NEWS

Mining company fails to revive billion-dollar ICSID claim

Tom Jones
20 March 2019

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London-listed Churchill Mining has failed to revive a US$1.3 billion ICSID claim against Indonesia that was dismissed because of findings of forgery, after an annulment committee concluded the tribunal had not violated due process in its treatment of the evidence.

An ICSID committee chaired by French judge **Dominique Hascher** and including **Karl-Heinz Böckstiegel** of Germany and **Jean Kalicki** of the US rejected Churchill's annulment application in its entirety in a decision on 18 March.

First published on the *Global Arbitration Review* website, 20 March 2019

The committee also terminated a stay of enforcement of a US$9.4 million costs award granted in Indonesia's favour in the original arbitration.

The dispute concerned a coal mining project in the Regency of East Kutai on the island of Borneo. Churchill invested in the project in 2006 in partnership with Indonesia's Ridlatama Group, which purportedly obtained the licences to exploit the deposit. But the licences were later revoked, with an Indonesian administrative tribunal finding that Ridlatama had been illegally felling trees in protected forestland.

Churchill and its Australian subsidiary Planet Mining filed a pair of ICSID claims in 2012 under Indonesia's bilateral investment treaties with the UK and Australia. The two cases were consolidated before a tribunal chaired by Switzerland's **Gabrielle Kaufmann-Kohler** and including **Michael Hwang SC** of Singapore and **Albert Jan van den Berg** of the Netherlands.

In a final award in 2016, the ICSID tribunal rejected the investors' claims after finding that a number of documents submitted by the claimants as evidence – including mining licences and letters from authorities at all levels of the Indonesian government – had been forged, most likely by Ridlatama.

Churchill applied to annul the award in 2017, arguing that the tribunal departed from a fundamental rule of procedure, manifestly exceeded its powers and failed to state its reasons. The company argued that the tribunal had breached due process by inviting the parties' views on *Minnotte v Poland* – an ICSID award dealing with the admissibility of claims tainted by third-party fraud, on which neither Churchill nor Indonesia had relied.

Churchill said that the tribunal refused to give them an opportunity to present new factual evidence relating to the *Minnotte* test. It argued that, while good faith is the operative principle in the *Minnotte* test, the tribunal had excluded any evidence on good faith when it signalled in a prior procedural order that it did not want to hear about facts allegedly justifying a finding of estoppel.

In its decision, the committee said there was no need to second guess whether *Minnotte*– which was one among 20 investor-state cases the tribunal had relied upon to establish the legal framework to apply to unlawful conduct by a claimant or its business associate – was dispositive for the award.

The committee said the tribunal found no need to enquire about the facts on estoppel and the claimants' good faith because the seriousness of the forgery precluded the claimants from even invoking estoppel and similar doctrines. The committee therefore found that there had been no violation of the right to be heard.

Churchill also complained that the tribunal readmitted the evidence of Isran Noor, the former Regent of East Kutai and one of the state's key witnesses, without notice – despite having previously struck his testimony from the record after he refused to attend the hearing or even be questioned via video-link. The company said the tribunal relied on this evidence as part of its award.

However, the committee found that the tribunal could have reached its conclusions on the forgery based purely on Ridlatama's conduct. Given the breadth of the alleged Ridlatama

scheme, the committee did not share Churchill's view that the only way the tribunal could have reached its conclusions was based on Noor's testimony.

Finally, Churchill said that in relation to its case on state responsibility – in particular its allegations that Ridlamata's fraud was abetted by government insiders and the state should therefore incur liability – the tribunal had failed to exercise its jurisdiction and failed to state the reasons for its decision.

Although the committee was not "insensitive to the question of whether, and to what extent, the widespread scheme of forgery might have involved the support of one or more state officials," it said it was for the tribunal to assess the relevance of this issue. It found that the tribunal had implicitly considered issues of comparative responsibility and rejected the claimants' arguments in this regard.

Clifford Chance partner **Audley Sheppard QC**, one of the lead counsel acting for Churchill in its annulment bid, says the outcome is "disappointing", but that the investors "understand the deference given to the procedural decisions of the arbitral tribunal."

"However, it was hoped that the annulment committee would have taken the opportunity to engage more fully with the issues of state responsibility where the state itself was complicit in dishonesty."

