FORTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION
28 JULY – 3 AUGUST 2013
HONG KONG

IN THE CHINA INTERNATIONAL ECONOMIC AND TARDE ARBITRATION COMMISSION

and

IN THE MATTER OF AN ARBITRATION

BETWEEN

ENERGY PRO INC. **Claimant**

and

CFX LTD **Respondent**

MEMORANDUM FOR CLAIMANT

TEAM NO. 232C

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LIST OF ABBREVIATIONS

AfA	Application for Arbitration
Art.	article / articles
CIETAC	China International Economic and Trade Arbitration Commission
CLAIMANT	Energy Pro Inc.
Clarifications	Procedural Order No.2
Ex.	Exhibit Number
FUTURE ENERGY	Future Energy Inc.
GH gearboxes	GH 2635 gearboxes
GJ gearboxes	GJ 2635 gearboxes
JV	The Joint Venture
No.	Number
p. / pp.	page / pages
para.	Paragraph
Parties	Energy Pro Inc. and CFX Ltd.
RESPONDENT	CFX Ltd.
SoD Defense	Statement of Defense, Defense

SoD Resignation	Statement of Defense, Resignation of Ms. Arbitrator's Resignation
the Agreement	The Certification Agreement, Procedural Order Number 2 Question 13
the Arbitration Clause	Clause 20 of the Purchase Contract, Claimant's Exhibit Number 2
the Contract	Purchase Contract, Claimant's Exhibit Number 2
the Penalty Clause	Clause 15.2 of the Purchase Contract, Claimant's Exhibit Number 2
the Tribunal	The Three Arbitrators
v.	Versus

INDEX OF AUTHORITIES

	Perspectives from CISG, UNIDROIT Principles and PECL *cited as: Liu*	
Mo Zhang	Chinese Contract Law: Theory and Practice' (Koninklijke Brill NV, The Netherlands, 2006) *cited as: Zhang*	**8, 11**
United Nations	UNIDROIT Principles of International Commercial Contracts 2010, International Institute for the Unification of Private Law (UNIDROIT), Rome *cited as: PICC Commentaries*	**41, 44**

INDEX OF CASES

INDEX OF LEGAL INSTRUMENTS

A. FUTURE ENERGY can be brought into the arbitration proceeding as a third party

1 CLAIMANT submits that FUTURE ENERGY can be brought into the proceeding as a third party on the grounds that (I) Parties have consented to join FUTURE ENERGY as a third party; (II) the participation of FUTURE ENERGY is not obtained by duress; and (III) joining FUTURE ENERGY into the arbitration will facilitate procedural efficiency.

I. Parties have consented to bring FUTURE ENERGY as a third party

2 Parties have consented to join FUTURE ENERGY as a third party on three bases: (i) FUTURE ENERGY is substantially involved in the performance of the Contract; (ii) the Contract and the Agreement constitute an ‘indivisible whole’; and (iii) the dispute involving FUTURE ENERGY is ‘intertwined with the Contract’.

i. FUTURE ENERGY is substantially involved in the performance of the Contract

3 Applying the 'Group of Companies' doctrine, CLAIMANT submits that the substantial role FUTURE ENERGY played in the performance of the Contract implied consent between Parties to have FUTURE ENERGY as a party to the Arbitration Clause, [*Dow Chemical; Municipalité de Khoms; Hanotiau p.547*]. FUTURE ENERGY was substantially involved in the Contract as an independent certification company to ensure the gearboxes reached necessary specifications [*SoD Defense para.3*].

ii. The Contract and the Agreement shall be read as a whole

4 CLAIMANT submits that the Contract and the Agreement were inextricably tied and constituted an 'indivisible whole' [*Westland Helicopters; Lufthansa*]. The Agreement was not

entered independently, rather it was formed on the basis of the Contract [*Clarifications 13; Claimant's Ex.2 Clause 10.2*]. The Agreement was concluded as a result of RESPONDENT's concern that the best quality cannot be obtained for the price required under the Contract [*SoD Defense para.3*]. FUTURE ENERGY was brought in to satisfy the necessary specifications under the Contract.

iii. The dispute involving FUTURE ENERGY is intertwined with the Contract

5 CLAIMANT submits that RESPONDENT shall be estopped from denying arbitration with FUTURE ENERGY, since the dispute involving FUTURE ENERGY is essentially derived from the Contract containing Arbitration Clause [*Choctaw*; *Born p.1195*]

6 A close relationship existed between CLAIMANT and FUTURE ENERGY, and CLAIMANT's alleged failure to obtain necessary certification was intertwined with FUTURE ENERGY's duties and obligations under the Contract [*Thomson-CSF; Sunkist*]. Taking that into account, CLAIMANT asks the Tribunal to hold that RESPONDENT is bound to arbitrate with FUTURE ENERGY.

