THE INTERNATIONAL ADR MOOTING COMPETITION

HONGKONG 2013

MEMORANDUM FOR RESPONDENT

968R

TEAM NUMBER 968

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS iii

INDEX OF LEGAL INSTRUMENTS iv

INDEX OF AUTHORITIES v

INDEX OF CASES vi

PROCEDURAL ARGUMENTS 1

I. CLAIMANT CANNOT BRING FE INTO THE ARBITRATION PROCEEDINGS ... 1

A. No provisions of the Arbitration Agreement and its applicable laws enable a joinder 1

B. The Arbitration Agreement deliberately excludes the possibility for FE to join the proceedings 2

C. Bringing FE into the arbitral proceedings could significantly lower its efficiency and cause serious procedural difficulties 3

II. MS. ARBITRATOR 1 CANNOT RESIGN 4

A. Ms. Arbitrator 1's resignation is not in conformity with CIETAC Rules 4

B. Ms. Arbitrator 1's resignation violates Ethical Rules 4

C. Claimant shall pay additional fees to Ms. Arbitrator 1 5

ARGUMENTS ON THE MERITS 6

III. CLAIMANT DID NOT VALIDLY TERMINATE THE CONTRACT 6

A. Termination by Claimant was not possible since Respondent had already validly suspended the Contract 6

B. Respondent validly withheld the subsequent payments 8

C. Even if suspension is invalid, Claimant cannot rely on Respondent's non-performance to terminate the Contract 9

IV. CLAIMANT IS NOT ENTITLED TO CLAIM THE TERMINATION PENALTY . 9

A. The provision regarding the termination penalty can be avoided by Respondent..... 10

B. The termination penalty is grossly excessive 10

C. Claimant should have mitigated the losses..... 11

RELIEF REQUESTED 13

INDEX OF ABBREVIATIONS

AfA	Application for Arbitration
Art.	Article
CIETAC	China International Economic Trade and Arbitration Commission
Cl. Ex.	Claimant Exhibit No.
Clarification	Procedural Order No. 2
Contract	Purchase Contract
FE	Future Energy
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
No.	Number
p./pp.	page/pages
para./paraa.	paragraph/paragraphs
Q.	Question
SoD	Statement of Defense

Tribunal	Arbitral Tribunal
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF LEGAL INSTRUMENTS

CIETAC Rules	CIETAC Arbitration Rules (2012)
CIETAC's Code of Conduct	Code of Conduct for Arbitrators of CIETAC (1994)
CIETAC's Evaluation Rules	Rules for Evaluating the Behavior of Arbitrators of CIETAC (2009)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Fee Schedule	Arbitration Fee Schedule of CIETAC (2012)
IBA Rules	IBA Rules of Ethics for International Arbitration (1964)
MAL	UNCITRAL Model Law on International Commercial Arbitration (as amended 2006)
NY Convention	New York Convention (1958)

PICC	UNIDROIT Principles of International Commercial Contracts (2010)
PRC Arbitration Law	Arbitration Law of the People's Republic of China (1994)

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Born	Gary Born, International Arbitration: Law and Practice (Kluwer Law International 2012)
Böckstiegel	Karl-Heinz Böckstiegel, "Case Management by Arbitrators: Experiences and Suggestions", in Robert Briner, Gerald Aksen et al (eds.), Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of (ICC Publishing 2005)
Tao	Jingzhou Tao, Arbitration Law and Practice in China, Third Edition (Kluwer Law International 2012)
Kröll/Mistelis/Perales Viscasillas	Stefan Kröll, Loukas A. Mistelis, Pilar Perales Viscasillas, UN Convention on Contracts for the Sale of Goods (CISG) (Beck 2011)
Redfern/Hunter	Alan Redfern, J. Martin Hunter, Redfern and Hunter on International Arbitration (Oxford University Press 2009)

Ripinsky	Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law 2008)
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Nadal	Nadal Nicolau, Carlos A. c. Departamento General de Irrigación Suprema Corte de Justicia de la Provincia de Mendoza (2001)

Finland:

Helsinki 28.01.1998	Ad hoc Arbitration, Helsinki, Arbitral Award (1998)

United Kingdom:

Adgas	UK No. 13, Eastern Bechtel Corporation v. Chiyoda Chemical Engineering & Construction Company Ltd., Abu Dhabi Gas Liquefaction Company Ltd. v. Eastern Bechtel Corporation, and Chiyoda Chemical Engineering & Construction Company Ltd. and others, Court of Appeal (1982)
C v D	C v D (2007) England and Wales Court of Appeal, Civil Division 1282 (2007)

