

**INTERNATIONAL COURT OF THE CHAMBER OF COMMERCE  
INTERNATIONAL**

**CCI CASE 27720/SP/ETT(EA)**

**In an emergency arbitration between:**

AVZ INTERNATIONAL PTY LTD (Australia)

GREEN LITHIUM HOLDINGS PTE LTD (Singapore)

DATHCOM MINING SA (Democratic Republic of Congo)

Below respectively "AVZI", "GLH" and "Dathcom" or together the  
"Plaintiffs"

vs.

CONGOLESE MINING COMPANY (Democratic Republic of  
Congo)

Below "Cominière" or the "Defendant"

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PREScription

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## **I. APPLICABLE RULES**

1. The emergency arbitrator was appointed on the basis of Article 2 (1) of Appendix V of the ICC Arbitration Rules in force as of January 1 , 2021 (the “Regulations”). Appendix V constitutes the rules relating to the emergency arbitrator (“Appendix V”). The emergency arbitrator issues this order on the basis of Article 29 (2) of the Regulations and Articles 6 (1) and 6 (8) of Appendix V.

## **II. THE PARTS**

### **A. The Claimants**

2. The Claimants in this procedure are:

#### **AVZ INTERNATIONAL PTY LTD (“AVZI”)**

Level 2, 1 Walker Avenue, West Perth  
Western Australia 6005, Australia

AVZI is a company incorporated under Australian law.

#### **GREEN LITHIUM HOLDINGS PTE. LTD (“GLH”)**

100 Tras Street  
#16-01 100 AM  
Singapore (079027)

GLH is a company incorporated under Singaporean law.

#### **DATHCOM MINING SA (“ DATHCOM ”)**

1st Level , La Piazza Complex, Hyper Psaro, Carrefour  
Crossing of Saio and Lumumba avenues  
Lubumbashi, Haut-Katanga Province  
Democratic Republic of Congo

DATHCOM is a company under Congolese law.

3. The Claimants are represented in these proceedings by:

T. Alexander Brabant

Maxime Desplats

Suriya Idris

Marie Morier

DLA PIPER FRANCE LLP

27, rue Laffitte

75009 Paris

France

Tel: + 33 1 40 15 24 00

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[Marie.Morier@dlapiper.com](mailto:Marie.Morier@dlapiper.com)

## **B. The Defendant**

4. The Defendant in this proceeding is:

**THE CONGOLESE MINING COMPANY (“ COMINIÈRE ”)**

60, avenue Uvira

AIMEE TOWER building (1st floor, apartments 1B)

Kinshasa Gombe

Democratic Republic of Congo

5. The Defendant is represented in these proceedings by:

Peter N. Mantas

Gabrielle Cyr

FASKEN MARTINEAU LLP

100 Liverpool Street

London EC2M 2AU

United Kingdom

Tel: +44 20 7917 8500

E-mail : [pmantas@fasken.com](mailto:pmantas@fasken.com)

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Capucine Du Pac de Marsoulies  
DE GAULLE FLEURANCE & ASSOCIATES

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Jacques Mukomba Sefu

MUKONGA AND ASSOCIATES

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Makomeno GCM

Lubumbashi

Democratic Republic of Congo

Tel: +243 990 901 552

E-mail : [mukongaa@gmail.com](mailto:mukongaa@gmail.com)

6. The Claimants and the Defendant are hereinafter collectively referred to as  
" the parts ".

### **III. THE EMERGENCY REFEREE**

7. The emergency arbitrator in this proceeding is:

Catherine Schroeder  
SCHROEDER ARBITRATION

167, avenue Victor Hugo  
75116 Paris

France

Tel: + 33 1 42 56 57 99

Email: [schroeder@schroeder-arbitration.com](mailto:schroeder@schroeder-arbitration.com)

#### IV. THE SECRETARIAT OF THE COURT

8. The advisers in charge of this case at the Secretariat of the International Court of arbitration of the Paris Chamber of Commerce (the "Secretariat") are:

Eléonore Toupart - advisor

Nadine Kozma - deputy advisor

Secretariat of the International Court of Arbitration of the Paris Chamber of Commerce

33-43 avenue du Président Wilson

75116 Paris

France

Tel: + 33 1 49 53 29 51; + 33 1 49 53 30 37

E-mail : [ica2@iccwbo.org](mailto:ica2@iccwbo.org)

#### V. THE ARBITRATION CLAUSE

9. The Request for Emergency Measures (the "Request") was filed on the basis of the Joint Venture Contract modified by amendment no. 1 concluded on March 25, 2017 (the "Amended JV Agreement")<sup>1</sup>. The arbitration clause contained in article 11 of the Amended JV Agreement reads as follows:

##### *11.1 Arbitration*

*(a) In the event of any claim, dispute or dispute under or relating to this Contract, or relating to the negotiation, existence, legal validity, the enforceability or termination of this Contract (a "Dispute"), the managers, directors or other officers of the Parties authorized to settle the Dispute, will do everything reasonably possible to achieve settlement of the this Dispute. To this end, within fifteen (15) days following the written request of one of the Parties to the other Parties, the managers, administrators or others leaders will meet and negotiate together, in good faith, a settlement of the Fair, equitable and satisfactory dispute for the Parties.*

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<sup>1</sup> Exhibit DM6-6, Exhibit MKG 1.

- (b) *If the Parties fail to resolve the Dispute within thirty (30) days following the written request referred to above, they hereby agree Contract, to refer the Dispute to the Court of International Arbitration of the International Chamber of Commerce, with a view to its settlement by way of arbitration, in accordance with the Rules of the Chamber of Commerce international.*
- (c) *The Dispute will be settled by an Arbitral Tribunal composed of three (3) arbitrators who will be appointed in accordance with the Regulations of the Chamber of Commerce International.*
- (d) *The seat of the Arbitral Tribunal will be Paris, France.*
- (e) *As part of the settlement of the Dispute submitted by the Parties, the arbitral tribunal will apply the applicable law designated by this Agreement and, in the absence provision of this Contract on the applicable law, the general rules of the international law.*
- (f) *The language of arbitration is French. The arbitral award is drawn up in French. The documents and briefs exchanged by the Parties will be drawn up in French. The documents are communicated in their original language and accompanied by a French translation.*
- (g) *To follow the example of the State of the DRC with regard to Article 320 of the Code Mining, COMINIÈRE SA waives, expressly and irrevocably, in the event of arbitral proceedings and proceedings before a court of competent jurisdiction (including a procedure concerning procedural matters or enforcement), to the law to claim protection through immunity, as in particular, immunity from jurisdiction, immunity from forced execution and immunity diplomatic/sovereign.*

## **VI. THE LANGUAGE OF THE PROCEDURE**

10. Section 11.1 (f) of the Amended JV Agreement reads as follows:

*(f) The language of arbitration is French. The arbitral award is drawn up in French. The documents and briefs exchanged by the Parties are drawn up in French. The documents are communicated in their original language and accompanied by a French translation.*

## **VII. THE VENUE OF THE ARBITRATION**

11. Section 11.1(d) of the Amended JV Agreement reads as follows:

*(d) The seat of the Arbitral Tribunal will be Paris, France.*

Accordingly, the venue for the emergency arbitration will also be Paris, France.

## **VIII. APPLICABLE LAW**

12. Article 11.2 of the amended JV Agreement reads as follows:

*11.2 Applicable law*

*(a) This Agreement will be governed by the laws of the Democratic Republic of Congo.*

*(b) In the event of any discrepancy between the provisions of this Agreement and the provisions mandatory legal requirements of the DRC, the latter will prevail.*

## **IX. THE PROCEDURE**

13. On April 19, 2023, the Secretariat acknowledged receipt of the Request dated April 18 2023.



14. On April 20, 2023, the Secretariat acknowledged receipt of payment of US\$40,000 from the Claimants and therefore notified the Request to the Defendant. THE Secretariat also informed the Parties of the appointment of Catherine Schroeder as an emergency arbitrator in accordance with Article 2 (1) of Appendix V and indicated that the deadline for the emergency arbitrator to issue his order was no later than May 5 2023.
15. On the same day, the Application was transmitted to the emergency arbitrator.
16. On April 26, 2023, the Respondent submitted its Response accompanied by its documents.
17. On April 28, 2023, the Claimants submitted their Reply accompanied by documents.
18. The 1 May 2023, the Respondent submitted its Rejoinder.
19. On May 2, 2023, a hearing was held at the Claimants' premises.
20. On May 5, 2023, the Emergency Arbitrator issued his order by email, in accordance with in Article 6(5) of Appendix V. Under this Order, the Emergency Arbitrator has decided as follows:
  1. *The emergency arbitrator is competent to order emergency measures;*
  2. *The Application is admissible in accordance with Article 29 (1) of the Rules;*
  3. *Cominière is ordered not to take any action or take any action that would result the implementation of the termination of the modified JV Contract and/or the consequences of this termination, until the delivery of the final award on the merits;*
  4. *Cominière is ordered to comply with article 11.1 of the amended JV Contract and not to not take legal action before state courts for any dispute relating to the JV Contract modified and/or the termination that it claims to have carried out, until the delivery of the final award on the merits;*
  5. *Any violation of the injunctions pronounced in points 3 and 4 will, where applicable, be accompanied a penalty of 50,000 Euros per day of violation;*

*6. The dispute over the liquidation of the penalty will be reserved, if necessary, to the court arbitration seized of the question of the validity of the termination of the modified JV Contract;*

*7. The costs relating to the procedure before the emergency arbitrator will be borne by Cominière who must therefore pay USD 40,000 to AVZI.*

*8. The hearing costs will be borne 100% by Cominière who must therefore pay AVZI the sum of 2060.40 EUR.*

*9. Cominière will bear all of its defense costs as well as 90% of those of the Requestreses. Cominière must therefore pay AVZI the sum of 188,371.35 AUD.*

*10. All other requests of the Parties are rejected.*

21. On October 30, 2023, the Claimants submitted a Request for the purposes of modification of the Emergency Measures Order (the "Request No.2").

22. The same day, the emergency arbitrator acknowledged receipt of Request no.2 and invited the Defendant to submit comments on this motion by November 2, 2023 at 12. The emergency arbitrator also invited the Parties to indicate whether they considered a second exchange of writings necessary.

23. On October 31, 2023, Me du Pac de Marsoulies indicated that the Fasken firms Martineau and De Gaulle Fleurance having been mandated by the Defendant on July 4 2023, it therefore requested the communication of all the elements of the procedure to date, including those relating to the hearing held on May 2, 2023. She added request, once these elements have been communicated, a reasonable period of time to respond, which she estimated to be *at least* November 7, 2023. She also indicated wish to hold a hearing and proposed November 10, 2023 in the premises of the De Gaulle Fleurance office.

24. The same day, the Claimants recalled that the Defendant was represented -and continued to be - by Me. Jacques Mukonga Sefu. They added that it was sufficient therefore contact him to have access to the entire file while specifying that they had communicated with Request no.2 - all the documents produced

in the context of emergency arbitration, namely the Request for Arbitration of Applicants of April 11, 2023, the Request for emergency measures of Plaintiffs of April 18, 2023, the Response of the Defendant, the Reply of the Claimants, the Respondent's Rejoinder and the Order of May 5, 2023. They added that in any case the Fasken Martineau and De Gaulle Fleurance firms were familiar with the dispute between the Parties since they represent the Respondent in CCI case no. 27769 and involved the general director of Cominière in as a witness in CCI case no. 26986, cases relating to difficulties damning the Manono Project. The Claimants also requested that the time limit for the submission of the Response set for November 2 at 12 p.m. be maintained taking into account the current situation and the decision of the emergency arbitrator to intervene at the earliest quickly. Finally, the Claimants indicated that given the urgency and seriousness of the situation they preferred not to have a second exchange of writings subject to be able to submit at the hearing the precise text of the different asset models relating to injunctions requested. They added that the date of the hearing was too far away and proposed to hold it on November 7, 2023 at the office of the Defendant if possible at this date, within theirs otherwise. The Claimants also have proposed to use the stenotype services of Ms. Christine Rouxel-Merchet for the audience.

25. The same day, the Respondent recalled that she had received the day before a request for 51 pages accompanied by 88 factual documents and 31 legal documents and that in addition to the volume of this submission, an order had already been issued and documents and documents exchanged on this occasion. She added that she therefore had to answer the first order of the emergency arbitrator as well as Motion no.2, that the requests were very important and numerous and that the amount of these was very high. She has, on this basis, reiterated its request to have a reasonable period of time to submit its Response considering that the deadlines proposed by it made it possible to respect the deadlines provided for by the ICC Emergency Arbitration Rules. Finally, she indicated that according to an email of the same day from the ICC, the arbitral tribunal was to be constituted on 6 November 2023.

26. The same day, the Claimants clarified that the arbitral tribunal was not constituted on the day on which the co-arbitrators, in consultation with the Parties, agree on the

name of the person they intend to see preside over the court to the extent that he further agrees that the nominated candidate be officially contacted by the Secretariat, that he then sends a declaration of independence, impartiality and availability, that this does not give rise to any negative reaction from the Parties and that the ICC confirms this designation, which takes approximately fifteen days, thus leading to November 21, 2023. The Claimants added that in the face of the emergency they could wait until this date to submit a request for precautionary measures and then wait several weeks for it to be decided.

