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ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

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If you do not already have a copy of the Problem, it is available on the Vis Moot website, https://www.vismoot.org/wp-content/uploads/2024/11/32nd-Vis-Moot_Problem_incl_PO2.pdf. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No. 2 (PO 2).

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for Respondent.

The analysis will be sent to all teams after all Memoranda for Respondent have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem, in particular not all possible interpretations of the various contractual provisions or other communications.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation if they want to discuss certain issues specifically. They should do so if they want to make the in-depth discussion of a particular issue part of their evaluation.

INTRODUCTION

This year's case concerns a dispute arising from the contested termination of a turnkey green hydrogen plant project. The primary reason for the termination of the underlying Purchase and Service Agreement ("Agreement") by Respondent, a state-owned electricity provider, was a change in the state's energy policy. Whether that change in policy or an additionally existing delay in the submission of the requested plans by Claimant justified the termination of the Agreement may depend on whether the Agreement is governed by the CISG or by the Civil Code of Equatoriana.

Thus, the two substantive questions address different issues relating to the applicability of the CISG to mixed contracts awarded in a public procurement process and the requirements for an exclusion of the CISG.

Regarding the procedural problems, students have to discuss two conceptually independent questions. First, the legal consequences of Claimant's non-compliance with the mediation stage of a multi-tier dispute resolution clause due to the – assumed – futility of the mediation. Second, the exclusion of documents from the file that allegedly have been submitted in breach of legal privileges or confidentiality agreements.

In their Case Management Conference on 10 October 2024, the Parties agreed on a bifurcation of the proceedings. The present first phase of the arbitral proceedings is limited to the procedural issues and the question of the applicable law, i.e. the applicability of the CISG to the Agreement as well as its possible exclusion by the Parties in their choice of laws clause.

The second phase should then address the merits of the claims raised, should the Arbitral Tribunal assume jurisdiction and consider the claims to be admissible in the first phase. The evaluation of the merits will occur on the basis of the law considered to be applicable law by the Arbitral Tribunal and the documents considered to be admissible in the first phase. That second phase is not part of the Moot.

THE FACTS

I. Parties and contractual history

Claimant, GreenHydro Plc, is a medium-sized engineering company based in Mediterraneo. It specializes in the planning, construction, and sale of plants for the production of green hydrogen and connected services for the entire hydrogen and Power-to-X value chain for the industry, energy, and mobility sectors.

Respondent, Equatoriana RenPower Ltd. (ERenPow), is a fully government-owned company. Created in 2004 by merging two state-owned energy companies operating in the field of renewables it is a major player in the Equatorianian energy market with its wind and solar farms. ERenPow plays an important role in the "Green Energy Strategy" of the Government of Equatoriana. To achieve the ambitious goal of Net-Zero-2040, ERenPow was to invest in creating a "sustainable hydrogen infrastructure covering the entire value chain needed to decarbonize Equatoriana's large steel and transport industry", as stated in the Green Energy Strategy.

On 3 January 2023, ERenPow published a Request for Quotations (Exhibit C 1) inviting bids for the construction and delivery of a plant to produce green hydrogen and potential derivatives.

The relevant documents were published via the official tender platform. They stipulated that the tender process was governed by the Public Procurement Law of Equatoriana (Clause 8) and had to be conducted in its initial phase as a reverse auction (Clause 1c). It was a technology-open tender and for comparability of the various proposals overall efficiency in relation to the price was relevant. The Request for Quotation further stated that the local content of the materials to be provided was an important factor in evaluating the bids and that, to be eligible, a minimum local content of 25% was required.

According to the description, the bids were to cover the following four elements:

1. a fixed 100 MW plant for the production of green hydrogen (turnkey);
2. maintenance and training services for one year;
3. an option for the extension in capacity up to another 100 MW (extension option);
4. an option for the addition of a part for the production of eAmmonia (eAmmonia option).

Claimant, participating in the tender process, had a strategic interest in the project and its realisation. The plant would have been the first opportunity for Claimant to showcase its new technology on a larger scale and demonstrate the advantages of its patent-protected production process. This process allows for the use of excess heat created during the production of hydrogen for district heating, thereby increasing the overall efficiency of the plant. Claimant's innovative process is based on electrolysis using a proton exchange membrane (PEM-electrolysis). It relies on the special properties of the used membrane, which is permeable to protons but not to gases such as hydrogen or oxygen. The relevant electrolysers are delivered in stacks of 10 MW each. The modular setup has the advantage that further stacks may be added later, provided that the other required infrastructure and space are available.

The PEM-electrolysis is particularly suitable for the use of unstable renewable power, and the overall plant efficiency in Claimant's research facility was over 85% due to the additional use of the process heat.

One of the great attractions of the project for Claimant was the likelihood that it could be realized within a very short time, making it realistic that the plant would start producing green hydrogen from the beginning of 2026 onwards. There was strong Equatorianian government support, and many preparatory steps in the planning and permission process had already been taken. Furthermore, the construction site was prepared and well-connected with the required infrastructure.

Additionally, Claimant could avoid the usual lead times of several years for transformers as it had a suitable transformer available from another, finally abandoned project. Claimant had ordered the transformer in 2020 from its long-time Equatorianian business partner Volta Transformer for the other project, which was then cancelled in November 2022. The transformer was supposed to be delivered in early 2024 and was of the right size for the present project with a capacity able to cover also the two options, should Respondent make use of them.

For Claimant the availability of a successful reference project of that size in 2026 was important to dispel reservation concerning the commercial viability of the PEM-technique which existed in certain quarters of the renewable energy community. In light of that, Claimant decided to enter the tender process with an initial offer calculated on a cost-only basis without any profit margin.

