

Mining

Contributing editors

Michael Bourassa and John Turner



2018

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Mining 2018

Contributing editors

**Michael Bourassa and John Turner
Fasken**

Reproduced with permission from Law Business Research Ltd

This article was first published in June 2018

For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2005
Fourteenth edition
ISBN 978-1-78915-045-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and June 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview: update on recent and upcoming mining law conferences	5	India	119
Michael Bourassa Fasken		Neeraj Menon and Karthy Nair Trilegal	
Mining in Japan	8	Indonesia	127
Hiroyasu Konno, Yoshiaki Otsuki and Jun Katsube Nishimura & Asahi		Rahmat S S Soemadipradja, Robert M Reid and Rachel Situmorang Soemadipradja & Taher	
Latin America overview	10	Kazakhstan	138
Florencia Heredia Allende & Brea		Azamat Kuatbekov and Nurgul Abdeyeva Baker McKenzie	
Angola	14	Mexico	146
João Afonso Fialho and Ângela Viana Vieira de Almeida		Enrique Rodríguez del Bosque RB Abogados	
Argentina	21	Mozambique	154
Florencia Heredia and Agostina L Martinez Allende & Brea		João Afonso Fialho and Catarina Coimbra VdA Legal Partners Guilherme Daniel Guilherme Daniel & Associados	
Armenia	29	Myanmar	162
Aram Orbelyan, Lilit Karapetyan and Roustam Badasyan Concern Dialog Law Firm		Khin Cho Kyi, Nwe Nwe Kyaw Myint and Thawdar Sein Myanmar Legal Services	
Australia	35	Peru	169
Simon Fraser and Tanya Denning Ashurst		Fernando Pickmann Dentons	
Brazil	56	Philippines	176
Claudio Guerreiro, Luiz André Nunes de Oliveira, Carlos Maurício Ribeiro and Rodrigo Leite Moreira Vieira Rezende Advogados		Patricia AO Bunye Cruz Marcelo & Tenefrancia	
Canada	65	South Africa	185
Michael Bourassa and John Turner Fasken		Peter Leon and Patrick Leyden Herbert Smith Freehills South Africa LLP	
Chile	75	Sweden	192
Rodrigo Muñoz U Núñez, Muñoz & Cía Ltda		Peter Dyer and Pia Pehrson Foyen Advokatfirma	
Democratic Republic of the Congo	81	Thailand	199
Olivier Bustin and Matthieu Le Roux Vieira de Almeida		Albert T Chandler, Sawanee Gulthawatvichai and Christopher Kalis Chandler MHM Limited	
Ecuador	87	United Kingdom	208
Cesar Zumarraga and Juan Fernando Larrea Tobar ZVS Spingarn		Richard Blunt, Susie Davies, Saskia Volhard and Ruchika Patel Baker McKenzie	
Finland	95	United States	214
Pekka Holopainen and Panu Skogström Kallioliaw Attorneys Ltd		John D Fognani, Michael T Hegarty and Christopher J Reagen Haynes and Boone, LLP	
Ghana	105	Uzbekistan	222
Michael Edem Akafia, Kimathi Kuenyehia Sr and Sefakor Kuenyehia Kimathi & Partners, Corporate Attorneys		Bakhodir Jabborov GRATA International Law Firm	
Greenland	113	Zambia	229
Peter Schriver Nuna Law Firm		Charles Mkokweza Corpus Legal Practitioners	

Preface

Mining 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Mining*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia and the Democratic Republic of the Congo.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael Bourassa and John Turner of Fasken, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
June 2018

Democratic Republic of the Congo

Olivier Bustin and Matthieu Le Roux*

Vieira de Almeida

Mining industry

1 What is the nature and importance of the mining industry in your country?

The nature of the mining industry in the Democratic Republic of the Congo (DRC) is mainly cobalt, coltan, copper, gold, diamonds, zinc, cassiterite and wolframite.

The importance of the mining industry in the DRC is dominant since, despite several difficulties, the mining industry is still the backbone of the national economy, with a contribution of up to around 30 per cent of GDP.

