THE FOURTH INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2013

MEMORANDUM FOR CLAIMANT

Team Number: 863C

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INDEX OF ABBREVIATIONS

Art	Article
CFX	CFX Ltd.
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Contracts for the International Sale of Goods, 1980
De facto	Factually
De jure	Legally
e.g.	Example
Ed	Edition
Energy Pro	Energy Pro Inc.
Future Energy	Future Energy Inc.
ICC	International Chamber of Commerce
i.e.	Id est
Inc.	Incorporated
Info	Information
JV	Joint Venture
LCIA	The London Court of International Arbitration
LLC	Limited Liability Company
Ltd	Limited
Ms.	Miss
No.	Number
p.	Page
PICC	Principles of International Commercial Contracts
Para	Paragraph
Pp	Page
UNCITRAL	United Nations Convention of International Trade Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2010
v.	Versus

INDEX OF AUTHORITIES

Ambrose	London Maritime Arbitration, London: Informa, 2003.
Enid A. Marshall	Arbitration, Gill: The Law of Arbitration, Sweet & Maxwell, London, 2001.
J. Beatson	Anson's Law of Contract, Oxford Publications, 2002.
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Redfern & Hunter	Law and Practice of International Commercial, Sweet & Maxwell, London, 2003.
Vogenauer, Stefan Kleinheisterkamp, Jan	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), OXFORD University Press, 2009.

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DVD HiFi case

Cysteine Monohydrate case

Fisser vs.Int'l Bank, 282 F.2d 231, 233 (2d Cir.,1960)

Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173-4 (2d Cir. 1984).

In re Kellogg, 166 S.W.3d at 739

K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd, [1991] 1 Lloyd's Rep. 260

Sunkist Soft Drinks,Inc. vs.Sunkist Growers,Inc., 10 F.3d 757 (11th Cir., 1993)

Societe Korsnas Marma v. Societe Durand- Auziaz, CA Paris, Nov.

Zeiler v.Deitsch, 500 F.3d 157 (2nd Cir.2007)

ARGUMENTS

ISSUE 1. CAN ENERGY PRO INC. BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY?

1. Energy Pro Inc. can bring Future Energy Inc, into the arbitration proceedings: (1.1) Future Energy played an important part in the performance of the contract; (1.2) The negligence of Future Energy's engineer resulted in the delivery of non-conforming goods to CFX Ltd.; (1.3) Non-Signatories can be bound to an arbitration agreement (1.4) Future Energy had impliedly consented to the arbitration agreement in the purchase contract.

(1.1) FUTURE ENERGY PLAYED AN IMPORTANT PART IN THE PERFORMANCE OF THE CONTRACT

2. Future Energy is a wind energy company that had developed the 1.5 MW wind energy turbine, which was the subject of a JV and Purchase Contract between claimant and respondent.[1] It had agreed with Energy Pro and CFX to act as an independent certification company for the wind turbines of Model GJ 2635.[2] Moreover, Future Energy was aware of the required specifications of the wind turbines as mentioned in Clause (A) of the Purchase Contract.[3]

3. Future Energy was required to certify the gearboxes, in conformity with the specifications under Clause (A) of the Purchase Contract, which would be delivered to CFX. Thus, Future Energy had an integral role in the performance of the contract.

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[1] Problem, Fact No.1, Page 3
[2] Procedural Order No. 2, Q. 13, Page 3
[3] Procedural Order No. 2, Q. 14, Page 3

(1.2) FUTURE ENERGY'S ENGINEER NEGLIGENTLY CERTIFIED THE WRONG GEARBOXES THAT WERE DELIVERED TO THE CLAIMANT

4. Future Energy accepted that its on-site engineer had wrongly certified one of the gearboxes that were delivered to the claimant, and ultimately to the respondent. The engineer, erringly, approved the gearboxes as per specifications of Model No GH 2635, while the Purchase Contract was regarding Model No GJ 2635.[4]

5. This is a major mistake committed by Future Energy that rendered the delivered gearboxes to CFX worthless.

(1.3) NON-SIGNATORIES CAN BE BOUND TO AN ARBITRATION AGREEMENT

6. The Court of Appeal of Paris has held in several cases that: "an arbitration clause inserted in an international contract has a distinct validity and force, which requires it to be applied to the parties directly involved in the performance of the contract and in the disputes which may result from it, once it has been established that they were aware of the existence and the scope of the arbitration clause, even though they were not signatories to the contract which contained it.[5]"

7. Under Article 22(1)(h) LCIA rules, the consent of the third party to be joined as well as of the party applying for the joinder is required. The decision whether to allow a joinder is taken by the tribunal which has discretion in this respect.

