

**2013 International ADR (Alternative Dispute Resolution) Mooting
Competition**

Hong Kong - July/August 2013



**IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE
ARBITRATION COMMISSION**



Energy Pro Inc.

(Claimant)

v. CFX Ltd.

(Respondent)

MEMORANDUM FOR THE CLAIMANT

615C

LIST OF ABBREVIATIONS

Art. - Article

CISG - United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980

ICC - International Chamber of Commerce

MAL UNCITRAL - Model Law on International Commercial Arbitration (as amended 2006)

No. - Number

para. - Paragraph in the Memorandum

UNIDROIT- Principles of International Commercial Contracts of 2010

CIETAC- China International Economic and Trade Commission Arbitration Rules

EPA – Exclusive Purchase Agreement

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - International Institute for the Unification of Private Law

App. - Appellate Court

Arb. - Arbitration

Art. / Arts. - Article / Articles

Assn. - Association

Cir. - Circuit (U.S. Circuit Court of Appeals)

Com. - Commercial

e.g. - *Exemplum gratia* (for example)

LIST OF ABBREVIATIONS.....	I
INDEX OF AUTHORITIES.....	III-V
STATEMENT OF FACTS.....	1-2
ARGUMENTS AS TO JURISDICTION.....	3-6
1. FUTURE ENERGY MUST BE INCLUDED IN THE ARBITRAL PROCEEDINGS	
1[a] The Doctrine of Third Party Beneficiaries.....	3
1[b] The Doctrine of “Equitable Estoppel”.....	3-4
1[c] The Principle of Equality of Parties.....	4
2. Ms ARBITRATOR CAN RESIGN DURING ARBITRATION PROCEEDING	
2[A] CIETAC Rules provide for voluntary withdrawal of Arbitrator from office	
2[A.1] Ms Arbitrator resigned de-facto from office.....	5-6
2[B] Pursuant to the registration of an arbitrator, a substitute arbitrator can be appointed.....	6
ARGUMENTS AS TO MERITS.....	6-10
3. ENERGY PRO HAS VALIDLY TERMINATED THE CONTRACT.	
3[A] The termination is valid as per the terms of the EPA.....	6
3[B] Energy Pro’s termination is in accordance with the concerned provisions of UPICC and CISG.....	7
3[B.1] Suspension of performance by CFX Ltd has violated multiple provisions of UPICC & CISG.....	7
3[B.2] The respondent has committed fundamental breach of contract.....	7-8
3[B.3] The claimant is entitled to terminate the contract under Article 64 of CISG.....	8
3[B.4] Alternatively, CFX Ltd. did not notify non-conformity within reasonable time.....	8-9
3[B.5] CFX Ltd could have resold the gearboxes in Catalan Market.....	9
4. ENERGY PRO IS ENTITLED TO CLAIM TERMINATION PENALTY	
4[A] The termination penalty clause in the EPA is valid and enforceable.....	9

4[B] Energy Pro is entitled to claim termination Penalty as per the Contract ...9-10	
4[C] Energy Pro’s claim for the termination penalty is in accordance with UPICC and CISG	10

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND LAWS

United Nations Convention on Contracts for the International Sale of Goods, 1980

UNIDROIT Principles of International Commercial Contracts, 2010

UNCITRAL Model Law on International Commercial Arbitration, 1986

RULES

China International Economic and Trade Arbitration Commission Arbitration Rules, 2012

COMMENTARY

Backaby/Partasides, "Redfern and Hunter on International Arbitration" (Oxford University Press: 2009)

Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, Global Sales and Contract Law (Oxford University Press: 2012)

Stefan Vogenauer and Jan Kleinheisterkamp (ed), Commentary on the UNIDROIT Principles of International Commercial Contracts, (Oxford University Press: 2009)

Gary B. Born, International Commercial Arbitration, (Kluwer Law International: 2009)

Peter Binder, International Commercial Arbitration And Conciliation In UNCITRAL Model Law Jurisdictions, (Sweet & Maxwell: 2005)

