THE FOURTH INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG : JULY-AUGUST 2013

MEMORANDUM FOR RESPONDENT

Team Number: 863

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS …………………………………………………………...3

INDEX OF AUTHORITIES ………………………………………………………........5

INDEX OF CASES ……………………………………………………………….........6

ARGUMENTS

ISSUE 1: FUTURE ENERGY CANNOT BE BROUGHT INTO THE ARBITRATION PROCEEDINGS BY ENERGY PRO ………...6

1.1 Existing dispute is solely between CFX and Energy Pro………………………………...6

1.2 There is lack of consensus as regards making Future Energy a part of the arbitration…...7

1.3 There is no provision in CIETAC Rules allowing joinder of third party…………………9

ISSUE 2: MS.ARBITRATOR 1 CANNOT RESIGN DURING THE ARBITRATION PROCEEDINGS…………...10

2.1 Appointment of a replacement may not be justified in cases where interests of justice require a quick decision………………………………………………………………..10

2.2 If the arbitration agreement requires a three-person tribunal and one of the arbitrators withdraws then the question arises as to whether the remaining members (a 'truncated arbitral tribunal') can proceed to issue a binding award………………………………....11

ISSUE 3: ENERGY PRO DID NOT VALIDLY TERMINATE THE CONTRACT…………………………………...13

3.1 There was a fundamental breach on the part of Energy Pro..13

3.2 CFX has a right to avoidance...14

ISSUE 4: ENERGY PRO CANNOT CLAIM THE TERMINATION PENALTY...17

RELIEF SOUGHT...19

LIST OF ABBREVIATIONS

Ad Hoc	arranged
Art	Article
CFX	CFX Ltd.
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Convention 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
Inc.	Incorporated
Info	Information
LCIA	The London Court of International Arbitration
LLC	Limited Liability Company
Ltd	Limited
Ms.	Miss
No.	Number
Oct	October
p.	page
Para	Paragraph

Pp	page
Sciss	Sciences
UNCITRAL	United Nations Convention of International Trade Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2010
v.	Versus

LIST OF AUTHORITIES

Redfern & Hunter	Law and Practice of International Commercial Sweet & Maxwell, London 2003.
Gary Born	International Arbitration: Law and Practice, Kluwer Law International, London 2012
Yan Li	Remedies for the Breach of Contract in the International Sale Of Goods: A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases. University of Southampton Researc Repository Available at http://eprints.soton.ac.uk
H.G Beale	Chitty on Contracts 28th ed, Sweet & Maxwell Limited, London, 1999

LIST OF CASES

1. *Volt Info. Sciss. Inc. v. Board of Treasurers of Leland Stanford Junior University* 489 US 468,479(1989).
2. *Final Award in ICC Case No. 7453,* XXII Y.B. Comm. Arb. 107(1997)
3. *Republic of Columbia v Cauca Co.* 190 US 524, 47 US Sup Ct Rep 1159 (1903)
4. *Himpura California Energy Ltd and Republic of Indonesia*, Final Award (Ad Hoc UNCITRAL Proceeding, Oct 16, 1999), reprinted in (2000) XXV YCA 186, 194, 198
5. *Shaping machine case* - Award of 20 July 1993 [CISG/1993/10]
6. *Judgment by China International Economic and Trade Arbitration Commission [CIETAC] (PRC)*, China 30 October 1991[CISG/1991/04]

ARGUMENTS

1) FUTURE ENERGY CANNOT BE BROUGHT INTO THE ARBITRATION PROCEEDINGS BY ENERGY PRO

1.1. Existing dispute is solely between CFX and Energy Pro.

1.1.1) It is humbly submitted before the Arbitral Tribunal that the dispute at hand is between CFX and Energy Pro. Irrespective of a mistake on part of Future Energy, who certified the gearboxes as per requirements of gearbox model GH 2635 instead of GJ 2635 (as was required under the Purchase Contract[1]), the fact remains that it was the prerogative of Energy is Pro as per the Purchase Contract to ensure that gearboxes were in conformity with the specifications laid down in it.[2] They have clearly failed to do so. The dispute arose due to the negligent conduct of Energy Pro in carrying out its affairs, as a result of which CFX was compelled to suspend performance of the contract. Thus, Future Energy need to be made a part of the arbitration.

