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DEBT FINANCING FOR MINING PROJECTS

By Ian R. Coles

While the dearth of availability of equity funds for the development of mining projects over the past couple of years has been well documented, debt financing in a variety of guises has continued to be available for the right company with the right project. This article considers the context in which such financings have been made available and some of the legal issues relating to the same, particularly in an African context.

The larger mining companies continue to have access to corporate credit facilities. While this is not the case for the mid-level and lower producers looking for debt financing to support the development of new projects those producers do have access to a variety of different products. Pure exploration companies continue not to have access to this type of financing - the risks are just too great. Project finance on a single asset basis continues to be available for a project which has passed the BFS stage and which is capable of showing (a) a reliable management team which has developed and delivered similar projects in the past, (b) a straightforward project from a technical perspective, and (c) no unusual political, security or other risks. However it is alternative forms of financing for the development of projects which have received a wide degree of publicity during 2013. Financings provided by metal streaming companies such as Silver Wheaton have been in the news (most recently in connection with the financing of projects in Peru). The terms and conditions attaching to such facilities tend to be less extensive and onerous than those in

traditional project finance. Other entities, including funds such as Red Kite, have also entered this space.

The provision of debt and equity finance by both generalist and specialist funds for the development of projects has been much discussed during 2013 although the actual amount invested in the industry via these sources seems to be limited. Funds established by high profile managers and financiers leaving large mining companies and investment banks have also featured here (for example, X2 Resources founded by Mick Davis and others following their departure from Xstrata in the wake of the Glencore transaction). A further source of finance has been royalty financing, traditionally popular in Australia and the US in connection with early stage projects but now used in other contexts (for example by Wolf Minerals in connection with the development of the Hemerdon tungsten project).

None of this is to say that traditional project finance is not available, particularly for good projects in Africa. Project finance facilities for projects such as those owned by Aureus (in Liberia) and Base Resources (in Kenya) have been signed. The structure of project finance facilities, involving extensive project related covenants and de-risking in connection with political, currency, commodity price and construction related issues, continues to be pretty much the same as has been the case in the past. What does seem to have changed are the types of institutions participating in these facilities. They are no longer the exclusive preserve of commercial banks. DFIs and ECAs



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more frequently participate (for example, DEG, Proparco and FMO in connection with the development of the Kwale mineral sands project in Kenya). The export/import banks of countries in Asia seeking to source mineral supplies are also frequently seen in the market. What is also seen with greater frequency is a financing package for projects involving multiple sources of finance (for example, all or any of royalty, offtake, equipment and project finance might feature in the financing for a single project).

Legal issues in project financing for mining deals in Africa are pretty much the same as those occurring in other parts of the world. What does vary are the types of legal systems across the continent. In sub-Saharan Africa, where most mining activity takes place, the legal systems separate into three discrete types. First, those countries which previously formed part of the empire assembled by Great Britain. These countries (“Anglophone”) tend to have a legal system originally based on the English system of common/case law. Those countries previously under the influence of France (“Francophone”) have a civil law based approach. Many of these countries are now closely linked through the OHADA treaty which provides for a homogenised approach (based closely on French law) to corporate and commercial law. The third group of countries (“Lusophone”) are those, such as Angola and Mozambique, which were previously under Portuguese influence.

Government regulation of the mining industry in sub-Saharan Africa, an important aspect of due diligence performed by lenders prior to extending finance to any project, also varies widely. All countries require the issue of a licence before exploration/exploitation can take place. However, many countries also provide for the negotiation and implementation of a separate private mining contract between the government and the developer. These provide for undertakings with respect to the development of the project (including, for example, an obligation to use local services and personnel), fiscal and other stability undertakings from the government, etc. Most African jurisdictions do support the taking of the usual project finance security package (although in the civil law jurisdictions the use of an English style security trustee may not be possible and so-called “parallel debt” structures may be required). Local regulations with respect to the sale of production (particularly precious metals), the remission offshore of foreign currency receipts and the maintenance of offshore bank accounts can produce challenges though.

The overall picture therefore is that even in a difficult market projects can still be financed. The market has adapted through the availability of different finance products and the entry of new providers. For the right project development funds continue to be available. It just may take a little more patience and a little more time to arrange and complete the right package.

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