II. The participation of FUTURE ENERGY is not obtained by duress

7 CLAIMANT submits that FUTURE ENERGY voluntarily joined as a third party and CLAIMANT did not in any event coerce FUTURE ENERGY to join the proceeding.

8 Duress consists of 4 elements: i) intent to coerce; ii) an act of coercion; iii) wrongfulness of the coercion; and iv) causation. In short, to establish duress, the threat must be so imminent and serious that the coerced

party would have no other alternative but give in to the threat [*Zhang pp.176-77*].

9 CLAIMANT submits that there was no intention to coerce, but only to state the facts of the situation [*Claimant's Ex.9*]. CLAIMANT actually provided FUTURE ENERGY an alternative way to have the dispute settled through arbitration in addition to litigation before the court.

10 Also, there must be a threat to cause harm or damage to either person or property, which causes the fear in the mind of the other party [*Civil Law Principles Art.69*]. CLAIMANT, however, did not in any event threaten to cause damage to the creditability, reputation or property of FUTURE ENERGY.

11 Lastly, CLAIMANT submits that a threat to exercise legally entitled rights should not be deemed as duress [*Zhang p.176*]. In addition, CLAIMANT did not in any way abuse this right to obtain illegitimate

interests from FUTURE ENERGY. The threat to bring a lawsuit served only to ensure that the legitimate rights of CLAIMANT would be safeguarded.

III. Joining FUTURE ENERGY into the arbitration will facilitate procedural efficiency

12 CLAIMANT submits that allowing FUTURE ENERGY to join the arbitral proceeding would facilitate the procedural efficiency. If FUTURE ENERGY is forced to try the case before the court, the objective of an arbitration agreement to centralize claims with common facts and issues in a single, neutral, expert forum would be frustrated entirely [*Thomson-CSF*; *J.J Ryan*].

13 CLAIMANT further submits that if FUTURE ENERGY is excluded from the arbitration, conflicting judgments might be rendered and confidential trade secrets of the parties might be publicized, which

would grossly jeopardize the interest of all the three parties involved [*Waincymer p.561*].

B. Ms. Arbitrator can resign during the arbitration proceedings

14 CLAIMANT submits that Ms. Arbitrator can resign during the arbitration proceedings because (I) she is allowed to resign under Art.31 of CIETAC Rules; (II) her resignation will not reduce the efficiency and incur huge costs; (III) the refusal of her resignation will affect her impartiality; and (IV) the award will not be unenforceable after her resignation. In any event, (V) Parties should bear the additional costs.

I. Ms. Arbitrator is allowed to resign during the arbitration proceedings under Art.31 of CIETAC Rules

15 CLAIMANT submits that the Tribunal should allow Ms. Arbitrator's

resignation as the refusal would force her to stay against her free will. Under Art.31(1) of CIETAC Rules, if Ms. Arbitrator believes that she will not be able to participate in the proceedings for reasons of law or facts, she can resign voluntarily. If Ms. Arbitrator is unable to perform as a result of withdrawal due to other reasons, another arbitrator will be chosen [*PRC Arbitration Law Art.37*].

16 CLAIMANT submits that Ms. Arbitrator should not be prevented from resigning and should be allowed to voluntarily resign on the fact that she is unsatisfied with the arbitration fees [*SoD Resignation para.1*]. Ms. Arbitrator's resignation should thus be accepted.

