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Congo – D.R.

Matthieu Le Roux



VdA Vieira de Almeida

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The main national legislations governing the mining industry in the DRC are (i) Law no. 007/2002 of 11 July 2002 (the “**2002 Mining Code**”), which is currently under revision, and (ii) the Mining Regulation enacted by Decree no. 038/2003, of 26 March 2003 (the “**2003 Mining Regulation**”). In addition, there are a set of Decrees and Ministerial Orders to be considered.

1.2 Which Government body/ies administer the mining industry?

The mining industry is administered by the following public representatives/bodies:

- The President of the Republic, who notably exercises classification and declassification authority in relation to minerals and prohibited areas for mining activities.
- The Minister of Mines, who has, *inter alia*, powers and jurisdiction over the granting, refusal and cancellation of mining rights.
- The Mining Registry, supervised by the Minister of Mines and the Minister of Finance, which has the main goal of conducting administrative proceedings in relation to the application for and registration of mining rights, as well as their cancellation and expiry.
- The Department in charge of Protection of the Mining Environment, which has the main role of handling the definition and implementation of mining regulations concerning environmental protection, as well as the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan.
- The Directorate of Mines, which is responsible for inspecting and supervising mining activities with regard to health and safety, work practices, production, transport, sale and social matters.
- The Provincial Governor, who has the authority for issuing trading cards with respect to artisanal mining production.

1.3 Describe any other sources of law affecting the mining industry.

In addition to the 2002 Mining Code, the mining industry is also regulated by the country’s Tax legislation, notably regarding VAT,

the Customs Code, the Labour and Immigration legislations, Law no. 11/009 of 9 July 2011, establishing the basic environmental protection principles, and various other laws dealing with contractual and corporate matters (i.e., the OHADA Uniform Acts).

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The carrying out of reconnaissance (*prospection* in French) is not attached to any specific right. However, any person or entity planning to engage in a reconnaissance process must submit a prior declaration to the Mining Registry. A Reconnaissance Certificate (*attestation de prospection* in French) is subsequently granted by the Mining Registry within five days and valid for a non-renewable period of two years.

2.2 What rights are required to conduct exploration?

An exploration permit (*permis de recherche* in French) is required in order to conduct exploration in the DRC.

2.3 What rights are required to conduct mining?

To conduct mining operations, a particular permit category is required, depending on the nature of the operations envisioned and may be a production permit (*permis d’exploitation* in French), a small mine permit (*permis d’exploitation de petite mine* in French), or a waste management licence (*permis d’exploitation des rejets* in French).

2.4 Are different procedures applicable to different minerals and on different types of land?

Specific procedures apply to minerals formally declared and classified as “reserved substances”.

2.5 Are different procedures applicable to natural oil and gas?

Yes, different procedures are applicable to natural oil and gas, as set out in Law no. 15/012, of 1 August 2015, establishing a general legal framework for hydrocarbons, and Decree no. 16/010, of 19 April 2016, establishing the hydrocarbons regulations.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 What types of entity can own reconnaissance, exploration and mining rights?

Please see the answer to question 3.2.

3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Under the 2002 Mining Code, no distinction is made between mineral rights that may be acquired by (i) Congolese individuals (over the age of majority, i.e. 18 years old) or legal persons, and (ii) foreigners. However, artisanal digging and trading can only be performed by nationals. Furthermore, before engaging in the DRC's mining industry, foreign companies must fulfil a few administrative obligations (e.g. elect domicile with an authorised Congolese mining agent, acting as such company's intermediary).

3.3 Are there any change of control restrictions applicable?

As a general rule and to the best of our knowledge, no specific change of control restrictions are applicable to mining companies' shareholders. Restrictions may, however, be imposed depending on the provisions of the Articles of Association of the company affected by the change of control. Mineral right transfers are subject to a number of restrictions (see the answer to question 5.1).

3.4 Are there requirements for ownership by indigenous persons or entities?

The 2002 Mining Code does not establish ownership requirements by indigenous persons or entities for mineral permit holders.

