Practice Guides

MINING

Fifth Edition

Contributing Editor
Ciaran Boyle

LEXOLOGY
Getting the Deal Through

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Practice Guide

Fifth edition

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About the editor

Ciaran Boyle
First Quantum Minerals Ltd

Ciaran Boyle is lead in-house counsel for First Quantum Minerals Ltd, a TSX-listed multi-billion dollar mining company with operations and assets across five continents that is one of the world's top 10 copper producers.

Since joining First Quantum in 2017, Ciaran has been responsible for leading in-house functions in M&A, corporate finance, project finance, and high-yield bonds, joint-venture arrangements, exploration activities and dispute management, as well as advising in relation to corporate governance, compliance strategy and securities/disclosure obligations.

Notable transactions at First Quantum have included the raising of over US$10 billion across various financing instruments, and the completion of two major M&A deals. On the back of these transactions and other achievements at First Quantum, Ciaran was listed in *The Lawyer Magazine*'s Hot 100 for 2020.

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Introduction

Ciaran Boyle[1]

It is my pleasure to welcome you to the fifth edition of the *Practice Guide – Mining*, published by Lexology Getting the Deal Through, based in London, United Kingdom.

It is my privilege to continue to serve as the editor of this publication. I am grateful to all of our authors, those who have continued to contribute by updating chapters from previous editions, and to our first-time authors who have provided new chapters for this edition. The result is a broad and eclectic mix of topics from both thematic and jurisdictional perspectives, and a resource that is genuinely interesting, thought-provoking and of practical use to all involved in the mining industry. What follows is a summary of each of the chapters contained in this book.

1 Streaming Agreements

This chapter addresses the relevance that streaming agreements have gained as a financing alternative for mining projects, and discusses how these are structured, as well as the benefits and risks that may result for the streaming company or investor, and the mining company. The authors provide an overview and history of streaming arrangements, starting in 2004 when Wheaton River shareholders decided they were not getting value for the company's by-product silver production, and incorporated Silver Wheaton Corp to maximise revenues from this. Following a statement that there is no standard form to be used for each streaming transaction, the chapter then details how certain provisions are drafted and what distinguish them from other agreements (eg, royalties and offtakes). Provisions such as purchase price and deposit (paid in advance), streamed metal, representations and warranties, security packages (with emphasis on requirements in civil code countries), covenants, buy-back and other rights for the operator, dispute resolution (typically by arbitration), tax matters, and general matters such as confidentiality and change of control provisions, are described in detail.

1 Ciaran Boyle is lead in-house counsel for First Quantum Minerals Ltd.

2 Legacy Issues in M&A Transactions

This chapter has been updated for the fifth edition and has widened its scope to discuss joint venture arrangements in addition to mergers and acquisitions. Legacy liability (also known as successor liability) in M&A transactions differs greatly between civil law and common law countries. This chapter analyses issues from the civil law perspective, with a particular emphasis on the Mexican legal system.

The authors:

- provide an overview of the different structures (share or asset acquisition, merger or a combination) to carry out an M&A transaction and analyse the general implications of structures from a legacy liability standpoint;
- flag the areas that typically involve legacy liability issues in the mining sector (eg, environmental, real estate, labour and employment, social and community issues, taxes, and breaches of contractual obligations); and
- discuss some of the strategies and tools available to minimise legacy liability risks (eg, using a special purpose vehicle to purchase; the pre-acquisition due diligence review process; provisions of the purchase agreement; and insurance (which is not generally available in Mexico in relation to M&A liability)).

Although asset transactions provide less successor liability risk than share deals, it is noted that asset deals may be more difficult to achieve in Mexico because of transfer formalities applicable to certain assets, such as real estate and intellectual property. Share acquisitions are easier to achieve since the target company assets do not need to be listed and a detailed purchase price allocation of the acquired assets is not required.

