THE INTERNATIONAL ADR MOOTING COMPETITION 2013

July-August 2013

MEMORANDUM FOR RESPONDENT

TEAM CODE: 281R

ON BEHALF OF:	**AGAINST:**
CFX Ltd,	Energy Pro Inc.,
26 Amber Street,	28 Ontario Drive,
Circus Avenue,	Aero Street,
Catalan	Syrus
RESPONDENT	**CLAIMANT**

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LIST OF ABBREVIATIONS

Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Cl.Ex.	Claimant Exhibit
Code	Code of conduct for arbitrators of CIETAC and CMAC
Contract	Purchase Contract between Energy Pro and CFX
ILC	International Law Commission
JV	Joint Venture
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration,1985
Off Cmt	Official Commentary
p.	page
PICC	UNIDROIT Principles of International Commercial Contract 2010
PRC	People's Republic of China
ProcOrder	Procedural Order No.
Q.	Question

INDEX OF AUTHORITIES

BOOKS/COMMENTARIES

GH Jones/P Schlechtriem	*'Breach of Contract' in AT Von Mehren. (ed), international Encyclopaedia of Comparative Law: Contracts in. General, vol VII ¶ 19* *cited as: Jones/P Schlechtriem* *(para 30)*
John O. Honnold	*Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999)* *Cited as: John O. Honnold*
Joseph Lookofsky	*International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) 1-192* *Cited as: Lookofsky* *(para 44)*
Justice V.K.Singhal	*Arbitration in Construction Contracts & Dispute Resolution Mechanism* *Cited as: V.K. Singhal. J* *(Para 9)*
Kruisinga	*(Non)-conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept? Oxford/New York 2004* *Cited as: Kruisinga* *(para 37)*

Lew, L Mistelis, and S Kröll	*Comparative International Commercial Arbitration (Kluwer Law International, The Hague, 2003)* *Cited as: Lew/Mistelis/Kröll* *(Para 23)*
Loukas A. Mistelis	*Concise International Arbitration* *cited as: Mistelis* *(para 13)*
Mckendrick, E	*Contract Law, 110, (8th ed. 2009* *Cited as: McKendrick* *(Para 2)*
Michael Collins	*Privacy and Confidentiality in Arbitration Proceedings, 11 ARB. INT'L321 (1995)* *Cited as: Collins* *(Para 6)*
Natalie Vorser	*Multi-party Disputes and Joinder of Third Partiesby Nathalie Voser* *Cited as: Voser* *(Para 7)*
Otto Sandrock	*Arbitration agreement and group of companies* *Cited as: Sandrock* *(Para 3)*

Redfern, Alan and Hunter	*Law and Practice of International Commercial Arbitration (2nd ed., Sweet and Maxwell, London, 1991).* *Cited as: Redfern/Hunter* *(Para 2, 4)*
Varady	*Interznational Commercial Arbitration. A Transnational Perspective, 3d ed., American Casebook Series* *Cited as: Varady* *(Para 4)*
Vogenauer/Kleinheisterkamp	*Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC),* *Oxford University Press, New York, 2009* *Cited as: Vogenauer/Kleinheisterkamp* *(para 38, 40)*
Y Derains and E Schwarz	*A Guide to the ICC Rules of Arbitration (2nd edn.Kluwer Law International, The Hague, 2005)* *cited as: Derains/Schwarz* *(Para 23)*

CONVENTIONS/TREATIES

CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980

NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2010
ILC Ybk	General Assembly Report -INTERNATIONAL LAW COMMISSION DOCUMENTS OF THE TENTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY- Yearbook of the International Law Commission
ILC Draft	Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat A/CN.4/92. United Nations, International Law Commission, 1955

INDEX OF CASES AND AWARDS

Ivan v Deutsche	*Case No.5017(1987)* *Ivan Milutinovic PIM v Deutsche Babcock AG* *(para 28)*

ICSID

Enersis case	(ICSID Case No.ARB/03/21) *Enersis S.A. and others v. Argentine Republic* *(para 25)*
Hrvatska v Slovenia	(ICSID Case No ARB/05/24) 6 May, 2008 *Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69 *(para 19)*

