The Mining Law Review

Editor

Erik Richer La Flèche

Law Business Research

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EDITOR'S PREFACE

I am pleased to have participated in the preparation of the first edition of *The Mining Law Review*. The Review is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 22 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes eight country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

After the lost decades of the 1980s and 1990s came the mining boom of the past decade and the beginning of the 'Commodities Super-Cycle'. During this time, the price of industrial minerals and other commodities rose sharply. Needless to say, the mining boom has resulted in the resurgence of mining and has been a boon to many emerging economies, particularly in Africa and South America.

Will the super-cycle continue? If one accepts that the root cause of the super-cycle is China, then the answer is yes and mining has a bright future: China needs minerals to continue its industrialisation and the rollout of modern cities and infrastructure. While its stated objective is to build a modern service-oriented economy, China is at best 10 to 15 years away from transiting out of its current intensive mineral consumption phase. As a result, continued strong demand should sustain prices for the next decade – this is particularly true for metals little found in China. Thereafter, demand should remain strong as the world adds an estimated 2 billion to its population by 2050, most of whom will reside in emerging markets and – if the past is indicative of the future – will want greatly improved living standards.

The Commodities Super-Cycle has fuelled increased mining activity across the globe. It has also given rise to the most important trend facing mining: economic nationalism. Governments, under pressure from their exchequers and populations, want increased and – perhaps more problematically – immediate economic benefits from mining. This phenomenon can be observed in post-industrial economies as well as in emerging ones and across all political lines. No country is immune from this trend.

The long period of sustained high prices for minerals and metals has greatly increased expectations and mining companies and governments are struggling to achieve the right balance between competing interests. The question of the day is how predictably and fairly to share income among various stakeholders: governments, mining communities, mining companies, their shareholders and employees. This is a very difficult question and there is no 'one-size-fits-all solution'.

Mining projects are endeavours of long gestation, which can take 10 years or more between discovery and commissioning. Mining projects are also very capital-intensive with a front-ended investment profile. In other words, mining companies invest large amount of money early but have multi-decade payback horizons and require stable legal and tax environments in order to attract project capital.

Governments, on the other hand, are subject to shorter-term pressures. Their budgets are yearly affairs, employees and local communities are impatient, and politicians are at the mercy of electoral cycles. The tax-receipt profile of mining projects, however, is predominantly back-ended; that is to say, governments receive the bulk of taxes and other charges many years after project commissioning and project debt repayment.

The long-term needs of projects for stable legal and tax environments and the short-term pressures placed on governments for more revenues has led to friction. While governments have considerable leverage thanks to supply constraints and high prices, they must nonetheless walk a fine line. They need to be careful not to 'kill the golden goose' while avoiding a 'race to the bottom'. After all, governments compete with each other to attract mining projects and mining companies can jurisdiction shop.

Economic nationalism is not limited to raising taxes: it can take other forms, including governmental or local ownership, benchmark export pricing, minimum in-country transformation, and export restrictions to ensure supply to local industry.

How can mining companies mitigate risks posed by economic nationalism? One of the best mitigation strategies is for mining companies to have a strong 'social licence'. A social licence may be defined as the acceptance or – better still – the approval of the community adjacent to a project. A strong social licence is not only effective against governmental overreach but can also serve as an effective anti-corruption mechanism.

A social licence has to be earned and maintained. This is best achieved through multi-stakeholder dialogues, local economic involvement, good environmental performance and social inclusion. Medical clinics, schools, roads, power plants, irrigation dams and water treatment plants are some of the types of projects carried out by mining companies as part of their social licence.

