MINING LAW: BRIDGING THE GAP BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS

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INTRODUCTION

It is a widely held view that in the 21st century the mining industry will be dominated by a relatively small number of large companies, truly global in scope and internationally staffed. Interestingly enough, most of the exploration and exploitation activities are being carried out by junior and major mining companies from common law jurisdictions in civil law countries, in particular in Latin America, where in recent years the region has ranked first as a destination for exploration dollars, thanks to the reforms undertaken by some countries to amend their legal framework to attract foreign investment. From a lawyer’s point of view this is where the main challenge lies: how to bridge the gap between the two legal systems.

In order to avoid pitfalls, common law lawyers should be more diligent and proactive when dealing with civil law jurisdictions, given the different systems of law, standards, traditions and customs. Common law lawyers cannot be expected to be well-versed in civil law but they should not be completely unfamiliar with it either. A balance should be struck to ensure clients’ needs are professionally taken care of and that common law requirements and standards are met.

MAIN DIFFERENCES BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS

Both systems of law borrowed much of their substantive law from Roman law. The difference is that, contrary to popular belief, common law has more similarities to Roman law of the classical period, the first two centuries AD, when it reached its highest point of technical development. One of these similarities is the fact that for both systems the law derived, for the most part, from the remedies (in civil law, by contrast, rights derive from the substantive law, and any right recognized under substantive law is provided a remedy under procedural law).

On the other hand, the characteristic external aspects of modern civil law systems derive from post Roman or at least post classical Roman law (most of the main features of modern civil law systems were not present in ancient Roman law). In terms of models, civil law systems accepted, in whole or in part, Justinian’s Corpus Iuris Civiles of the sixth century AD as authoritative, as a common organizing instrument (whereas common law did not). The design of the distinctive feature of modern civil law systems, their civil code, was derived mainly from Justinian’s Institutes.

Countries with “true” common law systems include England, Ireland, the U.S. (with the exception of Louisiana), Canada (with the exception of Quebec), Australia and most present and former members of the British Commonwealth. Civil law systems are found in continental Western European countries and in most of their ex-colonies, in most of Latin America, Russia and the CIS Republics. Certain jurisdictions, such as Israel, Scotland, South Africa and Puerto Rico, have mixed systems, that is to say, a mixture of civil law and common law concepts and principles are applied concurrently or to certain fields.

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4 Stein, supra, note 3.
5 Stein, supra, note 3.
6 Watson, supra, note 2.
Despite the peculiarities that may exist in each jurisdiction and the cross-influence that each system has had and still has on the other, the main differences between common law and civil law could be summarized as follows:

- **CODIFICATION:** most of the civil law is embodied in a highly systematic form, that is to say, most of the ordinary law is contained in codes and statutes. On the other hand, common law is judge-made law, it accords paramount importance to judicially developed precedent, not legislated law, as a means of expressing the rules of law; for instance, the principles of the English law of contract are almost entirely the creation of the English courts and the legislature has had little part in their development. In common law, statutes are generally of narrow application and not very meaningful without cases that define their scope and significance.

- **SOURCE OF LAW:** in civil law systems, only written law, custom and general principles, in that order, rank as sources of private law. The rules of private law are mostly in statutory form; they can be subject to different interpretations but can only be modified by subsequent amending legislation. In this sense, one may say that civil law is more rigid and less amenable to change.

By contrast, common law being largely judge-made law, is more flexible, open-ended and therefore, it evolves more easily. Courts can introduce modifications to existing rules at any time.

The role of the civil law judge is to apply the written law in force. The interpretation of what the law means is explained by academics who seem to be more prominent than the judge in the legal process is. On the other hand, in common law systems, case law is paramount; judges “create” the law and can have a profound effect on legal principles, the interpretation of statutes and other matters.

- **APPROACH:** the approach to understand legal issues is more theoretical, formalistic and dogmatic in civil law countries versus the more pragmatic/technical approach that prevails in most common law systems.

- **PUBLIC LAW vs. PRIVATE LAW:** in civil law systems, there is a very marked distinction between public and private law: private law lawyers deal with cases in which both parties are private parties; public law lawyers deal with cases in which one of the parties is a public entity. Public law lawyers practice in different courts with different procedural rules from private law lawyers. Given this duality, the implications for mining law and laws governing natural resources is that practitioners in civil law systems need to be able to handle both.

