

**350C**

**FOURTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE  
RESOLUTION MOOTING COMPETITION**

**28 JULY – 3 AUGUST 2013**

**HONG KONG**

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**MEMORANDUM FOR CLAIMANT**

**In the arbitration between**

**Energy Pro Inc.**

**AND**

**CFX Ltd.**

**Claimant**

**Respondent**

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**TEAM NO. 350**

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**LIST OF ABBREVIATIONS**

C. Ex.	Claimant Exhibit
¶	Paragraph
Art.	Article
CIETAC Rules	China International Economic and Trade Arbitration Commission
v.	versus
p.	page

**A. ENERGY PRO INC. CAN BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY**

1. On 1 January 2013, Energy Pro Inc.<sup>1</sup> requested Future Energy Inc. to join as a third party to the arbitration between CFX Ltd<sup>2</sup> and Claimant.<sup>3</sup> On 3 January 2013, Future Energy Inc. agreed to participate in the arbitration proceedings.<sup>4</sup>

**I. Future Energy can join the arbitration proceedings as a third party**

2. The Arbitration Clause provides that arbitration shall be conducted in accordance with the CIETAC rules.<sup>5</sup> The Arbitration Law<sup>6</sup> and the CIETAC rules are silent concerning these questions.<sup>7</sup>
3. The procedural law will usually be the law of the seat of arbitration.<sup>8</sup> PRC law is silent on third-party participation in arbitration. Under PRC law, parties must agree to an arbitration agreement or arbitration clause for it to be effective and, therefore, only those parties that have expressly consented to refer their dispute to arbitration will be bound by it.<sup>9</sup>
4. The better view is nonetheless that the New York Convention is applicable to questions of consolidation, joinder and intervention. The Convention does so with regard to both the recognition of arbitration agreements and arbitral awards. In the context of enforcing arbitration agreements, the Convention addresses consolidation and/or

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<sup>1</sup> Hereinafter "Claimant"

<sup>2</sup> Hereinafter "Respondent"

<sup>3</sup> C.Ex.9

<sup>4</sup> Application for Arbitration, ¶ 19

<sup>5</sup> Ibid

<sup>6</sup> The Republic of China Arbitration Law

<sup>7</sup> Louka A. Mistellis, *Concise International Arbitration*, Kluwer Law International, (2010)

<sup>8</sup> Andrew Tweeddale, Keren Tweeddale, *Arbitration of Commercial Disputes*, Oxford, (2007)

<sup>9</sup> Ulrike Glück and Falk Lichtenstein, *Arbitration in the People's Republic of China*, CMS

joinder/intervention in Articles 11(1) and 11(3), by requiring national courts to recognize and give effect to the material terms of international arbitration agreements- an obligation that readily extends to agreements regarding consolidation, joinder and intervention in arbitral proceedings. Put concretely, if a party has a contractual right to arbitrate particular claims in a consolidated arbitration, or with the presence of a particular party, then Articles 11(1) and 11(3) of the Convention require recognition of these rights as integral parts of the parties' agreement to arbitrate.<sup>10</sup>

5. Moreover, the possibility of third parties intervening in arbitral proceedings is specific situations at the request of one of the parties to the arbitration agreement was held by the Polish Court of Arbitration:<sup>11</sup> *If the result of the case may bear upon a party's recourse claim or claim for damages against a specific third person, this party may bring, before the end of first hearing, a motion for the notification of the pending proceedings to such third person summoning him to take part in the proceedings as an intervener.*
6. It is pertinent to note that Future Energy Inc. is an independent certification company that has an independent obligation to certify the gearboxes manufactured by the claimants. Breach of contract has occurred due to Future Inc.'s negligence. The participation of Future Inc. is necessary to ascertain the liability for breach of this contract and Claimant has a right to arbitrate in presence of Future Energy as a third party.

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<sup>10</sup> Gary B. Born, *International Commercial Arbitration*, Volume II Kluwer Law International, (2010)

<sup>11</sup> ¶ 21, Rules of the Court of Arbitration of the Polish Chamber of Foreign Trade in Warsaw

## II. Future Energy Inc.'s participation has not been obtained through duress

7. In their Statement of Defense, Respondents have alleged that Claimant has threatened Future Energy Inc. with legal proceedings should it choose not to participate in the arbitration between Claimant and CFX Ltd.
8. Future Inc. has agreed to participate in the arbitration proceedings with free consent. Article 52 of the Contract Law of PRC that deals with Invalidating Circumstances provides that a contract is invalid when a party induces conclusion of the contract through fraud or duress.<sup>12</sup>
9. "Duress" exists where one, by unlawful act of another, is induced to make a contract or perform or forego some act under circumstances, which deprive him of the exercise of free will.<sup>13</sup> A lawful assertion of a legal right is not "duress" no matter how harsh it may be in its effects.<sup>14</sup>
10. In the instant case, the claimant merely asserted their legal right to sue Future Energy for their negligence.<sup>15</sup> The act was not unlawful. They were merely asserting their legal right. Thus, it can be concluded that the participation of Future Energy has not been obtained through duress and there is no bar on its participation in the proceedings.

