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MOOTING COMPETITION

28 JULY – 4 AUGUST 2013

HONG KONG

MEMORANDUM FOR CLAIMANT

On Behalf of	**Against**
Energy Pro Inc.	CFX Ltd.
CLAIMANT	RESPONDENT

TEAM NO.656

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TABLE OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	UN Convention on the International Sale of Goods
Ex	Exhibit
FAS	Free Alongside Ship (INCOTERMS, 2010)
No.	Number
Para.	Paragraph
Parties	CLAIMANT and RESPONDENT
ICC	International Chamber of Commerce
PICC	UNIDROIT Principles of International Commercial Contracts
Tribunal	China International Economic and Trade Arbitration Commission
v.	Versus
SIAC	Singapore International Arbitration Centre
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
Ex.	Exhibit

INDEX OF AUTHORITIES

Arbitration Law	Written by Liangyi Yang, Shijie Mo, Daming Yang.
Law and Practice of International Commercial and Arbitration	Written by Martin Hunter
Digest of Case Law	UNCITRAL, 2012, Digest of Case Law on the Model Law on International
Lord Denning	best effort
the reference number of Guo Ban Fa No.44/1995 issued by the General Office of the State Council Article 2&3	http://www.cietac.org/index.cms

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Arbitration Fee Schedule	
Measure on Arbitration Fee to be Charged by Arbitration Commissions	
New York Convention	Convention on to Recognition and Enforcement of Foreign Arbitral Awards 1958 **Art.2；3(1) ;5(1) (d)** cited as: NY Convention
China Arbitration Act	**Art.4；34;58(5)**
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011 **Art.4(2)； 6 (1) & (6); 12(3)；22；24；29(2)；30(2)；31(1) (3)；33(1);34(2)；50(1)；72** cited as: CIETAC Rules
SIAC	Singapore International Arbitration Centre **Art.25 (b)** cited as: SIAC
CISG	UN Convention on the International Sale of Goods **Art.39(1)；** cited as: CIETAC Rules
LCIA	London Center of International Arbitration **Art.22.1 (h)** cited as: LCIA
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 **Art.7(1)** cited as: UNCITRAL Model Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 20049 **Art.7.1.2;7.3.1(1) (2)；7.3.2；7.4.13**

	7.4.2；7.4.10(1)；7.4.13(1)； cited as: UNIDOIT
UNIDROIT commentary	UNIDROIT Principles of International Commercial Contracts of 2004,Commentray cited as: UNIDROIT commentary

Cases

International Chamber of Commerce	*ICC NO.12171* Award on Third Person Notice, 7 April 2004

ARGUMENT ON JURISDICTION

I. ENERGY PRO INC. CAN BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY

A. Future Energy Inc. is a de factor obligator under the purchase contract

a) Energy Pro Inc. has no reason to know the technique of the goods

1. According to the purchase contract and Joint Venture Agreement Excerpts,the manufacturer of the subject matter of contract is JV(Surys-Catalan Wind Turbine Gearboxes Joined Venture Company). As a merely owner of the goods, Energy Pro Inc. has no reason to know the technique of the goods. Further more Energy Pro Inc. has no license to acquire the details of the gearboxes. Therefore, we have no possibility to examine the quality of the gearboxes.

b) Both seller and buyer agreed in the contract that the Future Energy Inc. shall make the certified approval for the gearboxes before Energy Pro delivered them to CFX Ltd..

2. According to CISG Art.35 (1) ,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 obligation of the seller, Energy Pro Inc. is to deliver the goods which meet the quality standers under the contract. Due to the lack of ability to examine the quality of the gearboxes, both seller and buyer agreed in the contract that the Future Energy Inc. shall make the certified approval for the gearboxes before Energy Pro delivered them to CFX Ltd.(10.1 10.2 p11 purchase contract). Which means we transferred this part of seller's obligation to Future Energy with the agreement of CFX in the contract. And according to the contract, our obligation is to obtain the certified approval of Future Energy.

c) Future Energy took it's burden with actions and it's performance led to the rise of this dispute

3. According to the email that Future Energy sent to Energy Pro, thecertification was actually made by itself, and CFX just paid the first payment after receiving the gearboxes approved by Future Energy. However, it turned out that the certification was wrongly made. If the Future Energy fulfilled it's obligation to certified the gearboxes and informed us before the deliver, we could have asked the JV to re-manufacture the proper gearboxes, then this dispute would be avoided.