II. The resignation will not reduce the efficiency of the proceedings and only trivial costs will be incurred

17 CLAIMANT submits that the efficiency of the proceedings will not be reduced. The replacement for Ms. Arbitrator does not necessarily mean

that the whole oral hearing must be repeated. The arbitral tribunal will determine "whether and to what extent the previous proceedings in the case shall be repeated" [*CIETAC Rules Art.31(4)*]. The new arbitrator can rely on the audio-visual and/or stenographic record of the oral hearing to understand the case as there should be record arranged by the tribunal and it is available for the Tribunal's use and reference [*CIETAC Rules Arts.38(1)*&38(2)]

III. The refusal of Ms. Arbitrator's resignation may affect her impartiality if she is forced to continue in the proceedings

18 Ms. Arbitrator's impartiality may be affected if her presence is forced during the proceedings. Inevitably, if CLAIMANT and Ms. Arbitrator cannot reach an agreement on the amount of the arbitration fees, contention may exist between Ms. Arbitrator and CLAIMANT as CLAIMANT refused to pay the additional fees as requested by Ms. Arbitrator [*SoD Resignation para.1*]. Hence, if Ms. Arbitrator is not

allowed to resign, she may have bias against the conflicted party.

19 Ms. Arbitrator's bias may undermine her independence which is required under Art. 22 of CIETAC Rules. Independence also implies impartiality [*Sturini/Hui p.278*]. Arbitrators have to declare their impartiality and lack of impartiality can be a ground for challenging arbitrators [*CIETAC Rules Arts.29(1)&30(2)*]. Therefore, Ms. Arbitrator's potential bias if she forced to resign may render the award unenforceable.

IV. The resignation of Ms. Arbitrator will not render the award unenforceable

20 The award will not be rendered unenforceable if a new arbitrator replaces Ms. Arbitrator. The parties can refuse the enforcement and the recognition of the award if the composition was not in accordance with the agreement of the parties [*The NYC Art.5(1)(d)*]. Pursuant to the

Arbitration Clause in this case, the parties have agreed on the composition of the arbitral tribunal [*The Arbitration Clause*].

21 As the resignation and the replacement are in accordance with the Art. 31 and 32 of CIETAC Rules 2012 and do not violate any provisions in the CIETAC Rules, there are no grounds to refuse the recognition and enforcement of award under the NYC [*The NYC Art.5(1)(d)*].

V. In any event, both parties should bear the additional cost incurred for Ms. Arbitrator's Resignation

22 Both parties will bear the additional cost due to the resignation of Ms. Arbitrator.

23 The losing party has to compensate the winning party for the expenses incurred due to the case [*CIETAC Rules Art.50(2)*]. Also, the arbitral tribunal will take specific factors into account when determining the

amount of fees that the parties have to pay [*CIETAC Rules Art.50(2)*].

24 In this case, Ms. Arbitrator's resignation is due to CLAIMANT's refusal to pay her additional fees. After her resignation, the arbitral tribunal may decide to replace her by appointing a new arbitrator. Extra arbitration fees may be incurred as well. As the resignation and the replacement are due to CLAIMANT's refusal to pay additional fees to Ms. Arbitrator, both the losing party and CLAIMANT will bear the additional costs.

C. CLAIMANT validly terminated the contract

25 CLAIMANT is entitled to terminate the Contract because (I) CLAIMANT has discharged all of their obligations under the Contract and (II) RESPONDENT breached the contract.

I. CLAIMANT has discharged all of their obligations under the

Contract

i. CLAIMANT has acquired Certification Services from FUTURE ENERGY

26 CLAIMANT's duty was to acquire the certification of the gearboxes from FUTURE ENERGY [*Claimant's Ex.2*]. This does not include supervision of the certification process. Therefore, CLAIMANT has duly executed its contractual duties in this regard.

ii. CLAIMANT performed its obligation to conduct two manufacturing reviews

27 CLAIMANT has performed its obligation as per Annex 1 of the Contract to conduct two manufacturing reviews with a view to enabling RESPONDENT to monitor the manufacturing process

[*Claimant's Ex.2*]. In both reviews, while manufacturing flaws were noted, RESPONDENT did not represent to CLAIMANT that the gearboxes being produced were not of the standard pursuant to Clause (A) [*Claimant's Ex.2*], nor that the gearboxes being produced were incompatible with RESPONDENT's 1.5 MW wind turbines. As such, it would be unreasonable for CLAIMANT to bear the responsibilities for RESPONDENT'S negligence.

iii. CLAIMANT produced gearboxes which were in conformity with Clause (A)

28 The Contract imposed a duty on CLAIMANT to produce gearboxes in conformity with Clause (A) specifications, no to ensure that the gearbox would be compatible with RESPONDENT's 1.5 MW wind turbines. As the gearboxes produced were in conformity with Clause (A) [*Clarifications 8*],

CLAIMANT has duly discharged its duty.

