
**Before the China International Economic and Trade and Arbitration Commission,
Beijing**

On behalf of

Energy Pro Inc.

28 ONTARIO Drive, Aero Street, Syrus

Tel No. (009) 2965 364

(CLAIMANT)

AGAINST

CFX Ltd.

26 Amber Street, Circus Avenue, Catalan

Tel No. (008) 5426 9877

(RESPONDENT)

COUNSEL APPEARING ON BEHALF OF CLAIMANT

WRITTEN SUBMISSIONS ON THE BEHALF OF CLAIMANT

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LIST OF ABBREVIATIONS

S. No.	Abbreviations Used	Full Form
1.	&	And
2.	AC	Advisory Council
3.	Art.	Article
4.	ASA	Swiss Arbitration Association
5.	Hon'ble	Honorable
6.	i.e.	That is
7.	CISG	United Nations Convention on Contracts for International Sale Of Goods, 11 April 1980
8.	Ltd.	Limited
9.	Cl. Ex.	Claimant's Exhibit
10.	e.g.	Example
11.	Cl. Memo	Claimant's Memorial
12.	ICC	International Chamber Of commerce
13.	S.	Section
14.	ICCA	International Council Of Commercial Arbitration
15.	Inc.	Incorporated
16.	v.	Versus

INDEX OF AUTHORITIES

ACTS/STATUTES

S. No.	Acts/Statutes
1.	UNIDROID Principles of International Commercial Contracts 2010.
2.	United Nations Convention on Contracts for International Sale of Goods 1980.
3.	The Convention On the Recognition and Enforcement of Foreign Arbitral Awards 1958.
4.	UNICETRAL Model Law on International Commercial Arbitration 1985.
5.	CIETAC- China International Economic And Trade Arbitration Commission.
6.	Contract Law of People's Republic In China.

BOOKS REFERRED

1. A. Reinisch, “Legality of Expropriations”, in A. Reinisch (ed. by), *Standards of Investment Protection*, Oxford, Oxford University Press, 2008
2. Alexander Jollies, *Consequences of Multi-Tier Arbitration Clauses : Issues of Enforcement*, Reprinted from (2006) 72 *Arbitration* 329–338 Sweet & Maxwell Limited.
3. B. H. Weston, ‘Community Regulation of Foreign-Wealth Deprivations: A Tentative Framework for Inquiry,’ in R. S. Miller and R. J. Stanger (eds. by), *Essays on Expropriation*, Ohio State University Press, 1967.
4. Beatson and Friedmann, *Good Faith and Fault in Contract Law*, Clarendon Press, 1995.
5. Halsbury’s Law of England, Fourth Edition, Butterworths Lexis Nexis, London 2002.
6. I Shihata, “Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties”, in *The World Bank in a Changing World* (1995) vol. II, 595, 601.
7. Ian Brownlie, *Principles of Public International Law*, 5th Edition., Oxford University Press, 1998.
8. J. Beatson, *Anson’s Law of Contract*, 28th edition, Oxford University Press, 2002.
9. JF O’Connor, *Good Faith in International Law*, Aldershot, Dartmouth, 1991
10. Joern Rimke, ‘Force Majeure and Hardship: Application in international trade practice with specific regard to CISG and the UNDRUIT principles of international commercial contracts’ *Pace review on the Convention on Contracts for International sale of goods*, Kluwer, 1999-2000, 197-243.

ISSUES PRESENTED

ISSUE 1: CAN ENERGY PRO INC. BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY?

ISSUE 2: CAN MS. ARBITRATOR 1 RESIGN DURING THE ARBITRATION PROCEEDINGS?

ISSUE 3: CAN ENERGY PRO. VALIDILY TERMINATE THE CONTRACT?

ISSUE 4: ENERGY PRO. INC CLAIMS THE TERMINATION PENALTY?

ARGUMENTS ADVANCED

ISSUE 1: CAN ENERGY PRO INC. BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY?

To bring Future Energy into the arbitration proceedings, the Commission has the required jurisdiction to make Future Energy Inc. as a third party to the arbitration proceeding. It is a well-established principle that a party who consents to arbitration is bound to agreement. It is also widely recognized that parties should bear the cost of the damages they cause to others.

The certification has been made by Future Energy Inc. It deems for a third party who shares its performance under any contract becomes a party to the contract.

