CHEON KWANG DEVELOPMENT COMPANY Ltd N'INDI v. LETA Y'URWANDA/MINAGRI

[Rwanda URUKIKO RW'IKIRENGA – RCOMA0004/16/CS – RCOMA0003/2016 (Kanyange P.J., Ngagi na Mukandamage, J.) 30 Kamena 2017]

Amategeko agenga amasezerano – Amasezerano y'ubukemurampaka – Iyo abagiranye amasezerano y'ubukemurampaka bateganyije ko bagomba kunyura mu nzira ya "adjudication" mbere yo kwiyambaza ubukemurampaka bigomba kubahirizwa, iyo bidakozwe inteko y'ubukemurampaka nta bubasha iba ifite bwo kwakira ikirego gikomoka kuri ayo masezerano.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Inteko y'abakemurampaka ishobora kwanga kwakira imyanzuro y'ababuranyi hakurijwe ubukererwe bw'ibihindurwa cyangwa ibyongerwamo – Itegeko N°005/2008 ryo ku wa 14/02/2008 ry'ubukemurampaka n'ubwunzi mu by'ubucuruzi, ingingo ya 35.

Incamake y'ikibazo: Sosiyete CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd zishyize hamwe zigirana amasezerano na Leta y'u Rwanda (MINAGRI) yo kubaka ibidamu no kuhira imyaka mu misozi, impande zombi zikaba zarateganyije mu masezerano zagiranye, ko ziramutse zigiranye ibibazo, bizakemurwa n'Ubukemurampaka ariko zibanje kwiyambaza *adjudicator*.

Nyuma yaho izo sosiyete zitangiriye imirimo, ntizabashije kubahiriza igihe imirimo igomba kurangirira zisaba Leta y'u Rwanda ko yazongerera igihe cyo kurangiza imirimo, nyuma yo kubisuzuma Leta yanga kongera icyo gihe ahubwo ifata umwanzuro wo gusesa amasezerano. Izi sosiyete ntizishimiye iki cyemezo ziregera abakemurampaka.

Impande zombi zatanze imyanzuro, maze Inteko y'Abakemurampaka itegeka ko iburanisha mu mizi y'urubanza izakomeza aruko impande zombi zishyize umukono ku nyandiko yateguwe n'inteko yabakemurampaka, ariko Leta y'u Rwanda/MINAGRI yavuze ko adashyira umukono kuri iyo nyandiko kuko yatanze inzitizi, mu mwanzuro wayo, ivuga ko nta bukemurampaka bwaba igihe ari nta cyemezo cya "adjudicator" gihari, byatumye Inteko itegeka ko impande zombi zitegura imyanzuro kuri iyo nzitizi kugirango hazabe iburanisha kuriyo, kandi itanga itariki ntarengwa yo kuba impande zombi zayishyikirije iyo myanzuro.

Mu myanzuro, abarega bagaragaje ko Leta y'u Rwanda/MINAGRI yanze inzira ya "adjudication", bityo akaba nta kundi bari kubigenza uretse kwiyambaza ubukemurampaka nk'uko amasezerano yabiteganyaga, kandi ngo ntabwo byari itegeko ko bagombaga kubanza gushyikiriza ikirego "adjudicator". Ku bijyanye n'imyanzuro y'inyongera inteko y'abakemurampaka yanze kuyakira kuko yatanzwe ikererewe inteko yamaze gufata icyemezo uretse kandi ko ntacyo yari kumarira inteko. Hanyuma Inteko ifata icyemezo cy'uko nta bubasha ifite kuko nta cyemezo cya "adjudicator" gihari.

Abarega ntibishimiye icyo cyemezo, baregera Urukiko Rukuru rw'Ubucuruzi, barusaba ko rwakwemeza ko Inteko y'Abakemurampaka yari ifite ububasha, bavuze kandi ko batishimiye uburyo Inteko yafashe icyemezo mbere y'uko ababuranyi baburana, kandi ko inteko yirengagije ibiteganywa n'ingingo ya 35 (2) y'Itegeko N°005/2008 ryo ku wa 14/02/2008, ndetse yirengagiza icyo amasezerano ateganya. Uru rukiko rwemeje ko nta gihindutse ku cyemezo cy'Inteko y'Abakemurampaka.

