McDermott Will & Emery

ISSUE 2 2014

International News

Focus On **Mining and Metals**

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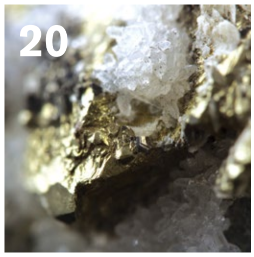

In This Issue

Welcome to the second issue of *International News* for 2014. In this issue we focus on mining and metals.

First, however, in our features section, we start with two articles taking a close look at doing business in Africa. The first outlines the various regional trading blocs that benefit investors active in Africa. The second takes an in-depth look at one of these blocs, the Common Market for Eastern and Southern Africa (COMESA), and examines the COMESA competition laws that are intended to support regional economic integration.

We then move our attention to the United Kingdom and examine the use of contractual post-termination restrictions (PTRs) to protect businesses from the risk of former employees and managers working for competitors, soliciting clients and poaching employees. When they work, PTRs can be an effective weapon in an employer's arsenal, but there are potentially significant hurdles that must be overcome before the UK courts will enforce PTRs.

Keeping current with changes to Chinese trade mark law is critical for businesses that must protect and enforce trade mark rights in China. A significant revision to the Chinese trade mark law came into effect on 1 May 2014, and businesses should adjust their trade mark strategies in China accordingly.

According to recent figures provided by the Latin American Private Equity and Venture Capital Association, 2013 was a record year for private equity in Latin America, and the region remains an attractive market for private equity investors. Robust economic development, civil stability, sound policy-making and strong macroeconomic fundamentals all support Latin America's sustained growth prospects. We outline the value of these elements and some of the challenges that still remain.

Although arbitration is an efficient means for resolving business disputes, complaints that arbitration has become too expensive are on the rise. For arbitration to continue to adequately serve its purpose, it must be time- and cost-effective. We look at a number of ways in which time- and cost-efficiency can be achieved.

We move then to our mining and metals focus section. We start in the United States with coal mining. Mining companies and their investors must contend with a growing number of environmental regulations, including methane capture regulations, mine permits and the Federal Clean Water Act, plus changing climate conditions and extreme weather.

For many years, anti-dumping and countervailing duty cases have provided legal means for domestic industries in many countries to obtain protection against low-priced and subsidised import competition. Several steel, other metals and metal products industries in the United States continue to rely on these actions as a means of combating imports. As a result, companies in these industries, including both US businesses and international businesses with interests in the United States, should be familiar with this form of legal proceeding and consider the implications of these actions in developing their international strategies.

Following the introduction of attractive legal provisions for investors in the early 2000s, the legal environment applicable to mining activities in Africa has seen increasing supranational and domestic legislation. We look at three measures (domestic beneficiation, taxes and mandatory participation by the state or nationals in the share capital of mining operators) aimed at increasing mining revenues and economic returns for the local population, and review the implications of these measures for businesses and investors.

Many metal producers and metal processors use a central hedging entity within their group to mitigate financial risks from price volatility. As part of a merger and acquisition process, the seller usually aims to terminate contractual relationships with the sold company. Explicit provisions in the sale and purchase agreement on metal hedging are, however, surprisingly scarce. We look at ways in which ambiguity can be avoided.

If you have any comments on our articles or would like to discuss any of the issues raised, please contact me at hnineham@mwe.com.

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Investors in Africa Benefit from Regional Trading Blocs

By Stuart Mathews

An investor new to Africa needs to understand not only the relevant local laws but also the applicable regional arrangements. Africa has multiple regional trading blocs, some of which provide significant advantages for investors. The main regional trading blocs are

- The Economic Organisation of West African States (ECOWAS), which comprises 15 western African states with a population of about 300 million
- The Common Market for Eastern and Southern Africa (COMESA), which comprises 19 mainly eastern and central states, from Egypt and Libya to Zimbabwe, with a population of more than 400 million
- The Southern African Development Community (SADC), which comprises 15 southern African states with a population of 230 million
- The *Communauté des Etats Sahélo-Sahariens* (CEN-SAD), which comprises 28 northern, western and central African states

Memberships overlap: eight states are members of both SADC and COMESA, all but one of ECOWAS's members are also members of CEN-SAD, and eight states are members of both COMESA and CEN-SAD. Other regional blocs include the East African Community (EAC), with five central and eastern African states and a population of 150 million; the Economic Community of Central African States (ECCAS), comprising 10 central and western African states; the Intergovernmental Authority on Development, formed of eight eastern African states; and the *Union du Maghreb Arabe*, comprising five northern African states.

These trading blocs aim to achieve ever-closer regional integration, including free trade areas, customs unions, monetary union, and legal and regulatory harmonisation. Although conflicts arising from overlapping memberships have slowed or stalled integration attempts in some blocs, these memberships still provide significant benefits for investors.

Closer Unions

A number of important free trade areas have been established. The EAC (Burundi, Kenya, Rwanda, Tanzania and Uganda) has a common market for goods, labour and capital, but no monetary union yet. The remaining free trade areas are sub-sets of the larger trading blocs.

The Southern African Customs Union (SACU) is a customs union between certain SADC members (Botswana, Lesotho, Namibia, South Africa and Swaziland) that allows the free movement of goods between member countries. There is a common external tariff, and all customs and excise collected are pooled and then divided according to a revenue-sharing formula.

All SACU states other than Botswana are also part of a monetary union.

The best integration has been achieved in west and central Africa. The *Union Economique et Monétaire Ouest-Africaine* (UEMOA), comprising Benin, Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo, is a full customs union amongst a sub-set of ECOWAS members. Similarly, the Central African Economic and Monetary Community (CEMAC) of Cameroon, the Central African Republic, Chad, Equatorial Guinea, Gabon and the Republic of Congo is a full customs union amongst a sub-set of ECCAS members.

Both UEMOA and CEMAC are matched by monetary unions under a unitary regional central bank. The CFA franc (XOF) is the name given to the West African CFA franc, which is used in the eight UEMOA states, with a population of more than 100 million, and the Central African CFA franc (XAF) is used in the six CEMAC states, with a population of 45 million. Both currencies trade at parity, are guaranteed by the French treasury, were formerly linked to the French franc and now have a fixed exchange rate to the euro (one euro to 655.957 CFA francs).

In addition, both UEMOA and CEMAC have enacted many other rules binding member states and overriding national laws. Harmonised regulations cover competition control, public procurement, taxes and customs, plus the telecommunications, mining (UEMOA only), public health (UEMOA only) and transport (CEMAC only) sectors. Both blocs act through regulations and directives that are binding upon members.

Business law in west and central Africa is being harmonised through an initiative by *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) that applies to 17 countries, including all UEMOA and CEMAC countries, and draws heavily on French law. Importantly, the OHADA treaty has created a supranational court to ensure uniformity and consistent legal interpretations across member countries.

Investor Protections

Some of the treaties creating the regional blocs can provide investor protections. Usually investors seek protection through bilateral investment treaties (BITs), which allow an investor from one treaty country to seek money damages directly against the other treaty country in a neutral international arbitration forum. In general, BITs promise investors treatment equivalent to that enjoyed by local and other foreign investors, protection from expropriation without adequate compensation, and freedom to transfer funds in and out of the host country without delay using a market rate of exchange.

