



LALIVE
THE DISPUTES POWERHOUSE

Miner's Legal Toolbox for Dealing with Impacts of Covid-19

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About LALIVE

- LALIVE is an international disputes firm with fifty years of experience in international arbitration and a strong track record in mining arbitrations.
- We represented the claimants in the first ever ICSID case in 1971.
- We are consistently ranked as one of the leading law firms worldwide in international arbitration by major legal directories and publications, in particular by **Chambers & Partners – Chambers Global** and by **Global Arbitration Review**.
- We are market leaders in investment arbitration and are currently handling multiple mining related investment arbitrations in Africa.

SELECTED EXPERIENCE IN THE MINING SECTOR

Ntacka Nickel Holdings Ltd. v. Tanzania

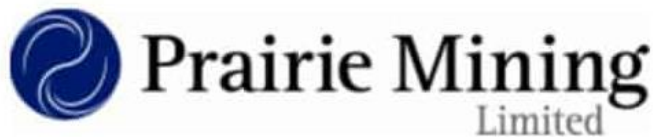
- A multi-million dollar ICSID arbitration involving a subsidiary of Australian mining company, Indiana Resources, concerning the illegal cancellation of a retention licence over a nickel mine by Tanzanian Government.



SELECTED EXPERIENCE IN THE MINING SECTOR

Prairie Mining v. Poland

- A multi-million UNCITRAL arbitration involving Poland and Australian coal development company, Prairie Mining Ltd, concerning the obstruction of two coal-mining projects.



SELECTED EXPERIENCE IN THE MINING SECTOR

AngloGold Ashanti v. Ghana

- A multi-million dollar contractual ICSID arbitration involving South African gold mining company, AngloGold Ashanti Ltd, under a mining lease, concerning Ghana's alleged failure to prevent illegal miners from entering the concession.



SELECTED EXPERIENCE IN THE MINING SECTOR

Gabriel Resources v. Romania

- A multi-billion ICSID arbitration involving Canadian gold mining company, Gabriel Resources, concerning an environmental permit and social licence.



