THE 4TH INTERNATIONAL ADR MOOTING COMPETITION
HONG KONG – JULY 2013

MEMORANDUM FOR

CLAIMANT

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CONTENTS

INDEX OF TERMS AND ABBREVIATIONS

UNIDROIT: International Institute for the Unification of Private Law

PICC: Principles of International Commercial Contracts 2010

CIETAC: China International Economic and Trade Arbitration Commission

CISG: United Nations Convention on Contracts for the International Sale of Goods 1980

NY Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Pg.: Page

Standing Comm. Nat'l People's Cong.: Standing Committee of the National People's Congress of the People's Republic of China

Claimant: Energy Pro Inc.

Respondent: CFX Ltd

JV: joint venture

STATEMENT OF FACTS

Energy Pro Inc. ("Claimant") is a company incorporated under the Laws of Syrus, which supplies raw materials to the "Syrus-Catalan Wind Turbine Gearbox Joint Venture Company" (the "JV").

CFX Ltd ("Respondent") is a company incorporated under the Laws of Catalan, which entered a cooperation contract with Energy Pro Inc. under the name of the "JV" to manufacture the 1.5 MW wind turbines and to expand its sales in Catalan.

The Parties entered into an agreement to establish the joint venture based in Catalan as well as an exclusive purchase contract (the 'Purchase Contract'), inter alia both were equity holders of the JV, with Claimant being the seller and Respondent the buyer.

The Purchase Contract stipulates that Claimant should provide gearboxes which meet the required quality standards and obtain the certification from Future Energy before shipping to Respondent. If Respondent fails to make the payment when it is due, Claimant has the right to suspend or terminate the Purchase Contract and to claim a termination penalty.

On 17 September 2011 and 16 January 2012, meetings were held between the Parties to perform the 1st Design Review (the 'DR1') and 2nd Design Review (the 'DR2'). Claimant states that no objections were made by Respondent in both reviews, whereas Respondent provides contrary evidence.

On 10 February 2012, Respondent issued a purchase order for 100 gearboxes. Later on 13 March, Respondent transferred the first part payment of USD 2 million to Claimant after receiving the gearboxes.

Afterwards, Future Energy wrote to both Respondent and Claimant that one of its engineers had wrongly certified the gearboxes. A month later, Respondent sent an email to Energy Pro emphasizing outstanding concerns with the gearbox designs and the lack of approval.

Claimant reiterated to Respondent that it had duly performed all of its obligations and therefore cannot be held responsible for Future Energy's negligence. However, Respondent confirmed in response that it would suspend performance of the Purchase Contract until Claimant acknowledges its failure to fulfill the Purchase Contract.

Later on, Claimant issued and sent the first and second notice of default (the 'Default Notices') to Respondent. With no reply from the latter, Claimant sent a demanding letter to Respondent before initiating the arbitration. A notification of termination of the Purchase Contract was thus made by Claimant. Nevertheless, Respondent denied the validity of the termination and requested for reimbursement of the first part of payment it already made.

Claimant requested Future Energy Inc. to join as a third party to the arbitration.

Regarding the resignation of Ms. Arbitrator 1, the arbitration fees she received is insufficient for the additional 3 days of arguments on quantum. Hence, she will resign immediately after the second day of hearing on quantum unless being duly paid.

ISSUES OF DISPUTE

I. PLEADINGS ON PROCEDURAL ISSUES

1. JOINT OF A THIRD PARTY INTO THE ARBITRATION

A. The Arbitration Clause and Applicable Law Do Not Prohibit the Introduction of a Third Party into the Arbitration.

Referring to Clause 20 of the Purchase Contract, it can be discovered that there exists a valid arbitration agreement between Claimant and Respondent, which provides both parties' intention to refer to arbitration in Beijing, China, applying the CIETAC Rules. The law governing the arbitration procedure is not provided in the agreement, the *Lex Arbitri* should be the Arbitration Law of the P.R.C.[1] in this regard.[2]

Based on the choice of law clause in the Purchase Contract, i.e. Clause 29, applicable law of the Purchase Contract include the UNIDRIOT Principles of International Commercial Contracts 2010 ('PICC'), the United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG') and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention').

Although the arbitration agreement as well as the aforementioned applicable law does not include any provision concerning the introduction of a third-party into the arbitration, it does not expressly prohibit this action at the same time.
Regarding the fact that Future Energy Inc. is responsible for granting gearboxes which are produced by Claimant "quality certification" before they are shipped to Respondent, the introduction of Future Energy Inc. could be conducive to identifying the merits for this phase.

