FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTUION

MOOTING COMPETITION

28 JULY – 4 AUGUST 2013

HONG KONG

MEMORANDUM FOR RESPONDENT

On Behalf of	**Against**
CFX Ltd.	Energy Pro Inc.
RESPONDENT	CLAIMANT

TEAM NO.656

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TABLE OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	UN Convention on the International Sale of Goods
Ex	Exhibit
FAS	Free Alongside Ship (INCOTERMS, 2010)
No.	Number
Para.	Paragraph
Parties	CLAIMANT and RESPONDENT
ICC	International Chamber of Commerce
PICC	UNIDROIT Principles of International Commercial Contracts
Tribunal	China International Economic and Trade Arbitration Commission
v.	Versus
SIAC	Singapore International Arbitration Centre
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
Ex.	Exhibit

INDEX OF AUTHORITIES

Arbitration Law	Written by Liangyi Yang, Shijie Mo, Daming Yang.
Law and Practice of International Commercial and Arbitration	Written by Martin Hunter
Digest of Case Law	UNCITRAL, 2012, Digest of Case Law on the Model Law on International
Lord Denning	best effort
the reference number of Guo Ban Fa No.44/1995 issued by the General Office of the State Council Article 2&3	http://www.cietac.org/index.cms

INDEX OF LEGAL INSTRUMENTS

Arbitration Fee Schedule

Measure on Arbitration Fee to be Charged by Arbitration Commissions

New York Convention	Convention on to Recognition and Enforcement of Foreign Arbitral Awards 1958 **Art.2； 3(1) ;5(1) (d)** cited as: NY Convention
China Arbitration Act	**Art.4； 34;58(5)**
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011 **Art.4(2)； 6 (1) & (6); 12(3)； 22； 24； 29(2)； 30(2)； 31(1) (3)； 33(1);34(2)； 50(1)； 72** cited as: CIETAC Rules
SIAC	Singapore International Arbitration Centre **Art.25 (b)** cited as: SIAC
CISG	UN Convention on the International Sale of Goods **Art.39(1)；** cited as: CIETAC Rules
LCIA	London Center of International Arbitration **Art.22.1 (h)** cited as: LCIA
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 **Art.7(1)** cited as: UNCITRAL Model Law
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 20049 **Art.7.1.2;7.3.1(1) (2)； 7.3.2； 7.4.13 7.4.2； 7.4.10(1)； 7.4.13(1)；**

	cited as: UNIDOIT
UNIDROIT commentary	UNIDROIT Principles of International Commercial Contracts of 2004,Commentray cited as: UNIDROIT commentary

ARGUMENT ON JURISDICTION

I. ENERGY PRO INC. CAN'T BRING FUTURE ENERGY INC. INTO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY

A. Future Energy Inc. is not the party under this contract, it has no rights to participate in the arbitration

a). Future Energy Inc. is not the party under this contract

1. Future Energy Inc. is the independent certification company for the wind turbine of Model GJ2635 (refer to clarification 13.) it did not give consent to anything in the contract, it's the obligation of the seller which is Energy Pro Inc. to obtain certified approval from the independent company.

b). Future Energy Inc. has no rights to participate in the arbitration

2. The arbitration agreement is concluded by the parties under the contract, a party outside the contract shall not be bound by the arbitration agreement.

B. Future Energy Inc. has no legal standing to participate in the arbitration

a). Future Energy Inc. is not the signatory party under the arbitration agreement

3. The parties' autonomy validate the arbitration agreement, the signature reflects the parties' autonomy. Therefore, the signature of a party is the legal approval participating in the arbitration. The lack of signature of Future Energy Inc. result in the lack of legal standing to participate in the arbitration.

b). Future Energy did not express it's will of participating in the arbitration before the arbitration agreement concluded

4. There is no evidence in the bundle indicates that Future Energy was aware of the existence of the arbitration agreement before the rise of dispute. Hence, it is invalid to deduce that Future Energy implied it's intention to participate in the arbitration.
5. Only after Future Energy received the letter sent by Energy Pro, which threaten it into arbitration did Future Energy agreed to join the arbitration.(refer to Claimant's Exhibit No.9)

C. It will disable Future Energy Inc. and left it unable to obtain relief if the tribunal allows Energy Pro to bring Future Energy into the arbitration.

a). The reason why Energy Pro wants to bring Future Energy into the arbitration is to blame its negligent engineers. Future Energy would take the risk to take its liability for the wrong certification.

b). Subject to that arbitration award shall be final and binding, Future Energy would lose the right to appeal if it take part in the arbitration and lose it.

II. Ms. Arbitrator can not Resign during the Arbitration Proceedings.

A. Pursuant to CIETAC Art. 31, the chairman of CIETAC has the authority to approve the resignation

6. Accordingly, the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.
7. There is no provision in CIETAC rules nor in China Arbitration Act to rule that the parties should decide the resignation of arbitrators.
8. Under the particular circumstance of this case, the reason why Ms.1 wanted to resign is related to the substantive right of claimant. If the reason is harm to the claimant, the chairman should not take it into account, hence should not allow the resignation of Ms. Arbitrator 1.

