formation of Arbitral Tribunal Case* No M2013/33] Some form of contract must have existed for an arbitrator to demand monetary reward.

10. (b) Nature of the contract

As to the nature of such a contract, it is neither an agency arrangement nor a professional service contract. [*Waincymer* 2012] The arbitrator is appointed by the Claimant but she is not a complete subordinate due to the arbitrator's quasi-judicial function. Considering the nature of the contract between the Claimant and Ms. Arbitrator 1, Ms. Arbitrator 1's unwillingness to conduct the proceedings in the manner originally planned by the parties—to serve as arbitrator during the period of arbitral hearing—can be seen as an attempt to modify a previous agreement. If so, then the

Claimant would be entitled to refuse and demand the arbitrator's completion of the mandate under their original terms.[*Waincymer* 2012]

11. (c) Rights and Obligations

The contract between Claimant and Ms. Arbitrator 1 is an international contract, and the Claimant's rights and obligations are determined mainly by the seat of arbitration. The seat of arbitration is the place of lex arbitri governance, as well as the place of characteristic performance. [*Waincymer* 2012] Therefore, in this case, the rights and obligations of Claimant and Ms. Arbitrator 1 are based on Chinese contract law.

C. Arbitrator's Failure to perform, breach of contract, and damage payment

12. At present, the change in the time allocated for the arbitral process from 2 days to 5 days is only a possibility, not a decided fact. Ms. Arbitrator 1 is in fact guilty of repudiation, for she is refusing to deliver her arbitration services as written on the contract. Other than her personal prediction, she has no basis for believing that the time needs to be extended from 2 days to 5. Moreover, even if the duration were to be elongated, such change would not be solely due to the Claimant's fault, but due to discussions with the arbitral tribunal and both counsels.

13. In arbitrations, fees are determined at the outset of the process in order to prevent any conflicts at a later stage. UNCITRAL Model Law Art. 41 does allow the tribunal to fix the fees if there are justifiable reasons to do so, such as the complexity of the arbitration process. [*Waincymer* 2012] However, in the case of an arbitrator asking for a change in fee and withholding her duties as agreed upon in the contract until payment, it is difficult to accept modifications to the original agreement with regards to the arbitrator's fee. Moreover Ms. Arbitrator 1's resignation was invalid, which signifies a breach of contract making her potentially liable to damages. [*Waincymer* 2012]

MERITS

IV. CLAIMANT FULLY PERFORMED ITS OBLIGATIONS

A. Claimant performed all of its obligations in accordance with the Purchase Contract's terms and conditions

14. Claimant "must obtain from Future Energy certified approval" of the gearboxes in conformity in the Purchase Contract Paragraph 10.1 [Ex.2] Claimant did not fail in obtaining certification of approval from Future Energy.Therefore, it provided 100 gearboxes in conformity with the terms of the contract, such as performance on the delivery date, quantity and quality. Hence, Claimant duly fulfilled all of its contractual obligations.

B. Future Energy Inc.'s negligence

15. On April 18, 2012, Future Energy admitted that one of its engineers had wrongly certified the gearboxes as appropriate for sale in Catalan [*Ex. 3*]. Future Energy, as an independent certification company, is outside the scope of Claimant's business. The Claimant is not allowed to have a part in certification or to have any control in the results of certification. This exclusive business scope of Future Energy is why they are considered a fair and neutral agency in the parties' contractual relationship.

16. Another important point is that it was the Respondent who wanted to bring in an independent certification company for credible quality examination. The Respondent claimed that "the only way it could ensure to obtain the best quality gearboxes required was to insert an independent certification" in the Purchase Contract. Claimant was only accepting and respecting Respondent's request. Therefore, by demanding Future Energy's involvement, the Respondent was responsible for bearing the risks of Future Energy's failure to properly do its job. Hence, the Claimant cannot be held responsible

for Future Energy's negligence.

C. The goods were well within the range of the goods defined in the Joint Venture agreement

17. According to the joint venture agreement, the first and foremost purpose of the joint venture was to manufacture and assemble 1.5 MW wind turbine gearboxes for sale in Catalan in general [*Background Information, paragraph. 3*], which implies that the finished products delivered to Respondent do not necessarily have to be restricted to the specific GJ 2635 model.

18. Furthermore, the delivered products are unencumbered by any flaws that may hinder its sale in the Catalan market and thus, the products pose no problems in achieving the joint venture's purpose. This is why there are no grounds for Respondent to claim that the delivered goods were beyond the scope of the purchase contract.

III. TERMINATION

A. Negligence of Respondent in performing due diligence as a buyer

19. The regulations that apply to the purchase contract stipulate that the buyer in a sales contract must examine the goods and give notice to the seller if the goods do not meet the standards required in the purchase contract "within as short a period as is practicable in the circumstances." [CISG Art. 38, 39] Once the buyer fails to notify the seller within a reasonable time after he ought to have discovered difference, he automatically loses his right to claim lack of conformity.