3 Covid-19, Inflation and Mine Valuations

This chapter has been substantially updated for the fifth edition. In this chapter, the authors discuss common mine valuation concepts and how inflation impacts mine valuations generally, then apply those concepts to the specific issue of valuations of copper and gold projects with reference to case studies for both. In their review of both markets, the authors identify indications that the upcycle trends in the mining sector have likely increased the valuation of individual projects in the short term owing to increases in commodity prices that reflect spot demand. However, increased commodity prices have been matched by increased inflation, demand destruction, and the onset of a market down cycle. The chapter contains detailed analysis of mine valuation, commodity cycles and inflation and their inter-relationship. This is a must read for those with an involvement or interest in the copper and gold markets.

4 Tax Stability in the Mining Industry

This chapter analyses tax stability in Argentina and other jurisdictions in the region. Since the enactment of Mining Investments Law No. 24,196, in 2017, mining activity in Argentina has become one of the major industries in the export sector, attracting important investment and infrastructure projects to the country. The authors discuss some of the benefits of the Mining Investments Law, such as stability of the total tax burden for 30 years after the filing of a feasibility study, and special income tax deductions for amounts invested in prospecting, exploration, and other work intended to determine the technical and economic feasibility of mining projects. The authors provide an excellent summary of a court challenge by mining company Cerro

Vanguardia regarding an equalisation tax imposed in addition to corporate tax. The Supreme Court concluded that the application of the equalisation tax increased the total tax burden of the company and was therefore contrary to the stabilisation regime obtained by the taxpayer.

Finally, the chapter provides a comparison with the laws in Chile and Peru and concludes that the guarantee of tax stability is an essential tool to protect mining investments from regulatory changes that could occur during the life of a mining project. In Argentina, the tax stability guarantee is stipulated by law, whereas in Chile and Peru the investor must enter into an agreement with the state to benefit from it.

5 Challenges Faced by the Critical Mineral Industry in the Era of Energy Transition

This chapter is new to the fifth edition. The global energy transition will require significant change to the world's energy infrastructure, while at the same time transforming the economy and global supply chains. Energy transition technologies such as electric vehicle and renewable energy generation require significant quantities of critical minerals, therefore, the mining industry will have a vital role to play as demand for these minerals increases. This in turn could lead to an imbalance of supply and demand for critical minerals, creating the conditions for a growth in resource nationalism. This, combined with insufficient capital expenditure, will bring challenges regarding how to achieve the necessary production without compromising the sustainable goals of the energy transition. The authors discuss how higher demand for critical minerals increases the potential for resource nationalism, and provide a country by country review of key geographies. It is clear that the required investment to meet demand quickly and sustainably will only be made through a collaboration between governments and producers/investors.

6 Global Mining Resource Disclosure

This chapter provides an excellent overview of mineral resource and reserve disclosure standards, starting with the Poseidon scandal in Australia and the establishment of the Joint Ore Reserve Committee (JORC) in 1971. The JORC Code played an important part in the development of standard definitions for codes and guidelines, including the concept of the 'competent person'. Developments in Australia were followed by the Bre-X fiasco in Canada and the establishment of National Instrument 43 101 in 2000 (and the similar concept of the 'qualified person').

Current disclosure rules began to see some uniformity following the establishment in 1994 of the Committee for Mineral Reserves International Reporting Standards (CRIRSCO). It comprises organisations from around the world, with mining as its focus. Much of the current disclosure in the industry is presently derived from CRIRSCO standard definitions and has been adopted in Australasia, Brazil, Canada, Chile, Colombia, Europe, Indonesia, Kazakhstan, Mongolia, Russia, South Africa, Turkey and the United States.

The author concludes by stating that the world of mining disclosure is gradually converging because of the efforts of CRIRSCO and the national mining associations, and the application of regulators and stock exchanges throughout the world of similar disclosure standards. The chapter includes a summary of the provisions of Regulation S-K (subpart 1300) of the US Securities and Exchange Commission, which will use CRIRSCO-based disclosure standards and eventually replace the antiquated Industry Guide 7.