Some countries, like Mauritius, are keenly expanding their BIT network. Mauritius has 24 BITs in operation and has entered into another 17 that are awaiting ratification. These BITs complement Mauritius' expanding double tax treaty network and its low local taxes, making it a leading choice for African holding companies.

In contrast, South Africa, which has an extensive BIT network, recently terminated BITs with important investor countries, including Belgium, Germany, Luxembourg, the Netherlands, Spain and Switzerland, and other cancellations may follow. South Africa argues that BITs are too favourable to investors and that investor protections already exist under the constitution, although these are more limited. COMESA is also reviewing whether or not BITs should be retained. In this environment, investor protection in regional bloc agreements becomes more important.

> "The best integration has been achieved in west and central Africa."

The SADC Protocol on Finance and Investment provides protection against expropriation and discrimination, although indirect expropriation is not expressly covered, and protection is diluted because states are allowed to give preferential treatment to achieve national objectives. Rights can be enforced through binding international arbitration, although local remedies must be exhausted first, making the process longer and more costly. The protocol's protections are not restricted to certain investors or those from treaty countries only.

COMESA provides investor protections similar to those typically found in BITs, including the right for COMESA investors to be treated in the same way as domestic investors and for investment disputes to be settled through arbitration. If Mauritius is used as a holding company and there is no BIT between Mauritius and the relevant COMESA member, it may be possible for an investor to invoke these COMESA protections.

CEMAC has a robust investment charter that requires member states to permit foreigners to make investments without discrimination, protect property rights and ensure free repatriation of profits, and allow disputes between an investor and a member state to be resolved by arbitration.

Competition Law

The COMESA competition regime came into force in January 2013 and was conceived as a one-stop shop for competition filings. There have been some teething problems, however. Filing thresholds were set at zero, with the result that even a very small merger involving businesses in two or more COMESA countries requires a COMESA competition filing to be made. Despite COMESA's one-stop-shop rules, some local competition authorities have maintained that local competition filings are still required. Given that failure to comply with local law not only carries administrative fines and penalties, but also can result in criminal sanctions and contracts being rendered void, prudent investors may prefer to make both COMESA and local filings. For more on the COMESA competition rules, see "Understanding the COMESA Merger Control Regime" on page 6.

Both UEMOA and CEMAC have enacted comprehensive competition rules superseding national laws. In CEMAC, notification is mandatory if one of the parties has a turnover of more than one billion Central African CFA francs or if the parties together have more than 30 per cent of the relevant market. In UEMOA, notification is not mandatory and there are no thresholds, but the merging parties may file an application for negative clearance if the merger creates or reinforces a dominant position in the market.

Zoe Walkinshaw, a trainee in the London office, also contributed to this article.

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Understanding the COMESA Merger Control Regime

By **Matthieu Adam**, **Andrea Hamilton** and **Carla Hine**

The Common Market for Eastern and Southern Africa (COMESA) was formed in 1994 by a treaty among 19 African countries: Burundi, Comoros, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi (where COMESA is based), Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Its objective was to create a common market. COMESA has a wide range of priorities, but its primary focus is achieving regional economic integration.

Competition law is one of the specific mechanisms envisaged to achieve regional economic integration. The COMESA competition regime is rapidly evolving, and given its broad reach, companies engaged in international transactions are well advised to monitor its development and the potential obligations it may impose.

The COMESA Merger Control Regime

COMESA's merger control jurisdiction has an undeniably broad reach. Transactions are caught if they have an "appreciable effect" on trade between COMESA member states and restrict competition in the COMESA common market. In relation to which transactions are caught, COMESA's competition regulations apply to

> *The direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of a business, where both the acquiring firm and target firm operate in two or more Member States and where the relevant turnover or asset threshold has been exceeded.*

As noted in "Investors in Africa Benefit from Regional Trading Blocs" on page 4, the current jurisdictional thresholds are set at zero. This means that any transaction where one party is active in two or more COMESA countries is reportable, and the actual size of the parties, the extent of their business in the COMESA region and the impact of the deal do not matter.

If a transaction is subject to COMESA Competition Commission (CCC) review, the parties must notify it to the CCC within 30 days from their decision to merge. The transaction will be subject to a review of 120 days which, under draft merger guidelines, is composed of a 60-day Phase 1 period and a 60-day Phase 2 period. This 120-day review period may be extended for an undefined amount of time. When making their filing, the parties must pay a fee of whichever is lower: 0.5 per cent of the merging parties' combined annual turnover or assets in the COMESA region (whichever is higher), or US$500,000.

The COMESA Competition Regulations contain no suspension requirement; once parties notify their transaction to the CCC, they can close the transaction at any time. Failure to notify a transaction can trigger fines of up to 10 per cent of the parties' combined turnover in the COMESA region, although no fines have been imposed to date.

If a transaction is notifiable under COMESA's merger control rules, the CCC is meant to act as a one-stop shop; transactions notifiable to the CCC are not also subject to review by individual COMESA member states under their national rules. This principle faced an early test when certain COMESA member states asserted national jurisdiction over transactions notifiable to the CCC. It should, however, be confirmed following the August 2013 ruling in *Polytol v Mauritius*, in which the COMESA Court of Justice affirmed the superiority of community rules over inconsistent national legislations.

With a view to interpreting the merger control rules and addressing the early and understandable criticism of several elements of the COMESA merger control regime (notably the zero thresholds, the high filing fee and the lack of a requirement that the transaction have a nexus with the COMESA region), over the course of 2013 the CCC issued draft guidelines covering its approach to mergers and other selected topics, and initiated a first wave of reforms.

Revisions to the merger guidelines can be made by the CCC, but any reforms to the Competition Regulation, such as to the zero jurisdictional thresholds, will have to be made by the COMESA Council, which meets once a year. By amending the merger guidelines, however, the CCC intends to introduce reforms that can have an immediate impact. To our knowledge, at the time of going to press the approval of the new merger guidelines by the board of commissioners was still pending, although it had been tabled for early August this year.

Among other things, the new merger guidelines are expected to include interpretation of certain elements of the COMESA jurisdictional test. The requirement to have "operations" in two or more COMESA member states and the requirement that a transaction have an "appreciable effect" on trade between COMESA member states should be clarified. The introduction of thresholds and criteria could limit the jurisdictional reach of the COMESA merger regime to the transactions that actually have an impact in the COMESA region. The filing fee, and the mechanism to determine it, may also be changed in the near future.

> "While the number of mergers notified to the CCC is relatively low, it is growing."

COMESA Enforcement to Date and Current Trends

Nearly two years after it became operational, the CCC has received more than 30 notifications, 12 of which were received in 2013, and more than 18 to date since January 2014. The rate of notifications in 2014 shows a dramatic increase over the prior year.

To date, the CCC has not prohibited any transactions. While it has issued several written decisions, these remain relatively brief with regard to its competitive analysis. It has also been reported that in some cases the CCC is providing parties with "comfort letters" reassuring the parties that, even though their transactions fulfil the COMESA jurisdictional thresholds, the transaction does not have an appreciable effect on trade. It therefore does not restrict competition in the Common Market and subsequently does not meet the requirement of Article 3(2) of the COMESA Competition Regulations. It is understood that, by issuing comfort letters, the CCC is exempting certain transactions from filing full notifications and paying the high filing fees. This approach should be clarified by the revised merger guidelines on the concepts of "appreciable effect on trade" and "operations".