2 What are the target minerals?

The target minerals are cobalt, copper, zinc, diamond, gold, tin and manganese.

3 Which regions are most active?

The most active regions are those of Haut-Katanga, Haut-Uele, Ituri, Lualaba, Kasai Occidental, Kasai Oriental, Kongo Central, Maniema, North Kivu and South Kivu.

Legal and regulatory structure

4 Is the legal system civil or common law-based?

The legal system is a civil law-based one.

5 How is the mining industry regulated?

The mining industry is regulated through national legislation and regulations issued by the DRC parliament and the DRC executive branch and mainly by the new Mining Code adopted in 2002 (as amended by Law No. 18/001, dated 9 March 2018) and its ancillary Mining Regulation, adopted in 2003. These norms are of general application throughout the entire country. Mining agreements were suppressed by the new Mining Code. Those validly existing under the former mining legislation could, subject to certain formalities, be maintained until their contractual expiry.

6 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws? Were there any major amendments in the past year?

The main legislation in the DRC dealing with the mining industry is the Mining Code (adopted in 2002 and amended by Law No. 18/001, dated 9 March 2018) and the ancillary Mining Regulation, adopted in 2003.

The implementing measures of the Mining Code are provided by the Mining Regulation, enacted by Decree No. 038/2003 on 26 March 2003 (the Mining Regulation). This core legislation includes environmental standards applicable to mining activities (also including quarry rights). The main administrative entities in charge of regulating mining activities in the DRC as provided by the Mining Code are:

- the President of the Republic, who can enact mining regulations to implement the Mining Code and exercises his or her powers by decree made on his or her own initiative or on the proposal of the Minister of Mines, after having obtained the opinion of the Directorate of Geology or of the Mining Registry;

- the Minister of Mines, who has, among other powers, jurisdiction over the granting, refusal and cancellation of mining rights, and exercises his or her powers by way of decree;
- the Mining Registry, which is a public entity, under the supervision of the Minister of Mines and the Minister of Finance, whose assignment is to conduct administrative proceedings concerning the application for, and registration of, mining rights, as well as the withdrawal, cancellation and expiry of those rights; and
- the Department in Charge of the Protection of the Mining Environment, which has powers regarding the definition and implementation of the mining regulations concerning environmental protection and the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan.

7 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

To the best of our knowledge, apart from the general distinction between mines and quarries, the mining legislation does not impose a classification system for reporting mineral resources and mineral reserves. This therefore leaves freedom for private parties or investors to select an existing classification system.

Mining rights and title

8 To what extent does the state control mining rights in your jurisdiction? Can those rights be granted to private parties and to what extent will they have title to minerals in the ground? Are there large areas where the mining rights are held privately or which belong to the owner of the surface rights? Is there a separate legal regime or process for third parties to obtain mining rights in those areas?

Following the Constitution and the Mining Code, all deposits of mineral substances in the soil or subsoil are the exclusive property of the state.

The conditions under which corporate entities may be granted mining concession rights are determined by law.

Although any corporate entity can obtain mining rights without distinction of nationality as opposed to the provisions in the previous Mining Code, this extended eligibility, however, has its limits. Indeed, mining rights for non-artisanal research and exploitation are reserved for DRC nationals.

9 What information and data are publicly available to private parties that wish to engage in exploration and other mining activities? Is there an agency which collects mineral assessment reports from private parties? Must private parties file mineral assessment reports? Does the agency or the government conduct geoscience surveys, which become part of the database? Is the database available online?

Private parties willing to engage in exploration and other mining activities can have access to data publicly available through the authorities, agencies and organisations below:

- the Ministry of Mines (www.mines-rdc.cd);
- the Mining Registry (www.cami.cd or www.flexicadastre.com);
- the CTCPM (Cellule Technique de Coordination et de Planification Minière) (www.miningcongo.cd);

- the CEEC (Centre d'Expertise, d'Évaluation et de Certification des substances minérales précieuses et semi-précieuses), which frames the artisanal and industrial mining and marketing of precious and semi-precious mineral substances and provides valuations and certifications (www.ceec.cd). The CEEC also issues certificates for shipments of rough diamonds required under the Kimberley Process Certification Scheme;
- the CRGM (Centre de Recherches Géologiques et Minières), which promotes, carries out and coordinates scientific studies on Congo's potential mineral resources and renders them available for consultation (www.drcmining.com);
- the University of Lubumbashi (Katanga) (www.unilu.ac.cd); and
- the Royal Museum on Central Africa (Brussels, Belgium), which has a very active geological department (www.africamuseum.be).