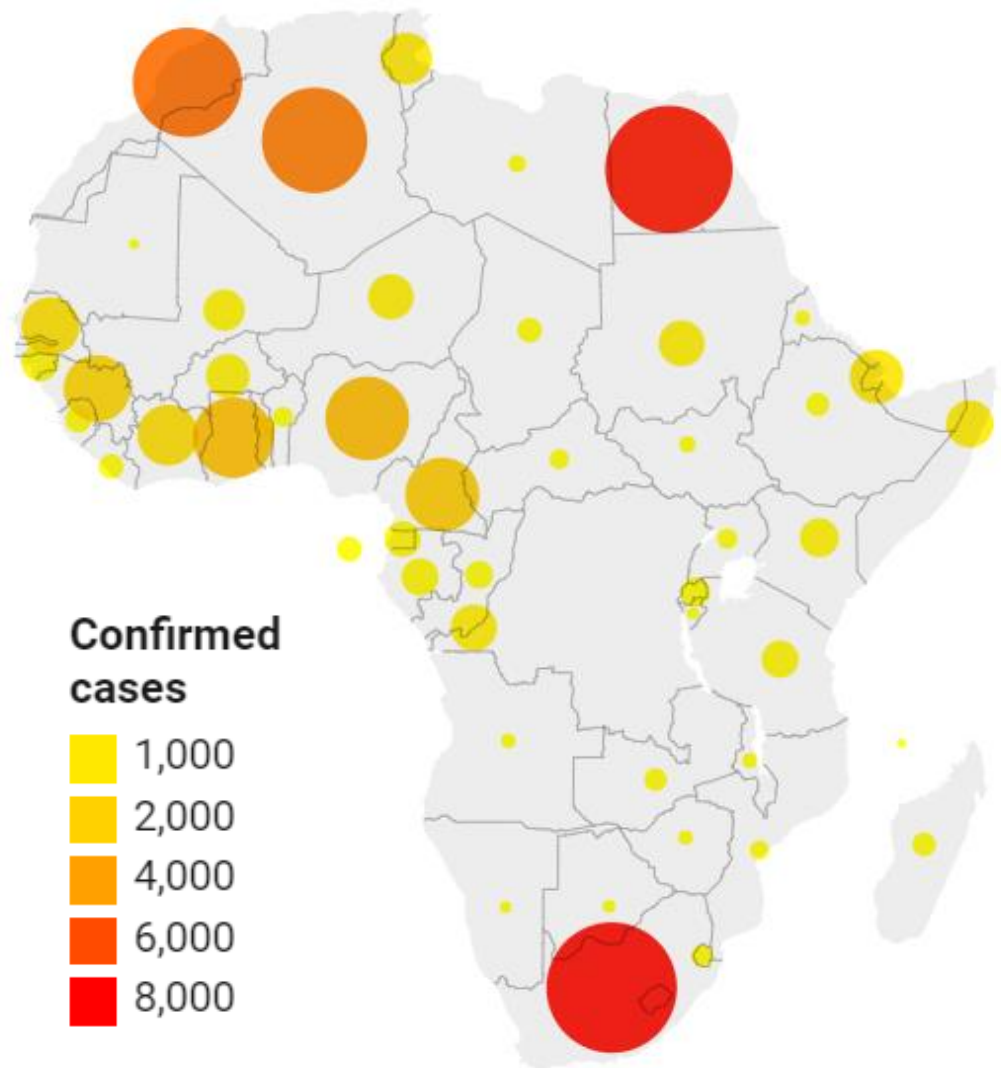
SELECTED EXPERIENCE IN THE MINING SECTOR

Copper Mesa v. Ecuador

- A multi-million UNCITRAL arbitration involving American mineral exploration and development company, Copper Mesa Mining, concerning Ecuador's termination of several mining concessions.



COVID-19 cases in Africa



Africa CDC, 6 May 2020

Certain COVID-19 measures in African mining jurisdictions



DR Congo – 2 day lockdown in March, mining industry now operating



Ghana – mining industry exempted from lockdown and restriction measures



South Africa – mining open-pit operations to 100% activity from 1 May; underground operations still at 50%



Tanzania – mining industry operational, no movement restrictions or closing of borders



Zambia – mining industry operational; Glencore's attempt to halt operations declared illegal by the Government

Possible repercussions of COVID-19 on mining projects

- Reduced workforce
- Inability for experts to travel to mining sites from abroad
- Disruptions to supply chain
- Decrease in commodity prices
- Possible permitting delays
- Shutdowns and start-ups; increased costs
- Decreased production – less income

A Tool for Every Job

Tool 1 – The Force Majeure Clause

Tool 2 – Claims Against the State

Tool 3 – Leverage with Offtake
Agreements

Tool 4 – Leverage with Contractors

Tool 1 – The Force Majeure Clause

Overview of force majeure legal doctrine

- Excuses party's non-performance of an obligation due to events beyond party's control
- Will usually depend on the contract
- Common law (Australia, Tanzania):
 - No force majeure unless in the contract
- Civil law (France, francophone African countries, South Africa):
 - Force majeure exists even if not in the contract
 - If there is a force majeure clause, wording will be determinative