Abarega ntibishimiye imikirize y'urwo rubanza bajurira mu Rukiko rw'Ikirenga bavuga ko Urukiko Rukuru rw'Ubucuruzi rwashingiye ku Itegeko ry'imiburanishirize riri rusange kandi hari itegeko ryihariye ry'ubukemurampaka bituma rwemeza ko inteko y'abakemurampaka yari ifite uburenganzira bwo kwanga kwakira imyanzuro y'inyongera yatanzwe n'abarega ku nzitizi. Kandi ko urwo rukiko rutasobanuye icyo ingingo y'amasezerano irebana n'icyemezo cyagombaga kujya mu bukemurampaka kuko iyi ngingo idafata "adjudication" nk'itegeko kugirango ikirego cyakirwe n'abakemurampaka ndetse ko ubukemurampaka butagombaga gukorwa hashingiwe ku cyemezo cya "adjudicator" ahubwo ko iyo ngingo ivuga ku mpaka zose zivutse mu masezerano.

Leta y'u Rwanda ivuga ko nta kuvuguruzanya kuri hagati y'ngingo ya 69 y'Itegeko N^{o}21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, n'iya 35 y'Itegeko ry'Ubukemurampaka. Kandi ko uburyo bwo gukemura impaka bwateganyijwe mu masezerano bubanzirizwa na adjudication byananirana hakiyambazwa ubukemurampaka.

Incamake y'icyemezo: 1. Iyo abagiranye amasezerano y'ubukemurampaka bateganyije ko bagomba kunyura mu nzira ya *adjudication* mbere yo kwiyambaza ubukemurampaka bigomba kubahirizwa, iyo bidakozwe inteko y'ubukemurampaka nta bubasha iba ifite bwo kwakira ikirego gikomoka kuri ayo masezerano.

2. Inteko y'abacyemurampaka ishobora kwanga kwakira imyanzuro y'ababuranyi hakurijwe ubukererwe bw'ibihindurwa cyangwa ibyongerwamo.

Ubujurire nta shingiro bufite.
Urubanza rujuririrwa ntiruhindutse.

Amategeko yifashishijwe:
Itegeko N^{o}21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ingingo ya 69.
Itegeko N^{o}45/2011 ryo ku wa 25/11/2011 rigenga amasezerano ingingo ya 64.
Itegeko N^{o}0005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi ingingo ya 35.

Nta manza zifashishijwe.

I. IMITERERE Y'URUBANZA

[1] Amasosiyete y'ubucuruzi CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd yishyize hamwe (joint venture), hanyuma agirana amasezerano na Leta y'u Rwanda (MINAGRI), binyuze mu mushinga wo kubaka ibidamu no kuhira imyaka mu misozi mu Karere ka Rwamagana (Construction works of a 14 meters high earth-fill dam and 267 ha Hillside Irrigation System), impande zombi zikaba zarateganyije, mu masezerano zagiranye, ko ziramutse zigiranye ibibazo, bizakemurwa n'Ubukemurampaka.

[2] Nk'uko amasezerano abiteganya, impande zombi zashyizeho abakemurampaka babiri (2), nabo bahitamo undi uzaba Perezida w'Inteko, hanyuma Inteko itumiza ababuranyi i Nairobi muri Kenya, mu

ibiranisha ry'ibanze, impande zombi zumvikana ko amategeko azakoreshwa ari ay'u Rwanda. Muri iryo buranisha, Leta y'u Rwanda/MINAGRI yagaragaje ko Umukemurampaka washyizweho n'amasosiyete yareze ari umujyanama wayo, bityo akaba adakwiriye kuba Umukemurampaka, hanyuma Inteko ifata icyemezo cyo kutabiha agaciro.

[3] Impande zombi zatanze imyanzuro, maze Inteko y'Abakemurampaka itegeka ko iburanisha mu mizi y'urubanza rizakorwa ku wa 16/06/2016 no ku wa 17/06/2016. Ku wa 16/06/2016 iyo Nteko yazanye inyandiko, isaba ko ababuranyi bayisinya, iyo nyandiko ikaba yari ikubiyemo ibi bikurikira: "*Notwithstanding the provision of clause 24 of the contract which obliged the parties in the first instance to refer their disputes and differences to an adjudicator and only refer the matter to arbitration after the adjudicator's written decision thereon, the parties agree to refer the disputes and differences between them arising out of the contract to arbitration by a tribunal of three arbitrators two of whom shall be the parties appointees and the third one who shall be the presiding arbitrator shall be appointed by the two party arbitrators*".