10 What mining rights may private parties acquire? How are these acquired? What obligations does the rights holder have? If exploration or reconnaissance licences are granted, does such tenure give the holder an automatic or preferential right to acquire a mining licence? What are the requirements to convert to a mining licence?

The DRC's legal framework allows for any corporate entity to engage in non-artisanal research or exploitation of mineral substances, as long as the private party holds a valid mining right.

Mining rights are acquired in two different ways:

- through a competitive bidding process organised by the government, through the relevant minister. Competitive bidding is governed by the Congolese legislation related to public procurement and the process cannot last more than nine months; or
- on a first-come, first-served basis, with a perimeter being divided into squares and registered in the chronological order of their filing.

The rights holder must begin exploration within one year (in the case of a research permit) or begin construction within one year (in the case of an exploitation permit) from the date the title was issued. The rights holder must also pay the surface duty per square over the counter at the Mining Registry.

In order to convert a mining licence, a research permit holder must, in particular:

- demonstrate the existence of an exploitable deposit;
- demonstrate the existence of the financial resources required to continue carrying out its project; and
- transfer 5 per cent of its shares to the state.

To obtain an exploitation permit, the applicant must demonstrate that he or she holds a valid research permit that covers the mining perimeter for which the exploitation permit is applied.

11 What is the regime for the renewal and transfer of mineral licences?

The regime for the renewal of and transfer of mineral licences is as follows.

Research permit

A research permit is valid for five years, and renewable once for another five years, for all mineral substances. The main conditions are detailed below. The holder of a research permit must:

- have complied with all obligations related to a research permit;
- submit a report on the research work carried out during the validity of the permit, as well as the validity of the period of the permit;
- submit a schedule for the execution of the research studies in question;
- have complied with the applicable tax liability and customs requirements;
- provide evidence of the opening of a research centre, recorded by the local authorities;
- determine the remaining phases to be carried out up to the final stage of certification of reserves and the development of feasibility studies; and
- present a supplementary budget for the research programme, corresponding to the remaining steps.

The request for renewal must be submitted to the mining registry between three and six months prior to the expiry of the permit. Every renewal requires the holder of the research permit to give up 50 per cent of the perimeter covered by its permit. If the minister does not respond to the renewal request within 30 days after submission, then the renewal is deemed granted. In case of refusal of a renewal, this refusal must be justified and is subject to appeal. However, this rule might be changed. Indeed, article 62 of Law No. 18/001, dated 9 March 2018, provides that this rule will be determined by the new ancillary regulation.

Exploitation permit

An exploitation permit cannot exceed 25 years and is renewable for another 15 years.

The main conditions are detailed below. The holder of an exploitation permit must:

- have complied with all obligations related to an exploitation permit;
- submit new feasibility studies showing the existence of recoverable reserves;
- demonstrate the existence of the financial resources required to continue carrying out its project;
- make a commitment to continue exploitation;
- demonstrate entry into the profitability phase of the project;
- have complied with the applicable tax liability and customs requirements; and
- transfer 5 per cent of its shares to the state at each renewal of the permit.

12 What is the typical duration of mining rights?

See question 11.

The Minister of Mines, who has, among other powers, jurisdiction over the granting, refusal and cancellation of mining rights, exercises his or her powers by way of decree.

13 Is there any distinction in law or practice between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

Whereas the previous Mining Code imposed nationality criteria, this was suppressed by the 2002 Mining Code, which established the grounds for wider eligibility criteria. Hence, no distinction is made between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties. However, artisanal digging and trading can only be carried out by DRC nationals.

