THE INTERNATIONAL ADR MOOTING COMPETITION

HONGKONG 2013

MEMORANDUM FOR CLAIMANT

TEAM NO. 739C

In The Matter Of:

ENERGY PRO INC. v. CFX LTD.

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LIST OF ABBREVIATIONS

¶	Paragraph
p.	*pagina* (page)
pp.	*paginae* (pages)
Art.	Article
v.	*Versus*
CLAIMANT	Energy Pro Inc.
RESPONDENT	CFX Ltd.
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for International Sale of Goods
UPICC	UNIDROIT Principles of International Commercial Contracts

INDEX OF AUTHORITIES

BOOKS, ARTICLES, ESSAYS

Munir, M.	The Authority of a Truncated Arbitral Tribunal – Straight Path or Puzzle? For Institute for Transnational Arbitration, Kluwer Arbitration Blog, 2012 *Cited as: Munir*	**5**
Schlechtriem, P.	Commentary on the International Sales Law, Giuffre: Milan (1987) *Cited as: Schlechtriem*	**9**
Shen, Jianming	Declaring the Contract Avoided: The UN Sales Convention in the Chinese Context, New York International Law Review, Vol. 10, No.1, New York State Bar Association, (1977) *Cited as: Shen*	**10**

CASES

LEGAL INSTRUMENTS

ARGUMENTS ADVANCED

I. FUTURE ENERGY CAN AND SHOULD BE MADE A PARTY TO THE ARBITRATION

1. In the absence of any specific provisions in the CIETAC Rules with regard to the issue of joinder, the necessity of allowing Future Energy to be made a party to arbitration is illustrated by the following:

A. Issue Of Joinder Is Arbitrable

2. Problems of consent may arise when a party that has not signed the arbitration agreement is made a party to the arbitration on the basis that the arbitration agreement is also binding on it. In light of the *doctrine of competence-competence*, the tribunal can decide whether or not a multiparty arbitration is covered by the arbitration agreement. [Lew/Mistalis/Kroll, pg. 304]

B. Future Energy Plays A Pivotal Role In The Performance Of The Purchase Contract Under Consideration

3. The gearboxes under consideration had specific technical requirements. They could only be utilized after Future Energy had certified the fulfilment of all necessary specifications. Thus the certification provided by them was instrumental to all provisions of the contract being fulfilled and performance be completed. Courts have upheld the referral to arbitration of disputes involving non-signatories on the ground that the dispute between a signatory and a non-signatory appeared *sufficiently* connected to the interpretation or execution of a contract of the signatory that contained an arbitration clause. Accordingly, such dispute was held as arguably falling under the material scope of the arbitration clause. [*ICCA, pg. 60-61*]

(I) JOINDER BE ALLOWED BY TAKING COGNIZANCE OF CONDUCT OF FUTURE ENERGY

4. Under most developed legal systems, an entity may become party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement. [*Born/Rutledge, p. 357*] Since, the conduct of Future Energy, due to the mistake made by its employee, is the root cause of the inability of the RESPONDENT to use the gearboxes; this joinder should be allowed so that the responsibility is shouldered by the appropriate party in the interests of justice and fairness. It has been held that the performance of some or all of the obligations of a contract, even when unsigned by a counter-party, can bind a party to the agreement, including its arbitration provision. [*Born, p. 1151*]

(II) JOINDER BE ALLOWED BY INDEPENDENT INTERPRETATION OF CIRCUMSTANCES AT THE DISCRETION OF THE TRIBUNAL

5. Following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators in the *Dow Chemicals case*, for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that Dow Chemical France and Dow Chemical Company were parties to certain agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well. [*ICC Case No. 4131*] Similarly, in light of the facts of the case, Future Energy can be made a party to this arbitration.

C. The Question Of Formal Validity Is Independent Of The Assessment Of The Parties To The Arbitration Agreement

(I) IT IS A MATTER OF MERITS AND NOT SUBJECT TO FORM REQUIREMENTS

6. One of the conditions for an arbitration agreement to be valid is that it must exist in writing. [*Art. II, NYC/ Art. 5(2), CIETAC*] Binding of a non-signatory cannot be read as conflicting this rule. Once it is determined that a formally valid arbitration agreement exists, it is a different step to establish the parties which are bound by it. Third parties not explicitly mentioned in an arbitration agreement made in writing may enter into its *ratione personae* scope. [*ICCA, p. 59*]

D. A Joinder Would Be In The Interests Of Procedural Economy And Effective Administration Of Justice

7. Adjudging these matters by involving all parties involved, as part of a single arbitration, places the tribunal in the best position to render a just and equitable award.

