

PROCEDURAL ORDER NO. 2

of 13 November 2024

in the Arbitral Proceedings:

FAI MOOT 100/2024

Green Hydro Plc. v. Equatoriana RenPower Ltd.

1. **Are the administrative centers of the various companies involved located at their places of registration?** Yes.
2. **Have the Parties had any previous contractual relationships?** No. Claimant, however, had concluded two smaller contracts with other government entities based on the old Model Contract. Both had been negotiated by Mr. Deiman and Mr. Law, Claimant's head of legal at the time, and had not resulted in any problems. It had been in the context of the first of these transactions concluded in 2020 that Mr. Law had made the statement concerning the CISG being the "Gold Standard" in international transactions to Mr. Cavendish.
3. **To what extent was the Government of Equatoriana involved in the business of Respondent?** Respondent is a separate legal entity of private law. Its only shareholder is the State of Equatoriana which also appoints Respondent's management, which is then entrusted with the day-to-day management, including the representation of Respondent.
4. **Does Respondent have assets in countries other than Equatoriana which would make it possible to enforce a potential award against Respondent in said country?** Yes, there are assets in other countries which would most likely not benefit from immunity from execution.
5. **What portion of Volta Transformer's overall business did its relationship with Claimant make up before the negotiations between Claimant and Respondent?** Volta Transformer, in principle, had the capacity of producing two transformers of the size acquired by Claimant at a time. Depending on existing deadlines, the workforce, and other resources are not always evenly allocated between the contracted transformers but one of the projects is prioritized. That is what happened from June 2023 onwards with the transformer that Claimant had originally ordered for the project in Ruritania and then had planned to use for the project with Respondent. Furthermore, according to the contractual set-up Volta Transformer was also Claimant's contractual partner for the delivery of the stacks and the packaging services which were to be provided by Volta Electrolyser. That is the background of Mr. Deiman's not entirely accurate statement in Exhibit C 8 that the Agreement with GreenHydro was the most important individual contract of Volta Transformer "making up 70% of its production capacity".
6. **Is Volta Electrolyser selling the electrolyzers produced under a license of Claimant to third parties?** Yes, until the order for the plant project, Volta Electrolyser was nearly exclusively producing for third parties and not for Claimant. The order for the contracted plant would have made up 60% of the annual production capacity of Volta Electrolyser for the next year.
7. **At the time when the Respondent was contracting with the Claimant were they aware of the acquisition of Volta Transformers by the Claimant?** Claimant did not inform Respondent about the offer by the Volta family before the conclusion of the Agreement.
8. **How was Volta Transformer acquired by Claimant?** By a share deal. Until the acquisition there were no formal or informal agreements which guaranteed Claimant any control or operational influence on Volta Transformer.
9. **Was the reverse auction conducted in person or online?** The entire process developed in three different steps of which the reverse auction itself constituted the second step which was conducted in person. At the first stage, all registered suppliers which intended to submit bids had to do so online. In light of the "technology-open" nature of the RfQ it was necessary to

make the various bids “comparable” despite the differences in the technologies suggested (e.g. PEM-Electrolysers/Alkaline-Electrolysers). For that Respondent had developed a complex formular weighing inter alia the technologies used, the efficiency of the plant and other factors to arrive at the (calculated) price. The formular and the (calculated) price of its bid was communicated to each bidder. The reverse auction, as the second step, was then conducted on the basis of these formulas and the resulting calculated prices. With the final two bidders Respondent then conducted individual negotiations.

