

**MEMORANDUM FOR  
RESPONDENT**

**841 R**

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**INDEX OF TERMS AND ABBREVIATIONS**

UNIDROIT: International Institute for the Unification of Private Law

PICC: Principles of International Commercial Contracts 2010

CIETAC: China International Economic and Trade Arbitration Commission

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

NY Convention: Convention on the Recognition and Enforcement of Foreign Arbitral  
Awards 1958

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Claimant: Energy Pro Inc.

Respondent: CFX Ltd

## **STATEMENT OF FACTS**

Energy Pro Inc. (“Claimant”) is a company located in Syrus. CFX Ltd (“Respondent”) is a company located in Catalan.

On 17 December 2010, the claimant and respondent established a Catalan-based joint venture (“JV”) to manufacture and deal with sale of wind turbines there. Claimant provided all of the raw materials to the JV and subsequently owned all gearboxes produced by the JV. After further negotiation, both parties entered into an exclusive Purchase Contract (“Purchase Contract”) on 10 April 2011, under which Claimant has the obligation to provide gearboxes which meet the required quality standard and obtain certification from Future Energy before shipping to Respondent, and Respondent should correspondingly pay the payment when it is due. If Respondent fails to do so, Claimant has the right to suspend and terminate the Purchase Contract and claim for termination penalty, given its written notice to the Respondent for the breach is not addressed within 30 days. Claimant proposed and adopted a majority of the contractual terms of both the JV and Purchase Contract. It also drafted both the JV and Purchase Contract, making the Purchase Contract a pre-condition to entering into the JV.

On 10 February 2012, Respondent issued a purchase order for 100 gearboxes and on 13 March 2012 transferred the first payment to Claimant before receiving the notice of defective products from Future Energy on 18 April 2012. Respondent asked Claimant to fix the situation otherwise Respondent would suspend its performance. Claimant asserted responsibility to Future Energy and sent two default notices in relation to Respondent’s failure to make the second and third payments under Purchase Contract, on 20 June 2012 and 20 August, respectively.

On 28 December 2012, Claimant sent a notification of termination of the Purchase Contract to Respondent. Claimant alleged that they have validly terminated the

contract and wish to obtain termination penalty from Respondent. The Respondent, on the other hand, pointed out that Claimant did not validly terminate the contract and cannot claim the termination penalty. Also, Respondent claimed that Claimant must return the first part payment.

On 12 February 2013, Claimant filed a notice of the dispute to the China International Economic and Trade Commission.

**ISSUES ON DISPUTE**

**I. PLEADINGS ON PROCEDURAL ISSUES**

**1. MS. ARBITRATOR 1 CANNOT RESIGN AND CLAIMANT MUST PAY HER ADDITIONAL FEES**

**A. CLAIMANT HAS THE OBLIGATION TO PAY THE DEPOSIT IN ADVANCE**

According to the Arbitration Rules, the aforementioned three arbitrators formed the arbitral tribunal on 22 February 2013 to hear this case.<sup>1</sup> Apart from the arbitration fees charged in accordance with its Fees Schedule, CIETAC may charge the parties any other extra and reasonable costs.<sup>2</sup> When the issue of quantum extended to 5 days instead of the 2 days originally allocated, extra costs are needed for the arbitration and Claimant should pay in advance a deposit for actual costs of Ms. Arbitrator 1, who was nominated by Claimant.<sup>3</sup> Claimant's refusal to pay the deposit is in breach of its obligation under the CIETAC Rules.

**B. IF CLAIMANT FAILS TO PAY THE DEPOSIT, A NEW ARBITRATOR SHOULD BE NOMINATED BY CHAIRMAN OF CIETAC.**

If Claimant fails to pay the deposit within the time period specified by CIETAC, it shall be deemed not to have nominated the arbitrator.<sup>4</sup> When it is deemed that Claimant fails to nominate the arbitrator, the Chairman of CIETAC shall appoint the arbitrator.<sup>5</sup>

Thus, Claimant should pay the deposit to Ms. Arbitrator and if it fails to do so within the specified time period, the Chairman, rather than Claimant, will nominate another arbitrator to replace Ms. Arbitrator 1.

