

Mining 2021

Contributing editors

Darrell Podowski, Brian Dominique, Brandon Manhas and Lauren White



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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 May 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2005

Seventeenth edition

ISBN 978-1-83862-690-7

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Mining 2021

Contributing editors**Darrell Podowski, Brian Dominique, Brandon Manhas
and Lauren White****Cassels Brock & Blackwell LLP**

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Mining*, which is available in print and online at 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. Our coverage this year includes new chapter on Ireland, Nigeria and Uzbekistan.

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.

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, Darrell Podowski, Brian Dominique, Brandon Manhas and Lauren White of Cassels Brock & Blackwell LLP, for their assistance with this volume.



London

May 2021

Reproduced with permission from Law Business Research Ltd

This article was first published in June 2021

For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction: the coronavirus pandemic and its effect on mining	5
Darrell Podowski, Brian Dominique, Brandon Manhas and Lauren White Cassels Brock & Blackwell LLP	
Latin America overview	8
Florencia Heredia Allende & Brea	
Angola	12
João Afonso Fialho and Ângela Viana VdA	
Argentina	22
Florencia Heredia, Agostina L Martinez and Valentina Surraco Urtubey Allende & Brea	
Canada	35
Darrell Podowski, Brian Dominique, Brandon Manhas and Lauren White Cassels Brock & Blackwell LLP	
Democratic Republic of Congo	46
Olivier Bustin and Matthieu Le Roux VdA	
Ecuador	55
César Zumárraga and Juan Larrea Savinovich Tobar ZVS Spingarn	
Finland	65
Panu Skogström and Niklas Vartiainen Kalliolaw Asianajotoimisto Oy	
Ghana	84
Kimathi Kuenyehia Sr, Michael Edem Akafia, Sefakor Kuenyehia and Kafui Quashigah Kimathi & Partners Corporate Attorneys	
Greenland	95
Helen Kibsgaard and Peter Schriver Nuna Law Firm	
India	104
Neeraj Menon and Karthy Nair Trilegal	
Indonesia	114
Fitriana Mahiddin and Fernando Lintong SSEK Legal Consultants	
Ireland	127
Brendan Ringrose, Thérèse Rochford, Robert Carroll and Gerald Quinn Whitney Moore LLP	
Mexico	141
Enrique Rodríguez del Bosque RB Abogados	
Mozambique	152
João Afonso Fialho, Guilherme Daniel and Ângela Viana VdA	
Myanmar	162
Khin Cho Kyi, Kana Manabe, Sooksun Popun-Ngarm and Albert T Chandler Myanmar Legal MHM Limited	
Nigeria	171
'Gbite Adeniji and Jumoke Fajemirokun ENR Advisory	
Philippines	178
Patricia A O Bunye Cruz Marcelo & Tenefrancia	
South Africa	187
Peter Leon and Patrick Leyden Herbert Smith Freehills LLP	
Sweden	199
Peter Dyer and Pia Pehrson Foyen Advokatfirma	

Thailand 207

Nuanporn Wechsuwanarux, E T Hunt Talmage III,
Sawanee Gulthawatvichai, Tachatorn Vedchapun
and Noraseth Ohpanayikool
Chandler MHM Limited

United Kingdom 219

Richard Blunt, Susannah Davies and Jackson Martin
Baker McKenzie

United States 229

John D Fognani and Christopher J Reagen
Haynes and Boone LLP

Uzbekistan 242

Bakhodir Jabborov, Anora Turakhujaeva, Olmoskhon Khamidova,
Dilorom Yuldasheva and Parvina Bashirova
GRATA International

Democratic Republic of Congo

Olivier Bustin and Matthieu Le Roux

VdA

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 civil law-based.

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, enacted by Decree No. 038/2003 on 26 March 2003 (as amended by Decree No. 18/024, dated 8 June 2018). 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 pieces of legislation in the DRC dealing with the mining industry is the most recent versions of the 2002 Mining Code and the 2003 Mining Regulation. The Law No. 17-001, dated 8 February 2017, on subcontracting in the Private sector, shall also be considered as regard local content requirements, alongside the set of implementing decrees and Ministerial orders.

The implementing measures of the Mining Code are provided by 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 exercise 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;
- 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; and
- the Regulatory Authority on Subcontracting in the Private Sector.

