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THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG 2013

MEMORANDUM FOR CLAIMANT

On behalf of

Energy Pro Inc.

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Head of Company: Andre Li, CEO

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CLAIMANT

Against

CFX Ltd

26 Amber Street, Circus Avenue, Catalan

Chairman of Board: Peter Yuen

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RESPONDENT

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Abbreviation Explanation

Art.	Article
Agreement	An agreement between CFX Ltd, Energy Pro Inc. and Future Energy Inc.
CFX	CFX Ltd
Cl. Ex	Claimant's Exhibit
Cl's SoF	Claimant's statement of facts
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules (2012)
DR1	the 1st Design Review held on 17 September 2011
DR2	the 2nd Design Review held on 16 January 2012
Default Notices	the first and second notice of default on 20June 2012 and 20 August 2012
Energy Pro	Energy Pro Inc.
Future Energy	Future Energy Inc.
JV	Syrus-Catalan Wind Turbine gearboxes joint Venture Company
Parties	CFX Ltd and Energy Pro Inc.
PC	an exclusive PC between CFX Ltd and Energy Pro Inc. concluded on 10 April 2011
PICC	UNIDRIOT Principles of International Commercial Contracts (2010)

TurboFast	TurboFast Ltd
Termination Notice	a notification of termination of PC from Energy Pro Inc.
Re. Ex	Respondent’s Exhibit
Re’s De	Respondent’s statement of defense
REBA	CIETAC’s Rules for Evaluating the Behavior of Arbittrator
PO. 2	Procedural Order No. 2

STATEMENT OF FACTS

1. Energy Pro, approach TurboFast, for a possible co-operation with regards to manufacturing gearboxes for its 1.5MW wind turbines which had been developed by Future Energy. By that time, however, TurboFast had already granted a license for the assembly of its 1.5 MW turbines to CFX. Accordingly, TurboFast recommended Energy Pro's representatives contacting CFX directly for that possible co-operation.

2. After discussion began in mid-2010, CFX and Energy Pro entered into a joint venture agreement for JV, a company manufacturing gearboxes for not only the 1.5 MW wind turbines but also for sale in Catalan more generally based in Catalan and operates there.

3. According to the joint venture agreement, Energy Pro and CFX entered into PC [Energy Pro as seller and CFX as buyer] on 10 April 2011 after extensive negotiation. Meanwhile, an agreement was reach between CFX Ltd, Energy Pro and Future Energy that Future Energy would be the independent certification company for the wind turbines of Model GJ 2635.

4. On 17 September 2011 and 16 January 2012, the parties held meetings to perform DR1 and DR2 according to PC. Less than one month later after DR2, CFX issued a purchase order for 100 gearboxes. Still around one month later, CFX transferred the first payment of USD 2 million to Energy Pro after receiving the gearboxes around 11 February 2012 and 13 March 2012.

5. On 18 April 2012, however, Future Energy reminded both CFX and Energy Pro that one of its engineers had wrongly certified the gearboxes appropriate for sale in Catalan. One month later, CFX emailed Energy Pro emphasizing outstanding concerns with gearbox design and the lack of approval by Future Energy of such designs. But Energy Pro reiterated its duly performance of obligation and no

responsibility for Future Energy's negligence to CFX after 2 days. Still one month later a, CFX wrote to Energy Pro to suspend performance of PC, pending Energy Pro's full performance of PC.

6. On 20 June 2012 and 20 August 2012, Energy pro issued Default Notices to CFX Ltd according to PC. One month later after the second Default Notice, Energy Pro served on CFX pre-action demand letter for the second and third payment otherwise arbitration would be initiated against them. 3 days later, Energy Pro terminated PC.

7. On 1 January 2013, Energy Pro requested Future Energy to join as a third party to the arbitration between the parties, and Future Energy agreed 2days later.

8. On 11 February 2013, CFX sent a letter to Energy Pro, contending that the latter's termination was unlawful and the first payment made on 13March 2012 should be reimbursed.

PLEADINGS

I. Energy Pro can bring Future Energy into the arbitration proceedings as a third party.

Energy Pro can bring the Future Energy into the arbitration proceedings as a third party because Future Energy is bound by the arbitration clause in PC since the Agreement and PC shall be considered as a group of contracts [**1**], CFX has expressed its consent impliedly that Future Energy can be a third party for arbitration in arbitration clause of PC [**2**] and Future Energy has agreed to be in the arbitration proceedings [**3**].

1. Future Energy is bound by the arbitration clause in PC since the Agreement between CFX, Energy Pro and Future Energy and PC shall be considered as a group of contracts.

Since the 1.5 MW wind turbine is developed by Future Energy, it is authorized to be the independent certification company for the wind turbine for Model GJ 2635 in the Agreement between CFX, Energy Pro and Future Energy [PO. 2, 13]. Noticeably, before the gearboxes are delivered to CFX, Energy Pro must obtain from Future Energy certified approval for them. Therefore, Future Energy is an indispensable party in the performance of PC. In fact, the Agreement is a subsidiary contract for the implementation of PC. Thus, the Agreement and PC shall be considered as not only a group of contracts but also indivisible one.

