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EXPLORE

Insights from the DLA Piper Mining Sector

DLA PIPER

CONTENTS

THANK YOU for the positive feedback we received on the publication of our first edition of *Explore*. We set out to provide a global perspective on the mining sector and to harness the experiences and insights our people gain working with you and with others on a range of issues. It is helpful to know that we are providing a service that is useful.

While mining is as varied and diverse as the geographies from which it springs there are some themes that are common to all jurisdictions – or as close to 'standard' as you get in this industry.

Governments the world over are pondering how best to stimulate their depressed exploration sectors or how to keep pace with increasing demand for infrastructure and administrative services in emerging markets. With increasing capital markets effectively closed to the junior end of the market, innovative interventions to reduce costs, encourage investment and get things moving again are imperative. James Newnham analyses the **Australian government's proposed exploration incentive plan**. Terence Dambe considers the **need for a refresh of Botswana's legal framework** to cater for the explosion in mining activity in that country.

One way to reduce costs is to remove trade barriers. I examine **the potential benefits of the Pacific Alliance**.

Competitive advantage and the **protection of technology and processes** are at the heart of intellectual property rights, and a failure to understand their implications can be an expensive oversight, says Robynne Sanders.

The impact of the Chinese economy on our sector cannot be overemphasised, and so **changes to the coal sale process in the PRC** will be watched by many. Yao Chi and Caroline Dong provide a helpful overview of the key points.

To draw the edition to a close, we introduce new arrivals at DLA Piper, update your diaries and finish on a bright note – turning the spotlight on Aston Goad (Amsterdam/Jakarta).

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INTRODUCING THE DLA PIPER MINING SECTOR

DLA Piper's mining-focused lawyers offer practical and relevant advice that is grounded in commercial reality. They advise on many of the world's most significant mining and logistics projects, involving the acquisition, operation and development of mines, road and rail systems, ports and new mineral provinces. DLA Piper has a network of experienced people across both traditional and emerging mining centres and the ability to support your business needs, wherever you do business in the world.

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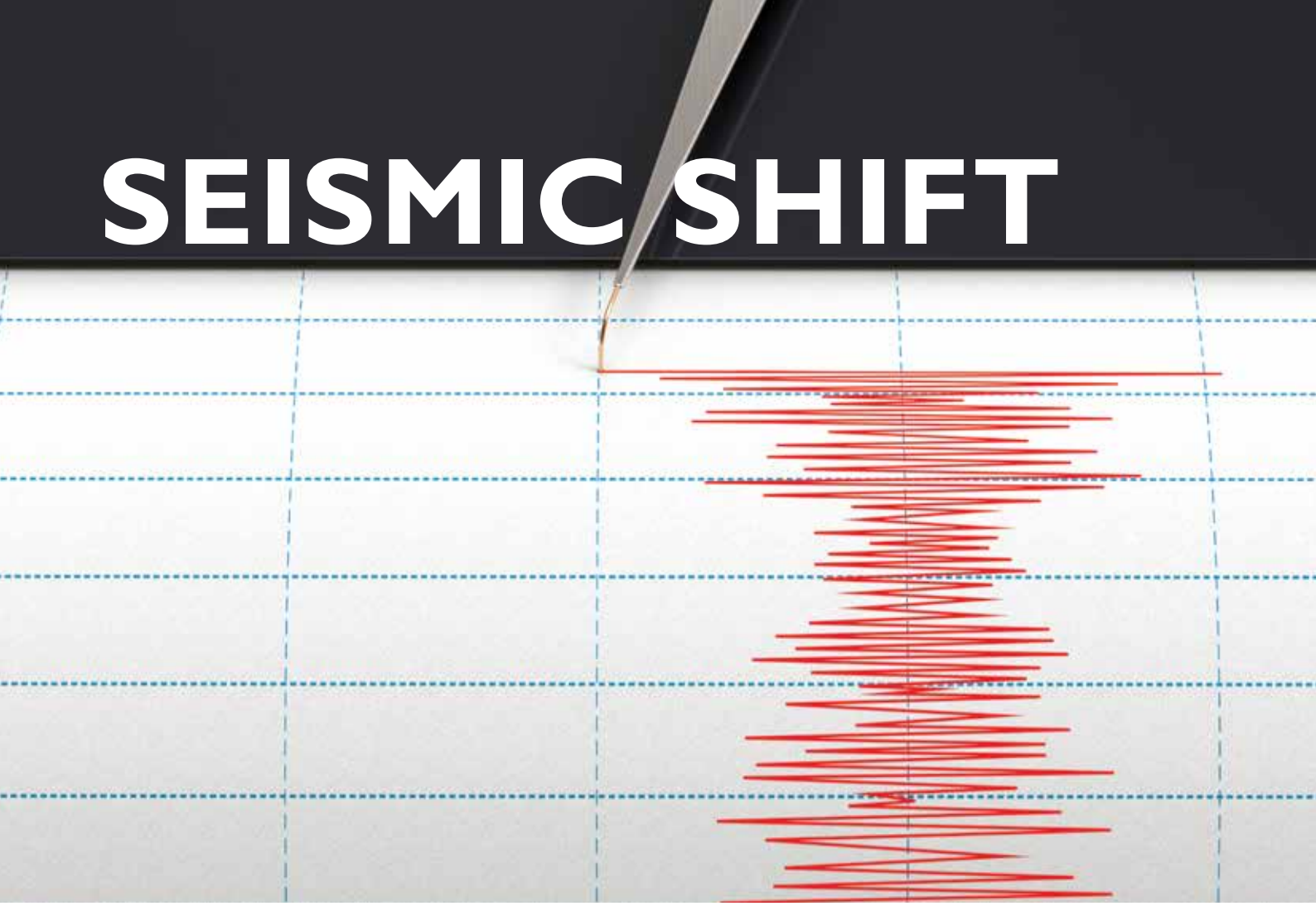
SEISMIC SHIFT



WILL THE PACIFIC ALLIANCE SHAKE UP MINING INVESTMENT PATTERNS?

By **Robert Edel**

It is an ambitious agenda: attracting foreign investment, freeing up trade and forming the bedrock of a trading group stretching along the Pacific corridor from Chile to Canada. If the Pacific Alliance delivers on its early promise then it is good news for the mining sector.

In the midst of tighter financial markets and, as a consequence, reduced development and investment opportunities in developed economies, companies, developers and financiers are diversifying their investments into emerging markets. Governments of developing economies have shown continued growth despite the slowdown and are taking active measures to capitalise on attracting investment by reducing entry barriers and providing transparent, dynamic and innovative investment conditions to attract global interest. The Pacific Alliance and its member countries, namely Mexico, Colombia, Chile and Peru, are at the forefront of this.

