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Summary of Facts

In February 2010, Mr. Yuen established CFX Ltd in Catalan to assemble wind turbines with another company, TurboFast whose technology was developed by Future Energy. Energy Pro entered the picture when it wanted to expand its business in Catalan by manufacturing gearboxes for the wind turbine. Energy Pro approached TurboFast to discuss a possible co-operation. However, as TurboFast had already granted the license to CFX Ltd, it advised Energy Pro to strike a deal with CFX Ltd instead. Heeding TurboFast's advice, Energy Pro succeeded in sealing a contract with CFX Ltd whereby it has to manufacture and subsequently own all the wind turbines whilst CFX Ltd would buy the wind turbines and sell them in Catalan. Future Energy held the duty of certifying the wind turbines before Energy Pro manufactures it. The problem arose when an engineer of Future Energy wrongly certified a wind turbine which Energy Pro subsequently manufactured. CFX Ltd refused to buy the wind turbines as it was of no value for sale in Catalan. As a result Energy Pro initiated an arbitration proceeding for breach of contract against CFX Ltd when the latter defaulted in the agreed payment. Energy Pro also invited Future Energy to join the proceedings as a third party.

A. Can Energy Pro can not bring in Future Energy as a third party to the arbitration proceedings.

1.0 The concept of confidentiality in arbitration would not permit Future Energy to join the arbitration proceedings as a third party

1.1 Confidentiality has been one of the fundamental traits of arbitration. Numerous common law countries share the same view[1]. In the leading case *of* ***Esso Australia Resources v. Plowman***[2] the court held that confidentiality is an implied term in arbitration agreements.

1.2 In the present situation, Energy Pro wrote a letter to Future Energy inviting them to join the arbitration proceedings as a third party without seeking permission from CFX Ltd, a genuine party to the arbitration. The joining of Future Energy to the arbitration proceedings without express consent by CFX Ltd has defeated the crux of arbitration, that is, confidentiality.

1.3 Future Energy via Energy Pro did not obtain consent from CFX Ltd to join the arbitration proceedings, against the concept of arbitration, i.e. confidentiality.

1.4 Therefore, Future Energy should not be allowed to join in the arbitration proceedings.

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[1] ***(1994) 1 VR 1***, *10-14; Hutchings v. United States Indus. Inc.,*

428 F.2d 303, 312 (5th Cir. 1970) (privacy in labour arbitration).

[2] ***[1994] 1 VR 1.***

2.0 Future Energy is not a party to the arbitration agreement nor are they a party to the purchase agreement.

2.0 The principle of an arbitration's contractual character forbids any third-party involvement in the exclusively bilateral arbitration process, unless all relevant parties have consented thereto either expressly[3] or impliedly[4].

2.1 Participation of third parties in arbitration makes it more expensive and time-consuming. The Arbitration Law of the People's Republic of China is silent on the system of arbitration that allows the participation of third parties whilst most arbitration rules disallow entirely participation of third parties without consent. Though, one of the concrete processes of a third party's intervention in an arbitration procedure is that the involvement must be voluntary, not upon invitation or forced. They themselves have to seek the permission from the arbitration tribunal to protect their right as per the contract[5].

2.2 Future Energy is not a party to both the arbitration agreement and the purchase agreement. They are merely a certification company. Therefore, may not take part in the proceedings. CFX Ltd's claim is in no way attached to Future Energy whom acts as a certification company to Energy Pro Inc, they should not even be invited by Energy Pro Inc to join in the first place. Future Energy must initiate a

[3] ***Hoesch Export v Hansa Projekt Transport (The World Umpire) [1990]1 Lloyd's 374.***

[4] Berger, International Economic Arbitration, (Kluwer 1993) p. 295.

[5] Yongshuang Ma, The Design for the System of the Third Party's Intervention in the Arbitration Process (2005) 66 US-China Law Review.

positive action and full consent in wanting to join the arbitration proceeding in order to protect their right, not due to threats by Energy Pro.

2.3 Therefore, we submit that Future Energy is not a party to the arbitration agreement nor are they a party to the purchase agreement therefore they should not be allowed to join the arbitration proceeding as a third party.

3.0 CFX Ltd as a party to the arbitration agreement has an inherent right to refuse the participation of Future Energy in the proceedings.

3.1 The two relevant provisions in the **CIETAC Arbitration Rules** would be Article 5 and Article 17. **Article 5 (2) provides that only parties that concluded the arbitration agreement can settle their dispute via arbitration**.

3.2 Since the CIETAC Rules are silent on third party participation, the next to kin to such involvement would be a consolidation of hearing which is provided for in **Article 17 CIETAC** whereby it **requires the agreement of all parties** which Energy Pro did not initiate.

3.3 The Vienna Rules[6] and the Netherlands Arbitration Institute rules[7] requires consent of parties to the arbitration in order for a third party to join.