Referring to the case Kis France [16.Y .B. Com. Arb. 145 (1991)], the arbitration tribunal holds that once the group of contracts is deemed as an indivisible whole, arbitration clause in the framework agreement shall be bound to all the parties in the indivisible whole. In the present case, the Agreement is only a subsidiary contract under PC as analyzed above hence Future Energy shall be deemed as a party of PC and the arbitration clause in PC shall be bound to Future Energy.

2. CFX has expressed its consent impliedly that Future Energy can be a third party for arbitration both in the arbitration clause in PC and its later

conducts.

In the Arbitration Clause, CFX and Energy Pro have agreed that any dispute arising from or in connection with this PC shall be submitted for arbitration. As stipulated in this arbitration clause, although CFX and Energy Pro defined clearly that any dispute shall be arisen from or in connection with PC, they did not express their will on banning a third party from the arbitration proceedings. In other words, CFX has no objection that a third party might engage in the arbitration proceedings if necessary.

From the view of a reasonable person, CFX is well clear that a third party would be engaged in PC inevitably Energy Pro must obtain certificate from Future Energy. In this sense, Future Energy is brought into the whole performance of PC by a subsidiary Agreement as analyzed above. Since the Agreement and PC shall be considered as an indivisible whole, therefore, CFX has made its conducts as an expression of implied consent that Future Energy can be a third party for arbitration.

3. Future Energy has agreed to be in the arbitration proceedings.

As analyzed above, Future Energy is an indispensable party in performance of PC and Energy Pro holds that it was Future Energy's negligence that resulted in the fault of passing non-conforming goods to CFX. Only Future Energy is in the arbitration proceedings, will the dispute between CFX and Energy Pro be settled efficiently.

On the request from Energy Pro, Future Energy has agreed to be in the arbitration proceedings on 3 January 2013 [Cl's SoF, Para. 7].

II.Ms. Arbitrator 1 can resign during the arbitration proceedings.

Ms. Arbitrator 1 can resign during the arbitration proceedings because the resignation of Arbitrator 1 is permitted by Art. 31 (1) of CIETAC Rules [**1**] and will be beneficial to the arbitration [**2**].

1. The resignation of arbitrator is permitted by Art.31 (1) of CIETAC Rules.

Art.31 (1) of CIETAC Rules has clearly stipulated that if an arbitrator fails to fulfill his/her functions in accordance with the requirements of these Rules or

within the time period specified in these Rules, he/she may also voluntarily withdraw from his/her office.

In this case, Ms. Arbitrator 1 accepted her office from CIETA for the issue of quantum for 2 days, which required Ms. Arbitrator 1 shall be present on the whole quantum but not just for 2 days. After subsequent discussions with the arbitral tribunal and both counsels, the issue of quantum could not be solved within 2 days and it was likely that it would take 5 days [Re's De]. Therefore, Ms. Arbitrator 1 shall be present on the issue of quantum for 5 days specified by the arbitral tribunal according to Art 46 (1) of CIETAC Rules but she rejects with the reason that Energy Pro pays her no additional fees.

Hence Ms. Arbitrator 1 will fail to fulfill her functions within the time period according to CIETAC Rules, and for that reason, Ms. Arbitrator 1 can resign during the arbitration proceedings.

2. The resignation of Arbitrator 1 will be beneficial to the arbitration.

CFX objects to the resignation of Ms. Arbitrator 1 for that her resignation and subsequent new appointment will result in the loss of great time and money for CFX [Re's De]. However, if Ms. Arbitrator 1 resigns before the hearing of the quantum, there will be another arbitrator nominated by Energy Pro for the arbitration immediately after her resignation. There is no need for the arbitral tribunal to reset the arbitration proceeding. Accordingly, the resignation of Ms. Arbitrator 1 will result in no any loss of time or money for CFX as a matter of fact.

Additionally, Art 9 of REBA states that "once the arbitrator has failed to fulfill his or her due diligence obligations which may affect the quality and impartiality of the case and prevent its timely resolution seriously, question of replacement of this arbitrator shall be forwarded and decided by the arbitral tribunal". In the present case, the immediate cause of Ms. Arbitrator 1's resignation is that Energy Pro has refused to deposit the additional fees required into her bank account. Ms. Arbitrator 1 did not take other remedial measures for solution of this problem but wrote to the President of the arbitral tribunal for

resignation. Meanwhile, she didn't consider the influence on this case drawn by her resignation. As a result, it is reasonable for Ms Arbitrator to resign from this proceeding.

III. Energy Pro terminated the Purchase Contract validly.

Although CFX alleged it has suspended PC, the suspension is invalid as Energy Pro had fully performed its contractual obligations [**1**], and Energy Pro terminate the contract in accordance with Clause 15.1 of PC validly [**2**].

1. CFX's suspension of PC is invalid since Energy Pro has fully performed its contractual obligation of deliver under PC

According to Art 35 of CISG, a seller must deliver goods which are of the quality, quantity, and description required by the contract. The decisive factor for deciding whether goods conform to the contract is the contractual description of the goods, and the characteristics are therefore not based on objective standards of quality but rather on the denomination and description of the required quality in the contract [Peter Schlechtriem: the UN-Convention on Contracts for the International Sale of Goods, p.66, Oxford University Press, 2010].