Furthermore, before engaging in the mining industry in the DRC, foreign companies must abide by some administrative obligations. For instance, they must incorporate a local company before applying for an exploitation permit and must also elect domicile with an authorised Congolese mining and quarry agent and always act through their intermediary. Moreover, 10 per cent of the mining company's share capital must be held by Congolese natural persons.

14 How are mining rights protected? Are foreign arbitration awards in respect of domestic mining disputes freely enforceable in your jurisdiction?

The Mining Code provides for a recourse system for mining rights holders with three different possibilities for the resolution of disputes over mining rights: administrative, judicial, national or international arbitral recourse.

15 What types of surface rights may mining rights holders request and acquire? How are these rights acquired? Can surface rights holders oppose these requests?

Mining rights holders can request and acquire from the governor of the province concerned and on the advice of the administration of mines the right to occupy within its mining perimeter the land necessary for its activities and industrial activities.

16 Does the government or do state agencies have the right to participate in mining projects? Is there a local listing requirement for the project company?

The state is a direct or indirect shareholder (major or sole) in many mining companies. A company willing to acquire an exploitation permit must also transfer 10 per cent of its share capital to the state for free.

Furthermore, 5 per cent of the mining company's share capital must be transferred to the state for free at each renewal of the exploitation permit.

There is no specific local listing requirement for the project company.

17 Are there provisions in law dealing with government expropriation of licences? What are the compensation provisions?

The expropriation of licences is provided by the Mining Code according to which expropriation is conditional on exceptional circumstances and to compensation for the holder of the mining licence, who has the possibility to appeal.

The compensation must be paid at least six months prior to the compulsory execution of the decision to expropriate.

Within 48 hours following the date of notification of the decision to expropriate, the state will notify the affected holder of the proposed amount for compensation, and the precise or estimated date on which the actual expropriation will take place.

The expropriated holder must react within 10 days from the date of receipt of the state proposal, unless he or she requests an additional extension.

18 Are any areas designated as protected areas within your jurisdiction and which are off-limits or specially regulated?

There are certain areas that are subject to specific regulations, such as those related to artisanal mining or those where mining is prohibited (for national security, environmental or safety reasons).

Duties, royalties and taxes

19 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these revenue-based or profit-based?

The Mining Code provides for an exhaustive customs and tax regime for mining activities with the inclusion of all taxes, charges, royalties and other fees owed to the Treasury by mining title holders in respect of their mining activities, to the exclusion of any other form of taxation. This principle does not, however, prevent the tax agencies from often claiming additional taxes. When applicable, the tax provisions of the Mining Code refer to the general tax legislation. Second, the Mining Code provides a certain guarantee of stability: the existing tax, customs, exchange and other benefits applicable to mining activities remain in effect for five years in favour of each concerned mining title holder in the event that the Mining Code is amended.

20 What tax advantages and incentives are available to private parties carrying on mining activities?

The Mining Code provides for a wide range of incentives for private parties carrying mining activities, as set out below.

The tax and customs regime that applies to mining activities is exhaustive: the Mining Code provides for all the taxes, charges, royalties and other fees owed to the Treasury by mining title holders in respect of their mining activities, to the exclusion of any other form of taxation.

The Mining Code also provides a certain guarantee of stability: the existing tax, customs, exchange and other benefits applicable to mining activities remain in effect for five years in favour of each concerned mining title holder in the event that the Mining Code is amended.

Mining royalty

A mining royalty is owed as from the date of commencement of effective exploitation. The rate of the mining royalty is:

- zero per cent for commonly used building materials;
- 1 per cent for industrial minerals, solid hydrocarbon and other substances not listed;
- 1 per cent for iron or ferrous metals;
- 3.5 per cent for non-ferrous metals;
- 3.5 per cent for precious metals;
- 6 per cent for precious and color stones; and
- 10 per cent for the strategic substance (the mining regulation will specify the nature of the strategic substance).