[4] Nyuma yo gutanga inyandiko imaze kuvugwa haruguru, uhagarariye Leta y'u Rwanda/MINAGRI yavuze ko adashyira umukono kuri iyo nyandiko kuko yatanze inzitizi, mu mwanzuro we, avuga ko nta bukemurampaka bwaba igihe ari nta cyemezo cya "adjudicator" gihari. Ibyo byatumye Inteko itegeka ko impande zombi zitegura imyanzuro kuri iyo nzitizi, igatangwa bitarenze saa sita z'ijoro ryo ku wa 16/06/2016 kugira ngo ku munsi ukurikiyeho (ku wa 17/06/2016) hazabe iburanisha kuri iyo nzitizi.

[5] Mu iburanisha ryo ku wa 17/06/2016 no mu myanzuro, abarega (joint venture) bagaragaje ko Leta y'u Rwanda/MINAGRI yanze inzira ya "adjudication" kuko yandikiwe kugira ngo hajyeho "adjudicator", isubiza mu buryo bw'amananiza, bityo akaba nta kundi bari kubigenza uretse kwiyambaza ubukemurampaka nk'uko amasezerano yabiteganyaga, kabone n'ubwo bitari itegeko ko bagombaga kubanza gushyikiriza ikirego "adjudicator".

[6] Ku wa 29/06/2016, abarega batanze umwanzuro w'inyongera wo kwiregura ku nzitizi, bashingiye ku ngingo ya 35 (2) y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, hanyuma ku wa 25/07/2016, Inteko ifata icyemezo cy'uko nta bubasha ifite kuko nta cyemezo cya "adjudicator" gihari.

[7] Amasosiyete CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd ntiyishimiye icyo cyemezo cy'Inteko y'ubukemurampaka, aregera Urukiko Rukuru rw'Ubucuruzi, arusaba ko rwakwemeza ko inteko y'abakemurampaka yari ifite ububasha bwo gukemura izo mpaka bagiranye. Ayo masosiyete yavuze kandi ko ikindi atishimiye ari uko Inteko y'Abakemurampaka yafashe icyemezo mbere y'uko ababuranyi baburana, no kuba yarirengagije nkana ibiteganywa n'ingingo ya 35 (2) y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, ndetse no kuba yarirengagije icyo amasezerano ateganya.

[8] Mu rubanza RCOMA00476/2016/CHC/HCC rwaciwe ku wa 28/10/2016, Urukiko Rukuru rw'Ubucuruzi rwemeje ko nta gihindutse ku cyemezo cy'Inteko y'Abakemurampaka. Mu gufata icyo cyemezo, Urukiko Rukuru rw'Ubucuruzi rwasanze kuvuga ko Inteko y'Abakemurampaka yafashe icyemezo ku rubanza, rutabanje kumva impande zombi, bitahabwa ishingiro kuko, kuba impande zombi zarumvikanye ko mw'iburanisha hazakoreshwa amategeko y'u Rwanda, ingingo ya 78, igika cya 2,

n'iya 142 z'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi zemerera umucamanza, abyibwirije, kubyutsa inzitizi y'iburabubasha aho urubanza rwaba rugeze hose, hanyuma iyo Nteko y'Abakemurampaka iza kubyutsa iyo nzitizi y'iburabubasha, nyuma yo kumva ababuranyi, rukayifataho icyemezo, ibyo byerekana ko rutanyuranyije n'amategeko y'u Rwanda impande zombi zemeranyije ko ariyo azakurikizwa.

