THE INTERNATIONAL ADR MOOTING COMPETITION

2013

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:

Energy Pro Inc.
28 Ontario Drive, Aero Street, Syrus
Tel. (009) 2965 364
Email: contact@syrus.net

CLAIMANT

AGAINST:

CFX Ltd.
26 Amber Street, Circus Avenue,
Catalan
Tel. (008) 5426 9877
Email: info@catalan.com

RESPONDENT

786C

LIST OF ABREVIATIONS

AOA - Association of Arbitrators of South Africa

CISG - Convention on International Sale of Goods

Cl. Ex. No. - Claimant Exhibit Number

CIETAC - China International Economic and Trade Arbitration Commission

CISG - Convention on International Sale of Goods

CLOUT - Case Law on UNCITRAL Texts

ICC - International Chamber of Commerce

ICSID - International Centre for Settlement of Investment Disputes

LCIA - London Court of International Arbitration

Proc. Or. No - Procedural Order Number

St. Cl. - Statement of Claim

St. Def. - Statement of Defense

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - UNIDROIT Principles of International Commercial Contract

INDEX OF AUTHORITIES

Klein, John	"Good Faith in International Transactions Liverpool Law Review; 1993, Volume 15, Page 130 Cited as: *[Klein]* Cited in: ¶ *H*
Park, William W.	"Non Signatories and INternational Contracts: An Arbitrator's Dilemma" (2009), p.3-4, par. 1.13 Cited as: *[Park]* Cited in: ¶ 3
Schwarz Franz & Konard Christian	"The Vienna Rules: A Commentary on International Arbitration in Austria, Kluwer Law International"(2009), p.340 Cited as: *[Shwarz v. Konrad]* Cited in: ¶ 7
Schwenzer, Ingeborg	"Commentary on the UN Convention on the International Sale of Goods (CISG)", 1998; Page 301 Cited as: *[Schwenzer in Schlechtrie]* Cited in: ¶ *H*
Sturini, Andrea	Commentary on the Arbitration Rules

INDEX OF CASES

CHINA

Transformer case

CIETAC Arbitration proceeding

December 2006

Cited as: *Transformer case*

Cited in: ¶ 20

Vitamin C case

Cietac Arbitration Proceedings

August 1997

Cited as: *Vitamin C case*

Cited in: ¶ 5

GERMANY

Live fish case

Appellate Court Thüringen OLG [Jena]

26 May 1998

Cited as: *Live fish case*

Cited in: I

UNITED STATES OF AMERICA

Steelworkers v. Mfg. Co.- 363 U.S 564

U.S. Supreme Court; 1960]

Cited as: Steelworkers Trilogy

Cited in: ¶ 9

ICSID

ICSID Case No. ARB/02/18

Tokios Tokelės (Claimant) v. Ukraine (Respondent)

Cited as: *ICSID; Case No. ARB/02/18*

Cited in: ¶ 12

STATEMENT OF FACTS

On December 17, 2010 CLAIMANT and RESPONDENT established the "Syrus - Catalan Wind Turbine Gearbox Joint Venture Company" (hereinafter "JV").

On April 10, 2011 CLAIMANT and RESPONDENT entered into an exclusive purchase contract (hereinafter "Purchase Contract").

On February 10, 2012 RESPONDENT issued a purchase order for 100 gearboxes.

On March 13, 2012 RESPONDENT transferred the first part payment

On April 18, 2012 Future Energy as the chosen certifier of the gearboxes notified the parties regarding the wrong certification committed by one of its engineers.

On May 21, 2012 RESPONDENT wrote to CLAIMANT confirming that it would suspend performance if the CLAIMANT does not comply with its own obligations.

On June 20, 2012 RESPONDENT issued the default notice to the CLAIMANT.

On December 28, 2012 RESPONDENT sent the notification of termination of contract.