Based on its initial offer and the innovative technology, Claimant was amongst the two final bidders with whom ERenPow entered into specific negotiations from early May 2023 onwards. From the beginning of the tender process, Claimant had been exploring opportunities to fulfil its obligations of local content both in relation to the already fixed part of the delivery obligations as well as for the two options. At the time detailed negotiations started, Claimant had been in negotiations with two local producers, Volta Transformer and P2G.

For the hydrogen plant itself, i.e. the agreed 100 MW plant and the extension option, Claimant had been in – finally successful – negotiations with Volta Transformer. According to the contract finally signed, Volta Transformer was to provide the following items for the agreed 100 MW plant:

- the transformer for the project (originally contracted for the abandoned project),
- 40% of the electrolyser stacks,
- packaging of all stacks at the site in Greenfield in Equatoriana.

The non-transformer-related tasks were to be performed by Volta Electrolyser, a 100% subsidiary of Volta Transformer based also in Equatoriana. Volta Electrolyser produced, under a licence from Claimant, electrolysers which were nearly identical to the ones of Claimant's and could thus be combined easily with Claimant's stacks. That contract with Volta Transformer had largely been negotiated by the end of June 2023 but was finally signed only on 25 August 2023. The delay in signing was due to an unexpected offer on 29 June by the Volta Family, the owner of Volta Transformer, to sell the company to Claimant. After an agreement had been reached on how the contract for the Green Hydrogen plant should affect the purchase price for Volta Transformer, it was finally signed on 25 August 2023. The overall value of the contract for the fixed part of the Green

Hydrogen Plant was close to EUR 100 million, while for the extension option, the plan was to reduce the number of stacks to be delivered by Volta Transformer to 20% and let them do the entire packaging.

For the eAmmonia-option Claimant had been in - ultimately unsuccessful - negotiations with the Equatorianian company P2G. The plan – later realized with a Green Ammonia from Danubia - was that Claimant itself would have provided merely works and services making up roughly 20% of the value of the eAmmonia option while the remaining 80% would have been provided by P2G. If everything had worked out as planned and Respondent had made use only of the eAmmonia-option, around 45% of the overall contract volume (including supply of goods and services) would have been produced and delivered by entities from Equatoriana.

Claimant and Respondent based their negotiation on the 2022 version of the "Model Contract for the Purchase of Goods and Services by Equatorianian State Entities" (2022 Model Contract) which had been part of the tender documents. The negotiations were primarily conducted by the Parties' Heads of Contracting at the time, i.e. Mr. Deiman (Claimant) and Ms. Ritter (Respondent), and had reached an impasse in early July. On 13 July 2023, the Parties' CEOs, Mr. Poul Cavendish (Claimant) and Dr. Michelle Faraday (Respondent) met to overcome the last obstacles and finalize the Agreement. They knew each other from their master's program and shared the same conviction concerning the importance of green hydrogen for the energy transition.

During that meeting, Mr. Cavendish informed Dr. Faraday that Claimant was willing to lower its price by another 5%, in return for the exclusion of the right to terminate the Agreement for convenience and certain commitments concerning the sharing of data for future marketing purposes. On the basis of the calculation at the time, which Claimant had shared with Respondent, the offer would not only have failed to cover the costs but also resulted in a loss of EUR 15 million already for the fixed part if no further savings could be realized.

Claimant also informed Respondent about its ongoing negotiations with the two local partners and the possibility that, if successful, Claimant would have a local content of much more than the required 25%.

On 17 July 2023, the Agreement was finally signed. Deviating slightly from the originally planned structure, the Agreement provided in essence that Claimant would deliver at a first stage a plant of 100 MW at a price of EUR 285 million and would grant Respondent two options for the extension of the plant in capacity and products (Exhibit C 2).

There was considerable media coverage about the project and the signing of the Agreement reporting inter alia about the local content requirement and Claimant's discussions with local suppliers including P2G (Exhibit C 3).

In the end, the negotiations with P2G failed and Claimant contracted Green Ammonia from Danubia as its partner for the eAmmonia module. This had no influence on the local content for the contracted 100 MW green hydrogen plant which was still above the requested 25%. The threshold of 25% would even have been met in the likely case that the eAmmonia option would be exercised. The creation of a mere option was primarily due to fiscal considerations, i.e. the lack of an approved budget at the time. Once the budget was approved, Respondent planned to exercise the option. In that case, the involvement of P2G would have led to a local content of more than 40% for which Respondent had still hoped at the time of contracting.

By email dated 26 August 2023 (Exhibit C 4), Claimant informed Respondent that the contract with Volta Transformers was concluded on the previous day, but that its plan to contract P2G for the eAmmonia module had not worked. As is apparent from an internal email of 10 July 2023 from Ms. Smith from Claimant's legal department to Mr. Cavendish and Mr. Deiman, the controversial Exhibit R 3, Claimant had already before the conclusion of the Agreement serious doubts that a contract with P2G would be concluded but did not want to disclose them to Respondent at the time. As a consequence, Mr. Deiman's email to Ms. Ritter concerning the planned local content of 12 June 2023 (Exhibit R 2) was drafted by Ms. Smith to avoid a legally actionable misrepresentation in relation to the information provided about the ongoing negotiations with P2G.

On 1 October 2023, Respondent paid the first 10% of the Contract Price as requested by Article 7 of the Agreement. Later in the month, local elections led to a shift in the power balance within the Equatorianian government. As a consequence, Mr. Positive, the particularly unpopular minister for energy and environment, was replaced by a colleague from the Equatoriana National Party (ENP), Ms. Theresa Vent. The ENP and Ms. Vent had long opposed the Green Energy Strategy developed by the previous minister. In their view, it was too strict and too focused on specific quotas for certain types of renewables, in particular green hydrogen.