7 Management of Group-wide Environmental, Social and Governance Risk in a Mining Context

This is a new chapter for the fifth edition. The mining industry sits in a somewhat paradoxical position with respect to the transition to net zero. Like other extractive industries, it must address those elements of its practices that can inhibit the transition. However, in respect of 'green metals' such as copper, cobalt, lithium and nickel, the industry will play a critical role in the world's advancement to net zero and beyond. The authors discuss the increasing regulatory and stakeholder scrutiny and expectations in this area, particularly focusing on ESG litigation and parent company liability for ESG harms. There then comes a look at the development of the regulatory landscape and its future prospects and the likely impact of reporting regimes. Finally, and perhaps of most benefit to the reader, there is an analysis of practical tips for companies to consider as they look to manage their activity and risk in this area.

8 Community Engagement and Indigenous Peoples

This chapter has been updated for the fifth edition and provides a discussion of ISO 26000 – the international standard developed to help organisations effectively assess and address those social responsibilities that are relevant and significant to their mission and vision, operations and processes, customers, employees, communities and other stakeholders, and environmental impact. Community engagement is a particular type of dialogue that falls within the social responsibility of an organisation, and the authors discuss the particular requirements of ISO 26000 in this regard.

Reference is made to the fact that in some countries that are signatories of ILO 169 there have also been discussions as to whether the granting of mining licences should be subject to prior consultation. The key issue here is whether the granting of a mining licence is per se an administrative measure that may affect indigenous peoples directly, in contrast with environmental licences that authorise concrete exploration and exploitation projects.

The principles of social responsibility with respect to community engagement to be followed by an organisation include accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour and respect for human rights. Commercial mining ventures face an increasingly complex and challenging framework of international regulations that touch upon different aspects of their activities. This year's chapter also addresses the increasing prominence of consultation. The authors also focus on international instruments that 'provide general norms and principles of behaviour that are not specific to the mining sector but fundamental to comprehend the responsibility of an organisation in the context of community engagement, and regulate general or specific aspects of community engagement, whether they are specific to the mining sector or generic to all commercial ventures' (such as the United Nations' principles and others).

9 Political Instability in Africa: a Complex Challenge for the Mining Industry

This chapter is new to the fifth edition. Unfortunately, political instability in Africa continues to be a major factor for the mining industry on the continent. For existing operators, it remains a key risk that requires significant attention and for potential entrants to the market, a key consideration. Geopolitics are ranked second (up four ranks) in EY's Top 10 risks and opportunities for mining and metals in 2023, and according to the British Broadcasting Corporation's calculations, coups have been occurring at an average rate of two per year on the continent between 2000 and

2019. With multiple elections to come in the next few years the continuation of this instability would have ramifications well beyond Africa. This chapter discusses the varying circumstances across the continent in excellent detail, and goes on to explore how companies can protect their operations and mining investments as well maintain investor confidence.

10 Controversial International Mining Arbitrations and the Impact of 'Social Licence'

This chapter is new for the fifth edition, and focuses on the analysis of international mining arbitration in the context of the energy transition. The authors begin by pointing out that international energy analysts agree that the transition from traditional energy sources (eg, oil and gas, coal) to renewable energy sources will cause an explosion of demand for certain key mineral inputs. With this dramatic expected increase in mining for key mineral resources, industry experts also expect an increase in international mining disputes. Further, the necessity for mining investors to liaise with local government and communities makes the concept of a 'social licence to operate' – that is, the process in which a mining investor gains approval from the local community where the mining project will occur – a key issue raised in international mining arbitrations. The authors go on to consider the concept of a social licence to operate in some detail, and also consider the sources of the legal obligation to consult and engage with local populations. Finally, the authors offer practical assistance by identifying key lessons learned and trends observed in recent international arbitration concerning the issue of a social licence to operate.

11 Restrictions on Cross-border Transactions in Angola

In May 2020, the National Bank of Angola (BNA) approved a new foreign exchange regime applicable to the mining sector, which led to the repeal of Notice 2/2003. The new foreign exchange regime falls under the powers of the BNA, responsible for macro- and micro-financial regulation, and brings more clarity to cross-border transactions and the remittance of funds that have an impact on the decisions of foreign investors considering investing in Angola and the mining sector.