ARGUMENT ON PROCEDURE

I. CLAIMANT CAN RIGHTFULLY BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS A THIRD PARTY.

1. Although in principle arbitration agreements are perceived to have a strictly contractual nature, meaning they only bind the parties which are party to it [*Dore, p.41*], it is not uncommon for arbitrators to hear cases which involve individuals and entities that never signed an arbitration agreement [*Townsend p. 359*].
2. In the purchase contract signed between CLAIMANT and RESPONDENT, both parties expressly agreed to involve Future Energy as a third party, a company which would certify the gearboxes prior to their shipping *[Cl. Ex. No.4]*. In a subsequent dispute between CLAIMANT and RESPONDENT, CLAIMANT righteously sought to bring Future Energy to arbitration proceedings as a third party, maintaining that: Future Energy could be implied as a party to the agreement (A). Moreover, the CIETAC Rules do not prohibit the joinder of third parties in the proceedings (B), given that they are silent on the issue they are supplemented by UNCITRAL Rules that similarly to other Arbitration Rules, foresee the possibility of bringing a third party to the dispute (C).

A. Future Energy could be implied as a party to the agreement

3. CLAIMANT and RESPONDENT by way of the Purchase Contract have established that Future Energy shall be the entity, which certifies the goods *[Cl. Ex. No.2]*. Therefore, it is the CLAIMANT's submission that the Tribunal should use the

"implied consent" doctrine in order to bind the third party to arbitrate [*Park, p.3-4*]. As Park explains this doctrine focuses on the true intentions of the parties', namely on the cases where the agreement shows itself in behaviour rather than words [*Id. p.3*]. In light of this explanation the consent of Future Energy to undertake an obligation arising out of the purchase contract was an expression of implied consent to be bound by the agreement consequently to the dispute settlement mechanism.

B. CIETAC Rules do not prohibit the joinder of third parties in the proceedings

4. The CIETAC Arbitration Rules as the applicable law, do not prohibit the possibility of the joinder of a third party. In fact, Article 27 of the CIETAC Rules provides for Multiple Party Tribunal through which it indirectly makes way for the possibility of involvement of more than one party.
5. In response to a potential argument by RESPONDENT that there have been previous cases governed by CIETAC and which have been decided otherwise such as the *Vitamin Case,* a distinction can be drawn. The Buyer in Vitamin C case had no idea regarding the agency agreement between the Seller and Jillin Company. Thus, for the Buyer, the *anonymous* agent Jillin, was an unknown entity. Consequently, even though it was Jillin's fault that triggered the dispute, the Tribunal rejected Jillin’s right to join the proceedings by claiming that the Seller's legal status cannot be changed [*Vitamin Case]*. Whereas in the case at hand, both parties contractually agreed to appoint Future Energy as the sole certifier of the gearboxes and conferred upon it rights and responsibilities.

C. The possibility of joinder is foreseen by the UNCITRAL rules and other similar arbitration rules.

6. Given the fact that CETAC rules are silent on the issue of bringing a third party to the dispute than the answer is found within the provisions of the UNCITRAL Rules, which clearly allow for this possibility. Article 17 of the UNCITRAL Rules foresees the possibility for a third party to be brought to arbitration as a party to it.
7. In comparative view, ICC Arbitration Rules, Swiss Arbitration Rules and LCIA Arbitration Rule specifically provide for the possibility of the joinder of third parties. Similarly the London Court of Arbitration Rules provide for the possibility of joinder of third parties given that the party requesting such joinder consents to join the proceedings [*Shwarz v. Konrad]*. On the same note, Swiss Arbitration Rules as well employ a less-stringent approach towards the joinder of third parties to arbitration by leaving it under the discretion of the tribunal to decide after having taken into account all the relevant circumstances [*Swiss Rules, Article 4(2)*].
8. Based on the arguments above CLAIMANT urges the Tribunal to treat Future Energy as a party to the case given also its essential role in the performance of the contractual duties by both parties.