In her first press conference, Ms. Vent announced a revision of the Green Energy Strategy and a major reshuffle in the board of directors of ERenPow. On 27 December 2023, Respondent's CEO Ms. Faraday informed Mr. Cavendish that she would be replaced by the end of the month by a former manager of a solar company, Mr. Henry la Cour. He was a member of the ENP and a well-known critic of hydro energy. She confirmed rumours that ERenPow would review all contracts to see whether they fit the new policy objectives (Claimant Exhibit C 5). Her prediction was that the new CEO would try everything to either terminate the unwanted contracts or at least aggressively renegotiate them.

On 29 February 2024, Respondent gave notice of termination of the Agreement due to a delay of more than 28 days in delivering the final plans for the entire plant including the options (Claimant Exhibit C 6). Under the Agreement (Article 3), Claimant was obliged to submit its Final Plans, including the plans for the eAmmonia option, by 1 February 2024. Due to internal problems, Green Ammonia did not deliver the planning for the eAmmonia option in time. As a consequence, Claimant did only deliver the final planning for the plant without the eAmmonia option by 28 February 2024.

In addition, Mr. la Cour pointed to a provision in the law of Equatoriana according to which state entities could always terminate contracts for convenience against the payment of expenses incurred if government policies changed. In the ensuing negotiations, Respondent took the position that the Agreement allegedly no longer fitted the amended policy and thus could be terminated.

Claimant objected to the termination. In its view neither a right to terminate the Agreement for cause nor for convenience existed. Claimant submitted that any right to terminate the right for convenience was excluded by Article 29 of the Agreement which had been included during the final negotiations of the CEOs in return for the final price reduction of 5% to protect Claimant's interest in the realization of the project. Furthermore, the delay in submitting the final plans a month late did not justify a termination for a fundamental breach under the CISG, even if they did not include the eAmmonia option.

In Claimant's view the termination was intended to reduce the already very favourable price even further. Claimant's evaluation is primarily based on the without-prejudice offer made by Respondent on 25 May 2024, the controversial Exhibit C 7. In that offer Respondent purported to have received the green light from the new minister to continue with the project provided that Claimant accepts another price reduction of 15%. That offer was unacceptable to Claimant which then initiated arbitration proceedings considering the foreseen mediation to be entirely futile given the differences between the Parties' positions.

II. Initiation of arbitration and relief sought

On 31 July 2024, Claimant submitted its Request for Arbitration to the FAI without going through mediation proceedings as foreseen in the dispute resolution clause of the Agreement. In light of the differences between the Parties' positions and Respondent's insistent on a larger price reduction Claimant considered the mediation to be entirely futile without any chances of success. In its Request for Arbitration Claimant asked the Arbitration Tribunal for the following orders:

1) Declare that the Agreement is governed by the CISG.
2) Declare that the Agreement has not been validly terminated by Equatoriana RenPower.
3) Order Equatoriana RenPower to fulfill the Agreement by using its best effort to have the necessary construction and operation permits issued and allowing Claimant to start with the construction works on the Greenfield site, as well as taking all further steps agreed upon under the Purchase and Service Agreement and necessary to ensure the realization of the project, including but not limited to making the relevant payments.
4) Order Equatoriana RenPower to bear the costs of the arbitration.
5) To make any other order the Arbitral Tribunal considers appropriate.

On 14 August 2024, Respondent submitted its Answer to the Request for Arbitration. It asked the Arbitral Tribunal to issue the following orders:

1) To declare that it has no jurisdiction to hear the case;
2) To exclude Claimant's Exhibit C 7 from the file;
3) To reject the Claim; and
4) To order Claimant to bear the costs of this arbitration

In essence, Respondent submits that the Arbitral Tribunal lacks jurisdiction to hear the case due to the non-compliance with the mediation requirement and that it validly terminated the Agreement with its Termination Letter of 29 February 2024. It further asserts that, contrary to Claimant's view, the Parties' contractual relationship was governed by the Civil Code of Equatoriana and not the CISG.

The Civil Code of Equatoriana allowed a termination either for cause, due to Claimant's delay in providing the required planning in time, or for convenience due to the fundamental change of Equatoriana's energy policy.

Furthermore, both Parties have submitted requests for the exclusion of one Exhibit submitted by the other Party from the file. Respondent considers its "without-prejudice"-settlement offer submitted by Claimant as Exhibit C 7 to be protected by a confidentiality agreement and the settlement privilege. Claimant relies on legal advice privileges to request in a submission of 14 August 2024 the exclusion of Exhibit R 3 containing an internal legal evaluation by Claimant's In-House Counsel.

THE ISSUES

I. Overview

On 10 October 2024, the Arbitral Tribunal and the Parties agreed in a TelCo on a number of further procedural issues. In particular, it was agreed that the proceedings should be based on the 2024 FAI Arbitration Rules and should be bifurcated in a way that the first phase should merely address all jurisdictional and procedural issues as well as the question of the law applicable to the merits.

The merits of the dispute, in particular, whether Respondent validly terminated the Agreement or whether Claimant could request its performance, were reserved for a second phase.

As a consequence, the **following issues** are to be discussed by the students in the present phase of the arbitral proceedings:

a. Should the Arbitral Tribunal reject the claim for lack of jurisdiction or admissibility or as part of its discretion?
b. Should the Arbitral Tribunal order the exclusion of the documents Exhibits C 7 and R 3?
c. Is the CISG applicable to the Agreement?
d. If so, have the Parties validly excluded its application?