27. On November 1, 2023, the Emergency Arbitrator acknowledged receipt of the respective emails of the Parties, noting their contents. The emergency arbitrator indicated that he noted that the Claimants had transmitted to the Defendant all of the documents submitted by them in the procedure, the exchanges of writings as well as the Order of May 5, 2023 ("the Ordinance") and noted that it seemed, therefore, that only the documents of the Respondent and the transcript of the hearing of May 2, 2023. She, therefore, invited the Respondent to confirm that Mr. Jacques Mukonga still represented her as part of this procedure, and that the latter had correctly communicated the said documents. The emergency arbitrator also recalled that in accordance with article 6.8 of Appendix V "*upon reasoned request from a party formed before the submission of the file to the arbitral tribunal in accordance with Article 16 of the Rules, the emergency arbitrator may modify or retract the Order or lift the measures ordered*", specifying that the Regulation thus did not set any deadline for this additional procedure. The referee emergency has finally decided, in view of the discussions of the Parties and taking into account the Request no.2, to extend the deadline set by the Respondent to submit its Response to 6 November 2023 at 12 p.m. and, having noted the agreement of the Parties on the fact that a second exchange of writings was not necessary, suggested on November 8 afternoon for the holding a hearing.

28. The same day, the Claimants confirmed their availability to hold a hearing on November 8 afternoon in the premises of the defendant's counsel or in theirs. They also indicated that the transcript of the May 2 hearing the latter was in the possession of the Defendant, through Mr. Mukonga, but that the new advice was also due to the communication of the said transcript as an exhibit in support of conclusions of May 5, 2023 in a proceeding

non-confidential ICC arbitration where Jin Cheng Mining was represented, among others, by Mr. Peter Mantas and Me Capucine du Pac de Marsoulies.

29. The same day, the Respondent proposed, after consultation between counsel, that the hearing will be held on November 9 in the afternoon. The Defendant clarified that Mr. Mukonga had to apply for a visa urgently but if he did not obtain it he would like to be able to attend the hearing remotely. The Defendant has also thanked the Claimants for their proposal to retain Ms. Christine Rouxel-Merchet for the stenotype of the hearing. Finally, the Defendant clarified that concerning the transcripts it must in any case have all the documents of the procedure and that it was not a question of knowing whether a document had been or not produced within the framework of another procedure to claim to prove his knowledge and that it was an obligation of the Claimants as part of compliance with the principle of contradiction. She added that the said document was communicated in the framework of another arbitration in which the Respondent does not participate since it is of proceedings brought by Jin Cheng Mining against AVZ.
30. The same day, the emergency arbitrator invited the Claimants to submit their availability to hold a hearing on November 9, 2023, as suggested by the Defendant, specifying that she would like to hold the hearing in the morning if this date suited everyone. She added that she noted that Mr. Mukonga always acted for the account of the Respondent in this procedure and confirmed that it did not object to their participation by videoconference if obtaining a visa proves complicated. Finally, she concluded that the documents communicated in this procedure on behalf of the Defendant was in possession of all of the latter's advice.
31. On 2 November 2023, the Secretariat informed the Parties that the President of the Court International Arbitration Court of the ICC had set an additional provision for arbitration costs of US\$ 25,000 and invited the Claimants to pay this amount for November 7, 2023 specifying that the Request could, in application of Article 7(2) of Appendix V) be considered withdrawn if the Claimants do not did not pay the advance payment within the set deadline.
32. The same day, the Claimants confirmed their availability to hold a hearing on the morning of November 9 and specified that they were awaiting confirmation of the

Defendant to contact the court reporter. They also asked the Respondent to please clarify whether the hearing could be held on its premises this that day. Finally, the Claimants indicated the participants in the hearing.

33. The same day, the Respondent indicated that it had noted that the hearing would be held on 9 November 2023 in the morning but clarified that it could not be held in its premises, the room being unavailable that day. The Defendant has, moreover, reiterated its agreement concerning the stenotypist and communicated the list of participants for its part.
34. The same day, the emergency arbitrator confirmed that the hearing would take place on November 9, 2023 from 9 a.m. to 12:30 p.m. in the Claimants' premises.
35. On November 6, 2023, the Defendant requested an extension until 6 p.m. of the same day to Submit your Response. She also indicated that only Me Capucine du Pac de Marsoulies and Me Gabrielle Cyr would attend the hearing in person to the extent where Mr. Peter Mantas had been admitted to the hospital and that for the moment the request for Mukonga's visa had been refused. It was therefore specified that the latter would assist in principle at the hearing by videoconference.
36. On the same day, the emergency arbitrator granted the Respondent an extension until 4 p.m. for submission of its Response. She also took note of the participants in the hearing on November 9, 2023 and wished Mr. Mantas a speedy recovery.
37. On the same day, the Respondent submitted its response to the Motion for the purposes of modification of the Emergency Measures Order (the "Response #2") accompanied by its parts.
38. On November 8, 2023, the Respondent communicated Exhibits R-34 and R-39 which were missing from its shipment of November 6, 2023.
39. The same day, the sole arbitrator acknowledged receipt of exhibits R-34 and R-39 of the Defendant and proposed an agenda for the hearing scheduled for November 9, 2023.
40. The same day, the Claimants raised a difficulty which could have a impact on the organization of the hearing scheduled for November 9, 2023. It has in fact indicated that the request for withdrawal as well as the request for lifting of the measures

emergency requests made by the Respondent constituted requests counterclaims and that only the Claimants having paid funds, it was not up to the emergency arbitrator to deal with them, as they were inadmissible as they stood.

41. On the same day, the Respondent indicated that under Article 6(8) of Appendix V of the Rules, the emergency arbitrator could “ *modify or retract the Order or lift the ordered measures* ”, adding that the retraction did not constitute a counterclaim but the simple exercise by the emergency Arbitrator of his attributions.
42. The same day, the emergency arbitrator acknowledged receipt of the Parties' emails and indicated that it would hear the Parties on this subject during the hearing.
43. On November 9, 2023, from 9 a.m. to 1:37 p.m., a hearing was held in the premises of the Plaintiffs in Paris.
44. The same day, the court reporter sent the first version of the hearing transcript from November 9, 2023.
45. The same day, the Claimants asked the Secretariat to confirm whether a request for additional provision was going to be called from the Defendant and if in the absence of payment, the Defendant's counterclaims would be considered withdrawn.
46. On the same day, the Claimants informed the emergency arbitrator that they had just receive additional elements demonstrating that Cominière, in collaboration with the Chinese group Zijin, had started earthworks that day on the scope of research permits 13359/15775 and thus requested to be able to submit these new elements unless Cominière acknowledges by return of mail to have actually started work on this area.
47. The same day, the Claimants sent their request for an amended mechanism as as discussed during the hearing.
48. On November 10, 2023, the emergency arbitrator acknowledged receipt of the email from Plaintiffs relating to the new elements which they would have discovered concerning

Cominière's actions and invited the Defendant to provide its comments as soon as possible.

49. The same day, the Defendant indicated that she was consulting her client and that she would return to the emergency referee as quickly as possible with his comments.

50. The same day, the Claimants indicated to the emergency arbitrator that the Parties thought they would be able to send the final transcript to the emergency arbitrator for the November 14, 2023.

51. On November 11, 2023, the Defendant requested to be able to respond to the elements new ones raised by the Claimants at the hearing. She also indicated that she would transmit the decision of the Kalemie High Court which would have rejected the second third party opposition upon receipt.

52. The same day, the Respondent provided its comments regarding the start of the work which would have started on the perimeter of research permits 13359/15775. The Defendant recalled in this respect that it exercised *"the rights which were conferred by the orders of the Minister of Mines of January 28 having withdrawn PE 13359 from Dathcom and by the judgment of the TGI of Kalemie of May 3, 2023, which makes Cominière the holder legal of PR 13359, the new JV also exercising its rights under PR 15775 issued regularly on October 20. The Defendant also indicated that*  
*"(i) the said judgment is enforceable and the two third party appeals filed by Dathcom have been rejected and (ii) none of the aforementioned mining titles have to date been challenged. »*

53. On November 12, 2023, the emergency arbitrator acknowledged receipt of the email from the Defendant of November 11, 2023 and authorized him to provide his comments on the changes made to the Claimants' system for November 13, 2023 at 5 p.m.

54. On the same day, the emergency arbitrator acknowledged receipt of the comments of the Defendant relating to the alleged start of work on the perimeter of the permits and invited the Claimants to provide their comments by November 13, 2023



at 12 p.m., including on the requests made by the Defendant concerning the requests for interim measures relating to other ongoing arbitral proceedings.

55. On November 13, 2023, the Respondent provided its comments to the Secretariat as to the Claimants' request relating to the request for retraction of the Order and a possible provision.

56. The same day, the Respondent informed the emergency arbitrator that after consultation with the opposing party would be able to transmit its submission on the costs at the end afternoon that day, given the time difference with the Ottawa office in charge to issue the invoice.

57. The same day, the Claimants sent their comments to the email of the Defendant relating to alleged work on the permit search perimeter PR13359 and 15775 as well as the measures requested by other arbitral tribunals.

58. On the same day, the emergency arbitrator acknowledged receipt of the comments of the Applicants and invited them to submit the interim measures requested in the other arbitral procedures.

59. On the same day, the Claimants provided requests for interim measures in the arbitration proceedings carried out against the DRC, on the one hand, and against Dathomir, on the other go.

60. The same day, the Respondent submitted its comments on the amended provisions of the Plaintiffs.

61. On the same day, the Parties submitted their respective expense statements.

62. The same day, the Respondent sent the final transcript of the hearing of November 9 2023.

63. On November 14, 2023, the Respondent sent comments to the emergency arbitrator relating to the Claimants' allegations regarding the alleged work on the perimeter search for permits PR13359 and 15775 as well as requests for measures emergency cases filed by the Claimants in ICSID arbitrations No. ARB/23/20 and

CCI No. 27401/SP (Section II) and appeals against the Kalemie judgment of May 3 2023.

## X. THE FACTS

64. Cominière holds a research permit PR 13359 authorizing him to conduct research work on deposits of coltan, tin, lithium and wolframite, located in Manono in the Democratic Republic of Congo ("DRC"), as well as certain other additional permits (12436, 12449, 12450 and 12454) relating to the same substances but in the province of Tanganyika and Haut-Lomami, it concluded a contract of research joint venture with the company Dathomir Mining Resources Sarl ("Dathomir") on October 17, 2016, amended on December 16, 2016, providing for the terms of their cooperation regarding the search for the perimeters of said permits. Likewise, they decided to create the Dathcom joint venture, in which Cominière held 30% and Dathomir 70%. By contract dated January 13, 2017, Cominière committed to transferring the research permits to Dathcom. Then, on the basis of a *Term Sheet* concluded between Cominière, AVZ and Dathomir, AVZ acquired on November 28, 2016 60% of the capital of Dathcom with Dathomir. <sup>2</sup>

65. A Joint Venture contract was then concluded between, on the one hand, Cominière, and, on the other part, AVZ, Dathcom and Dathomir on January 27, 2017 (the "JV Agreement"). Article 2 of the JV Contract indicates:

*"The purpose of this Agreement is to provide for the terms and conditions under which the Parties agree to conduct the Project through Dathcom Mining SAS, and in particular :*

*2.1 to register the Acquisition under which AVZ acquired 60% of the share capital of DATHCOM Mining SAS;*

*2.2 to provide for the conditions of, or register, as the case may be, the transfer by Cominière SA of the Research Permit and all Additional Research Permits, to DATHCOM Mining SAS;*

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<sup>2</sup> Exhibit DM-5, preamble 5), 6), 7).

*2.3 to organize payment of the Pass de Porte to COMINIÈRE SA;*

*2.4 to determine the rights and obligations of the Parties between themselves, within and with respect to of DATHCOM Mining SAS, and in particular, to provide for the rules concerning (i) the management, (ii) governance and (iii) financing of DATHCOM Mining's activity SAS;*

*2.5 to determine the conditions and terms to which DATHCOM Mining SAS must conduct, directly or indirectly through its subsidiaries, Prospecting, Development and Operations relating to the Assets and carrying out the Activities Mining. »* <sup>3</sup>

66. The JV Agreement was subsequently amended by amendment dated March 25, 2017 (the "Modified JV Agreement")<sup>4</sup> concluded between Cominière, AVZ, Dathcom, Dathomir and AVZI. At the of this amended JV Agreement, AVZI has replaced the rights and obligations of AVZ in the JV Agreement. Under the terms of the Coordinated Statutes of August 16, 2019 (the "Statutes")<sup>5</sup>, AVZI held 60%, Dathomir 15% and Cominière 25% of the capital.

67. On September 30, 2021, Cominière sold 15% of its 25% to the company Jin Cheng Mining Company Limited ("Jin Cheng") (the "Assignment Agreement"). This transfer is contested by AVZI and was the subject of the introduction of arbitration CCI 27720 by the Claimants against the Defendant dated April 11, 2023. <sup>6</sup> Moreover, two ICC arbitrations between Dathomir and AVZI are also underway concerning the 15% of Dathomir which would have been transferred to AVZI<sup>7</sup>, which Cominière disputes. <sup>8</sup>

## **XI. EMERGENCY MEASURES REQUESTED**

68. In paragraph 152 of Application no.2, the Claimants made the requests following:

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<sup>3</sup> Exhibit DM-5, Article 2.

<sup>4</sup> Exhibit DM-6.

<sup>5</sup> Exhibit DM-31, Exhibit MKG 3, article 6.1.

<sup>6</sup> Exhibit DM-22.

<sup>7</sup> Answer no.2, paragraph 43.