The four founding member countries have a lot to be proud of since the creation of the Pacific Alliance. A few of the most relevant facts and figures show that jointly they (i) have an average growth rate of 4.5% in 2013, which is well above the global average of 3% (Morgan Stanley has predicted growth of 4.25%, or $85 billion US Dollars, for the Pacific Alliance in 2014); (ii) had an average rate of inflation of 2.9% in 2013, which was below the regional average of 7% (largely affected by the 50% inflation rate in Venezuela); (iii) provide high macroeconomic stability, positive investment conditions and dynamic, globalised markets; and (iv) together, form the world's eighth largest economy and seventh largest exporter.

Samuel George of the Bertelsmann Foundation has stated that "Colombia, Chile, Mexico and Peru have taken big strides toward stabilizing their macroeconomic foundations" and that "the Pacific Alliance has the potential to push members towards Asian Tiger-style economies with correspondingly impressive growth."

WHAT IS THE PACIFIC ALLIANCE?

The Pacific Alliance is an economic pact signed in June 2012 between Mexico, Colombia, Peru and Chile, which created a unified economic trading block which seeks to generate "cross-border economies of scale and industrial linkages to help its members take full advantage of the Pacific Rim – the Pacific coastal countries of the Americas and Asia – which comprise one of the fastest growing regions on the planet" *(John Rathbone, 'Pacific Alliance takes pragmatic approach', Financial Times, 1 April 2014).*

Costa Rica completed its application for membership in February 2014 and is currently in the process of complying with the requirements.

Similarly, several other countries are reportedly looking to join including Panama, which signed a free-trade agreement with Mexico that Panama hopes will be its 'entry ticket' into the Pacific Alliance, according to Mexico's Economy Minister.

In addition, Australia is one of thirty "Observer States" that, along with other Asia Pacific countries such as New Zealand, Japan, China, India and South Korea, have been admitted as observers of the Pacific Alliance.

WHAT IS IN IT FOR THE MINING COMMUNITY?

Many of the Pacific Alliance's achievements to date are specifically geared to facilitating increased trade with third party markets and an ease of doing business within the region, including:

(i) Elimination of 92% of all import tariffs between members states – this was finalised at the most recent Pacific Alliance summit in February 2014. Member states have also committed to eliminating the remaining 8% of tariffs progressively over the next few years to become a 'free-trade' zone stretching along the Pacific corridor (with the potential to expand throughout Latin America and possibly North America – specifically Canada).

The elimination of import tariffs will facilitate the movement of goods and assets between member states and (i) enable entry into new markets from existing member states, and (ii) access to a greater geographic investment platform on uniform principles.

(ii) Linking of stock markets of Chile, Colombia and Peru (MILA) – The '*Mercado Integrado Latinoamericano (MILA)*' currently integrates the Colombia Stock Exchange, Santiago Stock Exchange and Lima Stock Exchange. The Mexican Stock Exchange is also set to join MILA later this year. Once this occurs, MILA will rival Brazil as the largest stock exchange in Latin America.

Linking the stock markets was done in order to strategically reduce overheads and fees, introduce uniform (lower) capital gains tax for clients and provide investors and companies a larger pool of capital and investment opportunity through a single source.

(iii) Elimination of business and tourist visas for visiting nationals of other member countries – One of the key objectives of the Pacific Alliance is to create a free flow of individuals and goods.

Abolishing business and tourist visas for visiting nationals of other member countries is only the first step – the end goal is to have a single visa for all Pacific Alliance countries for international visitors.

(iv) Creation of the Pacific Alliance Business Council (CEAP) – The '*Consejo Empresarial de la Alianza del Pacifico (CEAP)*' is charged with promoting the Pacific Alliance to third party markets, such as the Asia Pacific, and integrating the markets and infrastructure between member countries.

According to reports of the Inter-American Development Bank, "CEAP has prepared technical proposals to speed up integration between Pacific Alliance members in the areas of: production chains; regulatory harmonisation and convergence; PAHO safety certifications; implementation of foreign trade single windows (one-stop processing); logistical competitiveness; innovation and entrepreneurship; competitiveness training; public sector purchasing; financial integration; and standardisation of tax regulation."

FURTHER AFIELD – THE ASIA PACIFIC RESPONSE

There is no doubting that Trans-Pacific mining investment is growing – for example, more than 260 Australian companies are currently working in Latin America today (of this number 51 are ASX200 companies and 80 are mining companies). Korean, Japanese and Chinese companies are also investing in Latin America in greater numbers. And governments across the Asia Pacific have taken (and continue to take) specific measures to support investment into Latin America, and vice versa.

This is being done through the negotiation of free trade agreements with the Pacific Alliance member countries as well as providing active government support of economic blocs such as the Pacific Alliance.

At the time of writing, Australia has only one free trade agreement in place (with Chile), however, it is negotiating the Trans Pacific Partnership Agreement (TPPA) with Mexico and Peru, among others.

According to the Hon Kelvin Thomson Australia's MP, Parliamentary Secretary for Trade, "Australia has a unique ability to provide a practical and commercially significant link – a connecting rod – between Latin America and the dynamic economies of Asia."

Trade between Australia and Latin America in recent years has increased notably from around $1 billion in 1990 to in excess of $8 billion in 2013, with the Pacific Alliance countries taking the lion's share of that amount.

The Pacific Alliance is therefore very important to Australia and Australian companies alike, specifically in mining, education, water and renewable energy.

Importantly, all of the Alliance observers share in the principles and objectives set out in the 'Framework Agreement' of the Pacific Alliance and support its integration process.

Support such as this, from Asia Pacific nations, coupled with the growing presence of investors, aligns perfectly with one of the primary goals of the Pacific Alliance. This is to increase trade with third party markets, most importantly the Asia Pacific.

Similarly, it provides an attractive foundation for further investment and increased presence for Asia Pacific industry and investment into Latin America.

We believe that the Pacific Alliance's achievements to date incentivise the growing presence of Australian and Asia Pacific interests in Latin America.

The Pacific Alliance's determined strategy for growth demonstrates that it is not another politically-driven trading bloc that does not deliver results or opportunities – the Pacific Alliance has already proven that it is results-driven by having held eight presidential summits over the last two years.

According to Mr Felipe Larrain, Chile's Finance Minister: "The Pacific Alliance is the most exciting thing going on in Latin America today."

We tend to agree.

> There is no doubt that the Pacific Alliance is an aggressive, efficient and ambitious new economic trade bloc.

ABOUT THE AUTHOR

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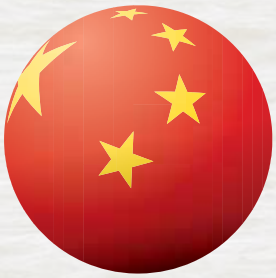
A WHOLE NEW BALL GAME

COAL TRADING IN CHINA

China's highly regulated coal trading market is in for a shake up. Carolyn Dong and Yao Chi talk us through some of the headline changes.



