THE INTERNATIONAL ADR MOOTING COMPETITION

2013

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

CFX Ltd.
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RESPONDENT

AGAINST:

Energy Pro Inc.
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Email: contact@syrus.net

CLAIMANT

786R

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

Cl. Ex. – Claimant's Exhibit

Res. Ex. – Respondent's Exhibit

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - UNIDROIT Principles of International Commercial Contract

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No. 9187

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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 CANNOT BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS A THIRD PARTY.

1. Arbitration agreements are a matter of contracts law expressly agreed to by the parties. Consequently "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit" [*AT&T Technologies Inc. v. Communications Workers of Am*].
2. RESPONDENT and CLAIMANT in the contract concluded expressly agreed to an arbitration clause, the scope of which clearly did not extend to third parties. In a subsequent dispute between CLAIMANT and RESPONDENT, CLAIMANT wrongly sought to bring Future Energy to arbitration proceedings as a third party since Future Energy is not a party to the Agreement (A). Moreover CIETAC Rules as the applicable law to the dispute explicitly prohibit the joinder of third parties in the proceedings (B), even the supplementary rules of UNCITRAL rule out such possibility (C).

A. Future Energy is not a party to the Agreement

3. CLAIMANT and RESPONDENT entered an exclusive bilateral Purchase Contract which expressly defined that the parties to it are only CLAIMANT and RESPONDENT [Cl. Ex. No. 2, p. 10, par. 20.1].

4. The subsequent dispute that arose between CLAIMANT and RESPONDENT exclusively is related to the rights and obligations of the parties under the contract. Opposite to CLAIMANTS allegations, it is the RESPONDENT's submission that Future Energy "cannot join the arbitration proceedings due to it not being a contracting party to the Contract" [*Lamm/Aqua, p. 716]*

B. CIETAC Rules prohibit the joinder of third parties in the proceedings

5. Having established that Future Energy is not party to the contract CLAIMANT submits that CIETAC Arbitration Rules do not allow for third-non-signatory parties to join arbitration proceedings neither by way of joinder nor by way of intervention [*Thorp/Sun, p. 8]*. This has been confirmed by the so called *Vitamin C* case which was governed by CIETAC, the tribunal did not grant the third party *Jillin* the right to join the proceedings due to the fact that "*the contract between [Buyer] and [Seller] clearly stated that [Buyer] was the buyer and [Seller] was the seller*." – and did not foresee any other party [*Vitamin C case*].

C. UNCITRAL Arbitration Rules rule out the possibility of joinder of third parties.

6. In response to CLAIMANT's argument that the Tribunal shall refer to UNCITRAL Arbitration Rules, the Respondent maintains that there is no gap whatsoever in

interpreting the CIETAC Rules, which clearly excludes the possibility of a third-party joining the proceedings. However, in the unlikely event that the Tribunal decides to do so it is important to emphasize that similarly to the CIETAC Arbitration Rules, Article 17 of UNCITRAL Arbitration Rules only allow joinder of a third party '*provided such person is a party to the arbitration agreement...*''.

7. In light of the above, and having established that Future Energy is not a party to the arbitration agreement RESPONDENT urges the Arbitral Tribunal to refuse the request of the Claimant with respect to the joinder of Future Energy.

II. FUTURE ENERGY WAS BROUGHT INTO THE DISPUTE UNDER DURESS.

8. In the unlikely event that the Tribunal decides that Future Energy can be brought as a third party to the agreement RESPONDENT submits that Future Energy was under economic and financial duress to accept the offer of the CLAIMANT to join the arbitration.

9. In the letter dated January 1, 2013 which the CLAIMANT addressed to Future Energy it had stated "*If you fail to join the arbitration…we will have no choice but to litigate against your Company to recover the damages CLAIMANT had to pay under the arbitration.*" [*Cl. Ex. No. 9, p.19, par. 3*]. It is clear that Future Energy was under

economic duress to join the arbitration proceedings. It is widely acceptable that duress is an unlawful coercion to perform by threatening financial injustice at a time when one cannot exercise free will [*Black's Dictionary p.255*]. In the case at hand Future Energy had no intention of being a part of arbitration, it is obvious that the threat of initiating legal measures against Future Energy was the deciding factor that forced it to join the proceedings.