A. The group of companies' doctrine is an established method of binding a third party to an arbitration agreement and to contractual obligations.

A group of companies exists where two separate legal entities conduct commercial activities in such a highly integrated manner that one of them exercises de facto control over the other's commercial activities. The doctrine is also used to bind the controlling company to contractual obligations where its control over the dependent company has contributed to the latter's breach of contract and the plaintiff's loss. In the present matter, Future Energy has certified the gearboxes for the wind turbines under the JV against the model no. of GH 2635. Being the sole independent company for certifying the gearboxes under the contractual obligations its participation in the arbitration proceedings in de facto made under the doctrine of "Group Companies."

B. The group of companies' doctrine is used to extend arbitration agreements to third parties.

When considering whether a non-signatory should be bound by an arbitration agreement, arbitral tribunals have adopted the test of implied consent¹ If the companies are in a group, are aware of the arbitration agreement and implicate themselves in the conclusion,

¹ [Hanotiau 2007 p.343]

performance or termination of the contract, then they are presumed to have consented to the agreement.² The doctrine has been widely accepted amongst arbitrators. In *Dow Chemical*, the tribunal held that a group of companies constituted a single economic reality capable of binding non-signatories to an arbitration agreement [*Van den Berg 343*].³ This reasoning has been acknowledged in “many awards and been discussed in scholarly articles” and has become so widely accepted that Boissésou comments (on the topic of the group of companies’ doctrine)

“Can a party that has signed an arbitration agreement and is a claimant in arbitration proceedings based on that agreement name as a respondent a party that has not signed the arbitration agreement? There again, the answer is obviously yes”⁴

In ICC 5721, the Swiss arbitration tribunal overcame a historical reticence towards the doctrine and accepted its validity when the facts of the case permit. Finally, the tribunal in ICC 6000 stated that the group of companies’ doctrine “is largely admitted [...] by virtue of [...] international trade”.

C. The tribunal should find second respondent bound by the arbitration agreement.

The question of fact arises when Energy Pro. Can be brought into the arbitration proceeding as it did not sign or otherwise become a party to the arbitration agreement. As a preliminary matter, the tribunal has the authority to determine its own jurisdiction in accordance with the principle of competence-competence. Claimant contends that Second Respondent is in fact bound by the arbitration agreement without signing the agreement. The Second Respondent's consent to be bound by the arbitration agreement is manifested on the basis that: (i) Second Respondent's conduct was an expression of implied consent to be bound, or

² *Hanotiau 2007 p.343-344; e.g. Dow Chemical and Société Sponsor A.B.; ICC 6519, 11209, 7604, 7610, 9517 & 9719. 53*

³ ICC 10758 ¶ 17]

⁴ [Boissésou p.19 emph. add.]

(ii) Second Respondent is estopped for denying it is a party to the agreement as it is intimately intertwined with the contract and receives a direct benefit from the contract, or Thirdly, Respondent is a member of a group of companies bound by the arbitration agreement. Finally where the Second Respondent is bound by the arbitration agreement, the formal requirements of writing will not inhibit enforcement of an award.

ISSUE 2: CAN MS. ARBITRATOR 1 RESIGN DURING THE ARBITRATION PROCEEDINGS?

An arbitrator in an arbitration proceeding can resign following illness or some other reasons. It is a generally accepted that one cannot force a person to continue as an arbitrator against their wills and arbitrators may resign if they are unwilling to proceed with the arbitration. The stated principle is largely self-explanatory.

In the case of *Jiangsu Corp. v. Automatiche S.P.A.* (hereinafter "Respondent I" or "[Seller]"), & Pharmacy Co., Ltd. (hereinafter "Respondent II" or "CCC") where the sole arbitrator in the case has resigned. The Chairman of the CIETAC has permitted for the change in the arbitrator in the arbitration proceeding.

Similarly in the "Peppermint Case" involving the change to an arbitrator was permitted by CIETAC. The fundamental question involving the resignation of arbitrators is permitted by the Tribunal.

The Rules and Procedures of Arbitration according to the CIETAC mentions, "in the event that an arbitrator is prevented de jure or de facto to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of the CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.

In the present matter, the arbitrator may be allowed by the institutional Tribunal to resign from his office. The subsequent withdrawal from the arbitration proceeding was initiated by the resignation of Ms. Arbitrator 1 to decide the quantum of damages which would take more than the allocated time of 2 days.