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<sup>1</sup> Moot Problem, pg26.

<sup>2</sup> CIETAC Rules Art.72(1)

<sup>3</sup> CIETAC Rules Art. 71(2)

<sup>4</sup> CIETAC Rules Article 12(2)&72(2)

<sup>5</sup> CIETAC Rules Art.25(1) & Arbitration Law of the PRC Art.32

**2. FUTURE ENERGY SHOULD NOT BE ALLOWED TO JOIN AS A THIRD PARTY**

**A. FUTURE ENERGY IS NOT A PARTY OF THE PURCHASE CONTRACT**

Arbitration has a contractual basis and only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that person to appear before it.<sup>6</sup> Here, the arbitration is based upon the Purchase Contract between Claimant and Respondent, meaning Future Energy is not a party of this agreement. There is no legal standing for Future Energy to join the arbitration proceedings.

**B. NO AGREEMENT FROM BOTH FUTURE ENERGY AND RESPONDENT TO ALLOW FUTURE ENERGY TO JOIN THE ARBITRATION**

As stated above, the arbitration is based on the agreements between Claimant and Respondent and Future Energy is not a party of it so the arbitration clauses under the Purchase Contract cannot oblige Future Energy to join this arbitration. In the present case, only if Future Energy and Respondent both give their consent to Future Energy's participation in the arbitration proceedings can Future Energy join as a third party. However, it is apparent that Respondent is against Future Energy's participation. Moreover, as Claimant threatened Future Energy to initiate legal proceeding against it, Future Energy should it not participate in the arbitration between Claimant and Respondent, the participation of Future Energy has potentially been obtained through Claimant's duress. It is elementary that arbitration is a consensual process that requires the agreement of the parties.<sup>7</sup> Future Energy's participation is against its real intention and it should not be allowed.

**C. EVEN IF CLAIMANT BRINGS A SEPARATE ARBITRATION AGAINST**

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<sup>6</sup> Commission on International Arbitration, Final Report on Multi-party Arbitrations, Paris, June 1994, by the Working Group under the Chairmanship of M. Jean-Louis Devolve (published in (1995) 6 ICC Bull.26, para 5)

<sup>7</sup> Gary B. Born(2012), International Arbitration: Law and Practice, Kluwer Law International

**FUTURE ENERGY, THE TWO ARBITRATIONS CAN NOT BE CONSOLIDATED WITHOUT THE CONSENT OF ALL OF THE PARTIES**

There is an agreement between Claimant, Respondent and Future Energy. If there are arbitration clauses contained in that agreement, Claimant may bring a separate arbitration against Future Energy. But the two sets of arbitral proceedings can not be consolidated without the consent of all of the parties<sup>8</sup> Therefore, even if Claimant brings separate arbitration proceedings against Future Energy, it cannot request the consolidation of the two arbitration proceedings and list Future Energy as a third party in this arbitration.

**II. PLEADINGS ON CONTRACTUAL TERMS**

**1. THERE IS GROSS DISPARITY AND THE PURCHASE CONTRACT IS INVALID**

**A. RESPONDENT WAS AT AN UNEQUAL BARGAINING POSITION DURING NEGOTIATIONS**

As Claimant was a powerhouse in the energy sector in Syrus, Respondent was at a disadvantageous status. It is indicated that during the negotiations about the Joint Venture Contract and the Purchase Contract, Claimant proposed and adopted a great majority of the contractual terms while most of the proposals put forward by Respondent were either ignored or rejected. Claimant also made the Purchase Contract as a pre-condition to entering in to the JV.<sup>9</sup> Respondent was put to an unequal bargaining position and Respondent could only follow Claimant's plan. When one party takes excessive advantage of the other party's disablement in conducting the negotiations and there is a serious disparity between the parties' reciprocal rights and obligations, the Gross Disparity principle can be applied.<sup>10</sup>