8. Moreover, a Federal tribunal in Switzerland held that:"an arbitration clause may be assigned, taken over, transferred or simply become binding as a third party involves itself deeply enough in the contractual relationship." (s. 3.2)

[4] Claimants' Exhibition No. 3
[5] Societe Korsnas Marma v. Societe Durand- Auziaz, CA Paris, Nov.

9. United States federal and state courts have recognized that under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement[6], like, assumption, agency, veil piercing, estoppel etc.

10. In international arbitration, joinder is generally not possible without some form of contractual relationship between the parties. In the present case, Future Energy Inc. is involved in the last stage of the contractual obligation as a party which certifies the quality of the gearboxes.

(1.4) FUTURE ENERGY HAD IMPLIEDLY CONSENTED TO THE ARBITRATION AGREEMENT IN THE PURCHASE CONTRACT.

11. Thus, Future Energy clearly had a great role in the performance of the Purchase Contract. Also it stood to be benefited from the contract as the successful marketing and sale of the wind turbines which they themselves developed.

12. Under direct benefits estoppel, "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes."[7]

13. US courts reasoned the use of the estoppel theory because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and (the fact that) the claims were 'intimately founded in and intertwined with the underlying contract obligations"[8]

14. Thus, the claimant can bring Future Energy into the arbitration proceedings.

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[6] Fisser vs.Int'l Bank, 282 F.2d 231, 233 (2d Cir., 1960)
[7] *In re Kellogg*, 166 S.W.3d at 739
[8] Sunkist Soft Drinks,Inc. vs.Sunkist Growers,Inc., 10 F.3d 757 (11th Cir., 1993)

ISSUE 2: CAN Ms. ARBITRATOR 1 RESIGN DURING THE ARBITRATION PROCEEDINGS?

15. Ms. Arbitrator can resign during the arbitration proceedings: (2.1) Energy Pro is not bound to pay Ms. Arbitrator 1 additional fees; (2.2) Ms. Arbitrator 1 has a right to resign during the proceedings; (2.3) Energy Pro is entitled to appoint a replacement arbitrator.

(2.1) ENERGY PRO IS NOT BOUND TO PAY MS. ARBITRATOR 1 ADDITIONAL FEES

16. The claimant submits that the fee of Ms. Arbitrator 1 was decided before hand. They are being economically exploited by Ms. Arbitrator 1 for the payment of additional fees as she had agreed to the fees when she was appointed.[9]

17. Courts in England have held that the right to a commitment fee is not an implied term of the contract created when an appointment is accepted,[10] and that it would be misconduct for an arbitrator to require a commitment fee as a condition of continuing to perform his services if the appointment had been accepted without such a reservation; "it did not accord happily with their status to become involved in negotiations about fees" after their appointment.[11]. In any event, once the appointment is accepted the parties are under no obligation to agree to any commitment or cancellation fees.

18. Thus, Energy Pro is not bound to pay any additional fees to Ms. Arbitrator 1.

(2.2) MS. ARBITRATOR 1 HAS A RIGHT TO RESIGN DURING THE PROCEEDINGS

[9] Procedural Order No. 2, Q. 10, Page 2
[10] K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd[1991] 1 Lloyd's Rep. 260
[11] Ibid.

19. An arbitrator always has the option of resigning from the proceedings of an Arbitral Tribunal. Leading institutional rules, such as those of the CIETAC, permit arbitrators to resign their appointments, whether in response to a challenge or otherwise. If an arbitrator chooses to withdraw, there is no judicial authority to overturn that resignation or to reinstate the arbitrator. In the words of one U.S. court:

"There are certainly circumstances under which, although a party could not successfully mount a charge of evident partiality against an arbitrator, the arbitrator may wish to resign. That decision is better left to the discretion of the individual arbitrator...... There is, therefore, no basis, statutory or otherwise, for a court to review an arbitrator's earlier resignation, and we know of no authority that grants courts the power to force unwilling arbitrators to continue to serve."[12]

20. As provided under Article 31 of the CIETAC Rules[13], an arbitrator may voluntarily withdraw from his/her office. The CIETAC Rules clearly provide for a contingency wherein an arbitrator is prevented de jure or de facto from fulfilling his/her functions or where voluntary resignation of an arbitrator occurs.

