THE INTERNATIONAL ADR MOOTING COMPETITION

HONGKONG 2013

MEMORANDUM FOR CLAIMANT

968C

TEAM NUMBER 968

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INDEX OF ABBREVIATIONS

AfA	Application for Arbitration
Art.	Article
CIETAC	China International Economic Trade and Arbitration Commission
Cl. Ex.	Claimant Exhibit No.
Claimant	Energy Pro Ltd.
Clarifications	Procedural Order No. 2
Contract	Purchase Contract
FE	Future Energy Inc.
Ibid.	Ibidem, "in the same place"
ICAC	International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation
ICC	International Court of Arbitration of the International Chamber of Commerce
JV	Joint Venture
LCIA	London Court of International Arbitration
No.	Number

p./pp.	page/pages
para./paraa.	paragraph/paragraphs
Q.	Question
Resignation	Resignation of Ms. Arbitrator 1
Respondent	CFX Ltd.
SIAC	Singapore International Arbitration Centre
SoD	Statement of Defense
Tribunal	Arbitral Tribunal
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF LEGAL INSTRUMENTS

CIETAC Rules	CIETAC Rules (2012)
Fee Schedule	Arbitration Fee Schedule of CIETAC (2012)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
ICC Rules	ICC Rules of Arbitration (2012)
LCIA Rules	LCIA Rules (1998)

NY Convention	Convention on the Recognition and Enforcement of Arbitral Awards (1958)
PICC	UNIDROIT Principles of International Commercial Contracts (2010)
PRC Arbitration Law	Arbitration Law of the People`s Republic of China (1994)
SIAC Rules	SIAC Rules (2013)

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Andersen	Camilla Baasch Andersen, Reasonable Time in Article 39 (1) of the CISG - Is Article 39 (1) Truly a Uniform Provision? (University of Copenhagen: Pace essay submission 1998)
Born	Gary Born, International Arbitration: Law and Practice (Kluwer Law International 2009)
Hanotiau	Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (Kluwer Law International 2006)
Kröll/Mistelis/Perales Viscasillas	Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, UN Convention on Contracts for the Sale of Goods (CISG) (Beck 2011)

Lew/Mistelis/Kröll	Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003)
Schlechtriem/Schwenzer	Peter Schlechtriem, Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Third Edition (Oxford University Press 2010)
Vogenauer/Kleinheisterkamp	Stefan Vogenauer, Jan Kleinheisterkamp, Commentary on the Principles of International Commercial Contracts (Oxford University Press 2009)
Zuberbühler/Müller/Habegger	Tobias Zuberbühler, Klaus Müller, Philipp A. Habegger (eds), Swiss Rules of International Arbitration: Commentary (Kluwer Law International 2005)

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France:

Jaguar	Société V 2000 v. société Project XJ 220 ITD et autres, Cour d'appel de Paris (1994), Revue de l'Arbitrage, (Comité Français de l'Arbitrage 1996 Volume 1996 Issue 2), pp. 245 – 249
Korsnas	Société Korsnas Marma v. société Durand-Auzias, Cour d'appel de Paris (1988), Revue de l'Arbitrage, (Comité

	Français de l'Arbitrage 1989 Volume 1989 Issue 4), pp. 691 – 691
SMBTAP	SMABTP et autre v. société Statinor et autres, Cour d'appel de Paris (1995), Revue de l'Arbitrage, (Comité Français de l'Arbitrage 1997 Volume 1997 Issue 4), pp. 550 – 551

Germany:

Mussels	Bundesgerichtshof, VIII ZR 159/94 (1995)

Switzerland:

Blood Infusion	OG des Kantons Luzern, 11 95 123/357 (1997)

USA:

Fischer	Jerry Fischer v. Queens Telephone Secretary Inc., 106 A.D.2d 314 (1st Dep't 1984)
Gvozdenovic	Court of Appeals, Second Circuit, Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir. 1991)

ICAC:

ICAC 134/2002	ICAC Case No. 134/2002 (2003)

ICC:

ICC 8962	ICC Case No. 8962 (1997)
ICC 9593	ICC Case No. 9593 (1998)
ICC 9083	ICC Case No. 9083 (1999)
ICC 9771	Final Award in ICC Case No. 9771 (2004), Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2004 - Volume XXIX, Volume XXIX (Kluwer Law International 2004), pp. 46 – 65

PROCEDURAL ARGUMENTS

I. FE CAN JOIN THE ARBITRAL PROCEEDINGS

1. Consent of all the parties involved is required to bind a non-signatory party to the agreement. This consent can be expressed not only explicitly, but also impliedly [*Hanotiau, p. 32*]. Both are equally suitable to determine the intentions of the parties. In order to discern implied consent, it is necessary to analyse the conduct or non-explicit declarations of the parties [*Gvozdenovic*].

