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Case Comments

Complicity in Forgery and Investor Due Diligence over Local Partners

Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case Nos ARB/12/14 and ARB/12/40, Award, 6 December 2016 (Gabrielle Kaufmann-Kohler, Michael Hwang, Albert Jan van den Berg)

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Foreign investors embroiled in large-scale fraudulent schemes make for tasty headlines and sensationalized tales. *Churchill* is no different. The investor-State dispute involved a corporation investing in a large-scale Indonesian coal mining project, the East Kutai Coal Project (EKCP) in the Regency of East Kutai on the island of Kalimantan. The EKCP controls the seventh largest coal deposit in the world and the second largest in Indonesia.[1] Vying for resource licenses is commonplace and teaming up with a connected local partner can provide

* The author assisted Michael Hwang, SC on this case briefly in the early stages. The author attended the first procedural conference call via video conference and is mentioned in Procedural Order No 1 as an assistant to Michael Hwang. The author ceased his employment with Mr Hwang in December 2012. The views expressed herein are those of the author.

1 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case Nos ARB/12/14 and ARB/12/40, Decisions on Jurisdiction (24 February 2014) para 7.

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the right edge to secure the deal. Where it goes south is when the foreign investor's local partner deviates from legitimate business activities into fraudulent conduct, including forging signatures of public officials. The two key issues discussed in *Churchill* are (1) the extent to which an investor can be expected to exercise diligence over its local partner and; (2) a host State's possible complicity in a fraud. Unfortunately, the resulting award has left more questions than it has provided answers.

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Churchill Mining PLC (Churchill), a publicly listed company in England and Wales, and its wholly-owned subsidiary incorporated in Australia, Planet Mining Pty Ltd (Planet) (collectively the Claimants), commenced arbitration proceedings before the International Centre for Settlement of Investment Disputes (ICSID) against the Republic of Indonesia under the United Kingdom-Indonesia bilateral investment treaty (BIT) and the Australia-Indonesia BIT, respectively. The facts of both cases are essentially the same.[2] The Parties agreed that the two cases would be heard on a consolidated basis. After ruling that the Tribunal had jurisdiction, the case never proceeded to the merits as the Tribunal found the Claimants' claims inadmissible after it came to light that critical licenses and related documents were unauthentic and unauthorized (para 557(2)–(3)).

In 2006, the Claimants became involved in the EKCP through a local company, the Ridlatama Group (Ridlatama), which spearheaded the licensing process in Indonesia.[3] Three licenses were required for coal exploration and mining in Indonesia: a Survey License permitting various mapping and sampling activities; an Exploration License permitting exploration activities, including drilling; and an Exploitation License permitting the holder to move into the mining site for development and production for 30 years.[4]

By March 2009, the Claimants obtained all of the above licenses. The Survey and Exploration Licenses bore the signature of the then-Regent of East Kutai, Mr. Awang Faroek Ishak, who later became Governor of East Kutai. The Exploitation Licenses, however, bore the signature of Mr. Ishan Noor, who at the time was the new Regent and was previously Deputy to Mr. Ishak. In May

2 ibid para 48.

3 ibid para 15.

4 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos ARB/12/14 and ARB/12/40, Annulment Application (31 March 2017) para 6.