FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTUION

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.743

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LIST OF ABBREVIATIONS

&	And
Art.	Article
p.	Page/pages
UNCITRAL	United Nations Commission on International Trade Law
CIETAC	China International Economic and Trade Arbitration Commission
Sta. of Cl.	Statement of Claim
Sta. of Def.	Statement of Defense
Cl. Ex.	Claimant's Exhibit
Res. Ex.	Respondent's Exhibit
Ltd.	Limited
P. O.	Procedural Order
No.	Number

INDEX OF AUTHORITIES

Legislations & Rules

CIETAC Rules	Arbitration Rules of China International Economic and Trade Arbitration Commission, 2011
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

Scholarly Works& Articles

STATEMENT OF FACTS

Energy Pro Inc. ("Claimant") is a company incorporated under the laws of Syrus. It signed contracts with CFX Ltd ("Respondent"), a company incorporated under the laws of Catalan, to manufacture gearboxes for the 1.5 MW wind turbines and for sale in Catalan. The Licensing Agreement related to a 1.5 MW wind turbine was granted to the Respondent. On 17 December 2010, Claimant and Respondent entered into a joint venture agreement to establish a "Syrus-Catalan Wind Turbine Gearbox Joint Venture Company" (the "JV") which would be based in Catalan and would operate there *[App. Arb. ¶4]*. The Purchase Contract was signed on 10 April 2011, and Respondent bought the gearboxes manufactured by the "JV" to Claimant at least 100 per year *[Cl. Ex. 2]*. Future Energy is an independent certification company specified in the contract *[Cl. Ex. 2]*. In the contract, the parties incorporated an arbitration clause, stipulating that the arbitration shall be subject to the China International Economic and Trade Arbitration Commission which came into force on 12 February 2013 ("CIETAC Rules") and take place in Beijing, China, which adopts the UNIDRIOT Principles of International Commercial Contracts 2010 supplemented, the matters which are not governed by the UNIDROIT Principles by the United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG') *[Cl. Ex. 2]*.

The gearboxes are manufactured by the JV and belong to Claimant *[Cl. Ex. 1]*. After meetings about Design Review on 17 September 2011 and 16 January 2012, Respondent issued a purchase order for 100 gearboxes on 10 February 2012 and transferred the first part payment of USD 2 million to Claimant after receiving the gearboxes on 13 March 2012. Unfortunately, the certificate made by Future Energy is wrong and both parties knew the fact on 20 April 2012. Then Respondent thought the gearboxes didn't gain the approval by Future Energy on 16 May 2012. But Claimant had fulfilled its obligation and cannot be held responsible for Future Energy's negligence. On 21 May 2012, Respondent said it would suspend performance unless Claimant comply its obligation and didn't pay the and third part payment. Claimant sent twice "Default Notices" to Respondent based its behavior. On 28 December 2012, Claimant sent the "Termination Notice" to Respondent. And there was no reaction of Respondent. What's more, Claimant requested Future Energy to join as a third party to the arbitration on 1 January 2013 and Future Energy agreed it on 3 January 2013. Therefore, on the behalf of Respondent, Claimant made an application for arbitration and required the Termination penalty of USD 8,000,000 as damages and some expenditure.

ARGUMENTS

ARGUMENTS ON JURISDUCTION

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

1. Claimant submitted that as Future Energy is interest party of the purchase contract [A], it is it is necessary and appreciates to bring Future Energy into the arbitration. [B] Therefor the tribunal shall permit the participation of Future Energy. [C]

A. Future Energy is interest party of the purchase contract.

2. There is an agreement has been reached between Energy Pro, CFX Ltd and Future Energy that Future Energy would be independent certification company for the wind turbines of Model GJ2634. *[Clarification, 13 &32]* And it is also mentioned on the purchase contract that only obtain a fit certification from Future Energy can Claimant send the gearboxes to the Respondent. *[Cl. Ex.2 & Clarification 1].*

1. Claimant can only ensure the qualified products with the certification from Future Energy.

3. We can safely concluded that Claimant have the responsibility to make sure that the gearboxes are in conformity with Clause (A). However, as the Claimant has no ability to deal with the specific technique detection, Future Energy' s certification is the only evidence.

2. Future Energy has undertaken the certification obligation successfully

4. In addition, the Respondent and Future Energy have accepted the transformation of the contract obligation, which is to guarantee the quality products. Pursuant to the purchase contract, we can find the fact in Clause (A) is that Future Energy develops the gearbox for use in a 1.5MW wind turbine. Therefor, it is obviously that Future Energy has been an interest party of the purchase contract and he has the ability to undertaken the certification obligation successfully.