10. **What was the wording of the choice of law clause of the former Model Contract of the Equatorianian government?** “The Agreement is governed by the CISG. For all issues not regulated by the CISG the law of Equatoriana shall apply”. The official press release made in relation to the amended Model Contract in 2022 explicitly mentioned that changes were made to the forum selection clause and the choice of law clause “to strengthen the role of Equatorianian Law and Equatoriana as a place of dispute resolution”.
11. **What was the background for including the issue of the applicable law on the list of issues to be discussed by Mr. Cavendish with Ms. Faraday?** The list had been prepared by Claimant’s head of legal at the time, Mr. Law, after he had taken a look at the Model Contract and the changes made to the old Model Contract which had been the basis of a previous transaction with another government entity. Originally, a meeting between Mr. Law and Mr. Cavendish had been planned for the day before the first meeting with Ms. Faraday in which the different items on the list were to be discussed. Furthermore, it was planned that Mr. Law would support the negotiations from the legal side as he was the only lawyer in the five lawyers of the legal department that specialized in international contracts. The other lawyers dealt with labor law and regulatory questions. On the day before the meeting, it was discovered that Mr. Law had leaked important information to one of Claimant’s competitors, which led to the immediate termination of his contract and the start of a criminal investigation against him. Thus, the reason for the inclusion was never revealed to Mr. Cavendish. The following negotiations were conducted by Mr. Deiman with the support of Ms. Smith, one of the labor lawyers who then became the new head of the legal department. As Ms. Smith had interpreted the choice of law clause in the Model Contract to refer to the non-harmonized law of Equatoriana, she had conducted her examination referred to in Exhibit R 3 primarily on the basis of the non-harmonized law of Equatoriana. In addition, her legal intern – a former Vis Mootie – had also provided an evaluation on the basis of the CISG, which is the reason for her statement that she had “checked that under all potentially applicable regimes”.
12. **Is there any usage or practice concerning the enforceability of mediation clause, or did the Parties discuss during negotiations of the Purchase and Service Agreement, that mediation was to occur within a specified time period?** No.
13. **Was there any discussion about the mediation clause and its deviation from the model clause?** No. Respondent accepted the draft of the clause submitted by Claimant without checking whether it deviated from the FAI-model clause.
14. **Did the Respondent ever request mediation or indicate that it would be inclined to participate in mediation as it applies to these issues?** No. There was no specific request after the dispute had arisen and before the RfA had been submitted.
15. **Did Respondent make any payments to Claimant?** Yes. Respondent paid the 10% due on 1 October 2023 but not the 25% due on 10 February 2024 as Claimant had not submitted the Final Plans on 1 February 2024. Respondent has complained about the non-delivery, stating that it would not make any further payment until the Final Plans were delivered for which it set a deadline until the end of the month. Respondent reserved any further rights.
16. **Were the components produced by Volta Transformer/Electrolyzer to be delivered directly to the construction site?** Yes. As the transformer and the stacks were produced in Equatoriana, it was planned to have them delivered directly to the site where they were to be

connected to the existing infrastructure (electricity, pipes, buildings). The connection of the transformer the stacks and the various other elements of the core system was to occur in a way which allowed their easy removal in case of maintenance or replacement.

17. **Under the EPC-work Section of the table, do the headings “Compressor, pipes, cable installation, connections, and other equipment” refer to the supply of goods?** Yes. The highlighted parts for the EPC-Work and the electrolyser are to be treated as a delivery of goods.
18. **Are the two extension options finalized to the extent that the Purchase and Service Agreement already includes the final purchase price as well as a timeframe?** Yes. For the case that Respondent intended to exercise the options in full, price, timeframe, and all further details were agreed and no further contract needed to be concluded. That was also the background for including clause 4 into the RfQ. Respondent, however, also had the option to exercise the extension options only in part. For that case, the Agreement provided for a proportional reduction of the price and the addition of a further handling fee to compensate Claimant for the additional costs resulting from the reduced scope.
19. **Did the local content requirement (“at least 25%”) concern just the electrolyser (i.e., the main plant) or were the option(s) a part of it?** It extended to the options as well. Claimant would have met the requirement even if only the eAmmonia option had been exercised and Green Ammonia had done the work.
20. **Does Green Ammonia source any of its material from Equatoriana?** No.
21. **Would the delay in delivery of the final plans for the eAmmonia option have had any effect on the delivery date of the turnkey plant?** Most likely not. The delay was entirely due to problems on the side of Green Ammonia where the entire planning team had left the company in December. Claimant had expected the plans for the eAmmonia option in the first week of January to include them in its Final Plans. As Respondent had informed Claimant that the exercise of the eAmmonia-option was very likely, Claimant wanted to take into account the plans for the eAmmonia extension in its planning of the already contract plant, hoping to subsequently save up to EUR 1 million for a subsequent construction of eAmmonia extension. In the beginning, Green Ammonia had promised Claimant to deliver the planning by the end of January but then did not deliver anything until the end of March. Claimant communicated the reasons for not submitting the Final Planning to Respondent on 1 February 2024 when the plan was due. It also started to finalize the plans for the plant without taking into account the eAmmonia option. It intended to recover the additional costs resulting for the lack of coordination or the planning from Green Ammonia, in case the eAmmonia-option was exercised.
22. **Is there an urgency for Claimant to complete the project by the agreed timeline in the Agreement of 2026?** Claimant had a very strong interest in having the plant operate as soon as possible to have a reference project available for the expected increase in orders for green hydrogen plants from 2026 onwards.
23. **What was the extent of the Parties’ negotiations between the issuance of termination letter and the without-prejudice offer?** With the letter of 12 March, Claimant had rejected Respondent’s termination as non-justified and pointed out that the belated delivery of the Final Plans would most likely not result in any delays concerning the final handover of the plant. Furthermore, Claimant requested payment of at least 50% of the amount due on 10 February 2024 and the issuance of the final permits as agreed, or a discussion about dates should that not be possible. By the letter of 24 March, Respondent rejected those requests, confirmed the termination, and announced that no further payments would be made. Claimant reacted with a letter dated 4 April, prepared by its lawyers, rejecting once more the termination and outlining the legal situation and potential claims by Claimant suggesting a meeting at C-management level. The meeting had been planned for 28 April in Equatoriana. Due to a car accident on 27 April which left him hospitalized, Mr. Cavendish had to cancel the meeting which led to the discussion