1.2) There is lack of consensus as regards making Future Energy a part of the arbitration

1.2.1)It is submitted before the Arbitral Tribunal that **in general**, the fundamental cornerstone of arbitration is a consensus between the parties to resolve their disputes through such an out-of-court process.[3] It can be safely said it is based on the principle that arbitration is "a matter of consent, not coercion"[4]. It is only meant to supplement litigation as an alternate process of dispute resolution and not to replace it.[5]

Conversely, what follows is that only those parties who have expressly or impliedly

[1] Claimant's Exhibit No.2.
[2] Para 2 of Defense, p.21 of Problem.
[3] Gary B. Born , *International Arbitration: Law and Practice*, Volume (Kluwer Law International 2012) ,p. 95
[4] Volt Info. Sciss. Inc. v. Board of Treasurers of Leland Stanford Junior University ; 489 US 468,479(1989).
[5] Employers' Insurance of Wasau v. Bright Metal Specialties, 251 F.3d 1316,1322(11th Circuit 2001).

agreed to submit themselves to a process of arbitration, by virtue of a pre-existing agreement or otherwise (e.g. reference) on the basis of **free consent**, can be compelled to do so.

1.2.2) In the given case, the Purchase Contract entered into by the parties does contain a dispute resolution clause[6](hereinafter referred to as "the clause"), whereby they agree to submit "any dispute arising from or in connection with [the] Purchase Contract" to arbitration.[7] It is amply clear from the wordings of the clause that the parties consented to subjecting disputes, which arose "out of or in connection with"[8] the Purchase Contract entered into by them, to arbitration . There was no express intention to subject any party apart from the signatories to the Contract to arbitration. It is expressly mentioned that " [the] arbitration agreement is binding upon both parties"[9]. Thus, it can safely inferred that at the time of entering the contract, the parties did not contemplate compelling anyone but themselves to arbitrate. The consent was restricted to subjecting all disputes that arose only between CFX and Energy Pro to arbitration.

1.2.3) Having said so, courts, tribunals and other authorities have propounded through case law certain doctrines or situations which are to be applied in exceptional circumstances , under which third party non-signatories can be compelled to arbitrate, if the facts of the case fit into the set parameters. These are as follows: the alter-ego doctrine; the Group of Companies doctrine; Estoppel ; Piercing the corporate veil; Agency; Assignment ; Assumption; Incorporation by reference; Succession; and

[6] Clause 20.1, Claimant's Exhibit No.2.
[7] Ibid
[8] Ibid
[9] Ibid

Novation[10]. However, the given facts do not fit into the parameters in any of the situations or doctrines set out above.

1.2.4) Further, the fact that Future Energy agreed to arbitrate at the "request"[11] of Energy Pro is rendered infructuous. They were not a party to the Purchase Contract , which contained the Dispute Resolution Clause, and neither were they extracting any direct benefit from it. It must be borne in mind here that the consent of CFX Ltd., along with that of Energy Pro, which is of material importance here in determining whether Future Energy can be made to arbitrate.[12] This consent is clearly absent. Energy Pro can resolve its disputes with Future Energy through a separate arbitration or any other dispute resolution mechanism as it deems fit.

1.3) There is no provision in CIETAC Rules allowing joinder of third party

1.3.1) It is finally submitted that no provision in the CIETAC rule allows for the joinder of third parties. Tribunals, such as the ICC[13] and the LCIA[14], where joinders have been allowed, have express provisions for joinder. As it stands, the position is further cemented that Future Energy cannot be joined in the arbitration proceedings between CFX and Energy Pro.

Thus in the light of the above submissions, it is humbly submitted that **Energy Pro cannot bring Future Energy into the arbitration.**

[10] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 4th ed, 2004), 3-36.
[11] Claimants Exhibit No. 9
[12] *Final Award in ICC Case No. 7453,* XXII Y.B. Comm. Arb. 107(1997)
[13] Article 22(1)(h).a
[14] Article 4.2.

2) MS. ARBITRATOR 1 CANNOT RESIGN DURING ARBITRATION PROCEEDINGS.

2.1) Appointment of a replacement may not be justified in cases where interests of justice require a quick decision.

2.1.1) It is submitted that respondents have received email addressed by the Ms. Arbitrator 1 to the President of the Arbitral Tribunal. Ms. Arbitrator 1 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.

2.1.2) Arbitrator 1 has righteously explained that the initial time allocation to her was for a period of 2 days when she accepted her appointment from CIETAC after being nominated by Energy Proc Inc. It was also intimated by her that after subsequent discussion with the arbitral tribunal and both counsels that the issue of quantum would take 5 days. Owing to the aforementioned extension the arbitrator sought deposition of additional fees into her bank account.

2.1.3) The arbitrator is not prevented de jure or de facto from fulfilling his/ her functions nor has she failed to function in accordance with the requirements of the CIETAC rules or within the time-frame mentioned within the rules, as provided for under Article 31[15].

2.1.4) Article 32[16] unequivocally lies down that, if an arbitrator owing to her demise, removal from CIETAC Panel of Arbitrators or any other reason, the other two arbitrators may seek a replacement of such an arbitrator. Furthermore the other two

---

[15] Article 31 Replacement of Arbitrator

[16] Article 32 Majority Continuation of Arbitration

arbitrators may also continue the arbitration proceedings and make decisions, rulings or render the award.

