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Streaming Agreements

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This chapter discusses the relevance that streaming agreements have gained in recent years as a financing alternative for mining projects regardless of their stage of development (greenfield, current operations, future expansions and even business rescue), as opposed to traditional funding mechanisms such as equity and debt financing.

It addresses how these agreements are usually structured and the benefits, opportunities, advantages or risks they entail for the streaming company or investor, and the mining company.

Background

During the past decade, a persistent volatility in commodity prices, rising production costs and the risk-averse nature of formal financing institutions, have caused mining companies to encounter certain difficulties and higher costs when searching for financing through traditional equity and debt funding, leading them to seek alternative mechanisms beyond the formal finance

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market and customary project finance structures. Streaming agreements have become one such alternative, giving place to a whole new industry that has gained a relevant role in the global market in terms of players, number of transactions, volume of minerals and financial values involved in them.

In 2004, the shareholders of Wheaton River Minerals Ltd realised that the company was not receiving the same value for its by-product silver production as primary producers, so they incorporated Silver Wheaton Corp as an independent company to maximise revenues from the by-product[2] by means of a business model that derived in part from royalty agreements, which then were the primary object of complex transactions in the mining industry.

In general terms, royalty agreements entail an up-front payment or contribution from the royalty holder – normally, the holder of an interest in a mining property or a mining company – to a mining company or operator, in exchange for a long-term right to receive a fixed percentage of the proceeds from the sale of specific minerals produced from the mining property in question, after certain allowable deductions.

Conversely, streaming agreements are essentially metal purchase and sale agreements, in which the streaming company (the Buyer) pays in advance the purchase price to the mining company (the Operator), either as an up-front payment or in a series of instalments, in exchange for the right to acquire a specified amount or percentage of the future production of a specified refined metal for the long term (more than 20 years) or even during the life of the mine.[3]

2 Kari MacKay and Mark T Bennett, 'Under the Rocks Are the Words: How a Metal Purchase Agreement Revolutionized Alternative Financing and Launched the New Majors – A Look Back at the First Decade of Metal Streaming Transactions', *Proceedings of 60th Annual Rocky Mountain Mineral Law Institute* (2014), chapter 16 (MacKay and Bennett).

3 Alan H Monk, 'Understanding Streaming Agreements and Royalty Agreements: Alternatives to Traditional Financing', *Rocky Mountain Mineral Law Foundation Journal*, Vol. 51, No. 1, 2014 at p. 1.

Although initially streaming agreements focused on precious metals (gold and silver, primarily), recent developments in the industry have led to an expansion to base metals (copper and lithium, for instance), rare metals and coal.[4]

Among other features, streaming agreements allow for enough flexibility to accommodate the interests of both parties so that risks are more or less equally allocated, unlike other types of agreements and financing mechanisms. In addition, as explained below, streaming agreements are non-participatory in the mining operation and non-dilutive to the Operator's shareholders, unlike equity financing; therefore, they are an attractive source of funding, particularly for exploration and junior mining companies. However, medium-sized and major companies have also entered into these types of agreements to diversify their investment and credit portfolios.

Streaming agreements are relatively new to the mining industry, which means there is no standard form or model; they can be tailored to each transaction to account for each party's interests and expectations. They have certain features, however, that distinguish them from other agreements (eg, royalties and offtakes), such as the form of delivery of the funds and the object of the agreement, both of which are addressed in the following paragraphs. Other provisions that are relatively common to bilateral agreements relating to financing, such as confidentiality, dispute resolution mechanisms and governing law, are also addressed later in the chapter.

Purchase price, consideration and deposit

In streaming agreements, the consideration to be paid or purchase price for the streamed metal is paid in advance by the Buyer; therefore, in practice, this advance payment is treated as a deposit, which can be structured as a full upfront payment or as a series of instalments that depend upon the predetermined sequential milestones being reached, or a combination of both. Depending on the stage of development of the mining project, these milestones

4 Andrew Osterland, 'Mine Streams Go Mainstream', *Global Finance Magazine*, March 2019, www.gfmag.com/magazine/march-2019/mine-streams-go-mainstream (last accessed 8 September 2023).

can relate to the completion of pre-feasibility or feasibility studies, obtaining operation permits and licences, the beginning or completion of construction, and commencement of commercial operations.

