607R

THE FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDA FOR

RESPONDENT

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

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

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

TABLE OF AUTHORITIES

Primary Sources

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

Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, International commercial arbitration: an asia-pacific perspective, Cambridge

JURISDICTION

I. The Tribunal constituted under CIETAC Rules has no jurisdiction

A. Arbitration proceeding in Hong Kong should be dismissed as it is not an appropriate place of arbitration.

1. According to the application for arbitration, any dispute arising from or in connection with the purchase contract between Energy Pro Inc. and CFX Ltd. shall be submitted to the CIETAC and the arbitration shall take place in Beijing, China.

2. However, the Claimant and the Respondent have not discussed the place of arbitration in the application for arbitration. Due to the fact that the place of arbitration has its own primary meaning [*Weigand*, 2009], the parties should agree upon the place of arbitration before advancing to the hearing of arbitration.

3. First, the seat of arbitration and the place of arbitration are two completely different concepts and should not be treated similarly. Second, when the seat of arbitration is in a place that is not convenient for parties to make arguments, collect evidence, or summon witnesses, the hearings may be held elsewhere in a location other than at the seat of arbitration for the sake of the parties' convenience. Third, the nationality of the award which is relevant for the ultimate enforcement of the award is determined by the place of arbitration. Fourth, non-legal factors such as available facilities, transportation, accommodation, and telecommunication of the place of arbitration should be cautiously considered, as these factors might affect progress of the arbitration [*Lew et al*., 2003].

4. Although the place of arbitration is also important for CFX Ltd. to make robust arguments, the hearing of arbitration is now in progress in Hong Kong without any formal consensus between the participants. Therefore, the place of arbitration should be on the table as an important issue before starting the hearing of arbitration.

5. The CIETAC Arbitration Rules recognize that parties are free to select the seat of the arbitration; furthermore, the arbitration shall ordinarily be heard at the place that the parties have agreed upon as the place for oral hearings. In the absence of such an agreement, a case accepted by CIETAC shall be heard in Beijing, or if the arbitral tribunal considers it necessary, at other places with the approval of the Secretary-General of CIETAC [*Weigand*, 2009]. Based on this argument, the oral hearing should be held in in Beijing, China. Also, before starting the proceeding of arbitration, as there is no agreement where the oral hearings should be, the two parties must wait until the arbitral tribunal approves of Hong Kong as a legitimate place for oral hearing.

II. Future Energy Inc., a third party, cannot be involved in this arbitration

A. The arbitral tribunal should not allow Future Energy Inc. to participate in the arbitration proceedings.

6. When a third party enters into the proceedings, the arbitral tribunal should consider whether all of the parties have previously given their consent, and whether that consent is sufficient [*Greenberg et al*., 2011; *Lew et al*., 2003; *Blackaby*, 2009]. Future Energy Inc. is under duress from Energy Pro Inc. to participate in the arbitration process. Energy Pro Inc. wrote in the letter that if Future Energy Inc. did not participate in the process of arbitration, Future Energy Inc. would be litigated [*Claimant's Ex. 9*]. Because of this threat, it is highly expected that Future Energy Inc. will not play a neutral role in the future process of arbitration. In this situation, based on UNCITRAL Model Law Art. 17(5), the participation of Future Energy Inc. should not be allowed.

7. In addition, because CFX Ltd. officially disagrees with the participation of Future Energy Inc. in the process of arbitration, it can be said that there is absolutely no consent among the parties.

8. Clause 20 of the purchase contract executed between Energy Pro Inc. and CFX Ltd. does not include a third party as the party directly involved. Furthermore, Future Energy Inc. did not participate in the performance of the contract and did not play a key role making the purchase contract. Therefore, Future Energy Inc.is not familiar enough with the contract in detail, and therefore has no legal position to have a voice in the arbitration proceedings.

