2013 International ADR (Alternative Dispute Resolution) Mooting Competition

Hong Kong - July/August 2013

IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

Energy Pro Inc.

(Claimant)

v. **CFX Ltd.**

(Respondent)

MEMORANDUM FOR THE RESPONDENT

615R

LIST OF ABBREVIATIONS

Art**.** - Article

CISG - United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980

ICC - International Chamber of Commerce

MAL UNCITRAL -Model Law on International Commercial Arbitration (as amended 2006)

No**.** - Number

para**.** - Paragraph in the Memorandum

UNIDROIT- Principles of International Commercial Contracts of 2010

CIETAC- China International Economic and Trade Commission Arbitration Rules

EPA – Exclusive Purchase Agreement

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - International Institute for the Unification of Private Law

App. - Appellate Court

Arb. - Arbitration

Art. / Arts. - Article / Articles

Assn. - Association

Cir. - Circuit (U.S. Circuit Court of Appeals)

Com. - Commercial

e.g. - *Exemplum gratia* (for example)

LIST OF ABBREVIATIONS….....I

INDEX OF AUTHORITIES.....III-V

STATEMENT OF DEFENCE......1-2

ARGUMENTS AS TO JURISDICTION……..3-6

1. **FUTURE ENERGY MUST NOT BE INCLUDED IN THE ARBITRAL PROCEEDINGS**

   1[A]Privity prevents a non signatory from taking part in an arbitration proceeding……...3
   1[B] The functions performed by future energy does not fall as an exception to privity.
   1[B.1] Function performed by them is not an essential function of the EPA……..3-4
   1[B.2] Future energy did not receive any benefit from the EPA…….4

2. **Ms ARBITRATOR 1 CANNOT RESIGN DURING ARBITRATION PROCEEDING**

   2[A] Ms.Arbitrator.1 has no cause to voluntarily withdraw from her office……...4
   2[A.1] Ms.Arbitrator.1 was not prevented de jure/de facto from fulfilling her function……...5
   2[A.2] Ms.Arbitrator.1 cannot resign from proceedings ……..5
   2[B] Resignation of Ms.Arbitrator.1 is detrimental to the eficiency of the arbitral proceedings……..5-6

ARGUMENTS AS TO MERITS…….6-10

3. **ENERGY PRO HAS INVALIDLY TERMINATED THE CONTRACT.**
   3[A] CFX Ltd has not breached the EPA and the Suspension of the Exclusive Purchase Agreement by CFX Ltd conforms to the principles laid down in the UPICC and the CISG ……..……6
   3[B] Energy Pro has not performed its obligations as required by it under the Exclusive Purchase Agreement.....7
   3[B.1] Energy Pro's Non Performance has fundamentally Breached the Contract 7
   3[B.2] Energy Pro Cannot Absolve Liability on Grounds of Third Party negligence 8

4. **ENERGY PRO INC CANNOT CLAIM TERMINATION PENALTY**

4[A] The clause providing for the termination penalty is unfair and invalid.....8

4[B] Energy pro's claim for the termination penalty is against the terms of the contract...9

4[C] Energy pro cannot claim the termination penalty since it was their non-performance that led to suspension of the EPA by the respondents.....10

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND LAWS

United Nations Convention on Contracts for the International Sale of Goods, 1980

UNIDROIT Principles of International Commercial Contracts, 2010

UNCITRAL Model Law on International Commercial Arbitration, 1986

RULES

China International Economic and Trade Arbitration Commission Arbitration Rules, 2012

COMMENTARY

Backaby/Partasides, "Redfern and Hunter on International Arbitration" (Oxford University Press: 2009)

Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, Global Sales and Contract Law (Oxford University Press: 2012)

Stefan Vogenauer and Jan Kleinheisterkamp (ed), Commentary on the UNIDROIT Principles of International Commercial Contracts, (Oxford University Press: 2009)

Gary B. Born, International Commercial Arbitration, (Kluwer Law International: 2009)