(I) PREVENTION OF CONFLICTS OF DECISIONS

8. If matters pertaining to the same facts and parties are adjudged by separate tribunals, there is a risk of a conflict arising between different decisions given by the two tribunals with regard to the same issue. This affects the enforcement and validity of the arbitral award and can ultimately defeat the purpose of arbitration without providing a solution to the dispute. Allowing Future Energy to join the dispute would avoid the possibility of conflicting decisions on the same issues of law and fact, since all issues would be determined by the same tribunal at the same time.

(II) MINIMIZATION OF EXPENSES AND TIME CONSUMED FOR ALL PARTIES INVOLVED

9. A joinder would have the advantage of enabling the dispute to be resolved in one single procedure taking account of all issues and interests of all parties affected and would save considerable time. In addition, the parties would only have to pay for one arbitration tribunal. [*Lew/Mistalis/Kroll*, ¶ *16-2*]

II. MS. ARBITRATOR 1 CAN RESIGN DURING THE ARBITRATION PROCEEDINGS.

A. Ms. Arbitrator 1 can voluntarily resign during the arbitration proceedings.

(I) PURSUANT TO ARTICLE 31(1) OF THE CIETAC RULES

10. Pursuant to Article 31(1) of the CIETAC Rules, Ms. Arbitrator 1 can voluntarily resign as arbitrator. She may do so, either in response to a challenge or for other reasons. [*Lew/Mistalis/Kroll, p. 252*] Ms. Arbitrator 1 is unwilling to continue due to lack of consensus with the CLAIMANT regarding financial remuneration and can voluntarily resign as per Art. 31(1).

(II) RIGHT OF MS. ARBITRATOR 1 TO RESIGN FROM HER MANDATE

11. An arbitrator has the right, in some circumstances, to resign from his or her mandate thereby terminating the arbitrator's contract (although an unjustified resignation may expose the arbitrator to liability). [*Born, p. 1612*]

12. If an arbitrator chooses to withdraw, there is no judicial authority to overturn that resignation or to reinstate the arbitrator. An arbitrator may be exposed to liability for wrongful resignation, but there is no basis for (or sense to) forcing an unwilling arbitrator to serve. [*Munir*] If she has chosen to resign due to non-payment, CLAIMANT will not contest her resignation.

B. CLAIMANT is not obliged to provide additional remuneration

13. The arbitration fees to be paid had been decided by CIETAC pursuant to Article 12(3) of the CIETAC Rules. Since the fee has already been decided as per the CIETAC Fee Schedule, Ms. Arbitrator 1 cannot ask for extra payment for the additional three days. She

had agreed to the fees decided and although subsequent discussions reveal that the issue of quantum would take longer, this is no justification to pay her more once an agreement has been reached. [*Clarification 10*]

14. CLAIMANT has already paid her in advance for the services she will render for the two days of hearing on the issue of quantum and does not feel obligated to pay her any additional sum for the extra three days for issue on quantum.

C. CLAIMANT can replace Ms. Arbitrator 1 with a new arbitrator.

(I) IT IS NOT IN PARTIES' INTERESTS TO FORCE AN UNWILLING ARBITRATOR TO CONTINUE AND IT IS BETTER TO REPLACE HIM.

15. In most cases it is not in the parties' interest to force a resigning arbitrator to continue; it is better to replace him by another, more cooperative arbitrator. There is no basis, statutory or otherwise, for a court to review an arbitrator's earlier resignation, and we know of no authority that grants courts the power to force unwilling arbitrators to continue to serve." [*Florasynth v. Pickholz pp. 171, 173]*

III. THE PURCHASE CONTRACT WAS VALIDLY TERMINATED

A. A Contract Can Be Terminated In Accordance With Its Terms

16. A contract can be terminated in accordance with its terms. [*UPICC, Art. 1.3*] Clause 15.1 of the Purchase Contract clearly states that CLAIMANT has a right to suspend the contract in case RESPONDENT fails to make any payments, as in the present situation.