Next Steps and Practical Implications

Companies engaged in international mergers and acquisitions must be aware of COMESA in connection with multijurisdictional transactions. While the number of mergers notified to the CCC is relatively low, it is growing.

It is worth bearing in mind that, although fining companies is not the CCC's current priority, it is clear that blatant disregard for its rules may be punished. In addition, while the CCC has not yet prohibited any transactions and is taking steps to reform contentious elements of its regime, businesses should not make the mistake of thinking it has no bite.

Transactions involving businesses operating in the COMESA region, which comprises much of southern and eastern Africa, should be assessed in every case to determine whether or not obligations arise under COMESA.

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Protecting Your UK Business Against Departing Employees

By **Sharon Tan** and **Paul McGrath**

Departing employees can represent a significant threat to a business. This is particularly so in the case of senior managers and employees who have access to confidential information or who exert influence over key relationships with actual or prospective customers, suppliers or key members of staff.

Many employers seek to manage this threat by obtaining an employee's agreement to a broad range of contractual post-termination restrictions (PTRs), often referred to as restrictive covenants.

PTRs are generally designed to protect a business against a range of threats: former employees working for competitors, soliciting clients and poaching employees, *etc*. When they work, PTRs can be a very effective weapon in an employer's arsenal, but there are potentially significant hurdles that must be overcome before they will be enforced by the UK courts.

The Path to Enforcement

A PTR will only be enforced by the UK courts if an employer can show that it restricts the departing employee's activities only so far as is reasonably necessary to protect the employer's legitimate business interests. If the PTR is drafted more widely, it will be struck down entirely.

In considering what is reasonably necessary, the UK courts will examine both the scope and duration of the PTR.

It is important to note that a UK court will consider what is reasonable based on how matters stood at the time the restriction was entered into, not at the time enforcement is sought. A UK court therefore may not enforce a PTR against a senior employee, even if the PTR is shown to be reasonably necessary at the time employment terminates, if the court does not consider the PTR to have been reasonable at the time the contract was entered into. Employers who want to protect their position, therefore, ought to ensure that PTRs are updated as and when an employee's role changes.

The powers of the UK courts to amend the drafting of a poorly worded PTR are very limited. They may delete words from a PTR, but may not, generally speaking, add or replace ill-considered drafting to give effect to what the parties intended, unless

the meaning of the PTR is ambiguous. A UK court will not, therefore, reduce a 12-month non-compete to six months based on its own assessment that this would be a reasonable period.

This all or nothing approach means it is worth investing time and effort into the drafting of PTRs, particularly when they are being used in key employees' contracts.

Individually Tailored PTRs

Given the approach taken by the UK courts, employers who wish to protect their business in the United Kingdom should ensure that the nature and scope of each PTR is carefully considered on an individual basis or, at the very least, by reference to grade or job type.

The starting point is to identify the extent of the threat that would be posed by the particular individual in question if he or she were to leave, and how long it would reasonably take the business to protect its interests against that threat. PTRs should then be carefully drafted to closely mirror these specific risks.

In undertaking this analysis, employers might want to consider the following questions: Can the non-compete clause be limited to a particular product or line of business? Can the geographical area be limited? Can customers be restricted only to those with whom the employee has had material contact within a set period prior to the termination of the employment contract? Are there certain key employees or groups over whom the individual has particular influence?

There are also wider considerations for an employer to bear in mind when tailoring individual PTRs, *e.g.*,

- *The scope and duration of PTRs imposed on employees at other levels of the organisation.* It may be more difficult to enforce PTRs against a middle manager if it can be shown that senior management are subject to exactly the same restrictions.
- *The relative duration of different PTRs in the employee's contract.* The UK courts have shown themselves more willing to uphold a PTR that prohibits the departing employee from soliciting the employer's clients for longer than a non-compete clause that is designed to prevent the employee from having free access to the job market. Opting for different periods can occasionally increase the likelihood of the PTRs being enforced.
- *Standards across the wider industry in which the employer operates.* A 12-month PTR that seeks to prevent solicitation of the employer's customers is more likely to be enforceable in an industry where client contact is infrequent, such as the insurance industry, where renewals normally take place annually.
- *The extent to which the PTRs are consistent with other provisions in the contract.* The context in which the PTRs arise can sometimes be of relevance. If, for instance, an employee is permitted to resign on very short notice, a court might be less inclined to uphold a lengthy non-compete clause.

> "The UK courts will examine both the scope and duration of the PTR."

Getting the Wider Contract Right

In addition to PTRs, there are a number of other key contractual provisions that can help employers to insulate their business interests against such threats. Employers should consider including the following in their UK employment contracts:

- *Payment in lieu of notice (PILON).* PTRs will fall away if a contract is wrongfully terminated, *i.e.*, without the employee being given the required amount of notice. By including a contractual PILON provision, an employer is able to achieve an immediate clean break without acting in breach of contract, thus leaving the PTRs intact.
- *Garden leave.* Garden leave contractually obliges the employee not to attend the office or contact clients, customers or staff. Such provisions are particularly effective, because the UK courts are much more willing to enforce this kind of market isolation on the basis that the individual continues to be paid and, in exchange, remains subject to the control of the business. Time spent on garden leave should, however, be discounted from the restricted period under the PTRs, as the courts consider the two provisions to achieve the same effect. This prevents an increase in the ex-employee's overall length of time spent out of the market, which might otherwise render a PTR void and unenforceable.
- *Confidentiality.* A robustly drafted confidentiality clause will protect the employer's business both during and beyond the life of any PTR.

Implementation Strategy

Introducing PTRs can sometimes be a challenge. Junior employees may not consider them appropriate given their relative lack of importance to the business. Senior employees, whilst recognising the business' legitimate need to protect its interests, may not wish their future activities to be unduly restricted and may possess sufficient leverage to create a challenging negotiation.

It is often easier to obtain agreement to PTRs at the time of hiring, when the employee has not yet secured a role he or she wants, rather than during an ongoing employment relationship. In any event, once obtained, the suitability of any existing PTRs should be kept under review on an ongoing basis. Where appropriate, employers may want to use the leverage presented by a positive change in the employment relationship, such as a promotion or proposed pay rise, to update or reaffirm a key employee's PTRs.

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China's New Trade Mark Law: Implications for International Brand Protection Strategy

By **Jennifer Mikulina** and **Wendy Wu**

Keeping current with changes to Chinese trade mark law is critical for businesses that must protect and enforce trade mark rights in China. For the third time in 21 years, the Standing Committee of the National People's Congress of the People's Republic of China has revised the Chinese trade mark law.

On 30 August 2013, a significant revision to the Chinese trade mark law was approved, and the new law came into effect on 1 May 2014. Although these changes may prompt adjustments to trade mark strategies in China, they make Chinese trade mark practices more familiar to European and US businesses.

China's new trade mark law extensively revises the previous trade mark law (the 2001 law). In particular, the new law has accomplished the following:

- Improved the trade mark application system
- Made modifications to the trade mark opposition system
- Introduced the concept of consumer confusion
- Aggregated adverse consequences for non-use of registered trade marks
- Increased damages available for trade mark infringement
- Rectified the wrongful use of well-known trade marks
- Imposed limitations on the timing of trade mark prosecution

Improvements to the Trade Mark Application System

One example of an improvement under the new law is that sound is now eligible for trade mark registration in China. Under the 2001 law, companies using sound trade marks in China had no choice but to file for copyright protection for their sounds, because Chinese trade mark law did not recognise the concept of sound as an identifier of the source of goods or services.

