FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE

RESOLUTION MOOTING COMPETITION

28TH JULY – 3RD AUGUST 2013

HONG KONG

MEMORANDUM FOR RESPONDENT

CLAIMAINT	RESPONDENT
ENERGY PRO INC	CFX LTD
28 Ontario Drive Aero Street	26 Amber Street, Circus Avenue
SYRUS	CATLAN

Team Code: 975

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Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985.
New York Arbitral	Convention on the Recognition and Enforcement of Foreign Awards, New York, 1958.
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, 2010
CISG	United Nations Convention on Contracts for International Sale of goods
CIETAC	Chinese International Economic and Trade Arbitration Commission

ARGUMENTS ADVANCED

1. CAN FUTURE ENERGY BE MADE A PARTY TO THE ARBITRATION PROCEEDINGS?

1.1. Future Energy cannot be made a party to the proceedings as: [A] It is not a party to the arbitration agreement and hence, not bound by it; [B] the consent of Future Energy to be a party to the arbitration was obtained under threat.

A. Future Energy not a party to the arbitration agreement

1.2. The arbitration clause is the "cornerstone of the arbitration process". The submission of the dispute to arbitration necessitates an agreement between the parties of the dispute who cannot be forced to arbitrate without consent. This approach is reflected in New York Convention and UNCITRAL Model Law on International Commercial Arbitration.

1.3. The principle that the rights and obligations of an arbitration agreement apply only to the signatories is a straightforward application of the doctrine of privity of contract, recognized in both civil and common law jurisdictions [UNIDROIT Principles of International Commercial Contracts Art. 1.3 ("A contract validly entered into is binding upon the parties.")]

1.4. Contrary to litigation in front of state courts where any interested party can be implicated to protect its interests. In arbitration only the parties to the arbitration agreement expressly written could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent in the essentially voluntary nature of arbitration, is recognized internationally by virtue of Article II of the New York Convention.

1.5. Arbitration is essentially based upon the principle of consent. Clearly an arbitral

tribunal has power only with respect to the parties to the arbitration [ICC Case No. 7337] [Hanotiau page. 253, 256]

1.6. The intention of other parties to be bound by the agreement to arbitrate with the non-signatory is also necessary. [W. Craig, W. Park & J. Paulsson para 5.09]The requirement for both parties' consent is implicit in both international conventions and national law. [New York Convention, Art. II(3) ("the parties have made an agreement"); UNCITRAL Model Law, Art. 7(1) That is, even if a non-signatory intended to be bound by the arbitration agreement, one must also determine whether the signatory (and other) parties to the agreement accepted it as such: for commercial or other reasons, signatories to an arbitration agreement may wish to extend their obligations to arbitrate only to those entities that have signed the agreement, and not to others [Gary Born page 1151].

1.7. Again, performance or involvement in performance of only isolated aspects of a contract is less likely to constitute consent to the arbitration clause than broad involvement in many or central aspects of the contractual relationship.[Gary Born page 1151]. It can be concluded that Future Energy being appointed as mere independent certifying authority does not give rise to the presumption that it is implicated in the performance of the contract neither it implies its consent to be bound by the arbitration clause.

1.8. The fact that a party is directly implicated in contractual performance and aware of an arbitration clause, or had congruent interests, should generally be insufficient, without more, to subject that party to an arbitration agreement. [Gary Born page 1205]

1.9. The arbitration clause inserted in an international contract has self-standing validity and effectiveness which requires that its application be extended to parties which are

directly implicated in the performance of the contract and in the disputes that may arise there-from as long as it is established that their situation and their activities give rise to the presumption that they were aware of the existence and the scope of the arbitration clause, even though they were not signatories of the contract3 which provides for it. [SMABTP case:]

1.10. There is no material evidence to show that Future Energy was aware of the existence and scope of the arbitration clause which is sufficient reason for its exclusion from the arbitration proceedings. It is not the case wherein Future Energy has been appointed by the Respondents, as stipulated by the Claimant that Future Energy and the Respondent shared an agency-principal relationship.

1.11. On the contrary Procedural order no.2 (Q.13) states clearly that there is a separate tripartite agreement which implies that each of the parties acted on Principal to Principal basis. Further except for the specification of wind turbines, there is no explicit reference to the purchase contract in the tripartite agreement hence Future Energy is a stranger to the contract. Intention of the Claimant is dilatory, as any attempt to array Future Energy as a party would be opposed by the prudent form of arbitration practice.

B. <u>Consent of the Future Energy obtained by threat</u>

1.12. Duress has been defined as a "threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition". Thus in the instant matter Future Energy’s consent to be made as a party to the arbitration proceedings is obtained by a threat of legal action which clear falls within the ambit of duress. Therefore, Future Energy cannot be made party to the arbitration proceedings.