A. FE is actively involved in the performance of the Contract

2. Active involvement of the non-signatory party in the performance of a contract strongly indicates the consent of the parties to bind it to the arbitration agreement [*Born, pp. 1150-1151; Jaguar*]. This indication is strengthened if the non-signatory party repeatedly participates in the performance of the main contractual obligations [*ICC 9771*]. Even more so, if the involvement is crucial and indispensable to the fulfilment of the contract.

3. Pursuant to Clause 1 of the Contract, Respondent is obligated to purchase from Claimant, and Claimant is obligated to sell to Respondent minimum quantities of 1.5 MW wind turbine gearboxes at fixed prices over a 5 year period. These are the main obligations of the Contract. However, before Claimant can deliver aforementioned gearboxes to Respondent, it has to obtain certified approval from FE that the shipped

gearboxes are in conformity with the standards required under Clause (A) of the Contract [*Cl. Ex. 2, Clause 10.2*]. FE's corresponding obligation to provide such an approval arises from an ancillary agreement, concluded by FE, Claimant and Respondent [*Clarifications, Q. 13*].

4. Consequently, Claimant cannot fulfil its main contractual obligation without the cooperation of FE. Furthermore, pursuant to Clause 1.2 of the Contract, gearboxes will be delivered at least 5 times over a 5 year period. This requires FE to certify no less than 5 deliveries over an extensive period of time.

5. FE is significantly involved in the performance of the main obligations of both Claimant and Respondent. FE's certification of the gearboxes is indispensable for the performance of the Contract. Without FE, the Contract cannot be fulfilled. Claimant and Respondent must have foreseen that certain disputes arising from the Contract could only be resolved by including FE in the arbitral proceedings.

6. Consequently, FE's active involvement in the performance of the Contract constitutes the implied consent of Claimant, Respondent and FE to arbitrate this dispute in a single proceeding. Hence, it would be unconscionable for Respondent to claim that FE has no legal standing in the proceedings [*SoD, Defense, para. 5*].

B. FE's conduct confirms its intention to be bound by the Arbitration Agreement

7. If a non-signatory party is aware of the existence and the scope of the arbitration clause in addition to being directly involved in the performance of the contract, this indicates the party's intention to be bound by the Arbitration Agreement [*Korsnas; SMBTAP*]. As set out above, FE is substantially involved in the performance of the Contract and

entered into an ancillary agreement to which Claimant and Respondent are parties to. Moreover, FE is also explicitly mentioned in the Contract [*Cl. Ex. 2, Clause (A), para. 1; Clause 10.2*].

8. Furthermore, when asked to join the arbitration [*Cl. Ex. 9*], FE did not raise any objections. Instead, it promptly agreed. Contrary to the accusations of Respondent, FE's consent was not obtained under duress. Claimant merely notified FE of the commencement of legal proceedings that could affect it and suggested that FE should join the arbitration in order to secure its own interests [*Cl. Ex. 9*].

9. The consent to arbitrate of FE, Claimant and Respondent can be inferred from the facts and circumstances. Therefore, FE is party to the Arbitration Agreement, and should be permitted to join the arbitral proceedings.

II. MS. ARBITRATOR 1 CAN RESIGN

A. CIETAC Rules permit Ms. Arbitrator 1 to resign

10. Pursuant to Clause 20.1 of the Contract [*Cl. Ex. 2*] CIETAC Rules are the rules governing the arbitral proceedings. Art. 31 CIETAC Rules states that in the event that an arbitrator is *de jure* or *de facto* prevented from fulfilling his functions, or fails to fulfil his functions, the arbitrator can be removed and replaced by the Chairman of CIETAC or he may also voluntarily withdraw from his function. Ms. Arbitrator 1 can thus voluntarily tender her resignation. It is not in the best interest of Claimant and Respondent to force her to continue; it is better to replace her with a more co-operative arbitrator [*Lew/Mistelis/Kröll, p. 318*].