The new law also simplifies certain trade mark application formalities. The 2001 law required applicants to file a separate trade mark application for each class of goods and services. Under the new law, an applicant can submit one application for the same mark, covering multiple classes. As a supplemental

procedure to this change, the new law also introduces a "splitting policy," under which an applicant has the right to request a split of the original trade mark application if it is partially rejected for some, but not all, classes. The Chinese Tademark Office (CTMO) will grant a new registration number for the application, covering the approved items (this system is similar to the concept of dividing a US trade mark application). The applicant can then decide whether to proceed with an appeal for the rejected items.

Modifications to the Trade Mark Opposition System

Before the new law was enacted, any third party could oppose a trade mark application in China during the opposition period. Some parties took advantage of the opposition process by using it to intentionally delay registrations. To prevent this, the new law places certain restrictions on who is qualified to oppose a registration. Only an entity that is a holder of prior rights and/or an interested party can file an opposition, which must be based on the following legal grounds:

- The trade mark application infringes another party's well-known trade mark or prior rights.
- The trade mark applicant is acting in bad faith.
- The trade mark application contains a geographical indication of goods.
- The trade mark application is similar or identical to a prior trade mark application or registration covering similar goods or services in the same class.
- The trade mark application is a pre-emptive attempt to register a trade mark previously used by others.

The new law also eliminates the opponent's right to appeal a negative opposition decision to the Trademark Review and Adjudication Board. Once the CTMO rejects an opposition, the concerned trade mark application will immediately be registered, and the opponent must initiate an invalidation procedure against the registration. These changes may have a significant effect on filing strategies, because opposing a third party's application may no longer be an effective option to prevent registration of a trade mark for a long period.

Another important change to the opposition process is that "bad faith" is now clearly included as a ground for an opposition, which demonstrates that the concept of bad faith is becoming more integrated into trade mark jurisprudence in China. For example, a trade mark application may be rejected if the opposing party has evidence to prove that the applicant knew about the opposing party's trade mark based on contractual, business or other relationships.

Introduction of the Concept of Consumer Confusion

The new law introduces "consumer confusion" as one of the key factors that constitute trade mark infringement under the following circumstances:

- Use of a similar trade mark for identical goods
- Use of an identical trade mark for similar goods
- Use of a similar trade mark for similar goods

This change may provide legal support to claims that original equipment manufacturer (OEM) products will not constitute trade mark infringement if the OEM products are not sold in China, because no consumer confusion is likely to be caused under this scenario.

Aggregated Adverse Consequences of Non-Use of Registered Trade Marks

The new law aggregates adverse consequences based on the non-use of a registered trade mark for three successive years prior to the filing of a lawsuit against a third party based on trademark infringement. Specifically, if the trade mark owner has no evidence to prove the use of a registered trade mark in the three years prior to the filing date of the challenge, or to prove any loss caused by the infringing behaviour, the alleged infringer will not be liable for compensating the owner.

Increased Damages for Trade Mark Infringement

In a demonstration of the Chinese legislature and Government's determination to crack down on trade mark infringements, the new law increases the amount of financial damages for trade mark infringement. The new law introduces punitive damages, which can be between one and three times the amount of actual damages, if the infringer maliciously infringes a trade mark. It also increases the amount of statutory damages from RMB 0.5 million (approximately US$80,000) to RMB 3 million (approximately US$480,000).

Changes to Well-Known Trade Mark Status

Under the new law, a trade mark owner cannot claim the trade mark is "well-known" on goods or on the packaging or container of the goods, or for the purpose of advertisement, exhibition and other commercial activities. This change purports to address the practice of granting the designation of well-known trade mark status, and the protections that come with that designation, to marks that may not actually qualify as well known. Under the new law, petitions based on a well-known trade mark will be examined and determined on a case-by-case basis.

Limitations on Trade Mark Prosecution Timing

The new law sets a nine-month limit for trade mark registration, cancellation petitions and certain invalidation actions, and a 12-month limit for opposition proceedings and invalidation proceedings based on infringement. The time limits for everything but the registration procedure can be extended with the Trademark Review and Adjudication Board's consent.

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Latin American Private Equity on the Rise

By **Daniel Chavez**

According to recent figures provided by the Latin American Private Equity and Venture Capital Association, 2013 was a record year for private equity in Latin America, with approximately US$8.9 billion of total investments (a six-year high and a 13 per cent increase over 2012), US$5.5 billion of funds raised and US$3.7 billion in proceeds generated by exits. The data also show that the market is still dominated by Brazil (with 43 per cent of funds raised and 68 per cent of total amount invested), while Chile, Colombia, Mexico and Peru continue to experience increasing activity.

Although not all of the region's economies have performed this well in the last few years, Latin America in general remains an attractive market for private equity investors. During the past decade, robust economic growth in the region as a whole, civil stability and sound policy-making have created solid investment opportunities, while strong macroeconomic fundamentals support Latin America's sustained growth prospects.

Population growth and increasing urbanisation rates in the region drive a growing demand for power and public infrastructure. At the same time, investment strategies and the need for effective hedges against inflation propel international investors towards Latin American markets, which can offer a steady supply of minerals and other raw materials. This mounting demand for infrastructure and power, coupled with the region's natural resources, has created substantial investment opportunities for private equity investors.

> "Restrictions on foreign investments in the region are gradually disappearing."

In addition, a young, growing middle-class population in the region's largest markets fuels investors' appetite for middle-market opportunities in industries such as consumer products, retail, health care and financial services. A large presence of family-run businesses and fragmented industries in Latin American economies, as well as the fact that public markets in the region are still dominated by natural resource companies and banks, create a need and an opportunity for private equity, both local and foreign, to fill the investment gaps.

An Improving Regulatory Environment

The regulatory environment for private equity funds and investors in the major Latin American markets shows sustained improvement. On the fundraising side, ongoing efforts by local regulators to ease the restrictions for institutional investors in private equity have resulted in increased private equity allocations by pension funds and insurance companies. There are still some challenges, however, for fund managers trying to raise funds from institutional investors in these markets. For example, some large pension funds in Brazil demand a seat on the investment committee as a condition for investing in a fund. Countries

such as Chile and Mexico only allow their pension funds to invest in locally registered funds, forcing foreign fund managers to set up local feeders to attract investment from institutional investors. Despite recent efforts in some jurisdictions (most notably Mexico and Peru) to reduce the number and complexity of procedures to form new investment vehicles and to register local feeder funds with securities regulators, these processes are still more burdensome and time consuming than those in more developed markets.

> "Another positive development is major markets' increasing adoption of international accounting standards."

Despite these challenges, restrictions on foreign investments in the region are gradually disappearing. With the exception of Argentina, Cuba and Venezuela, where tight exchange controls and reporting requirements continue to hinder foreign investment, all Latin American countries have eliminated exchange controls and minimum stay and reserve requirements. As a result, foreign investments in all Latin American countries except Argentina, Cuba and Venezuela are no longer subject to prior approval, although they must still be registered with the central banks in order to guarantee access to foreign currency for repatriation.