<sup>8</sup> Answer no.2, paragraph 21 " Majority shareholder of Dathcom, AVZ holds 60% of the shares issued by the Company, although the latter claims to hold 75% of the shares, which is false. In reality, its attempt to appropriate all of the shares of the minority shareholder, Dathomir Mining Resources SARLU (Dathomir), will have failed. These events are, moreover, the subject of two proceedings pending before the ICC. »

The Claimants request the Emergency Arbitrator to:

150. ***CONFIRM*** the Order of May 5, 2023 in that it: \_\_\_\_\_

150.1 ***JUDGED*** the Emergency Arbitrator competent to order the measures emergency;

150.2 ***JUDGED*** the Application admissible in accordance with article 29 (1) of the Regulations;

150.3 ***ENJOYS*** Cominière not to take any action and not to take any action action that would arise from the implementation of the termination of the JV Agreement Modified that she claims to have made and/or the consequences of this attempt termination;

150.4 ***ENJOYS*** Cominière to comply with article 11.1 of the JV Contract Modified and, in any event, not to seize state courts in merits for any dispute relating to the Amended JV Agreement and/or termination that she claims to have operated on;

150.5 ***ORDERED*** that Cominière bear the costs relating to the procedure before the Emergency Arbitrator who gave rise to the Order of May 5, 2023 and to pay USD 40,000 to AVZI;

150.6 ***ORDERED*** that Cominière bear 100% of the hearing costs of the 2 May 2023 and to pay EUR 2,060.40;

150.7 ***ORDERED*** that Cominière bear all of its defense costs in the context of the emergency arbitration which gave rise to the Order of 5 May 2023;

150.8 ***ORDERED*** the rejection of the other requests of the Parties;

151. **AMEND** the Order of May 5, 2023 as follows:

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151.1 **RESERVE** the liquidation of penalties provided for by the Ordinance from May 5, 2023;

151.2 **ORDER** Cominière to bear all defense costs of the Claimants engaged in the emergency arbitration having given place in the Order of May 5, 2023 and thus reimburse the Claimants, in addition to 90%, the remaining 10%;

151.3 **BEAR** the penalties which accompany the injunctions of the paragraphs 150.3 and 150.4 to 150,000 euros per day of violation;

152. **ADD** to the Order of May 5, 2023 the following measures:

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152.1 **ORDER** the liquidation of the penalty accumulated to date for a amount of 22,300,000 euros under the Order of May 5, 2023 or any other sum which appears necessary to the Emergency Arbitrator;

152.2 **ENJOY** Cominière, by means of a press release distributed on his website (<http://cominiere.cd>) and on his X account (formerly Twitter) @cominiereSA, to officially renounce the benefit of the judgment of Kalemie High Court of May 3, 2023 (RC 3815), the communicated to clarify that: (i) the question of termination has not yet been was decided and was submitted to the arbitral tribunal in ICC arbitration no. 27720/SP, the Kalemie High Court not having jurisdiction to note the termination, and (ii) Cominière has taken the necessary steps necessary for PR13359, covering all 221 squares, to be returned to Dathcom, within four (4) working days from the notification to the Parties by the Emergency Arbitrator of his order to to intervene ; **ASSORTE** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;

152.3 **ORDER** Cominière to send the CAMI within four (4) working days from the notification to the Parties by the Emergency Arbitrator of the order to intervene a letter so that PR13359, of which Dathcom is holder, is re-registered in the name of the latter and it is specified as being "active in transformation from PR to PE" over the entire scope covered by said permit and that a copy will be kept, within the same deadlines, of this letter to Dathcom; **ASSORTE** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;

152.4 **ORDER** Cominière to send a letter to the Minister of Mines indicating that, as long as the question of termination of the JV Agreement and its consequences are not decided by the arbitral tribunal in ICC arbitration No. 27720/SP, Dathcom remains the rightful owner of PR13359 (of 221 squares) and this, within four (4) working days from the date of notification to the Parties by the Emergency Arbitrator of his order to intervene and that a copy will be kept, within the same deadlines, of this letter to Dathcom; **ASSIGN** this injunction to a penalty of 150,000 euros per day of delay after this period of four (4) working days;

152.5 **ENJOY** Cominière, in the context of his opposition to third-party opposition formed by Dathcom (RC 3882), to ask the High Court request from Kalemie to take note of the fact that, by virtue of an order of the emergency arbitrator in ICC arbitration No. 27720/SP, she recognizes that this court is not competent to rule on the validity of the termination of the Modified JV Agreement, only the arbitral tribunal in ICC arbitration no. 27720/SP being competent to do so, within four (4) days working days from the notification to the Parties by the Emergency Arbitrator of his order to be made, and that a copy will be kept, within the same deadlines, of this asks Dathcom; **ASSIGN** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;

152.6 **ORDER** Cominière to take all necessary measures to withdraw from the proceedings it initiated in the context of direct citation RP 16027/CD and within a maximum period of four (4) working days from

of the notification to the Parties by the Emergency Arbitrator of the order to intervene ; **ASSORTE** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;

152.7 **ORDER** Cominière, within the framework of the procedure initiated by Dathomir to obtain the dissolution of Dathcom, to indicate by way of conclusions to be submitted to the debates within the framework of the action registered under RAC 3268 before the Lubumbashi Commercial Court, within a maximum period of time four (4) working days from notification to the Parties by the Arbitrator emergency of the order to be intervened, that: (i) the question of termination has not yet been decided and has been submitted to the arbitral tribunal in the arbitration CCI No. 27720/SP, (ii) Cominière has taken the necessary steps to ensure that PR13359, covering all 221 squares, is returned to Dathcom and (iii) disputes between shareholders have been submitted to arbitration tribunals international instruments which will allow the resolution of the disputes mentioned in the framework of this procedure; **ASSORTE** this injunction with a penalty of 150 000 euros per day of delay after this period of four (4) working days;

152.8 **ORDER** Cominière not to take any action aimed at explore and exploit, directly or indirectly, mineral reserves in the perimeter of PR13359 and PR15775; **MATCH** this injunction with a fine of 150,000 euros per day of violation;

152.9 **SAY** that the dispute over the penalty not yet liquidated will be reserved, where applicable, to the arbitral tribunal seized of the question of the validity of the termination of the Amended JV Agreement;

152.10 **ORDER**, at Cominière's expense, the publication of the Ordinance as well as the order to be intervened by the Emergency Arbitrator in the Journal DRC official;

152.11 **ORDER** Cominière to bear the entirety of the costs of this emergency arbitration and to reimburse the Claimants for all costs

*exposed by them under this procedure, including in particular costs and attorneys' fees.*

69. The Claimants then amended their requests at the hearing and sent the amended device which reads:

*1. The Claimants request the Emergency Arbitrator to:*

*2. **CONFIRM** the Order of May 5, 2023 in that it:* \_\_\_\_\_

*2.1 **JUDGED** the Emergency Arbitrator competent to order emergency measures;*

*2.2 **JUDGED** the Application admissible in accordance with Article 29 (1) of the Rules;*

*2.3 **ENJOYS** Cominière not to perform any act or take any action that would arise from the implementation of the termination of the Modified JV Contract that it claims to have carried out and/or the consequences of this attempted termination;*

*2.4 **ENJOYS** Cominière to comply with article 11.1 of the Amended JV Contract and, in any event, not to refer any dispute to state courts on the merits in connection with the Modified JV Contract and/or the termination that it claims to have carried out;*

*2.5 **ORDERED** that Cominière bear the costs relating to the proceedings before the Emergency Arbitrator giving rise to the Order of May 5, 2023 and to pay 40,000 USD to AVZI;*

*2.6 **ORDERED** that Cominière bear 100% of the costs of the hearing on May 2, 2023 and to pay EUR 2,060.40;*

*2.7 **ORDERED** that Cominière bear all of its defense costs in the framework of the emergency arbitration which gave rise to the Order of May 5, 2023;*

*2.8 **ORDERED** the rejection of the other requests of the Parties;*



3. **AMEND** the Order of May 5, 2023 as follows:

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**3.1 RESERVE** the liquidation of the penalties provided for by the Order of May 5 2023;

**3.2 ORDER** Cominière to bear the entirety of the defense costs of the Claimants involved in the emergency arbitration which gave rise to the Order of May 5, 2023 and thus reimburse the Claimants, in addition to the 90 %, the remaining 10%;

**3.3 IMPOSE** the penalties that accompany the injunctions in paragraphs 2.3 and 2.4 150,000 euros per day of infringement;

4. **ADD** to the Order of May 5, 2023 the following measures:

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**4.1 ORDER** the liquidation of the penalty accumulated as of October 30, 2023 for a amount of 22,300,000 euros under the Order of May 5, 2023 or any other sum fixed by the Emergency Arbitrator and ORDER payment to GLH, for the account of the Claimants;

**4.2** In the alternative, if, by extraordinary means, the Emergency Arbitrator were to follow the position of the Defendant regarding the inability of the Claimants to reimburse, where applicable, the penalties liquidated by the order to be made, the The plaintiffs request the following measures:

(a) **ORDER** Cominière to record the amount of the fines paid in the fifteen (15) days from the delivery of the order to be intervened;

(c) **DESIGNATE** the French Caisse des Dépôts et Consignation as receiver of the are ;

(c) **ORDER** that escrow funds will only be released in accordance with the written instructions of the tribunal constituted in ICC arbitration No. 27720/SP or to a mutual agreement between the parties, as approved by the court;

(d) **ORDER** that in the absence of deposit of the above-mentioned sums by Cominière within fifteen (15) days of the pronouncement of the order to be intervened, the Applicants will be entitled to demand payment of the amount of the penalties liquidated;

(e) **ORDER** that the amount of the penalty not paid or not sequestered will bear interest at the legal rate in force in France with anatocism.

**4.3 ENJOY** Cominière, by means of a press release published on its website internet (<http://cominiere.cd>) and on his X account (formerly Twitter) @cominiereSA, to officially renounce the benefit of the judgment of the Court of high instance of Kalemie of May 3, 2023 (RC 3815), the press release must specify that: (i) the question of termination has not yet been decided and has been submitted to the arbitral tribunal in ICC arbitration No. 27720/SP, the High Court of Kalemie not being competent to note the termination, and (ii) Cominière has undertaken the necessary steps for Dathcom to be recognized as a licensee of PR13359 covering all 221 squares, within four (4) working days from the notification to the Parties by the Emergency Arbitrator of his order to be made; **ASSIGN** this injunction to a penalty of 150,000 euros per day of delay after this period of four (4) working days;

**4.4 ORDER** Cominière to send the CAMI within four (4) days working days from the notification to the Parties by the Emergency Arbitrator of the order to intervene a letter so that PR13359, of which Dathcom is the holder, is re-registered in the name of the latter and that it is specified as being "active in transformation of PR into PE" over the entire perimeter covered by said permit and that a copy will be kept, within the same deadlines, of this letter to Dathcom and to the Minister mines ; **ASSORTE** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;

**4.5 ORDER** Cominière to send a letter to the Minister of Mines indicating that, as long as the question of the termination of the JV Contract and its consequences is not not decided by the arbitral tribunal in ICC arbitration No. 27720/SP, the decisions administrative decisions taken on the basis and/or as a result of the judgment of the Court

*Kalemie High Court of May 3, 2023 (RC 3815) must be withdrawn so that Dathcom continues to be the holder of PR13359 on 221 squares within a period of four (4) working days from notification to the Parties by the Emergency Arbitrator of its order to be intervened and that a copy will be kept, within the same deadlines, of this letter to Dathcom and CAMI; **ASSIGN** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;*

**4.6 ENJOY** *Cominière, as part of his opposition to the third-party opposition formed by Dathcom (RC 3882), to ask the High Court to Kalemie to acknowledge that under an emergency arbitrator's order in ICC arbitration No. 27720/SP, it recognizes that this jurisdiction is not competent to rule on the validity of the termination of the Modified JV Contract, alone the arbitral tribunal in ICC Arbitration No. 27720/SP having jurisdiction to do so, and this within four (4) working days from notification to the Parties by the Emergency Arbitrator of his order to intervene, and that a copy will be kept, within same deadlines, of this request to Dathcom; **MATCH** this injunction with a penalty of 150,000 euros per day of delay after this period of four (4) working days;*

**4.7 ORDER** *Cominière to take all necessary measures to withdraw of the proceedings it introduced in the context of direct citation RP 16027/CD and this within a maximum period of four (4) working days from notification to the Parties by the Emergency Arbitrator of the order to intervene; **MATCH** this injunction of a penalty of 150,000 euros per day of delay after this period of four (4) business days;*

**4.8 ORDER** *Cominière, as part of the procedure initiated by Dathomir to obtain the dissolution of Dathcom, to indicate by way of conclusions to be paid to the debates in the context of the action filed under RAC 3268 before the Commercial Court from Lubumbashi, within a maximum of four (4) working days at Affaire CCI No. 27720/SP/ETT(EA) from the notification to the Parties by the Emergency Arbitrator of the order to be made, that: (i) the question of termination has not yet been decided and was submitted to the arbitral tribunal in ICC arbitration No. 27720/SP, (ii) Cominière has taken the necessary steps for Dathcom to be recognized as holder of PR13359, covering all 221 squares, and (iii) disputes*

*between shareholders have been submitted to international arbitration tribunals which will allow the resolution of disputes raised within the framework of this procedure;*  
**ASSIST** *this injunction with a penalty of 150,000 euros per day of past delay this period of four (4) working days;*

**4.9 ORDER** *Cominière not to take any action aimed at exploring and exploit, directly or indirectly, the mineral reserves within the perimeter of PR13359 and PR15775; ASSIGN this injunction to a penalty of 150,000 euros per day of violation;*

**4.10 SAY** *that the dispute over the penalty not yet liquidated will be reserved, in the event appropriate, to the arbitral tribunal seized of the question of the validity of the termination of the Modified JV Agreement;*

**4.11 ORDER,** *at Cominière's expense and at the initiative of the most diligent party, publication of the Order as well as the Arbitrator's future order Emergency in the Official Journal of the DRC;*

**4.12 ORDER** *Cominière to bear the entire costs of this arbitration emergency and to reimburse the Claimants for all costs incurred by them herein under this procedure, including in particular the costs and fees of lawyers.*

70. On page 70 of his Response to the Motion to Modify the Order of emergency measures (the "Response no.2), the Respondent made the requests following:

*243. In light of the foregoing developments and the new facts that have occurred, the Defendant respectfully requests the Emergency Arbitrator to:*

*has. Retract the Emergency Ordinance of May 5, 2023 in all its provisions; And*

*b. Consequently, reject all requests, purposes and claims formulated by the Claimants as part of the emergency procedure, resulting from the first query and the second query.*

*244. In the alternative:*

*vs. Lift the emergency measures resulting from the first request; And*

*d. Reject all requests, purposes and claims made by the Applicants in the second application.*

*245. In the alternative, and extraordinarily, if the Emergency Arbitrator considered maintain provisional measures against the Defendant resulting from the consequences of the dissolution of the JV:*

*has. Do not combine these restrictive measures;*

*b. Failing this, use your discretionary power to revise the amount of the penalty which is currently disproportionate;*

*246. In any event,*

*has. Order the Claimants to bear all costs and fees relating to the emergency procedure, resulting from the first request and the second request<sup>9</sup>.*

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<sup>9</sup> Email from the Claimants dated November 9, 2023.