Usually, the Operator will not be compelled to allocate the deposit to cover specific costs but will use it as is necessary. Accordingly, mining companies have resorted to these types of agreements for construction work, expansion of current operations or to obtain funds for the repayment of outstanding debt with formal lenders.

In addition to the deposit, the Buyer will be required to pay a fixed price for the streamed metal, which is usually set below the market price (as quoted, for instance, by the London Bullion Market Association or other commercial exchange, as agreed by the parties), but in an amount that is sufficient to cover the operation costs of the Operator. If the fixed price is lower than the market price at the time of payment, the difference is credited against the deposit until it is reduced to zero. From then onwards, the Buyer will be required to pay the Operator the lesser of the fixed price or the market price; although in more complex transactions, the parties could also include provisions regarding inflation adjustments to the fixed price.

Under certain circumstances, such as non-compliance with production targets, insolvency or other events of default, the Operator will be required to repay the uncredited amount of the deposit back to the Buyer. If a repayment obligation is not structured properly, the streaming agreement may be qualified as a non-traditional debt instrument for credit rating purposes. In this regard, the relevant rating entity may take into account, for instance, whether the repayment of the deposit includes payment of interest accrued on the uncredited amount of the deposit, or whether the securities granted by the Operator in favour of the Buyer have priority over those granted in favour of other lenders and creditors.[5]

5 Nicole Mordant, 'DEALTALK-Big miners may balk on streaming as S&P changes tack', Reuters, October 2013, https://www.reuters.com/article/mining-streaming/dealtalk-big-miners-may-balk- on-streaming-as-sp-changes-tack-idUSL1N0I529X20131024 (last accessed on 8 September 2023).

Streamed metal

As has been explained, the idea of streaming agreements resulted from the concept that mining companies were not receiving enough value – or any value at all – for non-core products. Therefore, in virtually all these agreements, the streamed metal is a by-product obtained from an Operator's base metal mining project (ie, gold or silver obtained from copper processing). Aside from adding value to an otherwise non-valued or undervalued asset, streaming agreements over by-products allow the Operator to combine these transactions with other types of financing for their primary metal exploitation without affecting their borrowing capacity.

The Operator's obligation to sell and deliver streamed metal may be fulfilled either in kind – that is, by delivering actual concentrates of the streamed metal to the Buyer – or by way of credits to be purchased by the Operator on metals markets and transferred to the Buyer's metal account. Conversely, in offtake agreements the Operator's obligation to sell and deliver metal is only and exclusively fulfilled in kind.[6] Naturally, the payment option chosen will depend on whether the Buyer is a manufacturer interested in acquiring actual concentrates or a metals trader. From the Operator's side, however, it might be preferable to agree on a credit-based payment system, so that the Operator can sell the concentrates of streamed metal to a third party (an offtaker, for instance).

If the parties agree on an obligation for payment in kind, they will normally also agree on whether the streamed metal can be obtained from specific or combined mining projects of the Operator, provided, however, that in the latter case the minimum referential qualities and quantities are met. Commingling may be also tolerated by the Buyer, to the extent that the Operator adopts all necessary measures to ensure traceability on amount, minimum quality and grade of the streamed metal.

6 Rachel Perks, 'I loan, you mine: Metal streaming and off-take agreements as solutions to undercapitalization facing small-scale miners?' *The Extractive Industries and Society*, Vol. 3, 2016 at p. 813.

Representations and warranties

In streaming agreements, both parties grant the usual representations and warranties of any bilateral agreement in relation to (1) their validity and good standing under their respective jurisdictions of incorporation, (2) their legal capacity and necessary prior corporate approvals to enter into the agreement and to be bound by its terms, and (3) the absence of conflict between the rights and obligations of each party under the agreement and the pre-existing agreements entered into with third parties, the by-laws of each company and the applicable laws.