As you consult this book you will find more on economic nationalism and other topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

Erik Richer La Flèche
Stikeman Elliott LLP
Montreal
November 2012

Chapter 30

UNITED KINGDOM

Kate Ball-Dodd and Connor Cahalane[1]

I INTRODUCTION

The UK remains a leading destination for mining companies seeking to have their shares traded on a public stock exchange. As at 31 August 2012, there were 40 mining companies admitted to trading on the London Stock Exchange's Main Market, with a combined market capitalisation of over £233 billion, including many of the world's largest mining groups by market capitalisation. The London Stock Exchange's growth market, AIM, continues to be a popular listing venue for the mining sector, with 143 mining companies admitted to trading as at 31 August 2012 with a combined market capitalisation of approximately £6 billion. In June 2012, ICAP plc acquired the PLUS Stock Exchange plc (formerly known as OFEX), the operator of two primary markets in the UK, the PLUS-listed market for listed securities and the PLUS-quoted market for unlisted securities. As of 31 August 2012, there were 15 mining companies admitted to trading on the PLUS Stock Exchange, with a combined market capitalisation of approximately £30 million.

During 2011, a total of 24 new mining companies were admitted to trading on the Main Market and AIM, including the initial public offers of Glencore International plc, an integrated commodities producer and marketer, and Polymetal International plc, a gold and silver producer with operations in Russia and Kazakhstan. As the global economic crisis, and in particular the European sovereign debt crisis, continues to affect global capital markets, the first half of 2012 has seen just one new mining company admitted to the Main Market, Nord Gold NV, a gold producer with operations in Africa and Siberia, which in January 2012 completed an admission of global depository receipts to the standard segment of the Official List. In June 2012, Polyus Gold International plc

1 Kate Ball-Dodd is a partner and Connor Cahalane is a senior associate at Mayer Brown International LLP.

transferred its listing from the standard segment to the premium segment of the Official List. During the eight-month period to 31 August 2012, 10 new mining companies were admitted to AIM. Notable among the new AIM admissions was Rare Earths Global Limited, a Chinese mining services group, which completed a placing and admission to AIM in March 2012 and had a market capitalisation of £256 million as at 31 August 2012.[2]

II CAPITAL RAISING

i General overview of the legal framework

Under the UK listing regime, different admission criteria and listing rules will apply depending on whether a company is seeking to have its shares (or other securities) admitted to a regulated market governed by the EU Prospectus Directive,[3] such as the Main Market or the PLUS-listed market, or to AIM, which has a more flexible regulatory structure.

Official List

In order to be admitted to the Main Market or the PLUS-listed market, a company must first apply to the UK Listing Authority ('the UKLA'), a division of the UK's Financial Services Authority, to join the Official List.

Mineral companies

For the purposes of the Listing Rules ('LR'), which set out the admission requirements for the Official List, a mineral company is a company with material mineral projects (not just those whose principal activity is the extraction of mineral resources). The materiality of projects is assessed having regard to all the company's mineral projects relative to the company and its group as a whole. Mineral projects include exploration, development, planning or production activities (including royalty interests) in respect of minerals, including:

a metallic ore, including processed ores such as concentrates and tailings;
b industrial minerals (otherwise known as non-metallic minerals), including stone such as construction aggregates, fertilisers, abrasives and insulants;
c gemstones;
d hydrocarbons, including crude oil, natural gas (whether the hydrocarbon is extracted from conventional or unconventional reservoirs, the latter to include oil shales, oil sands, gas shales and coal bed methane) and oil shales; and
e solid fuels, including coal and peat.

2 Source for Main Market and AIM statistics is the London Stock Exchange website, www.londonstockexchange.com. Source for PLUS statistics is the PLUS Stock Exchange website, www.plus-sx.com.

3 EU Prospectus Directive (2003/71/EC).

Admission requirements

The Official List is divided into two segments: standard listings and premium listings. A standard listing is one that satisfies the minimum requirements laid down by the EU Prospectus Directive. A premium listing denotes a listing that meets more stringent criteria that are not required by the EU Prospectus Directive but that are seen as providing additional investor protections. A mineral company may apply for either a premium or standard listing provided it complies with the relevant admission requirements.