Peter Binder, International Commercial Arbitration And Conciliation In UNCITRAL Model Law Jurisdictions, (Sweet & Maxwell: 2005)

John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (Kluwer Law International: 2009)

Kroll/Mistelis/Visacasillas, UN Convention on Contract for the International Sale of Goods, (Hart Publishing: 2012)

Professor D. Mark Cato, Arbitration Practice and Procedure, (LLP: 2002)

Michael Bridge, The International Sale Of Goods Law And Practice, (Oxford University Press: 2009)

CASES

1) Model Locomotives case - 11/1999/99 Kantonsgericht (district court) schaffhauren

2) Machine for rectification of bricks case-

juzgado de Primera Instancia instruccion no 3 de tudela , 29/3/2005

3) Squash and cucumber case- entro de arbitraje de Mexico (CAM) 30/11/2006

4) Cisterns and accessories case- Tribunale di Forli 16/2/2009

5) Movable goods case- 2282/2009 polymeles proto dikio athinon

6) Chilling press case- CISG/2006/13 CIETAC PRC

7) Flexo label printing machine case- CISG/2007/07 CIETAC PRC

8) Bullet proof vest case- 4505/2009 polymeles proto dikio athinon

9) shoe leather case- V CSK 456/06 Supreme Court

10) Liquors case- Shanghai first intermediate people's court 25/12/2008

11) Aluminium case- ZHK 273/95 Zurich Chamber of Commerce

12) ECGD v Universal Oil Co- [1983] 2 ALL ER 205

13) Dunlop Ltd v. New Garage Co ltd- [1915] AC 79

14) Propane case- 10 ob 518/95 oberster gerichtshof

15) Stones case- 419 o 48/01 LG Hamburg

16) Shoes case- 10 o 5432/01 LG Munchen

17) Acrylic blankets case- 2 U 31/96 OLG Koblenz

18) Equipment case- Tribunal of ICA the Ukranian Chamber of Commerce and trade 21/6/2002

19) medicine manufacturing equipment case- CISG/2002/29 CIETAC PRC

20) SN Prasad v. Monnet Finance- 2011 1 SCC 320

21) Deutsche Post bank home finance ltd.v. Taduri Sridhar- 2011 11 SCC 375

22) Ciade navegacion omsilv hugoneo corp case – 359 F.Supp 898 SDNY 1973

STATEMENT OF FACTS

1. 17 December 2010 - Energy Pro Inc., a company based in Catalan, initiated and proposed the formation of the 'Syrus-Catalan Wind Turbine Gearbox Joint Venture Company'(JV) with CFX Ltd., a company based in Syrus. The JV was set upfor the production of gearboxes for a certain set of1.5 MW wind turbines, and was entered into by both companies.

2. 10 April 2011 – Energy Pro and CFX Ltd entered into an Exclusive Purchase Agreement (EPA) as seller and buyer respectively, whereby, Energy Pro would own all the gearboxes manufactured under the JV as it supplied all the raw materials for the production of the same.

3. 18 January 2012 –CFX Ltd. raised concerns regarding manufacturing flaws in the first design review and reemphasized such concerns in the second review as well.

5. 10 February 2012 – CFX Ltd issued a purchase order for 100 gearboxes, which were delivered, payment for which was made on 13th March 2013, as per the EPA

6. 18 April 2012 – Future Energy wrote to both CFX Ltd. and Energy Pro that one of its engineers had wrongly certified the gearboxes following which CFX Ltd. sent a mail to Energy Pro emphasizing outstanding concerns with the gearbox designs and lack of approval by Future Energy of such designs.

6. 18 May 2012 – Energy Pro reiterated to CFX Ltd. that it was no longer required to do anything under the contract and cannot be held responsible for Future Energy's negligence to which CFX Ltd. replied informing Energy Pro of suspension of the EPA, pending confirmation from Energy Pro to comply with its obligations.