20. Claimant made the delivery of gearboxes before March 13, 2012. The Respondent had more than a month to confirm the quality of the delivery and notify the Claimant of any deviations from the standards of the contract. Considering that the requirements for the GH 2635 wind turbines are radically different from the GJ 2635 model, it can be

evaluated that the Respondent had more than enough time to respond if it had thought that the breach was significant. Another notable fact is that the Respondent did not contact the claimant about the notification from Future Energy until one month after receiving notification from Future Energy concerning the mistake they made. [*Ex. 3*] Due to the Respondent's procrastination in performing due diligence as a buyer and its late reaction to the email from Future Energy, it is inferable that the Respondent would not have examined the goods within a short period of time deemed practical in the given circumstances. [CISG Art. 38] In the case of 103 O 213/02, the court held that the period within which notice of non-conformity has to be given includes the period for the examination of the goods as well as that for the notice itself. In the opinion of the court, the buyer should examine a sample of product to detect defects shortly after delivery. As Respondent did not give notice of non-conformity to Claimant within in reasonable time after delivery, it lost its right to claim non-conformity against Claimant.

B. Respondent failed in its obligation to make the second and third part of its payments, and it did not provide reasonable evidence that the breach had not occurred.

21. Claimant performed all of its obligations in a timely manner and thus had reasonable expectations for Respondent to meet the payment deadline stipulated in the contract [PICC Art. 6.1.1(a)]. Parties agreed to arrange payment in installments for 5 years, 3 of which were to be paid in the first year. There is a total of 3 part payments for which the Respondent was responsible, each payment amounting to USD 2 million for a total of USD 6 million.[*Ex.2*] The dates for the first 3-part payments were March 13, 2012, June 20, 2012 and August 20, 2012 and the first payment was paid on time. However, on May 21, 2012, the Respondent claimed suspension of payments, pending further

confirmation from the Claimant of "satisfactory proof." [*Ex. 6*] Afterwards, no further part payments were made. The arbitrary and non-effective suspension claimed by the Respondent does not provide justification for its breach of obligation and the non-performance of the part payments. This gives the Claimant the legal grounds to validly terminate the contract.

C. Claimant terminated the purchase contract in compliance with the contractual procedure.

22. Claimant is given the right to suspend or terminate the purchase contract if Respondent "substantially breaches a material obligation … including the failure to make any payment." Claimant has to issue to the Respondent a written notice of the breach once Respondent fails to make any payment when it is due, and within 30 days after the receipt of the notice, Respondent must either cure the breach or provide reasonable evidence that the breach did not occur [*Ex.2*]. The Claimant issued and sent the default notices for the failure of both the second and third part payments, warning the Respondent of "drastic action" that could be taken [*Ex.7*]. Despite the notice of default, Respondent did not take any measures to cure or disprove its non-performance within 30 days. Therefore, the Claimant satisfied the procedural requirements for valid termination.

IV. LIABILITY FOR DAMAGES

A. Claimant has the right to claim the termination penalty

23. Termination of the contract by the Claimant does not preclude a claim for damage against the Respondent for its non-performance [PICC Art. 7.3.5]. Non-performance is defined as a failure by a party to perform any of its obligations under the contract [PICC Art. 7.1.1]. Under PICC, the Claimant has the right to both terminate the contract and

claim damages caused by the Respondent's non-payment.

B. Claimant is entitled to any part payments and termination penalty

24. According to the purchase contract, in the event that the Claimant terminates the purchase contract as provided, it is entitled to retain any part payments made by the Respondent. That is, the Respondent cannot claim the return of the first part payment against the Claimant. Also, the Respondent refused to pay the rest of the part payments despite the Claimant's proper performance by its due date and subsequent default notices. As a result, the Claimant was deprived of USD 8 million, which would have been obtained had the Respondent performed its obligations according to the Purchase Contract. The Respondent shall pay to the Claimant a termination penalty equal to the difference between the total value of the purchase contract and the value of gearboxes already delivered to the Respondent as of the termination date as provided in the purchase contract. As a termination penalty, the Respondent has to pay USD 8 million, which is the amount in damages for its non-performance of monetary obligations.

25. Lastly, if a party does not pay a sum of money as per its contractual obligations, the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment, regardless of whether or not the non-payment is excused [PICC Art. 7.4.9(1)]. Regardless of the Respondent's excuse for its non-performance, the Claimant is entitled to interest upon the 2nd and 3rd payments, of which its payment due date was passed on 20 June 2012 and 20 August 2012, respectively. These dates are calculated from the time when each payment was due to the time of payment. And as the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment [PICC Art. 7.4.9(2)], the interest has to be computed by the rate given by the Bank of China. In total, the

Respondent has to pay USD 8 million as a termination penalty and interest upon the unpaid 2nd and 3rd payments.

(3,009 words)