John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (Kluwer Law International: 2009)

Kroll/Mistelis/Visacasillas, UN Convention on Contract for the International Sale of Goods, (Hart Publishing: 2012)

Professor D. Mark Cato, Arbitration Practice and Procedure, (LLP: 2002)

Michael Bridge, The International Sale Of Goods Law And Practice, (Oxford University Press: 2009)

CASES

1. American Bureau Shipping case [170.F.3d.349]
2. MS Dealer Service Corp Case [(177) F.3d 942 11th Cir.1999]
3. Natural Petroleum Charters Inc Case [931 F.2d 191 (2nd Cir.1991)]
4. Lianhe Enterprise (US) Ltd v Yantai Branch of Shandong Foreign Trade Co
. [(1998) Case No. 358 Supreme People's Court of China]
5. Shoes Case 52 S 247/94 LG Berlin
6. BV BA J.P v S.Ltd 1997/AR/2235 [AC Gent]
7. Electrical Good's Case EMC v Cde AB SL 20000327[AC] de Navarra
8. Frozen Bacon Case 19 U 97/91 OLG Hamm
9. Granite Rock Case 22 S 234/94 LG Stendal
10. Furniture Case HG 930138 HG Zurich
11. Shuttle Packaging System's v Tsonakis 101/CV/691 Federal District Court [Michigan]
12. Foamed Board Machinery Case 7585/1992 CA/ICC
13. Jewellery Case 1 Ob 292/99v Supreme Court Austria
14. Downs Investments v Perwaja Steel 10680/1996/Supreme Court Queensland
15. Memory Module Case 13 U 102/01 OLG Hamm
16. Souvenir Coins Case CISG/2000/17 CIETAC (PRC)
17. Mung Bean Case CISG/2001/02 CIETAC (PRC)
18. Styrene Monomer case CISG/2002/03 CIETAC (PRC)
19. Alumina Case CISG/2003/10 CIETAC (PRC)
20. Chicago Prime Packers Inc v Northam Food Training Co. Case 01 C 4447 Federal Court US

21. Tiles Case	32 O 508/04 LG Bayreuth
22. Vetimo v Aubert	R.G. 242/99 Cour d'appel [AC Mons]
23. CNA International Corporation v Guangdong Kelon Electrical Holding Ltd.	
.	05 C 5734 DC Illinois
24. Video Recorders Case	10 O 72/00 LG Darmstadt
25. Doors case	1 U 69/92 OLG Saarbrücken
26. Machines Case	2 Ob 100/00w Oberster Gerichtshof
27. Zweirad Technik v C Reinhardt A/S	U2008.181H HD

STATEMENT OF FACTS

1. 15 April 2010 – CFX Ltd., a company registered in Catalan entered into a technology licensing agreement with Turbofast Ltd., a wind turbine manufacturer based in Andelstein. The Licensing agreement related to a 1.5 MW wind energy turbine which had been developed by another wind energy company, Future Energy Inc., also based in Andelstein.
2. 17 December 2010 - CFX Ltd. and Energy Pro Inc., a company based in Syrus, entered into a joint venture agreement (JV) to produce Gearboxes for the said turbines.
3. 10 April 2011 – Energy Pro and CFX Ltd entered into an Exclusive Purchase Contract (EPC) as seller and buyer respectively, whereby, Energy Pro would own all the gearboxes manufactured under the JV as it supplied all the raw materials for the production of the same.
4. 10 February 2012 – CFX Ltd issued a purchase order for 100 gearboxes, which were delivered, payment for which was made on 13th March 2013, as per the EPA
5. 18 April 2012 – Future Energy wrote to both CFX Ltd. and Energy Pro that one of its engineers had wrongly certified the gearboxes following which CFX Ltd. sent a mail to Energy Pro emphasizing outstanding concerns with the gearbox designs and lack of approval by Future Energy of such designs.
6. 18 May 2012 – Energy Pro reiterated to CFX Ltd. that it had duly performed all its obligations and cannot be held responsible for Future Energy’s negligence to which CFX Ltd. replied informing Energy Pro of suspension of the EPC, pending confirmation from Energy Pro to comply with its obligations.
7. 25 September 2012 – Energy Pro served CFX Ltd with a letter demanding the required payments that were pending from CFX Ltd. failing which arbitration would be initiated against them. CFX Ltd did not pay and Energy Pro sent a notification of termination of the EPA to CFX Ltd on 28th Dec 2012.
8. 1 January 2013 – Energy Pro requested Future Energy Inc. to join as third party to the arbitration between Energy Pro Inc. and CFX Ltd, to which they agreed.

