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

On behalf of

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 RESPONDENT

WRITTEN SUBMISSIONS ON THE BEHALF OF RESPONDANT

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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 PENALITY?

ADVANCED ARGUMENTS

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

The arbitration between the parties is to resolve disputed by an arbitration proceedings. The limits or constrains imposed on the contracting parties to an arbitration proceeding are: (i) Parties' failure to agree, (ii) Breach of fundamental due process principle, (iii) Other mandatory procedural laws, (iv) Institutional requirements, (v) Third Parties involvement, (vi) Arbitral tribunal discretion.

It is a generally acclaimed principle that the consent of the parties is essential to make a third party who is an non-signatory to the arbitration agreement. Mere participation in an arbitration proceeding as a certifying agency does not itself imply consent in participation in an arbitration proceeding. The principle characteristic of arbitration is that it is chosen by the parties¹ by executing an agreement to arbitrate. The arbitration agreement is considered the foundation stone of international(commercial) agreement, as it records the mutual consent of the parties to submit to arbitration.-mutual consent which is indispensable to any process of dispute resolution outside courts.² Such proceedings depend for their very existence upon the agreement between the parties. Hence, the element of mutual consent is essential.

In the context of commercial arbitration, it is generally accepted that the capacity to take part in proceedings is exclusively determined on a contractual basis. Entering into an arbitration agreement is as indispensable requirement for a person to participate in the arbitration proceedings.³

¹ Lew , Mistelis and Kroll p 1-11

² Redfern, Hunter, Blackaby and Partasides, para 3-10

³ Brekoulakis, *Third Parties*, para 1.09

Furthermore, Future Energy has been made a third party to the arbitration clause and its consent has been obtained by duress [Statement of Defense]. In *Progress Bulk Carriers Ltd v. Tube City IMS LLC (the "CENK KAPTANOGLU")* [2012] 1 Lloyd's Rep. 501, the High Court was called upon to consider the question what conduct might amount to economic duress in the context of a commercial relationship between the owners and charterers of a vessel. In the above case it has been found that a settlement agreement had been procured by economic duress and was accordingly voidable in circumstances.

The doctrine of economic duress deemed to exist where a party gains advantage over the other in a contractual business relation. In the present matter, Future Energy's consent has been obtained by duress by mitigating the terms and contractual obligations under the purchase contract and has been brought into the arbitration proceeding as a respondent. Therefore, Future Energy cannot be brought into the arbitration proceeding as a third party as its consent has been obtained by duress.

The "but for" test applies in case of a where consent that been obtained by duress such that "but for" the coercive pressure the innocent party would never have entered the contract.

Coercive Pressure

A range of factors are taken into account while one party exercises illegitimate pressure to a party to enter into a arbitration proceeding being a non-signatory.

1. Whether guilty party acted in bad faith (here there was no finding of bad faith).
2. Whether there was any realistic practical alternative to the innocent party, but to submit to the pressure.
3. Whether protest was made at the time.
4. Whether the innocent party affirmed and sought to rely on the contract.

The main provisions have been relied on the affirmation of whether the guilty party has acted in a bad faith or not.

(A) Whether guilty party acted in a bad faith.

The defaulting party (herein Energy Pro. Inc.) has obtained de facto participation of Future Energy as a third party through duress in order to gain undue advantage in of the arbitration proceedings. In its letter dt. 21 May 2012 , CFX Ltd. mentioned Future Energy that it was shifting the blame in fulfilling its duties under the contractual terms and obligations.⁴ The act of Energy Pro. Inc was prima facie wrong in supplying the specified gearboxes under the purchase contract. Energy Pro Inc. act is questionable in taking Future Energy in the arbitration proceeding.

Herein, it has been found that the participation of Future Energy has been obtained by duress to bring it as a respondent in the arbitration agreement. This raises serious doubts to the intention of Energy Pro. Inc. gaining an unfair and undue advantage in the arbitration proceeding. The terms of the Purchase Contract for the supplying of the gearboxes has been intentionally ignored by Energy Pro. Inc. and the shipment have been delivered. The annotated provisions of Art. 35(1) of CISG mentioned that , *“the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”* Under the contractual obligations the gearboxes sent were not in conformity with the Purchase Contract against the specific model of GJ 2635 thus violating the Purchase Contract.

The intention of Energy Pro. Inc. is to shift the onus on supplying the gearboxes on part of Energy Pro Inc. to Future Energy for the non- delivery of the actual gearboxes under the contract which does not fulfill the requirements for the 1.5 MW gearboxes and to make it a third party in the arbitration proceedings. Hence, Future Energy should not be made a part to the arbitration agreement for duress and non-objectivity under the contract.