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<sup>12</sup> Contract Law of People's Republic of China

<sup>13</sup> *Bell Bakeries, Inc v. Jefferson Standard Life Ins.C.*,96S.E.2d408

<sup>14</sup> *Molloy v. Benis Bro. Bag Co.*, D.C.N.H., 174F.Supp.785

<sup>15</sup> C.Ex.7

## **B. MS. ARBITRATOR CAN RESIGN DURING THE ARBITRATION PROCEEDINGS**

### **I. Ms. Arbitrator is validly appointed as an arbitrator and may voluntarily resign**

11. Ms. Arbitrator is fully within her rights to resign after the completion of oral hearings. As per the information received by her<sup>16</sup> she was expecting the matter of quantum to be sorted within 2 days, and being paid for such.
12. An arbitrator may voluntarily withdraw from office under the CIETAC Rules.<sup>17</sup> The principal right of an arbitrator is to receive payment in return for his/her obligations.<sup>18</sup> Consequently, she can withdraw if the claimant does not agree to pay her the three days' worth of extra costs that they will be incurring if she continues after the last oral hearing.
13. The arbitrators cannot be said to be performing the arbitration in a purely judicial capacity. The parties and the arbitrators have entered into a contract and the arbitrators are thus bound by law to perform their part of the contract. The arbitrator does not have a status resulting directly from law and comprising rights and obligations assumed in public interest.<sup>19</sup>
14. It is widely recognized that the relationship between an arbitrator and the parties is based on contract.<sup>20</sup> The appointment of the arbitrator and his acceptance is seen as the

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<sup>16</sup> Statement of Defense, ¶ 2

<sup>17</sup> Art.31, CIETAC Rules

<sup>18</sup> M. R. Sammartino, *International Arbitration Law and Practice*, Kluwer Law International, (2<sup>nd</sup> Edition)

<sup>19</sup> Mustill and Boyd, *Commercial Arbitration*, 220 *et seq*

<sup>20</sup> Clay, *L'arbiter*, 499 *et seq*;

conclusive phase of a contract originating from an arbitration clause or submission agreement.<sup>21</sup>

15. Such a contract is classified as a contract for services.<sup>22</sup> It is a basic premise of contract law that a party should perform to the extent agreed.

16. Ms. Arbitrator entered into the contract with the knowledge that her services for determination of quantum would require 2 days, not 5. Based on the remuneration she is getting, she cannot be reasonably expected to perform for the 3 extra days without payment.

17. An agreement for augmentation of fees during the arbitration must also be reached with all parties and it is not possible that only one party agrees to pay the higher fee. This raises questions of partiality or questionable independence.<sup>23</sup> The claimant shall not be forced to pay a greater amount to Ms. Arbitrator when the other arbitrators are being paid a preset amount for the same duration.

## **II. The replacement of the arbitrator will not result in loss of time or money for the respondent**

18. The respondent is apprehensive that the second arbitrator to be appointed shall not be in the best position to arbitrate on the issue of quantum. CIETAC Rules state, “*After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated*”.<sup>24</sup> If the respondents have any concerns with respect to the newly appointed arbitrator’s understanding of their

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<sup>21</sup> See Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, Limited, 2004)

<sup>22</sup> *Schiedsrichtervertrag*(Contract to arbitrate), *Arbitration Law in Europe*, ICC, Paris, 1981, p. 20

<sup>23</sup> Supra note 18

<sup>24</sup> Article 31.4, CIETAC Rules



issues or over determination of quantum, they may request the tribunal to repeat proceedings and bring the new arbitrator up-to-date on the issues at hand.

19. Once Ms. Arbitrator resigns, and only two of the three-member tribunal are left, if the arbitral tribunal decides that appointment of the arbitrator shall result in loss of time to the respondent, they may of their own accord decide to continue with the proceedings with permission from the Chairman of CIETAC along with the consent of the parties.<sup>25</sup> Thus, the arbitration proceedings can continue while the appointment of a third arbitrator is ongoing.