9. 11 February 2013 – CFX Ltd. sent a letter to Energy Pro Inc. terming the latter's termination as unlawful and also including a request for reimbursement of the first payment made.

10. Ms Arbitrator 1 wrote an email to the President of the Arbitral Tribunal that she would resign after the completion of the oral hearings on the disputed issues and will not remain on the panel in determining the issue of quantum.

ARGUMENTS

ARGUMENTS AS TO JURISDICTION

1. FUTURE ENERGY MUST BE INCLUDED IN THE ARBITRAL PROCEEDINGS

Energy Pro Inc. can bring Future Energy Inc. into the arbitration proceedings even though it is a non-signatory to the EPA. Although CIETAC Rules and the UNCITRAL Model Law are silent upon joinder of a non-signatory third party to the arbitral proceedings, but this does not preclude the Claimant from urging Future Energy to participate in the arbitration, as per (A) the Doctrine of third party beneficiaries; and (B) the Doctrine of Equitable estoppels.

A. THE PRINCIPLE OF EQUALITY OF PARTIES

The 'Equality of Parties' principle as also embodied under Article 18 of the UNCITRAL model laws which states that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". Hence it is understood that third party non-signatories can be included in the arbitration proceeding, if their non-inclusion will result in depriving one party of their ability to present their full claims or defenses, thereby jeopardizing party equality, and also to ensure that there does not arise an issue of multiple suits on the same subject matter. *[Intervention and Joinder under the Principle of Equality between the Parties, Vanderbilt Journal of Transnational Law, October 1998]*

The claimant has suffered immense material detriment in terms of non-payment of the contract price by the respondent. The non-payment was based on an alleged lack of conformity of gearboxes, which were certified by Future Pro as conforming. The dispute as such, can hence be attributed to the improper certification on the part of Future Energy. Energy Pro's claim is based on the fact that the non-conformity, if it existed, occurred as result of the said improper certification.

Hence the inclusion of Future Energy is critical in establishing the claims raised by Energy Pro.

It is submitted that the non-inclusion of Future Energy would thus result in depriving the claimant of its ability to present their claim fully. Hence, it is submitted that Future Energy can be included in the arbitration proceeding, by invoking the Principle of Equality of Parties.

B. THE DOCTRINE OF “EQUITABLE ESTOPPLE”

The Doctrine of Equitable Estoppel provides for the inclusion of a third party non-signatory, when a signatory raises allegations of concerted misconduct by both the non-signatory and one of the signatories to the contract, when there is a substantial interdependence between the three parties for the contract to be performed. [*MS Dealer Service Corp. case*, (177 F.3d 942 11th Cir. 1999)]

Both the signatories share a fundamental interdependence with Future Energy as regards the EPA. The completion of the purchase is strictly subject to the issuance of the quality and conformity certification by Future Energy.[*Clause 10.2 EPA* The respondent’s obligation to make payment also arises only after the said certification is produced [*Clause 1.2(iii) EPA*]. It is hence submitted that there exists substantial inter-dependence between Future Energy and the two parties for completion of their respective contractual obligations.

It is also submitted that there has been grave misconduct on the part of CFX Ltd, since it defaulted on its fundamental contractual obligation of making the payment. Grave misconduct can also be proven on the part of Future Energy, since it is their incompetence and the consequent issuance of erroneous certification of gearboxes that has given rise to the very dispute itself [*Para12-14, ofFacts*]. Hence, Future Energy must be made party to the arbitration proceeding as per the Doctrine of Equitable Estoppel.