⁴ Claimant’s Exhibit No. 6

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

The arbitrator for Energy Pro Inc, Ms. Arbitrator 1 cannot resign during the arbitration proceeding. The resignation of Ms. Arbitrator 1 from the death or health related problems is a vexing problem that admits no solution. If the proceedings have been extensive, the substitute arbitrator will not be effective or even may not “catch-up” with the arbitration proceedings. The starting of the arbitration proceeding *de novo* will result in a waste of time and cost that would neither be acceptable to one or more of the parties.

A. The resignation of Ms. Arbitrator is not in conformity with the Rules and Procedures.

The Code of Conduct for the Arbitrators at the initiation of arbitrators calls for an independent and impartial participation by the Arbitrators in the arbitration proceeding. The Arbitrators give their consent to the arbitration proceeding till the completion of the arbitration.

In the present instance, the resignation of Ms. Arbitrator 1 would extend the arbitration process beyond the stipulated time limits. The subsequent change of the arbitrator in the three member arbitral tribunal would render the arbitration proceeding to start afresh from the beginning. At a very advanced stage of the arbitration it would be a waste of time and the arbitration proceedings will have to take more than which both of the parties may not agree to. The e-mail sent by Ms. Arbitrator 1 claiming that she would not remain on the panel in determining the issues of quantum would defeat in spirit the CIETAC Rules and procedures. Ms. Arbitrator 1 would be in the best position to arbitrate on the issues of the case.

a. Cost Effectiveness

The change in the arbitrator Energy Pro Inc. from the Panel of Arbitrators would not be cost effective and will ultimately result in the great loss of money. There arises no logic for the appointment of another arbitrator in replacement of Ms. Arbitrator 1. The party appointed arbitrator acted during the entire course of proceedings and she should be allowed to continue with the extended arbitration proceeding by paying the additional fees.

ISSUE NO 3: CAN ENERGY PRO. VALIDLY TERMINATE THE CONTRACT

A. Essentials of the Contract

The Gearbox will be manufactured by the JV with the following specifications which has been agreed between Energy Pro Inc. and CFX Ltd.⁴

- 1. For use in a 1.5 MW wind turbine developed by Future Energy Inc. ('Future Energy')*
- 2. Model No. GJ 2635*
- 3. Rotor speed of 360 rpm*
- 4. Grey colour*

B. The Buyer is desirous of purchasing the Gearbox from the Seller on the terms set out in this Purchase Contract

Purchase Contract has been formed between the claimants (Energy Pro. Inc) as seller and the respondent (CFX Ltd.) as buyer. According to the Purchase Contract the very essential of the contract was the shipping of the gearboxes Model no. GJ 2635 by the claimant to the respondent. The Purchase Contract expressly made it clear under Exhibit no. 2 that Energy Pro. Inc. has the burden to make sure that the gearboxes were in conformity with the specifications laid out in the contract. The gearboxes which were shipped to the respondent by the claimant did not meet the essential requirements specified in the Purchase Contract, hence the gearboxes received were useless for the respondent. The claimant failed to adhere to the contract right from the first delivery.

C. Breach of Material Obligation:

The material obligation here is the delivering of the desired goods by the seller to the buyer. Desirability of the goods were specifically mentioned in the Purchase Contract signed between the seller and the buyer. The model no. GJ2635 was agreed upon by the parties to contract. Claimant was under a material obligation to ship the model no. Specified and desired by the buyer which was GJ2635 but rather claimant delivered the gearbox model

⁴ Claimant's Exhibit No.2

no.GH2635 which in turn was useless for the respondent hence causing them loss in the business. CFX Ltd. is new to the Catalan market and has been recently formed, the delivery of the wrong gearboxes by the claimant amounted to loss to the respondent. Material obligation has occurred on the part of the Claimant as the gearboxes did not meet the essentials of the Purchase Contract.

D. Energy Pro. Inc not in position to validly terminate the Contract:

Article 155 of Contract Law of The People's Republic Of China

“if the subject matter delivered by the seller fails to comply with the quality requirements, the buyer may hold seller liable for breach of contract in accordance with Article 111 hereof”

Here the breach of contract has occurred due to the delivery of gearboxes which did not meet the no obligation to pay the remaining part payments of USD 4million.

Article 49⁵: (1) The buyer may declare the contract avoided:

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

CFX Ltd. was under the obligation to pay for the gearboxes meeting the requirement of the Purchase Contract but the subject matter delivered by the seller fails to comply with the quality required by the buyer and this releases the respondent to make any part payments for the gearboxes which are useless for them and allows the respondent to terminate the contract as a remedy in the present situation.

E. Termination of contract by the buyer is valid:

Article 51⁶(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

CFX Ltd. is justified in law to terminate the contract in these circumstances of violation as the fundamental quality of goods by the Energy Pro.

⁵ CISG Rules.

⁶ CISG Rules.