III. THE TRIBUNAL SHOULD NOT ACCEPT THE RESIGNATION OF THE ARBITRATOR AND ASK CLAIMANT TO PAY THE ADDITIONAL FEES.

10. There are many advantages that international arbitration has been characterized with for years, such as neutral forum, timely efficiency, the participation of parties in the decision making process and enforceability of awards *[Deb.& Plim. LLP]*. However, there has been a tendency on increasing the length and cost of the arbitration process. This can easily be seen as a threat to the good reputation of international arbitration, which can also question the value of as an efficient dispute resolution mechanism. RESPONDENT urges this Tribunal to keep in mind these arguments when deciding on the dispute and maintain the standards of the characteristics of the Arbitration.

11. As such, RESPONDENT considers that the resignation of the arbitrator is disruptive for the whole process (A), and a substitute arbitrator who had not heard the evidence should not participate in the decision as it would cause a situation of a Truncated tribunal (B), therefore this Tribunal should rule that CLAIMANT must pay her additional fees in accordance with CIETAC Arbitration Rules 2012(C) in order not to allow for the process to be disrupted.

A. The resignation of the Arbitrator is disruptive for the whole process

12. One of the core elements of arbitration is avoiding unnecessary delay and expenses. Though like litigation in that it is a legal way to settle civil or economic disputes, arbitration can save time and money [*Yunhua*]. RESPONDENT considers that the resignation and the process of appointing a new arbitrator will be disruptive and will cause loss of money and time *[Stat.of Def. Resign of Ms. Arbitrator 1;p.22,¶ 4]*.
13. In practice resignation are accepted when there is a conflict of interest or where an arbitrator feels that the complexity of the case has exceeded his qualifications *[Greenberg/Kee/Weeramantry, p. 301]*. In the given case none of the aforementioned situations is present. Therefore it is unreasonable for CLAIMANT not to pay the additional fees to the Arbitrator and appoint a different arbitrator to case decide only on the issue of quantum.

B. Replacing an arbitrator midway process would result in a truncated Tribunal.

14. It bears emphasis that an arbitrator's resignation can have substantial adverse consequences for the parties due to the fact that they might need to repeat their submissions and will certainly need for the new arbitrator to read the file and this can be time-consuming and increased expense *[Born, p.1637]*. Furthermore, Born considers that resignation can cause serious procedural unfairness. If there would be a new arbitrator appointed for the issue of quantum who has not heard the oral testimonies, than the judgment could hardly be objective. That can seriously disrupt the procedural equilibrium of the arbitral proceedings and imbalance the adversarial process [*Id., p.1637*].

15. Finally the failure of an arbitrator to participate in the final deliberations leading to the award will cause a situation of a truncated tribunal. At this point, the participation of all members of the tribunal in the making of an arbitration award is generally considered to be a fundamental part of due process [*Lew/Mistelis/Kroll, p.323]*.

C. CLAIMANT should pay the additional fees.

16. CLAIMANT has argued that Ms Arbitrator's resignation is based on her own will. In response to that RESPONDENT submit in the case at hand Arbitrator's resignation is not as a result of her non-willingness to continue rather than to Claimant unwillingness to pay her the fees requested.

17. As provided by CIETAC rules, the Chairman shall make a final decision on whether or not an arbitrator should be replaced with or without stating the reasons [*CIETAC Rules; Art.31.2]*. Moreover, CIETAC rules are very clear when it comes to fees and the costs of the procedures. These rules provide, *inter alia,* that *''... CIETAC may charge the parties any other extra and reasonable costs, including but not limited to arbitrator' special remuneration." [CIETAC Rules; Art:72.1]*. Hence RESPONDENT considers that CLAIMANT'S refusal to pay additional money for 3 (three) more days is a clear violation of CIETAC Arbitration Rules.
18. Consequently, RESPONDENT submits that the Tribunal should not accept the resignation of Mrs. Arbitrator 1, due to the fact that it is not based on her free will and ask CLAIMANT to pay her the additional fees for the issue of quantum, end ensure the fairness of the decision and enforcement of the arbitral award.