III. Resignation of Ms. Arbitrator 1 and a subsequent new nomination by CLAIMANT should not be permitted

A. Ms. Arbitrator 1 should not resign and she must be paid additional fees by Energy Pro Inc.

9. The main reason that arbitrators should resign is if the arbitrator lacks impartiality or independence. [*Lew et al*., 2003]. For example, Article 180 Switzerland Federal Code on Private International Law only mentions the lack of independence as a reason for challenge. Aside from considering some specific laws on arbitration, an arbitrator who has a problem with a lack of independence should obviously be rejected in the process of arbitration. Actually, most countries except for England and the US accept the concept of "justifiable doubt", which means that even if there is no real danger of a lack of impartiality, the arbitrator cannot be involved in the arbitration proceeding [*Lew et al*., 2003]. In this case, Ms. Arbitrator 1 does not have any problems with impartiality or independence at all.

10. According to Greenberg et al (2011), 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. But it is neither a problem with integrity nor efficiency that potentially impedes Ms. Arbitrator 1's ability to continue

her job. Rather, she just feels that she is not being paid properly. If she does receive the fees that she is asking for, there are no circumstances that would prevent her from fulfilling her functions. Therefore, CIETEC Arbitration Rules Art. 31.1 is not applicable in this case.

11. There may be a concern, however. The reason that CFX Ltd. requires an augmentation of payment for Ms. Arbitrator 1 is that CFX Ltd. may receive tangible or intangible benefits from Ms. Arbitrator 1 in the process of the arbitration. In order to prevent this situation, an augmentation of payment for an arbitrator must be agreed upon by all parties [*Lew et al.*, 2003; *Waincymer*, 2012]. However, CFX Ltd. has nothing to do with this hypothetic situation. Ms. Arbitrator 1 is appointed by Energy Pro Inc. not CFX Ltd.. She should earn additional fees from Energy Pro Inc. because she will work more than expected.

12. The act of replacing an arbitrator is an inefficient endeavor. CIETEC Arbitration Rules, Art. 31.3 states that if an arbitrator is to be replaced, a substitute arbitrator shall be nominated according to the same procedures and time period that applied to the nomination of the arbitrator being replaced. In other words, if replacement of an arbitrator happens, CFX Ltd. must wait until a new arbitrator shows up and completely understands the parties' situation. Also, Waincymer(2012) argues that an appointed arbitrator has a duty to complete the mandate expeditiously and efficiently. If Energy Pro. pays an additional 3-days' worth of fees to Ms. Arbitrator 1, not only would Ms. Arbitrator 1 be able to fulfill her duties, but also the whole arbitration process may continue without additional wasting of time and money.

13. From time to time, a limit may be imposed on the amount for which an arbitrator is reimbursed (ex. hotel expenses), and any expenditure over this limit is then paid for by

the arbitrator's own expense [*Blackaby*, 2009]. Additional fees for extra official working should not be regarded as expenditure over this limit. These additional fees are justified compensation for Ms. Arbitrator 1 who will have to work more than originally planned.

14. Based on UNCITRAL Model Law Art. 41, the modification of fees after the original agreement is justified if the process of arbitration becomes more complicated than originally expected. After subsequent discussions with the arbitral tribunal and both counsels, Ms. Arbitrator 1 came to the conclusion that 2 days were not enough to reach an agreement, which meant that due to the complexity of the case, 3 more days were necessary to reach a satisfactory agreement. Therefore, modification of the fees for Ms. Arbitrator 1 is justified.

MERITS

II. Even if the Purchase Contract was valid, Claimant failed to fulfill its contractual obligations

A. Claimant did not take action to remedy the problems raised by the Respondent after both the 1st and 2nd Design Reviews

15. Annex I of the Purchase Contract makes it clear that Claimant was to conduct two manufacturing reviews in order to enable Respondent to monitor the production process. Annex I of the Purchase Contract was the only assurance Respondent had that Claimant would perform their obligations according to the contract. Respondent would obtain quality assurance through the two manufacturing reviews by being able to monitor the production process.

16. However, Claimant did not keep its word on remedying the problem after the 1st Manufacturing Review. After the first review on 17 September 2011, the chief engineer for Respondent found serious manufacturing flaws that were present in the gearboxes

[*Respondent's Ex. 1*]. Respondent informed Claimant the next day, and was given assurance by Claimant that things would be on track by the 2nd Manufacturing Review.