21. Moreover, under Article 14 of UNCITRAL Model Law on International Commercial Arbitration, the mandate of the arbitrator terminates when he resigns from the office.Hence, Ms. Arbitrator can resign on her own accord from the tribunal.

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[12] *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-4 (2d Cir. 1984).

[13] Article 31 Replacement of Arbitrator -

1. In the event that an arbitrator is prevented de jure or de facto from fulfilling his/her functions, or fails to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.
2. The Chairman of CIETAC shall make a final decision on whether or not an arbitrator should be replaced with or without stating the reasons.
3. In the event that an arbitrator is unable to fulfill his/her functions due to being challenged or replaced, a substitute arbitrator shall be nominated according to the same procedure and time period that applied to the nomination of the arbitrator being challenged or replaced. If a party fails to nominate a substitute arbitrator accordingly, the substitute arbitrator shall be appointed by the Chairman of CIETAC.
4. After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated.

(2.3) ENERGY PRO IS ENTITLED TO APPOINT A REPLACEMENT ARBITRATOR.

22. Article 32 of the CIETAC Rules[14], read with Article 31, also provides for such a replacement after the constitution of an Arbitral Tribunal and commencement of proceedings by the same towards dispute resolution.

23. The second circuit court had held that the panel continuing with two members, subject to an opportunity of the relevant party to appoint a replacement arbitrator, was appropriate to avoid wasted resources and a manipulation of the process.[15] In another case, the second circuit upheld the replacement on the bases: (1) s.5 of the Federal Arbitration Act allows the court to fill a vacancy on the panel which necessarily includes a vacancy on a pending panel; and (2) the relevant arbitration clause was silent on the means of replacing members of the panel.

24. Article 15 of the UNCITRAL Model Law dictates that that a substitute arbitrator shall be appointed when the original arbitrator's mandate terminates. Hence, Ms. Arbitrator can resign from the arbitration proceedings and the claimant submits for the appointment of a replacement arbitrator.

ISSUE 3. DID ENERGY PRO INC. VALIDLY TERMINATE THE CONTRACT?

25. Energy Pro has validly terminated the contract: (3.1) CFX had committed a material breach of the contract; (3.2) Energy Pro cannot be held liable for the fault of Future Energy

[14] Article 32 Majority Continuation of Arbitration
After the conclusion of the last oral hearing, if an arbitrator on a three-member tribunal is unable to participate in the deliberations and/or to render the award owing to his/her demise or to his/her removal from CIETAC's Panel of Arbitrators, or for any other reason, the other two arbitrators may request the Chairman of CIETAC to replace that arbitrator pursuant to Article 31 of these Rules. After consulting with the parties and upon the approval of the Chairman of CIETAC, the other two arbitrators may also continue the arbitration proceedings and make decisions, rulings, or render the award. The Secretariat of CIETAC shall notify the parties of the above circumstances.

[15] s Zeiler v.Deitsch, 500 F.3d 157 (2nd Cir.2007)

(3.1) CFX HAD COMMITTED A MATERIAL BREACH OF THE CONTRACT

26. Under clause 15.1 of the Purchase Contract, Energy Pro had a right to suspend or terminate the Purchase Contract if CFX substantially breached a material obligation, representation or warranty, including failure to make any payment when it is due provided that seller issues Buyer notice of the breach and Buyer failed, within 30 days after receipt of the notice to either: (i) commence and diligently pursue cure of the breach, or (ii) provide reasonable evidence that the breach has not occurred[16].

27. The claimant had performed all its obligations dutifully and expected the respondent to fulfil his part of the obligation, i.e. to buy the gearboxes. Moreover, it's a violation of Article 25 of the CISG.[17]

28. The Buyer refused to make payments and committed a material breach of its contractual obligation under Article 7.2.1 of the UNIDROIT principles.

29. Hence, CFX had committed a breach of the contract, and Energy Pro can claim the contract to be avoided as under Article 64 of CISG.

