



CHEAT SHEET

32nd Willem C. Vis International Commercial Arbitration Moot

Government of Equatoria

Mr. James Positive
(former minister for energy and environment)

Ms. Theresa Vent
(new minister – opposed to green energy)

100%

CLAIMANT ("CL") – GreenHydro Plc

(Mediterraneo)

Company specialized in the planning, construction and sale of plants for the production of green hydrogen / CONTRACTOR under the PSA

Mr. Poul Cavendish (CEO) [WS C5 p16-18]

Mr. August Wilhelm Deiman (former head of contracting) [WS C8 p36]

Mr. Law (former head of legal department)

Ms. Heidi Smith (new head of legal department)

PROCEDURAL ISSUE (a) [PO1 p50 III.1.a.]

Should the Arbitral Tribunal reject the claim for lack of jurisdiction or admissibility or as part of its discretion?

Art 30 PSA: "Any dispute, (...), shall first be submitted to mediation (...). Any dispute, (...), shall be finally settled by arbitration (...)." ("DR Clause") [C2 p12-13]

CL: NO / RE: YES

- Mandatory nature of DR Clause and qualification of non-compliance with pre-arbitration requirements as an issue of **jurisdiction or admissibility**
- Potential **futility of mediation and relevance** thereof (RE stated that if CL does not accept a serious price reduction – despite already making a loss without such [further] reduction – further negotiations would be senseless [C7 p20])

TO FURTHER CONSIDER:

- Law applicable to the DR Clause:
 - CL → Danubia (seat)
 - RE → Equatoria (choice-of-law clause); consistent Equatorian case law states that when multi-tier clauses provide first for mediation and then arbitration, conducting mediation is a **condition precedent for jurisdiction**
- Email from Mr. Deiman (CL) to Ms. Ritter (RE) of 12 July 2023: "(...) *Model-Mediation Clause suggested by us clearly provides that the Parties must first try to mediate their dispute before resorting to arbitration. Thus, arbitration is only the last resort as you wished.*" [R2 p31]
- Sentence from FAI model mediation clause stating that "[mediation] (...) shall not prevent any party from commencing arbitration (...)" was **deleted** by the Parties

PROCEDURAL ISSUE (b) [PO1 p50 III.1.b.]

Should the Arbitral Tribunal order the exclusion of the documents Exhibits C7 and R3?

Art 34.1 FAI Rules: "The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence." (→ weighing of interests by tribunal)

CL: C7 shall be admitted, R3 excluded / RE: R3 shall be admitted, C7 excluded

Exh C7: "Without-Prejudice Offer" sent from RE to CL on 25 May 2024 [p20]

- Protected by **settlement privilege** under Equatorian law (common law)
- Confidentiality of settlement discussions had been discussed and agreed
- Unsolicited settlement offer, to which RE cannot unilaterally confer privilege

Exh R3: Internal email of CL's employees of 10 July 2023 → CL's head of legal gives advice to CL's CEO and head of contracting on how to report optimistically on the (likely failing) negotiations with the supplier PG2 without misrepresentation [p32]

- Protected by **attorney-client privilege** under Equatorian law [R4 p33]
- Likely **obtained** by RE or a third party **illegally** (but could also have been leaked by one of CL's employees); burden of proving illegal obtainment by RE on CL

PURCHASE AND SERVICE AGREEMENT ("PSA")

Concluded on 17 July 2023 for the (i) delivery of a 100 MW green hydrogen plant (turnkey) and (ii) the provision of maintenance and training services by CL [C2 p10-13]