South Africa

Umgeni v Hollis	*Kwazulu-Natal High Court, Durban* *(8 March 2012)* *Umgeni Water v Hollis NO and Another (11876/10)* *[2012] ZAKZDHC 10; 2012 (3) SA 475 (KZD)* *http://www.saflii.org/za/cases/ZAKZDHC/2012/10.html* *(para 22)*

Spain

Dye for clothes case	*Appellate Court Barcelona* *20 June 1997* *http://cisgw3.law.pace.edu/cases/970620s4.html* *(para 36)*

U.K

Carillion v Felix	*Carillion Construction limited vs Felix (UK) Ltd* *High court of Justice Queen's Bench division* *2001 BLR 1* *(Para 10)*
Monrovia Tankship case	*Universe Tankships Inc of Monrovia v International Transport Workers' Federation* *[1982] 2 All ER 67* *House of Lords* *(Para 11)*

United States of America

CNA v. Kelon	*CNA Int'l. v. Kelon Electronical* *United States Federal District Court [Illinois]* *3 September 2008* *http://cisgw3.law.pace.edu/cases/080903u1.html* *(para 34)*
Gateway v UMW	*Gateway Coal v. United Mine Workers of America* *414 U.S. 368 (1974)* *U.S Supreme court*

	(Para 1)
Thomson CSF	*Thomson-CSF, S.A. v American Arbitration Association* *64 F.3d 773 (2d Cir. 1995).* *(Para 2)*
Sarhank v Oracle	*Sarhank Group v. Oracle Corp* *404 F.3d 657 (2d Cir. 2005)* *(Para 8)*
ICC	*International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 97/2002* *(Cited as: 06.06.2003, UNILEX)*
ICC Award No.2138	*ICC Award No.2138 (para 3)*
Scaffold fittings case	*ICC Arbitration Case No. 7531 of 1994* *http://cisgw3.law.pace.edu/cases/947531i1.html* *(para 33)*
First Investment v Fujian	*Case No 5017 (1987)* *First Investment Corp of the Marshall Islands v Fujian Mawei Shipbuilding, Ltd,* *2012 WL 831536(E.D.La.March 12,2012)]* *(para 28)*

ARGUMENTS

I. Future Energy cannot participate in the Arbitration Proceeding.

1. Parties are only allowed to settle their disputes by arbitration if they "contracted to do so"[Gateway v.UMW], they may not participate in the arbitration if they are not co-signatories of the arbitration clause[Hanotiau,¶255].

A. Future energy's participation is violative of Privity of Contract.

2. Arbitration has a Contractual character[Thomson-CSF¶766; Redfern/Hunter¶3-30; Fouchard¶280-281]. A person cannot have any obligation enforced against him/ her where the obligation arises under a contact to which he was not a party[Atiyah p.355, Mckendrick p.110].
3. The arbitration clause allows the parties to choose arbitration over litigation. In order to protect this right, it must be interpreted restrictively[ICC Award No.2138 p.934; Sandrock, p.634&635].
4. There are exceptions to such privity through the applications of doctrines like Alter Ego, Group of Companies, agency, piercing the corporate veil, estoppel, assignment, assumption and incorporation by reference[Redfern/Hunter¶3-30, Varady¶197-199]. It is clear that the first four doctrines do not apply here, as the parties constitute different legal entities. The doctrine of equitable-estoppel allows a non-signatory to force a signatory to arbitration when he has a claim which is dependent on the contract containing arbitration. In this case the non-signatory has no such claim. In regard to incorporation by reference, there is no reference between the Contract and the certification agreement. The certification agreement only incorporates the specifications and does not explicitly mention the purchase contract[ProcOrder2].
5. Another exception is Third party beneficiary to the contract which does not apply here as Future Energy does not derive any direct benefit from the Contract but only

through the Certification agreement which is independent from the Contract[ProcOrder2]. Thus including Future Energy in the proceeding is violative of Privity of Contract which is the essence of arbitration.

