FOURTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE

RESOLUTION MOOTING COMPETITION

28TH JULY – 3RD AUGUST 2013

HONG KONG

MEMORANDUM FOR CLAIMANT

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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CISG	United Nations Convention on Contracts for International Sale of goods
CIETAC	Chinese International Economic and Trade Arbitration Commission

ARGUMENTS ADVANCED

1. CAN ENERGY PRO INC. BRING FUTURE ENERGY TO THE ARBITRATION PROCEEDINGS AS IT IS A THIRD PARTY?

1.1. It is contended before this Tribunal that Future Energy can be made a party to the proceedings: [A] Consent and indispensability for Future Energy to be a party; [B] Future Energy is an Agent of the Respondent; [C] The Respondent is Vicariously Liable for the Agent; [D] No duress.

A. Consent and indispensability for Future Energy to be a party

1.2. The Claimant humbly submits that the need to array Future Energy as a party to the proceedings is not an academic exercise; Future energy is a valid and necessary party to the proceedings. *The Rule for binding the arbitration agreement on the non-signatories can be determined by the actual or presumed intention of the parties as regards to participation of non signatories in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it."* (ICC Case No. 9517, Bridas SAPIC,].

1.3. *A party's performance of contractual obligations of another entity constituted consent to underlying agreement, including arbitration clause [(Paris Cour d'appel)]; The agreement [to arbitrate] may be implied from the party's conduct [Gvozdenovic v. United Air Lines, Inc.]. A party may be bound by an arbitration clause that it has not signed if its subsequent conduct indicates that it has assumed the obligation to arbitrate [Lamm & Aqua,84, 88]*

1.4. The claim that Future Energy is not a party to the arbitration proceedings would not hold good for the reason that it's name is found in the Purchase Contract [Clause 10.2] and the same is backed by a tripartite contract [Procedural Order No.2 Q No.13]

entered between this Claimant, the Respondent and Future Energy with reference to the obligations of this Claimant and the Respondent arising out of the contract and the obligation of Future Energy purportedly as an Independent Agency to certify the gear boxes meant for 1.5 MW Turbines.

It is pertinent to point out that this Claimant has not claimed any relief against Future Energy. However, without the participation of Future Energy, this tribunal will not be able to come to any conclusion as regards the claim and counter claim.

1.5. Admittedly the Respondent does not know anything about the designs, or models. It is not in the domain of the Respondent to talk about erroneous supplies, it is Future Energy alone who should say where, when and how the purported mistake had occurred at its end. Hence if this proceeding has to be meaningful, Future Energy has to be made a necessary party.

B. <u>Future Energy - Agent of the Respondent</u>

1.6. The next leg of the claimant's argument on this issue is that Future Energy is an agent of the Respondent. Their relationship of agent and principal has been masqueraded by a tripartite agreement. The obligations of Future Energy in the Tripartite Agreement would substantiate this claim.

1.7. In the absence of Future Energy or any other third party agency to examine and inspect the goods that are to be delivered by this Claimant to the Respondent, it would have been the inherent and implied duty on the part of the Respondent to carry on the examination and inspection and accept the deliverables. By delegating this authority to Future Energy, a relationship of agent and principal is entered into by the respondent with Future Energy. The consideration that is involved in the Tripartite Agreement would reveal the following legal positions:

a) The Respondent delegates the obligation of inspection to Future energy for a fee that is assumed to be paid by it.

b) If Future Energy had to reject the goods, the Respondent would gain by not holding on to a defective inventory

c) On the contrary this Claimant would suffer loss of material, cost and time.

The conduct of Future Energy would result in the benefit of one kind or another to the Respondent and not to this Claimant. Hence the Relationship between Future Energy and Respondent is that of Agent and Principal.

The Tri-partite agreement is an event incidental to the main contract. The performance or non-performance of the Claimant's obligation depends upon Future Energy's pleadings and evidence.