Profit-based tax

Professional tax on benefits: a professional tax on benefits at the preferential Mining Code rate of 30 per cent (instead of the 35 per cent corporate tax rate) is levied on the net profits from exploitation determined in accordance with the accounting and tax legislation in force.

Furthermore, a special tax on 'super profits' has been embedded and can be defined as income earned when commodity prices increase to 25 per cent above the levels included in a project's feasibility study.

Sales and revenue-based taxes

The sales tax system is now set in a way that the turnover tax has been replaced since 1 January 2012 with a value added tax.

This tax is a consumption tax essentially paid for by the end-consumer and is recoverable by the economic operators in between. A single rate of 16 per cent applies on imports and on sales of goods and services, while a rate of zero per cent is applied on exports. For mining activities, exemptions are provided for the import and purchase of equipment, materials, reagents and other chemical products that are exclusively destined for prospecting, exploration and research.

Withholding tax on interest and dividends

The 20 per cent standard rate of withholding tax is not applied to interest paid on loans contracted abroad in foreign currency. In addition, loans from affiliates must be on interest rates and other conditions as favourable or better than those of loans that could be obtained from third parties to benefit from this exemption.

Dividends and other distributions are subject to the preferential Mining Code withholding tax at the rate of 10 per cent.

Withholding tax on salaries

Rights holders are liable to pay the standard withholding tax on salaries payable by their employees at the progressively increasing standard rate ranging from 3 to 50 per cent, capped at a total tax of 30 per cent of taxable income.

The rights holder is liable to pay a 10 per cent tax on indemnities paid as the result of the termination of employment or the breach of the employment contract or contract for the hiring of services.

Exceptional tax on expatriates' salaries

Before the 2018 revision, the rights holder was liable to pay the exceptional tax on expatriates' salaries at the preferential Mining Code rate of 10 per cent, instead of the 25 per cent standard rate. Nevertheless, this tax benefit has been modified with the 2018 revisions. The rights holder must now comply with a 12.5 per cent rate for the first 10 years. Once this period has lapsed, the 25 per cent standard rates shall apply.

Asset-based taxes

The rights holder is liable to pay the tax on real estate property as determined by general tax legislation, except for buildings situated inside the mining perimeter, which are subject to the tax on the surface area of mining concessions.

Tax on the surface area of mining concessions

A research permit holder is liable for the tax on the surface area of mining concessions at the rates of US\$0.02 per hectare for the first year, US\$0.03 for the second year, US\$0.035 for the third year and US\$0.04 for each subsequent year.

An exploitation permit holder is liable for this tax at US\$0.04 per hectare for the first year, US\$0.06 for the second year, US\$0.07 for the third year and US\$0.08 for subsequent years.

Annual surface duty per square

A special surface duty, payable annually to the Mining Registry, is levied on the number of squares held by a title.

Duties charged by the Customs Administration

Before the effective commencement of exploitation work, all goods and products imported strictly for mining use are subject to import duties at the preferential rate of 2 per cent, as long as these goods appear on a 'list of assets benefiting from the preferential regime' approved beforehand by a joint decree issued by the ministers of mines and finance.

From the effective commencement of exploitation work, and during a period ending at the close of the third year from the date of first

production, the import duty rate of 5 per cent applies under the same conditions.

All intermediates goods are subject to import duties of up to 10 per cent and oil and lubricants are subject to a 5 per cent rate.

Export duties

The title holder is fully exempted from all customs duties and other taxes, regardless of their nature, for exports in relation to the mining project. Remuneration fees for official services on exports are capped at 1 per cent of the export value. However, the cap of 1 per cent is not complied with by the various state agencies involved with export formalities and the total fees often amount to 2 per cent or more of the export value.

21 Does any legislation provide for tax stabilisation or are there tax stabilisation agreements in force?

The Mining Code provides for a five-year warranty of no parliamentary amendment. This five-year period commences from:

- the enactment of Law No. 18/001, dated 9 March 2018, for mining titles existing at this date;
- the granting of an exploitation permit.

22 Is the government entitled to a carried interest, or a free carried interest in mining projects?

If a company wishes to obtain an exploitation permit, then 10 per cent of its share capital must be transferred to the state for free. Furthermore, 5 per cent of the mining company's share capital must be transferred to the state at each renewal of the exploitation permit.