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<sup>8</sup> Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Bechtel Corp[1982] 2 Lloyd's Rep. 435, CA

<sup>9</sup> Moot problem pg.21

<sup>10</sup> ICC Case Number 9029

**B. CLAUSE 15 OF PURCHASE CONTRACT UNJUSTIFIABLY GAVE CLAIMANT EXCESSIVE ADVANTAGE**

The unfair negotiations led to Clause 15 of the Purchase Contract only providing that Claimant has the right to terminate or suspend the contract in certain circumstances with no provisions dealing with Respondent's right of suspension or termination.<sup>11</sup> This provision is unfair to Respondent as it only imposes termination penalty on Respondent and it does not entitle Respondent to right of termination or suspension when faced with non-performance

In this way, the Purchase Contract unjustifiably gave Claimant an excessive advantage as Claimant is subject to neither termination nor penalty when it fails to fulfill its obligations under the Purchase Contract, while Respondent shall pay a heavy termination penalty to Claimant.<sup>12</sup> Therefore, there is gross disparity.

**C. RESPONDENT MAY AVOID THE PURCHASE CONTRACT AND CLAIM RESTITUTION**

As there is gross disparity between the obligations of the two parties and the Purchase Contract gives Claimant excessive advantages, Respondent is permitted to avoid the Contract and Claimant cannot claim to have terminated the Purchase Contract under Clause 15 of the Purchase Contract.<sup>13</sup>

If Respondent avoids the Purchase Contract, it may claim restitution of what it has supplied, in this case, the first part payment of USD 2 million.<sup>14</sup> Hence, Claimant should return the first part of payments to Respondent.

**2. EVEN IF CLAIMANT IS ENTITLED TO THE RIGHT OF TERMINATION, CLAIMANT DID NOT VALIDLY TERMINATE THE**

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<sup>11</sup> See Ex.No.2

<sup>12</sup> See Ex.No.2

<sup>13</sup> UNIDROIT Principles Art. 3.2.7

<sup>14</sup> UNIDROIT Principles Art.3.2.15

**PURCHASE CONTRACT**

**A. CLAIMANT FAILED TO PERFORM ITS OBLIGATION UNDER THE PURCHASE CONTRACT**

The Purchase Contract made it clear that claimant has the burden to make sure that the gearboxes were in conformity with the specifications laid out in the Purchase Contract.<sup>15</sup>

As the Purchase Contract clearly provides that the gearboxes manufactured by the JV should meet the specifications including Model No. GJ 2635,<sup>16</sup> the gearboxes certified using Model No. GH 2635, which is radically different from Model No. GJ 2635, could not be in conformity with the specified technical requirements set out in the Purchase Contract. Thus, Claimant failed to perform its obligation under the Purchase Contract by providing defective products.<sup>17</sup>

**B. RESPONDENT HAS NO OBLIGATION TO GIVE THE PAYMENTS**

The Purchase Contract made it clear that only after gearboxes have delivered in conformity with this Purchase Contract would then Respondent be required to make the requisite payment.<sup>18</sup> Claimant is bound to render its performance first.<sup>19</sup> When Claimant failed to perform its contractual obligations, Respondent may withhold its performance until Claimant has performed.<sup>20</sup>

Also, the Purchase Contract stipulates that Respondent's obligation to purchase is subject to the claimant being able to meet the established requirements which has been specified under Clause (A) of this Purchase Contract.<sup>21</sup> According to the respondent's Exhibit no.1, notice of the product not meeting the quality standard

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<sup>15</sup> Moot Problem pg.11.

<sup>16</sup> See Ex.No.2

<sup>17</sup> UNIDROIT Principles Article 7.1.1

<sup>18</sup> Moot Problem pg.11.