Additionally, it is especially relevant that the Operator represents and warrants to the Buyer the rightful and exclusive title to the streamed metal, the lack of encumbrances and other rights in favour of third parties, and the legal ability to exploit, produce and sell the streamed metal with preferential and exclusive rights. This includes complying with all the relevant environmental, health and safety, and other applicable regulations, and having all the necessary legal permits to exploit and produce the streamed metal for the duration of the agreement, which in turn includes the absence of judicial conflicts with the surrounding communities (known as social licence to operate a mining project).

Notwithstanding the foregoing, before entering into a streaming agreement, the Buyer will normally conduct thorough due diligence on the Operator's core assets and permits to confirm its legal ability to perform its obligations under the agreement and, ultimately, deliver the streamed metal. The material findings thus derived will determine the scope of the representations and warranties that the Operator will be required to provide in the agreement, to the extent that, for instance, there are pre-existing rights over the mining property or the streamed metal, or both, in favour of third parties, or that the mining concessions from which the streamed metal will be exploited are affected with grounds for termination or annulment under the applicable law, or have definite duration and, therefore, need to be renewed for as long as the agreement is in force. Even though these matters may seem standard and straightforward, they are of the utmost importance as, generally, the accuracy and effectiveness of these representations and warranties are conditions precedent to the payment of the purchase price (either by up-front payment or by means of consecutive instalments), and any inaccuracy or ineffectiveness may constitute default. Moreover, even though the Buyer has a non-participating interest in the mining project, it is a kind of de facto partner to the extent that it receives payment (either in cash or concentrates) upon actual production of the relevant mining project, generally without additional securities from the Operator's shareholders or controllers.

Securities

As explained above, streaming agreements have increasingly become a mechanism to raise capital as an alternative to debt and equity funding, particularly for exploration and junior companies with limited budgets that prevent them from entering into loan agreements with traditional financial institutions – which normally involve providing full packages of securities that traditional project finance customarily requires. Streaming agreements tend to include less strict securities requirements, particularly in the case of producing mines.[7] Thus, for instance, a comfort letter by a parent company could suffice. However, in practice, under a streaming agreement, the Operator will also be required to provide basic performance securities to the Buyer, at least with regard to obligations relating to delivery of the metal and repayment of the deposit.

In general terms, under a Civil Code-based legal system, unless otherwise agreed by the parties, non-compliance by the Operator would entitle the Buyer to enforce performance of the outstanding obligations or request early termination of the agreement by means of a judicial claim, and to request compensatory damages owing to the lack of, or delayed, performance. If the Buyer is ultimately awarded damages and the Operator fails to pay them upon formal judicial request, the Operator's assets are seized and sold at public auction, so ultimately the Buyer is paid from the sale's proceeds.

In terms of securities, performance of the Operator is normally secured by (1) a mortgage granted on the project's mining concessions from where the streamed metal is or will be produced (and even over future mining concessions

7 Robert Mason, 'Four trends driving mine streaming this year: The trend toward streaming to finance projects', *Canadian Mining Journal*, October 2018, https://www.canadianminingjournal.com/features/four-trends-driving-mine-streaming-this-year/ (last accessed on 8 September 2023).

that the Operator acquires for that project), a mortgage granted over the mining facilities relating to the project, or (3) by pledges over the streamed metal and movable assets of the Operator, or any selection or combination of the foregoing. For further coverage, the Buyer may even require the Operator's shareholders or parent company to provide additional securities, such as joint and several liability and pledges over its shares in the Operator – this will depend on the volume of the transaction and the level of exposure that the Buyer is willing to accept.

In any case, regardless of the governing laws of the streaming agreement, securities over assets located in a specific country must usually be granted following the formalities imposed in that country and, generally, subject to the local law. For example, in Chile, as in other Civil Code-based jurisdictions, securities are granted by means of a public deed executed in Chile before a notary public, as both the mortgage and the pledges need to be registered with specific entities to be valid or effective regarding third parties (namely, the mortgages and encumbrances registry of the relevant custodian of mines, the Chilean Pledge Without Conveyance Registry or the Civil Registry and Identification Service).