The capital markets in Latin America also continue to develop, thereby providing investors with a greater supply of securities, larger sources of funding and more feasible exit strategies than were available before this development started in earnest three years ago, other than in Brazil and Mexico where they were available before. The 2011 integration of the stock exchanges of Chile, Colombia and Peru into what is called the Latin American Integrated Market has created the second largest Latin American market by market capitalisation, behind Brazil's BM&FBOVESPA. In 2013, the region saw eight private equity-backed initial public offerings in Brazil, Chile and Mexico, and the number is expected to increase in 2014.

Another positive development in the region is major markets' increasing adoption of international accounting standards. Chile, for example, recently made International Financial Reporting Standards (IFRS) mandatory for both listed and private companies. Other countries, such as Argentina, Brazil, Mexico and Peru, require listed companies to use IFRS and, although they do not formally allow private companies to use these standards, have been gradually incorporating international principles into their local accounting standards. On the other hand, Colombia, whose national accounting standards diverge significantly from IFRS and US generally accepted accounting principles, lags behind other counties in the adoption and implementation of international standards.

Remaining Challenges

Despite the increasingly favourable regulatory environment, private equity investors still face significant challenges in Latin America. For instance, weak record-keeping practices and inadequate internal reporting systems, combined with deficient public records, continue to complicate investors' due diligence efforts in some industries. The prevalence of family-controlled companies, where ownership and management are closely tied together, can hamper post-acquisition integration in some cases.

> "Robust economic growth, civil stability and sound policy-making have created solid investment opportunities."

With the notable exception of Chile and Uruguay, where the levels of perceived corruption are comparable with those of developed countries such as the United States or Japan (according to Transparency International), rampant corruption is still a major concern in other Latin American countries, despite recently enacted anti-corruption legislation in Brazil, Mexico and Peru. Investors in regulated industries, as well as those that make use of local agents and consultants to secure government contracts or approvals, should conduct serious pre-acquisition due diligence and be ready to implement robust post-acquisition compliance programs in order to mitigate their exposure in this regard.

Another important obstacle for foreign private equity investors in Latin America is the prevalence of slow, inefficient and sometimes corrupt judicial systems. While private contracts are generally upheld, judicial disputes are lengthy and cumbersome. This situation has promoted the use of international arbitration in cross-border transactions, but enforcement of such arbitral decisions can be costly and problematic in some countries.

To be fair, these challenges are not different from—and in most cases, not worse than—those encountered by investors in other emerging markets. Favourable macroeconomic trends and positive regulatory developments make Latin America an attractive destination for private equity investors looking for acceptable returns in relatively stable emerging markets. Investors looking to enter Latin America should, however, seek the help of partners and advisors with specific experience in the region in order to navigate the new landscape and to mitigate the risks involved.

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Mexico's Energy Reform Group

Join McDermott's LinkedIn Discussion Group: Mexico's Energy Reforms for insight and discussions on legislative developments regarding the changing energy private investment climate in Mexico. We encourage your comments as well.

Controlling Costs in International Arbitration

By Jacob Grierson and Thomas Granier

Arbitration is an efficient means for resolving business disputes because it offers more flexibility than court proceedings and enables the parties to choose arbitrators experienced in a domain relevant to the dispute. In principle, arbitral awards are enforceable, with only limited grounds for objection, in more than 150 jurisdictions that have ratified the New York Convention on Recognition and Enforcement of Arbitral Awards of 1958.

Despite these benefits, complaints that arbitration has become too expensive are on the rise. For arbitration to continue to adequately serve its purpose, it must be time- and cost-effective. Cost-efficiency can be obtained through advance planning and better cooperation between parties and their lawyers.

A Clear Arbitration Agreement

More often than not, the arbitration clause is the last and least considered clause in a contract, and therefore commonly referred to as the midnight clause. Yet the importance of a clear, simple arbitration agreement, tailored to the specific features of a transaction, cannot be overstated. A well-drafted arbitration clause prevents uncertainty and disputes over its meaning, scope and effect (*e.g.*, the jurisdiction of the arbitral tribunal or the process of appointing arbitrators).

> "For arbitration to continue to adequately serve its purpose, it must be time- and cost-effective."

Choosing to submit a dispute to institutional arbitration rules—for example, those of the International Chamber of Commerce (ICC), the London Court of International Arbitration or the American Arbitration Association—is also an effective way to limit arbitration costs. Institutional rules typically offer arbitration administration services that are based on cost-efficiency. For example, some rules set the administrative and arbitrators' fees on the basis of fixed scales, rather than time spent. The institutions themselves closely monitor the financial aspect of the cases they administer, in order to discourage lengthy procedural timetables.

Careful Selection of Arbitrators

A tribunal with strong case-management skills will be able to manage the arbitration so as to make it as cost- and time-effective as possible. Careful consideration should therefore be given to selecting tribunal members, with particular attention paid to their previous experience as arbitrators.

In addition to considering the arbitrators' case-management skills, it is essential to ensure that the arbitrators selected have sufficient time to devote to the case. Even the best

arbitrator is unable to effectively administer an arbitration if he or she does not have the time available to do so. It is also important to nominate arbitrators with no conflict of interest, and whose risk of a conflict arising in the course of the procedure is limited, in order to prevent the delays that can result from objections to an arbitrator's confirmation or appointment.

> A well-drafted arbitration clause prevents uncertainty and disputes over its meaning, scope and effect.

Early Establishment of the Arbitration Proceedings Framework

The arbitration procedure is tailored at what is frequently referred to as a case-management conference, which should take place as early as possible in the proceedings. During the conference, the parties and arbitrators examine and select the procedural options best adapted to the specific case. The goal of the case-management conference is to establish procedures that are genuinely useful and necessary for the effective presentation of the case; any additional procedures are likely to result in unnecessary time and cost.

Cost-Efficient Strategy and Implementation

Bifurcating the arbitration proceedings into several phases, *e.g.*, jurisdiction, liability and quantum, can help reduce costs in certain circumstances, such as when bifurcating would result in the dismissal of the entire dispute or a significant reduction in its scope and complexity. There are other scenarios, however, in which bifurcation increases expenses, so its benefits and costs must be carefully weighed.

Written submissions should be clear, concise and well structured so as to allow the arbitral tribunal to understand the evidence correlated to the statement. Incomplete and badly structured submissions make it more difficult for arbitrators to fully appreciate the parties' arguments and might require the parties to provide additional written explanation. Long submissions require additional preparation time and associated cost.

More often than not, parties submit a large volume of evidential documentation on the assumption that more is better, a practice that can lead to unnecessary expense by distracting the arbitrator from the core issues underlying the dispute. It is therefore very important to sort the wheat from the chaff. Discovery-style document productions can be costly, so parties should agree in advance on the procedures for document production requests. For instance, parties might agree to apply the International Bar Association Rules on the Taking of Evidence in International Arbitration, which allow for document production in a manner that avoids overly broad requests.

Efficient Management of Hearings

Because hearings in international arbitration often necessitate travel and a considerable time commitment by the arbitrators, the parties and their lawyers, they can be the most costly elements of an arbitration. According to a 2011 survey by the Chartered Institute of Arbitrators, hearing costs account for 37 per cent of total external legal fees incurred by arbitration parties. It is therefore advisable to consider whether it is possible for the arbitral tribunal to decide the dispute on the basis of documents alone, without a hearing.