6. The most desired advantage of arbitration is that of private proceedings and the award rendered in such proceedings are confidential, unless the parties agree otherwise[Collins].

7. CIETAC expressly provides that arbitration proceedings will be held in-camera unless both parties request an open hearing[CIETAC Rules Art 36]. Thus confidentiality is the norm and there is an implied obligation to confidentiality. The opting for arbitration over litigation is to exclude third persons and be subject to private and confidential proceedings[Vorser]. Therefore third persons can only be admitted to the arbitration proceedings on the consent of all the parties to the proceedings[UPS vs Canada, Methanex vs USA]. Thus the joinder of Future Energy as party to the arbitration proceedings is violative of the doctrine of Privity of Contract and breach of Confidentiality.

B. Enforceability of award under New York Convention

8. Joinder of non-signatories if permitted will render the award unenforceable under the NYC. The NYC requires an agreement in writing as under Art.V(1)(a) and Art.II and such agreement must be presented in original to the enforcing court as under Art.IV(1)(b). The concept of arbitrability from Art.II(2)(a) of the NYC was applied in order to deny recognition[Sarhank v. Oracle].

C. Future Energy's consent was obtained under Duress.

9. The parties consent is the basic requirement for arbitration. It must be free from outside influence or interference[V.K.Singhal.J]. CLAIMANT has threatened Future Energy to initiate legal proceedings against Future Energy should it choose not to

participate in the arbitration[Cl.Ex.9]. In this case, it is clear that the consent of Future Energy was obtained only due to the CLAIMANT'S compulsion[ProcOrder2].

10. "The ingredients of actionable duress are that there must be pressure,(a) whose practical effect is that there is compulsion on, or a lack of practical choice for the victim, (b)which is illegitimate and (c) which is a significant cause inducing the claimant enter into the contract."[Carillion v Felix].
11. Lord Scarman has held that "Duress can exist even if the threat is one of lawful action: whether it does so depends on the demand"[Monrovia Tankship case]. In this case even though CLAIMANT has a right to litigate, it is using it only to compel participation in the arbitration. Compulsion to arbitration is against the fundamental principles of arbitration i.e. free consent and is thus illegitimate.
12. The claimant has threatened to litigate for damages which he may incur under the arbitration[Cl.Ex.9] which at minimum may amount to USD 2,000,000. A 2,000,000 USD suit is clearly a significant cause to induce Future Energy to enter arbitration. All the ingredients are thus satisfied and hence there is a clear case of Duress.

II. Ms. ARBITRATOR1 CANNOT RESIGN DURING THE PROCEEDINGS

A. Resignation valid only upon chairman's acceptance

13. An arbitrator may not resign from an arbitral tribunal as he wishes, but can only do so where there exist justifiable reasons that impede him for fulfilling his task as an arbitrator*[Mistelis, p.544]*. In practice, it is rare that arbitrators resign, where they do, their request needs to be approved by the chairman of CIETAC upon consideration of reason for resignation.*[Art.31(4) of CIETAC Rules]*

14. The tribunal and the Chairman, only after analyzing whether the reason for resignation supersedes all the extra costs and delay in conducting the proceedings, can accept the resignation.

B. Principle of immutability of properly constituted tribunals

15. Art.4(1) of Model Rules on Arbitral Procedure, 1958 and Art.5(1) of the ILC Draft on Arbitral Procedure provide this principle, which states that once a tribunal has been properly established, its composition should remain unchanged until the award is rendered.*[ILC Ybk Vol.II p.6,7]*

16. The aim of this principle is to ensure that the agreed arbitration proceedings is not subject to the frustration by a subsequent obstructive attitude of one of the parties or by failure to provide for foreseeable contingencies*[ILC Draft]*

17. Under Art.5(2) of the Draft and Art.4(2) of the Model Rules, this principle has the following exceptions: (a) Before the beginning of the proceedings a party may replace an arbitrator appointed by it and (b) After the beginning of the proceedings an arbitrator may be replaced by agreement between the parties.

18. Resignation of Ms. Arbitrator1 would violate this principle since the Tribunal has already been set up and the proceedings have commenced and replacement is not agreed upon by both the parties.