C. <u>The Principal is vicariously liable for the Agent.</u>

1.8. It can be rightly be submitted that Future Energy being the agent of the Respondent was acting within the scope of its authority to examine the goods [Art 2.2.2 of UNIDROIT]. So any act done by Future Energy can be directly implicated to the Respondent in accordance with UNIDROIT Principles [Art. 2.2.1]

D. <u>No duress</u>

1.9. It is unfortunate that the Respondent claims that Future Energy's expression of willingness to participate in these proceedings is out of Duress. There is no iota of material to substantiate this claim. If a threat of legal action is to be construed as an event of "Duress", no *lis* of civil nature would survive. A legal notice threatening legal action is the first process to resolve disputes in a civilized manner in a civilized society. There is neither physical duress nor any economic duress. A threat of litigation cannot under any stretch of imagination be termed as duress. It is also equitable to mention that no prejudice would be caused to the Respondent if Future

Energy is arrayed as a party. In the event of finding by the Tribunal that the Claimant is not at fault, it is for the Respondent to take appropriate action against Future Energy instead of penalizing the Claimant.

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

2.1. With due apologies to the tribunal we are of the opinion that the first issue that needs to be determined is wholly extraneous to the subject matter of the dispute before this Hon'ble tribunal In our opinion this question needs to resolved purely as an administrative issue. [A]. It is an extraneous issue and neither falls within the scope of authority of the tribunal. Nor, is it a question pertaining to the determination of jurisdiction by this tribunal; [B]. It also impels us to refer to the Principle of *"Nemo Debet Esse Judex In Propria Causa";* [C] There is no fear of loss of time; [D] The Arbitrators have to fulfill the contract of personal service.

A. Extraneous issue

2.2. It is submitted before this tribunal that this question needs to be resolved purely as an administrative issue .The demand for additional fee and the refusal of the demand resulting in Ms. Arbitrator 1 tendering her resignation is not the subject matter of the *lis* that needs to be resolved. It is purely an administrative issue. By deciding this issue this tribunal is not going to decide on anything of the jurisdiction of this tribunal this issue needs to be dealt with by the chairman, the secretariat and in consultation with the members of the tribunal and the parties on the sides but not certainly within these four walls.

B. *Nemo Debet Esse Judex In Propria Causa*

2.3. The principle *"Nemo Debet Esse Judex In Proporia Causa"* - no one ought to be a judge in his own cause, rings true in this context. In accordance with this principle, we humbly submit that Ms. Arbitrator 1 herself sitting in the arbitrators seat and deciding, on whether she can resign or stay on as an arbitrator on the subject of fee, is neither fair to her nor to the parties to the proceedings.

2.4. With due respect to all the members of this tribunal, the claimant has reservations in this arbitrator 1 being part of this tribunal, especially when there is a disagreement insofar as the additional fee demanded by Ms. Arbitrator 1 and this claimant opposing such a demand fears that there may be an element of prejudice against this claimant. Is it possible for the members of this tribunal to ensure that there will be no bias?

2.5. The claimants assert on not paying additional fees to Ms. Arbitrator 1 as they are being economically exploited by Ms. Arbitrator 1. Therefore, the claimant would not contest the resignation of Ms. Arbitrator 1. Even if the tribunal rules in favor of the payment of additional fees, it would be most difficult, in all fairness for the claimant to believe that she will be fair in further arbitral proceedings. Hence, the proceeding should be conducted in accordance with Article 32 of the CIETAC Rules.

2.6. Notwithstanding the above said contention and as a measure of abundant caution the Claimant submits on the merits of the issue. The panel comprises with three arbitrators in their experience they know very well that normal contentious issue cannot be resolved in two sittings. Whenever there is a fee fixed for an arbitrator's services, the sum agreed is intended to cover all the work done by the arbitrators on the case, including time spent at the hearing however long it may last [Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin Hunter]. Thus the Claimants are under no obligation to pay any extra amount to the arbitrator.

2.7. In most of the cases it is not in the parties' interest to force such an arbitrator to continue; it is better to replace him by another more co-operative arbitrator. [Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kroll. Chapter 13 page 318]. Further pursuant to Article 31(2) of the CIETAC rules, the Chairman in consultation with the arbitral tribunal and the parties to arbitration may appoint a new arbitrator.

2.8. Thus, in event Ms. Arbitrator 1 resigns, under Article 32 of CIETAC Rules the

tribunal can continue with the proceedings or request for the appointment of a new arbitrator which in turn will have the authority in accordance with Article 31(3) of CIETAC Rules to continue with the proceedings.