Coal is one of the most important energy sources in China. With new developments coming onstream, plus the introduction of shale supplies placing downward pressure on coal prices, it will continue to be a very competitive component in not just China's but also many developed and developing countries' energy mix. Clean coal technology at competitive cost will evolve to address the various social and environmental issues and, in the meantime, coal trading will continue to liberalise and support industry and consumption-driven growth.

In China, there are very important administrative reform objectives that underpin recent developments. It is not just about liberalising the economics of and access to the coal trading sector, but also about much needed administrative reform, the removal of privileges for a select few and an injection of competition into the sector.

In 2013 China consumed 3.61 billion tonnes of coal and imported 327 million tonnes. Despite its huge market, China's coal trading business has been highly regulated for a long time. Before 2013, all coal traders need to obtain a Coal Trading License (the "**CTL**") before it could engage in such business. To obtain a CTL, the coal trader had to satisfy many rigid requirements in relation to capital, equipment and human resources. However, the most important constraint was that authorities applied quota for CTLs which meant that in practice only selected traders could obtain a CTL and engage in coal trading.

The playing field changed in 2013. On 11 December 2013, the State Council published its *Decision on Cancellation and Decentralization of Certain Administrative Approval Items* (国务院关于取消和下放一批行政审批项目的决定) (the "**Decision**") in which the State Council announced the formal abolition of the CTL system. This system had in the past required CTLs to be issued prior to establishing coal trading enterprises. On 6 December 2013 the National Development and Reform Commission ("**NDRC**") issued draft amendments to the *Measures on the Supervision and Administration of Coal Operations* (煤炭经营监管办法) *(the "**Draft Measures**")*. The Draft Measures provide a detailed administrative process to replace the original CTL system, introducing a "filing" requirement under which coal trading companies are no longer required to obtain prior approval from the NDRC (by way of issuance of a CTL) but rather only need to notify the NDRC with the company's basic information within 30 business days after its establishment. For foreign investors, the establishment and incorporation procedures are otherwise no different from most other foreign-invested companies in China.

The new filing procedures presented in the Draft Measures differ from the current CTL system in the following key aspects:

1. The NDRC will no longer conduct a substantive review nor exercise any significant discretion on the establishment of coal trading enterprise under the proposed filing procedure. Upon receipt of the necessary documents to conduct the filing, the NDRC will publicise the information – primarily for the purpose of the ongoing supervision by regulatory authorities such as the Administration for Industry and Commerce ("**AIC**"), the Ministry of Environmental Protection, and the General Administration of Quality Supervision.

2. The Draft Measures do not contain specific requirements on the registered capital or the warehouse/storage capacities of a coal trading enterprise. In fact, a coal trader only needs to select and lease the warehouse/storage site, which still must be located within a designated coal storage area that has received the necessary environmental impact approvals (usually to be provided by the landlord). The Draft Measures have also removed the need for a pre-establishment review by the authorities of the quality and quantity of measuring equipment to be used by the coal trader; such equipment will only be checked from time to time during the daily operation of the coal trader.

3. For foreign direct investment, the Draft Measures will not alter the fact that coal trading enterprises are categorised as "commercial enterprises" by the Ministry of Commerce ("**MOFCOM**"), China's primary foreign investment approval authority. While all foreign-invested entities in China require MOFCOM approval prior to their establishment, "commercial enterprises" (which encompass, generally speaking, retail or wholesale distributors of third-party goods) are subject to a special review process that is more discretionary in nature. Under the CTL system, it was clear that the NDRC limited its issuance of CTLs in order to control the aggregate number of market participants in the coal trading sector. Now that the CTL system has been abolished, it is conceivable that MOFCOM will (at least have the discretion to) fill the role that the NDRC has played in the past.

Although the Draft Measures are not yet effective, we believe the final text will not vary substantially from the current draft.

Comparison of major aspects of the Draft Measures:

	2004 (CTL Regime)	2013 Draft Measures
Governing Department	▪ NDRC as **approval** authority ▪ NDRC, AIC, the quality administration, the environmental authority as on-going administrative authorities	▪ NDRC as **filing** authority ▪ Same as under the CTL regime (NDRC, AIC, the quality administration, the environmental authority as on-going administrative authorities)
Administration Methods	**Pre-establishment approval**	**Post-establishment filing**
Requirements	**NDRC will substantively examine the requirements before granting the CTL** **With** detailed requirements on following aspect, all of which must be confirmed prior to establishment of the company (*may be different in different provinces*): ▪ Specific amount of registered capital ▪ Specific area of storage site ▪ Compliance certification of the measuring and quality inspection equipment ▪ Personnel qualified for coal measuring and quality inspection	**NDRC will not substantively examine the requirements as information submitted by applicant is only for filing purposes** **Without** detailed requirements *(likely to be unified all across China)*: ▪ No requirements on registered capital ▪ Generally require the storage site to satisfy the environmental protection requirement only ▪ Equipment and operating personnel will be inspected on an on-going basis during the operation of the coal trader

ABOUT THE AUTHORS

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OHADA

WHAT FOREIGN INVESTORS NEED TO KNOW

Foreign investors must understand the laws and practical realities of the lands they are operating in. For investors in the majority of French speaking Africa, this means understanding OHADA and the practical realities of its operations and implementation on the ground.

By David Nancarrow, Peter Finan and Patrick Mohen.

OVERVIEW OF **OHADA**

GROWING INVESTMENT IN FRENCH SPEAKING AFRICA

Despite a worldwide downturn in foreign direct investment ("**FDI**"), FDI into Africa is on the rise. In 2012, global FDI fell by 18%, yet FDI in Africa increased by 5%, largely due to investments in the extractive industries.[1] A significant number of these projects are located in French speaking countries that have a civil law legal system inherited from France. OHADA builds on these historically similar legal systems and seeks to create a system of unified business law under which the laws applying to commercial transactions are the same across a number of different African countries.

"OHADA"

OHADA is an acronym formed from the French name *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, which translates into English as *The Organisation for the Harmonisation of African Business Law*.

The term OHADA is used to describe the organisation as well as the structures brought into existence to harmonise business laws in a number of African countries that have signed the OHADA Treaty.

OHADA TREATY

Due largely to differing political and economic ideologies, the Pan-African movement's focus on African unity and integration at the time colonial rule ended in Africa did not initially translate into a unified legal system.

However, efforts to modernise and unify business law in Africa in order to increase the predictability of commercial transactions (and accordingly, foreign investor confidence) led to the OHADA Treaty being signed in Port Louis, Mauritius in 1993.