B. It is necessary and appreciates to bring Future Energy into the arbitration.

5. According to what a foresight judge in English, Lord Denning had said, it is do has a danger in having two separate cases on virtually the self-same question, because it will waste time and money and embrace risk of evidentiary difficulties and inconsistent award. In the current case, the participation of Future Energy can avoid such problems.

6. The participation of Future Energy will ensure the integrity of the fact. Take the Email written by the Future Energy into accountant, as the last sentence of the sentence mentioned *"an exact copy of this letter has been sent to Mr. Yuen of CFX Ltd." [Cl. Ex.3].* It is the main reason give rise to the fact that Respondent refused to pay the second and the third payment due to the wrong certification made by the Future Energy. *[Cl. Ex.3, 6&7].* Therefor, Future Energy should be responsible for the improper certification and has the joint and several liabilities in our dispute. And only with his attendance, can we then find out what the problem is.

C. The arbitral tribunal shall permit the participation of Future Energy.

7. If the participation of Future Energy is not allowed, there should be another arbitration or litigation against the Future Energy, so there will be another award. As a result, it has the possibility that there may be some conflicts between the two awards or verdict. Those conflicts will not only influence the recognition and the enforcement of the arbitration award, also make arbitration lose its impartiality. Based on this, Claimant submits that Future Energy should enter into the arbitration proceeding as a third party.

ISSUE II: MS. ARBITRATOR 1 CAN RESIGN DURING THE ARBITRATION PROCEEDINGS.

8. Claimant also submitted that Ms. Arbitrator 1 has to right to resign voluntarily during the arbitration proceedings. [A] And Even if Ms. Arbitrator 1 remains on the arbitration, the claimant will not pay for the additional fees. [B]

A. Ms. Arbitrator 1 has to right to resign voluntarily during the arbitration proceedings.

9. Pursuant to Art.31 (1) of CIETAC Rules, *"In the event that an arbitrator is prevented de jure or de facto from fulfilling his/her functions, the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office."*

10. In this case, it is Ms. Arbitrator 1's own determination to submit that she will resign after the oral hearings on the disputed issues. *[Sta. of Def., p.22]* It states that an arbitrator has the right to voluntarily withdraw from his/ her office because of some reasons either de jure or de facto; the tribunal should respect his choice and replace him. In addition, there is no prohibitive law to prevent her from resignation.

B. Even if Ms. Arbitrator 1 remains on the arbitration, the claimant will not pay for the additional fees.

11. Claimant and Respondent had made an agreement on intuitional arbitration of the CIETAC *[Cl. Ex. 2, p.11].* As the Claimant, we not only transferred the requisite fees before the arbitration. *[Ap. for Arb., p.2]* but also exclude all possibilities of additional fees.

1. Claimant has fulfilled his obligation to pay the arbitration fees.

12. CIETAC Rules Art.12 (3) states a party applying for arbitration shall pay the arbitration fees in advance to CIETAC according to Arbitration Fee Schedule. The schedule is in accordance with the Notice of the Measures of the Charging of arbitration fees *[with the reference number of Guo Ban Fa No.44/1995 issued by the General Office of the State Council Article 2&3]* which provides that The arbitration fees shall be used to pay the arbitrators and maintain the necessary expenditures for normal operation of the arbitration commission.

1. The request for the additional fees is unreasonable.

13. According to CIETAC Rules Art.72 (1), apart from charging arbitration fee according to the schedule, it is the CIETAC that may collect other extra, reasonable and actual expenses pursuant to the relevant provisions of the Arbitration Rules. But in light of Ms. Arbitrator 1's reason for resignation is asking for the reward of other three days for quantum, which is not mentioned in the CIETAC Rules.

14. It is clear that Ms. Arbitrator 1's arbitration fees had been agreed taking into account that there would be only 2 days of arguments on quantum. *[Clarification, p.2]* However, the 2 days allocated originally is an uncertain time and Ms. Arbitrator 1 can realize this fact. Even if the time of the five days, which have been discussed by the arbitral tribunal and both counsels, is not completely sure. *[Sta. of Def., p.22]* Therefore, Claimant shouldn't be responsible for this situation with an irrational reason.