3.5 Does the State have free carry rights or options to acquire shareholdings?

The State has free carry rights and mining companies, wishing to acquire a production permit must, transfer 5% of their share capital for free.

4 Processing, Refining, Beneficiation and Export

4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

Yes, there are special regulatory provisions relating to processing and refining performed not by a mineral permit holder, but by another entity dedicated to those activities. Additionally, the construction and operation of processing plants are subject to environmental regulatory provisions.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

The export of raw minerals is closely controlled and can only be performed under strict conditions. The export of tradable mining commodities (i.e., processed minerals) must also comply with several legal requirements (e.g., minimum humidity rate, full traceability and certification). The export of certain concentrates may be restricted or prohibited. As a final note, the export of minerals is subject to 10% taxation, pursuant to the Customs Code.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Authorisation for conducting reconnaissance (*prospection* in French) cannot be exclusive and, strictly speaking, under the 2002 Mining Code, it does not provide any assignable mineral right. By contrast, exploration and production permits can be wholly or partially assigned, subject to the conditions attached to the assignment, such as the transferee's obligation to assume all of the permit holder's obligations to the State, and also the obligation to register any transfer at the Mining Registry, among others.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Production permits can be mortgaged, once a positive cadastral and technical evaluation has been issued by the Directorate of Mines, followed by the approval of the Ministry of Mines.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

As explained above, the 2002 Mining Code provides for authorisations to conduct reconnaissance, but these do not give rise to any formal mineral rights for their beneficiaries. Exploration permits are automatically subdivided when renewed. Production permits may be subdivided when partially waived or assigned by their holders.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The 2002 Mining Code does not provide for jointly-owned exploration and production permits.

6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

The holder of rights to explore for or mine a primary mineral is entitled to explore or mine for secondary minerals, provided that

such permit holders, when applying for an extension of their initial rights, also include secondary minerals in the application form.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The holder of a right to conduct mining operations is entitled to also exercise rights over any residue deposits on the land concerned, provided that this is not explicitly prohibited in the respective production permit, and subject to the holder having specifically applied for such additional right.

6.5 Are there any special rules relating to offshore exploration and mining?

To the best of our knowledge, there are no such special rules in force, except in relation to operations regarding mine waste.

7 Rights to Use Surface of Land

7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

Exploration or production permits do not grant their holders an automatic right to use the surface of the land. However, the Governor of the relevant province, further to an opinion issued by the Mines Administration, may grant the right to the permit holders to occupy the land necessary for their activities within their mining perimeter. Under specific circumstances, the consent of the respective landowner or lawful occupier may also be required.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

Pursuant to Article 279 of the 2002 Mining Code (*Restrictions on the occupation of the land*), the holder of an exploration or production permit must obtain the authorisation of the landowner or lawful occupier in order to occupy land located less than 180 metres from houses, 45 metres from tilled lands, or 90 metres from farms with cattle, a water tank, dam or private water reserve. Furthermore, any land occupation by the holder of exploration or production permit, preventing its use by those entitled to enjoy said land, gives the latter the right to receive compensation.

7.3 What rights of expropriation exist?

Expropriation rights can only be granted by the State under exceptional circumstances and for reasons of public interest, but always subject to fair compensation.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Many environmental requirements apply to exploration and

production operations, as outlined in the numerous annexes of the 2003 Mining Regulation dedicated to environmental issues. In addition, although no environmental authorisation is required at the reconnaissance stage, reconnaissance must comply with the Code of Conduct set forth in the 2003 Mining Regulation.

With respect to exploration, we highlight the need to submit for the approval of the relevant authorities a mitigation and rehabilitation plan describing the measures taken to limit and remedy any environmental damage caused by exploration works.

Furthermore, anyone applying for a production permit is required to submit an environmental impact study and a draft environmental management plan, which must contain a description of the “greenfield” ecosystem and of the measures envisioned to limit and remedy any damage caused to the environment throughout the duration of the project.

