Practice Guides

Mining

Editor
Michael Bourassa

GETTING THE DEAL THROUGH

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GETTING THE DEAL THROUGH

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Streaming Agreements

Rafael Vergara and Maximiliano Urrutia[1]

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

It will address 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

Over the past decade, a persistent volatility of 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 outside of the formal finance 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 than primary producers were receiving, so they incorporated Silver Wheaton Corp as an independent company to maximise revenues from such by-product,[2] by means of a business model

1 Rafael Vergara is a partner and Maximiliano Urrutia is an associate at Carey.

2 Kari MacKay and Mark T Bennet, '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

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 upfront 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 affected with the royalty, 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 upfront payment or by a series of instalments, in exchange for the right to acquire a specified amount or percentage of the production of a specified refined metal, with long-term (over 20 years) or even life-of-mine duration.[3]

Among other features, streaming agreements allow for enough flexibility to accommodate both parties' interests 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, as opposed to equity financing; therefore, they constitute 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, however, certain features that distinguish them from other agreements – for example, royalties and off-takes – such as the form of delivery of the funds and the object of the agreement, both of which will be addressed immediately below. Other provisions, which are relatively common to bilateral agreements related to financing, such as confidentiality, dispute resolution mechanisms and governing law, will be addressed further below.

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, such advanced 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 accomplishment of predetermined sequential milestones, or a combination of both. Depending on the stage of development of the mining project, these milestones can refer 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.

Decade of Metal Streaming Transactions', Proceedings of 60th Annual Rocky Mountain Mineral Law Institute 16-1 (2014).

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).

Usually, the Operator will not be compelled to allocate the deposit to cover specific expenditures but will use it as appropriate. Accordingly, mining companies have resorted to these agreements for construction works, expansion of current operations and even 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 that is usually set below the market price for the streamed metal (as quoted, for instance, by the London Bullion Market Association or other commercial exchange, agreed on 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 such 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 over the uncredited amount of the deposit, or whether the securities granted by the Operator in favour of the Buyer have preference over those granted in favour of other lenders and creditors.[4]

Streamed metal

As explained above, 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 of 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. Naturally, the selection of one of these forms of payment 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 off-taker, for instance).

If the parties agree on an in kind payment obligation, they will normally also agree on whether the streamed metal can be obtained from specific or combined mining projects

4 https://www.reuters.com/article/mining-streaming/dealtalk-big-miners-may-balk-on-streaming-as-sp-changes-tack-idUSL1N0I529X20131024. Last reviewed on 11 September 2018.

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.

Representations and warranties

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

Additionally, in streaming agreements 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, as well as 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 above, before entering into a streaming agreement the Buyer will normally conduct thorough due diligence on the Operator's core assets and permits to confirm the Operator's legal ability to perform its obligations under the agreement and, ultimately, deliver the streamed metal. The material findings derived from such due diligence 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 upfront 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. However, in practice, under streaming agreements the Operator will also be required to provide basic performance securities to the Buyer, at least with regard to the metal's delivery obligation and the deposit's repayment obligation.

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

In terms of securities, performance of the Operator is normally secured by a mortgage granted over the project's mining concessions from where the streamed metal is or will be produced (and even over future mining concessions that the Operator acquires for that project); a mortgage granted over the mining facilities related to such project; or by pledges over the streamed metal and other movable assets of the Operator, or any selection or combination of the above. 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 their shares in the Operator. It will all 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 become valid (namely, the mortgages and encumbrances registry of the relevant custodian of mines, and the Registry of Pledges without Conveyance of 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 over the secured assets immediately upon execution of the securities. In general terms, securities only grant creditors the right to sell the securities in 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 in the public auction and, if such 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 over the secured assets.

In addition to the mortgage and pledge over the Operator's 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. Such prohibition could be also registered for publicity and enforceability purposes, 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 such prohibition to transfer.