(3.2) ENERGY PRO CANNOT BE HELD LIABLE FOR THE FAULT OF FUTURE ENERGY

30. As it has already been mentioned, the non conformity of goods was due to the negligence of the Engineer of Future Energy. As per vicarious liability, Future Energy is liable for this gross negligence. The respondent cannot claim that the claimant is responsible for the delivery of non confirmed goods as it was a mistake committed by the Certification Company.

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[16] Problem, Purchase Contract, Page 11
[17] HG Aargau, 26 September 1997, supra note 8; OLG Hamm, 22 September 1992, in UNILEX

31. Article 79 of CISG which is relevant provides:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he 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.

32. As per A. 79 (1), Energy Pro is exempted from any obligation because the impediment was beyond its control and could not have reasonably taken it into the account.[18] The International Chamber of Commerce, when creating a guide for its arbitrators, concluded that an "impediment" should be "some kind of obstacle which has prevented performance as normally foreseen"—a definition appearing to leave room for hardship.[19]

33. The 'impediment' was clearly beyond control of Energy Pro as it could in no way have known of the negligence of engineer in issuing of the 'fit certificate'. Actually, Future Energy failed in its obligation under the licensing agreement to check the conformity of the goods.[20]

34. Thus, Energy Pro is exempted from any failure to perform any obligation as it was due circumstances beyond its control. It performed all its obligations as per the Purchase Contract with bonafide intent. Energy Pro has validly terminated the contract.

ISSUE 4: CAN ENERGY PRO INC. CLAIM THE TERMINATION PENALTY?

35. Energy Pro Inc. is entitled to claim the termination penalty as (4.1) Energy Pro terminated the contract due to material breach committed by CFX.

(4.1) ENERGY PRO TERMINATED THE CONTRACT DUE TO MATERIAL BREACH COMMITTED BY CFX.

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[18] CIETAC-Shenzhen Arbitration (*Cysteine Monohydrate case*)
[19] International Chamber of Commerce, Force Majeure and Hardship comment 9, at 11 (1985).
[20] China 25 December 2001 CIETAC Arbitration proceeding (*DVD HiFi case*)

36. Paragraph 15.2 of the Purchase Contract states, *"In the event Energy Pro Inc. terminates the Purchase Contract as provided: (a) Energy Pro Inc. shall be entitled to retain any part payment(s) made by CFX Ltd; and (b) CFX Ltd shall pay to Energy Pro Inc. a termination penalty equal to the difference between the total value of this Purchase Contract and the value of Gearboxes already delivered to CFX Ltd as of the termination date."*

37. It is respectfully submitted that the claimant had rightfully terminated the Purchase Contract due to substantial breach of material obligation by the respondent. So, consequently, it is entitled to a termination penalty equal to the difference between the total value of this Purchase Contract and the value of Gearboxes already delivered to CFX Ltd as of the termination date.

38. Under Article 7.3.5 of UNIDROIT PICC, the claimant has a right to claim the damages even after the termination of the contract. Also, under Article 7.3.7, the claimant can claim restitution for the period after the termination of contract.

39. It is therefore submitted that the claimant is entitled to claim termination penalty from the respondents due to non performance of the Purchase Contract. In conformity with Article 7.3.7 of UNIDROIT PICC, the penalty claimed is for the period after the termination of contract. As per the Purchase Contract, CFX committed to pay a total of USD 10,000,000 over the course of 5 years. CFX has paid only USD 2,000,000 to the claimant. So, the claimant is entitled to a termination penalty of USD 8,000,000.

40. Hence, Energy Pro is entitled to claim the termination penalty due to the substantial breach committed by CFX Ltd. of the Purchase Contract.

RELIEF REQUESTED

The Claimant respectfully requests that the Arbitral Tribunal find that:

I. Energy Pro Inc. can bring Future Energy Inc. into the arbitration proceedings.

II. Ms. Arbitrator 1 can resign during the arbitration proceedings.

III. The termination of the Purchase Contract by Energy Pro Inc. is vali

IV. Energy Pro Inc. can claim the termination penalty.

1. The Termination penalty of USD 8,000,000 as damages is requested
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, CIETC Arbitration Rules.
3. CFX Ltd shall pay Energy Pro Inc. interest on the amounts set forth in item 1 from the date those expenditures were made by Energy Pro Inc. to the date of payment by CFX.