On the other hand, in common law jurisdictions, there is no bright line separating public law from private law. For the most part, the same rules of law apply to both the government and individual citizens, and subject to some limited exceptions, the same courts deal with both bodies of law. When a common law lawyer uses the term public law, he/she refers to constitutional and administrative law; basically, the difference between public law and private law in common law countries lies solely on the type of remedies afforded when one of the parties is a public entity.

- **PROCEDURE:** in terms of procedure, in common law jurisdictions, trial proceedings are oral and the witnesses must give their evidence and are cross-examined in public. The judge is just a referee to make

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sure the questions put to the witnesses are relevant and that the cross-examination is fair (he himself does not initiate any lines of questioning); at the end of the trial he sums up the evidence and the relevant rules of law.

Civil law procedure is quite different; proceedings tend to be very bureaucratic (partly given the nature of the civil law system based on written rules) and are for the most part, in written form. The judge has a prominent role: to bring forward all the details of the case and find out the real nature of the dispute. On the other hand, in common law, the actual matters at issue can more readily be brought forward by the parties themselves.

In terms of PROOF, common law has a preference for publicity over secrecy and for oral testimony over written proof (witnesses testify in public and are challenged in cross-examination) whereas civil law preference for written proof over oral testimony has made certain documents prepared by professionals, such as notaries, have a special status.

When doing business in civil law countries, it is critical to understand the role that notaries play in those jurisdictions. Notaries in those legal systems play a key part in legal life; the concept is very different from that of notary public in common law jurisdictions, where courts do not grant documents prepared by common law notaries any special probative value.

In civil law countries, to determine whether a certain document needs to be executed before a Notary Public (other than when required by law), first it is necessary to understand the differences under civil law between the concepts of private and public documents.

Parties to a contract are generally free to use whichever form they deem most appropriate to enter into an agreement. However, for certain types of documents (i.e. documents involving the creation, conveyance, modification or termination of property rights, powers of attorney, etc.) the law requires that they be executed before a Notary Public or other authorized public officials (by contrast, in common law, legal documents fulfilling the requirements of signatures and witnesses are valid and enforceable regardless of who drafted them).

For those documents that can be executed either as private or public documents, the following main differences should be borne in mind in order to determine which form is more appropriate:

(i) public documents or public deeds have legal effect *erga omnes* (they are effective against the world and so can affect the rights of third parties) without further formalities as regards their contents and the date stated on them. On the other hand, the date stated on a private instrument does not have legal effect against third parties unless other available evidence can also determine the date; that is to say, the contents of a private instrument can be contested.

(ii) public documents can be submitted as evidence in a court of law without having to comply with any other legal requirements. Their contents cannot normally be challenged. When a document is signed by a notary, the instrument is a public document, which the courts will automatically admit as evidence. On the other hand, private documents must be proved; the signatures have to be recognized by the parties to the agreement before being admitted as evidence (if one of the parties denies that the signature on the document is his/hers, the other party has to request that a calligraphy expert determine whether the signature does indeed belong to the party who refuses to recognize it).

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9 Id. at 36-37.
10 Id. at 38.
(iii) if private documents are executed with a view to amend public instruments, they may only affect the rights of the immediate (private) parties, but they do not have legal effects against the parties to a public document.

(iv) public documents will usually involve higher fees (notarial fees and translations are not inexpensive).

MINING LAWS - CIVIL LAW VERSUS COMMON LAW CONCEPTS

Given the differences noted above between the two systems, common law practitioners approach and analyze legal issues in ways other than their civil law counterparts. And, as regards, mining law issues, the differences are even more pronounced.

In order to illustrate the point, the following is a summary of the main features of old Spanish law and the principles and rules of the Napoleonic Law of 1810 adopted by many Latin American countries; it is not meant to be exhaustive, but rather, as a case in point, to provide a sense of the origin of the problems facing Latin American civil law lawyers specializing in mining.

1. The government has inalienable / imprescriptible rights/ eminent domain over mineral wealth of the country: most constitutions and laws in Latin America state these principles and, in some cases, the principle that the government directly exploits certain mineral resources (the so-called “reserves” in favour of the government). This implies that in most Latin American countries, the granting of mineral and mining rights to an individual (in those cases where it is allowed) or to a company is the prerogative of the government. The obtaining of these rights is not done through the normal means of acquiring property but through an unilateral act of the administration, following the rules and administrative procedures governing natural resources, after the applicant has submitted the corresponding exploration or concession application and has complied with all requirements under the law. Once granted, the rights arising out of the permit/concession belong, although with a very high degree of administrative interventionism and certain restrictions, to its holder; however, the rights acquired can be revoked by the administration under certain circumstances (e.g., lack of exploitation, for public security reasons); in most instances the grantee is not allowed to transfer, mortgage, pledge, lien or deal in any manner whatsoever with those rights without the prior written consent from the state and, in a few countries, not at all.