> In-house counsel can and should play an active role in the arbitration process.

Where hearings are necessary, minimising their length and number might considerably reduce arbitration costs. Hearings also do not necessarily have to be held at the place of arbitration. The parties and the arbitral tribunal can instead agree to hold hearings at a place they deem more cost-effective, such as a location that is convenient for the majority of the witnesses due to give evidence.

Costs Orders

Arbitrators are frequently empowered with the discretion to award legal costs based on the reasonableness of those costs, among other factors. The recent, much-publicised *Yukos* award, for example, noted that some of the fees charged by the claimants' experts were excessive, observing that their evidence was of "limited assistance" to the tribunal in determining damages.

Cooperation Between In-House and Outside Counsel

Cooperation between in-house and outside counsel is another important factor in reducing arbitration costs. In-house counsel can and should play an active role in the arbitration process by attending case-management conferences and deciding on the procedure to be adopted. In certain cases, discovery-style document production, or an additional round of briefs, might produce benefits justifying the associated time and costs. In-house counsel are often in the best position to make this call in collaboration with their external counsel.

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Environmental Regulatory Developments Affecting Coal Mining in the United States

By **Jacob Hollinger**

The United States has ample coal deposits, but mining companies and their investors must contend with a growing number of environmental regulations that might affect the value of those deposits.

Heavy Regulation of Coal-Fired Power Plants Is Here to Stay

Coal-fired power plants in the United States are subject to extensive environmental regulations. Those regulations are likely to grow more stringent in the near future, possibly resulting in decreased domestic demand for coal. There are many examples of these regulations; the following are just a selection:

- In April 2014, the Supreme Court of the United States upheld the US Environmental Protection Agency's (EPA's) Cross-State Air Pollution Rule. This rule will likely require additional air emission controls to be installed on several midwestern power plants.
- In June 2014, EPA proposed new regulations that would limit greenhouse gas emissions from new and existing coal-fired electricity generating units.
- EPA is actively considering creating new, more stringent requirements for the handling of power plant coal ash.
- EPA is also developing new limitations on water discharges from coal-fired power plants, with a final rule expected on that topic by the end of 2015.

Many of the agency's efforts are controversial and face strong legal and political opposition, but the agency remains under intense pressure to do even more to limit emissions from coal-fired power plants. This pressure comes not only from environmentalists, but also, with respect to air emissions, from several downwind states that receive a significant portion of their air pollution from upwind power plants. Investors should therefore continue to expect heavy regulatory activity in this arena.

> "Entities pursuing coal export projects should anticipate both strong opposition and potential delays."

EPA's power plant regulations may serve to dampen domestic demand for coal and increase interest in exporting coal from the United States to other countries. Export projects face various hurdles, however, sometimes even after they appear to have been finalised.

An ongoing lawsuit against the Export-Import Bank of the United States illustrates this point. In *Chesapeake Climate Action Network, et al. v Export-Import Bank of the United States, et al.*, No. 1:13cv01820 (D.D.C.), a coalition of environmental groups contends that the bank violated the National Environmental Policy Act by guaranteeing a loan to Xcoal Energy & Resources LLC for use in connection with a coal export project, without first conducting a proper environmental review of the project's impacts. If successful, the lawsuit could result in a revocation of the loan guarantee. Cases such as this mean entities pursuing coal export projects should anticipate both strong opposition and potential delays in obtaining necessary government approvals.

Methane Capture Regulations: Threat and Opportunity

Methane is a potent greenhouse gas (GHG). It is also the primary component of natural gas and can sometimes be sold as a product, rather than merely treated as a waste. In 2010, coal mining activity accounted for roughly 10 per cent of human-related methane emissions.

To date, EPA has declined to regulate coal mine methane emissions under the federal Clean Air Act. In May 2014, a federal appellate court agreed with EPA that the agency is not required to promulgate such regulations at the moment. The court held, in essence, that EPA could prioritise other regulations, such as GHG emission limits for power plants, over the coal mine regulations sought by the plaintiff environmental organisation.

This decision is a significant victory for the coal mining industry, but it does not necessarily mean that methane emission limits will not be imposed in the future, perhaps three or four years from now, after EPA finishes its power plant rules.

In the interim, a different federal agency, the US Bureau of Land Management (BLM), is considering imposing regulations of its own that would apply to methane emissions from underground coal mines on federal lands. In April 2014, BLM solicited comments on options for capturing such methane for sale, use or destruction. New BLM regulations, if promulgated, could raise costs for mining companies but might also provide opportunities for those companies to develop and sell a new product.

Mine Permits and the Federal Clean Water Act

An ongoing source of frustration for some mining companies has been EPA's use of the federal Clean Water Act (CWA) to effectively veto the use of certain areas for the disposal of fill material and dredged material. In 2013, a federal appellate court held that EPA had the authority under Section 404 of the CWA to preclude the use of certain areas for disposal, even when the agency had previously acquiesced in CWA permits for those areas. In March 2014, the Supreme Court announced that it would not review that decision. This result is a significant loss for the mining industry, but mining companies do retain the right to challenge individual instances of EPA using its veto power, on a case-by-case basis.

> "New BLM regulations… might provide opportunities for those companies to develop and sell a new product."

Another topic of perennial controversy is the question of exactly when CWA permits are required. The controversy stems in part from confusion about which waterways are within the scope of the CWA's applicability. In April 2014, EPA and the US Army Corps of Engineers released a proposed rule intended to clarify the meaning of the CWA's phrase "waters of the United States", and thereby to clarify the specific categories of waters that are subject to CWA jurisdiction and for which a permit is required before a business can discharge into them. Comments on the proposed rule are due by 20 October 2014. The agencies are expected to issue a final rule, after reviewing and addressing the comments, in April 2015.

Changing Climate Conditions and Extreme Weather

Changing climate patterns may create additional challenges for US mining operations. One set of challenges involves the changing climate itself; more rainfall in some areas might lead to more frequent flooding. Conversely, less rainfall in other areas might make mining more costly if access to the water needed for mining operations becomes more limited.

A second set of challenges involves the possibility of new regulations designed to ensure climate "resiliency". President Obama has made resiliency to extreme weather events a central element of his Climate Action Plan, and increasing federal attention to that issue could lead to new regulatory proposals designed to strengthen mines against such events.

> "EPA's interest in promoting such installations may create new revenue opportunities."

Opportunities to "RE-Power" Old Mines

If there is a silver lining for mine owners, it is that EPA is actively seeking ways to encourage the use of old mines as locations for renewable energy projects. Through its RE-Powering America's Land initiative, the agency has created a set of resources, including mapping tools, to encourage the installation of solar, wind and other renewable energy projects on contaminated properties, including old mines. EPA's interest in promoting such installations might create new revenue opportunities for the owners of some older, contaminated mine sites.

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US Metal Products Industries Must Still Rely on Import Relief to Protect Against Competitive Imports

By **David Levine** and **Raymond Paretzky**

For many years, antidumping (AD) and countervailing duty (CVD) cases have provided legal means for domestic industries in many countries to obtain protection against low-priced and subsidised import competition. Although the annual number of US cases and the range of industries bringing actions have decreased significantly over the past decade, several metals and metal products industries continue to rely on these actions as a means of combating imports.

