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 RESPONDENT

TEAM NO. 232R

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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
DR2	2nd Design Review
Formation Notice	Notice on the Formation of Arbitral Tribunal Case No M2013/33
FUTURE ENERGY	Future Energy Inc.
GH gearboxes	GH 2635 gearboxes
GJ gearboxes	GJ 2635 gearboxes
JV	Joint Venture
JVA	Joint Venture Agreement, Claimant's Exhibit Number 1
Ms. Arbitrator	Ms. Arbitrator 1
No.	Number

p. / pp.	page / pages
para.	Paragraph
Parties RESPONDENT	Energy Pro Inc. and CFX Ltd. CFX Ltd.
SoD Defense	Statement of Defense, Defense
SoD Resignation	Statement of Defense, Resignation of Ms. Arbitrator 1
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	The 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

INDEX OF CASES

INDEX OF LEGAL INSTRUMENTS

A. FUTURE ENERGY cannot be brought into the arbitration proceedings as a third party

1 RESPONDENT submits that the Tribunal should not join FUTURE ENERGY as a third-party because (I) FUTURE ENERGY is a non-signatory to the Arbitration Clause; and, (II) its consent has been vitiated by duress.

2 As the seat of arbitration is China, the law to govern the arbitration is the *lex fori*, the law of China [*China Hi-Tech*].

3 If the Contract or JVA is invalid, the doctrine of separability will apply and the Tribunal will retain the authority to verify the validity of a contract [*PRC Contract Law Art.57*; *PRC Arbitration Law Art.19*].

I. FUTURE ENERGY is a Non-Signatory to the Arbitration Clause

4 RESPONDENT had never consented to arbitrate with FUTURE

ENERGY because:-

i. The scope of the Arbitration Clause does not extend to FUTURE ENERGY;

ii. Evidence of consent rebuts procedural efficiency; and

iii. There is no incorporation by reference

i. The Scope of Arbitration Clause Does Not Extend to FUTURE ENERGY

5 RESPONDENT only intended signatories to the Contract to be party to the Arbitration Clause because it is a general principle that 'party consent is a pre-requisite for international arbitration' [*PRC Arbitration Law Art.4; Redfern/Hunter 2.39, Waincymer p.506*].

6 The absence of FUTURE ENERGY's signature in the Contract demonstrates that there was no consent at the time of the conclusion of the Arbitration Clause. Therefore 'they are not a

party to the contract and arbitration' [*Asia Pacific Aluminum*].

7 RESPONDENT objects FUTURE ENERGY's late consent to participate in the arbitration by letter dated 3 January 2013 for it is only unilateral [*AfA para.19*]. With no meeting of minds, there is simply no agreement to arbitrate with FUTURE ENERGY.

8 The underlying intention of RESPONDENT in entering the Contract is so fundamentally different from the intention in entering the Agreement that the Tribunal should view them separately, hence restricting the Arbitration Clause to Parties only [*Suzhou Tongbao Real Estate*].

ii. Evidence of Consent Rebuts Procedural Efficiency

9 RESPONDENT submits that the evidence of consent can rebut the presumption of procedural efficiency and in this case, there is no

evidence that RESPONDENT consents to the joinder. [*Waincymer pp.496-498*].

iii. There is No Incorporation by Reference

10 RESPONDENT submits that it would be groundless for CLAIMANT to argue that the Arbitration Clause extends to the Agreement [*PRC Arbitration Law Interpretation Art.11*; *Clarifications 13*]. The Agreement the neither mentions the Contract nor any arbitration clause [*Clarifications 14*]. FUTURE ENERGY could not reasonably been aware of the Arbitration Clause and cannot be bound by it [*ICC Case No.6769/1991*].

iv. Consent to Arbitrate is Vitiated by Duress

11 RESPONDENT submits that FUTURE ENERGY's consent to the joinder is vitiated by duress from CLAIMANT.

12 The test for duress is subjective, commonly adapted as 'a threat to inflict personal or property damages' which affects the will of the victim [*PRC Civil Law Principles Opinion Art.69; Zhang p.175; Zhu p.191*].