II. General considerations

The teams are in principle free to select the order in which they address the various issues, as stated explicitly in PO1. The majority of the teams will first deal with the jurisdictional and procedural questions before then addressing the question of the applicable law in the

order set out above. As Exhibit C 7, containing Respondent's without-prejudice settlement offer, may play a role in the evaluation of Claimant's non-compliance with the meditation requirement some teams may also start with question b. Other teams may start with the merits as the law governing the Agreement could also be relevant for the interpretation of the dispute resolution clause contained therein. Irrespective of that, the primary guideline in evaluating the various submissions is whether the relevant arguments are presented in a convincing way and not where they are presented.

In relation to the merits, PO 1 states explicitly that beyond the two questions under c) and d), no further questions referring to the merits of the claims should be addressed. In particular, no questions relating to the remedies requested and their availability should be raised.

The following remarks are merely intended to highlight the legal issues arising from the Problem. One of the major difficulties of this year's case is that there are potentially more (smaller) issues than can be discussed in a meaningful way within the page- or time limit in the submission and the oral presentation. Thus, it is important that the students properly weigh the relevance and strength of the various arguments in light of their case stories.

III. Rejection of the claim for lack of jurisdiction or admissibility or as part of the Arbitral Tribunal's discretion (PO 1 para. III no. 1 a.)

1. Background

The Agreement concluded between the Parties contains in Art. 30 the following dispute resolution clause:

> Article 30: DISPUTE RESOLUTION
>
> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce.
>
> (a) The place of mediation shall be Danubia.
> (b) The language of the mediation shall be English.
>
> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce. However, at the request of a party, the Arbitration Institute of the Finland Chamber of Commerce may determine that the Arbitration Rules of the Finland Chamber of Commerce shall apply instead of the Rules for Expedited Arbitration, if the Arbitration Institute considers this to be appropriate taking into account the amount in dispute, the complexity of the case, and other relevant circumstances.
>
> (a) The seat of arbitration shall be in Vindobona, Danubia.

(b) The language of the arbitration shall be English.

The clause has been proposed by Claimant, who was not willing to accept the dispute resolution clause of the 2022 Model Contract, providing for arbitration in Equatoriana under the rules of the Equatorianian Arbitration Institution. The clause is a combination of the FAI model clauses for mediation and arbitration. The suggested model clause for mediation contains, however, the following additional sentence:

> "The commencement of proceedings under the Mediation Rules shall not prevent any party from commencing arbitration in accordance with the clause below."

There is no information as to why that sentence has been omitted or the clauses have been combined and Respondent did not check whether the proposed clause deviated from the FAI model clauses. The only further information available concerning the negotiation of the clause is contained in Mr. Deiman's email of 12 July 2023 (Exhibit R 2) addressing inter alia concern in relation to confidentiality and amicable settlement which had apparently been raised by Respondent. The email states in the relevant part:

> In relation to your concerns regarding the confidentiality of the foreseen ADR mechanisms and the communications made therein, I would refer you to Article 15 of the Mediation Rules and Articles 51 and 52 of the Arbitration Rules. The regulations contained therein should in my view be sufficient to address your concerns as they ensure the needed confidentiality.
>
> Furthermore, the FAI 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.

In addition, Ms. Ritter in her witness statement (Exhibit R 1, para. 9) has the following vague recollections about the negotiations which are the reason for the above statement in Mr. Deiman's mail:

> In Equatoriana, there is consistent case law that in case of a multi-tier clause providing first for mediation and then for arbitration under the rule of an institution, the conduct of mediation is a condition precedent for the jurisdiction of the arbitral tribunal. I think I also told Mr. Deiman about that jurisprudence. I am, however, not entirely certain about that. Irrespective of that, I definitively told him that we had a strong interest in an amicable settlement of disputes and arbitration should only be the last resort to resolve disputes.

Following Respondent's termination notice of 29 February 2024 and Claimant's rejection thereof, the Parties agreed on a meeting of their CEO on 28 April. Due to an accident on the previous day, Mr. Cavendish had to cancel his participation in the meeting on short notice. On 12 May 2024, finally, a meeting took place between Mr. Cavendish and Mr. la Cour. The meeting only lasted for 30 minutes, and Mr. la Cour made clear that the new

minister Ms. Vent would only authorize the continuation of the Agreement if the price was significantly reduced.

In its without-prejudice offer of 25 May 2024 (Exhibit C 7), Mr. la Cour stated that "to be competitive the price for the plant including the two extension options would have to be at least 15% lower" and requested a "Reduction of the price by 15%". The offer closed with the statement that "[a]ny further discussion between us or our lawyers only makes sense if Green Hydro is willing to accept a serious price reduction of 15% or at least a two-digit number".

Claimant rejected that offer the next day and declared its intention to initiate arbitration proceedings. Respondent never specifically requested mediation after the disputes had arisen or before the Request for Arbitration had been submitted (PO para.14).

2. Arguments

In its RfA of 31 July 2024 Claimant submits that the Arbitral Tribunal has jurisdiction over the dispute and the claims are admissible, though the Parties have obviously not tried to mediate their dispute as would have been required under Article 30.

According to Claimant, the Parties' conduct, and Respondent's final offer of 25 May 2024 made clear that mediation would not have resulted in a resolution of the dispute. Respondent had insisted on a 15 % price reduction and had made clear in its without prejudice settlement offer that "any further discussion made only sense if Claimant was willing to talk about "serious price reduction of 15% or at least a two-digit number" (Exhibit C 7). Such a reduction was, however, unacceptable for Claimant, which was already making a deficit under the contract as it stood. Thus, mediation would have been a mere waste of time and resources.

Respondent, by contrast, insisted on compliance with the pre-arbitration mediation requirement. It considers mediation a condition precedent for the jurisdiction of the Arbitral Tribunal or, at least, for the admissibility of the claim. Alternatively, the Arbitral Tribunal should exercise its discretion in not admitting the claim due to the non-compliance with the pre-arbitral mediation requirement.