11. *De facto* impossibility means that an arbitrator becomes unable to perform his functions due to any reason beyond his control [*Zuberbühler/Müller/Habegger, pp. 127-136*]. Ms. Arbitrator 1 accepted the appointment under the condition that the allocated time for quantum would add up to 2 days. When she agreed to arbitrate she was legitimately expecting the hearing to last for 2 days. Accordingly, when the circumstances changed she was *de facto* prevented from fulfilling her functions. The extension of time to more than double of the originally allocated time is clearly beyond Ms. Arbitrator 1`s control and permits her to resign.

12. Should the Chairman of CIETAC assume that Ms. Arbitrator 1 is not *de facto* or *de jure* prevented from fulfilling her functions, certainly the third alternative of Art. 31 (1) CIETAC Rules is applicable. By not appearing at the additionally allocated 3 days of quantum, Ms. Arbitrator 1 is definitely going to fail to fulfil her functions and is therefore able to resign. However, her resignation will not in any way affect the validity of the arbitral proceedings or the award.

B. Ms. Arbitrator 1's resignation is in conformity with international principles of arbitration

13. Not only pursuant to the CIETAC Rules are arbitrators given the right to resign, but resignation is also in accordance with international principles of arbitration, reflected in other leading institutional rules [*ICC Rules, Art. 15 (1); LCIA Rules, Art. 10 (1); SIAC Rules, Art. 14 (1)*] and national laws [*English Arbitration Act, 1996, Section 25 and the German Code of Civil Procedure, Section 1038*]. All these rules and laws reflect the international acceptance of the resignation of an arbitrator.

C. Ms. Arbitrator 1 should not be paid additional fees

14. Art. 12 (3) CIETAC Rules stipulates that Claimant shall make payment of the arbitration fee in advance pursuant to CIETAC's Fee Schedule. According to the said Schedule, the arbitration fee includes both the administrative fee of CIETAC and the costs of the arbitrator's fees and expenses.

15. Claimant has already transferred the requisite arbitration fee to the bank account of CIETAC in Beijing [*AfA*]. By doing this, Claimant has fulfilled its duty according to Art. 12 (3) CIETAC Rules. The already transferred money covers fees and expenses. Hence, Claimant need not pay any additional fees.

16. Furthermore, Claimant must not pay additional fees, because paying the requested sum to Ms. Arbitrator 1 would make her partial as she would be paid more than the other two arbitrators. Claimant is interested in having an impartial Tribunal to receive an enforceable award that cannot be challenged due to any violation of due process.

17. Moreover, a US court when reviewing an arbitral award found that discussions among the arbitrator and the parties regarding fees during the arbitration may require the annulment of an arbitral award [*Fischer*]. Even though bias was not proven, the court concluded that *the arbitrator's concern about his fees clearly infects the impartiality of the proceeding* [*Ibid.*]. As indicated above, the Chairman of CIETAC should not ignore the important fact that the dispute regarding the requested fee might result in a biased award, which would lead to the setting aside of the award under Chapter V PRC Arbitration Law or refusal of recognition and enforcement under Art. V NY Convention.

18. Considering that both ways, by paying and by rejecting payment, the financial issue would raise concerns about the partiality of Ms. Arbitrator 1, the best solution is to permit her to resign.

19. In any case, if Ms. Arbitrator 1 wants to resign, there is no way she can be forced to stay nor can her resignation be challenged. No power is given to CIETAC or, even less, to one party of an arbitration to force an arbitrator to continue to serve.

20. Taking into account all the above mentioned arguments, the resignation of Ms. Arbitrator 1 is not only in conformity with the CIETAC Rules and international principles of arbitration and therefore possible, but it is also necessary and unavoidable considering the risk of partiality.

ARGUMENTS ON THE MERITS

III. CLAIMANT VALIDLY TERMINATED THE CONTRACT

21. Pursuant to Clause 29.1 of the Contract, the governing law is the PICC supplemented by the CISG in matters which are not covered by the PICC.

22. Clause 15.1 of the Contract states that Claimant is entitled to terminate the Contract should Respondent substantially breach a material obligation, including the failure to make any due payment. In case of a breach, Claimant has to send a written notice of termination to Respondent.

