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RED ELECTRIC POWER

Memorandum for Red, Co.

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<Issue 1-1>

Executive Summary

【Background】

On May 1, 2009, Red Electric Power Company ("Red") and Blue Electric Power Company ("Blue") entered into a license agreement (the "License Agreement,") and thereby Blue granted Red its license regarding the CO_2 emissions reduction technology.

During the negotiation to conclude this contract, both parties had a mutual intent to make this grant exclusive. By applying the license, Red expected to gain the prize of US$ one million as the best contributor to environment protection. Blue was also aware of this intention, and had clearly stated that the license would be exclusive.

However, Blue granted the same license to Negoland Electric Power ("Nego Power") in breach of the License Agreement. Consequently, the informal decision to commend Red as the best contributor to environment protection was cancelled and Red suffered the damage of US$ one million.

【Claim】

We hereby seek the following arbitral award:

A. Blue shall immediately terminate the license agreement with Nego Power; and,

B. Blue shall pay US$ one million to Red.

【Legal Basis】

Claim A.

1. Red's license under the License Agreement is an **EXCLUSIVE** license. Therefore, Blue shall not grant the license regarding the CO_2 emissions reduction technology to any third party.
2. Blue breached its obligation not to grant the license regarding the CO_2 emissions reduction technology to any third party by granting the same license to Nego Power.
3. Therefore, Blue shall immediately terminate the license agreement with Nego Power (UNIDROIT 7.2.2).

Claim B.

4. Since Blue's act, as explained above, constitutes non-performance of its obligation under the License Agreement, Blue shall compensate any and all Red's damage caused by such non-performance (UNIDROIT[1] 7.4.1 to 7.4.4).
5. Consequently, Blue shall pay US$ one million as compensation for the harm.

[1] International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (2004)

Claim A.

Blue shall immediately terminate the license agreement with Nego Power.

1. Red's license under the License Agreement is an EXCLUSIVE license. Therefore, Blue shall not grant the license regarding the CO_2 emissions reduction technology to any third party.

(1) Although Art.3 of the License Agreement does not explicitly stipulate the exclusivity of the license, it is clear from the following reason that the license is an exclusive license.

(2) According to UNIDROIT 4.1, "a contract shall be interpreted according to the common intention of the parties." Thus, the License Agreement should be interpreted according to the mutual intention of Blue and Red.

(3) It is clear that the intent of Blue and Red upon signing the License Agreement was to make the grant of license exclusive based on the following three factors.

(a) Art.6 of the Basic Agreement

Art.6 of the Basic Agreement clearly stipulates that both parties should "deal exclusively" for "a period of two years from the date of the Basic Agreement." Since the License Agreement was concluded based on the Basic Agreement, the intention of both parties at the time of execution of the License Agreement should be the same as that of execution of the Basic Agreement.

(b) The process of how both parties agreed on the higher licensing fee

Both parties agreed on a licensing fee higher than the amount initially proposed by Blue, based on the promise that Blue would grant an exclusive license to Red[2].

(c) Blue's statement during the negotiation

Brown, who had full authority necessary to conduct negotiations on behalf of Blue[3], explicitly stated that Blue's license will be "the exclusive license which prohibits us to license the same technology to other parties[4]." Since Brown's statement comprises Blue's intention as a whole, it is clear that Blue's intention was to grant the license exclusively to Red.

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[2] Para.18.c
[3] Para.16.b
[4] Para.18.c

(4) Therefore, each article of the License Agreement should be interpreted according to the intent of both parties, which was to make the grant of license exclusive. Accordingly, Art. 3 of the License Agreement should be interpreted as follows; Blue should grant its license exclusively to Red.

(5) In addition, since the contract terms were supplied by Blue[5], the interpretation against Blue should be preferred pursuant to UNIDROIT 4.6. Thus, even if Blue offers a different interpretation, the interpretation provided by Red shall take first precedence.

2. Blue breached its obligation not to grant the license regarding the CO_2 emissions reduction technology to any third party by granting the same license to Nego Power.

(1) Blue granted Nego Power the same license as granted to Red in March 2010[6]. This constitutes a breach of the License Agreement, which obliges Blue not to grant the same license to any third party.