Conceptually and on the basis of the available case law and literature, the following three separate issues may be discussed in connection with this question.

- Is the pre-arbitration mediation requirement valid and enforceable?
- What are the legal consequences of non-compliance with the mediation requirement?
- Is reliance on it dependent on the chances of success of a mediation and would the facts of the present case excuse Claimant for not having tried to mediate the case

or prevent Respondent from relying on the requirement under good faith considerations?

In some older cases in particular from common law jurisdictions, the validity and enforceability of mediation clauses were questioned and occasionally denied. Today, the validity and enforceability of such clauses are no longer an issue in the majority of jurisdictions. Thus, most teams will probably focus on the second and third issues.

As far as the legal consequences of such pre-arbitration mediation requirements are concerned three different positions can be found in case law. While in some cases they are considered to be conditions precedents for the jurisdiction of the Arbitral Tribunal (temporal jurisdiction), others classify them as binding requirements for the admissibility of the claims raised. According to the third view, the Arbitral Tribunal has discretion whether to admit a claim even when no mediation has taken place.

In the end, the legal nature of the requirement will also be dependent on the intention of the parties. It is thus for the students to argue the position they are forwarding on the basis of the specific facts of the case.

Irrespective of which view is taken on the second issue the question arises whether Respondent may be precluded from relying on the "formal" non-compliance with the foreseen procedure due to the limited chances of success.

For both questions, there is considerable case law and legal literature supporting the various views, including references in the Guidelines by the ClArb on Jurisdictional Challenges.

Factors which may play a role in the discussion of the two issues are:

- the drafting history of the clause
- the deviation from the FAI Model Clauses
- the treatment of such pre-arbitration mediation requirements by the courts of Equatoriana (Exhibit R 1 para. 9)
- the case law – (differences between commercial arbitration and investment arbitration?)
- the Parties' negotiation history including Respondent's without prejudice settlement offer and its wording (Exhibit C 7) / threats against Mr. Deiman and office raid (Exhibit C 8) / likelihood of settlement in light of Claimant's commercial interest in the project and the commercial viability of the Agreement / presentation of internal document Exhibit R 3 (relevance as it happened after the RfA?))

IV. The exclusion of Exhibits C 7 and R 3 from the file (PO 1 para. III no. 1 b.)

1. Background

Both Parties have submitted one document which may be protected by privileges and confidentiality obligations invoked by the other side trying to exclude these documents from the file.

Claimant has submitted as Exhibit C 7 an email by Respondent of 25 May 2024 which contained an unsolicited without-prejudice offer.

During the negotiations of the Agreement, the confidentiality of dispute settlement efforts had been an issue between the Parties. Ms. Ritter stated in her witness statement (Exhibit R 1):

> Furthermore, given the political climate and the existing opposition to the new energy strategy, we wanted to keep any potential dispute within the project out of the press. At the same time, we did not want to press for a separate full-fledged confidentiality agreement for the resolution of disputes, which, if leaked, could be misinterpreted as an effort by us to hide relevant information from the public. Mr. Deiman reassured us that in case of disputes, the relevant rules already provided for the necessary confidentiality. For me, it was clear that Article 15 of the Mediation Rules should also extend to all negotiations preceding mediation.

The reassurance by Mr. Deiman referred to by Ms. Ritter was contained in his email of 12 July 2023, in the passage quoted above.

Article 15.2 of the 2024 FAI Mediation Rules provides for settlement offers made in connection with a mediation:

> "The parties, the mediator and any other person participating in the proceedings shall not invoke or produce as evidence any information (including, but not limited to, any statements made regarding the possibility to settle the dispute) obtained in the context of FAI Mediation in any subsequent legal proceedings."

According to an article in the journal Vindobona Legal from January 2024 reporting about the annual congress of the Danubian Bar Association (Exhibit R 4) under Danubian Law there is

> "insufficient protection of the confidentiality of negotiations either outside or within a mediation. Offers made in such negotiation are regularly used and admitted as evidence in subsequent court or arbitration proceedings by the other party to prove that the offeror was accepting part of the liability.

However, in reaction to the criticism raised the Danubian minister of justice promised the formation of a working group to address the issue.

Respondent has submitted as Exhibit R 3 an internal email of Claimant of 10 July 2023. In that email, Ms. Heidi Smith, Claimant's Head of the Legal Department, replied to a request from Mr. Cavendish and Mr. Deiman and provided a draft of the email, which Mr. Deiman intended to send to Ms. Ritter informing her about the ongoing negotiations with P2G. In light of the importance of the local content requirement, the email was to report on the negotiations with P2G as optimistically as possible without engaging in an actionable misrepresentation or actionable assurances given the fact that at the time a conclusion of the contract with P2G already seemed unlikely.

How Respondent got hold of that internal email is not clear. Following the meeting between Mr. la Cour and Mr. Cavendish on 12 May 2024, the Equatorianian police raided the offices of Mr. Deiman in Equatoriana, where he had in the meantime become the COO of Volta Transformer after the latter's acquisition by Claimant. The police detained Mr. Deiman for two days and confiscated his laptop containing the email files. In his witness statement, Mr. Deiman (Exhibit C 8) confirmed that he had never shown the document to anyone from Respondent's side. He thus speculated that the document must have been obtained either from the local investigation authorities, with whom Respondent had "very close contacts" or, less likely, through someone from within Mr. Deiman's office, which made the confidential document available to Respondent, breaking the confidentiality obligation existing for all employees.

2. Argument

The teams have to argue the exclusion requests in light of the general powers of the Arbitral Tribunal to determine the admissibility of evidence existing under the applicable rules. Concerning the taking of evidence the 2024 FAI Arbitration Rules provide in Article 34.1 as follows:

> The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.