## XII. DISCUSSION

### A. Jurisdiction and admissibility

71. In the initial emergency arbitration between the Parties, the emergency arbitrator pronounced on the admissibility of the Application in accordance with Article 29(1) of the Rules as well as on its competence to order emergency measures.

72. As for jurisdiction, the emergency arbitrator had thus indicated that it was not contested that the arbitration agreement had indeed been signed after January 1, 2012, that the Parties had not agreed to exclude the application of the provisions relating to the emergency arbitrator, that the agreement on which the Application was based did not arise not a treaty and that the President had carefully considered the provisions relating to the applicable emergency arbitrator.<sup>10</sup> Furthermore, the emergency arbitrator had decided that there was no had not had a waiver of the arbitration clause due to the introduction by Dathcom of a request for cancellation of general meeting minutes before the Lubumbashi Commercial Court.<sup>11</sup> Furthermore, the emergency arbitrator had decided that it had *prima facie* jurisdiction over all the Parties to the dispute.<sup>12</sup> These issues not contested in the second phase of the emergency arbitration relating to the request for modification of the Order<sup>13</sup>, the emergency referee won't come back to this.

73. The emergency arbitrator notes, however, that the Respondent emphasized in its Response no.2 that the emergency arbitrator would have been “*instrumentalized*” in the first phase of this procedure to the extent that the Claimants' requests in the context of emergency arbitration concerned the consequences of the termination of the JV Agreement modified while the Request for arbitration was essentially based on the nullity of the Assignment,<sup>14</sup> thus allowing the Claimants “*to obtain a decision in 15 days under a prima facie analysis*”. The emergency arbitrator notes, however, that the

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<sup>10</sup> Paragraph 89 of the Order.

<sup>11</sup> Paragraphs 90-91 of the Order.

<sup>12</sup> Paragraphs 92-97 of the Order.

<sup>13</sup> The emergency arbitrator notes in this regard that although the Respondent indicates in its Response that GLH is not a shareholder of the company and that the transfer of AVZ shares to the latter was not ratified by the company (see paragraph 24), the Defendant draws no conclusions from this.

<sup>14</sup> Paragraphs 91 and 92 of Response no.2.

Respondent does not conclude that the emergency arbitrator should have, or should, on this basis, declare himself incompetent to rule on the emergency requests.<sup>15</sup> In all state of affairs, the emergency arbitrator considers that assuming that the Claimants have become aware of the termination on April 7, 2023 and not on April 14, 2023 as they claim (and that they should therefore have made the request relating to the validity of the termination in their request for arbitration) they would not have probably not waited for the constitution of the arbitral tribunal to submit these emergency requests and would have addressed the emergency arbitrator.<sup>16</sup> Furthermore, and to all useful purposes, the emergency arbitrator notes that the Claimants have, once again, confirmed that they would submit the question of the validity of the termination of the JV Contract amended to the Arbitral Tribunal once it is constituted. <sup>17</sup>

74. In any event, the emergency arbitrator notes that the Respondent has not made any request for incompetence within its system.

75. For all these reasons, the emergency arbitrator considers that she has jurisdiction to decide on the measures requested both by the Claimants and by the Defendant.

76. As for admissibility, the emergency arbitrator notes that Request no.2 was received before that the file is transmitted to the arbitral tribunal, as required by Article 6(8) of

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<sup>15</sup> The Defendant concludes in its Response no.2 that “ *the bad faith of the Claimants is patent*”, paragraph 94, page 30. See also Transcript hearing November 9, 2023, page 65 lines 42-43, and lines 47-48 and page 66, lines 1-5: Q: “ *Do you deduce a consequence from this? Because for all that you consider me competent to retract the Order.*”

A: *That's a good question. I think one doesn't preclude the other. That is to say that it is not because you did not draw any conclusions from this fact, that is to say that you would not have jurisdiction, because indeed the Arbitral Tribunal does not is not even seized yet, that you could not then consider that, in any case, in the alternative and even if you had jurisdiction, the Order should be retracted.* »

(emphasis added) and page 67, lines 7-10 where the Defendant explains that “ *it was a procedural strategy*”.

<sup>16</sup> This is also what the Claimants recalled during the hearing of November 9, 2023 during which they indicated on page 67, lines 34-37: “ *So, in the meantime, the strategy does not change anything . If we had an emergency request, the only person we could turn to was you. The arbitral tribunal would not be constituted for months. Who would we have turned to? Finally ! What we just told you makes no sense !* »

<sup>17</sup> Request no.2, paragraph 78: “ *As already indicated in the Request and recalled in the Order, the Claimants will request the arbitral tribunal currently being constituted to rule on the validity of this alleged termination and the consequences that Cominière is trying to achieve. draw. (...)*”, See also, Transcript hearing November 9, 2023, page 66 lines 20-23 “ *Yes, but we still haven't done it, that's normal, we have an arbitral tribunal which has not been constituted. As soon as there is a mission statement which will be discussed with a constituted arbitral tribunal, you can imagine that the first thing we will do is to insert the fact that we will contest the termination.* »

Appendix V of the Regulations which provides that “ *upon a reasoned request from a party formed before the submission of the file to the arbitral tribunal in accordance with article 16 of Regulations, the emergency arbitrator may modify or retract the Order or lift the ordered measures* ” (emphasis added). This is not objected to by the Defendant. Furthermore, the emergency arbitrator notes that to justify his request for new measures, the Claimants recounted new facts which had occurred or which she has been aware since the Ordinance was rendered. As such, the Claimants notably reported various tweets from the Defendant on her relationship with AVZI, the modification of the mining map on May 11 and 12, 2023, the existence of a judgment of the Kalemie High Court dated May 3, 2023 noting the termination of the JV and the registration of the mining titles in the name of Cominière, of the summons introduced by Dathomir in dissolution of Dathcom of September 4 2023, of the creation of a new joint venture between Cominière and Zijin (announced on October 23, 2023) and the latter obtaining a new permit from the Minister of Mines dated October 20, 2023. They also indicate having notified the Defendant three formal notices following these various facts dated May 16, June 15 and September 22, 2023.<sup>18</sup> The emergency arbitrator therefore considers that these new facts, which attest to measures taken, in particular by Cominière or at his request, since its Order, provides the basis for the introduction of additional requests of the Claimants. The emergency arbitrator therefore decides that Request no.2 is admissible.

77. Concerning the Respondent's requests, the emergency arbitrator notes that the The plaintiffs raised an admissibility objection. In fact, they consider that the request for retraction of the Order as well as lifting of all measures constitute counterclaims which must, as such, be subject, while as the additional requests presented by it, to an additional provision, or failing that be declared inadmissible. They therefore questioned at the end of the hearing the Secretariat in order to find out whether a provision would be called for these counterclaims. The Claimants also asked whether, in the negative, these requests would be considered withdrawn as would have been its requests in the event of non-payment of the provision.<sup>19</sup> The Defendant objected to

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<sup>18</sup> Parts DM-64, DM-71 and DM-63.

<sup>19</sup> Email from the Claimants to the Secretariat dated November 9, 2023.



this request to the Secretariat by email dated November 13, 2023 alleging that his request for retraction did not constitute a counterclaim in the to the extent that a counterclaim would be a claim “ (i) *which does not seek only to the rejection of the claims of the other party (ii) since it is a request incidental, under the terms of which a new request is issued, which therefore does not constitute not a response to the arguments raised by the opposing party .*” She also has explained that the Claimants having requested the emergency arbitrator to confirm the Order, she requested in response that it be retracted. It is therefore not a matter of the Defendant “ *in no case of a new and distinct request from that which was formulated by the applicants* ” but a simple exercise of “ *its right to defense in the face of requests for confirmation of the first Emergency Order* ”. By letter of November 13, 2023, the Secretariat then indicated that it had noted that “ *the fees of emergency arbitrator and/or ICC administrative fees may be increased to at any time during the emergency arbitrator's procedure "taking into account, in particular, the nature of the case as well as the nature and quantity of the work provided by the arbitrator emergency, the Court, the President and the Secretariat"* and that “*The Application is considered as withdrawn if the applicant does not pay the required supplement within the time limit set by the Secretariat* ”. However, she added that a provision had been set by the President on November 2, 2023 and, at this stage, the President would not be invited to set a new provision. It is therefore up to the emergency arbitrator to rule on the admissibility of the request for withdrawal made by the Defendant. In this regard, the emergency arbitrator notes, firstly, that if article 6(8) of the Regulations indicates although “ *the emergency arbitrator may modify or retract the Order or lift the measures ordered* ”, he can only do so “ *upon the reasoned request of a party* ”, this which could mean that to give right to such a request for withdrawal, it It would be appropriate to make a specific request. Likewise, this article does not provide that one party can request the rectification of a request and the other its withdrawal. In reality, the arbitrator is left with the alternative possibility of modifying OR retracting OR lift the measures ordered upon reasoned request “ *from a party* ”. However, it goes without saying that when a party requests modification of the Order, it will not request also his retraction. Secondly, the emergency arbitrator emphasizes that the Defendant expressly stated on two occasions that it intended to submit this request for withdrawal to the Arbitral Tribunal. She has, in fact, first affirmed that it “ *intends to request the retraction of the Emergency Order before the*

Arbitral tribunal since it must be constituted today, November 6, 2023, but the will therefore first do before you " <sup>20</sup> then reiterated that " *Cominière intended to evoke these made before the Arbitral Tribunal, imminently constituted to call into question the Emergency Order - in accordance with the ICC Arbitration Rules in force at from January 1, 2021 (...). In doing so, it hoped to avoid a duplication of procedures and save state resources. However, having regard to the 2nd Request of the Claimants, it is required to respond to them .* <sup>21</sup> Therefore, it cannot justify his request for withdrawal by the sole desire to respond to the request for confirmation of the Order since it had the intention in any event to request withdrawal before the arbitral tribunal. Likewise, she could have been satisfied to request the emergency arbitrator to reject the request for confirmation of the Claimants' Order, which would not have had the same effect as a request withdrawal which retroactively invalidates the decisions taken. <sup>22</sup> In any case, in the event that it must be considered that a second request for referral to the emergency arbitrator independent of that first formulated by the other party could be admitted on the basis of Article 6(8) of Appendix V, it would be appropriate that this is introduced upon " *reasoned request*". The Claimants argued that comment that the Emergency Arbitrator could only retract his Order on the basis 23 new elements. The emergency arbitrator notes, in this regard, that in addition to the facts new<sup>24</sup> , the main reason why the Defendant requests the retraction of the Order is that it considers that it was without object upon its surrender due to the existence of the judgment of the Kamelie High Court (confirming notably the termination carried out by Cominière) dating from May 3, 2023, i.e. prior to the Ordinance. <sup>25</sup> The Defendant raises in this respect that " (...) *it is that*

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<sup>20</sup> Answer no.2, paragraph 2.

<sup>21</sup> Answer no.2, paragraph 72.

<sup>22</sup> The Respondent also admits this since she indicated "(...) *when we say retraction, it means that you have issued an order, you have obviously thought carefully and analyzed the situation. So, here, today, I ask you to retract it, and therefore, finally, to completely review your analysis which was made at the time*", (highlight added), Transcript hearing November 9, 2023, page 29, lines 6-9.

<sup>23</sup> Transcript hearing November 9, 2023, page 69, lines 17-19.

<sup>24</sup> The Defendant invokes in particular the fact that i) Dathcom like the JV would have already died having lost their purpose following the withdrawal of PR13359 by order of the Minister of Mines of January 28, 2023, ii) that AVZ was ruined, and iii ) that AVZ was in dispute with all the shareholders of the JV, Response no.2, paragraph 5. The emergency arbitrator notes, however, that she was aware of the decree of January 28, 2023 and the existence of other procedures. Furthermore, the other new facts mentioned are subsequent to the judgment of the Kalemie High Court.

<sup>25</sup> Transcript hearing November 9, 2023, page 29, lines 10-25: " *But today it is necessary, your retraction. For what ? Because at the time, you issued your Emergency Order, so in May. Two things: not only did you not have half the context of the file, and when I say that it is because in fact you*

*This judgment changes everything. It changes your whole analysis and it changes your whole reasoning (...)*.<sup>26</sup> The emergency arbitrator is, however, of the opinion that this cannot constitute “*a reasoned request*” insofar as the Defendant – who knew perfectly the existence of the procedure before this court since she had introduced it on April 8, 2023 (unilaterally), that a hearing was held before the court state on the same day as the arbitration hearing and the court's decision was rendered on May 3, 2023, i.e. on a date when the emergency arbitrator had not yet rendered his Order- deliberately failed to notify the emergency arbitrator and Plaintiffs. She cannot now legitimately ask the arbitrator urgently to retract its Order on this basis. In any event, she could have to do for many months if it considered this Ordinance to be irrelevant. For all these reasons, the emergency arbitrator declares the request for withdrawal of the Defendant inadmissible.