C. THE DOCTRINE OF THIRD PARTY BENEFICIARIES

It is submitted that the doctrine of “Third-Party Beneficiaries” will apply in the present case. The doctrine states that non-signatories that are beneficiaries of a contract will be bound by the arbitration clause contained in that contract.[*Gary B Born, p.1178; American Bureau of shipping case*]. Parties may confer by express or implied agreement a right on a third party and then consider them as the beneficiary. [UPICC Article 5.2.1]

The gearboxes, which are the subject matter of the EPA, were to be used by CFX Ltd to manufacture wind energy turbines, the technology of which was developed by Future Energy.

The production of the said turbines, on a commercial scale in a different country ensures that their technology gains commercial significance in the international market. It is hence submitted that the Exclusive Purchase Contract, confers on Future Energy intangible benefit of providing the company and their product cross-border recognition. Hence, Future Energy is a beneficiary of the EPA and can be made party to the arbitration proceedings.

2. MS. ARBITRATOR.1 CAN RESIGN DURING THE ARBITRATION PROCEEDINGS.

2 A. CIETAC RULES PROVIDE FOR WITHDRAWAL OF AN ARBITRATOR VOLUNTARILY FROM HIS/HER OFFICE

An arbitrator may voluntarily withdraw from his office if he/she has failed to fulfill his/her function in accordance with these rules. *[Art.31 (1) CIETAC arbitration rules 2012]*

A.1 It is the submission of the claimant that non-payment of additional fees has made Arbitrator 1 to not fulfill her function, which lead to her resignation from office.

On being made aware that the hearing on issues of quantum, shall take more time than was contemplated initially, Ms. Arbitrator 1 had asked for the payment of extra fee in this regard to be made directly into her account. The claimant objected to making the said payment, leading to her resignation. It is therefore submitted that although payment was not made to Ms. Arbitrator 1 she still had an obligation to discharge/fulfill her function as an arbitrator as she had agreed to be a part of the proceedings earlier. However she failed to fulfill her function as an arbitrator, entitling her to voluntarily resign from office.

It is submitted, the by not contesting her resignation, the claimant is merely not objecting to her right to resign *[Art.31 (1) CIETAC arbitration rules 2012]*.

B. PURSUANT TO RESIGNATION OF THE ARBITRATOR A SUBSTITUTE ARBITRATOR CAN BE APPOINTED

In the event of the resignation of an arbitrator, a substitute arbitrator shall be appointed according to the same procedure and time period that applied to the nomination of the arbitrator being

challenged or replaced. If a party fails to nominate a substitute arbitrator accordingly, then the CIETAC shall appoint the same. [Article 31(3) of CIETAC arbitration rules. 2012] The claimant as required by this rule is willing to nominate another arbitrator to hear the issue of quantum. [SoD. para 3]

After the replacement of the arbitrator, the arbitral tribunal shall decide whether and to what extent previous proceedings in the case shall be repeated. Subject to the discretion of the tribunal, it is permitted to continue the proceedings from the same point, once a substitute arbitrator is appointed. It is possible to bifurcate the proceeding into two separate steps of merits and quantum [Natural Petroleum Charters Inc case]. Hence, it is submitted that after the substitute arbitrator has been appointed, the arbitration proceeding need not start afresh and can continue from determining the issue of quantum. [Petroleum Charters case]

Hence, it is submitted that Ms. Arbitrator can resign during the proceedings and that the arbitration proceeding need not start afresh. The claimants have not challenged her resignation, since it has been provided for by the concerned provisions of CIETAC and also since, in the submission of the claimant, it will not affect the efficiency of the arbitral proceeding in any manner.

ARGUMENTS AS TO MERITS

3. ENERGY PRO HAS VALIDLY TERMINATED THE CONTRACT

[A]Energy Pro's termination is valid as per the terms of the EPA

It is submitted on behalf of the claimant, that Energy Pro's termination of the purchase agreement is based on and is in accordance with its right to terminate provided for in the termination clause in the agreement. [Section 15.2 of EPA] The claimant has complied with all procedural stipulations laid down by the termination clause of the EPA, and hence, the termination is valid as per the agreement. .