7. 25 September 2012 – Energy Pro served CFX Ltd with a letter demanding the required payments that were pending from CFX Ltd. failing which arbitration would be initiated against them. CFX Ltd did not pay and Energy Pro sent a notification of termination of the EPA to CFX Ltd on 28th Dec 2012.

9. 11 February 2013 – CFX Ltd. sent a letter to Energy Pro Inc. terming the latter's termination as unlawful and also including a request for reimbursement of the first payment made.

10. Ms Arbitrator 1 wrote an email to the President of the Arbitral Tribunal that she would resign after the completion of the oral hearings on the disputed issues and will not remain on the panel in determining the issue of quantum.

ARGUMENTS

ARGUMENTS AS TO MERITS

1) FUTURE ENERGY MUST NOT BE INCLUDED IN THE ARBITRATION PROCEEDINGS

1A. PRIVITY PREVENTS A NON SIGNATORY FROM TAKING PART IN AN ARBITRATION PROCEEDING

The Principle of Privity prevents a 3rd party non signatory from being a part of the arbitral proceedings. Only the signatories to an arbitral agreement shall be bound by it [*S.N.Prasad v. Monnet Finance*]. Enforcement of obligations on a signatory, including participation in proceedings, can only be done by another signatory keeping in mind the essentially voluntary nature of arbitration as is recognized internationally by virtue of Article II of the New York Convention.[*Gary B Born p.1135 Parties to International Arbitration Agreemnents*].

Hence it is the submission of the respondent that Future Energy, which apart from being a non-signatory has also been forced into giving consent to participate by the claimant, should not be made party to the proceedings.

As is clear from Claimant's ex No9, future Energy's consent was obtained through a threat to instigate litigation against it. Participation of third parties cannot be made by means of any forced intervention [*O.I.A.E.T.I v.SOFIDIF,1987 Rev arb.359 (Paris Courd'appel)]*. Since in this case, Future Energy is a non signatory to the EPA, and they were forced by Energy pro to intervene in the proceedings, it is the humble submission of the respondents that Future Energy should not be made party to the arbitration proceedings.

1B. THE FUNCTIONS PERFORMED BY FUTURE ENERGY DOES NOT FALL AS AN EXCEPTION TO PRIVITY.

It is the submission of the respondents that the functions performed by Future Energy in the present case do not warrant the overriding of the privity principle. Inclusion of a

non-signatory can be considered on account of a) performance of essential function and b) benefits received [*Deutsche post bank home finance ltd v.Taduri Sridhar*]. It is submitted that Future Energy cannot still be included in the arbitration proceedings as the (i) functions performed by them is not an essential function of the EPA and (ii)Future Energy did not receive any benefit from the EPA.

B1. Function performed by them is not an essential function of the EPA

As, Although Energy pro has to get an approval certificate from future energy according to clause 10.2 of the EPA; clause 10.1 of the EPA clearly mentions that the onus is on Energy Pro to deliver the goods to CFX in conformity. Hence, the failure of Energy Pro to deliver the goods in conformity, which is the essential function of the EPA, is the fault of Energy Pro itself and Future Energy cannot be held accountable for the same.

B2. Future energy did not receive any benefit from the EPA

It is submitted that even if we were to consider the function performed by Future Energy as an essential function of the EPA, Future Energy did not receive any benefit or consideration for the function performed by it in the EPA. Accruing a benefit, monetaryor otherwise is vital to bring a 3rd party non-signatory to the arbitration proceedings [*[Gary B Born, p.1178; American Bureau of shipping case].* It is humbly submitted that Future Energy cannot be made a party to the arbitration proceedings as making they did not receive any benefit from the EPA.

2. Ms. ARBITRATOR 1 CANNOT RESIGN DURING THE ARBITRATION PROCEEDINGS

2A. Ms.ARBITRATOR.1 HAS NO CAUSE TO VOLUNTARILY WITHDRAW FROM HER OFFICE

Article 31 of the CIETAC Arbitration rules state that an arbitrator may voluntarily withdraw from his/her office (i) if he or she is prevented de jure/ de facto from fulfilling his or her functions or (ii) fails to fulfill his functions in accordance with the CIETAC rules. It is the submission of the respondent that neither of these criterions is satisfied in the present case.

