FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTUION

MOOTING COMPETITION

28 JULY – 4 AUGUST 2013

HONG KONG

MEMORANDUM FOR RESPONDENT

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

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

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 gearbox is one of the most important parts of the 1.5 MW wind turbines. After meetings about Design Review on 17 September 2011 and 16 January 2012, Respondent made some objections to Claimant. 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. However, the certificate made by Future Energy is wrong and both parties knew the fact on 20 April 2012. Then Respondent informed Claimant that the gearboxes didn't gain the approval by Future Energy on 16 May 2012. But Claimant said it had fulfilled its obligation and cannot be held responsible for Future Energy's negligence. On 21 May 2012, Respondent made a suspension to Claimant. And there was no reaction except two notices of default and a termination. Claimant made an application for arbitration to request compensation. However, it is Claimant who didn't fulfill its obligation. Claimant participated in this arbitration to require Respondent turn the first part payment back.

ARGUMENTS

ARGUMENTS ON JURISDUCTION

ISSUE I: ENERGY PRO INC. CAN'T BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS, AS IT IS A THIRD PARTY.

A. Future Energy is the non-signatory of the arbitration clause.

1. Future Energy has no legal standing to join in the arbitration proceeding without an arbitration agreement. Under Arbitration Law of the People's Republic of China, Article 4 states that a dispute is set through arbitration based on parties' free will and an arbitration agreement. This article implies the conditions to participate in the arbitration are the arbitration agreement and voluntary. However, Future Energy is not a signatory to the arbitration clause in the Purchase Contract. There is no agreement with Future Energy.

1. There is no arbitration agreement between Future Energy and both counsels

2. The arbitration agreement is agreed between both Claimant and Respondent specified in the Purchase Contract *[Cl. Ex. 2, p.11]*. It is clear that this agreement is only bonding on Claimant and Respondent. It is not involved in Future Energy.

3. As there is no explicit rules in the applicable laws about the third party, according to CIETAC Arbitration Rules Article 17(1), which states two situations that whether at the request of a party or where CIETAC believes it necessary, it is only with the agreement of all the other parties that may the CIETAC consolidate two arbitrations pending under these rules into a single arbitration. However, there is not two arbitrations in the current case that can directly correspond to the rules.

1.1 Future Energy's participation would destroy the procedural justice

4. Procedural justice is the nature of arbitration. Due procedure is the safeguard to admit and execute the arbitration award. If Future Energy joined in the arbitration without an arbitration agreement, procedural justice would be damaged. The enforcement of arbitration award would be destroyed, either. Without due process could be the reason to cancel or to refuse to recognize and implement the arbitration award. That leads to the meaningless of the arbitration and waste of time and money.

1.2 Relating legal precedents show that the third party is not allowed to joined in the arbitration without an arbitration agreement

5. There is case between a company of Hong Kong and a company of Macao, which was accepted by Shenzhen Branch of CIETAC in 1998, is about rejecting the third party to participate the arbitration. The reason is that the third party is not a party of the arbitration agreement. A litigation ruling made by the Supreme People's Court about the third party in arbitration also implies the necessity of the arbitration agreement.

2. Future Energy is not one of the parties in the Purchase Contract

6. The current dispute is arisen to solve the problems about the obligations and rights which are specified in the Purchase Contract *[Cl. Ex. 2, p.11]*. Future Energy is mentioned in this contract in fact. However, Future Energy is not one of the parties in the Purchase Contract. It cannot get involved in this dispute.

3. The participation of Future Energy would break the arbitration autonomy principle

7. CIETAC article 3 point 1 stipulates that CIETAC accepts cases based on an agreement of the parties. The Arbitration agreement is the purpose of respondent and claimant, they refer their disputes to arbitration court voluntarily, if let Future Energy Inc join into the arbitration proceedings as a third party , it will break the arbitration autonomy principle because Respondent don't agree.

8. Because Arbitration tribunal's jurisdiction base on the arbitration agreement, but the third party doesn't have constraint in this arbitration agreement, so that the arbitration will lost the statutory force. Both litigants won't perform the arbitration agreement.