ICAC:

ICAC 88/2000	ICAC Case No. 88/2000 (2001)
ICAC 229/1996	ICAC Case No. 229/1996 (1997)

ICC:

ICC 09.10.2006	ICC Case of 09.10.2006 (2006)
ICC 8547	ICC Case No. 8547 (1999)
ICC 8817	ICC Case No. 8817 (1997)
ICC 9594	ICC Case No. 9594 (1999)

ICC 9797	ICC Case No. 9797 (2000)

UNCC:

UNCC S/AC.26	United Nations Compensation Commission, Panel of the Commissioners, Panel F1, Recommendation S/AC.26

PROCEDURAL ARGUMENTS

I. CLAIMANT CANNOT BRING FE INTO THE ARBITRATION PROCEEDINGS

A. No provisions of the Arbitration Agreement and its applicable laws enable a joinder

1. The Arbitration Agreement the Parties entered into does not provide for any regulation enabling a third party to join the arbitral proceedings [*Cl. Ex. 2, para. 20.1*]. Furthermore, the CIETAC Rules, which are applicable according to the Arbitration Agreement [*Cl. Ex. 2, para. 20.1*], do not expressly allow a third party to join the arbitration. Moreover, there are no CIETAC cases indicating otherwise.

2. A third party could only be brought into the arbitration pursuant to Art. 4 (3) CIETAC Rules. It provides that the CIETAC Rules may be modified as long as all participating parties agree on such a modification. However, there has been no agreement of the Parties on any such modification in the case at hand.

3. The Parties chose Beijing as the seat of the arbitration in their Arbitration Agreement, thus the PRC Arbitration Law applies as the governing law of the arbitration [*C v D case; Redfern/Hunter, 3.16*]. The PRC Arbitration Law does not provide for any regulation regarding joinder either.

4. In addition, as Chinese courts have a conservative and formalistic approach, they are likely to put emphasis on the protective aspect of the formal requirements of an arbitration agreement. Thus, they would be reluctant to extend the binding effect of an arbitration agreement to non-signatory parties, except in case of gross abuse of rights

[*Tao, p. 53*]. Therefore, if the Award was challenged according to Art. 58 (1) PRC Arbitration Law, the Chinese Courts would most probably arrive to the conclusion that there was no arbitration agreement between the Parties and FE. Consequently, the Award would be cancelled.

B. The Arbitration Agreement deliberately excludes the possibility for FE to join the proceedings

5. Given party autonomy, both Parties had the chance to provide for the possibility to include a regulation on joinder in the Arbitration Agreement, as FE's role was already clear at the time of its conclusion. However, the Parties left such regulation out of the Arbitration Agreement. Furthermore, as indicated above the arbitration rules chosen by the Parties do not provide for joinder at all. Thus, the Parties deliberately excluded the possibility for FE to join the arbitration proceedings, and it is the duty of the Tribunal to respect the Parties' intention.

6. This conclusion is also supported by case law. Party autonomy was subject to the *Boeing* case decided by a U.S. Court which stated that a court is not permitted to interfere with private arbitration arrangements of the parties. Should they wish to have all disputes arising from the same factual situation arbitrated in a single proceeding, they shall provide for consolidation in their arbitration clauses [*Born, p. 223*]. This judgment shows that the contractual autonomy of the parties should be strictly respected.

7. Moreover, during the negotiations of the Contract, including the Arbitration Agreement, the proposals put forward by Respondent were mostly ignored or rejected. The substantial majority of the provisions was proposed by Claimant [*SoD, Defense, para.*

1]. Therefore, had Claimant considered FE as a possible third party, a regulation enabling it to join the arbitration could have been easily included in the Contract. This clearly shows that it was not Claimant's intention to include FE in its legal relationship with Respondent.

8. A similar dispute was subject of an English Court decision. In the *Adgas* case the court ruled that if there is no cross reference clause in the actual arbitration clauses of multiple contracting parties, separate arbitration proceedings have to be conducted. The agreement between the Parties and FE [*Clarifications, Q. 13*] did not even contain an arbitration clause let alone a cross-reference clause, as Claimant intended to resort to litigation had FE not agreed to join the arbitral proceedings [*Clarifications, Q. 4*]. Therefore, FE cannot join these proceedings.