The subsequent resignation of the Ms. Arbitrator 1 amounts to coercion, malafied intention and is a coercive method. The arbitration fees needs to be paid according to the esatablished CIETAC rules and gulidelines for the payment of arbitration fees.

ISSUE 3: CAN ENERGY PRO. VALIDILY TERMINATE THE CONTRACT?

Energy Pro. Inc. can suspend and terminate the purchase contract⁵ if CFX Ltd, *substantially breaches a material obligation, representation or guarantee including the failure of any payments when it is due provided that the seller issues buyer a written notice of breach and buyer has failed within 30 days after receipt of the notice to either:*

- a. *Commence and diligently pursue cure of the breach or*
- b. *Provide reasonable evidence that the breach has not occurred*

1. Termination of the Contract.

According to Article 94 of Contract Law of People's Republic of China

Conditions that give rise to the termination of the contract are:

1. *The party delayed performance of its main obligation and failed to perform within a reasonable time after receiving the demand for performance;(sub clause 3)*
2. *The party delayed performance or otherwise breached the contract, thereby frustrating the purpose of the contract. (sub clause 4)*

A. Delay in Performance of the main obligation:

In the present dispute according to Article 94 (iii) CFX Ltd. Has failed to fulfill its main obligations. On 20 Aug 2012 a default notice was sent to the respondent by claimant regarding the default made by the respondent for the 2nd and 3rd Part Payments required under the purchase contract [claimant's Exhibit no.7].

After receiving the two default notices from the claimant's side respondent did not reply to any of the notices within 30 days and also no receipt of notice was issued regarding the

⁵ Claimant's Exhibit no. 2

commencement and diligently pursue cure of the breach or with any reasonable evidence that breach has not occurred. Thus it is clear that there has been a breach of contract by the respondent and hence claimant can validly terminate contract.

B. Breach of Contract by the Respondent:

Sub clause (IV) of the Article 94 clearly states that a contract can be terminated when the party has breached the contract. In concern with the present dispute, the respondent was under an obligation to make the payments for the gearboxes after receiving them. The first part payment was made on 13th march, 2012 as per the decided dates, by the respondent, while two part payments still due. The very basic purpose of the contract was the buying and selling of the gearboxes. The dispute arose in the present case when the gearboxes by the claimant were delivered to the respondent and respondent on his part failed to make the complete payment for the gearboxes as per the contract between the parties. Thus it is clear from the facts that respondent has breached the contract by not making the part payments.

2. Valid Termination of contract by the Energy Pro. Inc.

The contract has been validly terminated by Energy Pro. Inc as CFX Ltd. has failed to fulfill the obligations under the purchase contract. Before the delivery of the gearboxes both the “Design Reviews” were approved by the CFX Ltd. and only then the respondent placed an order for the same. The initial payment of USD 6million was to be made in three parts as on; 13th march 2012, 20 june2012, 20 aug2012 respectively each of USD 2 million each. The first part payment was made after receiving the gearboxes by the respondent but the respondent failed to make the next two part payments. No reply was sent to the claimant after receiving default notices within 30 days as required by the contract nor did the respondent diligently pursue any cure of the breach or have provided with the reasonable evidence that the breach, implies that contract has been effectively terminated.

The buyer had consistently failed to pay for the gearboxes on time. The seller had put the buyer on notice that timely payment of its invoices was made the essence of the contract notwithstanding that the contract was silent on the point. The buyer's failure to pay on time was therefore a repudiation of the contract.

Thus Termination of the Contract by the Claimant is valid in its nature. There was breach of contract by the CFX Ltd. by not making the left part payments and also not replying to the default notices within the period of 30 days. There is a clear breach of contract by the respondent which makes the termination of contract by the claimant valid in nature.

ISSUE 4: CAN ENERGY PRO. INC CLAIMS THE TERMINATION PENALTY?

The purchase contract also provide for a termination penalty, as follows:

In the event terminates the Purchase Contract as provided:

- a. seller shall be entitled to retain any part payment(s) made by the buyer; and*
- b. The buyer shall pay to seller a termination penalty equal to the difference between the total value of the purchase contract and the value of the gearboxes already delivered to the buyer as of the termination date.*

A. Non Payment of the Due Two Part Payments:

In the present dispute claimant and respondent agrees to settle on the selling of minimum 100 gearboxes to the buyer, and therefore buyer made the payment for the same in three part payments in the first year. The dates for the payments were decided by both the parties and thus respondent was under an obligation to make the payments on the respective dates⁶. the dispute arose when the first payment was made by the respondent after receiving the gearboxes on 13thmarch 2012 of USD 2million but did not pay the remaining two payments.