On the other hand, common law countries take a pragmatic approach: the government acts a contractor for its natural resources and the grantee is allowed to deal with them in the manner that he deems fit, subject to very few restrictions or none at all.

2. Nationalism: stated prohibition either in the Constitution or in legislation for foreigners to own mineral or mining concessions. In the past this led to limitations on participation of foreign companies and even expropriations by some countries (as it happened in Chile, Bolivia and Peru).

3. Sharp distinction between ownership of surface rights and subsoil which means that each of them is governed by a different set of laws, litigation takes place in different courts (private or public/administrative law courts, if one of the parties to the dispute is a government entity), and therefore two different kinds of practitioners are sometimes needed, public and private law lawyers. As mentioned

11 Pursuant to Art. 1 of Spanish Royal Decree of July 4, 1825 (drafted by Elhuyar, Director of Mines in Mexico from 1788-1821), mines belong to the Crown; subsequent legislation classified them as assets of the government (Art. 1, Law of April 11, 1849).
earlier, this is not the case in common law jurisdictions.

4. Very formal procedure regarding the granting, maintaining and transfer of exploration and exploitation rights for natural resources: the procedure is very bureaucratic and cumbersome; the problem is compounded by the fact that the applicant/grantee has to deal with various departments/layers of the administration; the implication is that in countries with civil law tradition a high degree of care and due diligence is required to obtain, maintain and transfer title to mineral and mining rights which is not the case in common law countries.

5. Broad administrative discretion in the granting and maintenance of title, which has led and still promotes practices of corruption and graft and arbitrary decisions by the bureaucracy.

6. Compulsory registration for validity: that is to say, if a contract or document relating to mineral rights or mining activities is not registered, it is not valid. This is one of the main differences between mining law concepts in civil law and common law jurisdictions and the main source of misunderstandings and adverse legal consequences. For example, most mining companies from common law countries would deem it sufficient to secure title to have a signed transfer contract. However, in Latin America, without proper registration, such contract would not be valid/enforceable as against third parties. The same requirement applies to pledges, mortgages and other encumbrances, in those cases where they are permitted by law.

7. Payment of canons, mining duties, royalties; this feature also comes from Spanish law; in the 14th century the Spanish king required that 2/3 of any exploited minerals be paid to him; it was reduced to one fifth of the net value of the minerals extracted under Phillip II 12, the famous “quinto real” (currently, the average royalty payable to governments in Latin America is around 1-3%, so there has been some improvement in this area since).

8. Compliance with certain obligations set out by law, minimum investments and work commitments: the administration has the ability to cancel or nullify any concessions, permits, licenses and other authorizations for failure to comply with obligations under existing laws and regulations. This is also true in many common law jurisdictions but is not as cumbersome, formalistic and subject to red tape and arbitrary decisions by the bureaucracy as in civil law countries where many deficiencies cannot be easily remedied in order to maintain title.

DUE DILIGENCE FOR MINING TRANSACTIONS IN LATIN-AMERICA - PROBLEM AREAS FOR COMMON LAW LAWYERS

Given the peculiarities between the two legal systems, common law lawyers requiring due diligence review processes in civil law countries are usually faced with situations/problems they do not normally encounter in their own jurisdictions. Following is a list of the main problem areas encountered when conducting due diligence for mining transactions involving mineral/mining assets located in Latin America. Many of these problems usually hamper, restrict or preclude mining companies from entering into, closing deals and/or obtaining financing:

1. LACK OF SECURITY OF TITLE/CONTINUITY OF TITLE: This is the single most important legal issue facing any mining company, whether it can get and maintain adequate protection for the exploration/exploitation rights it intends to acquire or lease. The guarantees for those rights are stronger when they are provided for under the constitution of the host country. Laws and decrees can also

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12 The Rules of Phillip II (“Ordenanzas”) of August 22, 1584.
provide security for investors but can be more easily changed than constitutional provisions. In addition, in some countries, the ability to have clear and exclusive right to explore and subsequently to exploit a claim and the continuity of title are not based on technical and objective criteria, but on the discretion of government officials.