"The investors' failing was that when they bought their investment, they didn't notice that certain documents had been forged, notably with the assistance of local government officials. Indeed, the forgery was not raised until the hearing on jurisdiction, a year after the claim was filed. The BIT legal system should balance the rights and obligations of investors and states and not apportion all of the consequences of third-party fraud to the investor and none to the state, especially after a valuable mineral resource has been de-risked for the benefit of the state."

Clifford Chance took over the representation of Churchill in the arbitration in 2015, replacing Quinn Emanuel Urquhart & Sullivan, who had in turn replaced Freshfields Bruckhaus Deringer and Hogan Lovells.

Churchill's chairman of directors David Quinlivan said the company was "extremely disappointed" that the ad hoc committee failed to "correct what was by any objective measure a manifestly defective and partisan award."

"It is the company's view that this case and its outcome will reflect poorly on the fairness of ICSID arbitration process and I imagine that, in time, fewer and fewer investors will have any confidence in the ICSID system for resolution of investment disputes with foreign governments."

Indonesia was represented Curtis Mallet Prevost Colt & Mosle and local firm Hendra Soenardi in the annulment phase. Lawyers from Curtis did not respond to request for comment. Curtis was also counsel to the state in the arbitration alongside DNC Advocates at Work.

Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia (ICSID Case No. ARB/12/40 and 12/14)

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In the annulment proceedings

Ad hoc committee

- **Judge Dominique Hascher** (France)
- **Karl-Heinz Böckstiegel** (Germany)
- **Jean Kalicki** (US)

Counsel to Churchill Mining and Planet Mining

- Clifford Chance

Partners **Audley Sheppard QC** in London; partners **Ben Luscombe** and **Sam Luttrell** and associate **Clementine Packer** in Perth; foreign legal consultant **Romesh Weeramantry** in Hong Kong; partner **Ignacio Suarez Anzorena** in Washington, DC

Counsel to Indonesia

- Ministry of Law and Human Rights

Minister **Yasonna Laoly**; and **Cahyo Muzhar**, **Agvirta Armilia Sativa** and **Dinda Kartika**

- Curtis Mallet-Prevost Colt & Mosle

Partner **Claudia Frutos-Peterson** and associate **Marat Umerov** in Washington, DC; partner **Mark O'Donoghue** and associate **Kevin Meehan** in New York

- Soenardi Pardi of the Hendra Soenardi Law Firm in Jakarta

In the arbitration

Tribunal

- **Gabrielle Kaufmann-Kohler** (Switzerland) (chair)
- **Albert Jan van den Berg** (Netherlands)
- **Michael Hwang SC** (Singapore)

Counsel to Churchill Mining and Planet Mining

- Clifford Chance (from February 2015)

Partners **Audley Sheppard QC** in London; partner **Ben Luscombe**, counsel **Sam Luttrell** and associate **Clementine Packer** in Perth; foreign legal consultant **Romesh Weeramantry** in Hong Kong, and associate **Montse Ferrer de Sanjose** in Washington, DC

- Linda Widyati & Partners

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Partners **Dezi Kirana** and **Salma Izzatti**

- **Robert Richter QC** at William Crockett Chambers in Melbourne
- Quinn Emanuel Urquhart & Sullivan (from January 2013 to February 2015)

Partners **Stephen Jagusch QC**, **Anthony Sinclair** and **Alex Gerbi**, counsel **Epaminontas Triantafilou**, and associates **Bridie McKinnon**, **Phil Devenish** and **Ben Burnham** in London; and partners **Tai Heng Cheng** in New York, **Fred Bennett** in Los Angeles and **David Orta** in Washington, DC

- Hogan Lovells (for Churchill Mining only) (until January 2013)

Partner **Michael Davison** and associate **David Earnest** in London

- Freshfields Bruckhaus Deringer (Planet Mining only) (until January 2013)

Partner **Lucy Reed** in Hong Kong (no longer with the firm)

Counsel to Indonesia

- Ministry of Law and Human Rights

Minister **Amir Syamsudin**; and **Cahyo Muzhar** and **Freddy Harris**

- **Didi Dermawan** in Jakarta
- DNC Advocates at Work

Wemmy Muharamsyah, **Dwi Deila Wulandari Taslim**, **Dwina Oktifani**, **Alvian Permana Putera** and **Benjamin Augusta**

- Curtis Mallet-Prevost Colt & Mosle

Partners **Claudia Frutos-Peterson** and **Mark O'Donoghue** and associate **Marat Umerov** in Washington, DC; and **Christina Trahanas** in New York

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