The OHADA Treaty created the OHADA organisation itself, as well as the institutions necessary for the OHADA Member States to have a uniform system of business law. These institutions include the Common Court of Justice and Arbitration which is charged with interpreting the OHADA Uniform Acts (**"the Uniform Acts"**). The process for enacting Uniform Acts is also set out in the OHADA Treaty.

[1] United Nations Conference on Trade and Development, World Investment Report 2013 (Report, United Nations, 23 June 2013).

OHADA MEMBER STATES

The OHADA Member States are the countries that have ratified the OHADA Treaty. There are currently 17 OHADA Member States. These countries are set out below.

OHADA Member States	
Benin	Burkina Faso
Cameroon	Central African Republic
Chad	Comoros
Côte d'Ivoire	Equatorial Guinea
Democratic Republic of the Congo	Guinea
Gabon	Mali
Guinea-Bissau	Republic of the Congo
Niger	Togo
Senegal	

The Uniform Acts apply to business in all OHADA Member States. The vast majority of OHADA Member States are former French colonies, with the exceptions of the Democratic Republic of the Congo (Belgium), Equatorial Guinea (Spanish), Guinea-Bissau (Portuguese) and the northern states of Cameroon (British).

THE UNIFORM ACTS

Currently there are nine Uniform Acts in force, which cover the following topics:

- commercial companies and economic interest groups
- general commercial law
- arbitration
- security and guarantee arrangements
- simplified procedures for recovering debts
- accounting systems
- bankruptcy
- carriage of goods by road, and
- cooperative banks

Together these Uniform Acts help provide an overall legal framework for business law in the OHADA Member States.

These Uniform Acts apply directly in all OHADA Member States and to the extent of any inconsistency, supersede any previous national legislation on the same topic. OHADA Member States may still pass their own legislation on specific topics provided it does not conflict with the Uniform Acts.

MITIGATING RISKS FOR **FOREIGN INVESTORS**

LIMITED LOCAL KNOWLEDGE OF AND FAMILIARITY WITH OHADA

Despite OHADA's widespread application and the detailed nature of the Uniform Acts there is, perhaps surprisingly, limited knowledge of OHADA and the Uniform Acts. Anecdotal evidence suggests this is not just among foreign investors, but also among African practitioners and business people. Although more needs to be done, OHADA has taken steps to distribute information and educate the legal profession within the OHADA Member States, including via its Benin-based regional training centre for legal officers known by the French acronym *ERSUMA*.

Working with legal practitioners with limited knowledge of and familiarity with OHADA creates risk for foreign investors. If companies and projects operating within OHADA Member States are not set up in conformance with the Uniform Acts there is the risk that questions of validity, title and historical legislative compliance may be brought into question at a later date, despite documents having been "rubber stamped" at the outset and appearing official to an unfamiliar investor.

FRENCH LANGUAGE CAPACITY

French is the dominant working language of the OHADA Member States and was originally the only permitted working language for matters under the OHADA Treaty. Although recently ratified amendments to the OHADA Treaty added English, Spanish and Portuguese as working languages for OHADA,[2] the reality is still that OHADA resources are rarely available in English and, even when they are, translations from the French versions are often poor and unreliable.

Foreign investors, particularly non-French speakers, should ensure they have legal advisors with French language capabilities. Using legal advisors who rely solely on translation by others can potentially lead to terms and concepts being misconstrued. This can in turn lead to a legal and commercial nightmare for investors.

RECOGNITION OF PRACTICAL LIMITATIONS

OHADA and the Uniform Acts aim to make doing business across the OHADA Member States easier. In its *Doing Business in OHADA 2012* report, the World Bank Group reported that in the six years prior to the report's publication all OHADA Member States had made it easier to do business.[3]

However, investors should also be aware of certain practical limitations of the OHADA system. For example, the Uniform Act Relating to General Commercial Law provides for the creation of a company register covering all corporate bodies registered in OHADA Member States. Yet, despite the Uniform Act entering into force on 1 January 1998, the OHADA Member States still lack a centralised electronically searchable company register. Further, company registers at national Member States levels have also faced criticism in relation to issues including inefficiency, maladministration and lack of basic infrastructure.

LOOKING FORWARD

The 2008 amendment to the OHADA Treaty begins by the current OHADA Member States reaffirming "their determination to make new progress towards African unity".

Historically, African countries have generally emerged from colonisation with a legal system that is either English speaking and based on the common law or French speaking and based on civil law. The current OHADA Member States are almost exclusively French speaking with civil law systems. The French speaking and civil law characteristics of the current OHADA Member States have left African countries that are English speaking with common law systems reluctant to implement the OHADA system.

If OHADA is to continue to expand to new member states it must ensure that the implementation of English as an OHADA working language is properly carried out. Further, OHADA needs to find a way to deal with unifying law across both civil law and common law countries.

[2] Article 42 OHADA Treaty revision, adopted on 16/10/2008 at Quebec.

[3] Subnational Doing Business 'Doing Business in OHADA 2012' (Report, World Bank Group, 25 January 2012). <http://www.doingbusiness.org/reports/regional-reports/ohada>.

Despite the hurdles associated with further expansion, OHADA and the Uniform Acts have provided the current OHADA Member States with modern codified legislation which has the potential to provide foreign investors with comfort regarding legislative certainty, as well as to facilitate cross border trade between OHADA Member States.

However, the practical implementation and workings of OHADA continue to create difficulties for foreign investors, particularly those from non-French speaking backgrounds. Foreign investors should ensure they mitigate the risks associated with investing in Africa by seeking appropriate advice on OHADA in relation to any companies or projects they invest in that have connections with the OHADA Member States.

Photo courtesy of Peter Finan

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BREAKING THE DROUGHT

The prolonged capital drought has taken its toll on the junior end of the market – the lifeblood of exploration within the mining industry. Australia's federal government is contemplating moves to stimulate investment. James Newnham takes a critical look at the proposals.

In March this year, the Australian Government released a Discussion Paper on the introduction and implementation of an Exploration Development Incentive (**EDI**). Its purpose is to allow investors in small to mid-tier exploration businesses to offset a proportion of the business' expenditure on certain greenfields exploration against the investors' taxable income (**exploration credits**).

JUNIOR MINERALS EXPLORERS TARGETED

The Government intends that the EDI will provide incentives for new greenfield mineral exploration activity. Noting that much of this exploration is conducted by small to mid-tier explorers, the EDI will be targeted to that sector.

Specifically, to ensure appropriate targeting and integrity of the EDI scheme, it is proposed that:

- Eligibility to participate in the scheme could be confined to Australian resident companies that are listed, or companies with over 50 members and which have dispersed ownership (i.e. 'widely held companies' as defined in s 995-1 of the *Income Tax Assessment Act 1997*)
- A related entity test may also be used to ensure large entities cannot access the scheme through a relatively smaller interposed subsidiary; and
- An eligible company will only be able to distribute exploration credits to its members if that company has 'no taxable income' in the year in which the relevant expenditure to generate the credits was incurred (i.e. 'expenditure year') and does not derive assessable income from mining activities in that year. Alternatively, any assessable income from mining activities could reduce the exploration expenditure eligible for the scheme.