It must be noted that financing for a mining project may not be available unless:

(1) there is proper evidence of secure title to the relevant exploration/exploitation rights, e.g., actual title document, validly granted by the relevant government authority, properly registered and in good legal standing (not subject to cancellation, revocation or nullity); mining agreement, if any; and, the constitutional/legal guarantees referred to above; and,

(2) that there is certainty of continuity of said title, that is to say, after spending a significant amount of exploration dollars in a mineral concession, the mining company will have, pursuant to the constitution/law in force, the automatic right to exploit it on an exclusive basis, and be able to maintain said right (provided it complies with certain requirements which are clearly set out under the law).

2. UNCERTAINTY AS TO WHICH GOVERNMENT ENTITY HAS THE RIGHT TO GRANT EXPLORATION/EXPLOITATION RIGHTS: In Latin American countries where titles are granted by the administration/mining authority (as in Mexico and Peru) or by the judiciary (as in Chile and Bolivia), there is usually no doubt as to which entity/authorized official is in charge of granting them. However, this is not the case in some countries where title is granted pursuant to a contract entered into by a government official/entity and the applicant (as is the case in Honduras and Venezuela).

3. INABILITY TO REGISTER CERTAIN CONTRACTS/WHEN REGISTERED NOT VALID: For example, English versions of draft contracts prepared and negotiated by common law lawyers pursuant to common law, and subsequently translated into Spanish may not be registrable in Latin America because their provisions may not conform to local law and/or certain type of obligations and/or remedies may not be enforceable under civil law; in some countries these contracts could either be rejected by the Registrar’s Office or be accepted for registration but without any implication that the agreement is valid. When a legal opinion states that the agreement has been registered it should also state whether it is enforceable (because it is not an obvious fact). Also, the parties cannot overrule certain legal

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13 An illustrative example involved the Cristina 4 and 6 concessions in Venezuela: In early 1986, these concessions were originally granted to Culver de Lemon for the exploration and exploitation of alluvial deposits in the State of Bolivar. On April 16, 1986, they were transferred to Ramon Torres who in turn transferred them to Inversora Mael S.A. on May 16, 1986. The Ministry of Mines omitted to publish the relevant transfer notice (a matter over which it had no discretion). At the same time the term of these concessions expired and the company applied for renewals. In 1989, the Ministry of Energy and Mines denied both renewals and issued two resolutions canceling the Cristina 4 concession and the Cristina 6 concession. Concurrently, the Ministry of Energy and Mines was granted rights over the direct exploration, development and exploitation of alluvial deposits in the Km 88 area and the ability to form corporations and/or enter into contracts with third parties. Subsequently, it granted these rights to CVG, the state owned mining company (some now argue that this delegation of power should not have been done). Based on the aforementioned decree, CVG entered into an agreement with Placer de Venezuela involving the concessions at issue (Joint venture, 70% Placer Dome, 30% CGV). To end the row as to whether CVG could or could not enter into those kind of agreements, on June 26, 1996, the rights and powers granted to CVG were canceled. Pre-existing contracts between CVG and third parties continue to be valid but the Ministry of Energy and Mines supervises them but no more contracts can be entered into by CVG; as of that date only concessions can be granted and the only authority in charge is the Ministry of Energy and Mines.
dispositions by mutual agreement; they may be invalid with respect to the rights of other persons or the
government or they may render the whole agreement null and void.

4. INABILITY TO ENCUMBER MINERAL RIGHTS / MINING CONCESSIONS: financing will not be
provided by any financial institution for any mining project if it cannot take a security interest on the
mineral/mining assets of the company. In most Latin American countries, it is not possible to encumber
them without the prior written approval of the government.

5. OVERLAPPING: In Mexico, as in other countries, this situation arose because the applicants who
applied for concessions prior to the enactment of the New Mining Law were not required to use GPS
units for surveys. Now they do, so in case of overlap, a request for administrative correction should be
presented to the Mining Authority so that it can adjust its records and clear up any conflict (preference
will be given to the oldest claim).

6. VARIOUS LEVELS OF GOVERNMENT GOVERNING MINING ACTIVITIES: For example, in
countries with a federal system, the allocation of jurisdiction between the various layers of government
(national, state/provincial and local/municipal) is not always clear-cut. In Argentina, for example, the
efforts of the federal authority to standardize the issue of royalties were frustrated by one of the
provinces; Catamarca was the only province not to follow the royalty calculation prescribed under the
federal laws.

Pursuant to provincial law No. 4759, the province ratified federal Mining Law No. 24196, which
stated that the provinces which receive royalties cannot collect “a percentage exceeding 3% over the
value of the mineral extracted”. Pursuant to the regulations of that federal law, the royalty is calculated
based on the following formula: revenues from smelter minus transportation, mineral extraction and
insurance costs, minus crushing, milling and processing costs, minus marketing and commercialization
costs, minus administrative costs minus amortization costs.