(2) Since Blue failed to perform its obligation not to grant the same license to any third party, Blue has committed "non-performance," as set forth in UNIDROIT 7.1.1.

3. Therefore, Blue shall immediately terminate the license agreement with Nego Power (UNIDROIT 7.2.2).

[5] Para.18.d
[6] Para.22.b

Claim B.
Blue shall pay US$ one million to Red.

4. Since Blue's act, as explained above, constitutes non-performance of its obligation under the License Agreement, Blue shall compensate any and all Red's damage caused by such non-performance (UNIDROIT 7.4.1 to 7.4.4).

(1) Since Blue's act constitutes non-performance, Red has the right to damages (UNIDROIT 7.4.1).

(2) Red shall be entitled to full compensation of US$ one million (UNIDROIT 7.4.2).

(3) Since "it was certain that Red would have been awarded US$ one million had Blue not licensed the technology to Nego Power"[7], there is a reasonable degree of certainty of the harm (UNIDROIT 7.4.3).

(4) Since Blue had the knowledge of the "Basic Principles Concerning Power Generation Business" and Red had clearly stated that "it would cause a serious problem if you [Blue] license the same technology to other Negoland companies[8]," Blue was able to foresee the harm arising from its non-performance (UNIDROIT 7.4.4).

5. Consequently, Blue shall pay US$ one million as compensation for the harm.

[7] Para.22.e
[8] Para.17.b

<Issue 1-2>

Executive Summary

【Background】

After concluding the License Agreement, both parties moved into investigating the amount of CO_2 emissions reduction they could reach with the application of Blue's new technology to Red's plants (this process was necessary in order to gain subsidy from the Negoland government.)

Instead of conducting on-site surveys at all power plants, the parties decided to conduct surveys on three representative plants with the given time limit. The investigation held by Blue at those three sites confirmed that the rate of reduction would be about one-half and Red applied for subsidy based on that data.

However, it turned out that with all the plants combined, Red was unable to achieve the planned emissions level. Since the actual result differed materially from the planned level, the government ordered Red to return the subsidy and thus Red suffered damage of US$ 15 million.

【Claim】

We hereby seek the following arbitral award:

Blue shall pay US$ 15 million to Red.

【Legal Basis】

1. Blue was obliged to provide the best "Technology" regarding the reduction of CO_2 emissions (License Agreement Arts.7.1 and 2.1).
2. In this case, Blue was obliged to provide appropriate information and know-how regarding the additional instruments to Red.
3. However, Blue did not fulfill its obligations.
4. In the alternative, Blue was obliged to dispense advice regarding the criteria to select three plants.
5. However, Blue did not fulfill its obligation.
6. Since Blue's act, as explained above, constitutes non-performance of its obligation under the License Agreement, Blue shall compensate any and all Red's damage caused by such non-performance (UNIDROIT 7.4.1 to 7.4.4).
7. Consequently, Blue shall pay US$ 15 million as compensation for the harm to Red.

1. Blue was obliged to provide the best "Technology" regarding the reduction of CO_2 emissions (License Agreement Arts.7.1 and 2.1).

(1) License Agreement Art.2.1 stipulates that Blue shall provide Red with all information, data, materials and know-how regarding the Technology.

(2) License Agreement Art.7.1 stipulates that Blue shall represent that the Technology is the best technology that Blue possesses at the time of its disclosure to Red.

(3) Please note that the word "Technology" in the above two articles has a broad meaning, which includes know-how[9] regarding the reduction of CO_2 emissions.

(4) In this case, "know-how" is used in terms of technological property. Thus, the meaning is not limited to the common usage of the word and therefore includes intangible forms of information, such as providing advice based on its accumulated knowledge and experience.

2. In this case, Blue was obliged to provide appropriate information and know-how regarding the additional instruments to Red.

(1) Information and know-how regarding the additional instruments for the decrepit power plants are an integral part of the best "Technology." This is because without the additional instruments, Red could not have achieved the planned level of reduction of CO_2 emissions[10].

