

# Mining 2019

Contributing editors  
Michael J Bourassa and Alison Lacy



**Publisher**

Tom Barnes

tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall

claire.bagnall@lbresearch.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

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 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2005

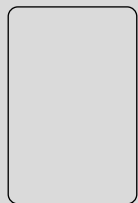
Fifteenth edition

ISBN 978-1-83862-125-4

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



---

# Mining

## 2019

**Contributing editors****Michael J Bourassa and Alison Lacy**

Fasken

---

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology 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.lexology.com/gtdt](http://www.lexology.com/gtdt).

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.

Lexology 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 J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



London

May 2019

---

Reproduced with permission from Law Business Research Ltd

This article was first published in April 2019

For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Introduction</b>	<b>5</b>	<b>Ghana</b>	<b>104</b>
Michael J Bourassa Fasken		Michael Edem Akafia, Kimathi Kuenyehia Sr and Sefakor Kuenyehia Kimathi & Partners, Corporate Attorneys	
<b>Project development: how to get started</b>	<b>9</b>	<b>Greenland</b>	<b>114</b>
Alison Lacy Fasken		Peter Schriver Nuna Law Firm	
<b>Mining in Japan</b>	<b>12</b>	<b>India</b>	<b>122</b>
Hiroyasu Konno and Yoshiaki Otsuki Nishimura & Asahi		Neeraj Menon and Karthy Nair Trilegal	
<b>Latin America overview</b>	<b>14</b>	<b>Mexico</b>	<b>131</b>
Florencia Heredia Allende & Brea		Enrique Rodríguez del Bosque RB Mexico-Law	
<b>Angola</b>	<b>19</b>	<b>Mozambique</b>	<b>141</b>
João Afonso Fialho and Ângela Viana VdA Legal Partners		João Afonso Fialho and Ângela Viana VdA Legal Partners Guilherme Daniel Guilherme Daniel & Associados	
<b>Argentina</b>	<b>29</b>	<b>Myanmar</b>	<b>151</b>
Florencia Heredia and Agostina L Martinez Allende & Brea		Khin Cho Kyi Myanmar Legal Services Ltd	
<b>Brazil</b>	<b>41</b>	<b>Peru</b>	<b>159</b>
Cláudio Guerreiro, Luiz André Nunes de Oliveira, Carlos Maurício Ribeiro and Rodrigo Leite Moreira Vieira Rezende Advogados		Fernando Pickmann Dentons	
<b>Canada</b>	<b>52</b>	<b>Philippines</b>	<b>168</b>
Michael J Bourassa and Alison Lacy Fasken		Patricia A O Bunye Cruz Marcelo & Tenefrancia	
<b>Chile</b>	<b>65</b>	<b>South Africa</b>	<b>180</b>
Rodrigo Muñoz U Núñez, Muñoz & Cía Ltda		Peter Leon and Patrick Leyden Herbert Smith Freehills South Africa LLP	
<b>Democratic Republic of the Congo</b>	<b>73</b>	<b>Sweden</b>	<b>190</b>
Olivier Bustin and Matthieu Le Roux Vieira de Almeida		Peter Dyer and Pia Pehrson Foyen Advokatfirma	
<b>Ecuador</b>	<b>81</b>	<b>Thailand</b>	<b>200</b>
Cesar Zumarraga and Juan Fernando Larrea Tobar ZVS		Ratana Poonsombudlert, Nuanporn Wechsuwanarux and Sawanee Gulthawatvichai Chandler MHM Limited	
<b>Finland</b>	<b>91</b>	<b>United Kingdom</b>	<b>211</b>
Pekka Holopainen and Panu Skogström Kalliolaw Attorneys Ltd		Richard Blunt, Susie Davies and Ruchika Patel Baker McKenzie	

**United States** **220**

John D Fognani and Christopher J Reagen  
Haynes and Boone, LLP

**Uzbekistan** **230**

Bakhodir Jabborov  
GRATA International Law Firm

**Zambia** **239**

Charles Mkokweza, Namakuzu Shandavu and Mutinta Annel Zulu  
Corpus Legal Practitioners

# Democratic Republic of the Congo

Olivier Bustin and Matthieu Le Roux\*

Vieira de Almeida

## MINING INDUSTRY

### Standing

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.