[9] CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd ntizishimiye imikirize y'urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, zijuririra mu Rukiko rw'Ikirenga kubera impamvu zikurikira:

1. Kuba Urukiko Rukuru rw'Ubucuruzi rwarashingiye ku ngingo ya 69 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rwemeza ko urukiko rufite ububasha bwo kuba rwakwemera umwanzuro w'inyongera cyangwa indi nyandiko itanzwe nyuma yo gupfundikira iburanisha, ariko ko rwirengagije ko Itegeko N°21/2012 rimaze kuvugwa ari "general procedure law/droit commun" rikoreshwa gusa iyo itegeko ryihariye ari ntacyo ryavuze ku kibazo; ko Itegeko ry'ubukemurampaka ari "specific" ku kibazo cy'ubukemurampaka ari naryo ryagombaga gukoreshwa kuko ingingo yaryo ya 35 igaragaza igihe umwanzuro w'inyongera ushobora kwakirwa cyangwa ntiwakirwe.

2. Kuba Urukiko Rukuru rw'Ubucuruzi rutarigeze rushaka gusobanura icyo ingingo ya 24 y'amasezerano yavugaga ku bijyanye n'icyemezo cyagombaga kujya mu bukemurampaka; ko iyo ngingo idateganya ko ubukemurampaka bugomba gukorwa hashingiwe ku cyemezo cyafashwe na "adjudicator", ahubwo ko ivuga impaka zose zijyanye n'amasezerano, ndetse ko idafata "adjudication procedure" nk'itegeko kugira ngo ikirego cyakirwe n'Inteko y'Abakemurampaka, ahubwo ko iyo "procédure" iteganyijwe mu yindi nyandiko yiswe "General conditions of contract" mu ngingo ya 24.1-3 ku byemezo byafashwe na "Project manager" gusa.

[10] Urubanza rwaburanishijwe mu ruhame ku wa 14/02/2017, CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd zihagarariwe na Me Butare Emmanuel, naho Leta y'u Rwanda ihagarariwe na Me Rubango Epimaque, Intumwa ya Leta, uyu akaba yaratanze inzitizi y'iburabubasha ry'Urukiko rw'Ikirenga, ariko uru Rukiko rusanga iyo nzitizi nta shingiro ifite, urubanza ruburanishwa mu ruhame ku wa 23/05/2017, impande zombi zihagarariwe nk'uko byari bimeze mu iburanisha ryo ku wa 14/02/2017.

II.IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

1. Kumenya niba kuba Inteko y'Abakemurampaka yaranze kwakira umwanzuro w'inyongera w'abarega, binyuranyije n'amategeko

[11] Me Butare Emmanuel avuga ko, mu kutakira imyanzuro y'inyongera yiregura ku nzitizi y'iburabubasha yari yatanzwe na Leta y'u Rwanda, Urukiko Nkemurampaka rwanyuranyije n'ibiteganywa n'ingingo ya 35, igika cya kabiri, y'Itegeko N°005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi. Asobanura ko, kugira ngo imyanzuro ntiyakirwe,

ari uko iba yaratanzwe ikererewe; ko igihe baburanaga mu bukemurampaka, babwiwe ko bazasomerwa "on notice", maze kuwa 29/06/2016, batanga imyanzuro y'inyongera, bigeze ku wa 08/07/2016 babona "e- mail" ibamenyesha ko iyo myanzuro itakiriwe, ariko ko bigaragara ko, mu gutanga iyo myanzuro y'inyongera, nta bukererwe bwabayeho, bityo ko basaba Urukiko rw'Ikirenga kwemeza ko iyo myanzuro yagombaga kwakirwa. Akomeza avuga ko ikindi ari uko Urukiko Rukuru rw'Ubucuruzi, ku bijyanye no gutanga imyanzuro y'inyongera, rwashingiye ku ngingo ya 69 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ariko rwirengagiza ko iri tegeko ari "droit commun", ko ahubwo rwagombaga gushingira ku ngingo ya 35 y'Itegeko ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi.

[12] Me Rubango Epimaque, uhagarariye Leta y'u Rwanda, avuga ko, ku bijyanye no kuba umucamanza yakwanga cyangwa akemera imyanzuro y'inyongera, asanga nta kuvuguruzanya kuri hagati y'ingingo ya 69 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, n'iya 35 y'Itegeko ry'Ubukemurampaka.