13 CLAIMANT's act in bringing FUTURE ENERGY into this arbitration [*Claimant's Ex.9*] amounts to duress because all four elements exist, namely i) intention to threat; ii) act of threat; iii) wrongfulness of the threat; and iv) causation [*Ling pp.182-84*].

14 RESPONDENT submits that CLAIMANT had the intention to threat because it knew its act will create fear in the mind of FUTURE ENERGY since litigation in Andelstein is undesirable. Therefore, FUTURE ENERGY would have no choice but to join the arbitration proceedings as intended by CLAIMANT [*Zhang p.176*].

15 RESPONDENT further submits that what CLAIMANT did amounts to an act of threat. It is accepted that a victim who demonstrates fear can constitute threat [*Zhang p.176*]. Litigation is known to be undesirable to any company because it will severely affect their reputation and may cause disruption to their business, so the fear test applies because FUTURE ENERGY would be in fear of litigation brought against them if they do not succumb to the request of CLAIMANT.

16 RESPONDENT submits that CLAIMANT's act was wrongful and illegitimate. 'The threat to bring a lawsuit in order to achieve a purpose beyond the rights legally granted' amounts to duress [*Zhang p.177*]. CLAIMANT is legally entitled to initiate litigation against FUTURE ENERGY. However it had an ulterior purpose of bringing FUTURE ENERGY into the arbitration in order for them to be the scapegoat.

17 Finally, RESPONDENT submits that CLAIMANT's threat is the causation of FUTURE ENERGY's submission to these arbitral proceedings because its participation was 'the real and natural result of the threat inflicted' [*Zhang p.177*]. If the threat had not inflicted fear in FUTURE ENERGY's mind, it would have 'other reasonable alternatives' rather than being coerced to arbitration [*Ling p.184*].

B. Ms. Arbitrator cannot resign during the arbitration proceedings

18 RESPONDENT submits that Ms. Arbitrator cannot resign during the arbitration proceedings because (I) her reason for resignation is unjustifiable; (II) she is in the best position to arbitration; (III) her resignation will reduce the efficiency of the proceedings; and (IV) the award will be unenforceable. Alternatively, (V) even if Ms. Arbitrator resigns, CLAIMANT should bear the extra cost.

I. The Resignation of Ms. Arbitration is unjustifiable

19 It is unjustifiable for Ms. Arbitrator to resign due to CLAIMANT's refusal to deposit additional fees into Ms. Arbitrator's bank account. Valid reasons are required for resignation, 'once a mandate is accepted, it should not be unilaterally rejected without valid excuse.' [*Waincymer pp.327-328*]

20 CLAIMANT's refusal to pay her additional fees does not amount to a valid reason for her to resign, as Parties shall pay the arbitration fees according to Art. 76 of the PRC Arbitration Law. The arbitration fees shall be paid by CLAIMANT directly to the CIETAC. In institutional arbitration proceedings, the CIETAC after receiving the fees will be responsible to pay arbitrators their fees [*PRC Charging Fees Measures Art.3*]. Thus, Ms. Arbitrator should not directly ask Parties for arbitration fees unless stated otherwise. Therefore, Ms. Arbitrator's reason for resignation is unjustifiable.

II. Ms. Arbitrator will be in the best position to arbitrate

21 RESPONDENT submits that Ms. Arbitrator will be in the best position to arbitrate. Ms. Arbitrator will fully understand the case after attending all the oral hearings of the disputes [*SoD Resignation para.1*]. And as the issue of quantum is closely related to whether CLAIMANT can claim the termination penalty and whether RESPONDENT can recover the part payment. If she resigns, another arbitrator will replace her and re-hearing will be necessary. As the hearing may not be repeated entirely [*CIETAC Rules Art.31(4)*], the new arbitrator may not be able to fully understand the case. Therefore Ms. Arbitrator will be in the best position to arbitration when comparing with the new arbitrator.

III. Ms. Arbitrator's resignation will reduce the efficiency of the proceedings

22 If Ms. Arbitrator resigns, the efficiency of the proceedings will be reduced due to the time and resources spent in seeking a replacement.

