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Mining across borders

By Ian Coles, Partner and Global Mining Group Head

Finance transactions in the mining industry cross borders. A Brazilian based mining company seeking equity capital to finance the development of a project in Africa might tap the market in Canada. A Canadian miner looking for debt finance in connection with a project in West Africa will probably look in the first instance in London. A large majority of M&A transactions in the mining world involve a cross-border element.

What challenges are posed by these cross-border elements of a transaction and how are those challenges best assessed and met? The following are just some of the challenges which this writer has seen over the years. Indiscreet actual examples would be inappropriate but, for example, when acting for sponsors we have been surprised when, at the last minute, finance providers for projects in LatAm have discovered that self-help remedies might not be available to them.

Language - the most basic and obvious challenge. English is the lingua franca of the international business world but it is not the day to day method of communication in a government department in Burkina Faso or a working mine in Kazakhstan. While international business men and women, lawyers and other advisers can communicate and negotiate in one language important pieces of deals must be transacted in some other language. For example, negotiations in connection with a direct agreement to be entered into with a government in the context of a project finance transaction will need to be conducted in the language of the country in question. The important factor here is not so much the actual negotiations but the communication of the results of the same to the core deal team. Negotiations of this type will invariably be conducted by somebody on the periphery of the overall transaction who is not familiar with the overall picture and the subtleties involved. Ensuring that what has actually been agreed is accurately communicated and assessed is key. In some particularly esoteric jurisdictions there just may not be an easily available foreign language resource. We have worked on early stage projects in places such as Eretria and Central African Republic where that has been the case.

Negotiating Style - while many of those who have negotiated in a cross-border environment will insist that particular nationalities have particular negotiating styles this may be a function of anecdotal experience rather than a more empirical assessment. There are aggressive and bombastic English bankers and lawyers just as there are those with a meeker and solicitous approach. Likewise, approachable and diplomatic Americans do exist. Stereotyping is dangerous and has got many a deal off to the wrong start. Commence deals with a clean sheet of paper without jingoistic presumptions - although of course by all means adjust behaviour in accordance what you are confronted with. The potential conflict is heightened where projects involve more than a single jurisdiction - for example a lithium salar on the border of Iran and Afghanistan or a stranded project requiring access rights through a neighbouring country where conflict exists.

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Business Custom - always be cognisant of local custom - be it attending meetings with equivalent numbers of representatives to the other side, not sitting closest to the door or not showing the bottom of your shoe to an adversary. Trade and business associations publish booklets with details of pitfalls to avoid so the relevant information is easily accessible. We have seen projects founder because, for example, parties have not understood the need for other participants in a negotiation to obtain multiple levels of approval in their home jurisdiction. Conventional wisdom suggests that this is common in many Asian jurisdictions but our experience is that it is far more widespread than that.

Legal Systems - legal systems vary hugely. Possibly the biggest difference is between those countries following the English common law approach of case law developing principles over time and those countries with a civil law approach where codification is the foundation. The important thing here is never to assume anything from the system you are familiar with will apply in a different jurisdiction. Invariably surprises arise as a result of the question which was never asked. For example much emphasis is placed on the effectiveness and perfection of security interests in debt finance transactions. To those versed in the common law approach that might be the end of the story - if there is a default the creditor enforces the security and sells the asset to a third party. Not so in many other jurisdictions - particularly in those with a civil law tradition. In such jurisdictions enforcement might be a court administered process. In those countries with less than efficient judicial systems this can be a significant impediment to the effectiveness of security.

Sanctity of Contract - much is written about the tendency of those from one country or another to have less respect for the binding nature of a contract. Of course those growing up in a jurisdiction with historically less formalistic legal structures might not have the same hinterland with respect to legal tradition as, for example, a Western European. On the international stage though it seems that most people now understand the significance of a signed document. The fact that courts, particularly those in England and the US, have shown an increasing tendency to entertain litigation of disputes between foreign litigants might be a factor here (witness the number of disputes between Russian oligarchs being fought out in the High Court in London).

The overarching theme here is that cultural differences can play a part in the conduct of cross-border transactions. With a little research and understanding though the impact of the same on any transaction can be minimised. There is nothing particularly unique in this respect in the mining industry. It is just a fact that cross border considerations come into play with great frequency.