Standard listing

A mineral company seeking a standard listing must comply with the general admission requirements set out in the LR.[4] These include a requirement that the company is duly incorporated (either within the UK or, if a non-UK company, in the company's place of incorporation), and that the securities must be free from any transfer restrictions (subject to certain exceptions[5]). If the company is making an offer of new securities, any necessary constitutional, statutory or other consents required must be obtained prior to listing.[6] The expected market capitalisation of the securities to be listed must be at least £700,000 in the case of shares and £200,000 in the case of debt securities. While the UKLA has a discretion to admit a company with a lower market capitalisation if it is satisfied there will be an adequate market, from a practical perspective it is likely that the market capitalisation would need to be significantly higher for a listing to be economical.[7] While there is no requirement for a company seeking a standard listing to confirm to the UKLA that it has sufficient working capital to meet the requirements of the business for the next 12 months, if the company is also producing a prospectus (which is likely to be the case – see below), it will be required to include a working capital statement in the prospectus confirming whether the business has sufficient working capital for that period.

Premium listing

If a mineral company is seeking an admission of its shares to the premium segment of the Official List, in addition to the minimum requirements applicable to all listings set out above, the company must confirm to the UKLA that it has sufficient working capital available to meet the requirements of the business for the next 12 months.[8] At least 25 per cent of the class of the company's shares to be listed in the premium segment must be in the hands of the public in one or more EEA countries at the time of admission. Where the company is already listed in a non-EEA country, shareholders in that country may be taken into account. For this purpose, 'public' means shareholders other than those holding 5 per cent or more of the class of shares being admitted, and also excludes shares held by the directors of the company or any persons connected to the directors.

4 LR 2.

5 LR 2.2.4R. For example, this does not prevent the company's shareholders from entering into agreements among themselves restricting their ability to transfer shares.

6 LR2.2.2(3)R.

7 LR 2.2.7R and LR 2.2.8G.

8 LR 6.1.16R.

Mineral companies are exempt from the premium listing requirement (which would otherwise apply) to have published or filed audited accounts that cover at least three full years, and also do not need to have at least 75 per cent of their business supported by a historic revenue earning record.[9] The rationale for this is that mineral companies are subject to their own specific eligibility requirements, which are discussed below.

Prospectus

As well as complying with the above admission requirements, a company seeking admission to the Official List (to the standard or premium segment) or making a public offer of securities in the UK must publish a prospectus setting out sufficient information to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the company.[10] The company must also confirm in the prospectus whether is has sufficient working capital to meet the requirements of the business for the next 12 months. The prospectus must be submitted for review by the UKLA, which will assess whether the document complies with the disclosure requirements set out in the Prospectus Rules ('PR'). A prospectus must not be published unless it is approved by the UKLA.[11] In the case of an offer of shares, the company and its directors must take responsibility for the contents of the prospectus, and may be liable for any inaccurate or misleading information in the document or for failure to comply with the relevant disclosure standards.[12]

Specific eligibility requirements for mineral companies

If a mineral company seeking admission to the Official List (to the standard or premium segment) does not hold a controlling interest in a majority by value of the properties, fields, mines or other assets in which it has invested, the company must be able to demonstrate to the UKLA that it has a reasonable spread of direct interests in mineral resources and has rights to participate actively in their extraction, whether by voting or through other rights that give it influence in decisions over the timing and method of extraction of those resources.[13]

Specific content prospectus requirements for mineral companies

In March 2011, the European Securities and Markets Authority ('ESMA') published an updated edition of its recommendations for the consistent implementation of the EU Prospectus Directive, with revised recommendations as to the content requirements

9 LR 6.1.8 and 6.1.9.

10 Section 87A(2), Financial Services and Markets Act 2000.

11 A company that has its home Member State in another Member State may also have a prospectus approved by the competent authority in that jurisdiction and seek to have the prospectus 'passported' into the UK pursuant to Articles 17 and 18 of the EU Prospectus Directive.

12 PR 5.5.

13 LR 6.1.10.

for prospectuses published by mineral companies.[14] When reviewing a prospectus, the UKLA will take into account these recommendations, which in effect supplement the requirements of the LR and PR.

