FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

28 JULY – 3 AUGUST 2013

HONG KONG

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Energy Pro Inc.	CFX Ltd
CLAIMANT	**RESPONDENT**

TEAM NO. 716C

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LIST OF ABBREVIATIONS

Arbitration Agreement	arbitration clause between Parties
Art.	article / articles
CLAIMANT	Energy Pro Inc.
No.	Number
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Para.	paragraph
Parties	CLAIMANT and RESPONDENT
Purchase Contract	contract for the sale of gearboxes between Parties
RESPONDENT	CFX Ltd
Tribunal	China International Economic and Trade Arbitration Commission
v.	versus

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Mullis, A.; Huber, P.	The CISG: A new book for students and practitioners, Regensburg: Sellier. European law publishers, 2007 *cited as: Huber/Mullis*	**33,34,36** **39,40**
Mustill, M. J.; Boyd, S. C.; Andrews, N.	Commercial Arbitration, 3rd ed., Butterworths Law, 2008 *cited as: Mustill/Boyd/Andrews*	**22**
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ARGUMENTS ON JURISDICTION

I. FUTURE ENERGY CAN BE BROUGHT INTO THE ARBITRATION PROCEEDINGS

1. Future Energy can join the proceedings because it is justly based on CIETAC Rules (**A**). Moreover, all parties consented to it (**B**) whereas no threat occurred (**C**).

A. CIETAC Rules implicitly allow Future Energy's participation

2. Multiple-Party proceeding is implicitly addressed in Art. 27 CIETAC. Although a joinder to an ongoing procedure is not provided under CIETAC Rules, it is clearly supported in a variety of internationally recognized arbitration rules, including ICC Rules [*Art.7*], LCIA Arbitration Rules [*Art.22.1 (h)*] and ICSID [*Rule 31(b,d)*]. Since the procedure itself is not expressly covered, Tribunal *"shall conduct a hearing in any way it deems appropriate"* [*Art. 33(1), CIETAC*] and *"with reference to international practices"* [*Art. 47(1), CIETAC*]. Accordingly, Future Energy could participate in the arbitration.
3. Moreover, ICC stated in Award No. 13009 that it is *"common judicial practice* [*that a party*] *joins its own contractor in the proceedings"*, mentioning Art. 6.2 Brussels Convention, which refers to a specific rule for third-party proceedings. The aim of such a rule of procedure is to have a complete situation in court, which allows the judge to make an informed decision [*Award No. 13009, Para. 56*]. In the same manner, Future Energy's participation is crucial in order to *"render a fair and reasonable award based on the facts of the case"* [*Art. 47, CIETAC*].

B. All parties consented to arbitration by this Tribunal

4. In order to fulfill the consensual nature of arbitration, an express agreement is required of Future Energy **a)** and at least implied consent from RESPONDENT **b)**.

a) Future Energy agreed to arbitrate

5. Express consent from a third party is required, which thereby impliedly waives its right to nominate an arbitrator [*Art. 22.1(h), LCIA Rules; Art. 24.1(b), SIAC Rules*]. Future Energy's case must be distinguished from *Dutco* case because nothing in its conduct indicates that it requires its own arbitrator.

b) RESPONDENT is to be equitably estopped from denying Future Energy's joinder

6. RESPONDENT impliedly consented to Future Energy's participation in Purchase Contract (*i*) and arbitration agreement (*ii*).

i. Close connection of the contracts gives rise to equitable estoppel

7. Ordinarily, *"a party cannot be required to submit to arbitration any dispute, which he has not agreed to submit"* [*AT & T, 643, 648*]. However, in appropriate circumstances, non-signatories may be bound by arbitration clauses contained in contracts signed by other persons [*First Options, 943- 946*].

8. A party must be equitably estopped from denying arbitration based on the nature of the claims and a strong connection between the contracts [*Hughes Masonry, Para. 10-12*]. It is therefore the *"intertwined"* nature of the contractual relationship between the parties that must *"estop"* RESPONDENT from objecting to Future Energy's participation in the proceedings [*Sunkist Soft Drinks, 757-58*]. Similarly in the case at hand, certification services of Future Energy are expressly mentioned in Purchase Contract.

ii. Arbitration agreement is wide enough to encompass Future Energy

9. Moreover, Arbitration Agreement considers *"any dispute arising from or in connection with this Purchase Contract" [Para. 20, Purchase Contract]* and should undoubtedly include disputes such as the one arisen. Even the fact that it refers to *"parties"* cannot *a priori* preclude non- signatories from participating in the arbitration [*Upstate Shredding, 365-66; S&R, 95,98-101*]. Therefore, since this arbitration clause is almost identical to the ones when non-signatories were able to arbitrate [*Sherer*], the same outcome is required.