2.2) If the arbitration agreement requires a three-person tribunal and one of the arbitrators withdraws then the question arises as to whether the remaining members (a 'truncated arbitral tribunal') can proceed to issue a binding award.

2.2.1) The International Law Commission addressed the issue over fifty years ago[17], holding that, where a party appointed arbitrator withdrew without cause then this would be contrary to the principles of the International Law. The truncated arbitral tribunal could then proceed to issue a valid award and the party whose appointed arbitrator had withdrawn could not challenge this decision. This view followed the established case law involving arbitration[18]. In the instant dispute the arbitrator is to resign owing to the reluctance on part of the petitioner to cause impediment and subsequent dereliction from the due delivery of justice.

2.2.2) As the Ms. Arbitrator 1 is to 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, replacement becomes impractical. Deciding upon a replacement and allowing the new arbitrator to become familiar with the case inevitably causes delay in such a late stage. Arbitral tribunals have decided to proceed 'truncated' in several cases. The most sensational case in South-east Asia being *Himpurna California Energy Ltd v. Republic of Indonesia*[19], wherein the Indonesian government exerted considerable pressure on appointed arbitrator to withdraw. The final award of the case contains a passage stating the relevant facts and analysis of legal consequences. The

[17] (1951) II Ybk of the International Law Commission 115.
[18] Republic of Columbia v Cauca Co 190 US 524, 47 US Sup Ct Rep 1159 (1903)
19 Himpura California Energy Ltd and Republic of Indonesia, Final Award (Ad Hoc UNCITRAL Proceeding, Oct 16, 1999), reprinted in (2000) XXV YCA 186, 194, 198

conclusion of the two remaining arbitrators, relying on the published works of a well-known international jurist, was that, "it may be appropriate to continue in truncated fashion when the absence occurs during deliberations"[20].

Thus in the light of the above arguments, Ms. Arbitrator 1 be paid her additional fees and be allowed to be part of determination of quantum. If not, in such cases where a quick conclusion to the arbitration is essential, the only sensible course may be for the two remaining arbitrators to continue with the proceedings and render an award without the participation of the third arbitrator.[21] Appointment of new arbitrator shall be a very expensive and tedious process for the respondents, which may still by enlarge fail to meet the ends of justice owing to lack of involvement of the new arbitrator in initial stages of proceedings.

20 Ibid
21 Redfern and Hunter On International Arbitration, Fifth Edition, Oxford University Press, London, 2009 , pp 288 para 4.142

3.ENERGY PRO DID NOT VALIDLY TERMINATE THE CONTRACT

3.1. There was Fundamental Breach of Contract by Energy Pro.

3.1.1) The goods delivered are not in conformity with the terms in the contract therefore the seller has not acted in conformity to Article 35 of CISG.

3.1.2). Under the Purchase Contract, Energy Pro was under an obligation to deliver to CFX gearboxes of Model No. GJ 2635. However they actually sent them gearboxes of Model No. GH 2635.

3.1.3). According to Article 7.1.1 "Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance." Thus the concept of fundamental non- performance contemplates that 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.[22]

3.1.4). Paragraph (2) of Article 7.3.1 of the UNIDROIT Principles indicates a further factor to be taken into account in each single case, whether "strict compliance with the obligation which has not been performed is of essence under the contract"[23]

3.1.5). In the given case, CFX was developing wind turbines of Model No. GJ 2635, therefore they required gearboxes for the wind turbines for Model No. GJ 2635. Since

[22] Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?,*Lucia Carvalhal Sica*

[23] Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG *Robert Koch* [*] November, 2004, http://www.cisg.law.pace.edu/cisg/biblio/koch1.html

the requirements for GH 2635 wind turbines are radically different from the GJ 2635 model[24], the GH 2635 gearboxes are useless to CFX Ltd.

3.1.6). Breach of contract has the following 3 aspects. Firstly, they all require the breach of a contractual obligation as the precondition for the breach of contract. Secondly, the main remedies for the breach of contract are the discharge of the parties from further performance of the contract and damages. Thirdly, in some circumstances, the criterion for discharge is based on the seriousness of the breach.[25] Therefore, the breach of any of these terms implied by law constitutes the breach of contract, with the same effect as the breach of express terms agreed by the parties in a contract.[26] The second and third circumstance clearly discharges CFX from paying the balance amount of the Purchase Contract which is the reason Energy Pro has terminated the contract.

3.1.7). The fact that the GH 2635 gearboxes are completely useless to CFX, the seller i.e. Enegy pro has substantially deprived him of what he was expecting under the Purchase Contract i.e. gearboxes of Model No. GJ 2635. This breach is therefore a fundamental breach under Article 25 of the CISG and Article 7.3.1 of UNIDROIT.