To enforce the securities, the Buyer will need to file for foreclosure of mortgages and pledges. Usually, in Civil Code-based jurisdictions such as Chile, creditors do not gain ownership of the secured assets immediately upon execution of the securities. In general terms, securities only grant creditors the right to sell the securities at public auction by means of a realisation process, and receive the proceeds from the auction up to the amount equivalent to the secured obligations. Of course, the Buyer will be entitled to bid at the public auction and, if its bid is the highest, to acquire the secured assets for an amount to be credited against the outstanding debt. Additionally, if no interested parties participate in the auction, the creditor will be immediately entitled to acquire ownership of the secured assets.

In addition to the mortgage and pledge over its assets, the Operator will also grant the Buyer a prohibition to sell or dispose of those assets without the Buyer's prior consent – which cannot be unreasonably withheld – unless the acquirer of the secured assets expressly assumes compliance with the secured obligations. This prohibition could be also registered for the purposes of publicity and enforceability, although a breach by the Operator would only entitle the Buyer to file a claim for damages against both the Operator and the third party that knowingly breached the prohibition to transfer.

Finally, in direct relation to the granting of securities in favour of the Buyer are the provisions relating to intercreditor agreements, regardless of whether the Operator has already secured its assets in favour of other lenders and creditors. As streaming agreements do not necessarily prevent the Operator from engaging in traditional debt funding, which would impose certain indebtedness restrictions, an Operator would still need to obtain additional funding for its core business through traditional project finance, particularly since the deposit paid by the Buyer can be allocated at the Operator's discretion. Accordingly, a streaming agreement would normally contain a commitment from the Buyer to subordinate the securities it has been granted to those granted in favour of banks or other financiers of the mining project. Naturally, if there are no funds to exploit and produce the primary metal, there will not be any production whatsoever of the streamed metal.

The purpose of these intercreditor agreements is essentially to establish priority of interests and rights in the event of default. Unlike streaming agreements, though, in which the parties' interests are more or less aligned, intercreditor agreements entail a much more complex negotiation as the Buyer will push for the Operator to remain in operation, whereas the financial institution will pursue the realisation of the securities.[8]

Covenants

Streaming agreements generally contain the following covenants.

Conduct of operations

Streaming agreements are non-participating interests, meaning that the Buyer does not get involved in the operation of the mining project where the streamed metal is produced, and the Operator is solely and exclusively responsible for deciding how to conduct its business, with the primary metal being the main

8 MacKay and Bennett.

focus and concern. However, to protect the Buyer's interests to some extent, the Operator will normally be required to conduct its business and operations pursuant to accepted mining practices, and to deploy its best commercial efforts to comply with agreement's terms.

The Operator, however, would be bound by reporting obligations with the Buyer with regard to types, tonnes and grades of ore mined, material damage that would require insurance claims, revocation or suspension of material permits, and other events that could qualify as a 'material adverse effect' under the agreement.

The Buyer, in turn, will be granted the right to access the Operator's books and records, and visiting rights for inspection on-site of the mining, processing and infrastructure operations, all with prior notice and without affecting the Operator's normal course of business.

Preservation of corporate existence

Both parties are required to do all things necessary and advisable to maintain their corporate existence. For this purpose, the parties may agree on certain restrictions to internal reorganisation processes, for instance, provided that after the reorganisation, the relevant core assets of the mining project are owned by an affiliate.

Commingling

The Operator is usually allowed to process and commingle the streamed metal with minerals obtained from other mining projects or properties, to the extent that the Operator is able to effectively adopt practices and procedures for weighing, sampling and assaying, and determining recovery factors.

Offtake agreements

Depending on the payment structure of the purchase price or consideration, that is, if the Operator's obligation is to deliver metal credits into a metals account appointed by the Buyer, the parties may agree that the Operator is entitled to enter into offtake agreements with third parties, provided that those agreements are negotiated on commercially reasonable arm's-length terms, and that the Operator takes all the commercially reasonable steps to enforce its rights and remedies under the offtake agreement.

Insurance

The Operator will be required to take out insurance on its core assets and operations against casualties and contingencies, and in amounts as is customary in the mining industry for similar operations, and with respect to shipments of the streamed metal, if applicable.