A comparable provision is contained in Art. 19 (2) of the Danubian Arbitration Law which is a verbatim adoption of the Model Law and gives the Arbitral Tribunal the power to determine the admissibility of evidence at its discretion, where the Parties have not provided otherwise.

In its decision, the Arbitral Tribunal has to weigh the conflicting interests of the Parties, i.e. on the one hand those of the Party submitting a document to effectively present its case and on the other hand those of the Party trying to exclude the document by relying on existing privileges and confidentiality agreements.

Guidance for the issue of admissibility could be found in the IBA Rules on the Taking of Evidence in International Arbitration, though they are not directly applicable to the case. They provide in the pertinent parts of Articles 9.2.and 9.4 as follows:

> 9.2 The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:
>
> (a) …
>
> (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below)
>
> ….
>
> 9.4 In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
>
> (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
>
> (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
>
> (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen
>
> d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
>
> (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

In the present case, the students first have to establish the existence of either a confidentiality agreement or a privilege for the two documents before they enter a second step in the weighing process.

In relation to Exhibit C 7 Respondent submits that the drafting history of the Agreement shows that the Parties' intention was to extend Article 15.2 of the FAI Mediation Rules also to all communications in the Parties' settlement discussions. Furthermore, the document explicitly mentions that it is a "without-prejudice offer" to confer privileges on it.

Claimant may argue that the offer was not made in the context of mediation but as an unsolicited settlement offer in the context of negotiations not protected by confidentiality agreements. Respondent can also not unilaterally confer a privilege on its communication.

Factors which may be relevant for the discussion are:

- the drafting history,
- the post-termination discussions and behavior,

- content of offer,
- settlement privilege.

In relation to Exhibit R 3, the students may try to invoke a legal advice privilege. The only – albeit very vague information – about existing privileges in the various jurisdictions involved is provided in Exhibit R 4. Guidance may thus primarily be drawn from the report of the IBA Arbitration Committee Task Force on Privilege in International Arbitration. (https://www.ibanet.org/document?id=Report-on-Uniform-Guidelines-on-Privilege-in-International-Arbitration).

Factors which may be relevant for the discussion are:

- content of the email (covered by legal advice privilege?),
- status of Ms. Smith as an in-house lawyer,
- Ms. Smith's admission to the local bar,
- whether privilege had been waived (use of the work product),
- expectations of the Parties involved on the basis of their legal background,
- equal treatment of the Parties.

V. Is the CISG applicable to the Agreement (PO 1 para. III no. 1 c and d)

1. Background

The Parties are in dispute about the law governing the Agreement.

The Agreement was concluded at the end of a public procurement process initiated by Respondent with its Requestion of Quotation (RFQ) on 3 January 2023 (Exhibit C 1). The object of the RfQ was described in clause 1 as follows:

> This request is for a quotation for
>
> - the engineering, planning, construction, and delivery of a plant (turnkey) for the production of green hydrogen from 1.1. 2026 onwards in Greenfield, at the site described in detail in Annex 1, having an original capacity of 100 MW;
> - the grant of an option to increase the quantity by up to 100 MW at a fixed price to be exercised within the first year of operation of the plant;
> - the grant of an option to add production facilities for eAmmonia at a fixed price to be exercised within the first year of operation of the plant; and
> - training and maintenance services for the first year of operation.

The bidding process was to be conducted in 4 phases (Clause 1c RfQ). It started with the submission of the "technology open" bids and their internal evaluation by Respondent according to a complex formular weighing several factors (Phases 1 and 2). On the basis

of that formular a reverse auction took place during the third phase in which the two best bidders were identified. In the fourth phase, detailed negotiations were then conducted with these two bidders, one of which was Claimant.

The negotiations were based on the 2022 Model Contract as attached to the Request for Quotation. The negotiations are described in some detail in the following passage of Ms. Ritter's witness statement (Exhibit R 1, para. 11) as the issue of the applicable law is concerned.

.

In her witness statement Ms. Ritter stated in relation to the discussion about the applicable law in para. 11:

> "The issue of applicable law had been one of the issues on the list which Mr. Cavendish sent Ms. Faraday for their initial meeting after Claimant had been selected as one of the two bidders for further negotiation. The issue was, however, not really addressed at that meeting or later. At the initial meeting, Mr. Cavendish merely mentioned to Ms. Faraday that in a previous transaction covering the sale of stacks, his head of the legal department had told him that for international sales transactions, the CISG is the gold standard. As neither Mr. Cavendish nor Ms. Faraday are lawyers, it was agreed that the issue should be left to the lawyers for discussion. There was no further discussion on the issue. Instead, Claimant accepted the choice of law provision, which had been taken directly from the 2022 version of the Model Contract. It had replaced an earlier version of the Model Contract, which had explicitly provided for the application of the CISG for all international sales transactions. During the negotiations, Mr. Deiman told me that they had already used the then Model Contract in a previous transaction with another government entity in 2020. As their experiences had been positive, he had no objections to using the Model Contract as a starting point for the negotiations. Thus, I assume that Claimant was aware of the change to the choice of law clause in the 2022 version."

The Agreement's choice of law clause in Article 29 provides as follows:.

> **Article 29: GOVERNING LAW**
>
> The Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles.

The clause taken over verbatim from 2022 Model Contract deviates from that of the old Model Contract which provided::

> "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” (PO 2 para.10)

Claimant had concluded two smaller contracts with other government entities from Equatoriana before, based on the old Model Contract declaring the CISG to be applicable. These contracts had been negotiated by Mr. Deiman and Mr. Law, Claimant’s Head of Legal at the time, and had not resulted in any problems. In the context of the first transaction concluded in 2020 Mr. Law had mentioned to Mr. Cavendish that the CISG constituted the “Gold Standard” for international sales transactions (PO 2 para. 2) which was the basis of Mr. Cavendish’s remark at the first meeting.