- 2019: Poul Cavendish becomes CEO of CL and Equatoria announces green energy strategy [C5 p16 §3 and §5]
- 2022: Equatorian government revises Model Contract (which the PSA is based upon) "to strengthen the role of Equatorian Law" → model choice-of-law clause is changed (deletion of reference to CISG) [R1 p29 §7]
- 3 Jan 2023: RE publishes Request for Quotations ("RFQ") [C1 p8-9] inviting bids for the construction and delivery of a plant to produce green hydrogen [RfA p3 §2]; RE invites CL to participate in the tender [C5 p16 §6]
- 28 Apr 2023: Presentation of the lowest bid in reverse bidding auction (RfQ phase 3) [C1 p8 §1c]
- Early May 2023: RE enters into specific negotiations with two final bidders (among them CL) [RfA p4 §10]
- May 2023: CL is in negotiations with two local Equatorian producers to fulfill the "local content criterion" (25% of material and works originating from Equ): Volta Transformer ("Volta") and P2G [C1 p9 §9, RfA p4 §12]
- 29 Jun 2023: Volta Family (owner of Volta) makes an offer to sell Volta to CL [RfA p4 §11]
- 10 Jul 2023: Internal email among employees of CL (including head of legal) shows serious doubts that a contract with P2G would be concluded (**controversial Exh R3**) [R3 p32], which an employee of RE learns from a friend involved in the subsequent criminal investigation against the COO of Volta [R1 p29 §6]
- 12 Jul 2023: Email from CL to RE reinforcing that local content would most likely almost be 50% [ARfA p26 §6]
- 13 Jul 2023: CL offers 5% discount for excluding the right to terminate the PSA for convenience [RfA p4-5 §13]; CL informs RE about ongoing negotiations with local partners (Volta and P2G) [RfA p5 §13]
- 17 Jul 2023: Parties conclude PSA, wherein RE is granted **two contractual options** for the extension in capacity up to another 100 MW and the addition of a part for the production of eAmmonia [RfA p5 §14, C2 p10-13]
- 25 Aug 2023: CL and Volta sign contract for production of green hydrogen plant + extension option [RfA p4 §11]
- 26 Aug 2023: CL informs RE about contract concluded with Volta and failed negotiations with P2G [C4 p15]
- Oct 2023: Local elections lead to a power shift within the Equatorian government and the former minister Mr. Positive is replaced by Ms. Vent, who strongly opposes the green energy strategy [RfA p5 §17, C5 p18 §13]
- 27 Dec 2023: Ms. Faraday (RE) informs Mr. Cavendish (CL) that she will be replaced by Mr. la Cour and confirms rumors that RE reviews all existing contracts in light of the revised green energy strategy [C5 p18 §14]
- Feb 2024: CL fails to meet deadline for submitting final plans for the plant (delivers 28 days late) [ARfA p26 §11]
- 29 Feb 2024: RE gives **notice of termination** of the PSA due to a delay of 28 days in delivering the final plans for the plant including the options and a resulting loss of trust [RfA p5 §19, C6 p19, ARfA p27 §12]
- 28 Apr 2024: Meeting of Mr. Deiman (CL) and Mr. la Cour (RE), where the latter raises serious allegations against CL's employees concerning the conclusion of PSA [awareness of unlikelihood of contracting with P2G] and collusion with RE's employees; threatens to inform public prosecution [C8 p36 §3, R1 p29 §6, PO2 p55 §27]
- Early May 2024: Police raids office of Mr. Deiman (CL), confiscates documents and imprisons him [C8 p36 §5]
- 25 May 2024: RE sends "Without-Prejudice Offer" to CL, purporting to have received green light from the new minister to continue with the project provided that CL accepts (another) "serious price reduction of 15% or at least a two-digit number" (**controversial Exh C7**) [C7 p20]
- 31 Jul 2024: CL submits RfA to the FAI, requesting the tribunal to (i) declare that the PSA is governed by CISG, (ii) declare that the PSA has not been validly terminated by RE and (iii) order RE to fulfill the PSA [RfA p7 §34]
- 14 Aug 2024: RE submits Answer to the RfA, requesting the tribunal to (i) declare that it lacks jurisdiction, (ii) exclude Exh C7 as evidence from the case file and (iii) reject the claim [ARfA p28 §23]; in consequence, CL requests the tribunal to exclude Exh R3 as evidence from the case file [Letter by Langweiler p34-35]

RESPONDENT ("RE") – Equatoria RenPower Ltd.

(Equatoria)

Government-owned company operating in the field of renewables / CUSTOMER under the PSA

Mr. Henry la Cour (CEO)

Ms. Michelle Faraday (former CEO)

Ms. Johanna Ritter (head of contracting) [WS R1 p29-30]

MERITS ISSUE (c) [PO1 p50 III.1.c.]

Is the CISG applicable to the Agreement?

Relevance: RE's right to terminate the PSA is different depending on whether the CISG or the Equatorian Civil Code applies (Equatorian Civil Code favors government-owned companies)

CL: YES / RE: NO

1) Internationality criterion:

Art 1(1) CISG: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (...)"

- CL has its seat in Mediterraneo, RE has its seat in Equatoria
- Volta (in Equ) is CL's relevant place of business [Art 10(a) CISG]

2) Presence of a "good" in the sense of the CISG:

- Plant needs to be operable at time of delivery and hence fully constructed and attached to ground (**immovable** → no good)

3) Mixed contract for sale of goods and provision of services:

Art 3(2) CISG: "This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

- Economic criterion:** More than 60% of the overall price of the PSA (i.e., preponderant part) consists of the delivery of goods; options shall be disregarded (exercise and value unclear)
- Essential criterion** (intention of the parties): economic value indeterminate because value of options unclear (conclusion of PSA); PSA is a turnkey contract (services more important)

MERITS ISSUE (d) [PO1 p50 III.1.d.]

If so, have the Parties validly excluded its [CISG] application?

Art 29 PSA: "The Agreement is governed by the law of Equatoria to the exclusion of its conflict of laws principles." [C2 p12]

CL: NO / RE: YES

- CISG is part of the (harmonized) law of Equatoria and would hence need to be excluded (**which requires a clear intention**)
- Parties **implicitly** excluded the application of the CISG by referring to Equatorian law in Art 29 PSA

TO FURTHER CONSIDER:

- Previous Model Contract explicitly referred to CISG → this reference was deleted in the new Model Contract of 2022
- Ms. Smith (CL) interpreted the choice-of-law clause in the Model Contract as a reference to the "non-harmonized law"
- Mr. Cavendish (CL) referred to the CISG as "gold standard"

We handle it.

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Links to sources:

Problem (including PO2) / Analysis for Arbitrators
FAI Arbitration Rules 2024 / FAI Mediation Rules 2024
CISG / Danubian Contract Act (UNIDROIT Principles)