International Arbitration

Churchill / Planet arbitration claims against Indonesia: Managing Costs in International Arbitration

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Churchill's ICSID arbitration against Indonesia continues. In this update we summarise the latest developments in the case and discuss strategies to manage costs in international arbitration in relation to mining investments.

Introduction

In March 2013, we wrote on the International Centre for Settlement of Investment Disputes ("**ICSID**") arbitrations brought by UK-listed Churchill Mining plc ("**Churchill**") and its wholly-owned Australian subsidiary Planet Mining Pty. Ltd against Indonesia.

To recap, Churchill's ICSID arbitration against Indonesia for more than US$2 billion concerns the ownership of a mine in East Kutai province which has been estimated to be the 7th largest undeveloped coal resource.

What has happened since March 2013?

There have been several procedural applications by both parties since the arbitration commenced. In particular, Indonesia applied to have an expedited hearing on the alleged forgery of the mining licenses and other documentation relied upon by Churchill.

The Tribunal agreed that it was efficient to bifurcate the issue of alleged forgery, effectively hearing it separately from the rest of the case. The Tribunal then ordered an expedited hearing to deal with all factual aspects relating to alleged forgery and the legal consequences of a finding of forgery on each claim.

This expedited hearing was concluded in Singapore on 10 August 2015. The parties have now been directed to file post-hearing briefs and rebuttal briefs on 12 October 2015 and 9 November 2015 respectively. The Tribunal is likely to render an award a few months later.

If the Tribunal makes any findings of forgery, the scope and nature of the dispute between Churchill and Indonesia could be substantially altered as Churchill's claims may be adversely affected and consequently, there may not be a need for arbitration on the other factual or legal disputes.

Bifurcation as a means to manage costs in international arbitration

Indonesia's application to bifurcate a preliminary issue is one of the common techniques used to manage costs in international arbitration.

Bifurcation essentially means that the tribunal determines particular discrete issues at an early hearing. This may help to narrow the scope of the parties' dispute hence saving significant time and costs for the parties.

However, for bifurcation to be appropriate, it is important that the parties consider whether the issues to be bifurcated:

a) Are clear and discrete (in our experience, issues which are suitable to be carved out and heard as preliminary issues tend to be largely of a legal nature); and

b) Significantly narrow the scope of the parties' dispute e.g. the applicable law which could determine whether the parties' substantive rights in the claims even exist.

Often parties look to separate liability and quantum to avoid the costs associated with determining the quantum of loss being unnecessarily incurred. Also, once liability is established, the parties may be more inclined to reach a settlement on quantum without expending further resources on additional hearings).

Other strategies to manage costs in international arbitration

In the right cases, this approach can save unnecessary costs of lawyers and experts. At a time of great pressure on costs in the coal sector, it is timely to point out some of the other ways for parties to manage costs in arbitration:

a) Expedited procedures: Parties can choose arbitration clauses with arbitration under institutional rules which provide for expedited arbitrations, or agree to a fast-track arbitration procedure in the contract. In the right cases, some savings in time and cost can be also achieved with one arbitrator rather than three.

b) Settlement as part of dispute resolution strategy: Parties should always keep the option of an early settlement of the dispute open and seek to incorporate settlement goals and means (e.g. mediation) as part of the overall dispute resolution strategy.

c) Managing the arbitration procedure: Parties should seize opportunities at the preliminary meeting stage to seek from the tribunal a tight timetable and, where appropriate depending on the facts, limits on disclosure, evidence and expert evidence. Achieving an early final hearing will almost inevitably naturally assist with effective cost control.

There have been concerns that international arbitration can be prohibitively expensive. However, an appropriate and properly evaluated cost-management strategy at the outset can help greatly to keep costs manageable, even for disputes concerning large international investments.

BLP's perspective on Churchill arbitration and the mining industry

Mining investments, inevitably, require significant financial risks arising from the size of the financial investments, time taken for the materialisation of the profits, and the necessity for a close-knit relationship between the investors and the government of the host state.

It is no surprise then that Churchill's ICSID arbitration continues to be closely watched by investors, who have also been following news about concerns for the future of some of Indonesia's bilateral investment treaties ("**BITs**").[1]

Potential mining investors who understand jurisdiction risk should not be deterred and the focus will be on management of these risks when conducting due diligence and entering negotiations in relation to investment opportunities.

In this regard, mining investors should carefully consider their dispute resolution clauses when entering into investment contracts.

International arbitration is often the best solution. Mining investors should also consider the option of structuring their investments in such a way as to take advantage of any recourse available under available BITs.

Further, boiler plate clauses will not always be appropriate to the circumstances and investors are advised to consider carefully whether for example, building in mandatory negotiation or mediation provisions or agreeing that disputes be heard using fast track techniques, will be to their benefit in the event that a dispute arises.

If such matters are not reviewed at the point of contracting, it will be very difficult to avoid being required to resolve disputes in the manner agreed, even if—with the benefit of hindsight—an alternative method of resolution would be more efficient or beneficial.

When disputes arise, we encourage early and objective analysis of the merits of the claims balanced by a careful cost analysis of dispute resolution options. This – and the other cost management strategies noted above – are good practices in a strong market, and vital when prices of the investments have fallen away.

For further information, we would be happy to get in touch:

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[1] K. Phillips, R. Milburn, "The end of the line for Indonesia's Bilateral Investment Treaties?" (April 2014), online: <http://www.blplaw.com/expert-legal-insights/articles/the-end-of-the-line-for-indonesias-bilateral-investment-treaties>.