Finally, in direct relation to the granting of securities in favour of the Buyer are the provisions related 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 they have 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 events 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 operations, whereas the financial institution will pursue the realisation of the securities.[5]

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 from 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 focus and concern. However, to protect the Buyer's interests to some extent, under streaming agreements 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, tons 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 visit rights to the site for the inspection of such mining, processing and

5 MacKay and Bennett, 2014.

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, the parties may agree that the Operator is entitled to enter into offtake agreements with third parties, provided that such 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 maintain insurance with respect to its core assets and operations against casualties and contingencies, and in amounts as is customary in the mining industry for similar operations, as well as 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.[6] Taking into account that streaming agreements have a long-term duration (over 20 or 25 years), if not life-of-mine, the parties may include the Operator's right to buy back part of the streamed metal within a limited period of time, 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, as well as 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 on 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.

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

6 *Mining Journal*, *Global Mining Finance Guide 2014*, p. 53. Available on https://www.mayerbrown.com/files/Publication/3e2dc5e3-878a-40a2-8b06-cb75f8d632ba/Presentation/PublicationAttachment/86b233d1-beb2-4f47-9b85-cd4793b90b92/global_mining_finance_guide_jan14.PDF. Last reviewed on 23 August 2018.

resolved amicably by the parties on a first instance, within a specific period established for that purpose. If no agreement is reached within such period, the matter will be submitted to an auditor appointed by the parties out of 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 the secured assets. The determination of the number of arbitrators relies not only on economic considerations, but also on corporate policies of the mining companies that seek further impartiality, particularly when the arbitrator's decision is final and binding upon 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 the local enforceability of the securities based on an arbitrator's judgement issued pursuant to a foreign law.

Tax matters

Applicable tax to payments and deliveries of metal under streaming agreements depends on tax laws of the parties' corresponding 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 levied with taxes for deliveries of metal, whereas the resident Operator will be levied with general income taxes upon reception of the consideration or purchase price. However, considering that the Operator may be required to repay the uncredited amount of the upfront payment under certain circumstances, such initial upfront 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's repayment obligation bears interests, such interests are subject to a withholding tax at a rate of 35 per cent of the amount paid.

Conversely, purchase of streamed metal by a local Buyer to a non-resident Operator is also subject to a withholding tax at a rate of 35 per cent of the amount paid.

Finally, if both parties are residents, payments made under the streaming agreement are subject to general income taxes as well as 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 taxation 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 the agreement as well as all information received or reviewed by them in relation thereto (i) except with prior approval of the disclosing party, (ii) to auditors, legal counsels, lenders and, in general, anyone for whom the confidential information would be relevant, or (iii) 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, such 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 the Buyer and the Operator, requires prior consent from the counterparty, and that the person or persons acquiring such control is not a 'restricted person', that is, a person included on governmental 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 those transactions.[7] For instance, there may be negative impacts on the cash costs of the Operator as, once a streaming agreement is in place, the by-product credits cannot be deducted from operation expenses. Also, if an Operator agrees to sell a percentage of the production of a specified streamed metal, the Buyer will benefit from operation expansions, although the amount of the deposit and 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

7 id.

too low from the market price, without the possibility of readjusting the fixed price once the agreement is in place.

Nonetheless, there are greater advantages in entering into streaming agreements. From the Operator's side, 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 such metal is actually produced, without the Buyer's intervention in the business; and, more importantly, they allow the Operator to monetise non-core products even before they are produced. Also, they can be perfectly combined with other forms of financing without affecting the Operator's borrowing capacity, because in the majority of these agreements the streamed metal is a by-product of the Operator's core business.

From the Buyer's perspective, streaming agreements allow them 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.

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 flexible nature and the appearance of specialised non-traditional investors, streaming agreements are acquiring a predominant role in the finance 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 and a relevant trend in the mining industry worldwide.

Appendix 1

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Rafael Vergara is partner at Carey and co-head of the firm's natural resources and environment group. His practice focuses on natural resources, mining, water rights, energy, environment, surface lands, project financing, and corporate and commercial law.

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Written from diverse jurisdictional viewpoints by leading industry practitioners, this Practice Guide – published by Getting the Deal Through – examines key themes topical to the international mining community.

Featuring detailed analysis and guidance on navigating critical issues facing commercial mining ventures worldwide, this Guide provides essential reading for lawyers, financiers, mining companies, advisory firms, consultants and contractors.

Subjects covered include project financing; commercial agreements; anti-corruption; battery minerals; glacier protection; community engagement; sanctions; and mining closure.

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