

Client Alert

International Arbitration Practice Group

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Malian Mining Sector Update: Mining Licenses Revocations and Mitigation Strategies

On 31 July 2014, the government of Mali announced that approximately 30 % of all mining permits—spanning a surface area of more than 5,000 square miles—had been cancelled in order to “clean up the sector.” Permits revocations affect not only Malian nationals, but also foreign mining companies.

These revocations are the consequence of a new government policy to expel mining companies whose activity the Ministry of Mines considers to be contrary to “the country’s interest.” Following the election of Ibrahim Boubacar Keita in September 2013, the Mines Ministry launched an “inventory” of mining concessions even though the country’s Mining Code did not expressly provide for that possibility. Although the current revocation only affects research and exploration licenses “for now”, the government could extend the revocations to licenses for mines already in production. These mines have indeed undergone the same audit as the projects that the Ministry of Mines forced to shut down after revoking their exploration licenses. This perspective would be particularly alarming for the mining sector.

In this rapidly deteriorating context, international mining companies operating or investing in Mali sector are advised to pay particular attention to ensuring that they will be able to navigate through potential disputes under the best conditions possible. These conditions may be optimized in investors’ investment agreement, in the structure of their investment, and in their relationship with their local partners and the government.

First, all of the parties considering or negotiating a new mining project in Mali should clearly delineate individual areas of responsibility for the different associated risks (political, fiscal, trade, environmental, supply, or price risks—to name a few) and provide for adequate adaptation and dispute resolution mechanisms. As a way to achieve that allocation of risks, parties to mining agreements should consider the opportunity to provide for stabilization and force majeure provisions in their contracts. Second, foreign parties in mining projects must obtain or preserve the right to seek resolution of their contractual disputes before international arbitration tribunals. Failure to do so would expose them to the uncertainties associated with litigating their disputes before local courts.

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Third, all parties involved in mining projects should actively manage the structure of their investments to obtain or preserve access to investor-state arbitration in case of adverse regulatory actions. A party should invest—or consider restructuring its investment—through a corporate vehicle from a country providing comprehensive treaty coverage (bilateral investment treaties (BITs), free trade agreements, or multilateral agreements) in order to obtain optimal protection. Adequate investment treaty protection plays a substantial role in procuring political risk insurance (particularly when offered by international organizations or public entities) and/or reducing the insurance premiums associated with international projects and operations. Mali currently has BITs in force with six foreign countries: Germany, the Netherlands, Switzerland, China, Egypt and Algeria. Subject to the provisions of the applicable investment treaty, the definition of investor and investment (enabling treaty protection and investor-state arbitration) will generally cover the investment and activities of the wide array of parties involved in mining or metals projects. Operators and direct investors, as well as lenders, long-term purchasers, and traders are advised to evaluate how to structure (or re-structure) their activity in a way to maximize available treaty protection. In this respect, the Netherlands and Switzerland appear particularly attractive both for the purpose of tax structuring and investment protection.

Finally, mining and metal companies should continue to engage with governmental entities in Mali to develop a better understanding of the value that a project brings to the country and its population. Mining companies investing in Mali could also partner with foreign state-owned companies that have strong State-to-State ties with the Malian government or its State-owned companies. Active government relations and lobbying efforts could also serve a similar objective. Judicious choices of lenders (including public or multilateral lenders, such as the International Finance Corporation or the European Investment Bank) and financial partners can also play an important role in unlocking disputes caused by adverse governmental actions.



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