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[1] Zhongcai Fa (仲裁法) [Arbitration Law of the People's Republic of China], promulgated by the Standing Comm. Nat'l People's Cong. on Aug. 31, 1994, effective on Sep. 1, 1995, translated by <Chinalawinfo. com>.
[2] Jingzhou TAO, *Arbitration Law and Practice in China*, pg. 97-98, 2nd ed., published by Wolters Kluwer, Law & Bus (2008).

Arbitration Law of the P.R.C. does not stipulate on the joint of third-party into the arbitral proceedings, whereas the Civil Procedure Law of the P.R.C. does. *Mutatis mutandis*, the Civil Procedure Law of the P.R.C. [3], article 56, section 2:

> *If a third party does not have the independent right to claim the subject matter of the action of both parties but the outcome of the case will affect his legal interest, it may file a request to join the litigation or the people's court may notify him to join the litigation. If a people's court holds a third party to bear a civil liability, such a third party shall have the litigation rights as a party to the litigation.*

Since the error was caused by a negligent engineer at Future Energy Inc., the corporation should be responsible for all the consequences arising therefrom, which is similar to the circumstances as abovementioned.

However, the arbitration award has no binding effect on any party outside of the arbitration agreement. Thus, Future Energy Inc. will for no reason perform the arbitration award, unless it is introduced to the arbitration being a 'party' of the arbitration, pursuant to rules about enforcement in Chapter VI, Arbitration Law of the P.R.C.

B. If Future Energy Inc. is Not Permitted into the Arbitration as a Third Party, Claimant should Appoint It as a Witness.

According to the Purchase Contract, Future Energy Inc. is involved in the contract dispute as it is selected to certify qualified wind turbines manufactured by Claimant before delivered to Respondent.

In reference to the facts of the problem, an in-charge engineer of Future Energy Inc. wrongly certified gearboxes produced by Claimant as in conformity with the

[3] Minshi Susong Fa (民事诉讼法(2012年修正)) [Civil Procedure Law of the People's Republic of China (2012 Amendment)], promulgated by Nat'l. People's Cong. on Apr. 9, 1991, effective on Apr. 9, 1991, translated by <Chinalawinfo.com>.

designated model. Hence, this employee should be to blame for dereliction of duty for the clear causality illustrated. As a consequence, Future Energy Inc., the employer, should be held liable for the resulting damages thereout.

In case that Future Energy Inc. is not permitted into the arbitral tribunal by arbitration panel, Claimant will nominate it as a witness to give oral testimony during evidentiary hearings. As a proverbial practice in arbitration, both the Tribunal and the Parties have the right to appoint witnesses.

The particularity of Future Energy Inc. being appointed as witness is that it takes a role in and has its own interest from the dispute. Whether testimony by interested parties is admissible vary from different legal systems. Prof. Garry B. Born, in his work *International Commercial Arbitration*, points out that "arbitral tribunals virtually always refuse to exclude testimony from 'interested' parties or their employees. Tribunals invariably hold that parties are entitled to the opportunities to prove their case, including with testimony from the parties themselves or their representatives."[4] It should, therefore, be noticed that the tribunal has 'extraordinary tolerance' toward the close relationship of interest that witnesses have with the Parties in dispute.

2. LEGALITY OF THE RESIGNATION OF MS. ARBITRATOR 1 DURING PROCEEDINGS

A. The Resignation of Ms. Arbitrator 1 Should be Permitted for Impossibility to Act, so Claimant Should Nominate a New Arbitrator to Hear the Issue of Quantum.

According to Ms. Arbitrator 1, the time allocated for quantum was originally 2 days when she accepted her appointment from CIETAC after being nominated by

[4] *See* Garry B. BORN, *International Commercial Arbitration*, pg. 1838-1840, published by Kluwer Law International (2009).

Claimant. However, the process turns out to be very likely to require 5 days. Therefore, Ms. Arbitrator 1 requested to resign after the completion of the oral hearings.

In order to terminate the arbitrator's mandate, an arbitrator could propose a voluntary withdrawal from the proceedings or meet the corresponding requirements pursuant to an agreement of all parties involved in the arbitration.[5]

The fact that Ms. Arbitrator 1 becomes unavailable on dates to determine the issue of quantum, which should be permitted, as the resignation occurs for reasons provided for "other reason" within the meaning of article 15 of the Model Law on International Commercial Arbitration[6]:

> *Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.*

Besides, according to article 31 of Arbitration Law of the P.R.C., the voluntary withdrawal from the office of Ms. Arbitrator 1 for reason of de facto, which prevents her from fulfilling the function as an arbitrator, should be permitted.