23. By defaulting on the second and third part payment, Respondent substantially breached a material obligation required under Clause 1.2 (b) (i) of the Contract. Subsequently, Claimant sent the notice of termination to Respondent [*Cl. Ex. 8*]. As Respondent

neither remedied the breach, nor provided evidence that the breach had not occurred within 30 days [*Cl. Ex. 2, Clause 15.1*], Claimant validly terminated the Contract.

A. Respondent cannot suspend the Contract and withhold payment since it failed to inform Claimant of the non-conformity of the goods

24. Pursuant to the Contract [*Cl. Ex. 2, Clause 15*] only Claimant has the right to suspend or terminate the Contract. Therefore, Respondent can only withhold its performance according to the PICC, supplemented by the CISG.

25. Art. 39 CISG obligates the buyer to give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. If he does not comply, he loses all remedies he would be entitled to under Art. 45 CISG, including the right to suspend the Contract and withhold payment [*Kröll/Mistelis/Perales Viscasillas, Art. 39, para. 100; Art 45; paraa. 4-14; ICC 9083*].

26. The inclusion of FE as an independent certification company does not release Respondent from the duty to examine the goods and notify as required by the Contract [*Cl. Ex. 2, Clause 1.2 (b) (iii)*]. By transferring the first part payment [*AfA, para. 10*], Respondent accepted the gearboxes.

27. Even if the Tribunal finds that this payment does not constitute an acceptance, Respondent still did not give notice of non-conformity of the gearboxes within a reasonable time. Respondent should have issued a notice after having received the goods. The gearboxes were received sometime between 11 February and 13 March 2012. Respondent sent the first email expressing concerns about the goods on 16 May 2012 [*Clarifications, Q. 16*].

28. In *ICC 9083* an overall period of 14 days was considered reasonable for examination and notification of conformity. Moreover, leading cases [*ICC 8962; Mussels; Blood Infusion*] and prominent scholars [*Andersen, at VI (3); Schlechtriem/Schwenzer, Art. 39, para. 17*] consider a period of one month for giving notification as a reasonable time.

29. Respondent notified Claimant only 95, respectively 64, days after having received the goods. This clearly exceeds the reasonable time limit for notification. It is true that FE informed Claimant and Respondent of the non-conformity of the gearboxes [*Cl. Ex. 3*]. However, this also happened after the reasonable time limit had elapsed (i.e. somewhere between 67 and 36 days after having received the goods) [*Schlechtriem/Schwenzer, Art. 39, para. 36*]. Finally, in the case at hand no special circumstances could justify an extension of the period for notification.

B. Respondent cannot withhold payment under Art. 7.3.4 PICC

30. Art. 7.3.4 PICC entitles a party, which reasonably believes that there will be a fundamental non-performance by the other party, to demand adequate assurance of due performance and meanwhile withhold its own performance.

31. The fact that Claimant once delivered gearboxes which were not in conformity with the Contract due to FE's negligence [*Cl. Ex. 3*] does not in any way indicate that Claimant will not properly perform its obligations under the Contract in the future. Claimant has always conducted itself with the utmost diligence, and even offered to engage another certification company solely selected by Respondent [*Cl. Ex. 5*]. This could have easily ensured proper performance of the Contract. Claimant thus demonstrated how it intends to avoid delivering defective goods in the future [*Vogenauer/Kleinheisterkamp, Art. 7.3.1, para. 50*]. Consequently, Respondent had no reason to believe that there would be

a fundamental non-performance by Claimant in the future. Hence, Respondent's suspension of the Contract could not be justified under Art. 7.3.4 PICC.

C. Lack of Respondent's cooperation contributed to the termination of the Contract

32. Art. 5.1.3 PICC requires each party to cooperate with the other party if such co-operation can be reasonably expected for the performance of that party's obligations [*ICC 9593*].

33. Claimant acknowledged Respondent's concerns and was seeking dialogue when it found out about FE's certification mistake [*Cl. Ex. 5*]. However, in response to Claimant's attempt to find an amicable solution, Respondent invalidly declared the suspension of the Contract [*Cl. Ex. 6*]. Subsequently, as Respondent was falling behind with two due payments, Claimant sent two default notices and informed Respondent of the possible consequences of its failure to pay [*Cl. Ex. 7*]. Respondent did not react at all. Had Respondent cooperated with Claimant, the termination of the Contract could have been prevented.