Companies in these industries—US producers, US importers, overseas producers and exporters to the US market alike—should be familiar with this form of legal proceeding and consider its implications when developing their global business strategies.

US AD and CVD Laws and Practices

The US AD and CVD laws are designed to counteract the impact of dumped and subsidised imports on domestic industries. For petitioners seeking relief under these laws, a successful result from an investigation is the imposition of an order that requires the deposit and eventual assessment of AD and/or CVD duties on entries of the imports in amounts sufficient to offset the dumping or subsidisation.

Affirmative AD and CVD determinations are based on historic periods, *e.g.*, the year preceding the petition, and apply as duty deposit requirements paid by importers on future entries. Each subsequent year, during the "anniversary month" of the order, interested parties may request an administrative review of the entries made during the past year so that the actual dumping margins and/or rates of subsidisation may be determined and assessed. If no review is requested, duties are assessed at the deposit rates.

Dumping occurs when an exporter sells a product or products in a country at prices that are less than "normal value," and those imports cause or threaten to cause material injury to the domestic industry. In the United States, the US Department of Commerce (DOC) determines if the imports have been dumped, and the US International Trade Commission (ITC) determines whether or not the subject imports are a cause of material injury or threat to the domestic industry.

US law establishes normal value as the price at which the products, or similar products, are sold in the exporter's home market. If there are too few home market sales, normal value is established by the price at which the product is sold in third countries. If home market and third-country prices cannot be determined, or if those prices are below the cost of production, normal value is established by a "constructed value," computed as the cost of producing the product plus statutory minimum additions for overhead and profit.

> The US metals and metal products industries represent a majority share of all US AD/CVD petitioners.

The DOC compares prices and costs by making various adjustments, *e.g.*, for movement charges, circumstances of sales and exchange rate fluctuations, to arrive at net, ex-factory prices. The amount by which the exporter's US price falls below normal value is the "dumping margin."

The DOC is also responsible for determining whether subsidies are "countervailable," *i.e.*, subject to countervailing duties. Countervailable subsidies typically consist of export subsidies or certain domestic subsidies. Subsidies are generally benefits conveyed directly or indirectly by a national, local or regional governmental authority. Under US law, domestic subsidies are benefits conferred on the subject products but are not dependent on their exportation. In order to be countervailable, domestic subsidies must not be generally available; they must be limited to specific companies or sectors.

Countervailable subsidies also include certain "upstream subsidies," *i.e.*, benefits provided by a government entity relating to an input used in the production of the subject merchandise. To be countervailable under US law, an upstream subsidy must convey a competitive benefit on the subject products and must have a significant effect on the cost of producing those end products. The DOC measures each countervailable subsidy against the sales to which it applies, *e.g.*, all sales or export sales only, then computes a subsidy rate for each program and combines them into an overall subsidy rate to apply as a countervailing duty on future entries of the subject products.

AD and CVD Orders on Steel, Metals and Metal Products

Of the 67 US AD and/or CVD cases filed since the beginning of 2008, 36 (54 per cent) involve metals (principally steel) or metal products. Metals industry actions similarly represent a large share of all AD/CVD cases that have resulted in the imposition of US import relief measures. There are currently 151 active US AD and/or CVD orders on metals and metal products (petitioners often bring combined AD/CVD cases against multiple countries). The following list, based on subcategories used by the ITC, illustrates the volume and breadth of cases involving metals and metal products:

- *Iron and Steel—Mill Products:* 57 active orders, including clad steel plate, steel concrete rebar, hot-rolled carbon steel flat products, carbon and stainless steel wire rod, carbon steel plate, stainless steel sheet and strip, tin mill products, stainless steel bar, steel threaded rod and steel wire garment hangers

- *Iron and Steel—Other Products and Castings:* 36 active orders, including pre-stressed concrete steel wire strand, iron construction castings, various types of pipe fittings, ball bearings, tapered roller bearings, steel nails, steel wire garment hangers, pre-stressed concrete steel wire strand, steel grating, high-pressure steel cylinders, utility scale wind towers and drawn stainless steel sinks

- *Iron and Steel—Pipe Products:* 34 active orders, including various types of line pipe, seamless pipe, pressure pipe and carbon, stainless and non-alloy steel pipe; drill pipe and drill collars; light-walled rectangular tube; light-walled rectangular pipe; and tube and oil country tubular goods

- *Metals and Minerals:* 24 active orders, including uranium, silicomanganese, silicon metal, ferrovanadium; magnesium, pure magnesium (ingot), gray portland cement and clinker, brass sheet and strip, foundry coke, pure granular magnesium; electrolytic manganese dioxide; and aluminium extrusions

The countries concerning which there are active AD/CVD orders and the number of orders covering each country in descending order are: China (45), Japan (13), India (10), Korea (10), Taiwan (9), Brazil (8), Indonesia (6), Ukraine (5), Thailand (5), Mexico (4), Russia (4), Italy (3), Turkey (3), South Africa (3), Vietnam (3), Germany (2), France (2), Spain (2), Moldova (2), Australia, Belarus, Belgium, Canada, Kazakhstan, Latvia, Malaysia, Philippines, Poland, Romania, Trinidad and Tobago, the United Arab Emirates, the United Kingdom and Venezuela (1 each).

The US metals and metal products industries represent a majority share of all US AD/CVD petitioners and consequently derive a level of protection under these laws against competition from imports that is greater than all other US industries combined. The range of metals products and the countries of origin that are the targets of AD/CVD cases in the United States is vast, covering billions of dollars in trade. While normal tariffs have decreased over recent decades, and other non-tariff barriers have been eliminated, including through many bilateral and multilateral free trade agreements, AD/CVD relief clearly remains the primary option for the US metals and metal products industries seeking to maintain and gain new protection against competitive imports into the domestic market.

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Legal Developments Affecting Mining in Africa

By **Jean-Claude Petilon** and **Matthieu Adam**

Following the introduction of attractive legal provisions for investors in the early 2000s, the legal environment applicable to mining activities in Africa has seen increasing supranational and domestic legislation and regulations intended to better take into account the interests of the state and the local population.

Resource Nationalism

A growing number of African countries have introduced, or are considering introducing, measures aimed at increasing their mining revenues and the economic returns for the local population. The following are just three examples of such measures.

Introduction of, or Increase in, Taxes

Tax initiatives have gained popularity with African governments anxious to better take advantage of any price increase in certain minerals, despite the lack of success in similar international tax initiatives, such as those in Australia and Québec, Canada. Zambia attempted to introduce a "windfall tax" in 2009, and Côte d'Ivoire did the same in late 2012 (the Côte d'Ivoire government actually tried to revive the additional profit tax that was already embodied in the 1995 Mining Code but never levied in the absence of the required implementing regulations). Both governments, however, had to step back following criticism from the mining industry. Nevertheless, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Ghana and Tanzania are still contemplating imposing windfall taxes, at least for certain minerals, such as gold ore.

> "Tax initiatives have gained popularity with African governments."

Domestic Beneficiation

Domestic beneficiation relates to mechanisms aimed at restricting or taxing the export of minerals that are not refined in the country of extraction. Gabon, South Africa and Zimbabwe recently announced such measures. In 2010, Katanga, the main mining province of the DRC, increased its tax on copper and cobalt concentrates from US$60 to US$100 per metric tonne. The DRC is planning a ban from late 2014 on the export of copper and cobalt that has not been refined in the DRC, although this ban is still subject to the government issuing the necessary regulations. A ban on exporting unrefined gold is also expected to take effect in Mali in 2015 with the inauguration of a new state-owned refinery. Gabon has also declared its position against the

export of unrefined raw materials, which may be reflected in future legislation.