Also, section 2 of article 37 of Arbitration Law of the P.R.C. is applicable to this circumstance, pursuant to which a new arbitrator should be appointed to replace Ms. Arbitrator 1 after her leave to hear the issues of quantum.

B. Claimant Has Already Fulfilled Payment Obligation and Ms. Arbitrator 1 Has No Right to Directly Request Claimant for

[5] *Id*., pg. 70.
[6] UNICITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, pg. 71, published by UN, office at Vienna.

Additional Fees.

It should be noticed that Claimant has fulfilled its obligation to pay for the arbitration which is sufficient for Ms. Arbitrator 1 to carry out her work. Ms. Arbitrator 1 had agreed to the fees and an agreement was reached. Although subsequent discussions reveal that the issue of quantum would take longer, Claimant believes that this is no justification to pay Ms. Arbitrator 1 in excess of the contractual amount.

Ms. Arbitrator 1 has no ground to demand for additional fees since it is illegal for an arbitrator to request a party of the tribunal to deposit money in his or her account directly. According to CIETAC Rules 2012, the only authority with the power to charge fees in arbitral proceedings is CIETAC, including the arbitration fees and "any other extra and reasonable costs" as is stipulated in section 1, article 72 of CIETAC Rules 2012:

> *Apart from the arbitration fees charged in accordance with its Fees Schedule, CIETAC may charge the parties any other extra and reasonable costs, including but not limited to arbitrators' special remuneration, their travel and accommodation expenses incurred in dealing with the case, as well as the costs and expenses of experts, appraisers or interpreters appointed by the arbitral tribunal.*

Moreover, all payments concerned should and must be completed in related department of CIETAC, instead of directly depositing it to the arbitrator's private bank account. Whether the required payment is fulfilled by the parties is decided by CIETAC, according to section 2 of article72, CIETAC Rules 2012.

> *Where a party has nominated an arbitrator who will incur actual costs such as travel and accommodation expenses, but fails to pay in advance a deposit for such costs within the time period specified by CIETAC, the party shall be deemed not to have nominated the arbitrator.*

Therefore, if a party fails to pay in advance a deposit within the time period specified

by CIETAC, the party shall be deemed not to have nominated the authority. Hence, now that no sign shows CIETAC objects to the appointment of Ms. Arbitrator 1, the payment by Claimant should be treated as consistent with requirements.

II. PLEADINGS ON CONTRACTUAL TERMS

1. VALIDITY OF THE TERMINATION OF CONTRACT CONDUCTED BY CLAIMANT

A. The Contract Was Validly Established and Has Binding Power over Both Parties.

According to facts, the Purchase Contract between the Parties was signed on 10 April 2011 after extensive negotiations. Referring to the UNIDROIT Principles of International Commercial Contract ("PICC"), article 2.1.1:

> *A contract may be concluded either by the acceptance of an offer or by the conduct of the parties that is sufficient to show agreement.*

Therefore, the conduct of signature of representatives from both Parties explicitly indicates the existence of "conduct" as required, thus resulting in valid establishment of the contract.

The legal effect of the Purchase Contract, as provided in article 1.3 of PICC, has binding power over both Parties.

> *A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.*

This article proclaims the principle of *pacta sunt servanda*, which emphasizes that the rule of sanctity of contracts is the foundation of any regulation within in the contract[7]. So, once the Contract is concluded, each clause therein has legal power over both Claimant and Respondent and so the two Parties must perform accordingly.

[7] *See* Stefan Vogenauer, Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contract*, pg. 125, published by Oxford University Press.

Furthermore, abovementioned article 1.3 also implies legal consequences of non-performance, since default clauses are always included in a purchase contract, which might result in certain kind of compensation as agreed upon by the parities.

B. Respondent's Failure to Make Second and Third Part Payment Constitutes a "Fundamental Non-Performance". Claimant Has Fulfilled Its Contractual Obligations.

As provided in Claimant's Exhibit No.7, Respondent failed to make the second and third part payment, which constitutes a breach of contract. Such act is called "non-performance" as defined in article 7.1.1 of PICC.

> *Non-performance is a failure by a party to perform any of its obligations under the contract, including defective performance or late performance.*

"Non-performance" in the above article is construed as "any situation in which one party fail to achieve a specific result according to the modalities of the contract".[8] In determining whether a failure constitutes a fundamental non-performance, several factors are considered, just as in one of the cases decided by court Centro de Arbitraje de México in 2006[9].