Tool 1 – The Force Majeure Clause

Overview of force majeure legal doctrine

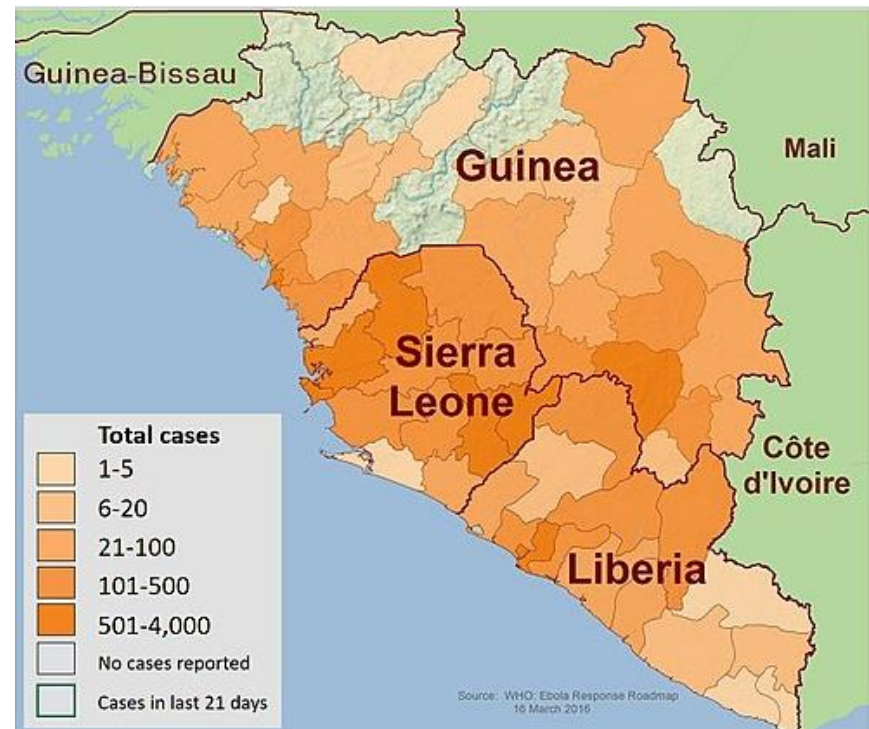
- To suspend obligations, performance must usually be **impossible** – not just more onerous or difficult
- **To assess whether COVID-19 is a force majeure event:**
 1. Find the law applicable to your contract and whether it has a force majeure clause
 2. See how the force majeure clause is defined
 3. Identify the effect of the event – impossible or just difficult?



Tool 1 – The Force Majeure Clause

2014 Ebola outbreak case study

- Impacted several mining companies in West Africa
- Provides a relevant case study for process

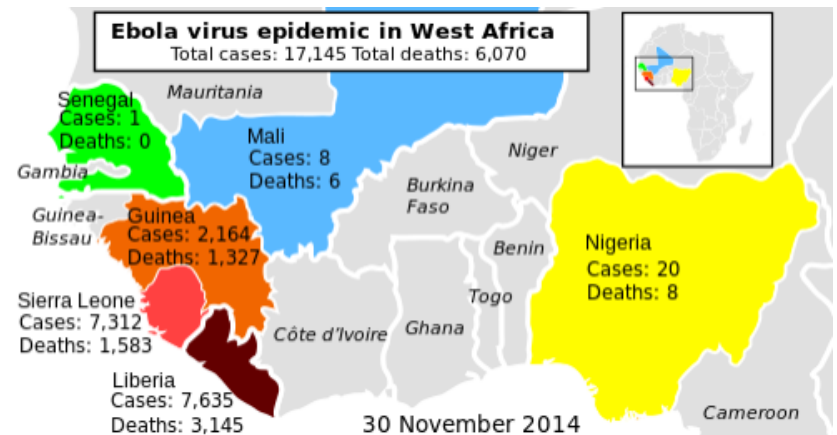


Ebola outbreak, December 2014

Tool 1 – The Force Majeure Clause

2014 Ebola outbreak case study

- Relevant FM clause required the force majeure event to be:
 - Unforeseeable
 - Insurmountable
 - Beyond the control of the miner
 - Prevents the party from fulfilling one or more of its obligations under the relevant agreement



Tool 1 – The Force Majeure Clause

2014 Ebola outbreak case study

- Unforeseeable?
 - Analysis typically done at the date of contract execution
- Beyond the control of the party relying on FM clause to excuse performance?
 - In the case of a pandemic, element fulfilled **automatically**

Tool 1 – The Force Majeure Clause

2014 Ebola outbreak case study

- Insurmountable?
- Coextensive with analysis of whether miner is prevented from fulfilling obligations under the relevant contract.
 - Requires obligation by obligation analysis of relevant contract/convention
 - In this case, convention was for developing resource
 - Had to analyse critical pathway activities necessary to meeting contractual target dates so as to argue that Ebola excused meeting target dates
 - Example: Could infrastructure bankable feasibility study be completed where Ebola had created “no go” red zones?
 - Not if marine environmental or botanical studies cannot be carried out