C. Bringing FE into the arbitral proceedings could significantly lower its efficiency and cause serious procedural difficulties

9. In comparison to simple two-party proceedings, allowing a joinder is likely to prolong the proceedings and thus delay enforcement of Respondent's rights [*Born, p. 221*].

10. In addition, the Tribunal has already been constituted. Should FE join the arbitration proceedings it would not have the possibility to appoint an arbitrator. This could raise serious concerns with respect to the fairness of the appointment of arbitrators and consequently also to the fairness of the proceedings [*Born, p. 228*].

II. MS. ARBITRATOR 1 CANNOT RESIGN

A. Ms. Arbitrator 1's resignation is not in conformity with CIETAC Rules

11. Art. 31 CIETAC Rules states that if an arbitrator is *de jure* or *de facto* prevented from fulfilling his functions, the arbitrator can be removed and replaced or he may also voluntarily withdraw from his office. There are neither legal nor factual reasons beyond Ms. Arbitrator 1's control preventing her from participating in the proceedings. Ms. Arbitrator 1 is not only able, but willing to remain on the panel. There is no actual hindrance that prevents her from doing so. She simply wants the agreement between Claimant and her to be adapted to the changed circumstances. It is only just that she should be properly compensated for her services.

12. Furthermore, a replacement of Ms. Arbitrator 1 in the middle of the hearing on quantum would cause significant delay, thus generating additional costs. The newly appointed arbitrator would require considerable time to become acquainted with the case. Moreover, the repetition of the first two days of the hearing on quantum might also become necessary.

B. Ms. Arbitrator 1's resignation violates Ethical Rules

13. In international arbitration, arbitrators should be impartial, independent, competent, diligent and discreet. Ethical Rules seek to establish the manner in which these abstract qualities may be assessed in practice.

14. This is expressed in Art. 7 CIETAC's Code of Conduct which states that an appointed arbitrator shall ensure his availability in respect to the oral hearings and Tribunal

deliberation [*Tao, p. 317*]. According to Art. 2 CIETAC's Evaluation Rules, an arbitrator shall strictly abide by CIETAC's Code of Conduct. Ms. Arbitrator 1 should therefore have ensured her availability when accepting her appointment.

15. Further, according to Art. 2.3 IBA Rules – which reflect internationally accepted standards of ethical conduct for the guidance of arbitrators – an arbitrator may only accept an appointment if he is able to grant to the arbitration the time and attention that the parties are reasonably entitled to expect.

16. The wide acceptance of the position expressed in the Ethical Rules is also shown by the opinion of leading scholars on international arbitration like Karl-Heinz Böckstiegel, who also suggested that arbitrators should only accept an appointment if they can be sure of having enough time available to deal thoroughly with all the work and meetings [*Böckstiegel, 116*].

17. At the beginning of the arbitral proceedings it is impossible to determine with utter certainty the exact amount of time they will take. A prolongation is not uncommon in international commercial arbitration. Therefore, Ms. Arbitrator 1 should have anticipated before accepting her appointment that more time would be required than initially allocated. Especially, since three additional days for quantum certainly do not constitute an unreasonable prolongation of the arbitral proceedings.

C. Claimant shall pay additional fees to Ms. Arbitrator 1

18. It follows from the above that Ms. Arbitrator 1 shall not be allowed to resign. However, as she seeks to obtain additional fees, the Tribunal must take Art. 72 (1) CIETAC Rules into consideration, pursuant to which Parties shall have to pay extra and reasonable

costs in addition to the arbitration fee charged in accordance with the Fee Schedule. For instance, an arbitrator can even be granted a special remuneration.

19. The originally allocated time for the issue of quantum was only 2 days. In fact, 5 days will be needed for the deliberation of this issue. This means that Ms. Arbitrator 1 will have to devote more time and work to render the award. Should the Parties wish to guarantee the efficiency of the Tribunal, Ms. Arbitrator 1 should stay on and be reimbursed for her additional time and work.

20. Taking all these arguments into account, the resignation of Ms. Arbitrator 1 would not be in conformity with neither the CIETAC Rules nor CIETAC's Code of Conduct and IBA Rules. Hence, she is required to remain on the panel and be granted the additional fees so that the efficiency of the Tribunal is guaranteed.