A1. Ms.Arbitrator.1 was not prevented de jure/de facto from fulfilling her function.

It is humbly submitted that nonpayment of additional fees to the arbitrator does not de facto or de jure impede Ms.Arbitrator.1 from adjudication. The current issue as regards Ms Arbitrator 1 has arisen because of a dispute between herself and the claimant regarding payment of extra fees. It is the submission of the respondent that this constitutes neither a de facto nor a de jure impediment and is merely an issue of disagreement regarding remuneration which can and has to be resolved without interfering with the conduction of the arbitral proceeding.

A2. Ms.Arbitrator.1 cannot resign from proceedings.

Ms. Arbitrator refused to fulfill her function as an arbitrator only after Energy Pro refused her additional payment. An arbitrator has a right to remuneration for her services which cannot be denied or disputed.[*Gary B Born p.1646 arbitrators right to remuneration*]. Article 39 of the UNCITRAL model laws authorizes the tribunal to fix its own fees taking into account time taken, complexity of the case etc.

Ms Arbitrator has been paid for only 2 days of service and if the issues on quantum take five days to adjudicate, she has an undeniable right to be paid for the extra period. It is the submission of the respondent that, the denial of extra payment by the claimant is inappropriate and is against the UNCITRAL model laws as well as CIETAC rules, and hence should not be allowed to affect the arbitral proceeding in any manner whatsoever.

2B. RESIGNATION OF Ms.ARBITRATOR.1 IS DETRIMENTAL TO THE EFICIENCY OF THE ARBITRAL PROCEEDINGS.

It is submitted that if an arbitrator resigns after hearing the merits of the case but before the quantum hearings the proceedings will have start all over again [*Cia de NavegacionOmsilv.HugoNeu Corp,359 F.Supp.898(S.D.N.Y.1973)]*. In the present case Ms.Arbitrator 1 has already heard the merits of the case. If a substitute

Arbitrator were to be appointed at this stage, rehearing on merits cannot be avoided without compromising the efficiency of the arbitral proceedings.

It is the submission of the respondent that, a substitute arbitrator cannot adjudicate with precision and efficiency on the issues of quantum, having been absent during the hearings on merits.

It is the submission of the respondent that such a scenario can only be avoided by conducting the hearings on merits anew. The respondent submits that would be more time consuming and costly efficiency thereby going against the very spirit of arbitration as a dispute resolution method.

3. ENERGY PRO HAS INVALIDLY TERMIINATED THE CONTRACT

3A. CFX Ltd has not breached the EPA and the Suspension of the Exclusive Purchase Agreement by CFX Ltd conforms to the principles laid down in the UPICC and the CISG

Energy Pro has terminated the EPA claiming non-performance and breach of contractual obligations on the part of CFX Ltd. CFX Ltd's suspension of the EPA was based on the Energy Pro's inability to satisfy its contractual obligations and is in accordance with section 71 of the CISG. The EPA clearly stated that CFX Ltd's obligation to purchase the gearboxes would be based on the delivery of gearboxes conforming to Clause [A] [Section 10.1 EPA]. Energy Pro having defaulted in this respect left CFX Ltd with no obligation to pursue the contract which however it did. There was non-compliance with contractual obligations by Energy Pro which is evident from the issues that were raised by CFX Ltd during the design manufacturing reviews [Respondent's Exhibit No. 1]. The suspension of the EPA and the resulting nonpayment was made inevitable by the delivery of non-conforming gearboxes by the claimant and hence the claimant cannot terminate the contract based the above nonpayment. [*Article 80 CISG*]

Despite raising concerns, Energy Pro instead of rectifying the manufacturing flaws, delivered non-conforming gearboxes and refused to rectify its mistake by substituting the non-conforming gearboxes with the right ones when requested [Claimant's Exhibit