B. Future Energy is bound by the original arbitration as it is assignee under the

contract

4. According to the widely accepted principle of Automatic Assignment Rule, in the circumstance that the obligation of the contract has been transferred, which shall be agreed by the obligee , the assignee is bound by the original arbitration agreement as the same as the rest of the parties. Unless the assignee and the other parties expressed opposite intention during transferring.
5. In this case, according to the clarification 13. the agreement has been reached between Energy Pro Future Energy and CFX that Future Energy would be the independent company for the wind turbines of Model GJ2635 ,the obligee which is CFX agreed with the transfer of obligation of obligator.
6. No party expressed in the contract that Future Energy Inc. can not take part in the arbitration, hence, the tribunal can not refuse the application of taking part in this arbitration of Future Energy Inc..

   It will infringe the rights of Future Energy Inc. if the tribunal refuse the participation of Future Energy Inc.

C. It will infringe the rights of Future Energy Inc. if the tribunal refuse the participation of Future Energy Inc.

7. As we supported in the second ground, Future Energy Inc. should be bound by the arbitration agreement, then should take part in this arbitration, if the tribunal refused its application, it would absolute face the litigation against it latter. The appeal of afterwards litigation is to recover the damages Energy Pro Inc. had to pay under the arbitration which would be absolute higher than the termination penalty in this arbitration. The loss of Future Energy Inc. could be avoided by exercising its right to take part in this arbitration. The parties can not object its right to participate in the arbitration because the lack of signature.
   The only way for the tribunal to figure out the fulfillment of the obligation of the seller in this case is to allow its participation into this arbitration and give it the rights to claim and to prove its claim

D. The only way for the tribunal to figure out the fulfillment of the obligation of the seller in this case is to allow its participation into this arbitration and give it the rights to claim and to prove its claim

8. As aforesaid, the seller has no ability to examine the quality of the goods, the seller is not the proofer of the goods, we have no ability to state the details of quality of the gearboxes to the tribunal. Nevertheless, even the seller can not clear the obligation to conform the goods with the contract, Future Energy, as a de facto obligator can make

this clear to the tribunal.

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9. All in all, Future Energy is bound by the arbitration agreement, therefore Energy Pro Inc. can bring Future Energy Inc. into the arbitration proceedings as it is a third party.

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

A. The arbitrator herself has no authority to request claimant to deposit the additional fees required into her bank account

10. According to Article 50.1 and Article 72.1, CIETAC has the authority to request the parties to deposit the arbitration fees into CIETAC's account. Arbitrators are not entitled to claim charges directly from the parties, even she is nominated by claimant.

B. The amount of arbitration fee is based on the amount of disputing

11. Pursuant to Art. 12.3 of CIETAC rules under which a party applying for arbitration. Claimant paid the arbitration fee in advance to CIETAC according to its Arbitration Fee Schedule. In according to Art. 72.1 of CIETAC rules, CIETAC may charge the parties any other extra and reasonable costs, Measures on Arbitration Fees to be Charged by Arbitration Commissions interprets the "extra and reasonable costs". Claimant had fulfilled it's obligation to pay the arbitration fee because **(a)** the amount of arbitration fee is based on the amount of disputing; **(b)** the amount of disputing remained unchanged when claimant applied for the arbitration; **(c)** claimant shall not pay extra and reasonable costs beside the arbitration fee under the particular circumstance of this case.

a).The amount of arbitration fee is based on the amount of disputing

12. According to the Fee Schedule, the arbitration fee consist of ⅰ. certain amount and ⅱ. the amount above a certain amount and ⅲ. Registration Fee. The final amount of arbitration fee is 696,500 Yuan.

ⅰ. certain amount

13. The amount of disputing is RMB 62,300,000, in the level "50,000,000 Yuan to100,000,000 Yuan", the certain amount is 625,000 Yuan.

ⅱ. the amount above a certain amount

14. The second part of arbitration fee is 0.5% of the amount above

50,000,000 Yuan.

iii. Registration Fee

15. The amount of Registration Fee is RMB 10,000 Yuan.

b).The amount of disputing remained unchanged when claimant applied for the arbitration

16. There is no evidence indicates that claimant changed the amount of disputing, hence claimant does not need to change the amount of arbitration fee.

c). Claimant shall not pay extra and reasonable costs beside the arbitration fee under the particular circumstance of this case

i. the two types of extra and reasonable costs need to be paid in advance

17. According to Measures on Arbitration Fees to be Charged by Arbitration Commissions Art. 7, only the living and transportation expenses and compensation for witnesses, identifiers, translators, and other persons whose presence is necessary in the hearing; fees for consultation, appraisal, examination, and translation shall be paid in advance by the party who raises the application.

ii. claimant did not apply for the two type of costs

18. Under the particular circumstance of this case, claimant did not apply for any consultation, appraisal, examination, and translation, hence Claimant shall not pay extra and reasonable costs beside the arbitration fee under the particular circumstance of this case.