17. Claimant failed again to respond to Respondent's show of concern after the 2nd Manufacturing Review. The same problems were detected again after the 2nd Manufacturing Review on 16 January 2012. As a result, Respondent informed Claimant in on 18 January 2012 of the problem and gave warning that Respondent may have to change the course of direction with Claimant if things did not improve as promised.

18. Claimant did not fulfill their duty of best efforts. Claimant had an obligation to conduct two manufacturing reviews in order to enable Respondent to monitor the production process in order to give the Respondent an opportunity to voice out opinions on the production process. However, Claimant did not keep its word that the situation would be remedied and ignored Respondent's show of concern. Therefore, Claimant failed in its duty to make best efforts [PICC Art. 5.1.4. (2)].

B. Claimant did not fulfill its duty to obtain certified approval from Future Energy Inc.

19. Clause 10.2 of the Purchase Contract makes clear that Claimant is responsible for obtaining certification. The responsibility to obtain certified approval from Future Energy Inc. that the gearboxes were in conformity with the standards required under Clause (A) of the Purchase Contract fell on Claimant under Clause 10.2 of the Purchase Contract.

20**.** Therefore, Claimant failed to perform its obligation to deliver goods that were in conformity with the standards required under Clause (A) of the Purchase Contract, which constitutes non-performance on Claimant's part [PICC Art. 7.1.1].

21. As a result, Claimant failed in its duty to achieve a specific result of delivering GJ 2635 to Respondent, bound to it by its obligations under the Purchase Contract [PICC Art. 5.1.4 (1)].

22. As such, Claimant is responsible for non-performance. The Claimant, having failed to deliver 100 Model No. GJ 2635 gearboxes, did not perform its duty to deliver goods in conformity with specifications in Clause (A) of the Purchase Contract. As such, Claimant is responsible for non-performance.

C. Respondent was not late in performing the due diligence of confirming that the goods were of standard quality

23. According to CISG Art. 39 (2), Respondent, as the 'Buyer', is responsible for notifying Claimant, the 'seller', within a period of two years. Respondent notified Claimant of the lack of conformity of the goods to the Purchase Contract, and of Claimant's violation of said contract within 1 month of receiving notification that the goods were not in conformity with the Purchase Contract. CISG Art. 39 (2) states that the buyer loses the right to rely on a lack of conformity of the goods if the buyer fails to notify the seller specifying the nature of the lack of conformity within a period of two years, at the latest, after he has discovered it. The period of 1 month that it took Respondent to notify Claimant was within 'reasonable time'.

24. The proper examination of goods according to CISG Art. 38(1) must involve a testing of the function of the machine**.** The German court ruled that the proper examination of the goods according to CISG Art. 38(1) in a sale concerning a machine or other technical device must involve a testing of the functions of the machine. In the case at hand, the purpose of obtaining certification from Future Energy Inc. was to insure that the gearboxes were tested and fully functional. Therefore, the obligation to

examine the goods within a 'reasonable time' does not apply to Respondent. As such, the responsibilities outlined in CISG Articles 38, 39 are irrelevant to Respondent's case.

D. The Joint Venture Agreement and the Purchase Contract are two separate contracts

25. Having delivered gearboxes which are not like the models stipulated in the contract, the Claimant claims that the delivered GH 2635 also meets the qualifications met for general sale in Catalan. What the Claimant seems to have overlooked is that the joint venture agreement and the purchase contract are two significantly different contracts and they must not be evaluated as overlapping or presuming each other. In the joint venture agreement, the claimant and the respondent are both equity holders of the joint venture. In essence, it is an agreement to become partners to a company, albeit with the Claimant holding 4 times more equity than the Respondent. However, in the purchase contract, the Claimant is the seller and the Respondent is the buyer, putting the two respective parties in a relationship with conflicting interests.