19. In the case of **Hrvatska v Slovenia,** the Tribunal held that 'Even fundamental principles must, give way to overriding exceptions'. The overriding principle is that of the immutability of properly constituted tribunals(Art.56(1) of ICSID Convention)'.

C. No valid grounds for resignation

20. An arbitrator can be permitted to resign only on certain valid grounds. Although the laws are silent about what constitute 'valid grounds', it is safe to assume that medical reasons or other serious conditions would fall under that category. Extension of oral

hearings by three days cannot be a rare serious ground. Certain national laws provide for resignation, usually specified circumstances. Even so, national laws, like institutional rules, are mostly silent regarding when an arbitrator may properly withdraw or resign*[Model Law, Art.13(2) and 14(1); English Arbitration Act, s25]*

D. Ms.Arbitrator1 is ethically bound to hear the case and deliver the award

21. Ms. Arbitrator1 accepted her appointment as a party-nominated arbitrator. The accepting of the appointment makes her bound by the Code[Art.7]. Ms.Arbitrator1 has a duty to ensure her availability for the oral hearings and deliberations. A three day extension of oral hearings does not constitute a special circumstance or a reasonable ground for Ms. Arbitrator1 to resign during the oral hearings.

22. Arbitrators who accept appointments must make sure that they will be reasonably available to hear the dispute; make an award; and are confident enough to deal with difficult parties and finally make a valid and enforceable award.***[Umgeni v Hollis]***

23. Taking into consideration various other major Institutional rules, there is a contractual obligation on the arbitrators to discharge their duties to the parties*[Lew/Mistelis/Kröll p.281; Derains/Schwarz p.128;]*

E. CLAIMANT must pay additional fees to Ms. Arbitrator1:

24. Pursuant to Art.72(1) of CIETAC Ms. Arbitrator1 reserves the right to claim additional fees for additional days of oral hearings. It is unjust and unfair to Ms. Arbitrator1 to be present for 3 additional days of oral hearings without payment of additional fees. Therefore, it is only justified to order the CLAIMANT to deposit the additional fees into her account.

a) Replacement causes unnecessary frustration in the proceedings

25. The Chairman of CIETAC has the power to decide whether that arbitrator should be replaced*[Art.31(4),CIETAC Rules]*. In the event an arbitrator resigns, a substitute

arbitrator will be appointed by CIETAC. Pursuant to Art.32 of CIETAC Rules, the other two arbitrators may request the Chairman of CIETAC to replace the resigning arbitrator. Replacement would require additional time and expenses not only from the parties, but also from the Tribunal, and also violates the general "he who hears must decide" rule. In the present case, when resignation itself is disputed, replacement would be an unnecessary obstacle frustrating the progress of the case. Many cases have gone to the extent of suspension pending replacement of an arbitrator***[Enersis case]***

26. Hence, to avoid unnecessary delay and expenses that occur due to replacement, CLAIMANT must pay the additional fees to Ms. Arbitrator as requested.

b) Disadvantages of truncated tribunals

27. Art.32 of the CIETAC Rules provide for the majority of the arbitrators in the panel to continue with the proceedings without a replacement of the resigned arbitrator, with the consent of the Chairman. This is not in compliance with Art.37(1) of PRC Arbitration law which provides for a substitute arbitrator when a vacancy arises in the panel. Proceeding with a truncated tribunal interferes with the parties' original agreement to have a three-arbitrator tribunal. To do so is unfaithful to the underlying principle of "party autonomy"[*G.Born,p.*1589]in arbitration, which CIETAC gives priority to.