In this case, both CFX and Energy Pro have no independent knowledge about those gearboxes since the 1.5 MW wind energy turbine is developed by Future Energy. Meanwhile, those gearboxes are produced by JV with the model number given by Future Energy [PO. 2, 41]. The only way for Parties to examine the products relies on the examination by Future Energy. Once Future Energy makes its approval of the gearboxes delivered by Energy Pro, these gearboxes shall be deemed as in conformity with Clause [A]. And such certificate is then forwarded to CFX as a proof of conformity of wind turbine to Clause (A) [PO. 2, 1]. Regarding the so call wrongly transferred products, Energy Pro has already obtained the certified approval for them from Future Energy [PO. 2, 38]. Therefore, Energy Pro has fully performed its contractual obligation of deliver under PC.

Since Energy Pro has fully performed its contractual obligation of deliver under PC, there is no justified reason for CFX to suspend PC. Thus, the suspension is totally

invalid.

2. Energy Pro has terminated the contract in accordance with Clause 15.1 of PC.

According to Clause 15 of PC, Energy Pro has the right to terminate the contract if CFX conducted a material breach of obligation.

Due to CFX's invalid suspension of PC on 21 May 2012, CFX has the obligation to pay according to Clause 1.2 of PC, which requires CFX to make the second payment on 20 June 2012 and third payment on 20 August 2012. However, CFX failed to fulfill its payment obligation when it was due [Cl. Ex, 7]. After breaching the contract, CFX should either commence and diligently pursue cure of the breach or provide reasonable evidence that the breach has not occurred within 30 days after receiving two "Default Notice" from Energy Pro, or it would be considered as the substantial breach of PC [PC, Clause 15.1]. However, Energy Pro has the right to terminate the contract since that CFX has substantially breached PC.

Notwithstanding, CFX did nothing after receiving the "Default Notice" and has substantially breached PC. That left Energy Pro no choice but terminate PC.

IV. Energy Pro can claim the termination penalty.

Energy Pro can claim the termination penalty because the clause of "termination penalty" between Energy Pro and CFX is binding both of parties [**1**] and the amount of termination penalty is quite reasonable [**2**]. Alternatively, even Energy Pro cannot terminate PC, claimant still can claim termination penalty because of CFX's material breach of PC [**3**].

1. Energy Pro can claim the termination penalty because the clause of "termination penalty" between Energy Pro and CFX is binding both of the parties.

According to Art 1.3 of the PICC 2010 "a contract validly entered into is binding upon the parties" which reflects the principle "*pacta sunt servanda*", CFX and Energy Pro shall perform what they have agreed on PC after the contract came to effect on 10 April 2011. Moreover, the termination penalty clause that "in the event

Energy Pro terminates PC as provided CFX shall pay to Energy Pro a termination penalty equal to the difference between the total value of this PC and the value of Gearboxes already delivered to CFX as of the termination date" is valid. According to Article 7.4.13 (1) of PICC 2010—"where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance and the aggrieved party is entitled to that sum irrespective of its actual harm". In the present, Energy Pro has validly terminated PC because of CFX's non-performance; hence the termination penalty clause shall have come into force.

Therefore, CFX shall pay the termination penalty to Energy Pro in accordance with their agreement on PC.

2. The amount of termination penalty is quite reasonable compared to Energy Pro's damage.

As is stipulated in the Art 7.4.2 of PICC that the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Full compensation shall cover not only the actual loss one has suffered, but also the profit one is deprived as a consequence of non-performance. In the present case, for the co-operation with CFX, Energy Pro invests a large sum of money to establish the JV Company and holds 80% equity of it [Cl. Ex, 1]. And the JV manufactured the gearboxes of the 1.5 MW wind turbines exclusively as required by CFX. If CFX refused to accept the gearboxes without justified reasons, there was no way to sell them out. Meanwhile, Energy Pro owns all the gearboxes produced by the JV [Re. Ex, 1] so that is responsible for all the loss of those refused gearboxes. Besides, if CFX unjustifiably terminated PC, Energy Pro would make no profit expected from PC.

In the sense of assurance of full performance of PC, Energy Pro suggests a termination penalty equal to the difference between the total value of this PC and the value of Gearboxes already delivered to CFX as of the termination date, which seems unreasonable but indeed not, and CFX agrees by signature.

CONCLUSION AND PREAYER FOR RELIEF

For the forgoing reasons, the claimant respectfully requests this Honorable Arbitration Tribunal to adjudge and declare that:

1. Energy Pro Inc. can bring Future Energy Inc. into the arbitration proceedings as a third party.
2. Ms. Arbitrator 1 can resign during the arbitration proceedings.
3. Energy Pro Inc. did validly terminate PC.
4. Energy Pro Inc. can claim the termination penalty.

Respectfully Submitted,

AGENTS FOR THE CLAIMANT