B. The reason why Ms. Arbitrator 1 wanted to resign is not reasonable, hence should not be accepted

9. Ms. Arbitrator 1 wanted to resign because claimant refused to deposit the additional fees required into her bank account.
10. The reason is not accepted because (a) Arbitrator herself has no legal standing to ask client directly to pay the fees; (b) the amount of that fees did not change

a). Arbitrator herself has no legal standing to ask client directly to pay the fees

11. Pursuant to Art. 12.3 of CIETAC rules under which a party applying for arbitration. Claimant paid the arbitration fee in advance to CIETAC according to its Arbitration. Fee Schedule. In according to Art. 72.1 of CIETAC rules, CIETAC may charge the parties any other extra and reasonable costs, Measures on Arbitration Fees to be Charged by Arbitration Commissions interprets the "extra and reasonable costs".

12. CIETAC has the authority to ask the client to deposit fees into CIETAC's account.

13. Claimant had fulfilled it's obligation to pay the arbitration fee because i) the amount of arbitration fee is based on the amount of disputing; ii) the amount of disputing remained unchanged when claimant applied for the arbitration; iii) claimant shall not pay extra and reasonable costs beside the arbitration fee under the particular circumstance of this case.

i)The amount of arbitration fee is based on the amount of disputing

14. According to the Fee Schedule, the arbitration fee consist of 1)certain amount and 2) the amount above a certain amount and 3) Registration Fee. The final amount of arbitration fee is 696,500 Yuan. certain amount.

15. The amount of disputing is RMB 62,300,000, in the level "50,000,000 Yuan to 100,000,000 Yuan", the certain amount is 625,000 Yuan.the amount above a certain amount.

16. The second part of arbitration fee is 0.5% of the amount above 50,000,000 Yuan Registration Fee.

17. The amount of Registration Fee is RMB 10,000 Yuan.

ii). The amount of disputing remained unchanged when claimant applied for the arbitration

18. There is no evidence indicates that claimant changed the amount of disputing, hence claimant does not need to change the amount of arbitration fee.

iii). Claimant shall not pay extra and reasonable costs beside the arbitration

fee under the particular circumstance of this case

(1)the two types of extra and reasonable costs need to be paid in advance

19. According to Measures on Arbitration Fees to be Charged by Arbitration

Commissions Art. 7, only the living and transportation expenses and compensation for witnesses, identifiers, translators, and other persons whose presence is necessary in the hearing; fees for consultation, appraisal, examination, and translation shall be paid in advance by the party who raises the application.

(2)claimant did not apply for the two type of costs

20.Under the particular circumstance of this case, claimant did not apply for any consultation, appraisal, examination, and translation, hence Claimant shall not pay extra and reasonable costs beside the arbitration fee under the particular circumstance of this case.

C. The request of resignation should not be accepted, hence Ms. Arbitrator 1 can not resign

21. The reason of resignation is not reasonable nor valid, hence the tribunal should not take it into account, should not allow the application of resignation of Ms. Arbitrator 1.

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22. Therefore, Ms. Arbitrator 1 can not resign during the arbitration proceedings.

III. Claimant's termination was unlawful under the UNIDROIT PRINCIPLES

A. Applicable law to this dispute is UNIDROIT

23.UNIDROIT is applicable for "international commercial contracts" and "when the parties have agreed that their contract be governed by them" .

24.Firstly, the contract is international when there is international element involved. Significant parties comes from more than one country and so the international element is present. Following, concept of a term "commercial contract" contains trade transactions for the supply or exchange of goods or services. In this case, the contract was dealing with a purchase of gearboxes, is commercial in nature and

therefore falls within the scope of first condition. Secondly, Parties chose UNIDROIT as the rules of law governing their conduct.

25.For all the presented reasons, UNIDROIT is the law governing the contract.

B. Respondent's non-performance cannot be determined to be fundamental. Art.7.3.1 of the UNIDROIT PRINCIPLES indicates 5 conditions refer to fundamental non-performance.

a). "Non-performance substantially depriving the aggrieved party of its expectation unless the other party did not foresee and could not reasonably have foreseen such result"

26.Respondent cannot foresee that its failure to make second and third payment deprives Claimant's expectation for Claimant failed to perform its obligations and refused to remedy at first, and Respondent had expressly informed Claimant that it suspended the contract on 21 May 2012, which formed valid bound as well. Hence, Claimant could have been clearly acquainted with that Respondent was entitled to remedy or justification by Claimant for its non-performance rather than to perform the further obligations.

b). "Strict performance of contract of essence"

27.The nature of the contractual obligation indicates that Respondent's payment is subject to that Claimant has fulfilled its own obligations under the contract. While Claimant failed to perform, Respondent was under no burden to render subsequent performance, which originally provided by the contract.