28. CLAIMANT must be ordered to pay Ms.Arbitrator1 the additional fees because, even if replacement is not made and the proceedings resume with a truncated tribunal, it is a serious disadvantage to the parties. In many recent Chinese, French, Swizz and US cases, awards rendered by Truncated Tribunals were set aside irrespective of whether there was a default or not on grounds that an award rendered by only two arbitrators was not in accordance with the agreement of the parties on a three-member tribunal or

in some cases contrary to the principles of equality of treatment and equal representation on the arbitral tribunal[***Ivan v Deutsche, First Investment v Fujian***]

III. CLAIMANT INVALIDLY TERMINATED THE CONTRACT

A. CLAIMANT committed an act of interference under PICC Art.7.1.2

29. RESPONDENT's obligation to purchase is subject to claimant meeting specified quality standards[Clause(10)] including the obtainment of a certification that the gearboxes are in conformity with Clause(A) of the Contract. A wrong certification of the gearbox lead to the approval of wind turbines of Model GH-2635[ProcOrder2-Q.8] which is incompatible with the GJ Model gearbox, thereby, defeating the purpose of the contract. Thus, CLAIMANT committed an act of interference. The provision is analogous to CISG Art.80, wherein, the interference by the CLAIMANT is a result of:

a) Non-conformity with the Contract under CISG Art.35(1)

30. Under CISG Art.35, the central concept of non-performance is 'non-conformity' [*Jones/Schlechtriem*, para192] which provides that the goods should conform to the quality description required by the contract. The gearbox did not conform to the quality specifications since it was certified based on the requirements of Model No.GH-2635[Cl.Ex.3].

b) Non-conformity with the Contract under CISG Art.35(2)(b)

31. CLAIMANT was aware that the gearbox was to be used in Turbo Fast's wind-turbines[Facts, para3]. The gearbox Model GJ-2635 proved useless to the GH-2635 Model wind-turbines which it received due to wrong certification. Since the CLAIMANT was aware of the purpose of the gearbox the RESPONDENT could depend on the CLAIMANT for a complying performance with respect to that purpose.[Bianca/Bonell,p.275].

c) Non-conformity amounting to fundamental breach

32. The non-conformity is a fundamental breach since:

i) It substantially deprived RESPONDENT of its legitimate expectations

33. RESPONDENT was denied any benefits it expected under the contract since the gearboxes were completely useless to it and could not facilitate the very purpose for which the Contract was entered into [Art.25 CISG; *Scaffold fittings* case; *Tiles* case]

ii) The detriment was foreseeable

34. CLAIMANT as an experienced trader in the business of gearboxes should have anticipated the losses that resulted from the non-conformity of such an important component, without which the Turbines cannot function. Since, the CLAIMANT was aware that the gearboxes were to be used in TurboFast's Wind Turbine, it cannot limit its liability since the losses incurred were reasonably foreseeable at the time of conclusion of the contract[CNA v. Kelon].

B. RESPONDENT entitled to rely on lack of conformity

a) Examination duly performed by the RESPONDENT

35. The buyer is normally not required to make an examination which would reveal every possible defect[Secretariat Commentary, CISG Art.38]. Since the scope of examination by the RESPONDENT was only limited to ensuring that the gearbox meets the standards of GJ-2635 Model, the RESPONDENT duly conducted the examination. Moreover, when the buyer is not able to discover a lack of conformity through the required examination, he may rely on such conformity and give notice to the seller only after the lack of conformity has been discovered[*Bianca-Bonell*, p. 298].

b) Notice within reasonable time

36. RESPONDENT'S e-mail to the CLAIMANT on 16/5/2012[Cl.Ex.4] constitutes a timely and proper notice in accordance with Art.39, CISG. Notice can naturally only be given when non-conformity is detected and should be given within a reasonable time of this discovery[*Canned food* case; *Dye for clothes* case]. A reasonable time-limit for submitting the notice is widely accepted to be one month after the lack of conformity is discovered[*Hygenic Tissues* case; *Machinery* case]. Since the RESPONDENT discovered the defect on 18 April 2012 its notice was within the one-month time period and hence, reasonable.

c) Notice specific enough for the CLAIMANT to understand.