This chapter analyses the new regulation and its impact on cross-border transactions and the remittance of funds or dividends. The general exchange regime is briefly discussed, followed by an analysis of the specific regime applicable to mining.

12 A South African Perspective on Water Rights

This chapter has been updated for the fifth edition. Among the many critical factors that must be considered from an ESG perspective in mining, there are perhaps none more pre-eminent than water. This chapter provides a general insight in the concept of water rights and their regulation. The author conducts a deep dive into existing and prospective regulatory frameworks and organisations, and towards the end of the chapter provides some interesting and helpful insights into how these matters have played out in court. While the chapter is predominantly written from a South African perspective, it also references on recent global developments in jurisdictions such as Canada, Bolivia and New Zealand.

13 Argentina, Mining and Glacier Protection

This chapter provides a thorough analysis of the National Glacial Law approved by the Argentine National Congress in October 2010, which specifically regulates the minimum environmental protection standards for the preservation of glacial and periglacial zones. This law is not without controversy and continues to be subject to interpretation and disputes between mining companies and environmentalists.

The law created an inventory of glaciers, which provides for information necessary for their protection, control and monitoring, and sets out types of activities that are prohibited in a glacial environment, including 'mining and hydrocarbon exploration and exploitation'. All activities that are not prohibited are subject to an environmental impact assessment process. Some actions have been taken by environmentalists and anti-mining non-government organisations in an attempt to suspend mining operations, which are awaiting decisions by the National Supreme Court, and several mining companies have challenged the constitutionality of the law. Charges have even been brought against certain former government officials for failing to properly create the glacier inventory. The discussion on the law continues to be influenced by political interests, resulting in persons being unjustifiably indicted and legal uncertainty being maintained. The criminal cases continue and hearings remain pending, subject to their viability in the context of the covid-19 pandemic.

1

Streaming Agreements

Rafael Vergara and Maximiliano Urrutia[1]

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 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.

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1 Rafael Vergara is a partner and Maximiliano Urrutia is an associate at Carey. The information contained in this chapter was accurate as at November 2020.

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].

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 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 upfront 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]

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 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

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 p1).

4 Andrew Osterland, 'Mine Streams Go Mainstream' (*Global Finance Magazine*, March 2019), www.gfmag.com/magazine/march-2019/mine-streams-go-mainstream (last accessed 10 September 2020).

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]

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).

5 Nicole Mordant, 'DEALTALK-Big miners may balk on streaming as S&P changes tack' (Reuters, October 2013), www.reuters.com/article/mining-streaming/dealtalk-big-miners-may-balk-on-streaming-as-sp-changes-tack-idUSL1N0I529X20131024 (last accessed 23 October 2019).

6 Rachel Perks, 'I loan, you mine: Metal streaming and offtake agreements as solutions to undercapitalization facing small-scale miners?' *The Extractive Industries and Society* (Vol 3, 2016 at p813).

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.

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 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. 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 that the Operator acquires for that project), (2) 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.

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7 Robert Mason, 'Four trends driving mine streaming this year: The trend toward streaming to finance projects' (*Canadian Mining Journal*, October 2018), www.canadianminingjournal.com/features/four-trends-driving-mine-streaming-this-year (last accessed 10 September 2020).

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 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.

8 MacKay and Bennett.

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, of 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

9 *Mining Journal*, 'Global Mining Finance Guide' 2014, p53, www.mayerbrown.com/files/publication/3e2dc5e3-878a-40a2-8b06-cb75f8d632ba/Presentation/PublicationAttachment/86b233d1-beb2-4f47-9b85-cd4793b90b92/global_mining_finance_guide_jan14.pdf (last accessed 23 October 2019).

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.

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 upfront payment under certain circumstances, an 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 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 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.

10 ibid.

Nonetheless, there are advantages to entering into a streaming agreement. 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 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.

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 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 global mining industry.