## **C. THE SELLER HAS VALIDLY TERMINATED THE PURCHASE CONTRACT**

### **I. Seller's contractual obligation was fulfilled**

20. In the present case the seller received a purchase order for 100 gearboxes 10 February 2012.<sup>26</sup> Accordingly, the seller performed its duty by getting manufactured sending the gearboxes to the third party for approval. The gearboxes were appropriately certified and further sent to buyer, in recognition of which the latter paid USD 2,000,000 on 13 March 2012.<sup>27</sup>

21. As per clause 10.1 of the Contract, claimant's sale is subject to established quality, technical and qualification requirements specified under clause (A) of the Contract. Subsequently, clause 10.2 puts them under an obligation to obtain from third party an approval that the shipped gearboxes conform to the standards specified under clause (A). Approval to be sought prior to the delivery of gearboxes to buyer.<sup>28</sup>

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<sup>25</sup> Article 32, CIETAC Rules

<sup>26</sup> Application for Arbitration, ¶ 9

<sup>27</sup> C.Ex.4

<sup>28</sup> Ibid

22. It was agreed that only upon receiving confirmation from the buyer that the gearboxes have been delivered in conformity with the Contract, would the buyer be required to make the requisite payment.<sup>29</sup>
23. Although the seller did not receive any official communication from the buyer but payment of USD 2,000,000 dated 13 March 2012 and received by the seller was an implied indicator that the gearboxes were in conformity.
24. It must be noted that under the Contract the seller's obligation is restricted to obtaining certification from the third party with respect to clause (A) and the former has dutifully performed the same. It is the third party's duty to inspect and certify whether the gearboxes conformed to quality standards prescribed in clause (A). In furtherance to that, it carried out the required inspection and gave approval to the products, thereby enabling the seller to deliver the same to the buyer. The seller relied on the necessary certification by third party and performed its obligation under the contract.

## **II. Substantial breach of obligation on the part of buyer**

25. As per clause 1.2(b)(i) of Contract, the buyer had a material obligation to make the 2<sup>nd</sup> & 3<sup>rd</sup> payments on 20 June 2012 and 20 August 2012.<sup>30</sup> Buyer suspended the Contract pending satisfactory proof that the seller has discharged its legal obligations.<sup>31</sup> However, the seller rightfully executed its obligation as per the terms of the Contract by obtaining required certification from third party and subsequently delivering the approved gearboxes to the buyer on time. Hence, the buyer cannot suspend the contract.<sup>32</sup>

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<sup>29</sup> C.Ex.2

<sup>30</sup> C.Ex.2

<sup>31</sup> Ibid

<sup>32</sup> Ibid

26. The UNIDROIT principles define non-performance as “*failure by a party to perform any of its obligations under the contract, including defective performance or late performance*”.<sup>33</sup>
27. A party must perform their obligations at a particular time if it is fixed by or determinable from the contract. (Art. 6.1.1(a) of UNIDROIT Principles 2010)
28. Remaining payments scheduled on 20 June 2012 and 20 August 2012 were material obligations under the Contract and non-performance of the same has resulted in substantial breach.

### **III. Validity of termination**

29. The seller had issued a notice of breach to the buyer on 20 August 2012<sup>34</sup> and the latter failed to either (i) commence and diligently pursue cure of the breach, or (ii) provide reasonable evidence that the breach has not occurred within 30 days of the receipt of notice, as mandated by clause 15.1<sup>35</sup> A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.<sup>36</sup>
30. In the present case non-payment of the remaining amount, which was intentional on buyer’s part, has resulted in fundamental non-performance.<sup>37</sup> Additionally, this willful conduct creates uncertainty and gives a reason to believe that no reliance can be placed on the buyer’s future performance vis-à-vis installments for remaining 4 years.<sup>38</sup>

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<sup>33</sup> Art.7.1, UNIDROIT Principles, 2010

<sup>34</sup> C.Ex.7

<sup>35</sup> C.Ex.2

<sup>36</sup> Art.7.3.1 (1), UNIDROIT Principles, 2010

<sup>37</sup> Art.7.3.1 (2)(c), UNIDROIT Principles, 2010

<sup>38</sup> Art.7.3.1 (2)(d), UNIDROIT Principles, 2010

31. The seller had sent notice of termination as per cl.15 of the Contract in the light of Art. 7.3.2 of UNIDROIT Principles 2010 within reasonable time.<sup>39</sup> The buyer did not commence and diligently pursue cure of breach<sup>40</sup> or provide reasonable evidence that breach has not occurred.<sup>41</sup> Thus, it was justified on the seller's part to terminate the Contract and it validly did so.