3.2) CFX has a right to avoidance

3.2.1). Since fundamental breach of the Purchase contract occurred, CFX has a right to avoid the contract under Article 49(1) of CISG.

[24] No. 9 Clarifications
[25] Different notions are used by the three regimes to describe the meaning of discharge: 'cancellation' is used in the FECL, 'avoidance' is used in the CISG and 'termination' is used in English law.
[26] p. 41 University of Southampton Faculty of Law, Arts & Social Sciences School of Law Remedies for Breach of Contract in the International Sale of Goods – A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases By Yan Li

3.2.2) Article 39(2) of CISG contemplates that the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

3.2.3). CFX Ltd. sent Energy Pro their first notice by a letter dated 16th May, 2012 and since the goods were delivered sometime between 11 February 2012 – 13 March 2012, it is well within the two year period.

3.2.4). In the *Shaping machine case,*[27] the buyer bought two shaping machines, a JB102 and a JB105 together with some auxiliary equipment and other parts C&F from the seller. The thickness auto control system (JSW) of the JB102 and JB105 machines was not functional and the seller failed to resolve the problem for eight years since they were first tested. The arbitration tribunal held that the JSW thickness auto control system was an essential part of the shaping machine for producing quality products. The defects on such an essential feature of the machine and the seller's failure to cure the defects for an unreasonable period of time amounted to a fundamental breach of contract. The injured buyer was held to be entitled to avoid the contract by returning the goods to the seller, a refund of the price paid and the recovery of damages resulting from the seller's breach.

3.2.5). Suspension of contract has the same effects as termination or avoidance of a contract, it just offers the seller an opportunity to remedy the situation. By suspending

[27] Award of 20 July 1993 [CISG/1993/10] (*Shaping machine case*)

the contract CFX gave Energy Pro an opportunity to remedy the situation. However Energy Pro neither remedied nor made any effort towards remedying the situation, therefore the contract would stand terminated and CFX would not be liable to pay the balance amount since it would be discharged of its obligations.

3.2.6). Thu the Purchase Contract would be avoided or terminated unilaterally by CFX Ltd according to Article 49 of CISG[28] and therefore Energy Pro Inc.'s termination and reason for termination of the Purchase contract is not valid.

[28] Article 49 (1) (a) of CISG

4. ENERGY PRO CANNOT CLAIM TERMINATION PENALTY

4.1). From the above argument, it is clearly proved that Energy Pro did not validly terminate the contract since they are the ones who breached the Purchase Agreement. They did not even offer any way to remedy the situation. Thus Energy Pro Inc. cannot claim the termination penalty.

4.2) .It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that one or both parties desire the return of that which he has already supplied or paid under the contract.[29]

4.3) Thus, for parties that have wholly or partially performed their contractual obligations, the first sentence of Art. 81(2) *creates a right* to claim restitution from the other side of whatever the party has "supplied or paid under the contract."[30]

4.4) CFX made the first part payment of USD 2,000,000 to Energy Pro Inc. after the delivery of the defective gearboxes was received by them.

4.5) On the other hand, the second sentence of Art. 81(2) emphasizes that, where both parties are required under the first sentence of the provision to make restitution (*i.e.*, where both parties have "supplied or paid" something under an avoided contract), then *mutual restitution* is to be made "concurrently."[31]Consistent with the principle of mutual restitution,

---

[29] Comment 7 of Secretariat Commentary on Art. 66 of the 1978 Draft *[draft counterpart of CISG article 81]*
[30] UNCITRAL Digest 5 on CISG Art. 81
[31] UNCITRAL Digest 8 on CISG Art. 81

the Tribunal in[32] has ordered simultaneous restitution of the goods by an avoiding buyer and restitution of the price by a breaching seller.[33]

4.6) . Therefore CFX Ltd. can validly claim restitution of the first part payment which is of USD 2,000,000 and is entitled to receive the same since they have conformed to the Contract even though Energy Pro has not and is under no obligation to make any future payment since they have been discharged from performing the contract due to fundamental non-performance of the contract by Energy Pro.

---

[32] China 30 October 1991 CIETAC Arbitration award

[33] *See* Judgment by China International Economic and Trade Arbitration Commission [CIETAC] (PRC), China 30 October 1991; No.: CISG/1991/04: 19 *Journal of Law & Commerce* (2000) 283-293. English translation by *Yu Weizhong and Frank N. Fisanich*; available at: <http://www.cisg.law.pace.edu/cases/911030c1.html>.

RELIEF REQUESTED

1. The Respondent respectfully requests that the Arbitral Tribunal find that:

I. Future Energy cannot be brought into the arbitration proceedings by Energy Pro;

II. Ms. Arbitrator 1 cannot resign during arbitration proceedings;

III. Energy Pro did not validly terminate the contract;

IV. Energy Pro Cannot claim termination penalty. Instead CFX can claim an amount towards restitution to the tune mentioned above.