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Answer to the Request for Arbitration

(pursuant to Article 8 of the FAI-rules)
in the Arbitral Proceedings
Green Hydro Plc v. Equatoriana RenPower Ltd.

14 August 2024

Introduction

1. In its Request for Arbitration, Claimant summarizes the facts accurately as far as the dates are concerned. Beyond that, the Request for Arbitration contains more wishful thinking than a correct legal analysis.

2. The general attitude in which Claimant approaches its own obligations under the Purchase and Service Agreement is evidenced by its blatant breach of the confidentiality of the Parties' negotiations. It is just an example of Claimant's general bad faith behavior and should in itself already result in the rejection of the claims.

Facts

3. Following the announcement of its ambitious Green Energy Strategy, the government of Equatoriana took several steps to ensure the implementation of the Strategy. Inter alia, the planning and permission regimes for the necessary infrastructure to ensure the energy transition were streamlined and necessary funding was made available. Equatoriana RenPower, as one of the government's primary vehicles to implement its Strategy, was charged with ensuring an accelerated development of the green hydrogen infrastructure. In that context, it planned the construction of three major facilities to produce hydrogen and asked for proposals from interested producers.

4. At the time, there had been no local entity which would have been able to realize a project of such magnitude in the field of hydrogen production as the main contractor. One of the objectives of the tender processes was to develop the local industry active in the field of renewable energy production through high local content requirements. Respondent's main negotiator, Ms. Johanna Ritter, informed the two remaining bidders with whom Respondent

conducted detailed negotiations about that objective and that the amount of local content was a decisive criterion for the final selection (Respondent Exhibit R 1).

5. Claimant had in its bid promised a local content of at least 30% for the 100MW Plant via the involvement of Volta Transformer and Volta Electrolysers. Furthermore, Respondent's CEO had informed Ms. Faraday that for the additional eAmmonia module, they were planning to use the Equatorianian entity P2G as the main subcontractor, which was supposed to provide up to 80% of the overall necessary works and services. Internally, Respondent had always planned to add eAmmonia production facilities to the plant. That the additional eAmmonia module was structured as an option had primarily financial and fiscal reasons. At the time of contracting, the necessary funding had not yet been authorized by the ministry, so that Respondent could not yet enter into a binding agreement but had to wait for an authorization in the next fiscal year.

6. That is the background against which Ms. Faraday made the concessions as to the exclusion of the termination rights and the inclusion of the best endeavors clause. The concessions were based on the wrong assumption that Claimant's delivery would most likely contain close to 50% of materials and services produced in Equatoriana. That was the impression Claimant had created during the entire negotiation process, and which was maintained until the signing of the Agreement. On 12 July 2023, Claimant's chief negotiator for the entire project, Mr. August W. Deiman, sent a carefully drafted email which further reinforced the impression that there would most likely be close to 50% local content (Respondent Exhibit R 2).

7. By the time, Claimant was, however, already aware that the negotiations with P2G would most likely fail. It was internally thinking about ways to formulate that in the negotiations (Respondent Exhibit R 3).

8. After the conclusion of the Purchase and Service Agreement, Claimant's CEO then informed Ms. Faraday that the final contract for the eAmmonia option had not been concluded with P2G but with Green Ammonia, a company located in Danubia (Claimant Exhibit C 4).

9. Respondent was shocked about this development but had to accept it. Upon the instruction of Ms. Faraday, Ms. Ritter made that clear to Mr. Deiman and expressed the expectation that Claimant would do its best to otherwise increase the local content. Furthermore, she emphasized that through this development the Agreement would be under particular scrutiny by the critical public. In light of that, she emphasized once more the importance of strict compliance with timelines and budget to keep the project out of the discussion (Respondent Exhibit R 1).

10. That became even more important following the changes in the government's strategy to alleviate the burden put on businesses in Equatoriana. Due to this change, only one of the three green hydrogen projects originally planned was going to be realized.

11. Irrespective of that warning, Claimant immediately failed to meet the first milestone. On 1 February 2024, the final detailed plans were due. They were, however, only sent on 28 February 2024, and when they arrived, it became clear that they were not complete. They did not include the planning for the eAmmonia module. Claimant tried to explain that with problems on the side of its subcontractor which had not been able to deliver the plans in time.