Buy-back and other rights

Although streaming agreements allow mining companies to add value to non-core products, they also limit the Operator's exposure to the streamed metal.[9] Taking into account that streaming agreements have a long-term duration (at least 20 to 25 years), if not for the life of the mine, the parties may include the Operator's right to buy back part of the streamed metal within a limited period, following commencement of the metal's deliveries.

Likewise, the Buyer can be granted a right of first refusal, to be exercised upon the Operator receiving an offer from a third party to acquire available amounts of streamed metal, and a right of first offer regarding additional amounts of streamed metal that the Operator wishes to sell, both of which allow the Buyer to increase the amount of streamed metal deliveries without substantial variations to the already agreed fixed price. The Operator, in turn, will be reluctant to grant a right of first offer considering the long-term duration of the agreement and the unforeseeable variations of the market price and the production costs.

9 *Mining Journal*, 'Global Mining Finance Guide' 2014, p. 53, https://app.ingemmet.gob.pe/biblioteca/pdf/665.pdf (last accessed on 8 September 2023).

Dispute resolution

Under streaming agreements, disputes regarding the amount of streamed metal delivered to the Buyer or the calculation of the uncredited balance of the deposit are typically resolved amicably by the parties in the first instance, within a specific period established for that purpose. If no agreement is reached within that period, the matter will be submitted to an auditor selected by the parties from a predetermined list of auditors contained in the agreement, or otherwise by appointing an auditor that has sufficient and reputable experience in the matter. Ultimately, objections to the auditor's report, or any other issue regarding the interpretation, validity, enforceability and termination of the streaming agreement, are commonly resolved by an arbitrator instead of ordinary courts, as the parties are normally from different jurisdictions. Determination of the rules of the arbitration depends entirely on the jurisdiction of the parties involved in the agreement and, most importantly, on the jurisdiction of the mining project and secured assets. The determination of the number of arbitrators relies not only on economic considerations, but also on the corporate policies of the mining companies that seek further impartiality, particularly when the arbitrator's decision is final and binding on the parties.

One of the most important matters to take into account when choosing the laws governing the agreement and arbitration over ordinary justice, is that the governing laws and the rules of arbitration are compatible with those of the jurisdiction in which the secured assets are located, so that there are no obstacles to local enforceability of the securities based on an arbitrator's judgment issued pursuant to a foreign law.

Tax matters

The taxes applicable to payments and deliveries of metal under streaming agreements depends on the tax laws corresponding to the parties' jurisdictions and, if they are different, on whether there are double-taxation treaties in force. In any case, streaming agreements normally provide that all deliveries of streamed metal or payments made by a party will be made without any deduction, withholding or charge because of taxes imposed by the relevant authorities.

In general terms, under Chilean law, a non-resident Buyer will not be subject to taxes for deliveries of metal, whereas the resident Operator will be subject to general income taxes on the consideration or purchase price. However, considering that the Operator may be required to repay the uncredited amount of the up-front payment under certain circumstances, an initial up-front payment may be structured as a security or as a payment subject to a condition so that the corresponding taxes are only accrued and paid once the streamed metal is delivered and actually credited against the received funds. Also, if the deposit repayment obligation bears interest, that interest is subject to withholding tax at 35 per cent of the amount paid.

Purchases of streamed metal by a local Buyer from a non-resident Operator are also subject to withholding tax at 35 per cent of the amount paid.

If both parties are residents, payments made under the streaming agreement are subject to general income taxes and value added tax at a rate of 19 per cent of the amount paid.

Consequently, one of the main concerns when negotiating and drafting streaming agreements is how to properly structure the initial payment and repayment obligation, so as to avoid tax authorities interpreting these agreements as debt instruments, or requiring payment of taxes beforehand, particularly owing to their long-term duration. For this purpose, the parties may agree that, following the execution of the agreement, the parties may implement adjustments to its structure to facilitate tax planning.