The recommendations recognise that mineral companies are distinct from other companies in that a key factor in the assessment of their value relates to their reserves and resources. The recommendations seek to ensure that appropriate levels of transparency and assurance over the reserves and resources figures are made available to investors by setting out a framework for the additional disclosure of reserves and resources information, including the following information segmented using a unit of account appropriate to the scale of the company's operations (rather than on a per-asset basis):

a details of mineral resources and, where applicable, reserves and exploration results and prospects;

b anticipated mine life and exploration potential or similar duration of commercial activity in extracting reserves;

c an indication of the duration and main terms of any licences or concessions, and legal, economic and environmental conditions for exploring and developing those licences or concessions;

d indications of the current and anticipated progress of mineral exploration or extraction, or both, and processing, including a discussion of the accessibility of the deposit; and

e an explanation of any exceptional factors that have influenced the foregoing items.

Competent persons report

A competent persons report ('CPR') is also required for all initial public offering prospectuses regardless of how long the company has been a mineral company. A CPR may also be required for secondary issues, but not where the company has previously published a CPR and has continued to update the market regarding its resources, reserves, results and prospects in accordance with one of the recognised reporting standards.

The CPR must be prepared by a person who possesses the required competency requirements, either by satisfying the requirements of the applicable codes or organisation set out in the recommendations, or by being a professionally qualified member of an appropriate recognised association or institution with at least five years of relevant experience.

The content requirements for the CPR are set out in the ESMA 2011 recommendations. These requirements vary depending on whether the CPR relates to a company with oil and gas projects, or a company with mining projects. The CPR must be dated not more than six months prior to the date of the prospectus, and the company must confirm that no material changes have occurred since the date of the CPR that would make it misleading. A list of acceptable internationally recognised reporting and

14 ESMA update of the Committee of European Securities Regulators' recommendations for the consistent implementation of Commission Regulation (EC) No. 809/2004 implementing the Prospectus Directive (23 March 2011).

valuation standards is also set out in the recommendations. The mining reporting codes are aligned with the Committee for Mineral Reserves International Reporting Standards (and do not include US SEC Industry Guide 7 on mining, or the Russian or Chinese standards).

Depository receipts

Companies incorporated outside the EU seeking admission to the Main Market often choose to do so through an issue of depository receipts, as a direct investment in their shares may be less attractive to international investors. Depository receipts are negotiable instruments that represent an ownership interest in a specified number of the company's shares. The underlying shares are issued to a depository, which in turn issues depository receipts to investors. Depository receipts may only be admitted to the Official List through a standard listing.

AIM

AIM is the London Stock Exchange's market for smaller and growing companies. Due to its status as an 'exchange regulated market' for the purposes of the EU Prospectus Directive, AIM is governed by a more flexible regulatory regime than the Main Market.

Role of the nomad

While admission to the Main Market and the Official List is regulated by the UKLA, the London Stock Exchange oversees the regulation of AIM and compliance with the AIM Rules. Each company seeking admission to AIM must appoint a corporate finance adviser that has been approved by the London Stock Exchange to act as a nominated adviser or 'nomad'. The company's nomad is responsible for assessing whether the company is an appropriate applicant for AIM, and for advising and guiding the company on its responsibilities under the AIM Rules.

Admission requirements

Unlike the Official List, there are generally no minimum market capitalisation requirements for a company seeking admission to AIM. However, investment companies must raise a minimum of £3 million in cash through an equity fundraising to be eligible for admission to AIM.[15]

There are also no minimum requirements as to the applicant company's trading history or the number of shares in public hands. The shares must however be freely transferable and eligible for electronic settlement.

Fast-track admission to AIM

Companies that are already listed on certain overseas exchanges may qualify for AIM's fast-track admission process, in which case the company will not be required to produce

15 Rule 8, AIM Rules for Companies. For this purpose an 'investing company' is any company that has as its primary business or objective the investing of its funds in securities businesses or assets of any description.

an admission document.[16] To be eligible for fast-track admission, a company must have its securities traded on an AIM designated market[17] for at least the last 18 months, and should also have substantially traded in the same form during this period.