COMMENT

Restricting the EDI to listed entities and widely held entities assists with protecting the integrity of the incentive (as generally these entities are required to prepare and lodge audited financial accounts and comply with Corporations Law disclosure requirements). However, adopting this requirement would mean that investors in closely held, smaller exploration companies could not benefit from the EDI.

Exploration core samples. Photo courtesy of Potash West.

WHICH INVESTORS WILL BE ABLE TO RECEIVE EXPLORATION CREDITS?

It is proposed that eligible companies will be able to distribute exploration credits to their members which have 'equity interests' in the company when the credits are distributed.

While the Discussion Paper acknowledges that providing the exploration credits to all equity interest holders would be the simplest option to implement, confining eligibility for the credits to holders of 'new shares' (e.g. holders of shares issued in the expenditure year) would increase the incentive for additional investment in exploration activity. However, this limitation may also increase the administrative burden associated with the EDI scheme.

COMMENT

the timing elements in relation to the eligible investors could become very complex to administer, especially where the administration of the benefit is determined by the investee company (e.g. where they are required to provide a report to the ATO about which investor received the tax offset – similar to what currently occurs with dividends, employee share schemes, etc). Therefore, this administrative burden will need to be considered in the context of the decision to incentivise all shareholders, or just new investor shareholders.

ELIGIBLE 'GREENFIELDS' EXPLORATION EXPENDITURE

The EDI will only apply to eligible exploration expenditure and therefore this definition is very important. There are two aspects to this:

(a) What is included in 'greenfields' exploration?

(b) What is eligible exploration and what activities does it include?

Targeting the EDI to these two aspects is designed to funnel investment into expenditure on exploration leading to new discoveries.

'Greenfields'

Limiting the EDI to exploration in 'greenfields' areas is intended to focus the incentive on the search for new discoveries. The Discussion Paper indicates that this will only include the exploration of unexplored or incompletely explored areas. Rather than focussing on the relevant area (and defining this as a greenfields area) the preference is to use an activity based approach, whereby the activities are important in determining the eligibility of the expenditure.

Accordingly, it is proposed that eligible exploration expenditures would be limited to activities that are for determining the existence, location, extent or quality of a new mineral resource in Australia. The EDI would exclude expenses incurred in relation to a mine that has come into production, an extension of a mine or a mineralisation that has been classified as an Inferred Mineral Resource or higher under the Joint Ore Reserves Committee Code, being activities associated with 'brownfields' exploration.

Exploration Expenditure

In terms of the definition of 'exploration expenditure', the Discussion Paper proposes that a practical starting point could be to adopt the current definition of 'exploration and prospecting' at subparagraph 40-730(4)(a)(i) of the *Income Tax Assessment Act 1997*, with certain adjustments. The current definition includes:

"geological mapping, geophysical surveys, systematic search for areas containing minerals (except petroleum) or quarry materials, and search by drilling or other means for such minerals or materials within those areas."

However, it is proposed that eligible exploration expenditure will exclude:

- searching for petroleum (per the definition)
- exploration for geothermal energy resources
- to ensure the expenditure is limited to exploring 'green fields', other aspects of the definition in subsection 40-730(4) – e.g. expenditure on activities normally associated with feasibility activities aimed at determining whether it is economically and technically feasible or commercially viable to proceed to development, or how to best develop a known mineralisation would be excluded.

COMMENT

A key issue for consultation will be in relation to activities connected to an exploration company, but not directly related to exploration (e.g. administration, overhead and compliance costs associated with setting up and running a widely held or listed entity). Where the EDI is only available in relation to the relevant exploration activities, investors will want to understand how much of their investment will go towards these activities, as opposed to the other costs of running the company.

HOW THE EDI SCHEME IS PROPOSED TO WORK

A company that wishes to provide exploration credits to its shareholders will:

- elect to reduce the loss it may carry forward from the expenditure year by the amount it wishes to provide to shareholders (its 'renounced loss')
- calculate the total exploration credit by multiplying its 'renounced loss' by the corporate tax rate
- notify its shareholders of their individual entitlement to a tax offset

The 'renounced loss' cannot exceed the company's 'eligible loss', which will be the lesser of a company's eligible exploration expenditure and its total tax loss from the expenditure year.

Shareholders would claim their tax offset in their tax returns for the year they receive the exploration credits. However, to ensure that a distribution of exploration credits does not put shareholders in a better position than if the company elected to carry forward its tax losses and subsequently distributed an unfranked dividend, shareholders may need to include the amount of the credit in their assessable income. This would be consistent with the treatment of franking credits under the imputation system.

The Discussion Paper also states that: "*Exploration credits will flow through trusts and partnerships. Corporate shareholders would also receive a benefit, but as with the imputation system, this may not be an offset. Individuals who are not required to lodge tax returns would be able to claim a refund of the exploration credits.*"

EXPLORATION CAPS AND MODULATION

The EDI Scheme is proposed to be limited by exploration caps and a "modulation" process. This is because the exploration credits that can arise under the EDI scheme will be capped at $100 million over the forward estimates period, as follows:

2013-14	2014-15	2015-16	2016-17
$0	$25 million	$35 million	$40 million

The existence of a cap will require special 'modulation' rules, to ensure the cap is not breached. Under these rules, it is proposed that companies wishing to participate in the EDI scheme would need to calculate and report their 'eligible losses' for the previous income year (i.e. the expenditure year), and lodge their tax-return by a cut-off date (e.g. 1 March following the expenditure year). The ATO would then calculate the total 'eligible losses' reported for the expenditure year.

If the total exploration credits that would result from the total 'eligible losses' exceed the cap for the particular year, the ATO would calculate an appropriate modulation factor (so that the cap is not exceeded) and advise eligible companies of the proportion of their 'eligible losses' they will be entitled to provide to shareholders as exploration credits.

The ATO also suggests alternative rules whereby the modulation process may be partially based on 'eligible losses' *estimated* at the start of the expenditure year, rather than just 'eligible losses' based on *actual* eligible exploration expenditure which is known and reported after the end of the expenditure year.

COMMENT

The modulation process could have the effect of reducing certainty for investors as at the time that they make an investment, they will not be able to determine whether or not a tax offset is available, or the amount applicable to that investment. Therefore, rather than being able to calculate the amount of the EDI when making an investment, the investor will need to understand that they may get the EDI because they have invested in a specific company.

CONCLUSION

There are a number of issues which need to be worked through in relation to the EDI. In particular, the definition of eligible exploration expenditure, the timing of which investors can participate and the possible uncertainty around the modulation process.