C. Time factor

2.9. Let us put to rest any apprehension that merely because Ms. Arbitrator 1 resigns, these proceedings get delayed substantial. Of course there may be a slight delay on account of the void created however Article 32 of the rules enable the proceedings to continue with two remaining arbitrators till its finality. If the arbitrator chooses to resign, or refuses to participate when the stage of the tribunal's deliberations is reached and in 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. [Nigel Blackaby; Constantine Partasides; Alan Redfern; J. Martin Hunter]

Article 14 and 15 of UNCITRAL and Article 31 and 32 CIETAC bestow the power to decide in such a truncated situation on the appointing authority and not on the tribunal itself.

D. Contract of Personal Service

2.10. The appointment of the arbitrator involves contract of personal service. Wherein, the arbitrator is required to render his services personally. When an arbitrator accepts an appointment he or she agrees to resolve the dispute between the parties and the parties in turn agree to remunerate the arbitrator for this. Many jurisdictions have adopted common law approach that no one can be compelled to perform personal services. Here there is a contract in place but it is a sui generis contract – a contract which is overlaid with a special adjudicatory function which is public in nature.

Therefore it can be concluded that this contract is in nature of personal service which cannot be specifically enforced.

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

3.1. It is submitted that there has been a valid termination of the Contract by the Claimant for: [A] Non-payment of the Price by the Respondent amounts to non-performance; [B] The Respondent's non-performance amounts to a fundamental breach; [C] Failure of Future Energy is to be attributed to the Respondent; [D] Valid Termination of Contract- Compliance with *Nachfrist* procedure.

A. Non-payment of the Price amounts to Non-Performance

3.2. Payment of consideration is the essence of a contract. The failure on the part of the respondent despite demands made by the Claimant after the amount become due, is a chronic breach. It is submitted that any type of default regarding the parties' contractual or statutory obligations, including complete failure to perform, fully or partially, non-confirming performance or violation of secondary obligations thus constitutes non-performance. [Lares Meyer page, 54].

3.3. In the instant matter the Respondent owed an obligation to pay according to terms of the Purchase Contract. The goods have been manufactured after two design reviews by the Respondent, the same was approved by the agent of the Respondent, *viz* Future Energy, the same were delivered to the Respondent, thus the title in the goods were passed on to the Respondent and what remained is payment of consideration for the goods that were sold. Article 59 [CISG] and Article 5.1 [UNIDROIT] set out the rules whereby the buyer must pay the price as soon as it becomes due, without the need for any request or compliance with any other formality by the seller, when the date of payment became due. The Respondent's failure to honor the obligation of the

payment price in spite of having adequate notice [CL. EX No. 7] amounted to non-performance [Art.7.1.1 UNIDROIT].

3.4. Irrespective of the conformity of the goods, the buyer must still perform by taking delivery and paying for the goods and follow the legal procedure [Clothes case]. Further, it can be rightly pointed out that the buyer should perform his obligation to pay the price if the loss of or damages to the goods occurs after the risk has passed to him [Article 66 CISG].

Once it has been established that the risk passed before loss or damage to the goods occurred, decisions routinely require the buyer to pay the price unless it is established that the seller was responsible for the loss or damage. [Mermark v Cvba] [(*Cerámicas S.L. v. Hanjin Shipping Co. Ltd*)] [GERMANY April 2000]; (obligation to pay not discharged where goods suffered damage after risk passed to buyer);

3.5. It is also submitted that the Respondent may not rely on the non-confirming goods as the sole reason for the non-payment of the price as non-conformity of goods was caused by its own acts [Article 80, Article 66 CISG] Thus its obligation to pay the price was still subsisting.

3.6. Hence, the failure on the part of the Respondent to pay for the goods, despite their delivery amounts to non-performance of the contract. The doctrine of mistake would not come into play in the instant case, as explained further herein.

B. <u>The Respondent's non-performance amounts to fundamental breach</u>

3.7. For the reasons stated in (A) Supra, the Claimant is entitled to terminate the contract as the Respondent has failed to perform his obligations. This amounts to a fundamental non-performance [Article 7.3.1(1) UNIDROIT Principles, Article 25 CISG]. The nature of the non-performance prevents the intended purpose of the contract from being fulfilled.

