

CHEAT SHEET

30th Willem C. Vis International Commercial Arbitration Moot

PROBLEM (including PO2)

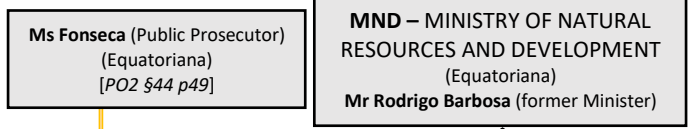
ANALYSIS FOR ARBITRATORS

PURCHASE AND SUPPLY AGREEMENT (“PSA”)

Dated 1 Dec 2020 for purchasing 6 Kestrel Eye 2020 Unmanned Aerial Systems (“UAS”) for EUR 44m plus 4 years basic maintenance at EUR 480k per UAS per year [C2 p10-12]



- **2016:** Resp is set up to develop Equatoriana’s northern part (“NP”) [NoA §2 p4; RNoA §3 p27]
- **Jan 2020:** Board approves purchase of 2-6 UAS at EUR 45m and 5year service at EUR 10m [PO2 §7 p44]
- **20 Mar 2020:** Tender by Resp for 4 “state-of-the-art” UAS for NP surveillance + exploration [C1 p9]
- **2020:** Negotiations of PSA by Mr Bluntschli and Mr Field [NoA §5 p5; C3 §2 p13; RNoA §8 p28; R1 §4 p32]
- **4 Nov 2020:** Claimant repurchases 3 drones and now offers 6 (not 4) drones at 20% discount and basic maintenance for 4 (not 2) years at EUR 11,520.00 [RNoA §9-10 p28]; costs for additional services estimated EUR 1,480,000 [PO2 §27 p47]
- **27 Nov 2020:** Parliamentary debate on approval of Arbitration Agreement called off [RNoA §13 p29]
- **29 Nov 2020:** Mr Bluntschli is arrested in Mediterraneo for tax evasion [PO2 §§39-40 p48-49]
- **1 Dec 2020:** PSA signed, also by Minister Barbosa (without parliamentary approval!) [C2 p12; C3 §4 p13]
- **Feb 2021:** Presentation of new UAS Hawk Eye 2020 by Claimant after 3 years of development: larger, greater payload, wider reach, but small airfield required and more expensive [NoA §10 p5; C3 §9 p14; RNoA §17 p29] Resp alleges misrepresentation: Claimant did not disclose Hawk Eye 2020 [C7 §13-17 p19; C8 p20-21; RNoA §27 p31]
- **3 July 2021:** Equatorianian (credible [PO2 §42 p49]) investigative journal “The Citizen” starts publishing articles on massive corruption scandal concerning the socialist government and the NP Development Program [C5 p16] leading to →
- **3 Dec 2021:** Early elections in Equatoriana resulting in new government [NoA §11 p5; RNoA §14 p29]
- **27 Dec 2021:** Resp informs Claimant that the PSA would be put on hold due to a moratorium [C6 p17] declared on all contracts connected to the NP Development Program [NoA §12 p5; RNoA §15 p29]
- **21 May 2021:** Press conference by Public Prosecutor Ms Fonseca on corruption charges against Mr Field regarding payments received for 2 other contracts related to the NP Development Program with companies owned by a relative of Mr Field [RNoA §16 p29; R2 p33]
- **Note (possible fairness issue):** Ms Fonseca’s brother-in-law was an unsuccessful bidder for UAS contract [R2 p33] and her son is fiancé of Ms Bourgeois (Assistant of Mr Field) [R2 p33; PO2 §43 p49]
- **27 May 2021:** Arbitration Agreement amended upon request of Resp: Expedited UNCITRAL rules for disputes below EUR 1m and UNCITRAL ISDS Transparency Rules [NoA §17 p7; C7 §10 p18; C9 p22]
- **28 May 2022:** Ms Queen accuses Claimant of bribery and misrepresentation [C3 §8 p14]
- **30 May 2022:** Resp declares the PSA avoided for corruption and misrepresentation [C8 p20]
- **15 July 2022:** Notice of Arbitration (“NoA”) [p4-8]
- **15 Aug 2022:** Response to the Notice of Arbitration (“RNoA”) [p27-31]
- **7 Oct 2022:** PO1 [p42-43]
- **7 Nov 2022:** PO2 [p44-51]
- **End of 2023:** Expected completion of corruption investigations by Ms Fonseca [RNoA §16 p29; R2 p33]
- **July 2024:** Expected court decision on corruption charges against Mr Field [RNoA §24 p31; Letter p40]