### Target minerals

2 | What are the target minerals?

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

### Regions

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

### Basis of legal system

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

The legal system is a civil law-based one.

### Regulation

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.

### Classification system

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

### State control over mining rights

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.

### Publicly available information and data

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](http://www.mines-rdc.cd));
- the Mining Registry ([www.cami.cd](http://www.cami.cd) or [www.flexicadastre.com](http://www.flexicadastre.com));
- the CTCPM (Cellule Technique de Coordination et de Planification Minière) ([www.miningcongo.cd](http://www.miningcongo.cd));
- the CEEC (Centre d'Expertise, d'Evaluation et de Certification des substances minerales 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](http://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](http://www.drcmining.com));
- the University of Lubumbashi (Katanga) ([www.unilu.ac.cd](http://www.unilu.ac.cd)); and
- the Royal Museum on Central Africa (Brussels, Belgium), which has a very active geological department ([www.africamuseum.be](http://www.africamuseum.be)).

### Acquisition of rights by private parties

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.

### Renewal and transfer of mineral licences

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.

### Duration of mining rights

#### 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.

### Acquisition by domestic parties versus acquisition by foreign parties

#### 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.

### Protection of mining rights

#### 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; and
- national or international arbitral recourse.

### Surface rights

#### 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.

### Participation of government and state agencies

#### 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.

### Government expropriation of licences

#### 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.

### Protected areas

#### 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

### Duties, royalties and taxes payable by private parties

#### 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.

### Tax advantages and incentives

#### 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 colour stones; and
- 10 per cent for the strategic substance (the mining regulation will specify the nature of the strategic substance).

#### Profit-based tax

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 per cent 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 service

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.

#### Tax stabilisation

#### 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.

### Carried interest

- 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.

### Transfer taxes and capital gains

- 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.

### Distinction between domestic parties and foreign parties

- 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

### Principal 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 (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 (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.

### Local entity requirement

- 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.

### Bilateral investment and tax treaties

- 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 non-double taxation treaties with Belgium and South Africa providing for several corporate tax, interest, intellectual property royalties and dividend advantages.

## FINANCING

### Principal sources of 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.

### Direct financing from government or major pension funds

- 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.

### Security regime

- 30 | Please 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

### Importation 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.

### Standard conditions and agreements

- 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 particularly difficult to assess whether the local market is friendly to the supplier or the buyer.

### Mineral restrictions

- 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.

### Import of funds restrictions

- 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 export revenue to the main bank account in the DRC within 15 days of fund receipt.

## ENVIRONMENT

### Principal applicable environmental laws

- 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.

### Environmental review and permitting process

- 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 some time (ie, several months) and setting a time-frame can hardly be made systematic.

### Closure and remediation process

- 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.

### Restrictions on building tailings or waste dams

- 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, about once a year, at least).

## HEALTH AND SAFETY, AND LABOUR ISSUES

### Principal health and safety, and labour laws

- 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.

### Management and recycling of mining waste

- 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 the 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.

### Use of domestic and foreign employees

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

## SOCIAL AND COMMUNITY ISSUES

### Community engagement and CSR

- 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 corporate social responsibility (CSR) obligations for permit holders.

### Rights of aboriginal, indigenous or disadvantaged peoples

- 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 has no specific legislation to protect an ethnic or specific group of people.

### International law

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

See question 42.

## ANTI-BRIBERY AND CORRUPT PRACTICES

### Local legislation

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

The DRC has been a signatory member of the United Nations 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, to date, these provisions have been poorly implemented, 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 149-bis of the Penal Code also penalises corrupt practices.

### Foreign legislation

- 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.

### Disclosure of payments by resource companies

- 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

### Foreign ownership restrictions

- 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

### Applicable 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 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 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**

ocb@vda.pt

**Matthieu Le Roux**

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

## Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Foreign Investment Review	Patents	State Aid
Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)