However, the province modified the basis for the calculation of the royalty; it took the position that
most costs should not be deducted (such as transportation costs) and calculated the royalty based on
the value of the mineral extracted from the pit (mineral in situ) without deducting any such costs.
Therefore, the royalty payable to the province of Catamarca ended up being much higher than in the rest
of the Argentine provinces. To illustrate this point, Minera Alumbrera would have had to pay US$ 9.0
million according to the royalty calculation under the federal law and US$14.0 million according to the
royalty calculation under the provincial law.

7. DELAYS IN GRANTING APPROVALS, PERMITS, AUTHORIZATIONS; INEFFICIENT
BUREAUCRACY: This is the case when administrative processes are not complementary to the law
and/or regulations or they are deficient. For example, the bureaucracy may not respect the fact that laws
set deadlines, and in practice, in many instances there is no recourse against delays by the
administration.

8. MINING REGISTRIES: All mineral/mining permits, concessions, transfers, contracts,
encumbrances and other documents relating to mining activities and/or affecting ownership rights must
be registered with the corresponding Public Registry. If these contracts or documents are not registered,
they are not enforceable as against third parties or are plainly null and void.

The state of some of the registries in some countries is less than desirable; files get lost or are not
kept properly; few countries are using computers to input all the data, in many of them the searches have
to be done manually, therefore title searches are only as good as the person conducting the search. That
is why more due diligence is required to double check all information; lawyers should not rely solely on certificates issued by the government or assume that because a state-owned company owns the mineral rights, they are in good legal standing. Searches should not be restricted to the current holders but should cover all prior transfers; it is conceivable that prior owners were not granted mineral rights in a proper manner and this may adversely affect the current transaction.

9. BROAD DISCRETIONARY POWERS OF THE ADMINISTRATION: CORRUPTION, UNCERTAINTY or UNPREDICTABILITY AS TO HOW LAWS AND REGULATIONS ARE APPLIED / ENFORCED: As noted above, in some countries the administration has broad discretion in the granting and maintenance of title which leaves the door open sometimes for corrupt practices. My advice on this matter is never obtain any documents or get anything done unless it is through the normal proper channels.

10. LACK OF RETENTION RIGHTS: When it is not viable for either economic or technical reasons to develop a deposit at the time of feasibility, and the mining company, after having had spent a considerable amount of exploration dollars, does not have the right to retain the claim in order to protect its interest and develop the deposit when conditions change.

11. INVASION OF PROPERTY: It could take various forms: third parties trespassing the property boundaries and settling in; third parties conducting illegal exploration/exploitation activities within the claim boundaries, such as high-grading (stealing of rich ore/best ore in a deposit). In some cases, the local police/army may not be willing to assist in enforcing a judicial order to remove the invaders.

12. NEW LEGISLATION: The uncertainty or the actual retroactivity of laws and regulations can have a detrimental impact on investment decisions. This problem is solved by signing a legal stability agreement coupled with a tax stability agreement for the life of the relevant project.

13. INABILITY/DIFFICULTY IN OBTAINING SURFACE RIGHTS: This may happen when there is no “free access” to surface rights, that is to say, when no preference is given by law to mining activities over other land uses, such as, for example, agriculture. In such cases, mining companies have to negotiate directly with the surface right owners without having any leverage, which leads in some instances to blackmail situations.

14. CONCESSIONS NEAR BORDERS, OWNED BY THE MILITARY, WITHIN RESERVE AREAS OF THE GOVERNMENT, NATIONAL PROVINCIAL PARKS, ABORIGINAL LANDS: For example, there are highly prospective areas along the 5,400 km border between Argentina and Chile and mineral deposits frequently spread from one country to another. The problem how to regulate such situation was solved when both countries decided to sign a mining integration treaty which permits companies to mine cross border deposits (two protocols for cross border projects had been previously agreed to by the Argentine and Chilean governments, one in respect of Pachon and the other for Barrick's Pascua Lame gold project which is close to the company's El Indio mine in Chile).

15. MAXIMUM NUMBER OF HECTARES: In some countries, there is a limit as to the maximum number of hectares that an applicant can apply for (both for exploration and exploitation concessions).