ARGUMENTS ON THE MERITS

III. CLAIMANT DID NOT VALIDLY TERMINATE THE CONTRACT

A. Termination by Claimant was not possible since Respondent had already validly suspended 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. The gearboxes sent to Respondent were not in conformity with the Contract. Claimant did not deliver Model No. GJ 2635, but Model No. GH 2635 certified as Model No. GJ

2635. Therefore, Claimant has not fulfilled its obligation pursuant to Clause 10.1 of the Contract. Although it was FE who wrongly certified the gearboxes, it was still Claimant's duty to provide for gearboxes that are in accordance with the specifications as set forth in Clause (A) of the Contract.

23. Art. 7.1.1 PICC generally states that non-performance is a failure by a party to perform any of its obligations under the contract, including defective performance. More specific Art. 35 (1) CISG says that it is Claimant`s obligation as a seller to deliver goods that meet the specifications of the Contract in terms of description, quality, quantity and packaging. Claimant violated these regulations as Claimant not only delivered goods with a minor aberration, but gearboxes that do not meet the requirements for the 1.5 MW wind turbine and are therefore not fit for the purpose for which they should be used by Respondent.

24. Claimant`s failure to meet the applicable requirements constitutes a material breach of the Contract and therefore Respondent had every right to suspend the Contract.

25. Even if FE contributed to sending the wrong gearboxes, the fact remains that Claimant was obliged to deliver Model No. GJ 2635 to Respondent. As Claimant breached the Contract by delivering wrong gearboxes, Claimant cannot shift the blame on FE or Respondent. Respondent only withheld payment because of the non-conformity of the gearboxes resulting in a material breach of Claimant's contractual obligation.

26. For all the above stated reasons and especially Claimant`s non-performance, Respondent had every right to suspend the Contract. Therefore there was no room for a valid termination by Claimant, because the Contract had already been suspended.

B. Respondent validly withheld the subsequent payments

27. According to Art. 7.1.3 PICC, Respondent justly withheld performance. Art. 7.1.3 (2) PICC states that where the parties are to perform consecutively, one party may withhold performance until the other party tenders its performance. In *ICC 8547* the Tribunal referred to Art. 7.1.3 PICC and concluded that the degree of non-conformity was irrelevant and the notice of non-conformity was enough to justify stopping payments pending agreement by the parties.

28. Respondent notified Claimant in its letter dated 21 May 2012 [*Cl. Ex. 6*] of the non-conformity of the gearboxes and at the same time suspended the Contract *"pending satisfactory proof*" that Claimant would carry out its contractual obligation. By doing this, Respondent clearly granted Claimant a second chance to perform, which it obviously failed to do. Only then did Respondent suspend the Contract.

29. Pursuant to Art. 5.1.3 PICC, Claimant should have cooperated with Respondent when both Parties were informed about the wrong certification of the gearboxes [*Cl. Ex. 3*]. However, Claimant showed no interest in cooperating and finding a solution to this problem, but it claimed instead not to have any responsibility at all [*Cl. Ex. 5*]. Because of Claimant's lack of cooperation Respondent was obliged to suspend the Contract and withhold payment.

30. Claimant's fundamental breach and absolute lack of cooperation has caused Respondent to believe that it can no longer rely on Claimant's future performance [*PICC, Art. 7.3.1 (d)*]. Thus, Respondent considers that it is in its best interest to terminate the Contract. Moreover, pursuant to Art. 7.3.6 (1) PICC, Respondent is entitled to claim restitution of the first payment. Claimant should make immediate arrangements to have the USD 2,000,000 returned to Respondent. Consequently, Respondent is willing to return the defective gearboxes to Claimant.

C. Even if suspension is invalid, Claimant cannot rely on Respondent's non-performance to terminate the Contract

31. In any case, according to Art. 7.1.2 PICC Claimant cannot rely on Respondent's non-performance to terminate the Contract. As Claimant has caused Respondent's non-payment by delivering defective gearboxes. Claimant cannot rely on Respondent's non-performance of payments 2 and 3. Respondent's refusal to perform was clearly due to Claimant's negligent behaviour [*ICC 09.10.2006*]. Therefore, Claimant cannot use this as a pretext to terminate the Contract according to Clause 15.1 thereof.

32. It follows from the above that Claimant materially breached the Contract by delivering not only different but completely wrong and useless gearboxes. Therefore, Respondent validly suspended the Contract and rightly withheld further payment. As the Contract was already suspended, Claimant could not validly terminate the Contract. Finally, even if the Tribunal finds that the Contract was not validly suspended, Claimant is still liable because it is the party in fault.