B. There is no necessary to bring Future Energy in to the arbitration proceedings

9. According to what a foresight judge in English, Lord Denning 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. However, there is no such kind of circumstance exist in the current case.

1. This arbitration has no interests relating to Future Energy

10. In fact, there are some arbitrations have a third party. But in those cases, third party is an interested party or involved in an infringement. However, there is no reason for Future Energy to join in the arbitration since it is not an interested party. This dispute is arisen for the non-performance and termination of parties *[App. Arb. ¶7]*.The verdict only involved in the interests between Claimant and Respondent. The clause of Purchase Contract only provides the obligation of buyer and seller. Certification could not change the quality of goods. Therefore, there is no interests between Future Energy and outcome of this arbitration.

11. This dispute between the two parties is quite clear, as Future Energy has admitted all his negligence of the certification in the his email to both parties, there is no risk of evidentiary difficulties while it will make my client to bear unnecessary cost if he come into the arbitral proceeding.

12. In terms of the inconsistent awards by two separate arbitrations, Lord Denning also said that by appointing the same arbitrator in different proceeding, it would not only avoid the conflict decisions but also safeguard the principle of party autonomy. Therefore, there is no need for both parties and only disadvantages for respondent to bring Future Energy into the arbitration proceeding.

2. Future Energy’s participation will break the arbitration's privacy and will reduce the arbitration's speed and efficiency

13. One of the advantages of arbitration is its privacy. CFX Ltd and Energy Pro Inc may didn't want to make their arbitration issue publicly when they sign the arbitration clause, and when Future Energy join into the arbitration proceedings as it is a third party, arbitration procedure will restart because arbitration court will face a new arbitration, and it's surly that will lost this advantage on privacy protection and the cost will increase a lot.

ISSUE □ Ms. Arbitrator 1 cannot resign during the arbitration proceedings.

A. Respondent didn't agree that Ms. Arbitrator 1 resign during the arbitration proceedings.

14. Respondent didn't agree Ms. Arbitrator 1's resignation. *[Sta. of Def., p.22]* Claimant has obligation to pay the additional fees to Ms. Arbitrator 1. According to the terms implied by law, one party nominates an arbitrator correspond to they sign a service contract. Ms. Arbitrator 1 would afford the obligation to arbitrate the current case between parties. And she has right to claim the deserved fees of 5 days. *[Sta. of Def., p.22]*Therefore, it is obvious that Claimant should pay the relevant fees to Ms. Arbitrator 1.

1. the reason for Ms. Arbitrator 1 to resign isn't in accord with the CIETAC rules

15. According to CIETAC Rules Article 31.1, which stipulates three situations where the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office. These three situations are all about failing to fulfill his/her functions as an arbitrator.

16. In the current case, we can see the reason from the email why Ms. Arbitrator 1 wanted to resign was that she couldn't get money from claimant for the additional days. *[Sta. of Def., p.22; Clarification.*

No.5] However, this cannot be the reasonable excuse for the resignation according to the CIETIC rules. What's more, there is no evidence to proof that Ms. Arbitrator 1 cannot fulfill her functions. On February 22 2013, the Secretariat has received the three arbitrators' Declarations of Independence and transferred them to the parties, which mean she will fulfill her functions within the time period specified in these rules. So there is no reasonable explanation for Ms. Arbitrator 1's resignation.

2. Ms. Arbitrator 1's resignation may lead the arbitration totally meaningless

17. The arbitration may become meaningless if Ms. Arbitrator resign during the arbitration proceedings according to the New York Convention and the Arbitration Law of China. New York Convention Article 5, section 1 and China Arbitration Act Article 71, recognition and enforcement of the award will be refused when the composition of the arbitral procedure was not in accordance wit the agreement of the parties, or failing such agreement, was not in accordance with the arbitration law of china if Ms. Arbitrator 1 presents the oral hearing on the disputed issues but not presents the proceeding of determining the issue of quantum, this would influence the fairness of this arbitration. The replaced arbitrator is not likely to make a fair decision without the comprehensive acknowledge of the previous hearings. The

unjustifiable decision could violate the doctrine of the due process. The violation of due process would eventually leads to staying enforcement of the arbitration award.