ARGUMENT ON THE MERITS

IV. CLAIMANT'S TERMINATION OF THE AGREEMENT IS NOT VALID

19. According to the UNIDROIT Principle Article 7.3.1.1, 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. The exclusive contract obliged CLAIMANT to produce the minimum quantity of 100 gearboxes per year [Cl. Ex. No.2.

p.10, ¶1.2.a] that would be produced under special requirements as defined in the contract. However, the goods delivered did not meet the required specifications under the contract.

20. Therefore RESPONDENT submits that it suspended the execution of the contract as a response to CLAIMANT's incapability to perform in accordance with the contract (A), namely CLAIMANTS failure to deliver CLAIMANT goods that were not fit for the particular purpose (B), therefore Claimant is not entitled to claim the termination penalty, and should return the first payment as obliged by the contract(C).

A. Respondent suspended the execution of the contract due to Claimant's inability to perform in accordance with the contract

21. While UNIDROIT only refers to the suspension with regard to the limitation period, CISG provides the right of the party to suspend its performance in relation to the other party. As Article 71.1 provides, "a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness". RESPONDENT, after it found out that the received gearboxes were not in conformity with the specifications provided under the contract, rightfully declared the suspension of performance, and that the payment of the

second and third instalment. At is has been decided in the *Granite rock case*, the party suspending the performance is not in breach of the contract [*Granite Rock case*], therefore, CLAIMANT has no basis to prove that RESPONDENT's declaration of suspension is unlawful and therefore terminate the purchase contract.

22. Moreover, by sending prior notice to CLAIMANT to suspend the performance [*Cl. Ex. No.6, p.16, ¶.3*], RESPONDENT met the obligation set by CISG Article 71.3 In practice, the idea that giving a notice for suspension is sufficient, is supported by the by the Russian Tribunal of International Commercial Arbitration, which ruled that the notice for suspension was valid [*Case: 302/1996*].

B. CLAIMANT failed to deliver goods that were fit for the particular purpose

23. CLAIMANT and RESPONDENT concluded the contract in order for RESPONDENT to be able to buy the necessary gearboxes for the 1.5 MW wind turbines, which were to be produced by CLAIMANT. The contract called for an external certifier. CLAIMANT's obligation was to obtain this certification by Future Energy, in order to deliver goods fit for RESPONDENT's needs. However, CLAIMANT did not deliver the gearboxes with the required model and specifications. Noting that and in response to CLAIMANT's termination of contract, RESPONDENT submits that the goods were not fit for the

particular purpose (a), and RESPONDENT fulfilled its obligation to examine the goods while involving Future Energy as the independent certifier (b).

a. Gearboxes delivered were not fit for the particular purpose

24. In today's business is of the highest importance that the goods delivered are fit for the particular purpose, if such purpose is required under the contract. This argument is also supported by the most eminent scholar Prof. Schlechtriem, who states that goods "must also be fit for the buyer's particular purpose, if the buyer expressly or impliedly informed the seller of the particular purpose when the contract was concluded." [*Schlechtriem*].

25. CLAIMANT's performance was defective, and as a result RESPONDENT suspended its performance to pay the remaining instalments. Goods were not fit for the particular purpose since RESPONDENT and CLAIMANT contracted for goods of particular specifications [Cl. Ex. No.3, p.13, ¶.2]. Statements and agreements made by the parties become contractual terms if the statements are meant to be essential and binding [*Dr. S. Sergueev Handelsagentur v. DATSCHAUB A/S*]. RESPONDENT made the purpose known expressly and in writing [Cl. Ex. No.3, p.13, ¶.2] namely the purpose was made "crystal clear and recognizable" [*Video Records Case; Globes Case*]. In addition, CLAIMANT and RESPONDENT started to conduct business because the latter was

licensed to produce the specific 1.5MW wind turbines [*St. Cl. p.3, ¶.1*]. To this extent, there was no room for CLAIMANT to mistake the specific model of gearboxes.