The list of issues to be discussed had been prepared by Mr. Law who wanted to discuss it with Mr. Cavendish but did not do so due to the termination of his contract (PO 2 para. 11).

2. Arguments

Parties' submissions and legal relevance of the issue of applicable law

Claimant submits that the Agreement - and thus Respondent’s right to terminate - is governed by the CISG. In its view, the Agreement constitutes a mixed contract falling within the scope of the CISG pursuant to Art. 3 CISG, as the preponderant part of the Agreement with a value of over 60% of the overall price consists of the delivery of goods. It does not fall into any of the exclusions from the CISG’s scope of application due to the Parties involved or the process of its conclusion. In particular, the choice of law clause does not exclude the application of the CISG. It provides for the application of the law of Equatoriana which is a Contracting State of the CISG and the CISG does not qualify as excluded "conflict of laws principles”.

By contrast Respondent considers the Civil Code of Equatoriana to be applicable to the Agreement. In its view, the Agreement does already not fall within the scope of application of the CISG as it does not constitute an international sales transaction in the sense of Articles 1 and 2. Furthermore, Respondent considers the choice of law agreement to be an exclusion of the CISG in the sense of Article 6 CISG.

As the termination rights existing under both codifications differ the issue may be outcome determinative for the second phase of the arbitral proceedings even if one considers Article 28 of the Agreement to be a conclusive regulation of the termination rights. The termination rights under the Civil Code of Equatoriana are contained in Article 7 which is a verbatim adoption of Article 7.3 of the UNIDROIT Principles with an addition in Art.7.3.8., allowing governmental entities to terminate contracts concluded in pursuance of a particular strategy if the government has changed that strategy (PO 1 para. 4). A slight majority considers that provision a mandatory provision which, however, does not form part of the ordre public of Equatoriana (PO2 para 33).

By contrast, a termination under the CISG requires either a fundamental breach of the Agreement by Claimant (Art.49 (1)(a)) or the expiry of additional time fixed for performance (Art.49 (1)(b)). Both will be difficult to argue, unless one interprets Respondent's complaint about the non-delivery of the plans in February, fixing a deadline for submission until the end of February (PO 2 para.15) as a fixing of an additional time in the sense of Article 49 (1)(b).

The Parties have regulated the termination of the Agreement in Article 28 which provides:

Article 28: TERMINATION

1. Both Parties may terminate this Agreement for cause in case of a failure of the other Party to perform any of its obligations resulting from this Agreement that amounts to a serious and fundamental non-performance.
2. There is no right for the CUSTOMER or the CONTRACTOR to terminate the Agreement for convenience against the payment of compensation. Both Parties will use their best endeavours to realize the project.

General Applicability of the CISG

Respondent may raise three objections in relation to the general applicability of the CISG to the Agreement:

- the Agreement was concluded through an auction in a public procurement process and thus falls under Article 2 (b) CISG;
- the Agreement does not provide for the sale of goods in the sense of Article 3 (2) CISG as the preponderant part of Claimant's obligation consists in the supply of labour or other services;
- the Agreement is not an "international" supply of good as
    - in case Option 1 is exercised as planned at the time of contracting with P2G, the majority of the supply obligations are performed from within Equatoriana;
    - in case Option 2 is exercised as agreed he majority of the supply obligations are performed from within Equatoriana by Volta Transformer
    - Volta Transformer constitutes the relevant place of business of Claimant in the sense of Article 10(a).

From the potential objections, the first has the least chance of success and many teams may also mention it shortly or not at all. While the action element played a role in the procurement process the final conclusion of the Agreement was based on individual negotiations.

Most teams will focus on the second objection, as already the description of the project in the Request for Quotation sounds more like a turnkey construction agreement than an agreement for the supply of goods.

The “Purchase and Service Agreement” is - as its name already indicates - a mixed contract in the sense of Article 3 CISG. Thus, the CISG would only be applicable if the requirements of Article 3 (2) are met and a “preponderant” part of the performance consists of a supply of goods and not in the construction of the plant or other services. For the classification of the various obligations under the contract as “supply of goods” and also for the “international” character of the Agreement (Article 1 CISG, Claimant’s internal calculation shared with Respondent during the negotiations is relevant. It is contained in para. 11 of Mr. Cavendish’s witness statement (Exhibit C 5) and was shared with Respondent during the negotiations. Those elements which can be classified as supply-of-goods elements are highlighted in yellow.

Claimant will argue in favor of a primarily quantitative understanding of the notion of “preponderant part” looking primarily at the overall investment and the value of the different parts, i.e. the supply of goods on the one hand and services and labour on the other hand, preferably without taking the options into account..

Respondent will probably argue in favor a more qualitative approach looking at the importance of the various parts for the Agreement and its conclusion or the general perception (“turnkey construction contract”). Irrespective of that, it is not easy for Respondent to argue that the other elements are the preponderant part of the Agreement. Respondent’s stronger point is that of the lacking “international character” of the Agreement.

For the discussion of the “international character” of the Agreement two questions will be relevant. First, is the evaluation only done on the basis of the firmly contracted plant part or are the two options or at least the eAmmonia-option also take into account? Second is the “international character” of the Agreement determined only on the basis of the supply of goods elements or is the entire investment relevant, including also the labour and service parts. Furthermore, it may play a role for the eAmmonia option whether P2G is taken into account, which Respondent considered to be the likely supplier of the goods at the time of contracting, or Green Hydrogen from Danubia as the finally selected supplier.