2. CAN MS. ARBITRATOR 1 RESIGN DURING THE ARBITRATION PROCEEDINGS?

2.1. This Respondent most humbly submits that [A] The fundamental nature of the issue; [B] Obligation of the Claimant; [C] The Duty to complete the mandate

A. Fundamental Nature of the Issue

2.2. Though the issue may appear to be administrative in nature, it is not so. This Respondent construes the issue of the Claimant refusing to pay the fee of Ms. Arbitrator 1 and her intent to resign from this proceeding would adversely affect the proceedings that have progressed so far.

B. Obligation of the Claimaint

2.3. The essential nature of the contract between the arbitrator and the parties is to provide arbitral services in return for remuneration. Such a right is hence the most central from the perspective of the arbitrator [Jeffy Waincymer]. Considerable amount of time, effort and money has been spent by all the parties and the Arbitrators have spared considerable amount of their valuable time for this matter. The conduct of the Claimant must be construed as a pre-mediated tactics to frustrate any logical outcome and delay the entire process. It is strange that the Claimant has pre-supposed that a dispute of this magnitude could be resolved in two days and the Claimant has apparently misled Ms. Arbitrator1. The nature of relationship between the arbitrator and the parties carries with it an implied undertaking by the parties to compensate the members of the arbitral tribunal fairly in respect of their work and expenses, whether or not an award is issued [Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin Hunter, page 310].

C. Ms. Arbitrators 1 duty to Complete the Mandate

2.4. There is an implied contract that the Arbitrators have a duty of complete the task of resolution of the dispute, irrespective of the time involved. Similarly the parties have an implied obligation to pay the fee of the Arbitrator. This is not a travel in a Taxi to get off the cab, when the meter registers a particular fare and claim that he can't afford to proceed with the journey. This proceeding has to be completed and without any interruptions or hindrance. An arbitrator's unjustified resignation or withdrawal is wrongful in most jurisdictions. [Gary B. Born Chapter 12]

2.5. Most of the common law jurisdictions do not allow an advocate to abandon the cause or client that he represents in a proceeding, merely because his fee has not been paid. If a new arbitrator is to be appointed, it would be unfair to expect him to decide on the quantum, without having had an opportunity to hear the arguments. The proceedings have to commence de nova, which is not in the best interest of all. We appeal to Ms. Arbitrator to reconsider her decision and also contend that the Claimant must pay the additional fees as demanded by Ms. Arbitrator 1, which would put an end to further delay of the proceedings.

2.6. In so far as the Ms. Arbitrator 1 is concerned, she ought not to have expressed her mind to resign. The CIETAC Rules [Article 50] provides for factoring the fee at the time of passing the award. The Arbitral tribunal has the power to determine in the arbitral award, the arbitration fee and other expenses. It also has the power to decide in the arbitral award that the losing party shall compensate the winning party for the expenses incurred by it in pursuance of the case Therefore, the arbitration fee as well as the additional fee demanded, along with the miscellaneous expenses incurred by the arbitrator, must be factored in the final award, leaving no ground for Ms

Arbitrator 1 to resign. Perhaps, the Claimant has zero confidence in winning the case, and fears that the additional fee would be placed on its back.

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

3.1. It is submitted that there has been no valid termination of the Contract by the Claimant for: [A]. Non-payment of the price does not amount to non-performance [B]. Delivery of non-conforming goods amounts to a fundamental breach [C] Respondent has rightly suspended the contract.

A. Non-payment of the price does not amount to non-performance

3.2. It is sufficient that the Respondent informed the Claimant of the non –conformity and then suspended payment until an agreement concerning the lack of conformity was reached. Thus it is not a violation of the Respondent's contractual duties (ICC No 8547. 57-60]

3.3. It can be rightly pointed out that where the contract is to be performed step by step i.e payment was to follow the delivery of goods. If the goods are not in conformity with the contract the buyer must give notice of the same to the seller. Until an agreement is reached between the parties as to the degree of the lack of conformity and as to how to proceed in regard to the non-conformity the buyer does not have to pay the price [SCHLECHTRIEM, II.5.a]. It would amount to a curtailment of the rights of the buyer if he had to continue payment of the goods without knowing what will happen in regard to the non-conformity. The same reasoning is also reflected in Article 7.1.3 UNIDROIT principles where a party may withhold its performance until performance has been effected by the other party.

3.4. In this case the Respondent has duly notified the Claimant about non-conforming gearboxes [Cl. Ex No.6] and also informed them about the suspension until satisfactory proof of conduct in conformity with the purchase contract by the claimant with respect of their obligations is made apparent.