Admission document

A company seeking admission to AIM (other than a fast-track applicant) is required to publish an admission document. The company's nomad will be responsible for assessing whether the admission document complies with the content requirements set out in the AIM Rules. While these requirements are less onerous than those that apply to a prospectus, a company preparing an admission document is subject to a general requirement to disclose any information that the company reasonably considers necessary to enable investors to form a full understanding of the assets and liabilities, financial position, profits and losses, and prospects of the applicant and its securities for which admission is being sought, the rights attaching to those securities and any other matter contained in the admission document.[18]

Due to the less onerous disclosure requirements, and as the admission document is reviewed and approved by the company's nomad rather than the UKLA, the process and timetable for admission to AIM can often be shorter and more flexible than the process for admission to the Official List.

Prospectus requirement for AIM companies

Although AIM is not a regulated market for the purposes of the EU Prospectus Directive, where a company seeking admission to AIM is also making an offer of its securities to the public in the UK, the admission document may also need to be approved as a prospectus by the UKLA unless it can avail of an applicable exemption. Where a company is offering its shares through a private placement, it will usually seek to rely on an exemption available for offers addressed solely to qualified investors, or fewer than 150 natural or legal persons per EU Member State (i.e., other than qualified investors).

Specific content requirements for mineral companies

In addition to the general requirements set out in the AIM Rules, a mining company seeking admission to AIM is required to comply with the AIM Guidance Note for Mining, Oil and Gas Companies ('the Guidance Note').[19]

The Guidance Note states that nomads are expected to conduct full due diligence on mining companies seeking admission to AIM, including by carrying out site visits

16 However, as with any company seeking admission to AIM, a fast-track applicant may be required to produce a prospectus under the EU Prospectus Directive where, for example, an offer of securities is made to the public and no relevant exemption is applicable.

17 These include the Australian Securities Exchange, Deutsche Börse Group, NYSE Euronext, Johannesburg Stock Exchange, NASDAQ, NYSE, NASDAQ OMX Stockholm, Swiss Exchange, TMX Group and the UKLA Official List.

18 Schedule 2(k), AIM Rules for Companies.

19 AIM Guidance Note for Mining, Oil and Gas Companies (June 2009).

and personal inspections of the physical assets where it is practical to do so. A formal legal opinion from an appropriate legal adviser is also required on the incorporation status of the company and any relevant subsidiaries, as well as the company's title to its assets and the validity of any licences.

Competent persons report

A mining company seeking admission to AIM is required to include in its admission document a CPR on all its material assets and liabilities. The CPR must comply with the disclosure requirements set out in the Guidance Note and the company's nomad is responsible for ensuring that the scope of the CPR is appropriate having regard to the applicant's assets and liabilities.

The CPR must be prepared no more than six months prior to the date of the admission document by a person who meets the minimum requirements for competent persons set out in the Guidance Note. These require the competent person to be a professionally qualified member of an appropriate association, independent of the applicant and to have at least five years of relevant experience.

Where information is extracted from the CPR for inclusion elsewhere in the admission document, that information must be presented in a manner that is not misleading and provides a balanced view. The Guidance Note also requires that the competent person must review the information contained elsewhere in the admission document that relates to the information in the CPR, and confirm in writing to the applicant and the nomad that the information is accurate, balanced, complete and not inconsistent with the CPR.

Lock-ins for new mining companies

The Guidance Note and the AIM Rules require that, where a mining company seeking admission to AIM has not been independent and earning revenue for at least two years, all related parties (which include the directors and any shareholders holding 10 per cent or more of the voting rights) and applicable employees must agree not to dispose of any interest in the company's securities for at least one year from the date of admission to AIM.

ii Tax considerations

Provided that a company is subject to UK tax, whether by being tax-resident in the UK or by another means, the UK tax regime does not distinguish between domestic mining companies and overseas mining companies.