II. REPLACEMENT OF ARBITRATORS AT ANY TIME DURING THE PROCEEDINGS IS PERMITTABLE.

9. Arbitration is a "creature of contract" [*Estreicher/Bennett; Campbell; Steelworkers Triology-U.S Supreme Court*,] and is based on the will of the parties [*Boralessa, p.15*] and freedom of choice. This freedom also includes the right of the Arbitrators to

resign from a given case at any time. CIETAC has reaffirmed the freedom of parties [*D'Agostino/Freehills]*

10. In the case at hand we are faced with the inability of one Arbitrator to act as such until the end of the proceedings. There is nothing in the CIETAC rules that prohibits an Arbitrator to withdraw from the arbitration (A) giving the right to the parties to appoint another arbitrator. CLAIMANT will refrain from objecting to Ms. Arbitrator's resignation and will appoint another arbitrator to hear the issue of quantum (B). Ms. Arbitrator 1 failed to respect the terms of her appointing agreement, subsequently the CLAIMANT cannot be forced to pay additional fees to the Ms. Arbitrator 1 (C)

A. CIETAC allows the withdrawal of an Arbitrator at any time during the proceedings.

11. CLAIMANT submits that CIETAC arbitration rules do not prohibit the resignation of an arbitrator after the tribunal has been constituted. Moreover, Article 31.1 of the CIETAC rules provides for the possibility for an arbitrator to voluntarily withdraw from his/her office. In general it is considered that in the event that an arbitrator is prevented de jure or de facto from fulfilling his/her functions or fails to fulfil the functions of an arbitrator in accordance with the CIETAC Rules or within the time period specified in the Rules, the Chairman of CIETAC has the power to decide whether that arbitrator should be replaced. Such a decision may be made with or without providing any reasons for the replacement [*Sturrini/Hui*].
12. In practice the resignation has occurred in several cases in other tribunals. In the case of *Tokios Tokelės v. Ukraine* before *The International Centre for Settlement of*

Investment Disputes one of the arbitrators, Mr. Prosper Weil resigned after the second hearing was held (about two years after the tribunal was constituted). The tribunal reconstituted following the resignation of Mr. Weil and appointed another arbitrator as a replacement. [*ICSID; Case No. ARB/02/18*]

13. In the case at hand right after the tribunal was constituted, Ms. Arbitrator 1 informed the Presiding Arbitrator that she will 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 *[Resign. Of. M.Arbitrator .p.22]* Arbitrator This action is in compliance with the CIETAC Rules and the world wide accepted practice.

B. CLAIMANT will refrain from objecting to Ms. Arbitrator's resignation and will appoint another arbitrator to hear the issue of quantum.

14. As provided above Ms. Arbitrator 1 has stated that she will resign after the oral hearings. CLAIMANT has informed the tribunal that it will not contest the resignation of Ms. Arbitrator 1 based on Article 31.3 can nominate substitute arbitrator.
15. The CLAIMANT henceforth will request the Chairman of CIETAC to appoint a new arbitrator following the nomination made by the CLAIMANT within the time period as foreseen by CIETAC arbitration rules.

C. Ms. Arbitrator 1 failed to respect the terms of her appointing agreement, subsequently the CLAIMANT cannot be forced to pay additional fees to the Ms. Arbitrator 1

16. Once an arbitrator has accepted his/her appointment and has embarked upon his/her duties arising therefrom, s/he is both morally and legally bound to discharge his/her duties to the best of his/her ability *[*''AoA*'']*. In the given case Ms. Arbitrator 1 failed to act according to the original agreement made between her and the CLAIMANT. Henceforth, the CLAIMANT considers that the Arbitrator's inability to meet the terms of their agreement does not oblige the CLAIMANT to fulfil her additional payment requests.
17. CLAIMANT deems that Ms. Arbitrator 1 has failed to manage her time well and there is no justification to pay her more once an agreement has been reached *[Proc.Ord. 2, p. 2]*. Subsequently the CLAIMANT cannot be forced to pay additional fees to Ms. Arbitrator and will instead appoint another Arbitrator.