C. Future Energy's participation is not induced by threat

10. Threat requires *"unjustified"* character that leaves *"no reasonable alternative"* and the act constituting threat may be but does not necessarily have to be wrongful in itself. [*Art. 3.2.6, UNIDROIT*] CLAIMANT therefore states that conduct characterized in Claimant's Exhibit No. 9 falls outside the scope of Art. 3.2.6 UNIDROIT **a)**. Even if considered as economic threat, it was not unjustified in the circumstances **b)**.

a) <u>CLAIMANT's conduct does not constitute threat</u>

11. Economic duress was dealt with in *Pao*, where the defendant wanted to avoid litigation and instead negotiated a business agreement. Accordingly, *"duress, whatever form it takes, is a coercion of the will so as to vitiate consent* [...]. *It must be shown that the payment made or the contract entered into was not a voluntary act"* [*Pao, 614, 635-6*]. Similarly, RESPONDENT's submission is based on the claim that Future Energy's agreement to participate in arbitration was obtained through threat of litigation. Clearly, this would be viewed as no *"coercion of the will"* in the eyes of the *Privy Council* in an analogical situation.

b) <u>CLAIMANT's conduct is not illegitimate</u>

12. For threat to be illegitimate the act of litigation would have to be unlawful in itself, which it is, admittedly, not. Alternatively, *"the purpose to be achieved is wrongful"* [*UNIDROIT commentary, p. 107*], which *"depends upon the nature of the demand"* [*Universe Sentinel, 67*]. Noticeably, *"competition* [*in business*], *by its very nature is deberate and ruthless"* [*Queensland, 189- 190*]. Consequently, as already shown above in *Pao*, suing in a court of law does not normally constitute an illegitimate demand nor is of illegitimate nature.
13. UNIDROIT commentary does state that a threat can also lie on the bringing of a court action, it says so in respect of a situation where the court action is not founded where a party misuses its financial capacity and where a party misuses its financial capacity against another party without financial resources to pay lawyers [*Award No. 13009, Para. 65*]. Award No. 13009 considered 6 court actions against the defendant and still, the tribunal held that these were not brought *"for the sole purpose of inducing the other party to conclude the contract on the terms proposed"* [*Ibid.*]. Thus, the court action wouldn't have been disproportionate given Future Energy's participation on the caused damage.

II. MS. ARBITRATOR CAN RESIGN

14. Ms. Arbitrator is legally permitted to withdraw from her function because the alternation of her fees is justified under the circumstances (**A**). However, CLAIMANT is not obliged to depose the additional remuneration (**B**) and her resignation is provided for in CIETAC Rules (**C**).

A. Ex post alteration of fees is completely legitimate pursuant to the underlying circumstances

15. It is true on one hand that it is usual to agree the particulars of arbitrators' fees and reimbursable expenses before or at the time the arbitrator accepts his appointment [*K/S*

Norjarl, at 524; Art. 1689, Arbitration Law Belgium]. However on the other hand, where the complex nature of the dispute was not clear at the time fees were agreed but became apparent after the arbitrator started rendering service under the contract, he can raise the issue of variation of agreed fees with the disputing parties [*Onyema, p. 137*].

16. As a result, because there is a significant change in the commitment in question, Ms. Arbitrator's unilateral modification of the terms of remuneration is justified under the circumstances [*K/S Norjarl, 535*].

B. CLAIMANT is however not obliged to refund the additional fees of Ms. Arbitrator, who is then not required to serve and can withdraw

17. CLAIMANT does not *a priori* contend that Ms. Arbitrator is entitled to remuneration [*Art. 72, CIETAC; CIETAC Ethical Rules for Arbitrators, 14*]. Additionally, *"before entry into the mandate, the arbitrator can decline to act if the rate of fees is unacceptable to* [*her*]*"* [*Onyema, p. 134; K/S Norjarl*]. However her right cannot be exercised without limits by and be in compliance with good faith at the same time.

18. The law that governs the substance of the issue and *lex loci* governs arbitrator's contract. Accordingly, pursuant to VIAC, the arbitrator's contract must be performed in conformity with good faith and fair dealing under Art. 1.7 UNIDROIT. [*Internationales Schiedsgericht; Bonell, p. 128*] Importantly, Art. 6.2.1 and 6.2.2 regarding *rebus sic stantibus* principle of general contract law, are a derivation from the good faith provision in Art. 1.7 UNIDROIT [*Award No. 7365*].

19. *Rebus sic stantibus* is indeed one of the fundamental ideas underlying UNIDROIT [*Bonell, p. 127*] and other similar international restatements such as PECL [*Lando/Beale, art. 1:201*]. *"From the covenant of good faith and fair dealing which is implied in each contract follows that in a case in which the circumstances to a contract undergo* [...]

fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract" [*Award No. 7365*].