## **B. The position of the Parties**

78. Just as in his first Order, the emergency arbitrator will briefly recall the position of the Parties as set out in their pleadings of this second phase, before to rule on the requests brought before it.

79. It is recalled that the Claimants' substantive requests revolve around two main axes which are:

*“- the violation by Cominière of AVZI's right of pre-emption provided for in article 9.1 (b) of the Amended JV Contract; And*

*- the actions of Cominière hindering the proper development of the Project in violation of Article 5.1 (h) of the Amended JV Agreement.”*<sup>27</sup>

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*had 10% of what was going on in the file. (...) First thing. And the second thing is that you were not aware at the time when you issued your Order of the judgment of TGI of Kalemie which we spoke to you about, of May 3, 2023, and this judgment, it is essential in this file and as part of your emergency procedure. Why is it essential? Because we tell you two things: this judgment, firstly, it analyzes the termination and it notes the termination which was made by Cominière. First thing. And second thing, he reinstates Cominière as holder of PR13359. So these are two essential elements which, today, have an obviously decisive impact on the fact that you should retract your Order. »*

<sup>26</sup> Transcript hearing November 9, 2023, page 29, lines 41-43.

<sup>27</sup> Request no.2, paragraph 22.

80. The Claimants indeed consider that the Transfer Agreement was concluded without allow AVZI to exercise its right of pre-emption stipulated in the Statutes as well as in the amended JV Agreement. They add that Cominière would have sought “ *to perfect the disputed transfer by multiplying actions (in particular legal) and obtaining, among other things, the convening of an extraordinary general meeting aimed at approving Jin Cheng as a new shareholder, thereby infringing on AVZI's rights and interests of Dathcom* .<sup>28</sup> The Claimants add that Cominière multiplied the steps against AVZI thus hindering the smooth running of the Manono project and harming to the interests of Dathcom.<sup>29</sup> They allege that Cominière; i) would have opposed validation of the feasibility study by the Ministry of Mines (delaying the process aiming to obtain the transformation of the research permit into an exploitation permit), ii) would have refrained from supporting Dathcom to be notified of the operating permit yet consecrated by ministerial decree<sup>30</sup> , iii) would have requested (by letter to the Minister of Mines of December 22, 2022<sup>31</sup>) and finally obtained the withdrawal of Dathcom's mining permit (by ministerial decree of January 28, 2023<sup>32</sup>) and iv) would have paralyzed the renovation and operation of the Mpiana-Mwanga hydroelectric power station in maintaining that it had rights to this abandoned power plant and which was the subject of a memorandum of understanding between the company AVZ Power SAU, a subsidiary of AVZ, and the Minister of Resources and Electricity<sup>33</sup> . The Claimants add that this forced AVZ to request on May 11, 2022, then again on December 15, 2022, a suspension of price on the Australian Securities Exchange (“ASX”).<sup>34</sup>

81. The Claimants further explain that after a formal notice dated December 6, 2022 and despite their responses<sup>35</sup>, the Defendant took another step stage and terminated the amended JV Agreement on April 4, 2023.<sup>36</sup> They emphasize that Cominière indicated in this letter “(...) *that, in the near future, the consequences will have to be drawn both on the fate of this common society, on the*

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<sup>28</sup> Answer no.2, paragraph 6

<sup>29</sup> Request no.2, paragraph 25.

<sup>30</sup> Exhibit DM-10.

<sup>31</sup> Exhibit DM-16.

<sup>32</sup> Exhibit DM-19.

<sup>33</sup> Exhibit DM-18.

<sup>34</sup> See also paragraph 30 of the Order.

<sup>35</sup> Parts DM-25, DM-26 and DM-27.

<sup>36</sup> Request no.2, paragraphs 31-33.

*mining title transferred by COMINIÈRE SA to the latter, only on the actual investment from AVZ so far »* 37 thus showing its desire “ *to scuttle Dathcom or in any case to dispossess it of its main asset* ” 38. They further emphasize that the Defendant was therefore “ *transparent about its desire to free itself from arbitral jurisdiction which is solely competent for all questions relating to the execution or termination of the Modified JV Agreement* ” and that “ *the implementation of the following phases of this plan thus probably presupposed the referral to the administrative authorities and/or Congolese jurisdictional authorities which one could legitimately fear, upon reading of the 2022 Corruption Perception Index established by the organization Transparency International, may they be exploited* ” 39. Following the termination alleged by the Defendant, the Claimants thus contacted the arbitrator emergency.

82. The Claimants allege that the Defendant continued to act to exclude AVZ of the project, in violation of the Ordinance. They thus relate that Cominière declared on his Twitter account on May 10, 2023 “ *AVZ is in the past, Sir* ” followed by many similar statements. They also indicate having discovered on May 11 2023 that the mining impact map of the Mining Cadastre (“CAMI”) had been modified and that PR13359 appeared extinguished, then the next day, indicating Cominière as the only company holding the permit (in the process of being transformed into a permit operating). They explain that they complained about these actions by letters of September 22, 2023 and September 16, 2023<sup>40</sup> which remained unanswered. The Claimants also mention having learned by chance, on June 2, 2023, as part of a arbitration proceedings involving Jin Cheng (CCI arbitration no. 26986/SP), the existence of a judgment rendered by the Kalemie High Court on May 3, 2023 by which this noted “ *the termination of the JV contract and restored the mining titles for the benefit of Cominière* . They explain that they discovered that this procedure was initiated on 8 April 2023 by Cominière who assigned CAMI for these purposes. They add that Dathcom wrote again to Cominière on June 8, 2023, reiterating his formal notice “ *not to perform any act which could be a direct or indirect execution of said*

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<sup>37</sup> Exhibit DM-28.

<sup>38</sup> Request no.2, paragraph 34.

<sup>39</sup> Request no.2, paragraph 35.

<sup>40</sup> Parts DM-63 and DM-64.

*judgment*” but that this letter received no response. They explain having also filed a third party opposition to this judgment on two occasions, the first having been declared inadmissible.<sup>41</sup> The Claimants further allege that the Defendant clearly displayed his position in his tweet of June 15, 2023 as well as in an article press release through Mr. Kibeya on July 14, 2023. <sup>42</sup>

83. The Claimants further relate that on September 4, 2023, Cominière, on the basis of a disagreement between partners, summoned before the Commercial Court of Lubumbashi Dathcom, Cominière, Jin Cheng, AVZI and the One Stop Shop for Creation company in dissolution of Dathcom, while continuing his tweets. THE The plaintiffs then indicate that they reiterated their formal notice a third time by letter dated September 22, 2023.<sup>43</sup> The Claimants also indicate that on October 12 2023, the Minister of Mines has, obviously at the request of Cominière, extended the validity period of permit PR13359 for the benefit of Cominière. Finally, the The plaintiffs indicate that they learned in a press release dated October 23, 2023 that Cominière and Zijin, a subsidiary of Jinxiang Lithium Limited, have created a new joint venture venture, Manono Lithium SAS, intended to exploit a new permit, the PR 15775, requested on October 19, 2023 and obtained on October 20, 2023 (permit which would encroach on permit PR 13359) but also that Jinxiang would have obtained the right to renovate the Mpiana-Mwanga power station.

84. The Defendant, for its part, alleges that the financial situation of AVZI would be catastrophic (“ *on the verge of financial collapse* ”) which would also explain the new requests aimed at replenishing its cash flow. The Defendant thus recalls the suspension of AVZI from the Australian Stock Exchange, indicates that a class action funded by Omni Brideway by aggrieved shareholders is underway, as three new directors were appointed “ *to ensure the good governance of the company and restore shareholder confidence* ” and mentions the group’s significant losses for six consecutive semesters. The Defendant notes that AVZI’s cash flow is from 76.31 million AUD in December 2021 to 11.7 million AUD to date, concluding that it is clearly on the verge of bankruptcy.<sup>44</sup>

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<sup>41</sup> Request no. 2 paragraph 66.

<sup>42</sup> Parts DM-63 and DM-73.

<sup>43</sup> Request no.2, paragraphs 94-97.

<sup>44</sup> Response no.2, paragraphs 25-30.

85. The Defendant then indicates that the Manono lithium deposit is considered as one of the largest known lithium deposits in the world and that it constitutes thus significant potential for the Democratic Republic of Congo. It indicates that the exploitation of this deposit would notably make it possible to create new jobs and build new infrastructure for the communities around Manono which suffer from poverty and food insecurity. Furthermore, she points out that lithium is of paramount importance for the development of renewable energies and that it is used in the production of pharmaceutical treatments. <sup>45</sup>

86. The Defendant maintains that the Claimants launched in 2021-2022 “ *in a crusade aimed at taking control of the Joint Venture*” but that his actions have led to the collapse of the JV. It first indicates that in April 2022, AVZ has unilaterally renounced more than a third of the project (82 squares) on the northern part of the deposit, renunciation being the subject of a ministerial decree of April 7, 2022.<sup>46</sup> She further indicates that because this procedure was not permitted under the Statutes of the Company and the modified JV Contract, the Minister of Mines reported this alleged waiver by decree of January 28, 2023. The Defendant maintains, by elsewhere, that faced with the refusal of Cominière and Dathomir to sell their shares to AVZI, the Claimants have initiated a series of proceedings both before the courts Congolese before the ICC or recently the ICSID and that these procedures, involving all AVZI, paralyzed the project and made decision-making impossible. There The Defendant concludes that these permanent conflicts and the multiplication of procedures led, on January 28, 2023, the Minister of Mines revoked permit 13359 to Dathcom, with the result that the JV has lost its only asset and is devoid of purpose since that date.

87. The Defendant recalls that it then terminated the JV on April 4, 2023 and began the necessary procedures to restore mining titles, thus leading to the decision of the Kalemie High Court of May 3, 2023 which noted the termination of the JV and the reestablishment of mining titles in Cominière. She recalls the settings

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<sup>45</sup> Response no.2, paragraphs 32-37.

<sup>46</sup> Exhibit R-52.

residence of the Claimants on May 16 and June 15, 2023 and the introduction of the news requests 4 months later.

88. The Defendant adds that in the face of this climate, Dathomir, on September 4, 2023, assigned its co-shareholders in order to demand the dissolution of the company, the matter still being pending. It also indicates that, faced with the termination of the project and the multiple procedures, the Minister of Mines issued a new permit, PR15775 covering the northern part of the project, to allow work to resume in the area to which AVZ had previously given up. The Defendant indicates that October 23, 2023 Cominière and Zijin have therefore announced the creation of a new joint venture to develop the part covered by this new permit.

89. It is therefore in this context that the emergency arbitrator must rule on the measures additional information from the Claimants as well as the requests from the Defendant.

### C. Examination of the requested measures

#### *Examination of the Claimants' requests*

90. The emergency arbitrator recalls that in the first phase of this procedure she granted the measures requested by the Claimants because it had considered i) that “(...) *prima facie the arguments of the Claimants as to the validity of the unilateral termination by Cominière [had] reasonable chances of success on the merits*” <sup>47</sup>, ii) that there was a risk of irreparable harm to the extent that it could not be excluded that “ *Cominière takes measures following the amended JV Contract*” <sup>48</sup> and these could constitute serious harm if Dathcom were dissolved, because it could then only be reinstated if “actions *relating to Dathcom or the title mining* » were taken, the possibility of repair by Cominière not then being established, iii) that urgency was established not only because of the indications of Cominière in its termination letter<sup>49</sup> and the absence of affirmation by the latter that it would not take action following the termination but also for the time that

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<sup>47</sup> Order, paragraph 114.

<sup>48</sup> Order, paragraph 117.

<sup>49</sup> “ *in the near future, consequences will have to be drawn both on the fate of common society, on the mining title transferred by COMINIÈRE SA to the latter, as well as on AVZ's real investment to date* .



the constitution of the arbitral tribunal was likely to take<sup>50</sup>, iv) that the balance interests leaned more in favor of the Claimants. <sup>51</sup> On these grounds, the arbitrator emergency had thus ordered the Defendant to “ *take no action and to not take any action that would arise from the implementation of the termination of the Contract modified JV and/or the consequences of this termination* ” and “ *comply with article 11.1 of the amended JV Contract and not to take legal action before state courts on the merits for any dispute relating to the Modified JV Contract and/or the termination that it claims to have operated* ” until the rendering of the final sentence. These measures were accompanied by the payment of a penalty of 50,000 euros per day in the event of violation. THE measures granted were therefore aimed at maintaining a *status quo* between the Parties until that the Arbitral Tribunal seized of the question of the validity of the termination rules on this question.

91. The emergency arbitrator was contacted again by the Claimants, five months after having issued its Order, in order to reiterate what it had decided in the latter and to order additional measures. These new measures aim, according to Plaintiffs, to restore a *status quo* which would have been altered due to changes occurred since May 2023 and recalled above. The Claimants thus request the liquidation of the penalty by October 30, 2023, the affirmation by Cominière through the press of the waiver of the benefit of the judgment of the Court of Kalemie High Authority of May 3, 2023 with the details that the question of termination of the modified JV Contract has not been decided and that Cominière has undertaken steps for Dathcom to be recognized as the holder of permit PR 13359, the communication by Cominière of a letter to CAMI so that it can re-register the permit PR13359 to Dathcom, communication to the Ministry of Mines by Cominière of a letter informing him that as long as the question of termination of the modified JV Agreement is not decided, the administrative decisions taken must be withdrawn so that Dathcom continues to hold permit PR13359, which Cominière is requesting from

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<sup>50</sup> Order, paragraph 118.