(2) Also, Blue must have recognized that Red has a certain number of decrepit power plants. Blue had a list of all Red's thermal power plants[11]. With the list, even common people, let alone a business partner of Red, could easily determine how old the plants are.

(3) Furthermore, Blue is experienced in selling environmental technology in Asian countries[12]. Accordingly, Blue could have recognized the importance of the additional instruments.

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[9] License Agreement Art.1.1
[10] Para.22.h
[11] License Agreement Art.1.2 Note
[12] Para 15.b

(4) Therefore, Blue was obliged to provide appropriate information and know-how regarding the additional instruments as a pivotal part of the best "Technology."

3. However, Blue did not fulfill its obligations.

(1) Blue has never provided appropriate information and know-how regarding the additional instruments from the time of the disclosure of the licensed technology until today.

4. In the alternative, Blue was obliged to dispense advice regarding the criteria to select three plants.

(1) Should it be found that Blue was not obliged to provide appropriate information and know-how regarding the additional instruments, Blue had another obligation.

(2) Since the word best "Technology" in the License Agreement covers know-how regarding reduction of CO_2 emissions, Blue was obliged to provide in-depth criteria concerning how to select the three plants. Blue had this obligation both before and after Red's selection of three plants.

5. However, Blue did not fulfill its obligation

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(1) Blue did not give proper advice to Red either (a) before the selection or (b) after the selection.

(a) Before the selection

As criteria, Blue suggested that "representative thermal power plants" be selected[13]. As a result, Red chose the three biggest plants with their power generation volume amounting to half of Red's total power generation[14].

However, if Blue had provided Red with proper criteria to select the plants, Red could have selected three plants including decrepit plants. If that had been the case, Red would have achieved planned level of reduction of CO_2 emissions.

[13] Para 18.e
[14] Para 18.g

(b) After the selection[15]

Blue should have pointed out that Red had made the wrong selection. This is because, from the list of all Red's thermal plants, Blue easily could have known that Red had not included decrepit plants[16].

6. Since Blue's act, as explained above, constitutes non-performance of its obligation under the License Agreement, Blue shall compensate any and all Red's damage caused by such non-performance (UNIDROIT 7.4.1 to 7.4.4).

(1) Since Blue's act constitutes non-performance, Red has the right to damages (UNIDROIT 7.4.1).

(2) Red shall be entitled to full compensation of US$ 15 million (UNIDROIT 7.4.2).

(3) Since the Negoland government ordered Red to return the subsidy[17], there is a reasonable degree of certainty of the harm (UNIDROIT 7.4.3).

(4) Blue was able to foresee the harm arising from its non-performance regardless of which of the above explained three possible obligations Blue is obliged to for the following reason (UNIDROIT 7.4.4).

(a) Blue had knowledge of "Basic Principle Concerning Power Generation Business" and that Red lacked expertise on this area prior to the execution of the license Agreement

(b) Therefore, it was possible for Blue to foresee that if Blue failed to provide information regarding the additional instruments, the situation in which Red would be ordered to return the subsidy could arise.

(c) Likewise, it was possible for Blue to foresee that if Blue failed to provide the criteria to select the sites, the situation in which Red would be ordered to return the subsidy

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15 Para 18.g
16 License Agreement Art.1.2 Note
17 Para.22.i

could arise.

7. ***Consequently, Blue shall pay US$ 15 million as compensation for the harm to Red.***

<Issue 2-1>

Executive Summary

【Background】

It was initially decided by both parties of the Joint Venture Agreement[18] ("JVA") that Red would obtain the materials from the leading farm according to the testing conducted by Blue[19]. However, the large-scale flood that hit the farms and the surrounding area made it impossible for Red to obtain the materials from the leading farm.

After the phone conversation to discuss how to deal with the situation, Red obtained the materials from the neighboring country, which was the only option left for Red. Red had absolutely no doubt that the materials from the neighboring country would not result in a different level of efficiency.

However, the planned level of power generation efficiency was not achieved due to a difference in the constituents of the materials, and thereby Red was ordered to return the subsidy[20].

【Claim】

We hereby seek the following arbitral award:

Blue's claim that Red shall pay US$ nine million to Blue is to be dismissed.