C. Failure of Future Energy is to be attributed to the Respondent.

3.8. The Respondent by appointing Future Energy as the certifying authority did not rely on the Claimants' skill and the judgment [Art 35 (2) (a) CISG] which clearly exempts the Claimant with respect to conformity of goods. Further, it can be stated that the delivery of the wrong models to the Respondent was the failure of Future Energy [Cl. Ex No.3] and the same has been admitted to by Future Energy. The Claimant had placed the goods at the disposal of Future Energy in accordance with contract specifications thus performing its part of the obligations. Future Energy being the agent of the Respondent was involved in the performance of its duty to examine [Article 38 (1) CISG] and give a fit certificate. Thus failure of the Future Energy should be attributed as the Respondent's failure. For the mistake of Future Energy this claimant cannot be accused of delivering goods which are contrary to the specification. Such mistake admittedly is that of Future Energy, the agent of the Respondent and not that of the Claimant.

3.9. On the other side, it has been asserted that a buyer may lose its rights to object to a lack of conformity if the buyer takes actions indicating acceptance of the goods without complaining of defects that it had discovered or should have discovered in its examination,[Germany, 9 May 2000]. Indefinitely delayed action on the part of Hence the Respondent negates right to rely on lack of conformity and seeks a finding of this Tribunal that the withholding or refusal on the part of the Respondent to pay the money due by it to the Claimant is bad.

D. Valid termination of contract: compliance with *Nachfrist* procedure.

3.10. It is submitted that the failure of the Respondent to make payments in accordance with the Purchase Contract gave the right to the Claimant to terminate the Contract. The Claimant after having performed its part of the contract, demanded the

money due to it from the Respondent, and on default committed by the Respondent, it gave a notice of default [Cl. Ex. No.7] to the Respondent giving them the additional period of time for making the payments[Article 63 CISG, Article 7.1.5 UNIDROIT] But there was no response to the said notices which gave the right for the Claimant to terminate the contract. Thus the Claimant by notice of termination [Cl. Ex.No.8] terminated the contract [CISG Article 64(1) (b)] and it's a justifiable act.

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

4.1. The Claimant humbly submits that the Respondent is liable to pay the termination penalty as there has been a fundamental breach of non-payment on the part of the Respondent which entitles the Claimant to invoke the termination clause of the purchase contract [Clause 15] which provides for the termination penalty.

4.2. It is also submitted that the Claimant has the right of termination and also claim a termination penalty upon a fundamental breach by the respondent. Since the mistake of certifying and dispatching the goods which were not in conformity as per the requirements of the purchase contract, was committed by Future Energy, the Respondent's action of not making the required payment to the claimant which was material to the contract even after notices [Cl. Ex. No.] send by the Claimant amounts to substantial breach of the obligation entitling the Claimant to invoke the penalty clause.

4.3. This penalty is a sum payable in the event of default and is recoverable in only that event. [Bryant G. Grath, pg 94]. The Respondent here has not performed its contractual obligations, making the Claimant a deeply aggrieved party and the aggrieved party is entitled to receive an agreed sum for such non-performance irrespective of actual harm. [Purchase contract – Clause 15] [UNIDROIT. 7.4.13]

4.4. The purchase contract clearly specifies the terms for payment of a termination penalty, where the termination was an after effect of a fundamental breach by the said party. Therefore, the respondent is obliged to make such a payment. [UNIDROIT 7.2.1]

4.5. Also, the Respondent is obliged to adhere to the termination penalty clause is such is present in the terms of the contract pursuant to articles 74 and 76 of the CISG 1980. Further it can be stated that under the purchase contract, the Claimant was to deliver

the goods to Future Energy for certification. From this point on, it can be clearly inferred that the fault has been Future Energy, a third person to the contract who is also an agent of the Respondent. The act of the Agent binds the Principal. Therefore, the Claimant contends that it is exempt from any liability arising out of the instant matter. [CISG Article 79 (2)]

PRAYER FOR RELIEF

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

- CFX Ltd. must pay a termination penalty of USD 8,000,000 as damages
- CFX Ltd. shall pay the costs of arbitration to Energy Pro Inc. and also other legal expenses as set out in Article 50 of CIETAC Arbitration Rules
- CFX Ltd. shall pay Energy Pro Inc. the interest on the amount set forth in item 1 from the date those expenditures were made by Energy Pro Inc. to the date of payment by CFX Ltd.

Respectfully signed and submitted for Energy Pro Inc., _____ June, 2013.