20. Accordingly as in Ms. Arbitrator's case, her fees rose by 150% and pursuant to general contract law CLAIMANT cannot be bound to remunerate the additional costs. Therefore should CLAIMANT fail to compensate Ms. Arbitrator, she is not required to serve and can resign [*Gusy/Hosking/Schwarz, p. 125*].

C. Ms. Arbitrator can withdraw from her function under article 31 CIETAC

21. An arbitrator may voluntarily withdraw pursuant to CIETAC Rules *inter alia* based on a failure to fulfill functions [*Art. 31, CIETAC*]. This must be read in conjunction with Art. 72 CIETAC, which guarantees the arbitrator's remuneration.
22. *"Fees are the only tangible benefit* [*she*] *gets from* [*her*] *appointment and involvement in the arbitration process"* [*Mustill/Boyd/Andrews, 233-346; Redfern/Hunter, 4.113-4.126*]. And naturally, since she has no rationale to serve, *"an unwilling arbitrator could not, in fact, be forced to perform [her] functions"* [*Holtzmann/Neuhaus, 464-465, 473*].
23. As a result, there is virtually no reason as to why the Chairman of CIETAC should decline Ms. Arbitrator's resignation based on CIETAC Rules.

ARGUMENTS ON MERITS

III. CLAIMANT IS ENTITLED TO TERMINATION PENALTY

24. Parties expressly chose UNIDROIT as the law applicable to the contract supplemented by matters, which are not governed by CISG [*Par. 29.1, Purchase Contract; Preamble, UNIDROIT*]. Pursuant to these rules CLAIMANT validly terminated Purchase Contract

and can claim penalty (**A**). Moreover, RESPONDENT's withholding of performance does not preclude termination (**B**).

A. CLAIMANT is entitled to claim termination penalty

UNIDROIT governs termination penalties and CLAIMANT may claim them in the amount stipulated in Purchase Contract **a)** based on CLAIMANT´s valid termination of Purchase Contract **b)**.

a) Termination penalty agreed by Parties under UNIDROIT is valid

25. An aggrieved party is entitled to agreed sum irrespective of harm suffered by non-performance in question [*Art. 7.4.13, UNIDROIT*]. Termination penalties stipulated in contracts are expressly included within the relevant provisions as *"agreed sum"* [*UNIDROIT commentary, p. 284*]. CLAIMANT is entitled to termination penalty in the event of a valid termination of Purchase Contract in the amount of USD 8 mil. [*Art. 15.2, Purchase Contract*].

b) CLAIMANT´s termination was pursuant to Purchase Contract

26. CLAIMANT may terminate contract *inter alia* if it issues RESPONDENT a written notice regarding termination and hence fulfills its contractual obligations [*Art. 15.1, Purchase Contract*] *(i)*. Moreover, if RESPONDENT fails within 30 days either to commence and diligently pursue cure of the breach or to provide reasonable evidence that the breach has not occurred, breaches the Contract [*Ibid.*] *(ii)*.

i. CLAIMANT duly fulfilled its contractual obligations

27. It is undisputed that delivery of wrong gearboxes to RESPONDENT was caused by negligence of Future Energy [*Claimant's Exhibit No. 6*]. Under UNIDROIT, non-

performance is excused *"if a party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences"* [*Art. 7.1.7, UNIDROIT*]. Unlike Art. 79, CISG, UNIDROIT expands force majeure as an exception from non-performance because it does not impose any limits on the non-performance caused by a third party, therefore is deemed to be more lenient [*Chengwei, Art. 20.2.2*].

28. Accordingly, in light of the chosen law, negligence of Future Energy is undoubtedly outside CLAIMANT's sphere of control. Moreover, it could not have anticipated such an event at the time of the conclusion of the contract because Future Energy developed the 1.5 MW wind turbines, which presupposes its expertise for examination of suitability of gearboxes necessary for assembly of wind turbines [*Application for Arbitration, p. 3*].

ii. RESPONDENT substantially breached its material obligation to make payment

29. RESPONDENT is in default with two payments, which became due on 20 June and 20 August 2012 [*Claimant´s Exhibit No. 7*]. As RESPONDENT neither responded to notices of default nor adopted any measures to cure the breach, CLAIMANT considers the failure to make payments to be a material breach of RESPONDENT´s obligation and on these grounds terminated Purchase Contract by means of Termination Notice [*Claimant´s Exhibit No. 8.*].

B. Withholding does not prejudice termination because non-conformity notice was not given

30. RESPONDENT´s failure to examine goods **a)** and its subsequent failure to give timely notice **b)** prevents RESPONDENT to rely on the non-conformity of goods.

a) RESPONDENT failed to examine goods

31. Questions of examination of goods and subsequent non-conformity notice are not governed by UNIDROIT, therefore relevant articles of CISG shall apply [*Par. 29.1, Purchase Contract*]. Goods must be examined *"within as short a period as practicable in the circumstances"* [*Art. 38, CISG*]. Generally, the period for examination of goods starts to run upon delivery of goods [*Art. 38, UNCITRAL Digest*].