Confidentiality

Parties to streaming agreements usually agree to maintain confidentiality and not disclose the terms of an agreement, or any of the information received or reviewed by them in relation thereto, (1) except with prior approval of the disclosing party, (2) to auditors, legal counsel, lenders and, in general, anyone for whom the confidential information would be relevant, or (3) when the information has already been disclosed to the public other than by a breach of the confidentiality terms of the agreement, or is known by the parties prior to entering into the agreement, or has been obtained independently. They also agree to comply with the applicable laws or judicial order.

Change of control

Aside from restrictions to the disposition of shares or equity rights over the Operator that the Buyer may request as additional security from the Operator's shareholders or parent companies, streaming agreements typically contain restrictions on changing control of the parties.

Naturally, these restrictions are stricter on the Operator's side, as a change of control may entail a reorganisation process that would ultimately affect the decision to continue with the mining operations subject to the streaming agreement. Accordingly, change of control of the Operator would not be allowed unless the Operator agrees that its obligations under the streaming agreement will continue in full force and effect despite the change of control, or unless the Operator's obligations under the agreement are assumed, or at least guaranteed, by a third party in favour of the Buyer, in which case the Operator is released from its obligations.

Another restriction on change of control, applicable to both Buyer and Operator, requires prior consent from the counterparty, and that the person or persons acquiring control is not a 'restricted person', that is, a person included on government lists of prohibited parties or subject to trade restrictions, or both.

Advantages and disadvantages

Despite the current relevance and presence of streaming agreements in the mining industry, there are some downsides for parties involved in these transactions.[10] For instance, there may be negative effects on the Operator's cash expenditure as, once a streaming agreement is in place, the by-product credits cannot be deducted from operational expenses. Also, if an Operator agrees to sell a percentage of the production of a specified streamed metal, the Buyer will benefit from operation expansion, although the amount of the deposit and

10 ibid.

the fixed price will remain invariable and, therefore, there will not be any additional capital contributions from the Buyer. This price invariability may also be detrimental to the Operator if the purchase price of the streamed metal is set too low below the market price, without the possibility of adjusting the fixed price once the agreement is in place.

Also, some views have recently emerged[11] in relation to alleged misconceptions of the 'true' economics underlying these kinds of agreements. For instance, that the Operator's sale of minerals lower than at market price is effectively a form of dilution by decreasing shareholders' revenues, and that in a fixed price structure the Buyer benefits from monetary inflation at the expense of the Operator, which would be the case where inflation adjustment provisions are not included.

Conversely, there are advantages to entering into a streaming agreement, and the vast number of streaming agreements that have been entered into over the past few years, and most notably the sums of money involved in them, indicate that the advantages and benefits largely surpass the downsides. From the Operator's side, for instance, the deposit received as part of the purchase price can be freely allocated, and without diluting the shareholders' equity interest; the obligation to sell the streamed metal is subject to the implied condition that the metal is actually produced, without the Buyer's intervention in the business; and, more importantly, the agreement allows the Operator to monetise non-core products even before they are produced. Further, the agreement can be combined with other forms of financing without affecting the Operator's borrowing capacity, because in the majority of streaming agreements, the streamed metal is a by-product of the Operator's core business.

From the Buyer's perspective, a streaming agreement allows it to secure long-term deliveries of metal (whether in the form of actual concentrates or credits in metals accounts) below the market price, without assuming operational costs and risks.

11 https://www.mining.com/as-the-world-looks-to-secure-metal-supply-miners-must-beware-the-hidden-costs-of-streaming-agreements/ (last accessed 8 September 2023).

Though traditional debt and equity funding are still available for large mining companies with solid financial backgrounds, exploration and junior mining companies have had to seek alternative funding mechanisms.

Owing to their flexibility and the involvement of specialist non-traditional investors, streaming agreements are acquiring a primary role in the financing of mining projects, as they are accessible by any mining company regardless of their size and the stage of development of their projects. Consequently, streaming agreements and transactions are continuously evolving into more sophisticated non-traditional finance instruments, thus developing into a relevant trend in the global mining industry. Views as that referred to above present an opportunity and a challenge for rethinking, drafting and negotiating streaming agreements having regard to market and commodities volatility and allocating risks between the parties accordingly.

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