Article 46⁷1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

The remedy that the buyer resorted to in case of breach of contract by the seller was the termination of contract, which was valid in nature. Articles mentioned above clarifies the doubt that whether buyer could terminate the contract or not and answer to it yes buyer can terminate the contract under the circumstances where the seller has caused a fundamental breach. *Where there is fundamental breach by the seller, the buyer can claim the already paid amount from the seller⁸* the part payment of USD 2,000,000 therefore has to be returned to CFX Ltd.

ISSUE NO 4: CAN ENERGY PRO. INC CLAIM 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.*

To claim termination penalty Energy Pro. Firstly has to prove that there has been a breach of contract by the CFX Ltd. to claim termination penalty the onus is on Energy Pro. To prove that the breach of contract originated on the part of CFX Ltd. the fact remains when the goods supplied were not in specified quality CFX Ltd. had no alternative but to reject it.

A. Energy Pro. Inc did not meet the Quality requirements:

In accordance with Article 148 of Contract Law of The People's Republic Of China

“where the purpose of the contract has been frustrated due to the failure of the subject matter to meet the quality requirements, the buyer may reject the subject matter or terminate the contract. If the buyer rejects the subject matter or terminates the contract, the risk of damage to or loss of the subject matter is borne by the seller”

The seller⁹ has failed to comply with the essential requirements¹⁰ of the gearboxes which were (a) for use in a 1.5 MW wind turbine developed by Future Energy Inc. (b) Model No.

⁷ CISG Rules.

⁸ China 2000 CIETAC Arbitration proceeding (Souvenir Coins Case)

⁹ Claimant.

GJ 2635 (c) Rotor speed of 360 rpm (d) grey colour. The gearboxes which were delivered to respondent were not of the same model number. And hence did not meet the requirements of the Purchase Contract. The gearboxes received by the respondent were of no use to them.

According to Article 35 CISG¹¹ The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

The goods delivered by the seller must meet the contract terms on quality and specifications. Since the parties agreed in the Contract to use GJ2635 quality standards, whether the goods are conforming depends on whether the goods are up to GJ2365 standards. Which results in failure to non conformity with the standards required by the buyer on the side of the claimant.

B. Liability for breach of Contract on Claimant:

Under the Article 111¹² Where the performance does not meet the prescribed quality requirements, the breaching party shall be liable for breach in accordance with the contract, where the liabilities for the breach has not been prescribed or clearly prescribed, and cannot be determined in accordance with article 61¹³ hereof, the aggrieved party may, by in reasonable election in light of nature of the subject matter and the degree of loss, require the other parties to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price remuneration, etc.

The breach of contract in the present dispute is due to the acts of the claimant by not complying with the fundamental quality requirements demanded by the respondent, buyer. The very first delivery of gearboxes which were shipped by the claimant were not of the model no. which was desired by the respondent. Immediately after receiving the gearboxes

¹⁰ Claimant's Exhibit no. 2 [Purchase Contract]

¹¹ [cystiene case, docket no. CISG /2000/06]

¹² Contract Law of People's Republic of China

¹³ Contract Law of People's Republic of China

the payment was made to the claimant of USD 2million on the date prescribed by the claimant, but the gearboxes shipped to the respondent did not meet the desired quality of the respondent. It is clear that liability of breach is on the shoulder of the claimant. In the Purchase Contract¹⁴ the buyer has made it crystal clear that the gearboxes that are required by them should adhere to the quality and specifications mentioned in the contract. Presently gearboxes received by the buyer did not match up with the specifications mentioned in the contract.

C. Claimant holds no position to claim termination penalty:

Claimant bears the burden of breaching the contract on the very first instance of the delivery of the gearboxes which did not meet the quality and specifications mentioned in the Purchase contract¹⁵. Article 148¹⁶ gives power to the buyer to reject the goods which were not according to the terms desired by him. The model no. GH2365 is of no use to the CFX Ltd. and has amounted to loss to the company and also additional to it the first part payment has been made to the claimant¹⁷ as asked by them. Considering the fact that the gearboxes delivered were not of specified quality, respondent has no other choice but to terminate the contract. Respondent is under no obligation to pay the next Two part payments as the claimant has caused breach by not shipping the GJ3265 model agreed in the contract. Hence claimant holds no position to claim Termination Penalty from the respondent.

¹⁴ Claimant's Exhibit no.2

¹⁵ Claimant's Exhibit no.2

¹⁶ Contract Law of People's Republic of China

¹⁷ Para. 10 Moot Problem 13 March 2012

PRAAYER FOR RELIEF

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

- 1) That Energy Pro Inc. cannot bring Future Energy Inc. into the arbitration proceedings.
- 2) That Ms. Arbitrator 1 can resign during the arbitration proceedings.
- 3) That Energy Pro Inc. cannot validly terminate the contract.
- 4) That Energy Pro Inc. cannot claim the termination penalty and CFX Ltd, is entitled to an interest on the US\$ 2 million.

All of which is respectfully affirmed and submitted

Sd/-

Counsel for Respondent