(I) UNFULFILLED MONETARY OBLIGATIONS

17. Where a party who is obliged to pay money does not do so, the other party may require payment. [*UPICC, Art 7.2.1*]. This reflects a generally accepted principle that payment of money which is due under a contractual obligation can always be demanded. [*UNIDROIT Commentary, p. 239*]

18. RESPONDENT had to pay six million to CLAIMANT via three instalments of two million USD each. [*Purchase Contract, Art. 1.2(b)(i)*] Although the first payment was made, RESPONDENT defaulted in payment of the second and third instalments. It clearly showed its intention to not pay these instalments when it informed CLAIMANT via letter dated 21 May. [*Claimant's Exhibit 6*].

19. RESPONDENT failed to make the necessary payments and thus CLAIMANT had the right to terminate the contract. [*Purchase Contract, Art. 15.1*]

B. Respondent Itself Responsible For Non-Fulfilment Of Obligation

20. RESPONDENT had an obligation to confirm that the gearboxes had been delivered in conformity with the technical specifications of the Contract, after which it was required to make payment.[*Purchase Contract, Art. 1.2(b)(i)*] Once CLAIMANT had obtained the certificate of approval with regard to the gearboxes from Future Energy [*Purchase*

Contract, Art. 10.2], it was for RESPONDENT to approve that the gearboxes were technically qualified. In the present case they have implied approval by paying the first instalment. [*Statement of Facts, ¶ 10*]. Thus, they cannot cite the defective performance of CLAIMANT as a reason for non-performance. CLAIMANT has fulfilled its duty to achieve a specific result [*UPICC, Art. 1.5.4*] by obtaining a fit certificate.

21. Any grievance that RESPONDENT has with regards to the certificate of approval given by Future Energy has to be taken up by RESPONDENT against them. CLAIMANT is not liable for any negligence on the part of Future Energy.

C. Fundamental Non-Performance Validates Termination Of A Contract

(I) FUNDAMENTAL NON-PERFORMANCE AS PER UNIDROIT

22. The principle that, a fixed term contract can be terminated before it expires if there are serious reasons for termination, constitutes a widely recognised principle in international trade. A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance." [*UPICC. Art. 7.3.1(1); ICC Case No. 10422 of 2001*]

23. RESPONDENT's non-performance by not paying the second and third instalments amounts to a fundamental breach of the contract. It was fundamental because it met the following criteria laid down by the UPICC:

- RESPONDENT's failure to make payment of second and third instalments deprived the CLAIMANT of the funds it was entitled to expect under the contract;
- RESPONDENT's non payment was intentional;
- These two circumstances were enough to give CLAIMANT reason to believe that it could not rely on RESPONDENT's future performance. [*UPICC, Art. 7.3.1(2)*]

Three conditions have been held sufficient for non-performance to be fundamental. [*CAM Case*]

D. <u>Anticipatory Breach As Grounds for Termination</u>

24. RESPONDENT made it clear that they will not be fulfilling any further monetary obligations on their part after paying the first instalment. [*Claimant's Exhibit 6*]. An alleged lack of conformity on seller's part has been found to most likely not constitute a seller's fundamental breach of contract but found that on the contrary, the non payment for the goods on the part of the buyer did constitute a fundamental breach, thus allowing seller to suspend performance under Art. 64, CISG. [*Shuttle v. Tsonakis*]

25. Under Art. 73(2) CISG one party may declare the instalment contract avoided for the future if the other party's failure to perform any of its obligations in respect of any instalment gives good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments. [*Poultry Feed Case*]

26. According to Art. 73(2), avoidance in regard to future obligations must be declared within a reasonable time so that the other party has sufficient time to consider the matter. [*Schlechtriem, p. 96*]

27. As per 73(2), the defaulting party's breach in respect to any of the instalments must only give the non-breaching party "good grounds" to fear that a fundamental breach will occur to future instalments. It is less strict as compared to grounds for avoidance under other articles like 72. The breach that has occurred does not have to be serious or fundamental. What is important is the seriousness of the anticipatory breach as to future instalments that the non-breaching party fears will occur in view of the current breach. [*Shen, p. 24*]

28. A mere breach may also lead to the conclusion that a fundamental breach will be committed in the future.[*Silveira ,Ch. IV, ¶ 3*]

29. In the present case, the non-payment of second and third instalments by RESPONDENT has given good grounds for CLAIMANT to believe that fundamental breach will be committed by RESPONDENT in the future when it comes to payment of further instalments. Hence the termination of the contract can be held to be valid.