23 After the resignation of Ms. Arbitrator, a new arbitrator would be needed to replace her [*CIETAC Rules Art.31(1)*], so the proceedings cannot continue immediately. Finding and appointing a new replacement, and allowing the new arbitrator to become familiar with the case, inevitably causes delay [*Redfern/Hunter p.288*].

24 Also, time and resources will be spent on the new arbitrator as full re-hearing may be required [*CIETAC Rules Art.31(4)*]. Huge cost will be incurred as the other two members in the tribunal and the new arbitrator may ask for higher arbitration fees.

25 Since the CIETAC Rules put an emphasis on the efficiency of the arbitral proceedings [*Yu*], hence the additional time and resources spent

in the proceedings is not in accordance with the principles and fundamental values of arbitration and the CIETAC Rules [*Brock/Feldman p.192*].

IV. The resignation of Ms. Arbitrator would render the award unenforceable under Art. 5(1)(D) of the NYC

26 Before the proceedings began, Parties had agreed upon the nomination of the Tribunal with Ms. Arbitrator, Dr. Arbitrator 2 and Prof. Arbitrator [*Formation Notice*]. The unjustified resignation of Ms. Arbitrator is against the intention of Parties. Since the composition of the tribunal was not in accordance with the agreement of Parties, the award will be rendered unenforceable [*NYC Art.5(1)(d)*].

V. Alternatively, even if Ms. Arbitrator resigns, CLAIMANT should bear the extra cost incurred

27 CLAIMANT should pay the extra cost incurred due to the resignation of Ms. Arbitrator. The extra cost incurred includes extra expenses associated with the substitution of Ms. Arbitrator after her resignation and cost related to re-hearing [*CIETAC Rules Art.31(1)&31(4)*]. Under Art.72 of CIETAC Rules, the CIETAC may charge Parties for any other extra and reasonable costs like travel expenses. RESPONDENT submits that CLAIMANT should bear the extra cost as her resignation is due to CLAIMANT's act and it would be unfair and unjust to for RESPONDENT to take on the extra cost [*CIETAC Rules Art.50(2)*].

C. CLAIMANT is not entitled to the termination penalty

28 CLAIMANT is not entitled to the termination penalty because (I) CLAIMANT fundamentally breached the Contract, (II) RESPONDENT validly suspended the Contract and CLAIMANT invalidly terminated the Contract; and (III) even if the penalty clause is valid, it is excessive and should be reduced to a reasonable amount.

I. CLAIMANT fundamentally breached the Contract

29 CLAIMANT has an obligation to deliver GJ gearboxes as per specifications [*Claimant Ex.2*]. CLAIMANT has a duty to achieve a specific result and not best efforts [*PICC Art.5.1.4; CISG Art.35(2)(a)*]. Failure to fully conform to Clause (A) [*Claimant Ex.2*] constitutes breach.

30 CLAIMANT's delivery of goods that are not fit for purpose and 'completely useless' is a fundamental breach [*CLOUT Case No.79*]. The GH gearboxes delivered by CLAIMANT are radically different from specifications under Clause (A), thus 'completely useless' to RESPONDENT [*Clarifications 9*]. Accordingly, CLAIMANT fundamentally breached the Contract [*PICC Art.7.3.1; CISG Arts.35& 36*].

II. RESPONDENT validly suspended the Contract and CLAIMANT invalidly terminated the Contract

i. RESPONDENT validly exercised its legal rights to suspend the Contract

31 RESPONDENT validly suspended the Contract under Art. 71(1)(a) of CISG as CLAIMANT was not willing to fulfill their obligations to cure the nonconforming goods [*Respondent's Ex.1; Claimant's Ex.6*].

32 RESPONDENT also validly suspended the Contract within 2 years [*PICC Art.7.3.4; CISG Art.39(2)*]. RESPONDENT contacted CLAIMANT about the concerns with designs and lack of approval on 16 May 2012, around two to three months after the delivery of gearboxes [*Claimant's Ex.4*]. Although this does not fall under the 'Noble Month' [*T-Shirts Case*], RESPONDENT did not lose the

right to rely on a lack of conformity of the goods as notice was given within two years from the date on which the goods were delivered.

