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Mining Law **2020**

A practical cross-border insight into mining law
Seventh Edition

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Matthieu Le Roux



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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The main national legislation governing the mining industry in the DRC is (i) Law no. 007/2002 of 11 July 2002 as amended by Law no. 18/001, dated 9 March 2018 (the “2002 Mining Code”), and (ii) the Mining Regulation (kindly note that the answers to the questionnaire have been drafted before the adoption of the revised Mining Regulation, by Decree no. 18/24, of 8 June 2018) enacted by Decree no. 038/2003, of 26 March 2003 (the “2003 Mining Regulation”). In addition, there is 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 Congolese Environmental Agency, the main role of which is to handle the evaluation and approval of environmental and social studies, also follows up on their implementation, by taking into account the environmental protection during the mining project.
- The Directorate of Geology, the Directorate of Mines and the Directorate of Protection of the Mining Environment. The Mining Regulation will determine the functions of these entities.
- The Provincial Governor, who has the authority to issue 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, Customs Code, the Labour and Immigration legislations, Law no. 11/009 of 9 July 2011, establishing the basic environmental protec-

tion principles, and various other laws dealing with contractual and corporate matters (i.e., the OHADA Uniform Acts).

2 Recent Political Developments

2.1 Are there any recent political developments affecting the mining industry?

The newly elected President, who was sworn in on 24 January 2019, offered support to the new Mining legislation dated 2018, and clearly stated, in different meetings, that he will apply such legislation. Hence, it seems the mining industry should not be impacted by those recent political developments, even though nobody can predict whether new regulations related to the sector will or will not be adopted on short notice.

2.2 Are there any specific steps the mining industry is taking in light of these developments?

Chairmen of the main mining companies active in the Democratic Republic of Congo (DRC) have already met with the newly elected President. In a meeting at the US Chamber of Commerce in Washington held in April 2019, the President confirmed DRC’s commitment to develop the mining industry in the country with the support of foreign investment.

3 Mechanics of Acquisition of Rights

3.1 What rights are required to conduct reconnaissance?

The carrying out of reconnaissance (*prospection* in French) allows anyone to investigate and to take samples in order to find out about the existence of a mineral deposit. Before the 2018 reform, any person or entity planning to engage in a reconnaissance process had to submit a prior declaration to the Mining Registry. A Reconnaissance Certificate (*attestation de prospection* in French) was subsequently granted by the Mining Registry within five days and is valid for a non-renewable period of two years. From now on, a declaration to the Directorate of Geology must be made, and the result of the *prospection* must be transferred to said entity.

3.2 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.

3.3 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).

3.4 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”. In that sense, Decree no. 18/042 dated 24 November 2018, declared cobalt, germanium and columbite-tantalite “coltan” as strategic minerals. The specific procedures applicable are yet to be adopted by decree of the Ministers in charge of Mines and Finance.

3.5 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, which establishes the hydrocarbons regulations.

4 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

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

Please see the answer to question 3.2.

4.2 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, as revised in 2018, no distinction is made between mineral rights that may be acquired by (i) Congolese legal persons, and (ii) foreign legal persons. However, artisanal digging and trading can only be performed by nationals. Furthermore, before engaging in the DRC's mining industry, foreign companies must fulfil certain administrative obligations (e.g. elect a domicile with an authorised Congolese mining agent, acting as such company's intermediary; and incorporate locally).

4.3 Are there any change of control restrictions applicable?

Any direct or indirect change of control of a mining company is subject to the prior approval of the Congolese State.

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

Since the 2018 revision, 10% of the mining company's share capital must be held by Congolese natural persons.

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

The State has free carry rights and mining companies, who wish to acquire a production permit, must transfer 10% of their share capital for free. Furthermore, 5% of the mining company's share capital must be transferred to the State for free at each renewal of the exploitation permit.

5 Processing, Refining, Beneficiation and Export

5.1 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.

5.2 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. For instance, the 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. The export of tradeable 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.

6 Transfer and Encumbrance

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

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.

6.2 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.

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

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

Exploration permits are automatically subdivided when renewed. Production permits may be subdivided when partially waived or assigned by their holders.

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

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

7.3 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.

7.4 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.

7.5 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.

8 Rights to Use Surface of Land

8.1 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.

8.2 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 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 1,000 metres from houses, 800 metres from tilled lands, or 800 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.

8.3 What rights of expropriation exist?

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

9 Environmental

9.1 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 Mining Regulation dedicated to environmental issues. 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.

9.2 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.

9.3 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.

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

To the best of our knowledge, there are no zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right.

10 Native Title and Land Rights

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

Subject to the answer 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.

11 Health and Safety

11.1 What legislation governs health and safety in mining?

The 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.

11.2 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.

12 Administrative Aspects

12.1 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.

12.2 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.

13 Constitutional Law

13.1 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.

13.2 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.

14 Taxes and Royalties

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

The 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.

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

The 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., 1% for iron or ferrous metals, 3.5% for non-ferrous metals, 3.5% for precious metals, 6% for precious and colour stones, 1% for industrial minerals, etc.) and 10% for strategic substance. The Mining Regulation or complementary additional ministerial orders determines the elements that will be considered as "strategic substance" (see question 3.4).

15 Regional and Local Rules and Laws

15.1 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 Mining Code regarding taxes and customs duties, this is applicable to permit holders. This clause, which used to provide a 10-year warranty, has been modified. The stability clause is now valid for only five years.

15.2 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.

16 Cancellation, Abandonment and Relinquishment

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

The 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.

16.2 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. Furthermore, the holder of a mining right must transfer 5% of its shares to the state for free at each renewal of its mining right.

16.3 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: (i) if the holder does not fulfil its obligation to start exploration or construction within one year from the date on which the permit was issued; (ii) when the permit holder fails to pay the applicable surface duty (*droit superficiaire par carré* in French) on time; (iii) when the permit holder fails to correct a formal notice within 60 days; and (iv) when a permit holder fails to comply with social obligations set out in the Mining Regulations.

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