IV. CLAIMANT CAN CLAIM THE TERMINATION PENALTY

A. Termination Clause is Binding on the Parties

30. Clause 15.2 of the Purchase Contract clearly states that, in the event CLAIMANT Inc. terminates the Purchase Contract as provided: (a) CLAIMANT Inc. shall be entitled to retain any part payment(s) made by RESPONDENT; and (b) RESPONDENT shall pay to CLAIMANT Inc. a termination penalty equal to the difference between the total value of this Purchase Contract and the value of Gearboxes already delivered to RESPONDENT as of the termination date. *[Claimant's Exhibit 2]*

31. A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles. [*UPICC, Art. 1.3*] This article lays down the basic principle of contract law, that of *pacta sunt servanda.* [*UNIDROIT Commentary, p. 11*]

32. Thus clause 15.2 of the contract is binding on RESPONDENT and hence they are liable to pay penalty as per the method mentioned in the clause which in this case is 8 million USD.

(I) NO EVIDENCE OF UNFAIR TRADE PRACTICES

33. CLAIMANT was in no way in a superior bargaining position to unfairly influence the contract. If anything it was CLAIMANT who approached RESPONDENT to start a joint venture. Hence RESPONDENT is bound by the contract and is liable for 8 million USD.

B. Termination Clause is Valid

34. Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination. [*UPICC, Art. 7.3.5(3)*]

35. Notwithstanding the general rule laid down in Art.7.3.5(1) there may be provisions in the contract which survive its termination. This is in case in particular to provisions relating to dispute settlement but there may be others which by their nature are intended to operate even after termination. [*UNIDROIT Commentary, p. 257*]

(I) AGREED PAYMENT FOR NON-PERFORMANCE

36. Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. [*UPICC, Art. 7.4.13(1)*]

37. Under this article, agreement to pay a specified sum includes agreements intended to operate as a deterrent against non-performance (penalty clause). [*UNIDROIT Commentary, p. 284*]

38. Article 7.4.13(1) in principle acknowledges the validity of any clause providing that a party which does not perform is to pay a specified sum of money to the aggrieved party, with the consequence that the latter is entitled to the agreed sum irrespective of the harm actually suffered. The non-performing party may not allege that the aggrieved party suffered less harm or no harm at all. [*UNIDROIT Commentary, p. 284*]

(II) TERMINATION PENALTY SHOULD NOT BE REDUCED.

39. Art. 7.4.13, UPICC is based on the validity of penalty clauses subject to a judicial discretion to reduce the amount where it is grossly excessive. [*CIETAC Case 0291-1*] In the present case, clause 15.2 of Purchase Contract is valid. Any claim to reduce the amount as per Article 7.4.13(2) should thus not be entertained by the arbitral tribunal as the clause is in effect taking into account the investment made by CLAIMANT in the

venture and hence they should be entitled to the requisite penalty as provided in clause 15.2 which is 8 million USD.

C. RESPONDENT is not entitled to Restitution

40. Under UPICC, Article 7.3.6 deals with restitution with respect to contracts to be performed at one time. Restitution with respect to contracts to be performed over a period of time is dealt with by Article 7.3.7. The present contract falls under Article 7.3.7. This is because the Purchase Contract entered into between the parties is for a period of 5 years and not a one-time transaction.

41. In case of termination of a contract to be performed over a period of time, the parts already performed should not be affected by the termination. [*IMS v. Iran*]

42. The rule that restitution can only be claimed for the period after termination does not apply if the contract is indivisible [*UNIDROIT Commentary, p. 264*]. However the present contract is divisible as clearly given in clause 1 of the Purchase Contract as per which there will be distinct deliveries made by Seller and also distinct payments in instalments. It does not conform to the illustration no. 4 under Article 7.3.7 in the UNIDROIT Commentary which deals with indivisible contracts.

43. Hence although the contract is terminated there cannot be any restitution made because there have not been any transactions after the contract is terminated. So RESPONDENT cannot claim reimbursement of its payment of 2 million USD.

PRAYER

44. In light of the submissions made above, CLAIMANT respectfully request tribunal to declare that:

- Future Energy be made a party to this arbitration
- Ms. Arbitrator 1 can resign and CLAIMANT may nominate a replacement
- CLAIMANT validly terminated the contract and can claim termination penalty of 8,000,000 USD
- RESPONDENT shall bear arbitration costs including additional expenses with interest.

Respectfully signed and submitted by counsel on June 21, 2013