33 Furthermore, even if the nonconforming goods are not deemed as a fundamental breach, RESPONDENT may still declare the Contract avoided if the seller failed to perform any of his obligations [*CISG Art.49; CISG Advisory Council Opinion No.5 Point 8*].

ii. RESPONDENT did not breach the Contract

34 As RESPONDENT validly suspended the Contract pending satisfactory proof that CLAIMANT has discharged all of their contractual duties [*Claimant's Ex.6*], RESPONDENT's subsequent withholding of payment is a valid act [*PICC Art.7.3.4; CISG Art.71*].

35 RESPONDENT agrees to buy from CLAIMANT the gearboxes on the terms and conditions set out in the Contract [*Claimant's Ex.2 Clauses (B)&1.1*]. As mentioned, CLAIMANT has an obligation to deliver gearboxes in conformity with Clause (A). Without such delivery, RESPONDENT does not have obligation to pay [*Claimant's Ex.2*]. Without an obligation to pay, there is no substantial breach of a material obligation, representation or warranty, thus CLAIMANT has no right to terminate on that ground. Moreover, the lack of response to the written notices of breach does not affect the invalidity of termination.

iii. CLAIMANT invalidly terminated the Contract

36 CLAIMANT failed to meet the requirements to terminate [*PICC Art.7.3.1*]. RESPONDENT's withholding of payment was not a fundamental nonperformance as RESPONDENT was merely suspending the Contract and providing CLAIMANT with an

opportunity to fulfill all of its contractual obligations [*Claimant's Ex.6*]. RESPONDENT did not deprive CLAIMANT what it was entitled to, as CLAIMANT is not entitled to payment until it have fulfilled all of its obligations [*PICC Art.7.3.1(2)(a)*]. With valid suspension of the Contract, CLAIMANT's subsequent termination [*Claimant's Ex.8*] is (1) invalid and (2) a violation of rights given to RESPONDENT [*CISG Art.71*].

37 In conclusion, as the Contract was validly suspended, CLAIMANT is not entitled to the termination penalty of US$8,000,000.00.

II. Even if the penalty clause is valid, it is excessive and should be reduced to a reasonable amount

38 CLAIMANT must take reasonable measures in the circumstances to mitigate loss, including loss of profit, resulting from the breach. As CLAIMANT failed to take such measures, RESPONDENT may claim

a reduction in the damages in the amount by which the loss should have been mitigated [*CISG Art.77*].

39 Furthermore, as Clause 15.2(b) of the Contract is a penalty clause as the sum stipulated is greater than the sum which ought to have been paid [*Kemble*]. A penalty clause cannot be enforced and the innocent party will be confined to a claim for nominal damages, damages for the recoverable loss which it can prove it has suffered as a result of the breach [*McKendrick p.913*].

40 The termination penalty requires RESPONDENT to pay sum equal to the difference between the total value of the Contract and the value of Gearboxes already delivered as of the termination date, i.e. US$8,000,000.00 as the termination penalty [*Claimant's Ex.2 Clauses 1.2(b)(i)&15.2(b)*]. However, CLAIMANT has only produced gearboxes for two of the three part payments for the first year, i.e. US$4,000,000.00 in value, which is the sum RESPONDENT, in theory,

ought to have paid CLAIMANT. The penalty CLAIMANT is seeking (US$8,000,000.00) doubles the sum which ought to have been paid in theory (US$4,000,000.00). As the sum stipulated is greater than the sum which ought to have been paid, the clause should be construed as a penalty and accordingly unenforceable. Therefore, CLAIMANT is not entitled to the termination penalty.

41 Even if CLAIMANT is entitled to the termination penalty, the specified sum is grossly excessive in relation to the harm resulting from the nonperformance, thus should be reduced to a reasonable amount [*PICC Art.7.4.13(2)*].