of Mr. la Cour and Mr. Deiman on 28 April. The meeting between Mr. Cavendish and Mr. la Cour took place on 12 May, lasted only 30 minutes, and had the content reported by Mr. Cavendish in his witness statement.

24. **How did Claimant respond to the without-prejudice offer?** Claimant rejected that offer on the next day and threatened to initiate arbitration proceedings should Respondent not engage in further discussion without any preconditions. There was no further response from Respondent to that letter.
25. **What happened to the other hydrogen projects that were reviewed by Equatoriana RenPower?** For one of the projects, the final contract was yet to be signed when the change of government occurred. The negotiation was terminated, and no contract was ever signed. The second project, which involved a 50 MW plant based on an alkaline electrolyzation process, was successfully renegotiated between the Parties and a new agreement providing, inter alia, a price reduction of 7 % was finally signed on 1 October 2024.
26. **What is Mr. Deiman's background?** Mr. Deiman has a degree in economics as well as an LL.M.
27. **Was the investigation against Mr. Deiman initiated based on information Mr. la Cour provided?** Yes. Mr. la Cour had accused Mr. Deiman of fraud through misrepresentations during the negotiations of the Agreement and collusion with unspecified employees of Respondent to the detriment of Respondent. None of the allegations could be proven, which led to the acquittal within one month.
28. **Do Claimant's employees have confidentiality agreements with the company?** Yes.
29. **Do communications by In-House lawyer containing legal advice benefit from the attorney-client privilege under the law of Equatoriana?** Yes, at least if the inhouse lawyer is at the same time a member of the bar and the advice was given in relation to a specific legal question relevant
30. **Are there any cases or jurisprudence in Equatoriana, Danubia, or Mediterraneo as to what the term "without-prejudice" means and how documents that have that label may be used?** No.
31. **Are all the relevant states Contracting Parties to the Singapore Convention and the Vienna Convention on the Law of Treaties?** Yes.
32. **Does the Public Procurement Law of Equatoriana cover only the bidding process and the award of the contract?** Yes. It does not cover the performance of the contracts concluded..
33. **Is Article 7.3.8 of the Equatorianian Civil Code, containing the right of governmental entities to terminate contracts for convenience under certain conditions, mandatory?** There are diverging views on that with a slight majority considering it to be not mandatory. It is, however, largely accepted that the provision does not form part of the ordre public of Equatoriana.
34. **Can you provide some additional information about the legal system in Equatoriana?** Equatoriana is a common law country and a dualistic state. It has ratified the Mauritius Convention and has adopted the UNCITRAL Model Law on Mediation, as has Danubia. There is no precedent on excluding the CISG, which would fit the present situation.
35. **Claimant would like to make the following corrections and clarifications to its submissions:**

In the Request for Arbitration the following corrections are necessary:

- a. In para. 22 it should read “The offer shows that **Respondent**” (instead of Claimant).
- b. Exhibit C 2 contains the version of the Purchase and Service Agreement which had been signed by the Parties on 17 July 2023. It was later discovered that inadvertently an earlier internal and not corrected version of the Purchase and Service Agreement had been printed out and signed at the ceremony. When that was discovered, a new version was signed which corrected the mistakes as to the Parties’ addresses and the remuneration in Article 7 which should have been **EUR 285,000,000** (instead of EUR 95,000,000).
- c. In Claimant Exhibit C 8, the Witness Statement of Mr. Deiman should be dated “**14** August 2024” (instead of 12 August).

36. Respondent would like to make the following corrections and clarifications to its submissions:

In the Answer to the Request for Arbitration the following corrections are necessary:

- a. In para. 5 it should read “**Claimant’s** CEO had informed Ms. Faraday” (instead of Respondent’s CEO).
- b. In para. 13 it should read “become the **COO** of Volta Transformer” (instead of CEO).
- c. In para. 16 it should read “is a condition precedent for the **operability** of the arbitration agreement” (instead of “validity”).

Vindobona, 13 November 2023

For the Arbitral Tribunal

D. Greenhouse

Prof. Dolores Greenhouse
Presiding Arbitrator