CLAIMANT – Drone Eye plc
(Mediterraneo)
Producer of UAS (drones) / Seller under the PSA

Mr William Cremer (CEO) [WS C3 p13]
Mr J.C. Bluntschli (former COO)
Ms Horacia Porter (legal department) [WS C7 p18]

RESPONDENT – Equatoriana Geoscience Ltd
(Equatoriana)
State Owned Entity (SOE) / Buyer under the PSA

Ms Wilhelmina Queen (CEO) [C6 p17; C8 p20; C9 p22]
Mr David Field (former COO) (“Teflon David” – suspect)
Ms Leonida Bourgeois (Assistant, fiancé of Ms Fonseca’s son) [WS R1 p32]

PROCEDURAL ISSUE (a) [PO1 III p42]

Does the Arbitral Tribunal have jurisdiction?
Respondent: NO

- Art 75 Equatorianian Constitution requires SOEs to obtain Parliamentary approval for arbitration agreements contained in “administrative contracts” [RNoA §§21-22 p30] which was (undisputedly) not given
- Invalidity of the Arbitration Agreement due to corruption or termination for misrepresentation [RNoA §20 p30]

TO FURTHER CONSIDER:

- Are preparatory contracts also administrative contracts?
- Minister signed + assured that consent was forthcoming
- Claimant knew about the requirement
- Amendment of the Arbitration Agreement
- Ultra vires effect of internal laws?

MERITS ISSUE (c) [PO1 III p42]

Is the PSA governed by the CISG?

Art 2 CISG: This Convention does not apply to sales: [...] (e) of [...] aircraft;

Claimant: YES → [NoA §21 p7]

- No intention to carry humans or cargo
- No registration requirement in Equatoriana

TO FURTHER CONSIDER:

- Art 7 CISG (international character) vs national laws
- Properties, use and risks of UAS
- The parties’ intentions for use and contract wording
- Preponderance of maintenance (Art 3(2) CISG)?

PROCEDURAL ISSUE (b) [PO1 III p42]

If the Tribunal’s jurisdiction can be established, should the proceedings be stayed until the investigations against Mr Field have been concluded or, alternatively, (regarding corruption [PO2 §52 p49]) bifurcated?

Art 17 para 1 **PCA Rules:** Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

Respondent: YES [RNoA §§23-25 p30]

- Corruption investigations against Mr. Field expected to be completed in 2023 + criminal proceedings by July 2024
- Public Prosecutor has broader investigative powers
- Conflicting decisions (enforcement – NYC) and Resp’s breach of the Anti-Corruption Act [RNoA §2 p27] avoidable

TO FURTHER CONSIDER:

- Red Flags of corruption
- Fairness of prosecution by Ms Fonseca
- Reasonable opportunity of Resp to present its case
- No witness statements by Mr Bluntschli and Mr Field

MERITS ISSUE (d) [PO1 III p42]

In case the PSA is governed by the CISG, can Respondent rely on Art 3.2.5 of the International Commercial Contract Act (ICCA, which is a verbatim adoption of the UNIDROIT Principles) of Equatoriana to avoid the contract?

Art 3.2.5 ICCA (Fraud): A party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

Art 35 (1) CISG: The seller must deliver goods which are of the quantity, quality and description required by the contract [...]

Art 39 (1) CISG: The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller [...] within a reasonable time after he has discovered it or ought to have discovered it.

Art 4 CISG: This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; [...]

Claimant: NO [NoA §22 p7]

- Defenses by Resp could only be based on Art 35 CISG and are forfeited
- Art 4 (a) CISG does not exclude remedies for fraud from the CISG
- Kestrel Eye 2010 was state-of-the-art at the time of contract conclusion

TO FURTHER CONSIDER:

- Requirement of “newest technology” and “state-of-the-art”
- Differences between Kestrel Eye 2010 and Hawk Eye 2020
- Was Claimant obliged to disclose the release of Hawk Eye 2020?