32. Stemming from factually similar case law, however, there is no obligation to carry out the examination within such a period [*Case No. 02-20166*]. RESPONDENT *"ought to have discovered"* defects of goods through examination carried out by the appointed third company, which took place before the shipping of goods, i.e. before goods were delivered to buyer [*Case No. 02-20166*].

33. Accordingly, the duty to examine goods may be transferred to a third party, such as an expert [*Lemire or Case No. 02-20166*]. However, it is clear that buyer is the one who has ultimate responsibility for examination of goods by any third party under [*Art. 38, CISG; Case No. 7 U 3758/94; Case No. 17 U 110/02*]. Moreover, *"if an independent third party appointed by the buyer is negligent in his examination, […] the buyer bears the responsibility for the defective examination"* [*Huber, Mullis, p. 150*].

34. In the case at hand, RESPONDENT relied on the certification of goods by Future Energy as a sufficient examination. Since RESPONDENT bears ultimate responsibility for examination of goods, it ought to have detected any non-conformities during Future Energy´s inspection. This constitutes a decisive moment for the start of a *"reasonable time"* period for giving of non-conformity notice under Art. 39 CISG [*Rheinland Versicherungen; Huber/Mullis, p.159*].

b) RESPONDENT's failure to give non-conformity notice

35. The buyer loses the right to rely on a lack of conformity of the goods *(i)*, unless he gives notice to the seller regarding the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it [*Art. 39(1), CISG*] *(ii)*. Therefore it is crucial to establish the *"reasonable time"* period, mainly to determine the beginning of such period and secondly, its duration to prevent state of uncertainty *(iii)*.

i. Reasonable time under CISG

36. There is no uniform period in which the non-conformity notice must be given, however, it is generally accepted that said period shall be determined on a case-by-case basis, based on the circumstances of individual case [*Rheinland Versicherungen; Appellate Court Dusseldorf; Huber/Mullis, p. 159 and 161*]. However, courts in certain states such as Germany or Switzerland introduced generous one month period as general guideline for non-conformity notice in normal circumstances [*Felemegas, p. 136*]. In their decisions, courts proposed even other presumptive periods, such as eight days after delivery [*Complex machinery case*], 14 days for examination and notice [*Oberster Gerichtshof*], from two weeks to one month after delivery [*Oberlandesgericht Hamburg*], one month after delivery *[Landgericht Bamberg*] and six weeks after delivery [*Obergericht Zug*].

37. In *Stove* case, the character of goods was similar to the case at hand, as they were not perishable and not affected by major fluctuations in price. The Swiss Appellate Court stated that a period for examination of two weeks but at least one week or five working days seems appropriate and the subsequent period for notification should be set as one month [*Stove, Par. 3*]. Consequently leading to a total period for the notification on non-conformities of six weeks.

38. In this case, the precise date of examination of goods is unknown, but it is carried out before delivery of goods, which took place at the latest on 13 March 2012 [*Art. 10.2,*

Purchase Contract]. Therefore it results, even in the best scenario for RESPONDENT to the period of more than 2 months until delivery of notice to CLAIMANT on 16 May 2012. Given the abovementioned, more than a two-month period is excessive.

ii. Purpose of non-conformity notice

39. The central purpose of the non-conformity notice is to *"give the seller the information needed to determine how to proceed in general with respect to the buyer's claim, and more specifically to facilitate the seller's cure of defects"* [*Huber/Mullis, p. 157*], not to inform the seller about the non-conformity. Therefore if buyer fails to give non-conformity notice within a reasonable time, it leaves seller in the state of uncertainty whether the former accepts the non-conforming goods or what remedy will he seek.

iii. Result of failure to give non-conformity notice

40. The result of the failure to give non-conformity notice is the loss of right to rely on the lack of conformity. It may *inter alia* amount to the obligation of a buyer *"to pay for the goods received at the contract price even if they are seriously defective"* [*Huber/Mullis, pp. 163-4*]. RESPONDENT relied on the defective performance caused by delivery of non-conforming goods as a ground for withholding of its performance under Purchase Contract. Following the submissions, RESPONDENT was not entitled to withhold its performance and shall be obliged to pay stipulated price for delivered gearboxes despite their non-conformity with Purchase Contract.

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PRAYER FOR RELIEF

In light of the submissions made above, CLAIMANT respectfully requests Tribunal to declare that:

- CLAIMANT can bring Future Energy into arbitration proceedings;
- Ms. Arbitrator can resign during the arbitration proceedings; and
- CLAIMANT validly terminated the contract and can claim termination penalty.

Respectfully signed and submitted by counsel on June 21, 2013.