ARGUMENT ON THE MERITS

III. CLAIMANT VALIDLY TERMINATED THE AGREEMENT

18. The exclusive purchase contract imposed an obligation on CLAIMANT to sell gearboxes, while RESPONDENT to pay the amount of 10 million USD during the period of 5 years [*Cl. Ex. No.2. p.10, par.1.2.b*]. CLAIMANT delivered the required gearboxes for the first year [*St.Cl.p.5, par.10]*, however RESPONDENT failed to make the full payment as required by the contract. Therefore, CLAIMANT validly

terminated the agreement due to the fact that RESPONDENT failed to fulfil its obligations (A), and CLAIMANT fulfilled all its obligations as defined under the contract (B), hence CLAIMANT is entitled to claim the termination penalty (C).

A. RESPONDENT failed to fulfil its obligations

19. The contract provides that RESPONDENT "substantially breaches a material obligation, representation or warranty including the failure to make any payment when it is due, provided that the Seller issues a written notice of the breach to the Buyer..."*[Cl. Ex. Nr.2]*. The failure to make the payment consists of a material obligation, therefore RESPONDENT has failed to meet this obligation entirely. The written notice sent by CLAIMANT, fulfilled the Seller's obligation to do so prior to termination, as required by the contract (a). Furthermore RESPONDENT failed to undertake the required contractual measures to commence and diligently pursue cure of the breach (b). In addition, RESPONDENT has also failed to provide reasonable evidence for the breach during 30 days period after receiving the default notice (c).

a. Buyer failed to make the payment, even after the default notice was sent by CLAIMANT

20. Article 6.1.1 of the UNIDROIT Principles stipulates that performance has to be made duly "*if a date is fixed or determinable from the contract*". The exclusive contract between CLAIMANT and RESPONDENT, called for the payment on the first year to be made in three instalments [*Cl. Ex. No.2. p.10, par.1.2.b.i*]. RESPONDENT, after receiving the goods performed the first payment on 13 March 2012 [*St.Cl.p.5,*

par.10]; however it did not perform the other two instalments as required by the contract hence breaching the contract. In the *Transformer Case*, CIETAC decided that the Buyer was found liable for breaching the contract for not paying the second (final) instalment of the purchase price [*Transformer case, CIETAC, December 2006]*. Therefore, RESPONDENT's failure to make the whole payment for the first year constituted a material breach of the contract.

b. Buyer failed to commence and diligently pursue cure of the breach.

21. As stipulated in Article 7.1.4 of the UNIDROIT Principle the non-performing party is obliged to cure the non-performance upon notification by the other party. RESPONDENT did not pay the second and third instalment of the purchase price it neither did try to pursue the cure of the breach. Noting that, it was upon RESPONDENT's responsibility to respond to CLAIMANT's default notices and take immediate steps to cure the non-performance which it failed to do, giving CLAIMANT the right to terminate the contract pursuant to clause 15 of the contract [*Cl. Ex. No.2, p.11, par.15.1*].

B. CLAIMANT fulfilled all its obligations under the Exclusive Purchase Contract

22. CLAIMANT had a contractual obligation to produce goods of certain specifications. The goods were delivered in a timely manner and received by RESPONDENT.

CLAIMANT did produce the goods as required (a), whereas RESPONDENT did not fulfil the seller's obligation to inspect the goods (b).

a. Gearboxes were produced in conformity with the contract requirements

23. CLAIMANT was obliged to: produce goods of a required quality standard conduct two manufacturing reviews were RESPONDENT would be present and obtain a certification approval by Future Energy, the independent certifier proposed by RESPONDENT [*Cl. Ex. No.2, p. 11,*]. Bearing in mind all the responsibilities, it is CLAIMANT's submission that the contract terms were completely met by CLAIMANT because of three main reasons.
24. Firstly, the gearboxes produced were in conformity with Clause (A) of the purchase contract [*Proc. Or. No. 2, p. 2, par. 8*]. As RESPONDENT did not present any concerns upon the delivery of the gearboxes, and confirmed in Procedural Order No.2 CLAIMANT has met his obligation under article 35 of the CISG to deliver conforming goods.
25. Secondly, CLAIMANT conducted the two manufacturing reviews, and in both of them RESPONDENT was present. Hence CLAIMANT met this obligation without a complaint by RESPONDENT. Moreover RESPONDENT was obliged under this contract to monitor the production of the goods, therefore bared a shared responsibility to make sure that the gearboxes meet the required quality standards.
26. Thirdly, it was CLAIMANT's obligation to obtain a certification approval by the Future Energy. CLAIMANT did receive the certification, and delivered the gearboxes as required. It was Future Energy that did mistake the model number when issuing the