No. 4,5]. Hence, CFX Ltd suspended the contract as it became apparent that Energy Pro was not ready to perform its obligations as under the EPA and further, their previous conduct also raises serious concerns about future performance [*Article 7.3.3 UPICC;Article 71& 73 CISG; Chilling Press Case; Bullet Proof Vest Case; Shoe Leather Case*]. Further, Energy Pro will be held liable for non-conformity as lack of conformity did exist at the time of delivery [*Article 36 CISG; Bullet Proof Vest Case]* and since Energy Pro was involved in the production process it could not have been unaware of non-conformity is such a basic requisite [*Article 40; Shanghai Anlili International Trading Co. Ltd. v. J & P Golden Wings Corp.*].

3B. Energy Pro has not performed its obligations as required by it under the Exclusive Purchase Agreement

As per the terms of the Exclusive Purchase agreement, Energy Pro is required to deliver gearboxes conforming to the specifications set out in Clause [A] of the said agreement. However, the delivery of non-conforming gearboxes when it had the responsibility to ensure conformity amounts to non-performance of its obligations [*Article 7.1.1 UPICC; Centre of Arbitration at Mexico case]*. Further, CFX Ltd also possesses the right to require Energy Pro to rectify its mistake and send conforming goods while bearing any additional costs [*Article 7.2.3 UPICC, Article 46 CISG; Flexo Label Printing Machine Case; Bullet Proof Vest Case; Shoe Leather Case*] to which Energy Pro has vehemently refused clearly showing its intention of not pursuing contractual obligations.

B1.Energy Pro's Non Performance has Fundamentally Breached the Contract

Energy Pro's defective performance tantamount to non-performance has substantially deprived CFX Ltd. of what it was entitled to expect under the contract. Energy Pro is obligated under the Exclusive Purchase Agreement as well as principles laid down by law to make delivery of goods according to the specifications laid down in the contract [*Article 7.2.2 UPICC; Article 35 CISG; ; Bricks Case; Cisterns and accessories case; PolymelesProtodikioAthinonCase Shoe Leather Case*]. The losses that have accrued to CFX Ltd out of Energy Pro's non-delivery of conforming goods was one which could have been reasonable foreseen and which were due to Energy Pro's own recklessness, hence, constituting a

fundamental breach in itself [*Article 7.3.1(2) UPICC; Article 25 CISG; Centre of Arbitration at Mexico case; Model Locomotives case; Bullet Proof Vest Case; Shoe Leather Case*].

B2. Energy Pro Cannot Absolve Liability on Grounds of Third Party negligence

Energy Pro had initiated all the negotiations as well as the agreements. The Joint Venture and the EPA clearly show that Energy Pro would gain more out of the concluded negotiations between both parties. Although, Future Energy was inserted as the independent and sole certification authority to ensure compliance with contractual provisions their mistake or error cannot absolve Energy Pro of their liability completely as it was still their duty to ensure appropriate certification [Section 10.2 Exclusive Purchase Agreement]. If Future Energy is liable for negligence, Energy Pro cannot claim this as a ground for non-performance as appropriate measures were not put in place to reduce the possibility of negligent certification [*Article 3.2.8 UPICC; QianBinzhen v. Huhhot Economic Technology Development Zone Mengniu Wine Co., Ltd.]*.

4. ENERGY PRO INC CANNOT CLAIM THE TERMINATION PENALTY

4A. The clause providing for the termination penalty is unfair and invalid

A clause quantifying the amount of compensation is valid only if the amount of compensation it entitles a party to receive is reasonable and genuine reflection of damages suffered when looked at in the light of the existing circumstances as well as the general construction of the contract. [E.C.G.D. v UNIVERSAL OIL CO] The question whether a clause is that of liquidated damages or has the nature of a penalty has to be decided looking into the circumstances as they existed at the time of entering into the contract, and not at the time of breach. [DUNLOP LTD v NEW GARAGE CO LTD]

In this case the clause in question dictates that the claimant shall be entitled to receive a sum equal to the difference between the sum that has already been paid and the total value of the EPA, irrespective of when the termination takes place and regardless of the number of gearboxes that it has delivered to CFX ltd at the time of termination. Also, Energry Pro reserved with itself the right to unilaterally terminate the contract, and

actually did so without taking into consideration their inability to conform to vital clauses of the contract.

