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MONGOLIA IS A YOUNG DEMOCRACY.

THE BODY OF LAW IS IMPROVING ALL THE TIME

Christopher Melville was formerly a managing partner at Hogan Lovell's Mongolia office before founding the new legal services firm M&E. Based in Mongolia since 2012, he has advised a number of clients, including corporate businesses, international financial institutions, and the Mongolian government.

Defacto: Good evening. Let's get right to it. Please tell us about Hogan Lovells, and why it has closed its office here in Mongolia.

CM: I have been working in Mongolia with Hogan Lovells for 5-6 years now. As you are aware, Hogan Lovells is one of the top-ten law firms worldwide, with over 2,500 lawyers operating from 46 offices. The way the office was set up in Mongolia was, let me say, rather opportunistic, in the sense that it's not the typical place that Hogan Lovells might look to open an office in the first place. There is a tendency and a strategy to focus on key financial markets. At the end of the day, I think it was a strategic decision to close the office. The firm had a perception that the Mongolian economy had not developed in the way that was anticipated. At the time of those discussions with Hogan Lovells, it was always my intention to remain here, because I think there is a lot of potential in the economy. And so I effectively pushed them towards allowing me, together with my partner, Erdenedalai, to buy out the current practice.

Defacto: For how long have you been practicing with Mr. Erdenedalai?

CM: He has been with us at Hogan Lovells for five years. He was the Mongolian partner at Hogan Lovells.

Defacto: I noticed that Hogan Lovells was working with mostly Mongolian lawyers on its staff, as partners, in the country.

CM: Yes, that's right. The concept was to bring international quality standards of legal advice and service to clients, and obviously advising on Mongolian law, as well. So, effectively, looking at assisting foreign investors to come into the country. At the same time, though, we did do a lot of work for the Mongolian government and for a number of Mongolian clients.

Defacto: Which means that you will be doing essentially the same things that Hogan Lovells was doing: providing services to businesses here. Let's go back to your point that Hogan Lovells found that the Mongolian economy was not going the way they were expecting. What are your thoughts about why?

CM: I think Hogan Lovells platform was international and therefore had quite a high cost base from the beginning because we paid Mongolian lawyers at international rates,

which was significantly higher than the rest of the Mongolian market. If the economy is not going in the direction that you want—if there's not significant amounts of foreign investment—then it's quite difficult to sustain the business on that basis. So that was certainly a factor. Although we did some very good work.

My philosophy for the *new firm M&E* is to operate from a lower cost base. I also think the economy has turned around, or at least showing signs of doing so. Therefore, it seems to me good timing and a good opportunity to take things forward with a smaller and less expensive platform.

Defacto: What were the main fields of law practiced in Mongolia?

CM: Generally speaking, we have been providing corporate support for foreign investors and/or foreign-invested companies within Mongolia, which I think remains the main target client and base. We've also done a number of financing transactions. For example, bilateral financings by international financial institutions, such as the EBRD and IFC, or commercial banks. Also, we've been quite active in international arbitration where that involves Mongolian parties, providing local Mongolian law support. And then infrastructure, which is a critical area for the development of the Mongolian economy.

Defacto: What kinds of big infrastructure projects have you been doing, for example?

CM: For a number of years, we were advising on the *Egiin Gol hydropower project*. We also had a role on the Tavan Tolgoi power plant. And then, more recently, advising on a number of solar power projects.

Defacto: Why are law firms necessary for these big transactions or infrastructure projects? And where do you think Mongolian law firms can improve, in terms of better services.

CM: On that first question, I used to work in Moscow in the late 1990s, which were very interesting times in that market. And there was a tendency for transactions to be done either very quickly or not properly documented or, as we say in the UK, "done on the back of a cigarette packet". Over time, I did work very closely with Russian clients, and gradually things became more sophisticated. Because, in essence, if you don't properly document and understand what you're doing at the

beginning of a transaction or project process then inevitably that only leads to difficulties down the line.