certification. Therefore, CLAIMANT submits that it should not be held liable for the Future Energy's mistakes, because the latter was the only one responsible for examining the gearboxes and issuing the proper certification.

b. RESPONDENT did not fulfil the seller's obligation to inspect the goods

27. CISG among other obligations provides for the duty of the seller to inspect the goods after the delivery pursuant to Article 38(1). RESPONDENT received the goods delivered by CLAIMANT with no claims, and accordingly transferred the payment. The obligation to examine the goods and to notify the seller of any lack of conformity is, at one level, intended to establish certainty for the seller in regard to those accounts, which he can consider to be closed at any particular time [*Schwenzer in Schlechtrie, p. 301; Klein, p. 130*].
28. RESPONDENT did not fulfil its obligation to examine the gearboxes after the delivery; what it did was raise claims for non-conformity three months after the delivery. The claims arose only after Future Energy notified both parties for the error in certification [*Cl. Ex. No. 4, p. 14, par.1*]. In the Fish Case where a prior certification of the goods was made, the court held that the seller must have examined the goods even in the case of a latent defect [*CLOUT Case 280]*. Noting all the aforementioned circumstances CLAIMANT rightfully submits that RESPONDENT's declaration of suspension cannot and should not be justified.

IV. CLAIMANT IS ENTITLED TO CLAIM THE TERMINATION PENALTY.

29. Contract provided for the penalty in case of breach, and used an understandable wording for the parties. Having that to consider, it is CLAIMANT's submission that CLAIMANT, is entitled to claim the Termination Penalty. Moreover, the termination declared by CLAIMANT was lawful (a), and that CLAIMANT is not obliged to return the first payment (b), as RESPONDENT claims.

a. The termination was lawful

30. UNIDROIT Principles provide for the right to terminate a contract by a party, where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance [*Article 7.3.1*]. CLAIMANT declared the termination of the contract only after it had sent default notice for the breach, and has had no reply by RESPONDENT in return [*Cl. Ex. No.8, p.18*]. The sole fact that RESPONDENT did not respond or try to commence and diligently cure the breach after the default notice was sent, gave enough reason to CLAIMANT to believe that its contractor will not perform the payment even at a later date.
31. The Tribunal should find that CLAIMANT's termination was lawful because the contract provided the circumstances for termination, and because also applicable rules in the dispute at hand, allow for such termination and are at no doubt supportive to CLAIMANT's actions.

b. CLAIMANT is not obliged to return the first payment.

32. RESPONDENT in its Statement of Defence requests the Arbitral Tribunal to rule that CLAIMANT returns the first part payment of 2 million USD [*St. Def. p. 23, par.3*]. RESPONDENT itself, at the time of the conclusion of the contract agreed on Clause 15.2 of the contract which states that in case of termination by CLAIMANT "... (a) CLAIMANT shall be entitled to retain any part payment(s) made by RESPONDENT" [*Cl. Ex. No. 2, p.11, par.15.2*]. An explicit clause like this one clearly sets out parties belongings after the termination, and leaves no room for a different interpretation by the RESPONDENT.

33. Therefore, CLAIMANT rightfully submits that the RESPONDENT request doesn't have the relevant contractual basis, and therefore requests the Arbitral Tribunal to dismiss the claims by RESPONDENT.

REQUEST OF RELIEF:

CLAIMANT respectfully requests the Tribunal to find that:

- Future Energy can be a party to the Arbitration Proceedings

- Accept the replacement of the Arbitrator

- Claimant lawfully terminated the contract

- Claimant is entitled to claim the termination penalty

Council for Claimant.