However, the fact that investors may receive the EDI in relation to a particular investment should, of itself, direct more investment into this area and on this basis, is a positive step.

ABOUT THE AUTHOR

James Newnham is a tax professional with over 15 years' experience consulting leading Australian companies and foreign owned corporations operating in Australia. He has advised numerous resources and energy companies on structuring and other issues.
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REVIEW OF MINING AND MINING RELATED LAWS IN BOTSWANA

Coal and a new rail network will boost Botswana's economy but Terence Dambe suggests a review of the administrative framework is needed to keep pace with developments.

Mining and minerals tend to form the backbone of the economies of most African countries. Botswana is no different. The success of the Botswana economy over the years is largely due to the revenues realised from diamonds, which continue to be the mainstay of the economy, currently accounting for more than one-third of GDP, 70-80% of export earnings, and about one-third of the government's revenues.

While diamond mining still retains its place as the mainstay of the economy, in recent years there has been significant growth in the non-diamond mining sector. The latest buzzword is coal. Botswana is said to have estimated coal deposits of 212 billion tonnes of which 7.1 billion tonnes are said to be measured reserves. As Botswana continues to try to move away from its heavy reliance on diamonds, coal presents a major growth opportunity. It has been recently reported that Botswana and Namibia have signed a bilateral agreement for the construction of the Trans-Kalahari Railway (TKR) Line. The proposed 1500km railway line will link some of Botswana's coalfields in the eastern part of the country with the Walvis Bay Port in Namibia. The main aim is to export coal to Asia, particularly China and India.

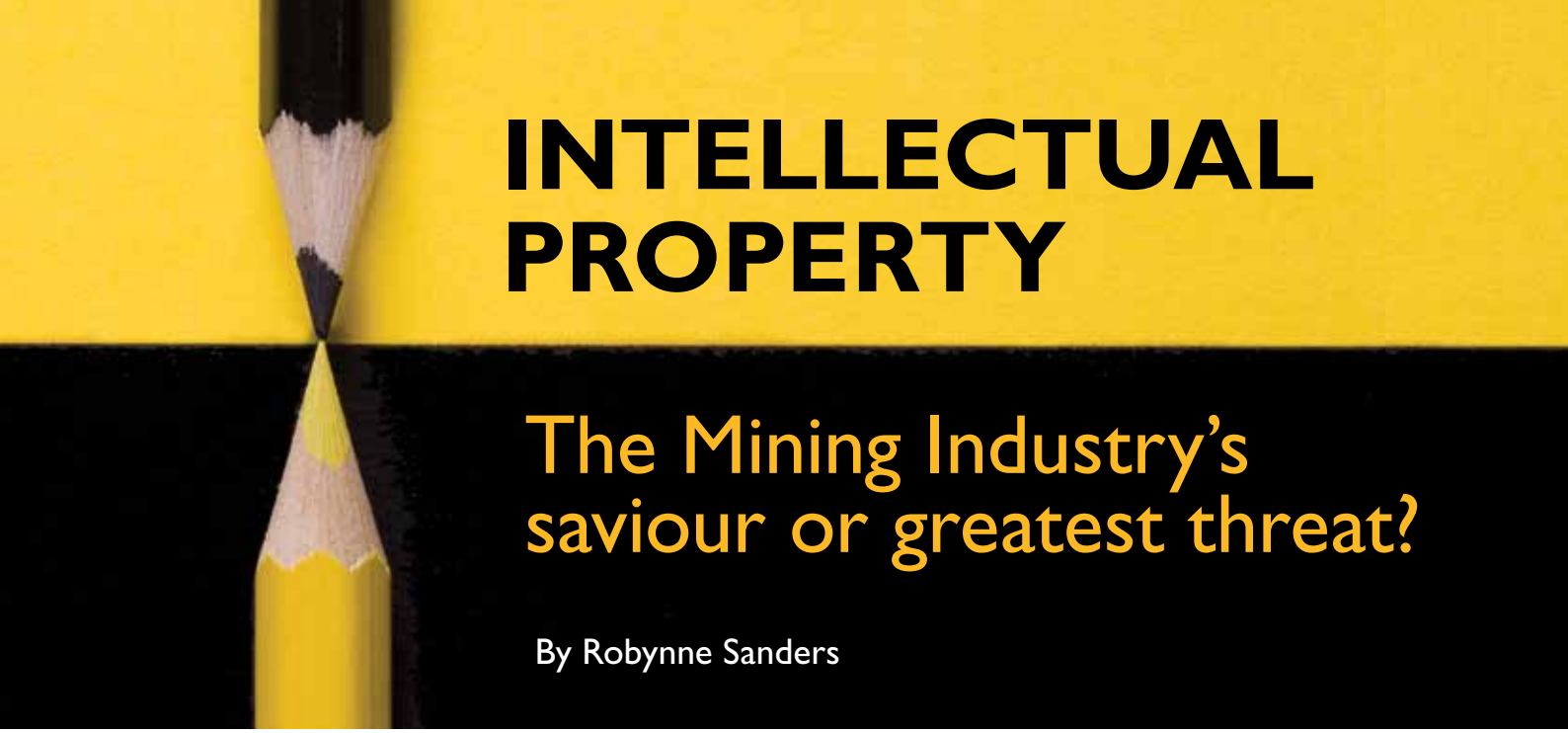
The construction of this proposed railway line along with the continued prospecting for and mining of other minerals in the country will most likely greatly increase the levels of mining activity. The question is whether the current mining and other associated laws in the country adequately address the legal aspects of the complex mining transactions that will arise as a result. The current Mines and Minerals Act dates back to 1999. Although by and large it provides an adequate legal basis for issues relating to mining, it is probably necessary for there to be a review of the Act to ensure that it caters for the current and future mining activity.

The bigger problem from a legal point of view arises with other legislation which has not been reviewed or amended to cater for the ever increasing mining and mining related transactions. As an example, the Deeds Registry Act (which dates back to 1960) has not undergone any amendments specifically to deal with issues of registration of mining licences under Mines and Minerals Act and the registration of various securities for financiers.

Another is the Hypothecation Act which provides for security for financiers by way of Deeds of Hypothecation but has not been amended since its enactment in 1977. It is however encouraging that in 2013 the Registrar of Deeds requested legal practitioners to present their views on possible amendments to the Deed Registry Act. It is hoped that this will provide an opportunity for the Act to be updated to deal with the present legal issues relevant to mining. Given the importance of mining to the country, it is vital that a proper and modern legal framework be in place to regulate mining and the transactions relating thereto.

ABOUT THE AUTHOR

Terence Dambe is the Managing Partner at DLA Piper Africa group firm, Minchin & Kelly. He advises a wide range of mining and energy companies. tdambe@minchinkelly.bw



INTELLECTUAL PROPERTY

The Mining Industry's saviour or greatest threat?