Mandatory Participation by the State or Nationals in the Share Capital of Mining Operators
A growing number of African countries are considering increasing the state's share in local mining companies at the exploitation stage, despite the inherent risks. For example, governments often do not realise the full value of the equity share, and profits are not always generated as initially expected. In Zimbabwe, the government wants to force foreign companies to transfer 51 per cent of their share capital to national interests (indigenisation law). The DRC, which is currently discussing amendments to its 2002 Mining Code, wishes to increase state participation from 5 per cent to 10 per cent, considerably less than the formerly anticipated 35 per cent.

Implications for Businesses and Investors

Although mining operators resist these mechanisms because of their potential impact on profits and local operations, the international context and the ongoing pressure imposed by finance organisations, *e.g.*, the World Bank, the African Development Bank and the International Monetary Fund, have led to a significant number of African countries reviewing their positions and adapting their legislative frameworks to increase both their mining revenues and the economic returns for local populations. This trend has already resulted, for instance, in new mining codes restricting extensive tax breaks and exemptions.

Several governments have revisited contracts with mining companies, despite the existence of stabilisation clauses in the initial contracts that should have protected the companies against any modifications to the legal and tax terms governing their local operations. In 2007, the DRC was one of the first African states to revisit and renegotiate a number of mining contracts. Guinea engaged in a similar move subsequent to the adoption of a new Mining Code in 2011. More recently, Senegal announced in early 2014 that it would review the economic and fiscal conditions granted to mining operators and renegotiate at least some of the existing mining conventions.

Influence of International Initiatives

The enactment of national legislation imposing stricter economic, social, labour and environmental obligations on mining investors has been supported by supranational initiatives promoting transparency and good governance, such as the following:

- The non-binding Extractive Industries Transparency Initiative, which a growing number of African countries either are already compliant with (Burkina Faso, Cameroon, Côte d'Ivoire, the DRC, Ghana, Guinea, Liberia, Mali, Mauritania, Mozambique, Niger, Nigeria, Republic of the Congo, Sierra Leone, Togo and Zambia) or are candidates to join (Chad, Ethiopia, Madagascar and Senegal)
- The Kimberley Process, which applies to the diamond industry
- The US Dodd-Frank Act, which compels all companies registered by the US Securities and Exchange Commission to disclose payments made to national governments, with a breakdown by country and project
- The draft European Commission legislation currently under review, which would require the profits of multinational companies carrying out activities in Africa to be published

"Several governments have revisited contracts with mining companies, despite the existence of stabilisation clauses."

The 2003 Community Mining Code of the West African Economic and Monetary Union (WAEMU), which recommends basic principles applicable to the mining industry in all WAEMU Member States, is currently under review. The aim of the review is to produce, *inter alia*, a more detailed and comprehensive community framework, and to improve the provisions that were not effective owing to the lack of implementing regulations.

The Economic Organisation of West African States (ECOWAS) Directive of 27 May 2009 on the harmonisation of principles and policies in the mining sector also has contributed significantly to the promotion of measures to improve the economic, social and labour aspects of the mining environment and to generate positive returns for local populations. ECOWAS Member States contemplating reformation of mining codes that were enacted prior to 2009 must incorporate the ECOWAS Directive principles in any new legislation.

Issues to Be Addressed by Legislation

In many countries, there are still several issues that must be addressed to enable the mining industry to offer fair and satisfactory development opportunities for both the mining operators and the relevant states. These issues include various forms of illegal mining activities and conflicts over mining perimeters; inappropriate allocation of mining resources, especially for local communities; lack of sufficient transport, such as railways, roads and ports; lack of energy infrastructure; and lack of ore processing facilities.

Recent national initiatives have attempted to tackle these inefficiencies by introducing provisions intended to better regulate the exercise of mining activities, plan the development of mines with increased upstream involvement by the local populations, facilitate the construction and financing of the necessary infrastructure, and ensure that a more substantial share of mining resources serves to improve the living conditions of the local populations and the economic development of the countries involved.

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Termination or Novation of Metal Hedges in M&A Transactions

By **Andreas Kurtze**

Many metal producers and metal processors use a central hedging entity within their group to mitigate financial risks from price volatility. As part of a merger and acquisition (M&A) process, the seller usually aims to terminate contractual relationships with the sold company, and particularly to extinguish all liabilities connected with the company to the extent possible and practicable. This aim applies to metal producers and metal processors with hedging arrangements that have a group-internal hedging entity as counterparty.

Explicit provisions in the sale and purchase agreement (SPA) on metal hedging are, however, surprisingly scarce, even on more widely used hedging instruments, such as foreign exchange contracts. SPAs generally only provide that intra-group arrangements must be terminated prior to the transaction's closing.

> Explicit provisions in the SPA on metal hedging are, however, surprisingly scarce.

As far as metal hedges are concerned, this lack leads to ambiguity, because the legal framework for derivatives transactions is often silent on the consequences of a mutually agreed early termination of a hedging contract. For example, neither the widely used International Swaps and Derivatives Association Master Agreement nor the German Master Agreement for Financial Derivatives Transactions contains any explicit provisions in this respect. Without an explicit SPA provision, in many cases it will be unclear whether the current value of the hedges must be compensated upon termination. Simply terminating all hedges without compensation would put the company in the same position as if the hedging had never occurred, so that is seldom the optimal solution.

An alternative to undoing all hedges without compensation is a termination for a cash settlement. This enables the company to substitute the hedges after closing with only very limited exposure to price volatility. To calculate the compensation amount, parties can determine the mark-to-market values of the hedges based on mid-market or other available benchmarks. Thereafter, all transactions can be netted with just one surviving liability payable in cash either from the company to the seller's hedging entity or vice versa. The resulting payment stream should be taken into account in the drafting of the purchase price clause.

Another option is the novation of the hedging arrangements at closing, which leads to the continuation of identical hedging arrangements with the purchaser's hedging entity as the new counterparty. From an M&A perspective, this solution can be considerably more complex, because it requires cooperation between the seller and the purchaser, and potentially third-party counterparties. Despite the added contractual complexity, the parties might see this option as an advantage because it does not trigger an additional stream of cash at the closing of the M&A transaction.

Novation requires a tripartite agreement between the company and the seller's and purchaser's hedging entities. The mutual obligations of the seller's hedging entity and the company can be cancelled without cash compensation. At the same time, identical obligations between the purchaser's hedging entity and the company can be created to replace the cancelled obligations. Where the seller has mirrored the internal relationships with the company with an external counterparty, and the purchaser group wishes to also mirror the novated hedging relationships with an external counterparty, the parties may also agree on a novation of the respective external hedging arrangements. Obviously, this requires the counterparty (or counterparties) to cooperate.

> As far as metal hedges are concerned, this lack leads to ambiguity.

Parties to an M&A transaction must consider intra-group hedges in good time in order to be able to address all issues. Treasurers, accountants and lawyers must develop the preferred route of action, which must be reflected in the SPA, with particular consideration given to the consequences for the purchase price clause.

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