Referring to section 2, article 7.3.1 of PICC, if the following conditions are satisfied, one party's failure to perform an obligation will amount to a "fundamental non-performance".

> *i. he non-performance substantially deprives 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;*

[8] *Id.*, pg. 734.
[9] Decided on 11 Oct. 2006, available at http://www.unilex.info/case.cfm?id=1149 (last visited on 15 June 20, 2013).

ii. strict compliance with the obligation which has not been performed is of essence under the contract;

iii. the non-performance is intentional or reckless;

iv. the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

v. the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

Firstly, according to Purchase Contract, Respondent is obliged to make three payments within due time period, as expected by Claimant. However, only the first part payment was made. Secondly, the purchase payment is of essence under the Purchase Contract, which is a consideration of gearboxes in this case. Thirdly, Respondent's non-performance is intentional because it continued refusing to make the rest payment even after Claimant sent two default notices. Fourthly, Claimant has reason to believe that Respondent will make no future performance since no reply was received concerning the two default notices. Finally, if the contract is terminated, Respondent will suffer termination penalty as provided in Purchase Contract.

Because of the above reasons, Respondent's failure to perform its payment obligation constitutes a "fundamental non-performance".

Claimant, on the contrary, has fulfilled its obligations pursuant to the Contract, since the gearboxes manufactured by JV meet the requirements in Clause (A) of the Purchase Contract, and certified approval has been granted by Future Energy Inc. Therefore, Claimant has already discharged its contractual obligations.

C. Claimant Has the Right to Terminate the Purchase Contract.

Claimant has the right to terminate the Purchase Contract because a clause about the cancellation of contract is stipulated in article 15.1 therein.

In addition, now that the Respondent's failure to make second and third part payment amounts to a fundamental non-performance, Claimant may determinate the contract according to section 1, article 7.3.1 of PICC:

> *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.*

Therefore, Claimant has legal grounds to terminate the contract, according to either article 15.1 of the Purchase Contract or section1, article 7.3.1 of PICC, with the latter a supplement for the former.

D. Claimant Fulfilled the Notice Obligation Before Terminating the Contract.

In order to terminate the contract, Claimant has to send the notice of termination to Respondent, according to section 1 article 7.3.2 of PICC:

> *The right of a party to terminate the contract is exercised by notice to the other party.*

Based on facts that on 20 June 2012 and 20 August 2012 respectively Claimant issued and sent by email the first and second default notice in accordance of the Purchase Contract, Claimant fulfilled the notice obligation for no requirement of modality is required according to section1, article 1.10 of PICC:

> *Where notice is required it may be given by any means appropriate to the circumstance.*

In conclusion, Claimant has successfully exercised its right to terminate the contract by notice to Respondent pursuant to regulations concerned under the framework of PICC.

2. REQUEST FOR TERMINATION PENALTY

In the Purchase Contract, a termination penalty clause was stipulated, which enables Claimant to retain any part payment made by Respondent as well as to claim for the difference between the total value of the Contract and the products already delivered to Respondent.

The legal foundation for Claimant to require termination penalty also lies in article 7.4.13 of PICC:

> *Where the contract provides that a party who 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.*

The Official Comment to this article states that this is an "intentionally broad definition" which encompasses agreements that are intended to facilitate the recovery of damages and agreements which are intended to operate as a deterrent against the non-performance[10]. Hence, the scope of this article includes the punitive charge for the non-performing party. In order to successfully claim for the agreed amount, a specified sum should be set out or at least the amount of damages could be calculated just as what the contract says in this case, the specified amount has been stated clearly. Besides, the amount should also not be grossly excessive from the perspective of any reasonable person. The difference must be sufficiently substantial for it to qualify as grossly excessive.[11]

[10] Official Comment on article 7.4.13 of PICC, available at www.unilex.org (last visited on 20 June 2013).
[11] *Supra note* 7, pg. 925.

Based on facts, the difference as claimed by Claimant is actually the damages it suffered, which could have been avoided should Respondent have performed within due time period. So the penalty is not excessive, let alone grossly excessive. For this reason, the termination penalty is valid and should be supported by the tribunal.

REQUEST FOR RELIEF

Claimant respectfully requests the tribunal to find that:

1. Future Energy Inc. should join the arbitration as a third-party.
2. Ms. Arbitrator 1 could resign during the arbitral proceedings and another arbitrator should be nominated by Claimant.
3. Claimant has validly terminated the contract.
4. Claimant could claim termination penalty from Respondent pursuant to the contract.