<sup>51</sup> Order paragraph 119: “ *The Claimants have stressed that the granting of urgent measures could not cause any harm to Cominière insofar as they are only requesting a maintenance of the status quo whereas the refusal to grant such measures could cause them irreparable harm due to the risk of dissolution of Dathcom and the loss of their investment. The emergency arbitrator notes that on this specific point the Respondent did not respond, having not alleged that the granting of such measures as such would cause it harm. It therefore seems that the risk incurred by the Claimants makes the granting of the measures.* »

Kalemie High Court to recognize within the framework of the third party opposition from Dathcom that it is not competent to rule on the validity of the termination of the modified JV Contract, that Cominière withdraws from the proceedings initiated within the framework of the direct quotation, which Cominière indicates, within the framework of the procedure in dissolution of Dathcom, by way of conclusions, that the question of termination has not not been decided and was submitted to the Court in case CCI 27720, which Cominière undertakes not to take any action aimed at exploring and exploiting, directly or indirectly, the mining reserves within the perimeter of PR 13359 and PR15775.

92. It is therefore at the dawn of all the above that the emergency arbitrator must examine the requests of the Claimants.

93. To justify these requests, the Claimants used the criteria analyzed during the first phase of this arbitration to assess *the “urgency”* which cannot “*wait for the constitution of the arbitral tribunal*” namely: the reasonable chances of success on the merits, urgency, risk of irreparable harm, not prejudging the outcome of the dispute on the merits and the balance of interests. These conditions were also used by the Defendant to request the dismissal of the Claimants' requests, which indicates that these criteria can be considered cumulative or alternative depending on the jurisprudence.<sup>52</sup>

94. The emergency arbitrator further notes that the Parties have both insisted on a “change of circumstances”<sup>53</sup> or on “new facts”<sup>54</sup> to justify their requests. These facts were taken into consideration to examine the admissibility of the respective requests of the Parties.

*The Claimants' reasonable chances of success on the merits*

95. In its Response no.2, the Respondent indicated that the emergency arbitrator had, in analyzing the reasonable chances of success on the merits of the Claimants in the context

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<sup>52</sup> Answer no.2, paragraph 101.

<sup>53</sup> Request No.2, paragraph 120 and Response No.2, paragraphs 73-74.

<sup>54</sup> Answer no.2, paragraph 3, paragraph 73.

of its Order, disregarded the provisions of the JV on the arbitrability of termination of the modified JV Contract and thus prejudged the merits of the dispute.

96. Concerning the arbitrability of the dispute, the Respondent relies on article 18.3 of the Contract of modified JV which provides in its paragraph b) that “ *If at the end of the formal notice, AVZ has not remedied the execution of its Obligations, COMINIÈRE SA will have the right to enforce the provisions of ARTICLE 11 of this Agreement* ” (highlighting added) to conclude that Cominière had a possibility and not an obligation to resort to arbitration in the event of non-compliance with the formal notice sent by Cominière at AVZ. The Defendant adds that it is not up to the emergency arbitrator to rule on this question and “ *to interpret the Contract and to go into the analysis to know if the termination, it must go before the arbitrator or it must go before the Congolese courts.* » <sup>55</sup>

97. As a preliminary matter, and as it previously indicated in the context of its analysis on the admissibility of the request for withdrawal, the emergency arbitrator may in fact rule again on a party's “ *reasoned request* ”, that is to say if changes circumstances may justify revising its prior decision. This is not the case when a party, like the Respondent in this case, simply contests the reasoning of the emergency referee and tries to make him reconsider his decision. The referee emergency also emphasizes that the Respondent supports this argument relating to arbitrability for the first time in this second phase of the procedure.

98. Furthermore, the emergency arbitrator notes that the Respondent does not really contest “the arbitrability” of the dispute because it does not invoke the fact that the dispute relates to a inarbitrable matter but rather that arbitration was only an option for Cominière at the time title of the modified JV Contract and that in any event it would not belong to the arbitrator to rule on this issue. The Defendant has in fact clearly indicated: “ *You do not have to look at the consequences or the merits of termination of the JV. (...) Why don't you have to do it? Because we are told: “ There is an arbitration clause”, but in reality the arbitration clause is not at all applicable to the termination of the JV.* » <sup>56</sup> In other words, the Defendant

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<sup>55</sup> Transcript hearing of November 9, 2023, page 44, lines 1-3.

<sup>56</sup> Transcript hearing November 9, 2023, page 34, lines 8-12.

maintains, on the one hand, that the emergency arbitrator did not have to rule on his jurisdiction because arbitration was only an option but also any question relating termination having been decided by the Kalemie High Court, any dispute relating to this decision must be made before this same court.<sup>57</sup>

The emergency arbitrator, however, reminds in this respect that it is indeed up to the arbitral tribunal to rule on his competence and in the same way for the emergency arbitrator to rule on its *prima facie competence*. In the presence of a reference to the clause arbitration of the contract, the emergency arbitrator therefore had to examine whether, *prima facie*, it constituted an obligation or an option for the Parties, within the framework of its *prima facie* analysis on the Claimants' chances of success on the merits. She does not could therefore escape the analysis of clause 18.3 of the amended JV Contract, invoked by the Defendant as one of the grounds authorizing it to unilaterally terminate 58 the amended JV Agreement. Furthermore, the emergency arbitrator emphasizes that the fact that the Kalemie High Court has ruled on the termination has not impact on the obligation of the Arbitral Tribunal to rule on its jurisdiction in the case applicable. In any event, the emergency arbitrator therefore confirms his analysis on the Claimants' chances of success as established in its Order. As subsidiary and to respond to the arguments of the Respondent,<sup>59</sup> the emergency referee notes that the interpretation of the terms "*shall have the right*" appearing in Article 18.3 is not not necessarily that of the Defendant. Thus, it could be considered that this article only authorizes recourse to arbitration following formal notice unsuccessful after 90 days. In other words, the prerequisite for arbitration would only be to allow the party in violation of its obligations to remedy the situation. He However, it will be up to the arbitral tribunal, if necessary, to rule on this question by conducting a detailed analysis of contractual provisions.

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<sup>57</sup> Transcript hearing November 9, 2023, page 34, lines 4-7.

<sup>58</sup> Moreover, the Respondent herself indicates that this is "(...) a fundamental point in the case because it is this which establishes your jurisdiction and that of the Arbitral Tribunal", Transcript hearing November 9, 2023, page 45, lines 16-18. Thus, a *prima facie* interpretation of Article 18.3 of the Amended JV Agreement was indeed necessary to determine the *prima facie* jurisdiction of the emergency arbitrator.

<sup>59</sup> This in fact indicated that " on the arbitrability of termination first of all, an examination even *prima facie* of the provisions of the JV allows us, on the contrary, to conclude that Cominière has the possibility both of referring the question of termination to an arbitral tribunal or of only terminating the JV without recourse to arbitration. », Answer no. 2, paragraph 154.

*The prejudgment of the dispute on the merits*

99. The Respondent raised this criterion in its Response no.2 even though it had remained silent on this subject in the first phase of this emergency procedure. She notes therefore that the Claimants cannot rely on requests different from those on the merits “ (ie nullity of the transfer of shares between Cominière and JCM v. termination of the JV) even though it [AVZ] did not specifically use the emergency procedure to obtain in the extreme urgency of measures which had nothing to do with his requests initials on the bottom. » <sup>60</sup> The emergency arbitrator has already responded to this argument and refers therefore to its developments above. <sup>61</sup> The Claimants then add “ *that in any event, AVZ is supposed to bring these new requests before the Court arbitration. In this case, it is quite obvious that the emergency measures requested prejudice already on the merits of the dispute for the following reasons:*

*To analyze the Claimants' alleged chances of success, the Arbitrator emergency has in fact already carried out an analysis of the substance and provisions of the JV to consider not only that the termination had to be arbitral, which is not however not the case, but also that it would be ill-founded, which is not the case no more. »* <sup>62</sup>

100. The emergency arbitrator cannot follow this argument regarding arbitrability for the reasons exposed during its analysis of the Claimants' chances of success on the merits. As for the merits of the termination, the emergency arbitrator considers that it was not in no way pronounced and, on the contrary, referred this question to the Arbitral Tribunal. <sup>63</sup> Finally, the Respondent indicates that by ordering measures until the end of the rendering of the final award, AVZ would already have won the case on the merits before any arbitration and that it would be “ *the granting of the remedy ultimately sought by AVZ*”. The emergency arbitrator points out, however, that she only ordered measures aimed at to preserve the *status quo* before the Arbitral Tribunal rules on the validity of unilateral termination inviting Cominière in particular not to take any actions arising

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<sup>60</sup> Request no.2, paragraph 183.

<sup>61</sup> See paragraph 72.

<sup>62</sup> Response no.2, paragraphs 184-185.

<sup>63</sup> See paragraph 114 of the Order: “ *it is not up to it to analyze the existence or not of a “serious and persistent non-performance of AVZI”, this task falling to the arbitral tribunal if necessary*”. However, this is what is involved in determining the merits of the termination.

of the termination that it indicated having made and to comply with article 11 of the Contract modified JV and therefore not to seize state courts on the merits, without decide on the merits of the termination, namely determining whether it was justified. By elsewhere, the emergency arbitrator doubts that the requests requested by the Claimants within the framework of the first phase of this emergency arbitration are identical to those which will be requested on the merits by the Claimants, the first not aiming again than to preserve a *status quo*, but it will be up to the Arbitral Tribunal to analyze these here and, if necessary, to reconsider the measures granted by the emergency arbitrator.

*The emergency*

101. To justify the urgency, the Claimants emphasize that Cominière has indeed implemented implements the threats contained in its termination letter of April 4, 2023 and adds that they run the risk that Dathcom will be dissolved and that the new joint venture exploits its mining title under cover of a new permit. THE

The Applicants also indicate that the required measures cannot wait for the constitution of the Arbitral Tribunal because by then “ *Cominière will in fact have all the leisure to continue the execution of its plan by recording the definitive spoliation of Dathcom of Mining Title, its dissolution and starting the exploitation of lithium from Manono in as part of a new joint venture .*”<sup>64</sup> They add that “ *the urgency is all the more more characterized that this affair is still the subject of the attention of the press as much national (in Australia and the DRC) and international, which weakens the position of Plaintiffs in particular vis-à-vis donors and/or investors whose The Manono Project will need to launch the exploitation phase.* »<sup>65</sup>

102. The Defendant considers, for its part, that the Claimants' request is only a instrumentalization of the procedure to the extent that the emergency would in reality be financial and procedural. Financial because the aim of the Claimants would not be “ *to obtain new measures regarding the JV or the dissolution of Dathcom- since these (sic) are already recorded elsewhere before the Congolese courts - but to obtain the liquidation of the penalty in order to replenish the empty coffers of AVZ (...)*” and procedural because the Claimants would try to “*avoid seizing the Arbitral Tribunal*

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<sup>64</sup> Request no.2, paragraph 110.

<sup>65</sup> Request no.2, paragraph 108.

*constituted today to obtain a favorable decision before the sole authority which gave it to date given a favorable decision. »* <sup>66</sup> In any event, the Respondent argues that the urgency is not characterized to the extent that the arbitral tribunal will be constituted in a few days. She explains that “ *the new facts that have occurred since the first emergency procedure was initiated completely emptying the new procedure of its object since:*

- *The judgment of the Kalemie TGI of May 3 under RC 3815 noted the dissolution of the JV, and consequently reestablished the mining titles for the benefit of Cominière who originally owned them before bringing them to Dathcom who is now relinquished. (...)*
- *The ICSID arbitration proceedings initiated by the Claimants against the DRC on June 8, 2023 has, one assumes, precisely the aim of reestablishing the mining title, however legally withdrawn by the Minister of Mines on January 28, 2023 and alternatively to obtain compensation for the loss of this title. The Claimants therefore request already before another arbitral tribunal which has jurisdiction, the same requests relating to the mining title. »* <sup>67</sup>

103. The emergency arbitrator notes that the essential question here regarding urgency is that of know whether the measures requested by the Claimants (to the extent that they would be adapted) must be granted by the latter rather than waiting for the Court arbitrator is able to decide. In this respect, it is indeed appropriate to remember that for grant an emergency measure, the urgency must be such that it cannot wait for “ *the constitution of the arbitral tribunal*”. This is also one of the elements that the referee emergency had taken into consideration when analyzing the emergency in its Ordinance since it had considered the risks of Cominière taking measures resulting from the termination of the modified JV Contract, considering that they were proven to the extent where the Defendant had not denied that it intended to act and that the need to order the measures, at this stage, were therefore established, especially since the constitution of the arbitration tribunal could take a few months.

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<sup>66</sup> Answer no.2, paragraph 119, a).

<sup>67</sup> Answer no.2, paragraph 119, b).

104. The emergency arbitrator notes here that the Arbitral Tribunal will be constituted shortly. The parts indeed indicated at the hearing that the president of the Arbitral Tribunal had been chosen by the co-arbitrators and that the latter had until November 14 to make his declaration of independence, impartiality and availability, following which it must be confirmed by the ICC Court of Arbitration (the "Court").<sup>68</sup> Furthermore, it was indicated in the letter of the Respondent of November 13, 2023 that the president-designate had transmitted his declaration of independence and impartiality with reservations and that the Parties had until November 16 to respond. The constitution of the Arbitral Tribunal in this case is therefore in principle imminent<sup>69</sup> and the fact that the case does not be handed over to the Arbitral Tribunal only a few days later is in this regard indifferent because the degree of urgency must be assessed in light of the "*constitution of the arbitral tribunal*" and not to that of the submission of the file to the arbitral tribunal, the submission of the file having not for the sole consequence of divesting the emergency arbitrator of any new request for modification or withdrawal, in accordance with Article 6(8) of Appendix V which indicates that the emergency arbitrator may be seized of requests for modification or retraction of its order until the file is submitted to the arbitral tribunal. 70

105. The question that therefore arises is whether the measures requested cannot wait a few days or weeks. The urgency in this case would therefore be characterized both by the risk that immediate measures will be taken but also that irreparable harm would result if they were not granted before the constitution of the arbitral tribunal.