B. Delivery of non conforming goods amounts to a fundamental breach

3.5. It can rightly be submitted that there has been a fundamental breach on the part of the Claimant as it had the obligation to deliver goods "which are of the quantity, quality and description required by the contract.[_ Article 35(1) CISG] and to obtain necessary certification before delivery of goods. If the seller does not comply with one of these requirements he is in breach of the contract. [von Caemmerer, E. / Schlechtreim, Peter, at Article 25 – 7]. Breach is to be fundamental where the parties had explicitly agreed on certain central features of the goods [CIETAC 30 October 1991,.] Delivery of gear boxes of Model No. GH2635 clearly amounted to fundamental breach.

C. Respondent has rightly suspended the contract

3.6. From the 'principle of concurrent performance', in Art. 58, para. 3, 71 CISG, as well as the right to withhold one's performance until the other party performs, as laid down in Art. 85, 86 CISG, it follows by way of interpretation in accordance with Art. 7 para. 2 CISG that the buyer has a general right to withhold performance in cases where the delivered goods do not conform to the contract. [Austria 8 November 2005]; [Poland 11 May 2007] the buyer who is entitled to and is insisting on delivery of substitute goods, is entitled to suspend performance. [Poland Court 11 May 2007]. The Respondent after becoming aware of the non conformity of the goods which was a substantial part of the contract has rightfully suspended the contract by giving due notice to the Claimant and withholding its obligations of payment [Article 7.1.5 UNIDROIT, Article 71 CISG] The suspending party does not breach the contract if the suspension is rightful.[ICC No. 8786]. Therefore it can be concluded that Respondent's suspension was in accordance with law.

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

4.1. The Respondent submits that it is under no obligations to pay the termination penalty claimed by Energy Pro Inc. as: [A] the Claimant was itself the non-performing party; [B] the purchase contract contained unfair terms disproportionately advantageous to the Claimant and; [C] the termination of the contract by the Claimant is invalid.

A. The claimant was itself the non-performing party

4.2. The delivery on non-conforming goods on the part of the Claimant was a clear non-performance of the contractual terms. The principle's notion of non-performance is based on a unitary concept: any failure to perform or any non-confirming performance of a contractual obligation, irrespective of its cause or consequences, constitutes non-performance [Lars Meyer, page 53].

4.3. When the Respondent received information as to the delivery of the non-conforming goods, it notified the Claimant of withholding performance until the non-performance was remedied [Claimant's Ex. No. 6] [UPICC Article 7.1.4 (4)].

4.4. The Respondent being the aggrieved party was rightfully entitled to the cure of non-performance by the Claimant as the same was the most appropriate resolution of the non-performance. [UPICC Article 7.1.4] As a consequence to the above line of argument, in the absence of performance by the Claimant, the obligation to pay any money to Claimant has not arisen or accrued and the claim is premature.

B. The purchase contract contained terms disproportionately advantageous to the Claimant

4.5. The terms of the purchase contract gave the right of termination, seeking a termination penalty retaining any payments made by the Respondent to the Claimant [Clause 15.1, purchase contract]. The Respondent had no rights of termination or seeking a termination penalty under the purchase contract when it was entered into

with the Claimant, who was the 80% equity holder in the JV and the Respondent was a subservient partner with 20% equity [Claimant's Exhibit No. 1]. This shows that the Claimant was in an economically better position to dictate the terms of the purchase contract. In a fair scenario it would have also been the right of the Respondent to avoid the contract. [UPICC Article 3.2.7]

C. <u>The termination of the contract by the Claimant is invalid</u>

4.6. It is a fact that the Claimant delivered gearboxes that were not in conformity with the purchase contract. As a notice was served by the Respondent for the claimant to make good or remedy the same, the Claimant was obligated to remedy it. Also, requiring repair and replacement of goods after the delivery is made falls under the ambit of 'right to performance', which the Respondent here is rightly entitled to [UPICC Article 7.2.3]. Since this was a non-monetary obligation, the Claimant was required by law to perform it as it was neither contrary to law or fact nor was it burdensome or unreasonable [UPICC Article 7.2.2]. Therefore, the Respondent has absolutely no obligation in the instant matter to make any payment to the Claimant pursuant to article 79 (1) of the CISG, 1980

PRAYER FOR RELIEF

In light of the submissions made above, the Claimant respectfully requests that this Arbitral Tribunal declare that:

- Ms. Arbitrator 1 cannot resign and Energy Pro Inc. must pay her additional fees.
- Energy Pro Inc. did not validly terminate the purchase contract and cannot claim the termination penalty.
- Energy Pro Inc. must return the first part payment of USD 2,000,000 to CFX Ltd.

Respectfully signed and submitted for CFX Ltd. ____June, 2013