If only the supply of goods elements of the Agreement are taken into account to determine its “international character”, the internationality is questionable if the options are exercised with the Parties foresee at the time of contracting, i.e. P2G for the eAmmonia option and Volta Transformer for the extension option. In cases of an exercise of the eAmmonia option, which was expected by the Parties the share of the goods supplied by entities having their place of business in Equatoriana would be 56% (see the calculation attached as Annex 1 (the first calculation on the basis of the entire investment made and its distribution to the different entities and jurisdictions, the second calculation merely looking at the supply of goods elements and their distribution to the different entities and jurisdictions.

There are good arguments in favor of taking into account the options as well. They have been negotiated in detail and fix the price and all other contractual terms in a way that

Respondent only has to exercise them (PO 2 para. 18). Furthermore, at the time of contracting both Parties assumed the Respondent would make use of the eAmmonia option once the necessary funding was available.

Even if the evaluation of the "international character" of the Agreement is made without the options, a "qualitative" approach, looking at the importance of the goods provided could come to the conclusion that the more important parts (transformer) where coming from entities having their place of business in Equatoriana. The problem would still be to classify Volta Transformer as a place of business of Claimant in the sense of Article 10.

Factors that may play a role in the discussion of the **supply-of-goods-character** of the Agreements and its qualification as an **international** sales contract are:

- the wording of the Request for Quotation;
- the wording of the Agreement (title / individual provisions (sales or service terminology)):
- the monetary value of the particular components and services:
- the importance of the particular components (transformer/stacks), services, and expertise for the transaction:
- the relationship between Claimant and Volta Transformer (amount of work done for Claimant / licence to Volta Electrolyser / time of taking over).

Exclusion of the CISG by the Parties

Whether the Parties in their choice of law clause excluded the CISG is primarily a question of contract interpretation which is governed by the CISG, i.e. Article 8. Thus, all relevant circumstances have to be taken into account.

Factors which may play a role in the discussion are:

- the wording of the Agreement (title / individual provisions (e.g. termination clause));
- the drafting history;
- the changes made to the governing law provision in the 2022 Model Contract forming the basis of the provision;
- the reference to Equatorianian Law in the RfQ;
- Respondent's nature as a state-owned party.

ANNEX 1

	Total Investment			Supplys/Services by countries/parties					
				Mediteranneo		*Equatoriana*			
				Green Hydrogen		VoltaTransformer		P2G	
Electrolyser	200 Mio €								
Core system	50%	100 Mio €		60%	60 Mio €	40%	40 Mio €		
Trafo and electrical equipment	20%	40 Mio €		0%	0 Mio €	100%	40 Mio €		
Packaging	10%	20 Mio €		0%	0 Mio €	100%	20 Mio €		
Project managment and engineering	8%	15 Mio €		100%	15 Mio €	0%	0 Mio €		
Site works	8%	15 Mio €		100%	15 Mio €	0%	0 Mio €		
Training and maintenance	5%	10 Mio €		100%	10 Mio €	0%	0 Mio €		
	100%	200			100		100		
EPC-Work	100 Mio €								
Compressor, pipes, cable installation, connections, and other equipment	50%	50 Mio €		100%	50 Mio €	0%	0 Mio €		
Buildings and foundations for the facility	25%	25 Mio €		100%	25 Mio €	0%	0 Mio €		
Remaining "EPC" services for constructing the turnkey facility	25%	25 Mio €		100%	25 Mio €	0%	0 Mio €		
	100%	100			100		0		
Supply of Goods		190 Mio €	63,3%		200 out of 300		100 out of 300		
Labour/Services		110 Mio €	36,7%		66,7%		33,3%		
		300	100%		Mediteraneo		Equatoriana		
1. Option (with P2G as originally communicated)									
eAmmonia-Option 100 Mio	100 Mio €								
Supply of Goods	60%	60 Mio €		0%	0 Mio €	0%	0 Mio €	100%	60 Mio €
Other contractual components	40%	40 Mio €		50%	20 Mio €	0%	0 Mio €	50%	20 Mio €
		100			20		0		80
Supply of Goods		250 Mio €	62,5%		220 out of 400		180 out of 400		
Labour/Services		150 Mio €	37,5%		55,0%		45,0%		
		400	100%		Mediterraneo.		Equatoriana		

	Investment in Supply of Goods			Supplys by countries/parties							
				Mediteranneo		*Equatoriana*					
				Green Hydrogen		VoltaTransformer		P2G			
Electrolyser	200 Mio €										
Core system		50%	100 Mio €	60%	60 Mio €	40%	40 Mio €				
Trafo and electrical equipment		20%	40 Mio €	0%	0 Mio €	100%	40 Mio €				
Percentage of entire costs/amounts		70%	140 Mio €		60 Mio €		80 Mio €				
EPC-Work	100 Mio €										
Compressor, pipes, cable installation, connections, and other equipment		50%	50 Mio €	100%	50 Mio €	0%	0 Mio €				
Percentage of entire costs/amounts		50%	50 Mio €	100%	50 Mio €	0%	0 Mio €				
				110 out of 190		80 out of 190					
	Supply of Goods		190 Mio €	57,9%		42,1%					
				Mediteraneo		Equatoriana					
1. Option (with P2G as originally communicated)											
eAmmonia-Option 100 Mio	100 Mio €										
Supply of Goods		60%	60 Mio €	0%	0 Mio €	0%	0 Mio €	100%	60 Mio €		
Percentage of entire costs/amounts		60%	60 Mio €	0%	0 Mio €	0%	0 Mio €	100%	60 Mio €		
				110 out of 250		140 out of 250					
	Supply of Goods		250 Mio €	44,0%		56,0%					
				Mediterraneo.		Equatoriana					