C. Claimant has no obligation to retain the arbitrator if she wants to resign

19. CIETAC Arbitration Rules and Chinese Arbitration law do not stipulate that parties have the obligations to keep arbitrator stay in the panel when she wants to resign. Respondent has no grounds to deduce that my client ought to retain the arbitrator in the panel when she wants to resign.

D. There is no prohibitive provisions to forbid the resignation of arbitrator

20. CIETAC Arbitration Rules and Chinese Arbitration law do not forbid the resignation

of arbitrator, the tribunal has the discretion to decided whether or not allow the resignation of arbitrator.

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21. All in all, claimant cannot fulfill the request of Ms. Arbitrator 1 to keep her stay in the panel, the resignation of arbitrator is not forbidden under CIETAC Arbitration Rules and Chinese Arbitration law. Therefore, Ms. Arbitrator can resign.

ARGUMENT ON MERITS

III. Claimant had terminated the contract validly due to Respondent's fundamental non-performance.

A. Applicable law to this dispute is UNIDROIT PRINCIPLES

a). Both parties agreed to set the UNIDROIT as proper law of the contract.

22. Pursuant to Para.29 Claimant's Exhibit NO.2, " This Purchase Contract shall be governed by and construed in accordance with the UNIDROIT Principles of International Commercial Contracts 2010.

b). UNIDROIT is applicable for "international commercial contracts".

23. In fact, the parties of the contract were established in two different countries. On the basis of the UNIDROIT commentary page 2, concept of a term "commercial contract" contains trade transactions for the supply or exchange of goods or services. In this case, the contract, was dealing with a sale of goods, is commercial in nature and therefore falls within the scope of stipulation of the contract.
For all this reasons, UNIDROIT is the law governing the contract.

B. Respondent caused a fundamental non-performance by failing to confer the rest payments.

a). According to contract paragraph 15.1, which includes that the failure to make any payment by Respondent when it is due stipulates the situation of substantially breach.

b). According to Art.7.3.1 of the UNIDROIT, Respondent's non-performance is

fundamental in constant with following terms:

i. “Non-performance substantially depriving the aggrieved party of its expectation unless the other party did not foresee and could not reasonably have foreseen such result”

24. Respondent’s refusal to make payment under the contract is held to a fundamental breach

since it deprives the unpaid Claimant of what it was entitled to expect under the contract, and Respondent shall have foreseen that the non-performance was fundamental for Claimant.

ii. “Strict performance of contract of essence”

25. Fundamental contractual obligation for which strict performance of essence, as such obligations of strict performance are not uncommon in commercial contracts, in contracts for the sale of commodities, namely in this case, payment is normally considered to be of essence. In sum, failure to make payment constitutes Respondent’s fundamental non-performance, thus, Claimant has a right to terminate the contract.

iii. “Intentional non-performance”

26. Claimant sent Respondent the Default Notices on 20 June and 20 August 2012, and a pre-action letter demanding Respondent’s payment on 25 September 2012, but without Respondent any reply, left Claimant in a state of uncertainty as to whether performance will be required. In this way, Claimant intentionally refused to perform.

iv. “No reliance on future performance”

27. Without receiving any reply from Respondent from 20 June to 12 December 2012, which gives Claimant reason to believe that in Respondent’s subjectivity, it suspended the contract validly and would not tender performance, but the suspension actually is invalid.

Summing up above 4 points, Respondent’s non-performance is fundamental.

C. Claimant is entitled to terminate the contract

a). Claimant is entitled to terminate the contract according to clause 15.1 of the contract.

28.First, Respondent substantially breached the contract; Second, after receiving default notice on 20 August 2012, respondent failed to pursue cure of breach or to prove its breach has not occurred within 30 days.

b). Claimant is entitled to terminate the contract according to Art.7.3.1(1), that Respondent's failure to make the second and third payment amounts to a fundamental non-performance.

D. Claimant exercised its right to terminate the contract by noticing to Respondent within a reasonable time under Art.7.3.2 (2) of the Official comments of UNIDROIT Principles, "when performance is due but has not been made, the aggrieved party's course of action will depend on its wishes and knowledge."

IV. Claimant is entitled to claim the termination penalty as damages

A. Claimant fulfilled its obligations stipulated in the contract

29.Claimant to make sure that the gearboxes meet the requirements is a general obligation which will be specified in para.10.2 of the contract.