c). "Intentional non-performance"

28.It is Claimant's delivery of non-conformity gearboxes , which had substantially deprived Respondent's exceptions under the contract, resulted in Respondent's consideration of the good faith, thus suspended its obligations to make the second and third payment. So, Respondent's non-performance is not intentional.

d). "No reliance on future performance"

29.The fact that Respondent failed to pay the payment under the contract, because Respondent suspended the contract pending satisfactory proof that Claimant had

discharged its obligations under the contract. There existed no such conditions revealing the lack of ability and reliance of Respondent to make payment in the future.

e). “Disproportionate loss”

30.This condition deals with situations in which a party who fails to problem has relied on the contract and has prepared or tendered performance. In this case, Respondent and Claimant both have not suffered such kind of loss, therefore the “Disproportionate loss” cannot be reached.

31.In sum, Respondent’s failure to make the second and third part of payments cannot be regarded being fundamental. Thus, Claimant did not validly terminate the contract.

IV. Claimant is not entitled to claim the termination penalty

A. Respondent had rightfully suspended the contract and its subsequent non-performance can be excused

a). Claimant’s non-performance cannot be excused by Future Energy’s default

i. Paragraph 10.1 of the contract concerning the requirements of gearboxes imposes on Claimant an obligation to achieve a specific result

32.As the Paragraph 10.1 of the contract was for Respondent to deliver gearboxes in conformity with the specifications in the contract, Respondent is obligated to meet the required quality, technical, and qualification. This is not a duty of best efforts, but a distinct duty to achieve a specific result.

ii. Breach of the obligation to achieve a specific result is itself non-performance.

33.Respondent delivered the gearboxes of the model GH 2635 with an improper certificate. Therefore breached its obligation to deliver the gearboxes of the model 2635 with a certificate that the gearboxes delivered were in conformity with clause A of the contract. This is a non-performance of the Contract.

b). Respondent had fulfilled its obligations under the contract before suspension.

i. Respondent monitored the production process on 17 September 2011 and 16 January 2012 and propose objections enable Claimant to amend and improve the wrong method of production being employed in producing the gearboxes

ii. Respondent issued an order on 10 February 2012 and made the first payment on 13 March 2012

iii. Respondent confirmed the gearboxes through the certificate from Future Energy before make payment. Unfortunately, the certificate itself was wrong, which out of Respondent's control.

c). Respondent has a right to require Claimant's performance due to its non-performance.

34.According to clause 10.1 of the contract, Respondent has the burden to make sure that the gearboxes were in conformity with the clause A of the contract. However, Respondent transferred the gearboxes of model GH 2635 instead of GJ 2635, which amounts to a non-performance.

35.Pursuant to Art.7.2.2 of the UNIDROIT PRINCIPLES, clause (a) (b) (d) do not refer to Respondent may require performance, unless (c) "may reasonably obtain performance from another source"; actually, the certain gearboxes specified under the contract are not staple goods, whose substitute goods are almost hardly to be obtained from the market.

36.Refer to (e), unless " request the performance within reasonable time"; Respondent lettered Claimant on 16 May 2012 for remedying its non-performance though Future Energy sent Respondent a letter about the wrong certificate on 18 April 2012. That one month is a reasonable time since, first, to Respondent, it put the 100 gearboxes to assembly for double inspection which takes at least 3 weeks, so it noticed Claimant then considered to be reasonable; while to Claimant, it processed the gearboxes of both model of GH 2365 and GJ 2365, there is no substantial damages when it had properly performed, such as replacement. In sum, the condition of 2~3 months in this case not only reflects both parties' interest, but related to contract items, which considered to be a reasonable time. Thus, Respondent is entitled to require Claimant's

performance.

d). Respondent is entitled to suspend its obligations due to Claimant's failure to render remedy.

37.As Claimant refused to remedy, the conduct itself amounts to a non-performance. According to Art.6.1.4(1) of the UNIDROIT PRINCIPLES, it is a simultaneous performance between Claimant and Respondent that based on Claimant refused to remedy, Respondent is entitled to suspend its subsequent performance.

e). Therefore Claimant cannot claim termination penalty as damages

i. Since Claimant did not validly terminate the contract, as to paragraph 15.2 of the contract, Claimant was not entitled to termination penalty equal to 8 million.

ii. Even if Claimant had validly terminated the contract, since Respondent rightfully suspended the contract, Respondent was fully shielded from liability for damages arising from non-performance, Claimant cannot claim the termination penalty as damages.

iii. Even if Claimant was entitled to claim the termination penalty, the agreed sum was reduced according to Art.7.4.13 of the UNIDROIT PRINCIPLES. Regard to the relationship between the sum agreed and the harm actually sustained, Respondent's non-performance would result in a grossly excessive benefit for Claimant. Therefore, the damages should be reduced.

B. Conclusion

38.Claimant is not entitled to the termination penalty 8 million as damages, even if Claimant has a right to claim the termination penalty, it should be reduced.