[B] Energy Pro's termination is in accordance with the concerned provisions of UPICC and CISG

B1. Suspension of performance by CFX Ltd has violated multiple provisions of UPICC and CISG

CFX Ltd is obligated under Section 1 of the Exclusive Purchase Agreement to purchase the requisite number of gearboxes from Energy Pro as per the terms of the contract while also making the stipulated payments. [*Article 7.2.1 UPICC; Article 53 CISG; Lianhe Enterprise (US) Ltd v Yantai Branch of Shandong Foreign Trade Co; Shoes case*]

Energy Pro's right to terminate the contract essentially stems from the rights conferred on the seller by Article 61 of CISG to use any or all of the remedial measures provided for by various subsequent Articles of CISG. It is submitted on behalf of the claimants that the termination of the exclusive purchase agreement by Energy Pro Inc. is valid and conforms to the termination clause mentioned in Section 15. CFX Ltd, in this regard, has invalidly suspended the contract [*Article 71 CISG; BV BA J.P v. S. Ltd; Electrical Goods case; Frozen Bacon case; Granite Rock case; Furniture case*] and thereby refused to pay the amount in arrears even after the two default notices were sent to them thereby constituting a fundamental breach of the contract, entitling Energy Pro to validly exercise the right to terminate. [*Article 7.3.1(1) UPICC; Article 64 CISG; Shuttle Packaging Systems v Tsonakis et al.; Foamed Board Machinery case; JewelleryCase; Downs Investments v Perwaja Steel; Memory Module case*]

B2.The respondent has committed fundamental breach of contract.

The suspension of the contract by CFX Ltd was invalid and constitutes a fundamental breach as the detriment substantially deprived Energy Pro of what it was entitled to expect under the contract which was further a direct corollary of the non-payment by CFX Ltd. It is clear that the loss caused to Energy Pro Ltd was a consequence which could have been reasonably foreseen by CFX Ltd by virtue of suspending the contract. The material detriment suffered by the claimant, in terms of non-payment thus amounts to a fundamental breach of contract. [*Article 7.3.1(2) UPICC; Article 25 CISG; Souvenir Coins case; Mung Beans case; Styrene Monomer case; Alumina case; Pizza Boxes case; Chicago Prime Packers, Inc. v. Northam Food Trading Co et al; Memory Modules case*]

B3. The claimant is entitled to terminate the contract under Article 64 of CISG

It is submitted that the claimant's obligation under the Exclusive Purchase Contract, is limited to obtaining the necessary certification of conformity from Future Energy, to which even the respondents have not objected. [*Respondent's Ex No 1*] T. The goods were delivered only after the required certified approval was obtained from Future Energy Inc. as required under Section 10.2 of the Exclusive Purchase Agreement and hence, it is submitted that the respondent cannot claim non-conformity as a reason to suspend performance. Therefore, by invalidly suspending performance, the respondent has entitled the claimant to terminate the contract under Article 64 of CISG.

B4. Alternatively, CFX Ltd. did not notify non-conformity within reasonable time.

Further, CFX Ltd raised objections regarding non-conformity only after Future Energy notified both parties regarding the wrong certification of the gearboxes. Payment of the first installment of the contract price is itself indicative of conformity. [*Section 1.2.b (iii) EPA*] CFX was under an obligation to examine the goods or to have them examined in as short a period as was possible and also to inform the claimant of non-conformity, if any. [*Article 38 & 39, CISG; Tiles case; Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al*]. Failing this obligation, a party claiming breach cannot rely on the said grounds and subsequently suspend the contract. Hence, it is the alternate submission of the claimants that, even if the alleged non-conformity did exist, the respondent has waived the right to claim it, by not giving reasonable notice, [*Article 39; Vetimo v Aubert; RheinlandVersicherungen v Atlares; Souvenir coins case; ; BV BA J.P v. S. Ltd*] and hence the subsequent suspension of performance by the respondent is invalid [*Article 71 CISG; Chengwei Liu para 2*]