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[13] Ingingo ya 35, igika cya kabiri, y'Itegeko N°0005/2008 ryo ku wa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, iteganya ko: "Uretse igihe abiyambaje ubukemurampaka babyemeranyijweho ukundi, uwiyambaje ubukemurampaka wese ashobora guhindura cyangwa kugira ibyo yongera mu mwanzuro wo gutanga ikirego cye cyangwa mu mwanzuro wo kwiregura, mu gihe cy'isuzumwa ry'ikirego, keretse Inteko y'Abakemurampaka isanze atari byiza kwemera uko guhindura hakurijwe ubukererwe bw'ibihindurwa cyangwa ibyongerwamo".

[14] Muri uru rubanza, dosiye igaragaza ko, nyuma y'uko ikibazo impande zombi zifitanye kigejejwe ku Nteko y'Abakemurampaka i Nairobi muri Kenya, mu iburanisha ryo ku wa 16/06/2016, Leta y'u Rwanda yatanze inzitizi y'iburabubasha y'Inteko y'Ubukemurampaka, hanyuma iyo Nteko ifata icyemezo cyo kwimurira iburanisha ku wa 17/06/2016 kugira ngo impande zombi zikore imyanzuro kuri iyo nzitizi, kuri iyo tariki urubanza ruraburanishwa, rurapfundikirwa, bigeze ku wa 29/06/2016 uburanira abarega yongera kohereza imyanzuro y'inyongera kuri iyo nzitizi, hanyuma ku wa 08/07/2016, Perezida w'Inteko Nkemurampaka amusubiza ko iyo myanzuro itakiriwe kuko, uretse kuba ntacyo yamarira Inteko mu ifatwa ry'icyemezo, n'ubundi yakiriwe Inteko yaramaze kwemeranya ku mwanzuro wabo ku bubasha bw'Inteko y'Abakemurampaka[1].

[15] Urukiko rurasanga, nk'uko biteganywa n'ingingo ya 35, igika cya kabiri, y'Itegeko N°005/2008 ryavuzwe haruguru, uwiyambaje ubukemurampaka wese afite uburenganzira bwo kutanga imyanzuro y'inyongera mu gihe cy'isuzuma ry'ikirego, ariko iyi ngingo inateganya ko iyo Nteko nayo ifite ububasha bwo kwanga kwakira iyo myanzuro hakurikijwe ubukererwe bw'ibihinduka cyangwa ibyongerwamo. Niba rero, nk'uko byasobanuwe haruguru, iyo Nteko yarasobanuye ko impamvu yanze kwakira iyo myanzuro y'abarega yiregura ku nzitizi yari yatanzwe na Leta y'u Rwanda/MINAGRI, ari uko ntacyo yabamarira, byongeye kandi ikaba yaratanzwe abagize Inteko bararangije kwemeranya ku mwanzuro wabo (deliberation), ibyo byerekana ko iyo Nteko nta tegeko yishe.

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[1] *Letter of July 8, 2016: "They are additional submissions made by party after the close of proceedings, and while an Award is pending, without any direction to that effect by the Tribunal. […] even though it is not material to our above decision, the said submissions were received after the deliberations by the Tribunal on the substance of the award on jurisdiction. […]".*

[16] Ku bijyanye no kuba, mu gukemura ikibazo cy'iyakirwa ry'imyanzuro y'inyongera mu rubanza rwari mu bukemurampaka, Urukiko Rukuru rw'Ubucuruzi rwarakoresheje ingingo ya 69 y'Itegeko N^{o}21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Urukiko rurasanga, hakurikijwe ihame mu mategeko (adage latin) "Specalia generalibus derogant"[2], rishatse kuvuga, mu kinyarwanda, ko itegeko ry'umwihariko risimbura itegeko rusange, Urukiko Rukuru rw'Ubucuruzi rutaragombaga gukoresha ingingo ya 69 y'Itegeko N^{o}21/2012 ryavuzwe haruguru, ahubwo ko rwagombaga gushingira ku ngingo ya 35, igika cya kabiri, y'Itegeko N^{o}005/2008 ryavuzwe haruguru ari yo yakemuraga, mu buryo bw'umwihariko, ikibazo cyerekeranye no kwakira cyangwa kutakira imyanzuro y'inyongera yatanzwe n'uwiyambaje ubukemurampaka. Urukiko rurasanga, ariko, nubwo Urukiko Rukuru rw'Ubucuruzi rwakoresheje ingingo ya 69 yavuzwe haruguru, n'ubundi isesengura ry'ingingo ya 35 nayo yavuzwe haruguru, nk'uko rigaragara mu gika kibanziriza iki, ryerekana ko Inteko y'Abakemurampaka yari ifite ububasha bwo kwanga kwakira imyanzuro y'abarega yiregura ku nzitizi yari yatanzwe na Leta y'u Rwanda/MINAGRI kuko yatanzwe abagize iyo Nteko bararangije kwemeranya ku mwanzuro wabo, bityo, kuri iyi ngingo, ibyo abajuriye baburanisha bikaba ntacyo byabamarira.