26. CLAIMANT produced gearboxes, but the certification provided by Future Energy, later showed that it was wrongful, and that the gearboxes would not meet the requirements for the 1.5MW wind turbine [*Cl. Ex. No.3, p.13, ¶.2*]. Hence, the wind turbines delivered are useless to RESPONDENT [*Proc. Or. No. 2, p.2, ¶. 9*].

27. Furthermore, a party's expectations under a contract are to be discerned from the terms of the contract and other circumstances preceding the contract, such as the contractual negotiations *[Enderlein/Maskow, p.112; Ferrara, p.497]*. It is also crucial to objectively establish what the parties themselves have made important in their contract *[Magnus, p. 423; Meat Case]*. Hence, in conclusion, RESPONDENT submits that CLAIMANT, despite the implied request, failed to produce the gearboxes fit for the particular purpose.

b. RESPONDENT fulfilled its duty to examine the goods by hiring a third party.

28. Claimant's submission that RESPONDENT did not meet its obligations to examine does not stand, due to the sole fact that RESPONDENT actively participated in the design reviews and it involved a third party, Future Energy, to certify the final product. As UNDROIT is silent on the issue of examination of goods, CISG obliges the buyer to examine the goods. The obligation to conduct two design reviews derived exclusively from the contract, and that for the purpose of RESPONDENT to be able to monitor the

production process [*Cl. Ex. No. 2, p.12, ¶.32.1*]. RESPONDENT attended both manufacturing reviews, and after the 2nd review, it raised concerns to CLAIMANT regarding serious manufacturing flaws present in the gearboxes, and hence expressed its expectations for the things to improve [*Res. Ex. No.1, p.24*].

29. In addition, RESPONDENT and CLAIMANT agreed that Future Energy, would be the independent certifier for the gearboxes of the specific model GJ 2635 [*Proc. Or. No.2, p.3, ¶.13*]. Future Energy provided a wrong certification for the gearboxes [Cl. Ex. No.3, p.13, ¶.2], however RESPONDENT cannot be held liable for not examining the goods at the time of delivery. ICC in a similar case ruled that a buyer shall be excused pursuant to Article 44 CISG that he cannot be held responsible for the incorrect examination of goods by the independent inspection body appointed jointly by both parties [*No. 9187*]. Hereof, to this extent Respondent submits that the Tribunal should disregard Claimant's allegations that RESPONDENT did not fulfil its obligations.

V. CLAIMANT IS NOT ENTITLED TO CLAIM THE TERMINATION PENALTY

30. In its written submission, Claimant argues that the Tribunal should find the termination made by CLAIMANT as rightful, and thereof award to the latter the right to ask for the termination penalty from RESPONDENT, hence keep the first payment *[Rel. Req. p.8, ¶. 1]*. However, Respondent rightfully submits, due to the fact that RESPONDENT did

not breach the contract, that the termination of the contract was not lawful, and that CLAIMANT is obliged to return the first payment.

31. CLAIMANT terminated the contract after it had sent to RESPONDENT the default notices and the termination notice. As it has already been elaborated, CLAIMANT did not respect RESPONDENT's right to suspension. CLAIMANT, regardless the fact that it was itself the one to not perform in accordance with the contract, raised allegations towards RESPONDENT for non-performance and not cure of damages.
32. To conclude, RESPONDENT requests the Tribunal to disregard the default notices and the termination notice. In addition, RESPONDENT rightfully submits that CLAIMANT should not be entitled to the right for the termination penalty, and hereby should return the first payment made due to the non-conformity of the gearboxes.

RESPONDENT respectfully requests this Tribunal to Find:

- **CLAIMANT cannot bring Future Energy inc. into the arbitration proceedings as a third party.**
- **Future Energy was brought into the dispute under duress.**
- **The Tribunal should not accept the resignation of the arbitrator and ask claimant to pay the additional fees.**
- C**laimant's termination of the agreement is not valid**
- **Claimant is not entitled to claim the termination penalty**

Submitted by Council for Respondent