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<sup>68</sup> Transcript hearing November 9, 2023, page 10, lines 1-8. Furthermore, the Claimants had indicated in their Request that the period after the appointment of the president was approximately two weeks, see paragraph 90: "at best two weeks after this date (the time for him to send his declaration of independence and impartiality, that the Parties can comment on it if necessary, that the ICC confirms the designation and that the file is finally transmitted to the tribunal thus constituted).", see also paragraph 105: "Until the constitution of the Tribunal (which will take at least two weeks if the co-arbitrators appoint a president of the tribunal within the allotted time, not counting the time to be taken into account for the establishment of the mission statement and procedural order no. 1".

<sup>69</sup> It is noted in this regard that even if the designated president were not to be confirmed, which has not been established, the designation of a president should be carried out quickly. The Claimants were also of this opinion since they had indicated in their email of October 31, 2023 that the process took approximately 15 days until the confirmation of the president of the arbitral tribunal by the ICC.

<sup>70</sup> The Respondent also indicates in this regard that "*under a combined reading of Articles 2(2) and 6(8) of Appendix V of the Arbitration Rules and Article 16 of the Rules, as well as that from a reasonable interpretation of the application of these articles in the event that the Emergency Arbitrator is seized again, the jurisdiction of the emergency arbitrator ceases as soon as the file is handed over to the Arbitral Tribunal, this which is therefore a matter of days.*" »



106. The emergency arbitrator notes in this regard that the Claimants fear, in view of the actions of the Defendant, of being definitively deprived of the Mining Title<sup>71</sup>, more particularly they fear the dissolution of Dathcom and that Cominière starts  
“ *the exploitation of Manono lithium as part of a new joint venture.* » 72

The urgency for the Claimants is therefore specifically confined to these two points. For its part, the Defendant indicates that in reality there is no urgency because the termination would have been noted by the Kalemie High Court and that it would therefore act completely legally, this judgment having in any event enforceable force. 73  
The Defendant therefore considers that it can act because the termination would have been established and the transferred Mining Title. The emergency arbitrator therefore notes that actions Cominière's potential actions cannot be excluded since it considers itself authorized to act. The urgency of preventing the occurrence of facts on the part of Cominière arising from termination could therefore be established.

107. Concerning the possible dissolution of Dathcom more particularly, the arbitrator emergency notes first of all that by the order of the Minister of Mines of January 28 2023, it reported its order of April 25, 2022 granting the “ *Permit of Operation No. 13359 to the company DATHCOM MINING SA* ” with the consequence that it “ *can no longer produce any effect* ”. She also notes a debate between the Parties on this subject, the Claimants indicating that Dathcom continues, in any state of cause, to be the holder of the research permit and the Defendant indicating that she has not due to this decree no more object just like the JV. The emergency arbitrator considers that given these elements, it cannot be stated with certainty that Dathcom no longer has of object. The emergency arbitrator further notes that Dathomir subsequently assigned Dathcom, Cominière, AVZ, Jing Cheng and the Single Window for Business Creation in dissolution of Dathcom on September 4, 2023 before the Commercial Court of Lubumbashi<sup>74</sup> and that this procedure is pending. The Claimants indicated at this title that this summons, although coming from Dathomir, was not foreign to

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<sup>71</sup> Power Point Presentation of the Claimants, page 28, point 3, “ *the emergency is characterized: the Cominière plan has accelerated; concrete actions implemented on the ground or already announced publicly; real risk of definitive spoliation of the Mining Title.* »

<sup>72</sup> Request no.2, paragraph 105.

<sup>73</sup> The emergency arbitrator notes in this respect that the decision relating to the second third party opposition was not communicated to him and that a debate between the Parties concerning the content of said decision.

<sup>74</sup> Exhibit DM-74.

Cominière.<sup>75</sup> This assertion, however, has not been tangibly established. The referee emergency therefore notes that while it cannot be excluded that the dissolution of Dathcom is pronounced, it cannot consider this request as urgent in the to the extent that he was not informed that a decision of the Commercial Court of Lubumbashi would intervene quickly. In this case, it seems that the next hearing is not scheduled until December 20, 2023<sup>76</sup> which implies that a decision of the latter is not imminent.

108. Regarding the fact that lithium exploitation on the Manono project can begin through the new joint venture and on the basis of permit PR15565, the arbitrator emergency recalls that the Claimants indicated by email of November 9, 2023 that “ *Cominière, in collaboration with the Chinese group Zijin, began this very day what appears to be earthworks on the perimeter of the Permits Search 13359/15775* ”. The Claimants thus requested to submit these elements unless the Defendant acknowledges by return email having actually started this work. Invited by the emergency arbitrator to provide his comments, the Defendant did not confirm having undertaken this work but indicated: “ *As a reminder, Cominière exercises the rights which have been conferred by the orders of the Minister of Mines of January 28 having withdrawn PR 13359 from Dathcom and by the judgment of the TGI of Kalemie of May 3, 2023, which makes Cominière the holder legal of PR 13359, the new JV also exercising its rights under PR 15775 issued regularly on October 20* . ”<sup>77</sup> In doing so, the Defendant has, again, indicated that it was legitimate to act and that the new JV exercised its rights to this title. The emergency arbitrator therefore considers that the risk that actions are undertaken by Cominère before the constitution of the arbitral tribunal is in existence. The emergency arbitrator notes that, by a letter dated November 14, 2023, the Defendant objected that the Claimants had finally indicated that they did not intend “ *(...) produce additional elements because this could slow down the process* ”

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<sup>75</sup> Request no. 2, paragraph 97.

<sup>76</sup> See Request for provisional measures of October 31, 2023 in arbitration CCI 27401/SP paragraph 21 (produced by the Claimants by email of November 13, 2023): “It is in these conditions of *marked urgency, the next hearing before the Lubumbashi Commercial Court being scheduled for December 20, the Claimants are forced to file this request for precautionary and provisional measures.* »

<sup>77</sup> Email from the Defendant dated November 11, 2023.

*arbitral* » <sup>78</sup> and this, in order not to give the Defendant the right to respond, on the one hand, and because they had no elements, on the other hand<sup>79</sup>. She added that although not having any new elements, she urgently invited the arbitrator to “*draw some conclusions of law and fact*” and concluded that “*if (...) they choose not to produce these elements for strategic reasons, they must accept the consequences of this decision. They cannot ask the court to draw a conclusion based on undisclosed evidence.* » The emergency referee emphasizes, however, that it did not conclude that it was urgent due to the allegations of the Claimants concerning the start of alleged works, which did not actually not been demonstrated to date, but there is a risk that these will not start before the constitution of the Arbitral Tribunal.

*The risk of irreparable harm*

109. The Defendant alleges that there is no risk of irreparable harm for AVZ

to the extent that “*the dissolution of Dathcom is already underway, and has not been requested by Cominière (...)*” and that “*(...) the request for early dissolution is based on the disappearance of the corporate purpose of Dathcom and the aforementioned provisions of the AUSC, which clearly provide among the just reasons for “disagreement between partners preventing the functioning of the company”, which is the case in this case*”.

<sup>80</sup>

The emergency arbitrator first notes that she does not have to determine whether the request for early dissolution is well founded or not. She then notes that the demand which presented to him in this capacity does not aim at Dathomir but at Cominière.

<sup>81</sup> The referee

finally considers that the fact that the dissolution is in progress does not detract from the fact that the dissolution of Dathcom could cause serious harm<sup>82</sup> to Plaintiffs to the extent that it could not be restored. However, it notes that it must assess this risk in the current context, that is to say by taking into account

<sup>78</sup> Email from the Claimants dated November 13, 2023.

<sup>79</sup> Email from the Defendant of November 14, 2023.

<sup>80</sup> Response no.2, paragraph 124, a), pages 39-40.

<sup>81</sup> This is in fact formulated as follows: “**ORDER** Cominière, within the framework of the procedure initiated by Dathomir to obtain the dissolution of Dathcom, to indicate by way of conclusions to be included in the debates within the framework of the action filed under RAC 3268 before the Commercial Court of Lubumbashi, and within a maximum period of four (4) working days from the notification to the Parties by the Emergency Arbitrator of the order to be intervened, that: (i) the question of termination has not yet been decided and has been submitted to the arbitral tribunal in CCI arbitration no. 27720/SP, (ii) Cominière has taken the necessary steps for Dathcom to be recognized as holder of PR13359 (...).”

<sup>82</sup> Motion, paragraph 117.

consideration, on the one hand, of the current dissolution procedure and, on the other hand, the imminent constitution of the Arbitral Tribunal. However, the emergency arbitrator recalls that the The next scheduled hearing appears to be set for December 20, 2023 in this case. Of the therefore, it cannot be considered that the absence of an injunction would result from this measure by the emergency arbitrator irreparable harm, this request being able, if necessary, be brought before the Arbitral Tribunal which will be constituted before this date. Furthermore, the emergency arbitrator notes that provisional measures aimed specifically at withdrawal of the action taken for dissolution have been presented before the arbitral tribunals in the proceedings between Dathomir and AVZI.

83

110. Concerning the mining title, the Defendant indicates that “ *Dathcom is no longer the holder of the mining title since January 28, 2023 and therefore no longer has any rights to this title, and this, by the serious fault of AVZ (...)*” adding that “ *the Emergency Arbitrator does not have jurisdiction to order the competent authorities (...) to restore the mining title in his name or yet to issue the permit to another entity (...)*” and concluding that “ *the harm resulting from the withdrawal of the title and, where applicable, the reinstatement of the title for the benefit of Cominière, is a question which falls within the jurisdiction of the ICSID Arbitral Tribunal (...) and the Congolese courts with regard to the contestation of the decrees of the Minister of Mines withdrawing the title or the judgment of the TGI of Kalemie restoring the mining title.*”

84 The emergency arbitrator recalls, first of all, that

as he recalled in paragraph 106, it cannot necessarily be deduced from the order of January 28, 2023 that Dathcom no longer has a mining title, an existing debate between Parts about it.

85 She also notes that contrary to what the

Defendant, the requests requested are not intended to order the CAMI or the Court of Kalemie High Court to order the restoration of the mining title in his name but

all aim at actions by Cominière.

86 Finally, the emergency arbitrator considers

that it must examine whether there is a risk of irreparable harm which cannot be

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<sup>83</sup> Request for provisional measures of October 31, 2023 presented in arbitration 27401/SP, paragraph 49 in which the arbitral tribunal is requested to “ *enjoin Dathomir to take the necessary measures to withdraw from the proceedings pending before the Commercial Court of Lubumbashi, in the Democratic Republic of Congo (RAC 3268) before its hearing on December 20, 2023* .

<sup>84</sup> Answer no.2, paragraph 124, b), page 41.

<sup>85</sup> Transcript hearing November 9, 2023, page 61, lines 20-27 and page 61 lines 38-41.

<sup>86</sup> The emergency arbitrator notes in this regard that the Respondent, again, objected in its letter of November 14, 2023 to the fact that the same measures were requested by the Claimants in the context of the ICSID arbitration

No. ARB/23/20 only in the context of this procedure. The emergency arbitrator notes, however, that the measures requested within the framework of the ICSID arbitration are intended for the Republic of Congo which does not have the same prerogatives as Cominière. So the measures, if they aim at the same goal, are not similar.

repaired if necessary in the absence of measures taken by the emergency arbitrator. In others terms, would there be irreparable harm if the current situation evolved again that is to say if in particular work was undertaken on the perimeter of the PR permits 13359/15775 before the Arbitral Tribunal is constituted? The emergency referee considers here that serious harm is established to the extent that it is established that this damage may not be adequately repaired by damages, Cominière having, as the emergency arbitrator had noted in his Order, stated financial difficulties which have not been denied<sup>87</sup> , and that it has not been denied that such work was going to be undertaken. The Claimants would thus lose the benefit of the project that compensation through damages cannot adequately compensate. However, it considers that to the extent that the Arbitral Tribunal will soon be constituted, only the request of the Claimants consisting of enjoining Cominière to “ *not take any action aimed at exploring and exploiting, directly or indirectly, the mining reserves within the perimeter of PR13359 and PR15775* ” must be ordered to the extent that it aims precisely to avoid an aggravation of the dispute 88 before the constitution of the Arbitral Tribunal. The emergency arbitrator further considers that he will subsequently be up to the Arbitral Tribunal to judge the follow-up to be given to this measure. if he was seized of it. Consequently, it orders this measure until the Court arbitrator be seized of this question. Concerning the penalty request, the arbitrator emergency notes that the Claimants wish it to be set at an amount of 150 000 euros per day of infringement to the extent that setting the initial penalty at 50 000 euros would not have been enough of a deterrent. The Claimants add that this would be justified in view of the risks in this case and the behavior of Cominière.<sup>89</sup> The arbitrator emergency considers, however, that it is not up to it to come and assess whether a party did or did not follow what she ordered. Therefore, it reiterates that a penalty of 50,000 euros per day seemed justified to him.

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<sup>87</sup> Order, paragraph 117. The Respondent did not return to this point, contenting itself with indicating that “(...) a party has never been asked to guarantee in advance the execution of a possible conviction, unless the costs are covered by possible security for costs”, Answer no. 2, paragraph 124 (d), page 43.

<sup>88</sup> Therefore, the emergency arbitrator considers that requests 4.4 and 4.5 (consisting of ordering Cominière to send a letter to CAMI so that PR 13359 is re-registered in the name of Dathcom as well as a letter to the Minister of Mines indicating that as long as the question of termination of the modified JV Contract and its consequences is not decided by the arbitral tribunal, the administrative decisions taken on the basis and/or as a result of the Kalémie High Court must be withdrawn ) can await the constitution of the Arbitral Tribunal.