2. Kumenya niba harirengagijwe icyo amasezerano ateganya ku bijyanye n'ikurikizwa ry'inzira ya "adjudication".

[17] Me Butare Emmanuel, uhagarariye CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd avuga ko Inteko y'Abakemurampaka yirengagije icyo amasezerano ateganya. Asobanura ko mu ngingo ya 2.3 ya "General conditions of contract", humvikanywe uburyo inyandiko zitandukanye zifitanye isano n'amasezerano (*contract agreement*) zikurikirana mu kugira agaciro (*hiérarchie des normes*), ko "Particular conditions of contract" ziza mbere ya "General conditions of contract". Akomeza avuga ko ingingo ya 24.4 ya "Particular conditions of contract" iteganya ko impaka zose zizavuka zishingiye ku masezerano, haba izijyanye n'iseswa ry'amasezerano cyangwa indi mpamvu yose, hazitabazwa ubukemurampaka; ko iyo ngingo idateganya ko ubukemurampaka bugomba gukorwa hashingiwe ku cyemezo cyafashwe na "adjudicator", ko ahubwo ivuga impaka zose zijyanye n'amasezerano, ndetse ko idafata "Adjudication procedure" nk'itegeko kugira ngo ikirego cyakirwe n'Inteko Nkemurampaka, ahubwo ko iyo "procédure" iteganyijwe mu ngingo ya 24.1-3 ya "General conditions of contract" ku byemezo byafashwe na "Project Manager" gusa. Avuga ko mu kirego cyatanzwe harimo ibyemezo byafashwe na "Project Manager", ariko ko icyo kirego cyari gishingiye ku gusesa amasezerano.

[18] Me Rubango Epimaque, uhagarariye Leta y'u Rwanda/MINAGRI, avuga ko ibijyanye n'ubusumbane bw'inyandiko z'amasezerano (*hiérarchie des normes*) buvugwa n'abajuriye bifashishije ingingo ya 2 y'amasezerano ntaho bigaragara, keretse babigaragaje; ko ingingo ya 24 ya "General conditions of contract", ifite umutwe ugira uti: ''Procedure for Disputes'', isobanura uburyo impaka zavuka zijyanye n'amasezerano n'ishyirwa mu bikorwa ryayo zakemurwamo, ko iyo ngingo inateganya uburyo impaka zigezwa mu Bukemurampaka, bityo ko mu gihe abajuriye badashobora kugaragaza ko hari indi nzira y'ikemurwa ry'impaka yateganyijwe itandukanye n'iteganyijwe muri iyo ngingo, ibyo bituma imvugo y'abajuriye y'uko Urukiko rwanyuranyije n'ibiteganyijwe mu masezerano nta shingiro igira. Akomeza asobanura ko uburyo bwo gukemura impaka bwateganyijwe mu masezerano bubanzirizwa, ku rwego rwa mbere, na "Adjudication", byananirana, bikajya mu Bukemurampaka ku rwego rwa kabiri

[2] *La loi spéciale déroge à la loi générale.*

UKO URUKIKO RUBIBONA

[19] Ingingo ya 64 y'Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, iteganya ko: "Amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye. Ashobora guseswa ari uko babyumvikanyeho cyangwa ku mpamvu zemewe n'amategeko. Agomba kubahirizwa nta buryarya".