16. EXPLOSIVES PERMITS: In Mexico, the Ministry of Defense used to require that the majority of the board members of a company with foreign shareholders be of Mexican nationality in order for an explosives permit to be granted. This requirement has in practice been abolished.

17. NATIONALISTIC ATTITUDES: Some constitutions /laws still state that the government directly
explores / exploits mineral resources and therefore it is possible at least from the legal point of view that limitations to participation of foreign companies in mining activities may occur in the future. In some instances, some constitutions state restrictions or prohibitions only applicable to foreigners.\(^{14}\)

**LEGAL OPINIONS FROM CIVIL LAW LAWYERS**

Given my earlier comments, when obtaining a legal opinion from a civil law lawyer, common law lawyers should keep in mind the following points; while many of these points might be self-evident, failure to recognize them could result in undesired legal consequences.

1. **SOME CIVIL LAW LAWYERS ARE NOT FAMILIAR WITH COMMON LAW CONCEPTS** (and vice-versa), and so the onus is on the common law lawyer to ensure that the appropriate common law requirements are met. In a due diligence process, civil law lawyers should be aware of the liability involved for them and for the common law lawyer and the high standards in common law jurisdictions imposed upon persons conducting searches, making statements and drafting legal opinions.

   To compound the problem, common law lawyers attempt to understand civil law concepts through a common law prism. This is a cultural/professional bias, not an act of dishonesty or mala fides. Therefore, civil law lawyers should be more diligent in clarifying and providing information and guidance.

2. **OBTAIN CURRENT AND COMPLETE INFORMATION**: Legal opinions from civil law lawyers should reflect exactly the legal situation in the host country without using common law terms that are foreign. Instead, the use of civil law concepts is advisable, which should include a detailed explanation of what they entail. Likewise, if a concept in civil law differs in any way from the equivalent common law concept, the differences should be noted and explicitly provided for, in order to avoid misunderstandings or misrepresentations.

3. **IMPORTANCE OF "UNWRITTEN LAW"**: Legal opinions usually only refer to legal dispositions, codes, statutes (all in written form) but do not generally refer to what the practice is. In Latin America, in some instances, practice or customs could be more relevant than the written law and should be mentioned specifically in the legal opinion (for example, the fact that the administration takes double the time required under the law to issue a title).

4. **LEGAL COUNSEL IN CHARGE OF OPINION SHOULD CONDUCT DUE DILIGENCE REVIEW / TITLE SEARCH**: Given the state of some mining registries in Latin American countries (as noted above) and that most title searches can only be done manually, foreign counsel should inquire of the lawyer who signed the legal opinion or conducted the title search as to the details of how the work was carried out. If a title search is not conducted properly, material information such as the title being subject to cancellation could get missed. This usually happens, for example, when only the register of titles/contracts is searched but not the records of pending obligations.

5. **OBTAIN LEGAL OPINION/TITLE SEARCH DIRECTLY FROM LOCAL LEGAL COUNSEL (AVOID "SALTING" OF LEGAL OPINIONS)**: I have coined the word “salting” as applied to legal

\(^{14}\) E.g., Art 27 of the Mexican constitution states that only Mexicans citizens or Mexican corporations have the right to acquire the ownership of land, water and accessories. The government may grant the same rights to foreigners provided they agree to be considered as nationals in respect of those rights or assets and do not request the protection of their governments; failing that they lose the ownership acquired in favour of the Mexican government. The inclusion of this Article is a sine qua non condition to be included in the by-laws of any company with foreign shareholders.
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opinions as an analogy with the “salting” in mineral samples. This could happen in two ways:

a) through fraud, i.e. the legal opinion from local counsel is "amended" with or without knowledge of local counsel; and,

b) inadvertently, for example, when the common law lawyer indicates to local counsel that he or she needs to indicate in the legal opinion whether the company has an undivided interest in the mineral property, or that the concession is held in trust, etc. without realizing that these concepts may not exist under civil law. The problem is compounded if the Latin American lawyer does not advise the common law lawyer in that regard but nonetheless incorporates the concepts in the legal opinion.

CONCLUSION

Given the many peculiarities and differences between the two legal systems, in particular as regards mining law issues, extra due diligence should be exercised by common law lawyers when dealing with a non-common law jurisdiction in order to avoid severe adverse consequences.

Practitioners should bear in mind that even within civil law countries in Latin America several significant differences exist given that each country possesses its own national mining laws, regulations, policies and customs, and diverse cultural and political environments. Extrapolation, reasoning by analogy and trying to impose common law concepts and approaches in civil law jurisdictions are common mistakes which should be avoided at all times.