Tool 1 – The Force Majeure Clause

2014 Ebola outbreak case study

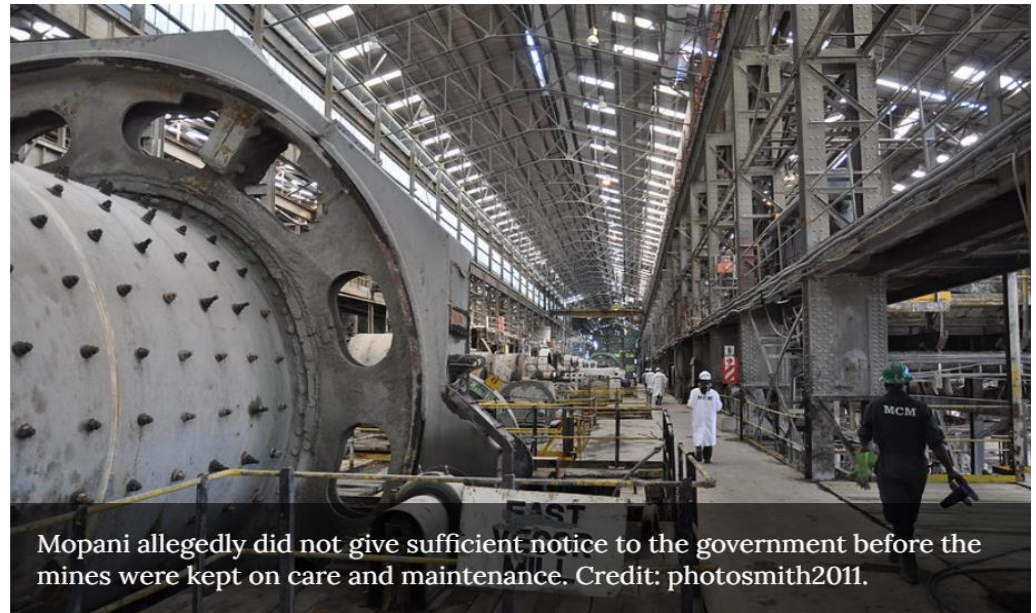
- Other considerations and key takeaways:
 - Would the party declaring FM not have been able to meet its obligations irrespective of Ebola outbreak?
 - Have similarly situated companies avoided declaring FM?
 - What have you said in correspondence?
 - Can you establish the necessary factual predicates for declaring FM?

Tool 2 – Claims Against the State

- General rule is that claims against States for measures responding to COVID-19 will fail.
- States have broad latitude in dealing with crises.
- There are exceptions:
 - Arbitrary conduct undertaken with no public consultation/lack of transparency
 - States can't baldly take advantage of COVID-19 crisis.
- Consultations with State more effective route.

Recent reports regarding Glencore's subsidiary Mopani in Zambia

- Announcement in early April that it was transitioning to care and maintenance and that *“In addition to the impacts of a rapid decline in the copper price, Mopani’s situation has been further impacted by the critical disruptions to international mobility, transportation and supply chains arising from COVID-19.”*
- Reportedly declared force majeure
- Zambian State authorities objected



Mopani allegedly did not give sufficient notice to the government before the mines were kept on care and maintenance. Credit: photosmith2011.

Tool 3 – Leverage with Offtake Agreements

- Offtake agreements typically contain detailed force-majeure clauses
- Stick to the process:
 - Notice periods
 - Required notification details
 - Explain how Covid-19 affects inability to perform
- Document impact of Covid-19
- No blanket notices/form letters
- What to do when receiving broad notices

Tool 4 – Leverage with Contractors

Potential problems with contractors due to COVID-19

Loss of access to the mine if mine is shut down

Delays due to social distancing

Lack of materials or increase of prices of materials

- Tempting opportunity for contractors to conflate COVID-19 impacts with pre-existing delays and additional costs

Tool 4 – Leverage with Contractors

3 practical steps to protect your rights on COVID-19 fallout:

1. Get a detailed picture of what activities are actually affected
2. Create a paper-trail – detailed records of the works and COVID-19 impacts
 - Government measures
 - Internal assessments and decisions
 - Which activities are suspended and when, status of works
 - Oral discussions with contractors
3. Mitigate and anticipate COVID-19 impacts
 - Engage with contractors
 - Identify current and future impacts

Conclusion

- Planning and preparation are key
- Avoid unfounded assumptions
- Take steps to protect your investment