【Legal Basis】

1. Red's obligation was to procure bird manure and wood waste ("materials") which are necessary to operate the power generation facility (JVA Art.14.3).
2. Red had fulfilled its obligation since the quality of the materials Red obtained was adequate for the facility to operate.
3. In the alternative, should it be found that Red's obligation was to obtain the materials in relation to getting the subsidy, Red's obligation was a "duty of best efforts."
4. Red fulfilled its duty of best efforts through obtaining the materials from the neighboring country.
5. In the alternative, Red shall be excused by the reason of Force Majeure.
6. Consequently, Red is not obliged to pay US$ nine million.
7. Ota relinquished Blue's right to demand Red any compensation (UNIDROIT 5.1.9).
8. Consequently, Blue cannot demand US$ nine million.

[18] Exhibit 6
[19] Para.23.a
[20] Para.23.a,b

1. Red's obligation was to procure bird manure and wood waste ("materials") which are necessary to operate the power generation facility (JVA Art.14.3).

2. Red had fulfilled its obligation since the quality of the materials Red obtained was adequate for the facility to operate.

(1) The facility did operate successfully with the materials Red obtained.

3. In the alternative, should it be found that Red's obligation was to obtain the materials in relation to getting the subsidy, Red's obligation was a "duty of best efforts".

(1) Obligations can be classified as either a "duty to achieve a specific result" or a "duty of best efforts (UNDROIT 5.1.4).

(2) Red's obligation under the JVA was a "duty of best efforts" for the following reasons as specified in UNIDROIT 5.1.5.

(a) Red's obligation is not expressed in a way that it is a duty to achieve a specific result for the JVA Art.14.3 does not specify the amount of reduction of CO_2 Red has to achieve by procuring the materials (UNIDROIT 5.1.5(a)).

(b) Blue had enormous influence on the performance of Red's obligation. This project was the first biomass power generation project in which Red was involved[21]. Thus, Red lacked expertise on biomass power generation. In particular, Red did not know what factors affect the power generation efficiency[22]. In this case, it was impossible for Red to conduct testing on the materials on its own. Therefore, if Red's obligation were "a duty of specific result", it would be unfairly onerous (UNIDROIT 5.1.5(d)).

(c) For these two reasons, Red's duty was "a duty of best efforts" in relation to achieving a desirable level of power generation efficiency.

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[21] Para.16.c
[22] Para.25.b

4. Red fulfilled its duty of best efforts through obtaining the materials from the neighboring country.

(1) The best efforts Red could exert were to obtain the materials from the neighboring country for the following two reasons.

(a) It was impossible at that time for Red to obtain the material from Negoland or Arbitria[23]. Thus the only option left for Red was to obtain the materials from the neighboring country.

(b) Red was not informed that the difference in location would result in a difference in constituents of materials and that such a difference would affect the biomass power generation efficiency[24].

(2) Red had obtained the materials from the neighboring country. Therefore, it can be concluded that Red had fulfilled its obligation.

5. In the alternative, Red shall be excused by the reason of Force Majeure.

(1) A party shall be excused for non-performance when non-performance is due to a natural disaster or any other cause whatsoever beyond the reasonable control of the party (JVA Art.17).

(2) The failure of Red to obtain the materials was attributable to the large-scale flood which made it impossible for Red to obtain the materials from Negoland or Arbitria.
For this reason, Red shall not be held liable for its non-performance.

6. Consequently, Red is not obliged to pay US$ nine million.

[23] Para.23.b
[24] Para.25.b

7. Ota relinquished Blue's right to demand to Red any compensation (UNIDROIT 5.1.9).

(1) An obligee may release its right by agreement with the obligor (UNIDROIT 5.1.9). In this case, the obligee, Blue, released its rights to demand compensation that could arise in case of the return of the subsidy since an agreement was established, as explained below, between Red and Blue to this effect.

(2) Ota, the president of Blue, stated that he was confident that Blue could develop the additive that works on the materials from the neighboring country and the ongoing negotiation with the Energy Agency would be successful, and promised to bear all responsibility if negotiation failed and subsidy was reverted[25].

(3) To bear all responsibility means to not demand compensation from Red in case the subsidy is reverted. As a consequence, Blue cannot demand compensation from Red.