23 Are there any transfer taxes or capital gains imposed regarding the transfer of licences?

The transfer of licences is not subject to any form of transfer of taxes or capital gains.

24 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

On paper, no distinction is made between the duties, royalties and taxes payable by domestic parties and foreign parties, but in practice when concluding a joint venture with a local business partner, the foreign party is expected to provide a certain number of advantages to the domestic party, such as the transfer of bonus and royalty on sales.

Business structures

25 What are the principal business structures used by private parties carrying on mining activities?

Under the Organisation for the Harmonisation of Business Law in Africa (OHADA) company law, the principal business structures used by private parties carrying on mining activities are the following:

- the private limited liability company (*société à responsabilité limitée* – SARL), in which members are liable for the company debts only proportionally to their contributions and whose rights are represented by equity interests. It may be incorporated by one single natural person or legal entity, or by two or more natural persons or legal entities; and
- the public limited company (*société anonyme* – SA), in which shareholders are only liable for the company debts to the extent of their contributions and in which the rights of the shareholders are represented by shares. The company may have only one shareholder.

26 Is there a requirement that a local entity be a party to the transaction?

The only requirement is that 10 per cent of the share capital must be held by Congolese natural persons.

27 Are there jurisdictions with favourable bilateral investment treaties or tax treaties with your jurisdiction through which foreign entities will commonly structure their operations in your jurisdiction?

The DRC has concluded 11 investment treaties of which four are in force, but none of them is specifically favourable for mining investments.

However, the DRC has signed with Belgium and South Africa non-double taxation treaties providing for several corporate tax, interest, IP royalties and dividend advantages.

Financing

28 What are the principal sources of financing available to private parties carrying on mining activities? What role does the domestic public securities market play in financing the mining industry?

The principal sources of financing available to private parties carrying mining activities are equity, shareholders' advances and loans from domestic and foreign banks.

There is nearly no domestic public securities market.

29 Does the government, its agencies or major pension funds provide direct financing to mining projects?

To the best of our knowledge, the government does provide for direct financing to mining projects.

30 Describe the regime for taking security over mining interests.

The regime for taking security over mining interests is set in a way that a mining licence can be mortgaged after a positive cadastral and technical evaluation and with the approval of the Ministry of Mines (whose refusal must be justified and is subject to appeal).

Restrictions

31 What restrictions are imposed on the importation of machinery and equipment or services required in connection with exploration and extraction?

There are no particular restrictions on the importation of machinery and equipment or services (except, eg, from explosive substances). However if these goods are resold, they will be subject to the regular import duties and taxes.

32 Which standard conditions and agreements covering equipment supplies are used in your jurisdiction?

To the best of our knowledge, there are no standard conditions and agreements covering equipment supplies in the DRC, and it is practically difficult to assess whether the local market is friendly to the supplier or the buyer.

33 What restrictions are imposed on the processing, export or sale of minerals? Are there any export quotas, licensing or other mechanisms that prevent producers from freely exporting their production?

The processing, export or sale of minerals is subject to the state's right to determine the production quotas to be exported according to the needs of local industry.

34 What restrictions are imposed on the import of funds for exploration and extraction or the use of the proceeds from the export or sale of minerals?

There are no general restrictions imposed on the import of funds for exploration and extraction or on the use of proceeds from the export or sale of minerals. However, the title holder who imports funds has an obligation to repatriate 40 per cent of the exports revenue to the main bank account in the DRC within 15 days of fund receipt.

Environment

35 What are the principal environmental laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The DRC has ratified a few international conventions related to the protection of the environment in the mining industry such as the global standard for the good governance of oil, gas and mineral resources or the World Heritage convention.

Domestically, the Mining Code (as amended by Law No. 18/001, dated 9 March 2018) and the Mining Regulation provide for environmental measures.