IV. CLAIMANT IS ENTITLED TO THE TERMINATION PENALTY

34. As shown above, Claimant validly terminated the Contract. Hence, pursuant to Clause 15.2 (b) of the Contract, Claimant is entitled to a termination penalty of USD 8,000,000. This sum is equal to the difference between the total value of the Contract [*USD*

10,000,000] and the value of gearboxes already delivered to Respondent as of the termination date [*USD 2,000,000*]. Furthermore, according to Clause 15.2 (a) of the Contract, Claimant legitimately withheld the payment made by Respondent [*AfA, para. 10*].

A. Clause 15.2 of the Contract is in conformity with Art. 7.4.13 (1) PICC

35. Art. 7.4.13 (1) PICC permits to include a termination penalty clause which provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance. Furthermore, the aggrieved party is entitled to such penalty, irrespective of its actual harm.

36. Pursuant to Clause 15.2 of the Contract, Claimant has the right to demand Respondent to pay a termination penalty in case of Respondent's failure to make payment. Moreover, the termination penalty is specified, since it can be easily calculated through the formula provided for in the aforementioned clause.

37. Furthermore, according to the principle of *pacta sunt servanda* incorporated into Art. 1.3 PICC, Respondent must abide by the Contract and pay the agreed termination penalty. Both, Claimant and Respondent were equal partners in the negotiation and drafting of the Contract [*Vogenauer/Kleinheisterkamp, Art. 7.4.13, para. 18*] and agreed on the termination penalty clause and the specified sum therein.

B. The termination penalty is reasonable and therefore not subject to reduction

38. The termination penalty may only be reduced under Art. 7.4.13 (2) PICC if it is grossly excessive in relation to the harm resulting from the non-performance and to other circumstances. The gross excessiveness of the termination penalty would have to be absolutely clear to any reasonable person [*PICC Commentary, Art. 7.4.13, para. 3; Vogenauer/Kleinheisterkamp, Art. 7.4.13, para. 17*].

39. The termination penalty in the Contract corresponds to the actual harm resulting from the non-performance. Due to Respondent's non-performance, Claimant terminated the Contract and lost USD 8,000,000. This loss has grave repercussions on Claimant, since it devised its future business plans expecting this income.

40. Furthermore, Claimant's plans to develop its business in Catalan [*AfA, para. 2*] are obstructed due to the dispute with Respondent. It will take significant time to find new business partners and start being productive again. Moreover, irreparable damage has been inflicted on Claimant's reputation. This will make it even more difficult for Claimant to conduct its usual business, since the trust in Claimant as a reliable company is shaken by the termination of the Contract and the possible failure of the JV [*PICC Commentary, Art. 7.4.3, para. 5*].

41. Additionally, a termination penalty is only grossly excessive when it is highly disproportionate to the inflicted harm, as it was in case *ICAC 134/2002* where the termination penalty amounted to no less than 487% of the contract price. The termination penalty in the case at hand does not even amount to 100% of the total value of the Contract.

42. Should the Tribunal decide on a reduction of the termination penalty, the contractually agreed amount still has to be taken into account as an expression of Claimant's and Respondent's intent [*Vogenauer/Kleinheisterkamp, Art. 7.4.13, para. 16*].

43. All these arguments clearly prove that Claimant is entitled to the termination penalty as defined in the Contract. The termination penalty is not grossly excessive. Furthermore, should the Tribunal decide on a reduction, the termination penalty already agreed upon should not be disregarded, but taken as reference for determining the reasonable amount.

RELIEF REQUESTED

Claimant requests the Tribunal to declare that:

1. Respondent shall pay to Claimant USD 8,000,000 in damages;

2. In the alternative, should the Tribunal find that the first payment of Respondent should be returned to Respondent, Respondent shall pay to Claimant USD 10,000,000;

3. Respondent shall pay the costs of arbitration, including Claimant's expenses for legal representation, the arbitration fee paid to CIETAC and the additional expenses of the arbitration as set out in Art. 50 CIETAC Rules;

4. Respondent shall pay Claimant interest on the amounts set forth in item 1 from the date those expenditures were made by Claimant to the date of payment by Respondent.