8. Consequently, Blue cannot demand US$ nine million.

[25] Para.24

<Issue 2-2>

Executive Summary

【Background】

Red guaranteed the payment of US $1.5 million which was paid by Blue to Green Biomass Power Corporation ("Green") as the upfront payment, in the event Green is obliged to repay such amount to Blue, as far as it will not conflict with the object of the JVA between Red and Blue (Exhibit 8). Green is obliged to repay US$ 1.5 million to Blue in case the CER Purchase Agreement ("CER Agreement") is terminated under CER Agreement Art.3.1 (CER Agreement Art. 3.2). Blue terminated the CER Agreement and demanded the payment of the upfront payment amount in full, pursuant to the guarantee by Red.

【Claim】

We hereby seek the following arbitral award:

A. Blue may not demand Red any payment.

Should it be found that Claim A does not stand,

B. Red shall pay US$ 750,000 to Blue.

【Legal Basis】

Claim A.

1. CER Agreement Art. 3.1 stipulates the conditions for Blue to terminate the CER Agreement.
2. In this case, this condition is not met and therefore, Blue may not terminate the CER Agreement.
3. Consequently, Red shall not pay any money to Blue.

Claim B.

4. Even if Blue could terminate the CER Agreement, Red shall guarantee the payment as far as it will not conflict with the object of the JVA. In this case, the object of the JVA was that Red shall guarantee only half of the payment.
5. Therefore, Red shall only pay US $750,000, half the amount of the upfront payment.

A. Blue's claim that Red shall pay US$ 1.5 million to Blue is to be dismissed.

1. CER Agreement Art. 3.1 stipulates the conditions for Blue to terminate the CER Agreement.

(1) Blue may terminate the contract when the project entity does not deliver all of the CERs within 15 business days of the date on which it was required to deliver those CERs under this Agreement. (CER Agreement Art.3.1).

(2) CER Agreement Art. 2.2 states that project entity will deliver "all CERs issued" and Art.2.3 states the project entity will deliver "any CERs deliverable to buyers".

(3) Therefore, it can be concluded that Blue may terminate the contract only when Red does not deliver all of the CERs within 15 business days even though they are issued and deliverable.

2. In this case, this condition is not met and therefore, Blue may not terminate the CER Agreement.

(1) In the first delivery year, CERs were not issued in the first place[26]. Therefore, Red's obligation to deliver CERs did not arise. This means non-performance of CER Agreement Art.3.1, which Blue asserted, did not exist.

(2) Therefore, Blue may not terminate the CER Agreement.

3. Consequently, Red shall not pay any money to Blue.

(1) Green shall only return US$ 1.5 million to Blue in the case the CER Agreement is terminated under Art.3.1 (CER Agreement Art. 3.2). Therefore, Green is not obliged to return US$1.5 million to Blue.

(2) Therefore, no obligation exists for Red to guarantee under Exhibit 8.

(3) Consequently, Red shall not pay any money to Blue.

[26] Para.27

B. Red shall pay Blue US$ 750,000, half the amount of the upfront payment since Red's payment to Blue of the upfront payment amount in full would conflict with the object of the Joint Venture Agreement.

4. Even if Blue could terminate the CER Agreement, Red shall guarantee the payment as far as it will not conflict with the object of the JVA. In this case, the object of the JVA was that Red shall guarantee only half of the payment at most.

(1) UNIDROIT 4.1 stipulates that a contract shall be interpreted according to the common intention of the parties. In accordance with this principle, "it does not conflict with the object of the Joint Venture Agreement" shall be interpreted in such way as mentioned above for the following reason.

(2) Green is a joint venture firm equally owned by Red and Blue. In addition JVA Art.14.4 stipulates that Red and Blue equally share the liability in case Green becomes liable to the third party. Therefore, it is clear that the common intention of the parties was to shoulder risks equally.

(3) Consequently, "as far as it does not conflict with the object of the Joint Venture Agreement" should be interpreted as follows; Red shall guarantee only half of the payment.

5. Therefore, Red shall only pay US $750,000, half the amount of the upfront payment.