C. The violation of the procedure prevents the Claimant paying the additional fees.

15. Even though the time is reasonable and it is necessary for Ms. Arbitrator 1 to request the additional fees for other 3 days, there is no reason for Claimant to pay for it to Ms. Arbitrator directly. Because this dispute choose intuitional arbitration to settle the claim, which means that only CIETAC can decide the reward of Ms. Arbitrator 1. *[Cl. Ex. 2, p.11]* CIETAC has the ability to make the decision depends on some factors of the current case after the arbitration proceedings, such as the complexity, time, material quantity and so on. Therefore, Ms. Arbitrator 1 cannot claim that Claimant should pay the additional fees.

16. The behavior of deposit can also have a negative effect on the recognition and enforcement of the award according to the New York Convention Article 5 (1)(d). If the final award is found against the Respondent, the claimant's deposit will certainly be one of the reasons for the Respondent to contest the force of the award. Therefor, Claimant would not only lose money, but also have an invalid or voidable arbitral award.

ISSUE III: CLAIMANT VALIDLY TERMINATED THE CONTRACT

A. Respondent fundamentally breached the Purchase Contract.

1. Applicable law to this dispute are UNIDROIT

15. UNIDROIT is applicable for "international commercial contracts" and "when the parties have agreed that their contract be governed by them" *[UNIDROIT – Preamble].*

16. Firstly, the contract is international when there is international element involved *[UNIDROIT commentary, p. 2].* Parties have their seats in different countries and so the international element is present. Following, concept of a term "commercial contract" contains trade transaction for the supply or exchange of goods or services *[UNIDROIT commentary, p. 2]*. In this case, the contract was dealing with a sale of goods, is commercial in nature and therefore

falls within the scope of first condition. Secondly, Parties opted *[Cl. Ex. 2]* for UNIDROIT as governing law.

17. For all the presented reasons, UNIDROIT is the law governing the contract *[Cl. Ex. 2].*

2. Respondent is required to make the requisite payment.

2.1 Respondent is liable to make 3 part payments in the first year under the Purchase Contract.

17. There is necessity for Respondent to make 3 part payments in the first year under the Purchase Contract, and the Respondent has no right to deny the obligation.

2.2. Respondent had not right to suspend the contract.

2.2.1. Claimant had no responsibility to the wrong gearboxes received by Respondent.

18. Respondent is obliged to make the confirmation that gearboxes have been delivered in conformity with the Purchase Contract before making the payment. As Respondent made the first payment on 13 March 2012, Claimant could probably imply that it was satisfied with the gearboxes had been delivered to their company.

19. Although there is an agreement between Claimant, Respondent and Future Energy, it's obvious that all the work for inspection belonged to the Future Energy. CLAIMANT has no independent responsibility to the wrong delivery. Accordingly, Future Energy, who offered the

"fit certificate' would take the responsibility.

2.2.2. Respondent lost the right to rely on a lack of conformity of the goods pursuant to the Art 39 CISG

20. CISG Article 39 formulates that "the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it". The time period from the delivery to the assertion made by Respondent is long enough for a common inspection, due to the number of gearboxes were only 100 and it lasted more than 2 months. This fact indicated that the right to rely on a lack of conformity of the goods should be deprived.

1. Respondent failed to make the second and third payments amounts to the fundamental non-performance according to a) Art.7.3.1; b) the origin intension when the two parties entered into the contract.

21. It's a fundamental breach that Respondent refusing to pay the second and third part of payment.

22. According to *UNIDROIT Principle 7.3.1.2 (a)*, "the non-performance substantially deprived the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result.

23. The right entitled to expect in this case shall be equivalent to the fixed price in the contract. That's the payments expected to be delivered on 20 Jun 2012 and 20 Aug 2012, for each of USD 2 million in it.

24. *UNODROIT Principle 7.3.1.2 (b)* writes *"... in contracts for the sales of commodities the time of delivery is normally considered to be of the essence..."* Respondent failed to give notice to the CLAIMANT specifying the nature of the lack of conformity within a reasonable time after it had discovered the lack of conformity to the gearboxes. Hence the Respondent failed to make the second and third amounts to the fundamental non-performance pursuant to *UNODROIT Principle 7.3.1.2 (b)*.