Law No. 11-009, of 9 July 2011, covers the fundamental principles relating to the protection of the environment, and Decree No. 13/015, of 29 May 2013, covers installations for environmental protection. The principal regulatory body administering these laws is the department in charge of the protection of the mining environment.

36 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

An exploitation permit is subject to the approval of an environmental impact study and an environmental management plan, whereas exploration permits must be approved by a mitigation and rehabilitation plan.

Theoretically it takes up to 30 days from the day when the request has been forwarded by the Mining Registry Office with its favourable opinion to the minister for a research permit to be issued. After this deadline, should no decision be taken, the permit is deemed granted. Similar rules apply for the granting of mining permits. In practice, it is noteworthy that the preliminary stages for collection of mandatory documents may take a while (ie, several months) and timeframe can hardly be made systematic.

37 What is the closure and remediation process for a mining project? What performance bonds, guarantees and other financial assurances are required?

In order to close and remediate a mining project, the permit holder will have to submit a rehabilitation plan for the site after its closure in order to be eligible for an exploitation permit. The closure of a research or exploitation centre must take place within one year and promptly notified to the mining administration. The holder of the mining rights is required to obtain a financial guarantee in an amount sufficient to carry out environmental rehabilitation. The conditions under which such guarantee must be set up are detailed in Annex II to the Mining Regulation.

38 What are the restrictions for building tailings or waste dams?

An emergency plan must be notified to the relevant authorities and also be made available to the neighbouring populations. To the best of our knowledge, facilities are inspected by authorities on a regular basis (ie, around once a year, at least).

Health and safety, and labour issues

39 What are the principal health and safety and labour laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Mining Code and the Mining Regulations provide for a certain amount of health and safety regulations, but most health and safety regulations are contained in the Congolese Labour Code, and are therefore not specifically geared towards the mining sector.

The main regulatory and control bodies are the Labour Administration and the Labour Inspectorate.

40 What are the rules related to management and recycling of mining waste products? Who has title and the right to explore and exploit mining waste products in tailings ponds and waste piles?

Mining permits applicants must submit measures for mitigation and restoration of the mining site to reduce and eliminate risk of negative effects of the project on the environment. Mining permit holders are also responsible for managing tailings piles, in compliance with the environmental legal framework.

The rights holder of an exploitation permit has the right to explore and exploit mining waste products. The minister can also grant an exploitation permit on waste products, which is not subject to an exploitation permit.

41 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

Certain positions are reserved for DRC nationals and local content rules apply. However, it is worth noting that said requirements have usually

Update and trends

The main event was the revision of the mining code, which was enacted in March 2018.

In 2016–2017 some of the significant transactions in the DRC were as follows:

- China Molybdenum Inc (CMOC) acquired from Freeport McMoRan its controlling stake in the Tenke Fungurume copper mine;
- Banro Corporation closed US\$67.5 million of its financing, relating to the Twangiza mine, with a mining investment fund managed by Resources Finance Works Limited;
- Armadale Capital and Kisenge Mining formed a joint venture to operate the Mpokoto gold project;
- Ivanhoe Mines and its joint-venture partner Zijin Mining Group transferred an additional 15 per cent interest in their Kamoa-Kakula copper project to the DRC government;
- Vector Resources acquired a 70 per cent interest in the Maniema gold project;
- First Cobalt signed a letter of intent with Madini Minerals for a 70 per cent controlling interest in seven prospective copper-cobalt properties; and
- Taruga Gold Ltd entered into a binding agreement to acquire, subject to due diligence, up to a 65 per cent interest in permit in the Manono Tin Tantalum Mining District in Tanganyika Province.

not been fully complied with. Furthermore, derogations are provided by law. That being said, the enforcement of local content requirements may become an objective for the authorities in the immediate future.

Social and community issues

42 What are the principal community engagement or CSR laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The DRC is a full member of EITI and the Mining Code also refers to some CSR obligations for permit holders.

43 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

To the best of our knowledge, the DRC does not have any specific legislation to protect an ethnic or specific group of people.

44 What international treaties, conventions or protocols relating to CSR issues are applicable in your jurisdiction?

See question 42.