3.4 Following the CIETAC rules which Energy Pro Inc and CFX Ltd has agreed to be the *lex arbitri* for the current dispute, Future Energy may not join the arbitration

[6] Article 10.

[7] Article 41.

proceeding as a third party. CFX Ltd as a genuine signatory party to the arbitration agreement has a right to refuse the joining of Future Energy into the arbitration proceedings.

B. Ms. Arbitrator 1 cannot resign during the arbitration proceedings.

1.0 Ms. Arbitrator 1 should continue to preside over the quantum.

1.1 The appointment of Ms. Arbitrator 1 is a contract.

1.1.1 There are three acts to be complied in an appointment of an arbitrator: [8]

1) claimant must communicate with the intended arbitrator, authorising him to act in respect of the particular dispute.
2) Intended arbitrator must indicate to the claimant his willingness to act
3) Fact of the appointment must be communicated to the defendant.

1.1.2 In the case of ***Jivraj v Hashwani***[9], the court came to a decision that there is indeed a contract between an arbitrator and the parties which is one of a sui juris nature.

1.1.3 Compliance of the acts stated above constitutes a formation of contract to act as an arbitrator. Hence, Energy Pro Inc. not willing to pay is considered to be a breach of said contract.

[8] Boyd, S. (1999). *Commercial Arbitration*. 2nd ed. Butterworths.

[9] [2011] UKSC 4

2.0 Ms. Arbitrator 1 deserves remuneration.

2.1 **Article 72 of CIETAC 2012** states that:

"Apart from the arbitration fees charged in accordance with its Fees Schedule, CIETAC may charge … as well as the costs and expenses of experts, appraisers or interpreters appointed by the arbitral tribunal."

2.2 This clause proves that even though the respondents, CFX Ltd. could not possibly force the claimant, Energy Pro Inc. to pay Ms. Arbitrator 1 the extra fees that is rightfully hers, CIETAC could ask the Claimant to do so, as this includes the extra and reasonable costs mentioned in the said article. The costs that Ms. Arbitrator 1 asked for is the additional fees required for her to stay and arbitrate after her appointment might extend from a two day quantum to a five day. Hence, it is only reasonable for CIETAC to request Energy Pro to bank in the additional fees that are required.

2.3 Furthermore, Article **24 (2) of CIETAC 2012** states:

"Where the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC in accordance with the law."

It is only natural that when the parties agreed to nominate an arbitrator that the resignation should be equally agreed upon. Thus, it ensures equal satisfaction on

both sides with the outcome without one claiming the procedures are unfair.

3.0 The resignation of Ms. Arbitrator 1 will result in the loss of time and money for CFX Ltd.

3.1 The resignation will result in loss of time and money, as the delay will accumulate more time to settle the dispute.

3.2 ***In the Matter of the Petition of Ins. Co. of N.A v. Public Service Mutual Ins. Co.***[10] in regards to the issue whether an arbitrator should be replaced and the proceedings to be start anew after a resignation of an arbitrator, it was held then that the proceedings must start over.

3.3 In addition to that in the case of ***Assoc. of Flights Attendants v. Aloha Airlines, Inc.***[11], the respondent wanted to substitute a party arbitrator who concurred with the umpire's unilateral award. The court found that the unilateral award is improper and that the substitute arbitrator who had not heard the evidence could not participate in the decision making thus requiring the arbitration to start anew.

3.4 Ms. Arbitrator 1 is to be allowed to resign due to Energy Pro Inc's refusal to deposit the additional fees required will definitely cause the loss of time and money for CFX Ltd.

[10] 2008 U.S. Dist. Lexis 101788 (S.D.N.Y.).

[11] 158 F.Supp.2d 1200

4.0 Three reasons have been established to prove Ms.Arbitrator 1 could not resign.

4.1 Firstly, a valid contract has been concluded between Energy Pro Inc. and Ms. Arbitrator 1, thus failure to adhere to the contract is a breach.

4.2 Remuneration is the rights should not be denied from Ms. Arbitrator 1.

4.3 The absence of Ms. Arbitrator 1 in quantum will result in great loss of time and money for CFX Ltd.

C. <u>Energy Pro cannot claim the termination penalty.</u>

1.0 Energy Pro cannot claim the termination penalty based on the status of Article 15.2 as a penalty clause.

1.1 It is a penalty clause because unlike liquidated damages in which the compensation must be equal to the loss, but in the case at hand the gearboxes must conform to the quality standard as stated in Article 10.

1.2 In the case of ***Dunlop Pneumatic Tyre Co. Ltd v. New Garage and Motor Co. Ltd , William Waung J explained the concept of penalty clause.***

1.2.1 The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

1.2.2 The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach.

1.2.3 To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

i. It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

ii. It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. This though one of the most ancient instances is truly a corollary to the last test.

1.3 Termination penalty notwithstanding its construction as a penalty clause orliquidated damages, is still inapplicable in by Energy Pro.