By Robynne Sanders

For the past decade the mining boom has enabled those companies lucky enough to work in the industry to grow and prosper. With the resources sector tightening the focus has shifted to protecting that growth to ensure the continued profitability of mining companies and suppliers alike.

One mechanism by which companies are looking to protect their position is intellectual property rights, most notably patents and confidential information (know how). Both are effective tools to ensure exclusive rights to technology and processes. For the owner, they enjoy market advantage as the sole provider of certain products or services or improved profitability as the result of their exclusive use of the best processes. This is clearly a huge advantage.

For these reasons many resources companies and suppliers consider intellectual property the new frontier of the mining sector. While it works for the owner, for those around them intellectual property can be, at best, a significant inconvenience, and at worst a serious threat to their business.

WHERE IS THE INTELLECTUAL PROPERTY

The mining industry is relatively new to embracing intellectual property. As such one of the major challenges is to identify areas where intellectual property is likely to exist.

It is a misconception that intellectual property only protects significant advances in technology. Obviously revolutionary extraction processes and equipment design can, and should, be protected.

Improved connectors for air conditioning ducting, configurations of spray nozzles on dust suppression systems, the shape of the walls on freight wagons, and freight train braking systems are all the subject of patent protection and actions before the Federal Court for intellectual property infringement.

WHY THIS SHOULD MATTER TO YOU

It is important to be aware of those around you who may have, or be amassing intellectual property rights either through research and development or acquisition. If the IP owner is a supplier then failure to identify IP rights in a technology they supply could result in insufficient safeguards to your continued rights to use the technology in the event the supply contract is terminated. For example, a contract for the supply and maintenance of turbines may not contain an ongoing licence to use the turbines. If you attempt to terminate the maintenance contract the supplier will inform you of their patents to the method of generating energy from the turbines, meaning you cannot operate the turbines you own without a licence.

This is an even greater problem where IP is owned by your competitors, especially in an area where you may not expect IP rights. When you provide or use competing products or services you can unwittingly infringe their rights. With an aggressive competitor you will very quickly be the subject of legal proceedings for infringement. This is costly both in terms of legal fees and time cost, and can

More marginal improvements can also be the subject of intellectual property protection, and it is these improvements that are often overlooked.

also seriously impact your relationship with your customers (who can be joined to the proceedings and will be aware of the risk of interruption to their supply).

INTELLECTUAL PROPERTY INFRINGEMENT

IP litigation in the mining sector is becoming more common, especially among suppliers using it to prevent competitors from obtaining contracts. There is a temptation to dismiss threats of IP infringement in mining. Comments like 'you can't possibly get a patent for that', 'we have been doing that for years' or 'but the standards say we have to do that' are common.

It is always possible to challenge the validity of a patent. To do so however can take years and funding such a case is a significant financial burden. While the proceedings are on foot conservative customers will avoid placing orders that could be affected by the litigation, which can further damage your financial position.

Obviously it is preferable to avoid litigation, by being aware of your competitors' IP and ensuring you do not cross their rights. If you do become involved in litigation there are many strategies that can be employed to facilitate quick resolution either by court decision or commercial outcome. Seeking to strike out aspects of the case, applications for summary judgement, referrals to mediation and applications for security for costs can all place pressure on the patentee.

If a quick resolution is not possible or desirable then a long term strategic approach should be taken to ensure the IP litigation aligns with your desired commercial outcomes while proceeding as efficiently as possible.

WHAT CAN I DO

IP is a valuable asset for the mining sector and can be used to grow the asset and worth of individual companies and the mining industry as a whole. When used strategically in litigation IP can be weapon for the owner and a significant risk for everyone else.

The best way to avoid those risks is to be aware which of your competitors and suppliers have IP, even in areas you would not expect or which you think should be invalid, and to avoid infringement. If you are accused of infringing IP rights a strategic approach needs to be taken to the litigation, placing maximum pressure on the patentee to achieve the best outcome for you.

THE UNIQUE CASE OF THE AUSTRALIAN INNOVATION PATENT

Australia operates two levels of patent protection. A standard patent and a lower level innovation patent with a lesser term and a much lower threshold of validity. Many improvements in the mining sector easily meet the requirements for an innovation patent, making it a particularly important tool for the industry.

This can be seen as a positive, providing the mining sector with patent protection it may not otherwise be able to achieve, and giving the owner exclusive rights to the invention, there is a significant downside.

Innovation patents can be used (some say misused) as an offensive tool in litigation. Innovation patents are granted quickly and easily and are almost impossible to invalidate. The owner of an innovation patent can assert it against a competitor, involving them in expensive and time consuming litigation, and ultimately obtaining an injunction and placing the competitor at a significant commercial disadvantage.

PATENT TROLLS

Patent trolls are companies that have questionable trading activities and exist solely to acquire unwanted or marginal patent rights and then sue for infringement. Most common in the software industry, patent trolls are very disruptive: often taking action in marginal or vexatious cases to generate income from those without the resources to defend themselves.

Patent trolls manage litigation as an income stream, targeting those with sufficient assets to make it worthwhile and often seeking a financial settlement which is calculated to be slightly more financially attractive than running the case.

Patent trolls are beginning to appear in other industries and we are waiting for them to see the opportunities of acquiring distressed assets and targeting companies in the mining sector.

ABOUT THE AUTHOR

Robynne Sanders has considerable experience in patent litigation and dispute resolution, particularly for clients in the resources, energy and construction/ manufacturing sectors. She is also experienced in drafting licensing and manufacturing agreements and advising on confidentiality, trade mark disputes, branding and other IP issues. Contact Robynne at robynne.sanders@dlapiper.com

SHORT CUTS

WELCOME ABOARD

Tara Lee There has been a change in the Americas team leadership, as Joe Tato steps down and Tara Lee joins Stuart Berkson as co-chair. Joe was of great help in establishing our mining sector and his experience in the African resources sector continues to be a valuable asset to DLA Piper and our clients. We thank him for his efforts. We also welcome Tara Lee. Tara is global co-chair of DIA Piper's cross border litigation practice and has considerable experience in Africa, Latin America and other important destinations. Contact Tara at tara.lee@dlapiper.com

Mohamed Mahjoubi One of Mohamed's first tasks on commencing at DLA Piper Paris was to join the mining team at the Cape Town Mining Indaba conference. Mohamed is an M&A specialist who focuses on large-scale investments across Francophone Africa. Contact him at mohamed.mahjoubi@dlapiper.com