Also, the right holder must declare any archaeological discoveries and publish safety warnings. Furthermore, the importation, marketing, transportation, storage and use of explosives are all subject to special rules.

8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

In order to close and remediate a mining project, production permit applicants are requested, when applying, to submit to the relevant authorities a draft rehabilitation plan for the site post-closure, alongside the application form. Later, the decision to close a mining site must be promptly notified to the relevant authorities.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

Holders of exploration or production permits are required to provide a financial guarantee in an amount sufficient to cover any necessary environmental rehabilitation. The terms and conditions according to which this guarantee must be set up are detailed in Annex II to the Mining Regulation.

8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

To the best of our knowledge, and assuming that an exploration or production permit has been duly issued with respect to third parties’ rights, permit holders who have complied with their duties arising under said permits may not be ousted, except in cases of expropriation (see the answer to question 7.3 above).

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

Subject to the answers to question 7.2, the holding of native title or other statutory surface use rights does not have any direct impact on the rights granted under an exploration or production permit. That being said, we emphasise that artisanal mining production is reserved solely to Congolese individuals by law.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

The 2002 Mining Code establishes that mining operations are subject to hygiene, security and protection measures enacted by special regulations.

Mineral permit holders must also comply with all measures ordered by the Administration to prevent or eliminate the causes of dangers to public health and safety.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

The Mining Code provides that mineral permit holders must publish safety regulations with regard to their mining operations. These regulations are disclosed to the relevant authorities, as well as to all employees. Any other persons having access to the site must also be duly informed. Moreover, as previously mentioned under the answer to question 8.1 above, activities related to explosives are subject to special regulations.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Mining Registry is the central office in charge of registering mineral permits. It notably processes the applications for such titles, grants the related rights and keeps records thereof.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

To challenge administrative decisions relating to mining activities, the 2002 Mining Code makes reference to the resources provided by the ordinary laws governing the judicial system and court proceedings, except for the applicable time limits, which are reduced.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

The DRC's constitution expressly provides that the State has unlimited sovereign powers over its soils and subsoil.

12.2 Are there any State investment treaties which are applicable?

The DRC has entered into bilateral investment treaties with several countries and also ratified treaties for the avoidance of double taxation, namely with the Kingdom of Belgium and the Republic of South Africa.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

The 2002 Mining Code provides for an exhaustive tax and customs regime applicable to mineral permit holders' activities. This regime is exclusive of any other present or future taxation, except more favourable ones.

13.2 Are there royalties payable to the State over and above any taxes?

The 2002 Mining Code sets a mining royalty which is owed from the date on which the mining operations effectively start and is calculated based on the value of the sales made. The rate of the mining royalty varies according to the mineral substances in question (e.g., 0.5% for iron or ferrous metals, 2% for non-ferrous metals, 2.5% for precious metals, 4% for precious stones, 1% for industrial minerals, etc.).

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Yes, depending on the province and, without prejudice to the stabilisation clause provided by the 2002 Mining Code regarding taxes and customs duties, this is applicable to permit holders.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

The DRC has been implementing the EITI Standard since 2007 and became a full member in 2014. The DRC is also a State Party to the Kimberley Process, as well as to the Pact on Security, Stability and Development in the Great Lakes, which includes its Protocol against the Illegal Exploitation of Natural Resources.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The 2002 Mining Code provides for the total or partial abandonment of mining exploration or production permits, performed by means of a declaration sent to the competent Minister. The permit holder does not have any right to compensation and remains liable to the local community for any environmental damage and/or any breach of its obligations.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

When the holder of an exploration right applies for the renewal of the respective permit, the holder automatically relinquishes 50% of the territory covered by said permit.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Subject to compliance with the formal procedures established by the 2002 Mining Code, the State is empowered to cancel an exploration

or production permit if the holder does not fulfil its obligation to start exploration within six months (in the case of exploration permits) or of starting construction within three years (for production permits) from the date on which the permit was issued, and also when the permit holder fails to pay timely the applicable surface duty (*droit superficiaire par carré* in French) on time.

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