The basic UK tax regime for mining companies is similar to that for other companies – the main rate of corporation tax is 24 per cent (set to reduce to 23 per cent from 1 April 2013, and then to 22 per cent from 1 April 2014), there is no limit on the period for which tax losses can be carried forward and set off against future profits (provided that they are incurred in the same trade that suffered the losses), and the usual withholding taxes regime applies. In broad terms, withholding tax applies (subject to any applicable double tax treaty and certain other exemptions) to overseas interest and royalty payments. There is no withholding tax on dividends.

The usual capital allowances regime for long-life assets (8 per cent writing down allowance per annum), and plant and machinery (18 per cent writing down allowance per annum), applies to mining companies. In addition, persons engaged in mining activities can benefit from the mineral extraction allowance, which is a form of capital allowance available to those who carry on a mineral extraction trade (a trade consisting of, or including, the working of a source of mineral deposits) and incur qualifying expenditure. Qualifying expenditure for these purposes can include expenditure on mineral exploration and access, and expenditure on acquiring mineral assets (defined as mineral deposits, land comprising mineral deposits, or interests in or rights over such deposits or land).

A major advantage offered to mining companies by the UK is that there are no specific mining or mineral taxes (although excise duty is payable on mineral oils, at varying rates, unless an exemption applies). There is also, generally, no VAT on exports. However, mining companies' activities may render them subject to the following indirect taxes:

a climate change levy – a tax on energy, with a variable rate depending on the nature of the fuel used;

b aggregates levy – a tax on the commercial exploitation (which includes both extraction and importation) of gravel, sand and rock, currently charged at £2 per tonne – this is subject to various exemptions, including exemptions for spoil from any process by which coal or another specified substance has been separated from other rock after being extracted from that rock, and for spoil from the smelting or refining of metal; and

c landfill tax – a tax on the disposal of waste to landfill, currently charged at the standard rate of £64 per tonne or the lower rate of £2.50 per tonne, depending on the material being disposed of; there is an exemption for the disposal of naturally occurring materials extracted from the earth during commercial mining or quarrying operations, provided that such material has not been subjected to and does not result from a non-qualifying process carried out between extraction and disposal.

Apart from the mineral extraction allowance, there are no special allowances or incentives for persons engaged in mining activities, or their investors or lenders.

III DEVELOPMENTS

On 1 October 2012, ESMA published a consultation paper seeking views on proposed further amendments to its recommendations regarding mineral companies. These include proposed amendments to the definition of 'material mining projects' to clarify that materiality should be assessed from the point of view of the investor; and projects will be material where evaluation of the resources (and, where applicable, the reserves or exploration results, or both) that the projects seek to exploit is necessary to enable investors to make an informed assessment of the prospects of the issuer. In addition, ESMA proposes to establish a rebuttable presumption within the definition of materiality that mineral projects can be material both where the projects seek to extract minerals for their resale value as commodities; or the minerals are extracted to supply (without resale to third parties) an input into an industrial production process (which includes but is not limited to the example of stone extracted in the cement and aggregates industry) and there is uncertainty as to either the existence of the resources in the quantities required or the technical feasibility of their recovery.

The consultation paper also sets out a proposal to amend certain of the existing exemptions from the requirement to publish a CPR, including a new exemption for non-equity securities (other than depositary receipts over shares).

ESMA expects to publish revised recommendations during the second quarter of 2013.

Appendix 1

ABOUT THE AUTHORS

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Kate Ball-Dodd is a partner in the corporate department of Mayer Brown International LLP. She has a wide-ranging corporate practice that encompasses corporate finance, mergers and acquisitions (including public takeovers), equity fund raisings, joint ventures and corporate governance. She advises a number of quoted companies and financial intermediaries on the UKLA Listing Rules and Disclosure and Transparency Rules, the Prospectus Rules, the AIM Rules, the Takeover Code and general company law. Kate speaks regularly at external conferences on corporate governance and takeovers.

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