[20] Dosiye y'uru rubanza igaragaza ko ikibazo kiri hagati y'ababuranyi gishingiye ku iseswa ry'amasezerano bari bafitanye yiswe "Construction works of a 14 meters high earth-fill dam (lot 1) and 267 ha Hillside Irrigation System (lot 2) for Rwamagana-34 site in Gahengeri Sector, Rwamagana District, Eastern Province", ryatewe nuko imirimo yakererewe gukorwa. Muri ayo masezerano hashyizweho "Project manager" ushinzwe kugenzura ikorwa ry'imirimo n'iyubahirizwa ry'amasezerano, ku wa 15/06/2015 akaba yaragejejweho icyifuzo na CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd (joint venture) cy'uko bakongererwa igihe cyo gukora imirimo yavuzwe haruguru, ariko ku wa 03/07/2015, (Project Manager) afata icyemezo cyo kutabibemerera, ari nabwo, nyuma y'aho, Leta y'u Rwanda (MINAGRI) yaje gufata icyemezo cyo gusesa amasezerano (*termination of contract*).

[21] Urukiko rurasanga ingingo ya 1.1. (c) ya "General Conditions of Contract" (GCC) yarasobanuye ko "adjudicator" ari umuntu ushyirwaho n'impande zombi zigiranye amasezerano mu buryo buteganywa n'ingingo ya 23 ya GCC, kugira ngo akemure impaka ku rwego rwa mbere[3]. Na none, ingingo ya 24[4] ya GCC isobanura ko icyemezo cyafashwe na "Project manager" ariko kitari mu nshingano ze, cyangwa se cyafashwe mu buryo butari bwo, gishyikirizwa "Adjudicator" mu minsi 14 uhereye igihe icyo cyemezo cyamenyesherejwe uwo kireba, ko kandi "adjudicator" agomba kuba yatanze umwanzuro wanditse kuri icyo kibazo bitarenze iminsi 28 uhereye igihe yagishyikirijwe, naho buri ruhande rukaba rufite iminsi 28 kugira ngo rushyikirize ikibazo umukemurampaka (*arbitrator*), ko kandi ubukemurampaka bugomba gukorerwa ahantu hagenwe muri "Particular Conditions of Contract", ndetse hakanakurikizwa inzira y'ubukemurampaka yashyizweho n'Urwego narwo rwavuzwe muri "Particular Conditions of Contract".

[22] Urukiko rurasanga, muri rusange, imyandikire ya "Particular Conditions of Contract" (PCC) iri mu mbonerahamwe (*tableau*) igaragaza ko ibiyikubiyemo biza byuzuza kandi bigasobanura zimwe mu ngingo zigize "General Conditions of Contract " (GCC). By'umwihariko, ingingo ya 24.4 ya "General Conditions of Contract" (GCC) yuzuzwa n'ibisobanuro biri muri "Particular Conditions of Contract" ku rupapuro rwa 28, aho igaragaza ko impande zombi zemeranyijwe ko amategeko y'urwego rwa

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[3] *1.1(c): The Adjudicator is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance, as provided for in GCC 23.*

[4] *24.1: If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.24.2: The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of dispute. 24.3: […]. Either party may refer a decision of the Adjudicator to an Arbitration within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision shall be final and binding. 24.4: The arbitration shall be conducted in accordance with the arbitration procedures published by the institution named and in the place specified in the PCC (Particular Conditions of Contract)*

UNCITRAL (*United Nations Commision on International Trade Law*) ari yo azakurikizwa ndetse ubukemurampaka bukazabera i Nairobi/Kenya[5].

[23] Urukiko rurasanga rero ibiteganywa mu ngingo ya 24 (1,2,3,4) ya GCC bitavuguruzanya n'ibiteganywa muri "Particular Conditions of Contract" kuri GCC 24.4, ko ahubwo byuzuzanya, kuko agace ka 3 k'ingingo ya 24 ya GCC gateganya uko ikibazo gishyikirizwa Umukemurampaka (*arbitrator*) kivuye kuri "adjudicator", naho agace ka 4 k'iyo ngingo kagateganya ko ubukemurampaka bugomba gukorerwa ahantu no mu buryo bwateganyijwe n'urwego (institution), byagenwe muri "Particular Conditions of Contract" (PCC). Rurasanga rero imyumvire ya Me BUTARE Emmanuel ko "Particular conditions of contract" (kuri GCC 24.4) idateganya ko ubukemurampaka bugomba gukorwa hashingiwe ku cyemezo cyafashwe na "adjudicator", atari yo kuko, nk'uko byamaze kuvugwa haruguru, ibyasobanuwe muri icyo gice cy'amasezerano byuzuza ingingo ya 24.4 ya GCC iri mu gice cyiswe "Procedures for Disputes" giteganya uburyo ibibazo bibanza byashyikirizwa "adjudicator" mbere yo gushyikirizwa "arbitrator", cyane cyane ko nawe (Me BUTARE Emmanuel), mu iburanisha yivugiye ko mu kirego cyatanzwe harimo ibyemezo byafashwe na "Project manager", byongeye kandi hakaba nta yindi ngingo iri mu masezerano iteganya ko ibibazo bijyanye n'iseswa ry'amasezerano bishyikirizwa Ubukemurampaka bitabanje kugezwa kwa "adjudicator".