IV. CLAIMANT IS NOT ENTITLED TO CLAIM THE TERMINATION PENALTY

33. As the Contract was invalidly terminated, Claimant is not entitled to claim the termination penalty under Clause 15.2 of the Contract. Taking into account general principles of equity, a request for damages has to be rejected if the acts of the accused party have not constituted a breach [*ICC 9797*].

A. The provision regarding the termination penalty can be avoided by Respondent

34. Should the Tribunal however assert that the Contract was validly terminated, the provision regarding the termination penalty shall be considered excessively advantageous to Claimant. Under Art. 3.2.7 (1) (b) PICC Respondent is entitled to avoid such provision as it contradicts the purpose of the Contract.

35. The Contract grants the right to terminate and subsequently claim the termination penalty only to Claimant, which shall be regarded as an unjustifiably excessive advantage given to one party only. Restricting the availability of contractual remedies arising from the sale of defective goods contradicts the purpose of the contract [*Vogenauer/Kleinheisterkamp, Art. 3.10, para. 15*].

B. The termination penalty is grossly excessive

36. Should the Tribunal however find the provision regarding the termination penalty valid, it shall still be regarded grossly excessive. Under Art 7.4.13 (2) PICC the termination penalty may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance [*ICAC 229/1996*; *ICAC 88/2000*].

37. The PICC grants the Tribunal discretion to reduce the termination penalty that is clearly disproportionate to the consequences of the breach to a reasonable amount. [*Vogenauer/Kleinheisterkamp, Art. 7.4.13, para. 20*]. This provision has found wide application in case law. In *Helsinki 28.01.1998*, the Tribunal held that the termination penalty corresponding to the total contract value was excessively high and therefore had to be reduced.

38. The Contract is still at an early stage. So far, Claimant has delivered only 100 defective gearboxes that Respondent has already paid for [*AfA, para. 10*] Thus, Claimant has suffered no actual harm, instead it acquired USD 2,000,000 in return for delivering defective goods that proved to be useless for Respondent. Despite the fact that it has not suffered any actual loss, Claimant still demands the payment of a termination penalty amounting to 100% of the total contract price. This claim has to be considered grossly excessive and therefore rejected or at least significantly reduced.

C. Claimant should have mitigated the losses

39. In the event that the Tribunal finds the termination penalty is not grossly excessive, it still has to be reduced pursuant to Art. 7.4.8 PICC. This article states that the non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter's taking reasonable steps. Art. 77 CISG expressly requires the aggrieved party to take reasonable steps in order to mitigate the losses resulting from the non-performance. The obligation of an aggrieved party to take steps in order to mitigate the harm is also widely confirmed in case law [*ICC 8817; ICC 9594; UNCC S/AC.26*] and by scholars [*Vogenauer/Kleinheisterkamp, Art. 7.4.8, para. 3; Schlechtriem/Schwenzer, Art. 77, para. 1; Kröll/Mistelis/Perales Viscasillas, Art. 77, para. 1]*. Should the aggrieved party fail to mitigate the losses, damages are subject to reduction [*Nadal*].

40. Claimant could easily have mitigated its alleged losses. Both Parties were notified of the faulty gearboxes at the same time [*Cl. Ex. 3*]. However, it was only Respondent who attempted to remedy the situation [*Cl. Ex. 4*]. Claimant denied all responsibility [*Cl. Ex. 5*] and failed to cooperate on mitigating the losses and to take reasonable steps to reduce

them. Thus, Respondent is entitled to demand a reduction of the damages put forward by Claimant, because latter could have taken reasonable steps to reduce the losses, but failed to do so [*Ripinsky, p. 320*].

41. It follows from the above that Claimant is not entitled to claim the termination penalty, as the Contract was invalidly terminated. Should the Tribunal find that the Contract was validly terminated, Respondent is still entitled to avoid the termination penalty clause, since it is excessively advantageous to Claimant. In any case, the termination penalty should be reduced due to its gross excessiveness and due to Claimant's failure to mitigate the harm.

RELIEF REQUESTED

Therefore, Respondent requests the Tribunal to

1. reject all of Claimant's claims

and rule that

1. Ms. Arbitrator 1 cannot resign and Claimant must pay her additional fees;
2. Claimant did not validly terminate the Purchase Contract and cannot claim the termination penalty;
3. Claimant must return the first payment of USD 2,000,000 to Respondent.