<sup>89</sup> Transcript hearing November 9, 2023, page 27, lines 31-32.

*On the balance of interests*

111. Furthermore, the emergency arbitrator notes that the Respondent alleges that the balance of interests would lean in its favor because for it it would be a question of “*developing a mining project of importance in the DRC* »<sup>90</sup> when on the other hand it would be a matter of protecting simple pecuniary interests. The emergency arbitrator does not share this analysis because the granting of measures requested have in no way the consequence of preventing the project from being develop but only to suspend its implementation pending referral to the Arbitral tribunal on this issue. Therefore, the emergency arbitrator maintains that the balance of interests leans more in favor of the Claimants.

*Other requests*

112. Concerning the other requests made by the Claimants, the arbitrator emergency considers that it has not been established that they would be so urgent that they would not could wait for the constitution of the Arbitral Tribunal. Indeed, as indicated by the Claimants during the hearing<sup>91</sup>, certain requests aim to return to the *status quo ante* to the extent that they would have violated the Ordinance. This would be the case for measures towards the public, i.e. measure 4.3 and measure 4.11. The emergency arbitrator does not consider however, there is no urgency to order these measures before the constitution of the Arbitral tribunal and that irreparable harm would result in the opposite case. He The same applies to requests relating to Congolese courts. consisting of ordering Cominière to indicate to the judge that the termination must be decided by the arbitral tribunal and the parallel request to withdraw from the criminal proceedings. The urgency is not such that it cannot wait for the constitution of the Arbitral Tribunal.

113. As for the request for liquidation of the penalty, the emergency arbitrator considers that it is not up to him to sanction possible violations of his Order which would be the case if it were to pronounce such a liquidation. Furthermore, the referee emergency recalls that it had reserved, if necessary, the liquidation dispute of the penalty to the Arbitral Tribunal. The emergency arbitrator therefore rejects the request liquidation of the plaintiffs' penalty. For the same reasons, she rejects the

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<sup>90</sup> Transcript hearing November 9, 2023, page 47, line 49.

<sup>91</sup> Transcript hearing November 9, 2023, pages 20-21.

request relating to the reassessment of the penalty subject to the Order as well as the subsidiary request from the Claimants for deposit of the amount of the penalty payments.

114. Finally, the emergency arbitrator notes that having rejected the request for withdrawal of the Order, there is no need to come and confirm its Order which continues to exist. Consequently.

### **XIII. COSTS RELATED TO EMERGENCY ARBITRATION**

115. Pursuant to Article 7(3) of Appendix V, the order of the emergency arbitrator must liquidate “(...) *the costs of the emergency arbitrator's procedure* (...)” and decide what part these fall to or the proportion in which they are shared. The article 7(4) of Appendix V specifies in this respect that “ *the costs of the arbitrator's proceedings emergency costs include the administrative costs of the CCI, the fees and costs of the emergency arbitrator and the reasonable costs incurred by the parties for their defense to the occasion of the emergency arbitrator's procedure.* »

116. By letter dated November 2, 2023, the Secretariat indicated that, on November 1, 2023, the President had set an additional provision, to be borne by the Claimants, for the emergency arbitrator's procedural costs at USD 25,000. The costs of the procedure the emergency referee are as follows:

- USD 5,000 for ICC administrative costs;
- USD 20,000 for emergency arbitrator fees and costs.

117. By letter dated November 9, 2023, the Secretariat confirmed that the Claimants have paid this amount.

118. On November 13, 2023, the Parties submitted their respective statements of costs.

119. The Claimants indicate that they incurred USD 25,000 for the costs of the emergency arbitrator proceedings, AUD 218,008.5 for defense costs and estimates 2040 euros for costs related to the hearing (stenotypist as well as microphones and service technique for video conferencing).

120. The Claimants recall that Article 8(3) of Appendix V provides that “[o]n all matters relating to the procedure of the emergency arbitrator no expressly referred to in this Appendix, the Court, the President and the arbitrator emergency procedures proceed on the basis of the Regulations and this Appendix” and that section 38(5) of the Regulations states that “[w]hen deciding on costs, the arbitral tribunal may take into account the circumstances it considers relevant, including to what extent each party conducted the arbitration promptly and efficiently in terms of costs. » On this basis, the Claimants emphasize that it is generally accepted that the costs are in principle borne by the losing party. They add that it was the behavior of the Defendant which forced them to initiate this procedure, which could have been avoided, and that it is because the latter did not respect the Order that they had to file a request for modification of the said prescription. In this regard, they invoke violations of the injunctions ordered by the emergency arbitrator, the refusal of the Defendant to reimburse the costs incurred in the framework of the first phase of this emergency arbitration and the holding, at the initiative of Cominière, from a hearing on May 2, 2023 before the High Court of Kalemie without informing the Claimants and the emergency arbitrator.

121. The Claimants then request that the arbitrator urgently “ *condemn the Defendant to pay GHL all of the above-mentioned sums (these sums being advanced by AVZ on behalf of the Claimants), as well as the remaining 10% of the Defense costs of the Claimants incurred in the context of the emergency arbitration from April/May 2023* ”.

122. For its part, the Defendant indicates that it had to pay the sum of 254,432.83 euros to ensure its defense costs in the emergency arbitration procedure as well as the sum of 5,490.86 euros for the purposes of organizing the hearing.

123. The Respondent recalls that in his Order the emergency arbitrator relied on article 35(5) of the Rules as well as on international arbitration practice, namely on the “ *costs follow the event* ” rule to determine the distribution of fees and costs relating to the emergency procedure. She adds that in the event that the emergency arbitrator were to accede to Request no.2 of the Claimants, the emergency arbitrator “ *should necessarily take into account the abusive behavior of the Claimants in the*



*procedure.* » She then first explains that the Claimants filed their Request no.2 on October 30, 2023, just before the president of the Arbitral Tribunal is appointed, and that it was therefore late. She adds that nothing justified not wait a few days for the file to be submitted to the Arbitral Tribunal and recall that this referral is motivated by the use of the emergency arbitrator for the purposes to obtain the liquidation of the penalty to replenish the AVZ accounts. She then explains that the Claimants lacked fairness in the procedure in initiating an incident the day before the hearing regarding the request for withdrawal of the Order formulated by the Respondent while “ *the retraction constitutes (i) a means of defense of the Defendant, insofar as it simply requests the rejection of all claims of the opposing party, who requests confirmation of the first Order, (ii) as well as one of the powers belonging to the Arbitrator emergency under Articles 6(7) and (8) of Appendix V of the Arbitration Rules of the ICC when considering any request for granting or modification of measures emergency, and (iii) that moreover no request for provision has ever been formulated by the ICC against him, this final maneuver disrupted the good progress of the hearing, forcing the arbitrator urgently to take up the matter and to ask the Claimants to refer the matter to the ICC* ”. Finally, she adds that the The plaintiffs requested that the arbitrator urgently “ *rule while the requests put forward clearly prejudge the merits, and that they will be processed in the case appropriate by the Arbitral Tribunal.* » They conclude that the Claimants adopted abusive behavior at all stages aiming to increase costs, in violation of their obligations of loyalty and promptness.

124. The Defendant thus requests from the arbitrator urgently “ (...) *in addition to the rule “cost follow the event”, that it takes into account not only the uselessness and abuse of second emergency procedure, as well as the unfair and abusive attitude of the Plaintiffs, to order them to pay jointly the entirety of the costs of arbitration, regardless of the outcome of this procedure.* » She explains in this respect that her request for solidarity, of which the Court of Cassation would have established a principle in the matter, is justified in this case by the fact that Dathcom no longer has any assets and no resource, which would be demonstrated by the fact that the Claimants request that the penalty is paid to GLH. She therefore urgently asks the arbitrator “ *that it jointly orders the Claimants to pay it the entire sums*

*above-mentioned and that it orders that the costs of the Defendants (sic) will remain at their charge, in the context of the first as well as the second request. »*

125. The emergency arbitrator notes, firstly, that the Claimants allege that the This procedure was introduced due to the behavior of the Defendant and, more particularly, that Request no.2 was introduced due to the violation by the Defendant of the measures ordered by the emergency arbitrator. They also insist on the casual nature of the Defendant in the context of the procedure which took place place before the Kalemie High Court to justify that the Defendant be ordered to bear the full costs of the emergency procedure initiated on October 30, 2023. For its part, the Defendant denounces the unfair behavior of the Plaintiffs by introducing this procedure very late - even though it was complained of violations since May 2023 and that the president of the Arbitral Tribunal was to be appointed a few days later - as well as by raising just before the hearing an incident relating to the request for withdrawal of the Order and more generally by multiplying the incidents and accusations of deception against the Defendant and of his advice. The emergency arbitrator notes in this regard that it appears in fact that the This procedure was initiated due to the actions of the Defendant, first title of which the procedure before the Kalemie High Court. In Indeed, it is indeed the Defendant who introduced this procedure for the purposes of establishing of the termination of the modified JV Contract and re-registration of permit PR 13359 to its name. Although this procedure was certainly introduced on April 8, 2023, that is to say before the arbitrator emergency is not seized, the fact remains that the Defendant did not consider it useful to inform the Claimants (who were not parties) and the emergency arbitrator then even though the debates before it also related to the termination and that the hearing was held on the same day as that of the emergency arbitrator. Furthermore, she does not have considered useful either to inform him of the decision of the TGI of Kalemie which had intervened before the decision of the emergency arbitrator. Furthermore, it was after this judgment that other actions were carried out such as the extension of the duration of permit 13359 to Cominière (considering Decision No. CAMI/DG/FM/006/2023 of July 6, 2023 approving the case of force majeure mentioned by CONGOLAISE D'EXPLOITATION MINIERE SA)<sup>92</sup> or the creation of the new JV with Jinxiang.

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<sup>92</sup> Exhibit DM-78.

Furthermore, the emergency arbitrator notes that the Defendant accuses the Claimants of not having submitted this request earlier and having waited for the arbitral tribunal will soon be formed. The emergency arbitrator notes that if the Claimants found violations of the Ordinance as early as May, she nevertheless attempted to oppose to the judgment of the Kalemie High Court through its third party opposition from June 19 (and although she only became aware of the existence of the judgment on June 2) and she gave notice three times to the Defendant to comply with the Order, the latest dating from September 22, 2023. In addition, the Claimants submitted this request 7 days after the announcement of the creation of the new JV and 10 days after obtaining the permit, which does not seem excessive. Due to the fact of these circumstances, the emergency arbitrator considers that the Claimants' request as to the admissibility of the request for withdrawal which could certainly have been submitted before the day before the hearing cannot be sufficient to consider that the Claimants have done proof of procedural disloyalty. The emergency arbitrator therefore decides that the Defendant must bear 100% of the arbitration costs relating to this second phase of the procedure. As such, she must reimburse GLH \$25,000.93 Furthermore, the Defendant will bear 100% of the hearing costs. As such, she must repay 1020 euros to GLH. <sup>94</sup>

126. Concerning defense costs, the emergency arbitrator notes that she upheld this second phase to one of the additional requests of the Claimants, the latter having been considered sufficiently urgent pending the constitution of the Arbitral tribunal. She also imposed a fine of 50,000 euros per day. of violation. The emergency arbitrator rejected all other requests from the Claimants (i.e. other additional requests, liquidation of the penalty and modification of the amount of the penalty). Furthermore, the emergency arbitrator also rejected as being inadmissible the Respondent's request for retraction of the Order. Therefore, the Claimants are winners but to a lesser extent. The referee emergency therefore decides that the Defendant will bear its defense costs

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<sup>93</sup> The Claimants have in fact requested in their statement of costs that payment be made to GLH to the extent that the sums paid under this emergency arbitration were "advanced by AVZ *on behalf of the Claimants*", see paragraph 13 statement costs of the Claimants.

<sup>94</sup> See statement of costs of the Claimants indicating that each of the Parties have advanced half the costs related to the audience and which amount to 2040 euros in total.

as well as 10% of the Claimants' defense costs<sup>95</sup>. These amounting to 218,008.5 AUD, the Defendant must reimburse 10% /218,008.5 AUD or 21,800.85 AUD to GHL.

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<sup>95</sup> It also rejects the Claimants' request made in point 3.2 of its amended operative part which it does not consider justified.

#### **XIV. PRESCRIPTION**

127. In view of the above, the emergency arbitrator decides as follows:

1. The emergency arbitrator is competent to order emergency measures;
2. Request no.2 is admissible in accordance with Article 29 (1) of the Rules;
3. The request for retraction of the Cominière Order is inadmissible;
4. Cominière is ordered not to take any action aimed at exploring and exploiting, directly or indirectly, the mining reserves within the perimeter of PR13359 and PR15775 until the question is, if necessary, brought before the arbitral tribunal seized of the question of the validity of the termination of the JV Contract modified;
5. Any violation of the injunction pronounced in point 4 will, where applicable, be accompanied a penalty of 50,000 Euros per day of violation;
6. The dispute over the liquidation of the penalty will be reserved, if necessary, to the court arbitration seized of the question of the validity of the termination of the modified JV Contract;
7. The costs relating to this second phase before the emergency arbitrator will be borne by Cominière who must therefore pay USD 25,000 to GLH;

8. Cominière will bear all of its defense costs as well as 10% of those of the Plaintiffs. Cominière must therefore pay GLH the sum of 21,800.85 AUD;

9. All other requests of the Parties are rejected.

Place of emergency arbitration: Paris, France

Date: 11/15/2023

**THE EMERGENCY ARBITRATOR**  
Catherine Schroeder

A handwritten signature in black ink, appearing to read 'C. Schroeder', with a horizontal line drawn underneath the signature.