⁶ Para. 15 of Moot Problem.

Article 61⁷ gives power to the Claimant to terminate the contract under Article 64⁸ 1) *The seller may declare the contract avoided:*

(a) *if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or*

(b) *if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.*

Essential conditions mentioned in the above article removes the doubt on the part of the buyer, whether breach has occurred on its part or not. Buyer has fundamentally breached the contract by not performance of its obligation and payment of the price as required. The issue of breach of contract by buyer can also be challenged under Article 94⁹ *Conditions that give rise to the termination of the contract are: iii the party delayed performance of its main obligation and failed to perform within a reasonable time after receiving the demand for performance;* the nonpayment of the remaining Two part payments amounts to delay in performance of the main obligation by the respondent thus can amount in termination of contract by the claimant.

B. No reply within the period of 30 days:

According to Claimant's Exhibit no.2 (15.1) there has been breach of contract by the respondent, under Article 59¹⁰, *The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.* In regard with the present dispute no reply was sent to the two default notices¹¹ which were sent on 20th June and 20th Aug

⁷ CISG Rules

⁸ CISG Rules

⁹ Contract Law of People's Republic of China

¹⁰ CISG Rules

¹¹ Para.15 of Moot Problem

2012 respectively by the claimant within 30 days according to the Purchase Contract. Secondly, respondent also failed to pay the remaining two part payments of USD 4 million which were to be made on the specified dates after receiving the gearboxes. Thirdly respondent, CFX Ltd. unilaterally suspended the Purchase Contract without issuing receipt notice either concerning the commencement and the cure of the breach, or regarding the non occurrence of breach on their part this further clarifies that there has been breach of the contract by CFX Ltd. hence Energy Pro. Inc can validly terminate the purchase contract and can also claim the Termination Penalty.¹²

C. Claim for the Termination Penalty:

15.1 Energy Pro Inc. has a right to suspend or terminate the Purchase Contract if CFX Ltd substantially breaches a material obligation, representation or warranty including the failure to make any payment when it is due provided that the Seller issues Buyer a written notice of the breach and Buyer has failed, within 30 days after receipt of the notice to either: (i) commence and diligently pursue cure of the breach, or (ii) provide reasonable evidence that the breach has not occurred.

All the essentials of the sub clause 15.1 of suspension and termination clause of Claimant's Exhibit no.2 has been proved by the above mentioned points in the present issue. That there has been clear breach of contract by the respondent's side as the two part payments which were to be paid on the respective dates were not paid even after the demand for the performance of the obligation by the claimant. Secondly, even after receiving the Default notices by the claimant regarding the fulfillment of the payment for gearboxes no reply was sent to the claimant by the respondent within period of 30 days regarding commencing and diligently pursuing cure of the breach, or to provide with reasonable evidence that the breach has not occurred on the respondent's side. The non performance of the obligation by buyer has directly resulted in valid termination of contract by the seller.

¹² Claimant's Exhibit no. 2 (15.2)

Accordingly, 15.2 In the event Energy Pro Inc. terminates the Purchase Contract as provided: (a) Energy Pro Inc. shall be entitled to retain any part payment(s) made by CFX Ltd; and (b) CFX Ltd shall pay to Energy Pro Inc. a termination penalty equal to the difference between the total value of this Purchase Contract and the value of Gearboxes already delivered to CFX Ltd as of the termination date

The Termination Penalty can be claimed by the claimant as the termination of the contract by the claimant is valid in nature.

PRAYER FOR RELIEF

All the above mentioned issues raised, articles reviewed, the tribunal may direct:

- 1) That Energy Pro Inc. can bring Future Energy Inc. into the arbitration proceedings.
- 2) That Ms. Arbitrator 1 cannot resign during the arbitration proceedings.
- 3) That Energy Pro Inc. can validly terminate the contract.
- 4) That Energy Pro Inc. can claim the termination penalty.

All of which is respectfully affirmed and submitted

Sd/-

Counsel for Claimant