29 As a result, the subsequent default in payment by RESPONDENT is a fundamental breach and provides CLAIMANT the ground for termination [*CISG Art.64*].

30 In conclusion, as CLAIMANT has discharged all contractual duties, RESPONDENT has no grounds to suspend the Contract. RESPONDENT therefore fundamentally breached the Contract when RESPONDENT defaulted in their payment, giving CLAIMANT the ground to terminate the Contract.

II. RESPONDENT breached the Contract

i. RESPONDENT invalidly suspended the Contract

31 RESPONDENT does not have the right to suspend or terminate

the Contract because there is no fundamental breach by CLAIMANT.

32 Fundamental breach is the precondition for avoiding a contract [*CISG Arts.49(1)(a)&64(1)(a)*]. In Clause 15 of the Contract, it explicitly states that (1) only CLAIMANT has the contractual right to suspend or terminate the Contract and (2) the Contract may only be suspended or terminated in the event of fundamental breach in 'material obligation, representation or warranty' [*Claimant's Ex.2*]. However, none of which occurred.

33 There is no fundamental breach by CLAIMANT if it offered a reasonable remedy but RESPONDENT refused to cooperate [*CISG Advisory Council Opinion No.5 Point 3*]. CLAIMANT offered a reasonable remedy [*Claimant's Ex.5*], but RESPONDENT unreasonably rejected such remedy [*Claimant's Ex.6*]. Under such circumstance, RESPONDENT in turn failed to

act in good faith as they simply wanted to use that situation to dismiss the Contract which they viewed disadvantageous to them.

34 Even if there was a breach, the breach of mal-certification is not sufficiently serious enough as grounds to terminate a contract [*CISG Advisory Council Opinion No.5 Comments 2.2*]. CLAIMANT delivered goods in full conformity with Clause (A). Certification, being only a warranty, will not affect the performance of the goods when applied with the 1.5 MW wind turbines.

35 In conclusion, as RESPONDENT's suspension of the Contract was invalid, RESPONDENT has an obligation to continue performance of duties stipulated by the Contract.

ii. RESPONDENT fundamentally breached the Contract by default in payment

36 Since RESPONDENT invalidly suspended the Contract, RESPONDENT still has an obligation to continue performance of contractual duties. As a result, RESPONDENT has an obligation to pay CLAIMANT when it is due [*PICC Art.6.1.1*]. RESPONDENT's failure to make the subsequent payments is therefore both a breach of the Contract [*Claimant's Ex.2*; *PICC Art.8.1.3(2)*]. Therefore, CLAIMANT can terminate the Contract as the failure to pay amounted to fundamental breach.

37 RESPONDENT has also failed to give notice of avoidance of the Contract to CLAIMANT, therefore there is no effective avoidance [*CISG Art.26*]. In absence of notice, RESPONDENT still has an obligation to perform its duties. Upon default in payment, a fundamental breach occurred.

iii. RESPONDENT failed to respond to CLAIMANT's written

notices of the breaches within 30 days of receipt

38 Pursuant to Section 15.1 of the Contract [*Claimant's Ex.2*], CLAIMANT may exercise its right to terminate upon RESPONDENT'S failure to either 'commence and diligently pursue cure of the breach' or 'provide reasonable evidence that the breach has not occurred' within 30 days of receipt of the written notices of the breach. CLAIMANT did not respond as required by the Contract.

39 In conclusion, CLAIMANT has met the prerequisite for termination of Contract.

D. CLAIMANT is entitled to termination penalty

40 CLAIMANT is entitled to the termination penalty because (I) the Penalty Clause is neither punitive nor excessive; (II) the damages are foreseeable; (III)

the damages are caused by RESPONDENT's breach; and (IV) CLAIMANT fulfilled its obligation to mitigate the problem.