One of the things that I do encounter in Mongolia is that Mongolian clients are not really used to cross-border international transactions. So frequently it's the case where no lawyers are involved at all. And when it comes to loan transaction, for example, there's a tendency just to sign documentation that's put in front of you—to make life easier and to take the money—without necessarily understanding all the nuances and details of the transaction. You've got sophisticated international institutions on the one hand, and an inexperienced counterparty on the other. So one of the challenges in this market is to make sure that both parties understand each other. That is also the case when it comes to due diligence because people are not necessarily familiar with the due diligence process. And some foreign investors try to take advantage of that, but at the end of the day that's only going to result in a dispute.

Defacto: So at which level of the negotiations do you need to involve lawyers?

CM: Well, in part that's a question of cost for the client. They can involve us right at the beginning of the process. For example, when you do the initial term sheet. But ordinarily, we get involved when it comes to documentation, which can be very significant. For example, the legal documentation behind the Tavan Tolgoi power plant extends to over one thousand pages.

Defacto: And those are required by law to be published in two languages: Mongolian and English. You do the initial work in English?

CM: Generally speaking, that's right.

Defacto: Are fees based on the size of the project, or on hours worked?

CM: For Mongolian clients, the retainer system of fees is quite common here, so paying a fixed amount in fees per month. That requires close monitoring to make sure the law firm and the client are satisfied with the arrangement, and that one is not abusing the other. For example, asking for too much work to be done for that amount of money or not instructing the lawyers to do anything, and then the lawyers are getting money for nothing. It's always a balance.

Defacto: Regarding issues of litigation and arbitration, several times the Mongolian government has been called to London arbitration. Some they won; some they lost. You've been involved in one such arbitration, specifically with Khan Investments, which was the case of the Mongolian government unilaterally taking over the licenses. Their company sued for \$326 million, but the government settled for only \$70 million. How was the final number so much lower?

CM: It's clearly the case of the investor who feels that they

are wronged will look to absolutely maximize the amount of damages that they are seeking. And at the end of the day, the critical question was about the value of the licenses. A lot of the major arguments during that arbitration were around what the valuation should be, what the valuation mechanism should be. The arbitration award effectively ended up around \$100 million, plus interest. And then the government did a good job, I believe, of negotiating the \$100 million down to a settlement of \$70 million.

Defacto: Such arbitration cases are happening in Hong Kong or London, for example. Why couldn't these companies arbitrate in Mongolian courts?

CM: I think the real issue, when we talk about foreign arbitration, is the unpredictability of the Mongolian courts: judgments, experience of commercial matters, etc. That is really what drives foreign investors, certainly on larger projects, to look for neutral jurisdiction.

In our experience of situations where clients had cases before the Mongolian courts was that you never really know the outcome. Even when you think you have strong argument, there's a certain randomness to things. While I personally think the body of laws in Mongolia are improving and fairly solid, at times it can be vague, and the courts are not bound by precedent. If a court has made a ruling on a similar case previously, then future court decisions would have to take that into account.

Mongolia is a young democracy. The body of law is improving all the time. But certain laws clearly need to be updated, for example insolvency law, or bankruptcy law, hasn't been updated in over twenty years. We live in a very different environment than the one in 1997. Bankruptcy is quite important for some of the new types of transactions that foreign investors are looking at at the moment. We're seeing quite a lot of interest in derivatives and repurchase transactions. In that context, bankruptcy law is very critical for correct implementation of these types of transactions. So that's another area where improving that type of legislation would potentially increase access to finance for Mongolian banks and companies.

But I think another factor would be the newness of the market economy which means that people are still coming to terms, and trying to understand, commercial and corporate transactions.

Defacto: Chris, you're quite knowledgeable, and you've lived here for five years now. What do you think is the number one thing we need to do to improve our legal procedures?

CM: I would like to see a bit more public consultation because I think it's still the case that sometimes laws are rushed through quickly. I know this is one of the topics that you talk about often: more civil society involvement. But on the other hand you also have the *US-Mongolia agreement on transparency* which needs to be implemented.

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This interview has been edited for space and clarity


Full interview available here:

<http://jargaldefacto.com/article/kristofer-melwill-christopher-melville>

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