37. Pursuant to CISG Art.39(1), a notice specifying the nature of lack of conformity had been given by the RESPONDENT to the CLAIMANT in its email. This requirement should however not be exaggerated[Kruisinga, p.93]. RESPONDENT in its email stated the lack of certified approval due to which the gearboxes were useless[Cl.Ex.4]. In addition, RESPONDENT admittedly was aware of the defect and its nature even prior to receiving this e-mail[Cl.Ex.5]. Even if the Tribunal considers the notice to not be specific enough for the layman to understand, the CLAIMANT should have understood it, being a seller experienced in this field[Facts, para2]

C. RESPONDENT rightfully withheld performance

38. Pursuant to PICC Art.7.1.3, the RESPONDENT withheld any further payments for the defective gearboxes till the CLAIMANT remedied the situation[Cl.Ex.4]. The reasons for non-performance by the CLAIMANT are irrelevant for exercising this right. Moreover, even if the non-performance is not fundamental the RESPONDENT is entitled to withhold performance*[Vogenauer/Kleinheisterkamp, p.741]*

D. Restitution of price paid by the RESPONDENT

39. Based on the reasons stated above, CLAIMANT'S termination is invalid. Thus, it cannot rely on Clause (15.2) of the Contract and retain the price of USD 2,000,000 paid by the RESPONDENT.

IV. RESPONDENT CANNOT CLAIM TERMINATION PENALTY

A. CLAIMANT cannot claim damages.

40. The alleged non-performance of the RESPONDENT constitutes an excused one as a result of CLAIMANT'S interference with RESPONDENT'S performance [Art.7.1.2,PICC] and because the non-performing party is entitled to withhold performance as per PICC Art.7.1.3[*Meyer*, p.197]. Accordingly, the CLAIMANT is barred from resorting to any of the remedies for non-performance including damages[*Vogenauer/Kleinheisterkamp*].

B. Grossly excessive penalty on RESPONDENT.

41. Penalty of an amount which was close to the value of the contract is excessive [Forrest v Henderson]. The present case is very similar to Illustration 2 of the PICC Commentary as per which the illustration, the buyer's non-performance would result in a grossly excessive benefit for the seller. Likewise, the CLAIMANT'S claim for USD 8,000,000 for the whole term of the contract in addition to it wanting to retain USD 2,000,000 already paid amounts to a grossly excessive penalty which the Tribunal should reduce[Russia, 1997].

C. Damages should be reduced

42. The CLAIMANT cannot claim USD 8,000,000 since:

a) Harm was due in part to the CLAIMANT

43. Assuming not conceding that the RESPONDENT was at fault in failing to perform its obligations, the CLAIMANT had contributed to harm pursuant to PICC Art.7.4.7 since the latter was responsible to obtain right certification, failure of which led to the

supply of GH-2635 Model wind turbines, making the GJ-2635 Model gearboxes useless.

b) CLAIMANT failed to mitigate damages.

44. The CLAIMANT cannot contend that its act of termination was an attempt to mitigate losses. The RESPONDENT suspended the Contract on 21 May 2012 expressing clearly its intention of not performing the contract until the CLAIMANT remedied the situation. The subsequent idleness and delay in action by the CLAIMANT amounted to a failure to mitigate losses[*Lookofsky*,Art.77; *Electric heaters case*] since the Contract was terminated on 28 December 2012. The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps[00.12.1987, UNILEX].

D. Interest on damages to be accrued when payment due.

45. Firstly, PICC does not cover interest-on-damages for any monetary obligation. Even on reliance to CISG Art.78, the CLAIMANT cannot charge interest as to be accrued from the date it incurred expenditures. The provision is silent on the date of accrual, but the interest is payable from the effective date of the obligation for payment of the purchase price[CLOUTNo.328] and not prior to that. The CLAIMANT cannot claim interest from the date of expenditure incurred by it. The aggrieved party is deprived of the use of the money only from the moment of the loss, accordingly, it should be entitled to interest payments on the loss from the time of the breach and not prior to it[*Thiele*].

RELIEF REQUESTED

46. In light of the arguments advanced, RESPONDENT requests the Tribunal to find that:

a. The CLAIMANT is prohibited from bringing Future Energy into the Arbitration Proceeding.

b. Ms. Arbitrator 1 cannot resign during the arbitration proceeding.

c. The termination of the contract by the CLAIMANT is invalid.

d. CLAIMANT is denied Termination Penalty.