3. Ms. Arbitrator 1's resignation may lead the arbitration restart

18. If the resignation of Ms. Arbitrator 1 were approved, claimant would pick up a new arbitrator. The new arbitrator needs time to be familiar with this case. The replacement of arbitrator would certainly cost more time. The mean we needed to pay more fees for employing our legal counsel and other personnel involved in this case. In the present case, claimant is a powerhouse in the energy sector in Syrus, while my client was established around February 2010. As we had already transferred the first part of payment of 2 million dollars to Energy Pro but we didn't get proper goods. We are suffering a huge damage.

B. It is reasonable for Ms. Arbitrator 1 to request additional fees

19. As for the money requested by the Ms. Arbitrator 1, Arbitration Fee Collection Measures of China Article 2 and CIETAC Rules article 12 Section 3 says, when a party applies for arbitration, he shall pay arbitration fees to the arbitration commission in accordance with the provisions of these measures. In the CIETAC Rules, Article 72, section1, apart from the arbitration fees charged in accordance with the Fees Schedule, CIETAC may charge the parties other extra and

reasonable costs including the arbitrator's special remuneration, their travel and accommodation expenses incurred in dealing with the case.

1. **there is a contractual relationship between Claimant and Ms. Arbitrator 1**

20. Claimant has obligation to pay the additional fees to Ms. Arbitrator 1. According to the terms implied by law, one party nominates an arbitrator correspond to they sign a service contract. Ms. Arbitrator 1 would afford the obligation to arbitrate the current case between parties. And she has right to claim the deserved fees of 5 days. Therefore, it is obvious that Claimant should pay the relevant fees to Ms. Arbitrator 1.

2. **the discussion with the arbitral tribunal and both counsels creates more workload**

21. In the current case, the time allocated to Ms. Arbitrator 1 was originally two days. However, it is likely that it would take 5 days. Energy Pro Inc. is claimant, so he needs to pay arbitration fees in advance. Although Ms. Arbitrator 1 has no right to ask claimant to deposit the additional fees into her bank account, CIETAC has the right to charge additional fees to Energy Pro Inc. and claimant is obligated to pay these additional fees.

ISSUE III: Claimant invalidly terminated the contract.

22. Respondent states that the purchase contract between two parties was

invalidly terminated because all relevant provisions of the applicable law were satisfied.

A. The performances of two parties are in order under the purchase contract.

1. Claimant has the obligation to provide qualified gearboxes first

23. The performances of two parties are in order under the purchase contract. Claimant has the obligation to provide qualified gearboxes first.

24. As indicated in the purchase contract clause 1 *[Cl. Ex.No.2 p.11]*, Claimant has the obligation to provide qualified gearboxes so that the trade would carry on. Only after that Claimant delivers the gearboxes would Respondent gets the opportunity to inspect the goods and entitle Claimant to require payment.

2. Respondent need to fulfill the obligation only after the Claimant fulfilling its obligation

25. Respondent needs to fulfill the obligation only after Claimant had fulfilled its obligation. If Claimant declares Respondent falling to fulfill the obligation, it would fulfill its obligation first, otherwise, the right and obligation would not be equal. In that case, Claimant would use right without bounds. That would be the least thing our jurisdiction system would like to see.

B. The non-performance of Respondent does not amount to a fundamental one.

1. **The non-performance of Respondent doesn't substantially deprive the Claimant of what it is entitled to expect under the contract *[Art. 7.3.1.2(a) UNIDROIT]***

26. The non-performance of Respondent does not amount to a fundamental one, namely, the non-performance of Respondent doesn't

substantially deprive the Claimant of what it is entitled to expect under the contract .In this case, all what Respondent did was to suspend the contract, rather than totally confirming the invalidity. As long as Claimant remedies the situation, Respondent would admit the contract and continue the trade.

2. the non-performance results from the Claimant failure to deliver the right goods

26. According to UNIDROIT Principle 2010 Article 7.3.1.2 (c), the non-performance is intentional or reckless would change the judgment whether it is a fundamental non-performance. The non-performance resulting from the failure to deliver the right goods by Claimant is not intentional. Neither of the parties would like to see the non-performance as a delay, or breach, of the contract.