CONGRATULATIONS TO OUR HONG KONG COMMODITY FINANCE TEAM

who were awarded the Asia Pacific Deal of the Year by *Trade Finance* magazine. Jolyon Ellwood-Russell, Catherine Arlin and their team advised the Book Runners and Arranges of a syndicated US$195 million commodity prepayment facility for a PRC-based aluminium producer. Contact Jolyon at jolyon.ellwood-russell@dlapiper.com

To receive a free copy of our trade finance glossary Defining Trade Finance, visit www.dlapipertradefinance.com

PROVING BUSINESS AND PLEASURE DO MIX

DLA Piper hosted an intimate dinner for a select group of international investors, financiers and mining executives with near production assets during the recent Hong Kong Mines & Money conference. Former "Wallabies", (Australian rugby test players) Nick Farr-Jones and John Welborn, gave the after-dinner address and reminisced about the ups and downs of playing sport at the highest level. They also included observations on the ups and downs of the mining sector – Nick is a director of Taurus Funds Management, which specialises in investment products based on the mined commodities industry and John is the Managing Director and CEO of Equatorial Resources Ltd. Equatorial is exploring and developing two 100% owned large-scale iron ore projects in the Republic of Congo.

Latin America Down Under | Sydney, 28-29 May 2014

DLA Piper event: **Financing & Implementation issues in Latin American resources projects**

- Major challenges in financing resources projects in Latin America
- The Pacific Alliance – what will it mean for us?
- Picking a JV partner for your project (public vs private entities?)
- Chinese investment in Latin American resources projects
- The global financial markets' take on the region

Joining our mining team members Rob Edel (Australia) and Terence Trennepohl (Campos Mellos Avogados, Brazil) will be Rob Gray, **Resource Capital Funds**, Tony Rovira, **Azure Minerals**, Chris Gale, **Latin Resources** and Jose Blanco, of **Blanco Partners** and the **Australia-Latin America Business Council**.

DETAILS: Thursday 29 May at 7.30am, Sheraton on the Park.

For more information, contact katy.ericksen@dlapiper.com

Africa continues to attract the lion's share of global exploration dollars as a new wave of international investors and explorers are drawn to the continent's massive mineral wealth. For 10 years now, the Africa Down Under Conference has been a melting-pot of companies, countries and commodities, attracting thousands of delegates to discuss opportunities, network and do business.

DLA Piper will once again be sponsoring the conference and hosting a breakfast panel discussion. For more details, contact katy.ericksen@dlapiper.com

SPOTLIGHT
MEET OUR TEAM

Aston Goad
Senior Associate
Amsterdam & Foreign Lawyer/Secondee at IAB&F law firm, Jakarta Indonesia.

Q HOW LONG HAVE YOU BEEN WITH THE FIRM?

I joined the Amsterdam office in November 2002. In September last year, I re-located to Jakarta and am now working for DLA Piper's focus firm in Indonesia called IAB&F.

Q YOU ARE CURRENTLY ON SECONDMENT TO IAB&F IN INDONESIA – HOW DID THIS COME ABOUT?

The first time we talked about this was in November 2012. During a mid-year review, Amsterdam-based partners Barbara van Hussen and Richard Fens floated the idea of a long-term secondment. At the time, we were looking at Asia more generally. Then it appeared that the Board was already investigating the possibilities of entering into a strategic alliance in Indonesia. I went to Jakarta in April to talk to the partners here. One by one, things began to fall into place and almost a year later, I was on a plane to Jakarta with my wife and two kids.

Q DESCRIBE THE TYPE OF WORK THAT YOU TYPICALLY GET INVOLVED IN?

By background, I am a corporate lawyer. However, the practice here is less specialised than it is back home. As a result, I also work on finance and commercial matters in addition to my corporate matters. The work here is very varied. I see myself as the linchpin between the international practice and the firm here. One day you are advising on the procurement of a satellite and the next on the lease financing of a 150 kilometre pipeline, complete with a jetty and storage tanks. By history, the firm has a strong coal mining client base. Also, we are involved in the energy sector more broadly. We have already worked with the teams in Hong Kong, South Korea, China, Australia and Singapore on a number of projects. For example an Italian producers of water heaters was referred to us by Alessandro Piermanni from Italy and we are now helping them set up their Indonesian operations.

Q WHAT IS THE MINING INDUSTRY LIKE IN YOUR PART OF THE WORLD? WHAT TYPE OF WORK IS MOST COMMON?

As in most places, it is heavily regulated. Indonesia is a resources rich country, so there is a lot of activity in all kinds of different areas of mining. Recently, a heavily debated ban on the export of ore has come into force. Also, there are various rules concerning foreign ownership of mines and requirements to reduce foreign interests over time. I think you can say that Indonesia is becoming increasingly protective of its resources and wants to get higher in the value chain on the one hand but still wants to have access to funds from foreign investors on the other.

Q WHAT DO YOU LIKE TO DO IN YOUR SPARE TIME?

I play golf. It is definitely a different experience here. To start with, you drive a cart, but also have a caddy who stands on the back of the cart. They know the course very well, so without having to check, they will give you the distance to the pin, ideal approach and club suggestion. Also, they tell you which line to take when putting. I guess if you want, all you have to do is swing your club without thinking or bending down to pick up your ball. Since I tend to like a bit more of a challenge, I do more myself.

Q CAN YOU PLEASE SHARE SOME OBSERVATIONS ABOUT THE SECONDMENT – WHAT HAS IT TAUGHT YOU AND HOW ARE YOU BENEFITTING?

It has made me think about all the aspects of being a lawyer besides the legal part a lot more. Sure, in the Amsterdam office I trained people, did business development, thought about how to approach the market and other things. But that was in a much more 'controlled' environment. Here, we are working on an expanding and emerging business with a lot of opportunities. It creates a whole different atmosphere where your non-legal skills are tested much more.

Q DID YOU FIND IT EASY TO INTEGRATE INTO INDONESIAN WAYS OF BUSINESS OR CULTURE? WHAT ADVICE WOULD YOU GIVE TO OTHER EXPATS?

People I speak to back home often ask me: 'And, what's it like?' I usually reply 'Everything is different.' Probably the key ingredient is that you need to be able to adapt. For example, you have probably heard horror stories about Jakarta traffic, congestions, etc. They are all true. I dubbed time in the car as 'non-existent time'. You need to cope with things like this, otherwise it could drive you mad.

I think the same also goes for the business culture. In the beginning, I gave myself some time to observe how people interacted. I have a clear list of objectives I want to achieve here. I always keep that in the back of my head, but try to implement them by going along with the way people act here and behaving in a respectful way, but always keeping a view of what I want to achieve. I got this from a sports coach in high school. He explained that when you throw a ball in a curtain, it stops and falls down. So when you catch a baseball, you should not move your hand towards the ball, but rather move your glove in the same direction as the ball. Applying this analogy in business and the workplace you are a guest at would be my advice to other expatriates.