26. Also, the purchase contract specifies that the obligation of the Respondent to purchase from the Claimant is "subject to" the Claimant "being able to meet the established quality … which has been specified under Clause (A) of this Purchase Contract." [Purchase Contract 10.1] This is a clear statement establishing the scope of the Respondent's obligations under the purchase contract. Coupled with the fact that Clause (A) of the purchase contract exclusively specifies GJ 2635 as the model that is subject to this contract, the interpretation of this purchase contract does not allow room for the Claimant to argue that the GH 2635 gearboxes are still valid as part of a broader scope of the interpretation that the Claimant arbitrarily applied in an attempt to mask its

fault. Therefore, the delivery of the GH 2635 gearboxes do not constitute performance of any part of the purchase contract.

III. Claimant's termination of the Purchase Contract is invalid

A. The suspension of the Purchase Contract by Respondent, which preceded the termination by Claimant, is valid

27. Respondent may request the adaptation of the contract to bring it in accordance with reasonable commercial standards for dealing according to PICC Art. 3.2.7 (2). As was established in I. A. 2, the Purchase Contract unjustifiably gave Claimant excessive advantage at the time of the conclusion of the Purchase Contract. As such, the Purchase Contract only specifies Claimant's right to suspension and termination of the contract. Hence, Respondent requests the court to adapt the contract in order to bring it into accordance with reasonable commercial standards of fair dealing, and allow Respondent the right to suspension and termination as well [PICC Art. 3.2.7(2)].

28. As the aggrieved party, Respondent rightfully withheld its performance, pending cure by Claimant. As was seen in II. B. 4, Claimant can be held responsible for non-performance. PICC Art. 7.1.4. (4) provides that as the aggrieved party, Respondent may withhold performance pending cure from Claimant. Hence, Respondent's decision to withhold the 2nd and 3rd payments until Claimant performed its obligation to deliver 100 gearboxes of Model No. GJ 2635, and thereby suspend the contract pending cure, is valid.

29. Respondent moves to terminate the Purchase Contract. Claimant's termination of the Purchase Contract based on Respondent's decision to exercise its right to withhold performance has no grounds. Therefore, Claimant's failure to perform its obligation

remains. Accordingly, the following factors constitute grounds for Respondent to terminate the contract due to Claimant's non-performance under PICC Art. 7.3.1.

30. a. Claimant failed to comply with its obligation to deliver goods that met the specifications outlined in the Purchase Contract. As goods that do not meet the specifications would be irrelevant to the Purchase Contract, Clause (A) of the Purchase Contract can be seen as an essential obligation of the contract [PICC Art. 7.3.1. (b)].

31. b. Claimant's non-performance and its subsequent refusal to remedy the situation [*Claimant's Ex. 3*] gives Respondent reason to believe that it cannot rely on Claimant's future performance [PICC Art. 7.3.1. (d)].

IV. Claimant cannot claim the termination penalty

A. Even if Claimant's termination were to be seen as being valid, Claimant cannot claim the termination penalty

32. The Respondent's actions do not meet the criteria set in Clause 15.1 of the Purchase Contract. Respondent has not breached a material obligation, representation or warranty, as is required in Clause 15.1 of the Purchase Contract for Claimant to claim the termination penalty provided in Clause 15.2. Respondent's decision to withhold further performance pending Claimant's delivery of 100 gearboxes that meet the specifications of the Purchase Contract was valid. Hence, Claimant is not entitled to retain the first payment made by Respondent, and Respondent is not obligated to pay Claimant the termination penalty [PICC Art. 15.2].

IV. Respondent claims damages

33. Respondent claim damages for delay as well as for any harm caused or not prevented by the cure. PICC 7.1.4 (5). In addition to the effects of Claimant's no non-performance detailed in III. A. 2, Respondent retains the right to claim damages for

delay as well as for any harm caused or not prevented by the cure. Seeing as Claimant has failed to provide a cure for its non-performance, Respondent's right to claim damages for delay is evident.

34. Claimant return USD 2,000,000 plus late fees and offers to return the 100 gearboxes of Model No. GH 2635. As stated in III. A. 3, Respondent rightfully terminates the Purchase Contract and asks for the return of the first payment of USD 2,000,000 made by Respondent plus the delay charge calculated from the day the payment of the USD 2,000,000 was made to the day Claimant makes the payment of USD 2,000,000 plus delay charge, and offers to return the 100 gearboxes of Model No. GH 2635.

(3,059 words)