25. In the Statement of Defense, CLAIMANT drafted both Purchase Contract as a pre-condition to entering into the JV. And under the purchase contract, Respondent committed to purchase from CLAIMANT minimum quantities of 1.5 MW wind turbine gearboxes at fixed prices over a 5 year period. Judging from the facts, we could indicate that CLAIMANT wanted to gain benefits as original intention, as well as a long-term cooperating with Respondent, when the two parties entered into the purchase contract. However, Respondent failed to pay the second and third payments, thus Respondent directly violated its original intention and Respondent 's act of omission amounts to non-performance

B. Claimant is entitled to terminate the contract

1. Claimant has a right termination according to the Clause 15.1 of the Purchase Contract.

1.1 Respondent breached a material obligation

26. Pursuant to *UNIDROIT Principles Article 1.3*, the contract can be terminated by agreement. And according to Clause 15.1 of Purchase Contract, Energy Pro Inc. has a right to terminate the Purchase Contract if CFX Ltd substantially breaches a material obligation.

27. In fact, Respondent did fail to perform its obligation, namely fail to make any payment, while claimant fulfilled its contractual obligations. The Respondent failed to make its material obligation, the second and third part payment *[Cl. Ex. 7]*.

1.2 Respondent had no positive action after receiving the termination notice within 30 days.

28. Respondent also failed to either commence or diligently pursue cure of the breach, or provided reasonable evidence that the breach had not occurred within 30 days after receipt of the determination notice.

2. Pursuant to Article 7.3.1 UNIDROIT Principles, Claimant is entitled to terminate the Purchase Contract.

29. Pursuant to Article 7.3.1 UNIDROIT Principles, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental

non-performance. As stated as above, Respondent failed to make the payments amounts to a fundamental non-performance, thus, pursuant to Article 7.3.1 UNIDROIT PRINCIPLES, CLAIMANT is entitled to terminate the contract.

C. Claimant had issued the Termination Notice in conformity with Article 7.3.2 UNIDROIT Principles

30. Pursuant to *Article 7.3.2 UNIDROIT Principles*, the right of a party to termination the contract is exercised by notice to the other party. On 20 August 2012, CLAIMANT issued and sent the Default Notices in accordance with the Purchase Contract. Thus, CLAIMANT fulfilled the obligation of the termination notice.

31. Conclusion: CLAIMANT validly terminates the contract.

ISSUE IV: CLAIMANT IS ENTITLED TO CLAIM THE TERMINATION PANALTY AS DAMAGES

A. The CLAIMANT can claim the termination penalty based on the valid termination of the contract.

32. As indicated in the purchase contract clause 15.2, “in the event the CLAIMANT terminates the purchase contract. Respondent shall pay to CLAIMANT a termination penalty equal to the difference between the total value of this contract and the value of gearboxes already

delivered to Respondent as of the termination date." Now that the contract provision writes like that, we could probably know that Respondent should take the obligation and pay the termination penalty.

B. Claimant claimed the termination penalty as damages in conformity to Article 7.4.13 UNIDROIT Principles

33. UNIDROIT Principles Article 7.4.13 writes that "where the contract provides that a party whop does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm." This article acknowledges the validity of any clauses providing that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, with the consequence that the latter is entitled to the agreed sum irrespective of the harm actually suffered by it. The non-performing party may not allege that the aggrieved party sustained less harm or none at all in this case.

C. Claimant claim USD 8,000,000 as damage is reasonable

34. CLAIMANT is entitled to the agreed sum, as the exact number is USD 8 million. This number is confirmed in the contract, and as long as one party breaches the contract, it shall pay the termination. The number of 8 million shall not be reduced because there is no convinced reason to do it, for the termination would influence the

whole contract, namely the following trade may not carry on.

D. Claimant has no right to claim 2,000,000.

35. The payment had been made by Respondent on 13 March 2013 is a part of accomplished trade. CISG Article 39 writes “the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.” It has been more than 2 months since Respondent delivered the first payment. Obviously, the period is not a reasonable time because as a professional wind turbine manufacturing company, Respondent ought to know the gearboxes are not in conformity with the model written in the contract. Hence, the trade shall not be deemed invalid.

36. Conclusion: CLAIMANT shall claim the termination penalty.

REQUEST FOR RELIEF

1. The Termination penalty of USD 8,000,000 as damages.

2. CFX Ltd shall pay the costs of arbitration, including Energy Pro Inc. expenses for legal representation, the arbitration fee paid to CIETAC and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules.

3. CFX Ltd shall pay Energy Pro Inc. interest on the amounts set forth in item 1from the date those expenditures were made by Energy Pro Inc. to the date of payment by CFX Ltd.