Article 7.4.13 of the UPICC states that any specific sum provided for by the contract as damages can be reduced keeping in mind the actual loss suffered and other relevant circumstances. [The UNIDROIT Contract Principles, CISG & national Law, Jacob s Siegel] It is the submission of the respondents that the penalty clause in the current case is unfair and invalid, since it takes into consideration, neither the actual damages suffered, nor any other relevant circumstance including contributory non-performance, act/omission of the party in whose favor the clause operates. Hence it is submitted the clause in one sided, unreasonable and hence be declared invalid.

ALTERNATIVELY,

4B. Energy pro's claim for the termination penalty is against the terms of the contract

Energy Pro's right to terminate the contract and subsequently claim the termination penalty both stem from and are governed by the binding provisions of the Exclusive Purchase Agreement; clauses 15.1 and 15.2 in this case. Clause 15.1 entitles the claimant to terminate the EPA in the event of CFX Ltd committing a substantial breach of its contractual obligation, and clause 15.2 gives the claimant the right to claim subsequently the termination penalty.

Energy Pro's claim for the penalty is founded on the argument that CFX Ltd has substantially breached the contract vis-à-vis nonpayment of the contract price. It is the submission of the respondents in this regard that, their suspension of the EPA and the resulting non-payment of the contract price do not amount to a substantial breach as warranted by the termination clause (15.1). Clause 1.2. b (iii), of the EPA clearly states, the only upon confirmation that the gearboxes have been delivered in conformity with the concerned provisions of the contract, would CFX Ltd be required to make the payment. Thus, any obligation to pay, arises only after the gearboxes are delivered in conformity with Clause [A] of the EPA. Hence it is the submission of the respondents that since the delivery of conforming gearboxes never took place, the obligation never arose on CFX ltd to make the payments. Thus its non-payment does not amount to a breach of contractual obligation.

4C. Energy pro cannot claim the termination penalty since it was their non-performance that led to suspension of the EPA by the respondents.

It is the submission of the respondents that even if an obligation to pay did exist at the time of nonpayment and Energy Pro did fail in fulfilling that obligation, CFX Ltd cannot rely on it to terminate the contract and subsequently claim the termination penalty. Article 7.1.2 of the UPICC read along with Article 80 of the CISG both unequivocally state, that a party cannot rely on the non-performance of another party, when the non-performance was caused by an act/omission of the first party.[*Soinco v. NKAP; Propane case; Stones case; Shoes case]* The act/omission does not have to be negligent/ willful. [*Acrylic blankets case]*The alleged breach, on the part of CFX Ltd, even if it did exist happened solely because of the delivery of non-conforming gearboxes by the claimant and renders the claim forth termination penalty invalid [*Equipment case; Medicine manufacturing equipment case]*.

It is submitted that the very termination of the contract by the claimant, based on an alleged breach of contract which was made inevitable by an act of the claimant itself is inconsistent with the principles of UPICC, CISG as well as that of the contract itself. Hence, the resulting claim for the termination penalty is invalid and does not have legal basis.

PRAYER FOR RELIEF

In light of the above submissions, the counsel for the respondent respectfully requests tribunal to find that;

Future Energy should not be included in the Arbitral Proceeding

Ms Arbitrator 1's resignation should be held invalid.

Energy Pro Inc has invalidly terminated the contract.

Energy Pro Inc shouldn't be entitled to receive Termination Penalty.

Energy Pro Inc cannot claim the termination penalty.

_____

Counsel on Behalf of Respondent