#### **D. CAN THE SELLER VALIDLY CLAIM THE TERMINATION PENALTY?**

##### **I. The seller has validly terminated the contract**

32. As proved in the previous issue, seller was fully within its rights to validly terminate the contract on the basis of clause 15.1 of the Contract.

##### **II. The seller is allowed to retain part payment**

33. Clause 15.2 (a) of the Contract categorically states: "Claimant shall be entitled to retain any part payment(s) made by CFX Ltd".

34. In pursuance to clause 15.2 (a), the seller is allowed to retain part payment made by buyer. Furthermore, a contract validly entered into is a binding contract, under the principle of *pacta sunt servanda*<sup>42</sup> and the buyer was obliged to perform its part of the contract on time<sup>43</sup> even if it was to be performed in installments.<sup>44</sup>

35. The Contract has clearly mentioned that once the seller terminates the Contract<sup>45</sup>, the seller retains whatever part payment(s) have already been made by the buyer i.e. USD

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<sup>39</sup> C.Ex.8

<sup>40</sup> Art.7.1.4, UNIDROIT Principles, 2010

<sup>41</sup> Clause 15.2, Purchase Contract

<sup>42</sup> Art.1.3, UNIDROIT Principles, 2010

<sup>43</sup> Art.6.1.1 (a) UNIDROIT Principles, 2010

<sup>44</sup> Art. 6.1.2, UNIDRIOT Principles, 2010

<sup>45</sup> 15.2(a) C.Ex.2

2,000,000. It should be noted that the seller has carried out the whole process in good faith and with fair dealing.<sup>46</sup> Moreover, the buyer was given additional four months to remedy its fault, where no abuse of rights was intended. Neither was this an exercise to merely damage the other party.

### **III.Seller can validly claim the termination penalty**

36. Clause 15.2 (b) of the Contract states that the seller can claim a “termination penalty equal to the difference between the total value of this Contract and the value of gearboxes already delivered to buyer as of the termination date”.<sup>47</sup> The Contract stipulated that once it has been terminated, the seller will be entitled to be paid in monetary amount the difference between the total value of the contract and the value of gearboxes already delivered i.e. the amount left to be paid by the buyer as part of the contract.

37. The buyer has defaulted twice in paying the seller, on 20 June 2012 and 20 August 2012, thus resulting in non-performance of its obligations under the Contract. The buyer was further intimated<sup>48</sup> and given time to make payments, which they did not. The buyer is required<sup>49</sup> to pay the termination penalty.

### **IV.Claimant is entitled to damages resulting from non-performance of respondent**

38. Once the seller gave notice asking for cure of non-performance<sup>50</sup>, buyer was obliged to affect the cure immediately and send a notice to the seller regarding the completion. Effect of cure is a must and even inconvenience does not justify non-performance of

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<sup>46</sup> Art.1.7, UNIDROIT Principles, 2010

<sup>47</sup> Ibid

<sup>48</sup> C.Ex.7

<sup>49</sup> Art. 7.2.1, UNIDROIT Principles, 2010

<sup>50</sup> C.Ex.7

cure.<sup>51</sup> Furthermore, non-performance is not justified by termination of contract, as effect of notice of termination is also suspended by cure.

39. Continued non-performance of contractual duty by the buyer further harmed the claimant, as there was forced termination of contract on 28 December 2012<sup>52</sup>, resulting damage to the seller's reputation. The seller is consequently entitled to claim damages in addition to the performance of cure.

40. Non-performance is considered the only criteria for claiming a right to damages, as is the case. The seller is further justified in claiming damages as its loss of reputation and damage to goodwill may preclude it from obtaining such contracts in the future. Hence there is a clear certainty of harm to the claimant's business ventures in the future.<sup>53</sup>

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<sup>51</sup> Art. 7.1.4(5), UNIDROIT Principles, 2010

<sup>52</sup> C.Ex.8

<sup>53</sup> Art. 7.4.2 UNIDROIT Principles, 2010

**PRAYER FOR RELIEF**

In light of the submissions made above, Claimant respectfully requests the Tribunal to declare that:

- The Respondent must pay the termination penalty of USD 8,000,000 as damages.
- The Respondent shall pay the costs of arbitration, including Claimant's expenses for legal representation, the arbitration fee paid to CIETAC and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules.
- The Respondent shall pay the Claimant interest on the amounts set forth in item 1 from the date those expenditures were made by the Claimant to the date of payment by the Respondent.

Respectfully signed and submitted by counsel on June 21, 2013.