3. There is no reason to believe that Respondent cannot rely on the Claimant's future performance

27. There is no reason to believe that Respondent cannot rely on the Claimant of future performance *[Art 7.3.1.2(d) UNIDROIT]*. Respondent doesn't really want to terminate the contract; it can also be noticed from the letter delivered by Respondent on 16 May 2012. Respondent requires remedy *[Cl. Ex.No.4 p.14]*, intending to correct the gearboxes models and the trade may continue as long as the remedy should be done.

4. The non-performance would not cause disproportionate loss

28. The non-performance would not cause disproportionate loss. It deals with situations in which a party who fails to perform has relied on the contract and has prepared or tendered performance. Neither of Claimant and Respondent is considered like that *[Art 7.3.1.2(e) UNIDROIT]*.

C. Respondent rightfully suspend the contract

29. Respondent rightfully suspend the contract. Here are 2 reasons to support the claim.

1. The gearboxes are not in conformity with clause (A) of the purchase contract.

30. Firstly, the gearboxes are not in conformity with clause (A) of the purchase contract *[Cl. Ex. No.2 p.10]*. Although Claimant manufactured the correct model as clause (A) in the contract, it didn't send the correct ones to Energy Pro to inspect *[clarification question 8]*. Due to the wrong inspection conducted by Future Energy as mentioned by a letter delivered to both of the parties on 18 Apr 2012 *[Cl. Ex. No.3 p.13]*, gearboxes provided by Claimant eventually passed the inspection by incident. However, it could not be neglected that the gearboxes delivered to Respondent are model GH 2635, rather than the required in contract, the model of GJ 2635, which is completely useless for Respondent .Claimant did wrongly deliver the gearboxes to Respondent. In other words, the Claimant failed to fulfill the obligation written in the contract.

2. Claimant refused to remedy the current situation.

31. Secondly, Claimant refused to remedy the current situation. Upon being informed by the Future Energy, both of the parties came into awareness that the gearboxes were not in conformity with the model which had been specified in the purchase contract. Respondent lettered Claimant on 16 May 2012 *[Cl. Ex.No.4 p.14]* and 21 May 2012 *[Cl. Ex.No.6 p.6]* to require remedy; nevertheless, Claimant refused and insisted that they had fulfilled the legal obligation under the contract.

32. Conclusion: the suspension is valid. Accordingly, the termination of CLIMANT is invalid.

Issue IV: Claimant cannot claim the termination penalty

A. There is no right for Claimant to claim the termination penalty.

1. There is no right for Claimant to claim the termination penalty.

33. Now that the Claimant failed to fulfill the obligation, it would shoulder the responsibility caused by its behaviors. In other words, if Claimant claims a termination, it would be harm to the whole contract, rather than an action trying to reduce the existed ones.

2. There is no exemption clause which excludes Claimant from taking the responsibility.

34. There is no exemption clause which excludes Claimant from taking the responsibility. Exemption clause is a clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract [Art.7.1.6 UNIDROIT]. There is no particular exemption clause in the purchase contract, hence, it should not be taken into account.

3. There is no force majeure which excludes Claimant from taking the responsibility.

35. There is no force majeure which excludes Claimant from taking the responsibility. Force majeure is considered as that non-performance by both of the parties is due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. *[Art. 7.1.7 UNDROIT]* It's obvious that Claimant has the capacity to ensure the gearboxes are in conformity with the purchase contract, though it didn't make it.

B. Even if the Claimant has the right to terminate, the harm alleged

would not be that huge

36. The harm is due in part to the act of Claimant
37. Claimant shall not get the whole amount of money indicated in the purchase contract. The harm is due in part to the omission of the Claimant. The amount of damages shall be reduced to the extent that the omission has contributed to the harm, having regard to the conduct of each of the parties. *[Art. 7.4.7 UNIDROIT]* the claim of whole amount of money shall be too much.
38. Conclusion: All above, we come into a conclusion that Respondent shall not claim the termination penalty.