12. In the meantime, however, Respondent had largely lost trust in Claimant's ability to realize the project as originally planned. Thus, its new CEO was forced to terminate the project on 29 February 2024.

13. The correctness of the decision to terminate this project and not the other project already contracted was later proven when criminal investigations were initiated against Mr. Deiman. He had in the meantime become the CEO of Volta Transformer, the Equatorianian entity responsible for delivering most of the local content. While Mr. Deiman was later acquitted, there had been lots of negative press associated with the project, which would have made its continuation more than difficult.

Legal Considerations

Jurisdiction and Procedure

14. Respondent nominates as its arbitrator **Mr. Carl Gustaf Synonoun, Väinämöinen Street 4, Oceanside, Equatoriana**.

15. Respondent agrees to Claimant's proposals that the FAI shall appoint the Presiding Arbitrator as well as that the Arbitration Rules should be applied.

16. The Arbitral Tribunal lacks jurisdiction to decide the case. Compliance with the mediation requirement is a condition precedent for the validity of the arbitration agreement or at least a requirement for the admissibility of the claim and should guide the Arbitral Tribunal in exercising its procedural discretion.

17. Claimant engaged in a blatant breach of the confidentiality of the negotiations between the Parties. The drafting history of the Agreement leaves little doubt that the confidentiality obligation in Article 15 of the FAI Mediation Rules in the present case also extends to all negotiations preceding the mediation. Irrespective of that inherent confidentiality obligation, Claimant has submitted Respondent's without-prejudice offer in clear breach of the Parties' agreement. To prevent Claimant from benefitting from this breach, the Arbitral Tribunal should exclude Exhibit C 7 from the file and ensure that its reasoning is not influenced by information contained in Exhibit C 7. Furthermore, the breach should be taken into account in any cost decision. This is in line with the ongoing developments in Danubia (Respondent Exhibit R 4).

Substance

18. Claimant's claims are devoid of any substance, as Respondent validly terminated the Agreement with its Termination Letter of 29 February 2024.

19. Contrary to Claimant's assertion, the relationship is governed by the Civil Code of Equatoriana and not by the CISG. In Article 29 of the Agreement, the Parties have explicitly chosen the "law of Equatoriana with the exception of its conflict of laws principles" as the governing law and thereby clearly excluded the CISG. The clause is from the model contract used by Equatorianian state entities for all their public procurement contracts and has to be seen against the background of the procurement law. While the previous model explicitly provided for the application of the CISG, that was changed in the new model contract to strengthen the role of Equatorianian law (Respondent Exhibit R 1).

20. Furthermore, the Agreement is anyway outside the CISG's scope and sphere of application. It was concluded as part of a reverse auction in the context of a public procurement process so that Article 2 lit. b CISG excludes the application of the CISG. Moreover, the contract does not constitute an international sales transaction. A considerable part of the Agreement consisted of planning and engineering work to be done by Claimant, and most of the actual deliveries of goods were made from its place of business in Equatoriana. Volta Transformer, while originally still independent, was producing at the time nearly exclusively for Claimant and thus already constituted a place of business of Claimant before its later formal acquisition by Claimant in November 2023.

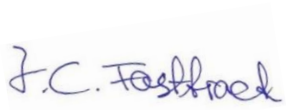
21. Under the Law of Equatoriana, Respondent, as a government entity, was entitled to terminate the Agreement both for cause and for convenience, which it did with its Termination Letter of 29 February 2024.

22. Even if the CISG were applicable and the termination was invalid – which is not the case – Claimant would not be entitled to specific performance. While specific performance is a remedy foreseen in the CISG, it should not be ordered, in particular not against a government entity. The Arbitral Tribunal should not interfere with the policy of a government. Furthermore, specific performance should already be excluded as the central piece of evidence presented for its submission that there would be no interference with the policy of the government is a document which is not admissible. The without-prejudice offer made by Respondent during the negotiation was protected by the confidentiality provision in the mediation rules.

Requests for Relief

23. In light of the above, Respondent requests the Arbitral Tribunal to make the following orders:

    a. To declare that it has no jurisdiction to hear the case;
    b. To exclude Claimant's Exhibit C 7 from the file;
    c. To reject the Claim; and
    d. To order Claimant to bear the costs of this arbitration.



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