[24] Urukiko rurasanga niba "Project manager" yarafashe icyemezo cyo kutemera iyongerwa ry'igihe imirimo iri mu masezerano yagombaga gukorwamo, iki cyemezo kikaba kitarashyikirijwe "adjudicator" ku rwego rwa mbere, mbere y'uko kigezwa ku mukemurampaka *(arbitrator*) nk'uko biteganywa n'ingingo ya 1.1. (c) n'iya 24(1.2.3.4) za GCC zavuzwe haruguru, ibyo byerekena ko Inteko Nkemurampaka itagombaga kwakira ikirego kuko cyatanzwe mu buryo bunyuranyije n'ibiteganywa n'amasezerano.

[25] Urukiko rurasanga, hakurikijwe ibimaze gusobanurwa haruguru, hanashingiwe ku ngingo ya 64 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 ryavuzwe haruguru, hatarirengagijwe icyo amasezerano ateganya ku bijyanye n'ikurikizwa ry'inzira ya "adjudication".

3. Kumenya niba Leta y'uRwanda/MINAGRI yagenerwa amafaranga y'ikurikiranarubanza

[26] Me Rubango Epimaque avuga ko kuba abajuriye barakomeje urubanza kandi bitari ngombwa, Leta y'u Rwanda/MINAGRI ikwiye guhabwa 1.000.000Frw yakoresheje ikurikirana urubanza.

[27] Me Butare Emmanuel avuga ko ayo mafaranga y'ikurikiranarubanza nta gaciro yahabwa kuko MINAGRI ari yo yasheshe amasezerano, bityo guca ayo mafaranga abo ahagarariye bikaba ari ukubasonga.

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[28] Urukiko rurasanga kuba amasosiyete CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd yarajuriye, ubujurire bwayo bukaba budafite ishingiro, byumvikana ko hari icyo byangirije Leta y'u Rwanda/MINAGRI yatakaje umwanya ikurikirana

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[5] *Institution whose arbitration procedures shall be used: "Unites Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules: Any dispute, controversy, or claim arising out of or relating to this Contract, or breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force." The place of arbitration shall be: Nairobi, Kenya.*

urubanza, bityo ayo masosiyete akaba agomba kwishyura Leta y'u Rwanda/MINAGRI amafaranga y'ikurikiranarubanza angana na 300.000Frw, izi ndishyi zikaba zigenwe mu bushishozi bwarwo kuko izifujwe ari ikirenga ndetse zikaba zitaratangiwe ibimenyetso.

III. ICYEMEZO CY'URUKIKO

[29] Rwemeje ko ubujurire bwa CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd (*Joint venture*) nta shingiro bufite;

[30] Rwemeje ko urubanza RCOMA00476/2016/CHC/HCC rwaciwe kuwa 28/10/2016 n'Urukiko Rukuru rw'Ubucuruzi rudahindutse, uretse ku mafaranga y'ikurikiranarubanza agenewe Leta y'u Rwanda/MINAGRI kuri uru rwego;

[31] Rutegetse CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd guha Leta y'uRwanda/MINAGRI 300.000Frw y'ikurikiranarubanza;

[32] Rutegetse ko ingwate y'amagarama yatanzwe na CHEON KWANG DEVELOPMENT COMPANY Ltd na EXERT ENGINEERING GROUP Ltd ihwanye n'ibyakozwe mu rubanza