B5. CFX Ltd could have resold the gearboxes in Catalan Market

3.2.7 It is submitted that the respondent ought to have undertaken reasonable steps to mitigate its losses, in the event of the alleged non-conformity being true, before resorting to suspension. The gearboxes, even if the alleged non-conformity as regards specification existed, did not lack in terms of quality and were fit enough to be sold in the Catalan market in general, which is also a

purpose for which they were produced, as per the contract. [*Para 3 of the statement of facts; Article 7.4.8 UPICC; Article 77 CISG; CNA International Corporation v Guangdong KelonElectronical Holding; Video Recorder's case*]

The invalid suspension of the Purchase Contract and the subsequent non-payment of the contract price, which the claimant is entitled to receive [*Article 62 CISG*] thus, amounts to a fundamental breach of contract within the meaning of Article 25 and hence, it is submitted that Future Energy validly exercised their right to terminate the contract, which is provided for by Article 64.

4. Energy Pro is entitled to claim the termination penalty.

[A] The termination penalty clause in the EPA is valid and enforceable.

The termination penalty clause[15.2 EPA] is part of a binding contract validly entered into by both parties. Clause 15.2 of the EPA quantifies the damages likely to be suffered by the claimant in the event of a breach on the part of the respondent. Clauses that entitle a party to quantified damages shall be deemed as penalty clauses, if the quantification made is extravagant and disproportionate[*Dunlop Ltd v New Garage Co ltd; [1892] QB 127*It is the submission of the respondent that the damages provided for under 15.2 of the EPA, which is equivalent to the sum of all outstanding payments to be made as stipulated by the EPA is reasonable and consistent with the actual damages suffered. It is the submission of the claimant that the tribunal upholds whatever terms that were agreed to by the parties as unnecessary interference in contractual terms result in causing commercial uncertainty. [*Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41*] Hence the clause is valid, fair and enforceable.

[B] Energy Pro is entitled to claim termination Penalty as per the Contract

Energy Pro's right to claim termination penalty is provided for in clause 15.2 of the purchase agreement between the parties. It is the claimant's first submission on this issue, that Energy Pro's claim for the termination penalty is strictly in accordance with the terms laid down in the said clause of the agreement, which says, that in the event of Energy Pro terminating the purchase contract, they shall be entitled to claim 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, at the time. [*Clause 15.2 of the EPA*]

[C] Energy Pro's claim for the termination penalty is in accordance with UPICC and CISG

It is the claimant's UPICC and CISG in this regard. Articles 7.4.1 and 7.4.2 (1) of UNIDROIT principles, read along with Article 74 of CISG give to an aggrieved party, on the non-performance of the other party, a right to damages either exclusively or in conjunction with any other remedy, inclusive of both direct losses as well as any loss of profit. [*Doors case; GMS Modules case; Zweirad Technik v C Reinhardt A/S; Foamed Board Machinery case; Jewellery case; Machines case; Alumina case; Schlechtriem 746*]

The losses suffered by the claimant, as is abundantly clear from the facts, have arisen directly out of non-payment of the contract price by the respondent in this case. Hence, claimant's right to receive the termination penalty, is in accordance with the relevant provisions of the UNIDROIT principles and CISG provisions. It is submitted that the claimant had undertaken significant financial and institutional burden, in order to continually ensure timely compliance with the respondent's purchase orders for the contract period of five years, owing to the long running nature of the purchased contract signed between the two parties.

PRAYER FOR RELIEF

In light of the above submissions, the counsel for the claimant respectfully request that the tribunal to find that

Future Energy should be included in the Arbitral Proceeding

Ms Arbitrator's resignation should be held valid and that a substitute Arbitrator should be appointed for adjudicating issues of quantum.

The claimant validly terminated the contract.

The claimant is entitled to receive Termination Penalty.

The respondent committed fundamental breach of contract and is liable to pay damages

Counsel on Behalf of Claimant