I. The Penalty Clause is neither punitive nor excessive

41 Where the Contract provides that a non-performing party is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. [*PICC Art.7.4.13(1)*] The principle acknowledges the validity of the Penalty Clause 15.2(b). Furthermore, this principle is designed to facilitate the recovery of damages and/or operates as a deterrent against non-performance [*PICC Commentaries p.284*].

42 As the Penalty Clause in this case is not punitive in nature, pursuant to Clause 15.2(b) of the Contract, in the event CLAIMANT terminates the Contract, RESPONDENT shall pay to CLAIMANT a termination penalty equal to the difference between the total value of the Contract

and the value of gearboxes already delivered to RESPONDENT as of the termination date, i.e. USD 8,000,000. [*The Penalty Clause*] It is not an extra sum in addition to the contract price for the gearboxes. The damages sought will not place CLAIMANT in a better position than it would have enjoyed if RESPONDENT had performed the Contract. Instead, the damages sought are nothing more than the sum CLAIMANT would have received as if RESPONDENT had performed the Contract.

43 Therefore, RESPONDENT is bound to pay such sum for its non-performance.

II. CLAIMANT's loss was foreseeable

44 PICC and CISG both impose a requirement on CLAIMANT to prove that the damages are foreseeable [*PICC Art.7.4.4; CISG Art.74*]. The test of foreseeability can only be fulfilled when the damages are proved

with a reasonable degree of certainty [*PICC Arts.7.4.3&7.4.4*; *PICC Commentaries pp.270-71*]

45 When RESPONDENT breached its contractual obligations, it was reasonably foreseeable that CLAIMANT will suffer significant losses from (1) losing all of CLAIMANT's initial investment in setting up of manufacturing of gearboxes for JV, and (2) CLAIMANT's investment in the procurement of the raw materials to JV for the manufacture of gearboxes. Furthermore, the object of JV is to manufacture gearboxes for not only the 1.5 MW wind turbines, but also for sale in Catalan more generally [*AfA para.3*] with a view to developing CLAIMANT's business in Catalan [*AfA para.2*]. RESPONDENT's non-payment will then make CLAIMANT financially difficult to continue operating JV's business to collect raw materials [*Claimant's Ex.1 Clause 5.1 (b)*] and manufacture and assembly the gearboxes.

III. CLAIMANT's loss was due to RESPONDENT's breach

46 On the one hand, have it not been for RESPONDENT's failure to perform, CLAIMANT would not have suffered loss as in the expenses incurred in manufacturing the gearboxes since such cost would have been covered by RESPONDENT's payment. On the other hand, CLAIMANT would not have lost the funding that the Contract would have produced when the gearboxes were sold. In conclusion, CLAIMANT should be entitled the recovery of the said loss.

IV. CLAIMANT fulfilled its obligations to mitigate losses

47 CLAIMANT has a duty to mitigate losses [*CISG Art.77*], which CLAIMANT fulfilled. The time limit for avoidance has to be taken into consideration. If a party delays in declaring avoidance and the difference between the market and the contract price increases, he may be held to have violated his duty to mitigate damages [*Liu para.1053*].

48 It took approximately four months [*Claimant's Exs.7&8*] for CLAIMANT to terminate the Contract after the Default Notices were sent to RESPONDENT. The wait was for RESPONDENT to commence and diligently pursue cure of the breach or provide reasonable evidence that the breach has not occurred [*Claimant's Ex. 2 Clause 15.1*]. There was no deliberate delay on CLAIMANT's part. In fact, it is reasonable for CLAIMANT to give RESPONDENT the opportunity to pursue cure of the breach or provide reasonable evidence that the breach has not occurred. It would otherwise be insensible to resell the gearboxes too soon after the issue of Termination Notice considering the exclusiveness of the Contract. In conclusion, CLAIMANT did not breach its duty to mitigate damages.

49 Since CLAIMANT did not breach its duty to mitigate damages, a reduction in the damages should not be allowed. RESPONDENT should thus fully compensate CLAIMANT.

PRAYER FOP RELIEF

50 CLAIMANT respectfully requests the Tribunal to declare that:

1. FUTURE ENERGY can be joined as a third party to these proceedings;

2. Ms. Arbitrator can resign during the proceedings;

3. CLAIMANT validly terminated the Contract;

   and

4. RESPONDENT is liable for the costs of arbitration and termination penalty for US$10,000,000 with interest for the breach of the Contract.