Anti-bribery and corrupt practices

45 Describe any local legislation governing anti-bribery and corrupt practices.

The DRC has been a signatory member of the UN Convention against Corruption since 2010 and passed its own anti-corruption law in 2004. The law is largely perceived as providing an adequate legal framework. All forms of corruption are prohibited and abuse of public office for personal gain can be punished by up to 15 years in prison.

Other anti-corruption-related legal provisions are included in the Constitution and the code of ethics of public officials, which require the head of state, government officials and civil servants to submit asset declarations to the Constitutional court upon entering and leaving office.

However, these provisions have been poorly implemented to date, owing to a lack of legislation and public access to collected data, which prevents effective monitoring of public officials' assets declarations. In the area of public finance management, legislation on the Public Procurement Code, which was adopted and promulgated in 2010, is not being sufficiently respected.

The 2004 Money Laundering Act criminalises money laundering and terrorism financing and provides for a financial intelligence unit. Under this law, the DRC cooperates with African and European crime-fighting organisations. To date there is no access to information law in the DRC.

The DRC is now also recognised as a compliant member of the EITI after the implementation of a set of corrective actions requested by the EITI board. According to the EITI, the DRC has been making significant progress since 2014, having published contracts between the government and private oil, gas and mining companies, as well as the names of their beneficial owners.

Finally, article 149bis of the Penal Code also penalises corrupt practices.

46 Do companies in your country pay particular attention to any foreign legislation governing anti-bribery and foreign corrupt practices in your jurisdiction?

Companies in the DRC will pay particular attention to the UK Bribery Act and the US Foreign Corrupt Practices Act before doing business in the DRC in order to mitigate business and regulatory risks.

Section 1502 of the US Dodd-Frank Wall Street Reform Act and the EU regulation regarding conflict minerals are also relevant for businesses active in the DRC.

47 Has your jurisdiction enacted legislation or adopted international best practices regarding disclosure of payments by resource companies to government entities in accordance with the Extractive Industries Transparency Initiative (EITI) Standard?

The government produces annual reports that disclose revenues from the extraction of natural resources. After companies disclose what they pay in taxes and the government discloses what it receives, the two figures are then compared and reconciled.

Foreign investment

48 Are there any foreign ownership restrictions in your jurisdiction relevant to the mining industry?

In general there are no restrictions on foreign investment in the mining sector and currency exchange provisions are quite liberal. However, operators must comply with some obligations, such as:

- the payment abroad of licensed activities is tolerated as long as all the applicable taxes and duties are paid in advance;
- shareholders' loans can be reimbursed as long as the ratio between the borrowed funds and capital does not exceed 72:25;
- payments made to affiliated companies abroad must be justified in view of the local market prices for similar goods or services; and
- the permit holder can maintain bank accounts abroad as long as it has opened a bank account locally.

International treaties

49 What international treaties apply to the mining industry or an investment in the mining industry?

There are a certain number of international treaties that apply to the mining industry in the DRC, namely:

- the World Trade Organization;
- the International Labour Organization;
- the International Finance Group;
- the Multilateral Investment Agency;
- the Convention Establishing the International Centre for Settlement of Investment Disputes; and
- the Common Market for Eastern and Southern Africa.

Furthermore, the DRC has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has adhered to the EITI criteria, as previously noted.

Finally, the DRC has been a member of the Organisation for the Harmonisation of Business Law in Africa (OHADA) since July 2012. The adherence to OHADA law can only benefit further investment by providing companies willing to do business in the DRC with a single business law framework that supersedes previous or subsequent national legislation, and which is supported by reliable jurisprudence issued by a common court of justice having jurisdiction over all the member states. Hence mining companies benefit highly from OHADA uniform acts as it covers commercial, corporate, loan-guarantee, accounting and arbitration law.

* *The authors are grateful to Pierrick Ferrero for his work in the preparation of this chapter.*



Olivier Bustin
Matthieu Le Roux

ocb@vda.pt
mlr@vda.pt

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal

Tel: +351 21 311 3400
Fax: +351 21 311 3406
www.vda.pt

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes

Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust

Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com