1.4 Albeit the claim of USD 8,000,000 that purportedly equates to the value of the gearboxes, but it is in actuality not equal, and not valued as such.

1.5 This is due to the fact that the reason Future Energy rejected the gearboxes is because of one the claimant's engineers had wrongly certified the gearboxes appropriate for sale in Catalan (Claimant's Exhibit No. 3). Wrongly certified gearboxes can't be valued as its original and rightly certified price.

1.6 Energy Pro therefore cannot claim the termination penalty because the inapplicability of penalty clause and also its non equivalence as a penalty clause respecting its value.

D. Energy Pro did not validly terminate the contract.

1.0 Both UNIDROIT and CISG place avoidance of contract as a last unavoidable resort, when there is no hope in rescuing the contract between two parties.[12] Even if there's reason for avoidance, CFX should be the one to avoid the contract, not Energy Pro as the breach resulted from Energy Pro's refusal to repair the breach.

1.1 **Article 25 of CISG** states that a **breach of contract is fundamental if it results in the detriment of the other party as to substantially deprive him from what he reasonably expects from the contract.**

1.2. The fundamental breach surfaced on the part of Energy Pro as according to Claimant's Exhibit No. 2, CFX's obligation to purchase is subject to Energy Pro being able to meet the established requirements in the contract and Energy Pro has to obtain certified approval from Future Energy before delivering the gearboxes to CFX.

1.3. In the case of ***Rotorex Corp. v. Delchi Carrier S.p.A[13]***, the Court applied Article 25 CISG in deciding that the seller's breach was to be considered fundamental, because cooling capacity and power consumption are important determinants of the value of air conditioner compressors for the buyer.

[12] Ulrich, M. (n.d.). The remedy of avoidance of contract under CISG -- General remarks and special cases. *Journal of Law and Commerce*,*25*(2005-06), 423-436.

[13] 71 F.3d 1024-1031 (2d Cir. 1995)

1.4. The breach surfaced when Energy Pro had failed to deliver the wind turbines according to the specifications stated in the contract. Even though the mistake in specification is not directly Energy Pro's fault[14], they did not do anything after they have been notified about the mistake until prompted by the email that CFX sent.[15] Even then, they refused to take responsibility over the mistake made.[16]

1.5. Since Energy Pro had failed to conform to the specifications stated in the contract, which is vital to ultimately assemble the 1.5 MW wind turbines; this can qualify as a fundamental breach under Art. 25 of CISG.

2.0 Fundamental breach committed by Energy Pro invalidates their request for avoidance.

2.1 Under **Article 35(1)**, the **seller must deliver goods that fit the description under the contract**. However the exceptions under Article 35(2) are not applicable in this problem because the items are not fit for the purpose that is under the contract.

2.2 In ***Schmitz-Werke GmbH & Co. v. Rockland Industries Inc***[17], the Court of Appeal held the seller liable for breach of warranty under Art.35(2)(b) CISG as the seller had failed to deliver goods suitable for the use it had expressly

[14] Claimant's Exhibit No. 3

[15] Claimant's Exhibit No. 4

[16] Claimant's Exhibit No. 5

[17] 2002 WL 1357095 (4th Cir. Md)

warranted. Also, the buyer had reasonably relied on the seller's statement that the fabric was particularly fit to be transfer printed.

2.3 Even though the unconformity was known after the gearboxes have been sent to CFX, under Article 36(1), the seller is still liable for any lack of conformity which exists at the time when the risk passes to the buyer although the lack of conformity becomes apparent only after that time.

2.4 **Article 39(2)** states that the **buyer has to notify the seller about the non-conformity within 2 years after the date when the buyer received the items** which was done by CFX a month after they have received the notification on the non-conformity of the items. Therefore, Energy Pro has the obligation to rectify the breach instead of asking for avoidance of contract.

3.0 Energy Pro refused to honour CFX's right to request for remedy in form of replacement of items, thus further aggravating the breach.

3.1 CFX's request for Energy Pro to replace the items that does not fit the specifications are a bona fide right specified under **Article 46** that states that the **buyer may require performance by the seller of his obligations and buyer may require the delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract.**

3.2 However, CFX's request was ignored by Energy Pro on the basis that the breach did not come from them as the qualifications were done by Future Energy. The only remedy that they were willing to supply to CFX was letting CFX choose

another qualification company to replace Future Energy that was chosen by them[18].

3.3 The stand taken by Energy Pro in addressing CFX's request of a remedy further aggravated the breach as CFX has exercised their right in accordance to Article 46 of CISG to avoid the contract from being avoided. Energy Pro's refusal to adhere to CFX's request may lead to CFX requesting for avoidance of contract under Article 49.

3.2 Thus, rightfully, CFX is the party that has the right to terminate the contract under the ground of the fundamental breach committed by Energy Pro. Energy Pro's action of terminating the contract is unlawful under CISG.

[18] Claimant's Exhibit No. 5