First, Claimant had appointed Future Energy to do the certification service. Second,Claimant had obtained certification from Future Energy. Though the certification is wrong because one of the engineer's negligence of Future Energy. Clarifications state that "An agreement has been reached 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." Claimant under no circumstance to bear the risk for defective examination, for the certificate was the product of an independent body appointed by both parties, Claimant was not bound by it or responsible for its errors.

B. Respondent failed to make the second and third part payment cannot be excused

a).Respondent is obliged to make payment under the contract

30.Pursuant to paragraph 1.1 b. i. respondent was obliged to make the second and third

part payment respectively on 20 June 2012 and 20 August 2012. While Respondent did not issue any order before second and third payment time but after first payment, Claimant was not obliged to make any delivery.

b).The suspension by Respondent is not rightful

i. Respondent lost the right to rely on any defect in the gearboxes as to Art.6.1.4 and Art.7.1.3 of the UNIDROIT

31.Pursuant to Art.6.1.4 of the official comments of the UNIDROIT PRINCIPLES refers to the order of performance, "A seller is entitled to payment on delivery but circumstance may indicates otherwise, for example any exception originating from the terms of the contract or from usages which may allow a party to perform from some time after the order." Under the contract, Respondent is required to make the payment, in other words, Claimant is entitled to payment after Respondent confirmed the gearboxes that had been in conformity with the requirements of clause A. Thus, the order of the performance is simultaneous.

32.Pursuant to Art.7.1.3 of the official comments of the UNIDROIT PRINCIPLES, "if one party performs in part but does not perform completely, the party entitled to received performance may be entitled to withhold performance but only where in normal circumstance this is constant with good faith and fair dealing." Though Respondent actually received 100 non-conformity gearboxes, Respondent ought to have discovered such defect for Respondent had confirmed the gearboxes before payment. However, in practice, Respondent did not give notice to Claimant specifying the defect that time, which enable Claimant to acknowledge that the gearboxes were accepted by Respondent. Any late notice is not constant with good faith and fair dealing. Thus, Respondent lost the right to rely on any defect in the gearboxes.

ii. Respondent lost the right to request Claimant to remedy the situation

33.Pursuant to Art.7.2.2 of the official comments of the UNIDROIT PRINCIPLES, "Obligee lost the right to performance if it not required within a reasonable time after it has become, or ought to have become aware of the non-performance."

On 10 Feb 2012, Respondent issued an order to purchase 100 gearboxes, until 13 Mar 2012, Respondent made the first part payment after receiving the gearboxes. At most,

certification by Future Energy, transportation of the gearboxes, confirmation by Respondent altogether took nearly 1 month. As a result, at least, 1 month is enough and reasonable for Respondent to discover the defect of the gearboxes, because 1 month reflects both parties reasonable interests and considers contract clause itself as well. However, Respondent did not require performance until 16 May 2012, nearly amounts to 2 months, which not within a reasonable time.

34.Though Respondent noticed Claimant of the non-performance on 16 May 2012, Respondent had become aware of the non-performance on 18 April 2012, the date when, Future Energy informed Respondent of the non-conformity gearboxes, here 1 month is not reasonable. Hence, Respondent lost the right to request claimant to remedy the situation.

iii .Respondent remained to make the payment

35.As Respondent did not issue notice to Claimant before making payment; Even it can be excused, Respondent failed to notice when it ought to discover the defect; Even this can be excused, Respondent failed to notice when it had become aware of the non-performance within a reasonable time. Hence, Respondent lost the right to claim the non-performance and remain obliged to perform its obligation to make the second and third payment under the contract.

36.On account of Respondent's non-performance, combining with the result that Claimant terminated the contract validly, as the agreement in the contract, Respondent should pay to Claimant 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.

C. Based on the conduct of termination, Claimant is entitled to claim the termination penalty according to clause 15.2 of the contract.

a). The clause of agreed payment for non-performance is valid under Art.7.4.13 of UNIDROIT PRINCIPLES.

37.Considering the term written in contract, and the term stipulated by UNIDROIT PRINCIPLES, the contract provides that a party who does not perform is to pay a

specified sum to the aggrieved party is entitled to that sum irrespective of its actual harm.

b). Claimant is entitled to 8 million termination penalty based on its valid termination.

D. According to Art.7.4.1 of the UNIDROIT, Claimant has right to damages based on Respondent’s non-performance

38.Art.7.4.1 of the official comments of UNIDROIT states that “Right to damages arises from the sole fact of non-performance.” As Respondent’s suspension is invalid, Respondent has no excuse to its non-performance. Therefore, even if Claimant terminated the contract unlawful, Claimant is entitled to damages.