<sup>19</sup> UNIDROIT Principles Article 6.1.4

<sup>20</sup> UNIDROIT Principles Article 7.1.3

<sup>21</sup> Moot Problem pg. 11.

established in contract was delivered on the telephone call on 18 September 2011 as well as the letter on 18 January 2012. So it is clear that the respondent has properly accomplished its obligation to inform. As mentioned above, the products Claimant provided for the Respondent were not in conformity with the contract. Therefore, Respondent has no obligation to give the payments.

**C. THE PURCHASE CONTRACT WAS NOT VALIDLY TERMINATED**

The Purchase Contract stipulates that the claimant has a right to suspend or terminate the Purchase Contract if Respondent substantially breaches a material obligation, representation or warranty including the failure to make any payment when it is due. Considering that Respondent has the right to withhold its performance before Claimant fulfilled its obligation, Respondent did not substantially breach its material obligation provided that Claimant gave a defective performance. Therefore, Claimant has no right to terminate the Purchase Contract and the termination it made was not valid.

**3. EVEN IF THE PURCHASE CONTRACT IS VALID, THERE IS A FUNDAMENTAL NON-PERFORMANCE AND RESPONDENT MAY TERMINATE THE CONTRACT**

**A. THERE IS FUNDAMENTAL NON-PERFORMANCE OF THE PURCHASE CONTRACT**

The Purchase Contract makes it clear that the gearboxes manufactured by the JV should meet the requirements set in the Purchase Contract, which includes that the gearboxes should be made for Model No. GJ 2635 and for the use of 1.5 MW wind turbine.<sup>22</sup> However, Future Energy negligently used a radically different model (Model No. GH 2635) instead of Model No. GJ 2635 to certify the gearboxes, with the result that the ‘certified’ gearboxes cannot meet the requirements for the Model No. GJ 2635 and cannot be used for the 1.5 MW wind turbines. Thus, it is safe to

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<sup>22</sup> See Ex. No.2

draw the conclusion that Claimant failed to perform its obligations under the Purchase Contract. As the entirety of the gearboxes is worthless for the Respondent, Respondent is deprived of what it was entitled to expect under the contract. Claimant should have foreseen that the certification of Future Energy is not 100% reliable and it should have tried their best to fulfill its obligation under the Purchase Contract, that is, to sell gearboxes that meet the specifications listed in the Purchase Contract. However, Claimant failed to do so and this constitutes non-performance under the Purchase Contract.<sup>23</sup>

As Claimant's non-performance deprives Respondent of what it was entitled to expect under the purchase contract, Respondent may require Claimant to cure the defective performance.<sup>24</sup> In fact, Respondent has made requests to Claimant and asked them to address the problem twice.<sup>25</sup> However, Claimant did not fix the problem and instead shifted the blame to Future Energy.<sup>26</sup> Under these circumstances, it is unlikely for Respondent to expect Claimant to fulfill its obligations in the future thus Claimant's failure to perform its obligation amounts to a fundamental non-performance which entitles Respondent the right to terminate the contract.<sup>27</sup>

## **B. RESPONDENT MAY CLAIM RESTITUTION ON TERMINATION OF THE PURCHASE CONTRACT**

On termination of the Purchase Contract, Respondent may claim restitution of the first part of payment if Respondent makes restitution of the gearboxes it received, that is, returning the defective gearboxes to Claimant.<sup>28</sup>

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<sup>23</sup> UNIDROIT Principles Art.7.3.1

<sup>24</sup> UNIDROIT Principles Art.7.2.3

<sup>25</sup> See Ex. No.4 & Ex. No.6

<sup>26</sup> See Ex. No.6

<sup>27</sup> UNIDROIT Principles Art. 7.3.1

<sup>28</sup> UNIDROIT Principles Art. 7.3.6

**REQUEST FOR RELIEF**

Respondent respectfully request the tribunal to find that

1. Ms. Arbitrator 1 cannot resign and Claimant must pay her additional fees
2. Future Energy should not be allowed to join as a third party.
3. The Purchase Contract is not valid due to gross disparity and the first part of payments should be restituted.
4. The Purchase Contract is not validly terminated and no termination penalty is payable to Claimant.