D. RESPONDENT is entitled to recover the part payment

42 RESPONDENT is entitled to recover the first part payment because (I) the Contract created a gross disparity between the parties, placing RESPONDENT at a disadvantaged position, thereby voidable, and (II) as a result of the Contract being voidable, RESPONDENT is entitled to the return of the first

part payment.

I. The Contract created a gross disparity between the parties, placing RESPONDENT at a disadvantaged position, thereby voidable

i. CLAIMANT failed to act in good faith

43 CLAIMANT is obliged to act fairly and in good faith [*PICC Art.1.7*; *Vogenauer p.169*]. This standard is also applicable to Art. 3.2.7 of the PICC on gross disparity [*Vogenauer p.170*].

44 More specifically, 'fair' and 'good' requires a value judgment on the basis of 'community standards of decency, fairness and reasonableness in commercial transactions' [*Vogenauer p.171*]. CLAIMANT acted against good faith by dictating negotiations and proposing the majority of the Contract terms [*SoD Defense paras.1&2*].

ii. RESPONDENT is placed at a disadvantaged position by the Contract

45 In an equity joint venture, where a minority share is allocated to one party, sufficient economic and commercial incentives should be established to allow the minority party to commit fully to the JV [*Hewitt p.248*]. Also, where there is a significant ancillary contract, the economic terms should be adequately balanced so that the party's commitment and self-interest does not become excessively focused on its rewards from that Contract, rather than the success of the venture as a whole [*Hewitt p.248*]. As 20% shares was allocated to RESPONDENT in the JVA and the Contract gave CLAIMANT seller total ownership over the gearboxes [*Claimant Ex.2*], RESPONDENT cannot commit fully to the JV. Also, the economic terms of the Contract is not sufficiently balanced, where CLAIMANT's commitment and

self-interest became excessively focused on its rewards from the Contract, instead of the success of the JV as a whole. Therefore, the Contract places RESPONDENT at a disadvantaged position.

iii. The Contract created gross disparity between the parties

46 Whilst the JV stipulates an 80/20% split among the parties, the Contract created a gross disparity among the parties where (1) CLAIMANT retains full ownership of the goods produced contradicting the equity ownership and (2) CLAIMANT requires RESPONDENT to purchase the goods produced.

47 Gross disparity occurs where the conclusion of the Contract unjustifiably gave the other party an excessive advantage [*PICC Art.3.2.7*]. Firstly, it was CLAIMANT who initiated cooperation [*SoD Defense paras.1&2*]. As most proposals put forward by RESPONDENT were either ignored or rejected, most contractual

terms were proposed and adopted by CLAIMANT [*SoD Defense paras.1&2*]. Secondly, the Contract was a pre-condition for the parties to enter into the JV [*Claimant's Ex.1 Clause 8*]. Under the Contract, RESPONDENT was not even conferred the right to suspend or terminate the Contract.

48 Also, no penalty would be imposed upon CLAIMANT even when a substantial breach by CLAIMANT has occurred. CLAIMANT ought to have known the terms of the Contract, which in this case is the ground for avoidance [*PICC Arts.3.2.7&3.1.4*].

II. As a result of the Contract being voidable, RESPONDENT is entitled to the return of the first part payment.

49 Irrespective of whether or not the Contract was avoided, RESPONDENT should be awarded damages that restore their position

to as if the Contract was never concluded if CLAIMANT knew or ought to have known of the grounds for avoidance [*PICC Art.3.2.16*].

50 CLAIMANT should have or ought to have known that the Contract suffers from gross disparity [*PICC Art.3.2.7*]. Irrespective of whether or not RESPONDENT declares the Contract void, RESPONDENT should be entitled to the return of the first part payment of US$2,000,000.00, which would restore RESPONDENT to the position as if the Contract was never concluded

PRAYER FOR RELIEF

RESPONDENT respectfully requests the Tribunal to declare that:

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1. FUTURE ENERGY cannot join the arbitration as third party;

2. Ms. Arbitrator cannot resign during the proceedings and CLAIMANT must pay her additional fees;

3. CLAIMANT did not validly terminate the Contract;

   and

4. CLAIMANT must return the first part payment to RESPONDENT and

   CLAIMANT cannot claim the termination penalty.