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 2002 Mining Code (as amended by Law No. 18/001, dated 9 March 2018), 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 Democratic Republic of the Congo (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, or securities commission regulating public companies, 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 following authorities, agencies and organisations:

- the Ministry of Mines (www.mines-rdc.cd);
- the Mining Registry (www.cami.cd or www.flexicadastre.com);
- the Technical Coordination and Mining Planning Unit (www.miningcongo.cd);
- the Centre for Expertise, Evaluation and Certification of Precious and Semi-Precious Mineral (CEEC), 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 Geological and Mineral Research Centre, 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).

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 or more senior tenure? 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.

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;
- transfer 10 per cent of its shares to the state; and
- grant 10 per cent of the shares to Congolese nationals.

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 of Mines does not respond to the renewal request within 30 days after of submission, then the renewal is deemed granted. If the renewal is refused, this refusal must be justified and is subject to appeal. However, this rule might be changed. Indeed, article 62 of the revised 2002 Mining Code, 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? Is there a requirement to relinquish a portion of the mining rights to the government after a certain number of years?

A research permit is valid for five years, and renewable once for another five years, for all mineral substances. An exploitation permit cannot exceed 25 years and is renewable for another 15 years.

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 2002 Mining Code (as amended in 2018) 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 or does the holder of the mineral tenure have priority over surface rights use?

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 2002 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 to mineral exploration or mining, 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 2002 Mining Code (as amended by Law No. 18/001, dated 9 March 2018) 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, tax credits and incentives are available to private parties carrying on exploration and mining activities?

The 2002 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 Minister of Mines and the Minister of 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 2002 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 Mining Code, as amended in 2018, provides for a capital gain tax in the case of either a transfer of mining titles, or a transfer of shares of the company holding a mining title.

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

- the private limited liability company, 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, 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.

Mining subcontractors may be keen to incorporate in-country by using the simplified limited company structure.

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. That being said, mining companies shall comply with a set of local content requirements when selecting their subcontractors.

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 Democratic Republic of the Congo (DRC) has concluded several bilateral investment treaties of which four are in force (the ones with the Germany, France, Switzerland and the United States of America), but none of them is specifically favourable for mining investments.

However, the DRC has signed non-double taxation treaties with Belgium and the Republic of 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 on mining activities are equity, shareholders' advances and loans from domestic and foreign banks.

There is almost 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 not 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?

Apart from the previously mentioned local content requirements, which apply to subcontracting activities, there are no particular restrictions on the importation of machinery and equipment or services (except, e.g., from explosive substances). However, if these goods are resold in-country, 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 Democratic Republic of the Congo (DRC).

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, given that there is a *sui generis* and favourable regime provided by the Mining Regulation to take out loans from foreign lenders, subject to prior opinion issued by the Directorate of Mines. With respect to the use of proceeds from the export or sale of minerals, the title holder has an obligation, during the amortization period, to repatriate 60 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 Democratic Republic of the Congo (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 2002 Mining Code (as amended by Law No. 18/001, dated 9 March 2018) and the Mining Regulation, enacted by Decree No. 038/2003 on 26 March 2003, 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 of Mines 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.

Sustainability

- 37 | Do government agencies or other institutions in your jurisdiction provide incentives or publish environmental and social governance (ESG) guidelines for green projects?

The government of the DRC adopted several decrees in accordance with Law No. 007/2002 of 11 July 2002 on the Mining Code, as amended and completed by Law No. 18/001 of 9 March 2018. Decree No. 038/2003 of 26 March 2003 on mining regulations, as amended and completed by Decree No. 18/024 of 8 June 2018, serves as a reference in the DRC as far as environmental and social governance is concerned. According to article 331 of Decree No. 18/024 of 8 June 2018, the overall aim is to reduce carbon emissions, decrease water consumption and meet predetermined sustainability targets.

Accordingly, government agencies provide guidelines dealing with environmental and social governance in the DRC. The Environmental and Social Management Plan, as stated by article 452 of Decree No. 18/024 of 8 June 2018, will be a major asset in:

- reducing adverse effects on the atmosphere, on water sources and watercourses;
- protecting wildlife and vegetation;
- reducing erosion, water or chemical leaks in the land relief;
- reducing adverse effects on the habitat of local flora and fauna;
- reducing the adverse effects of noise and dust on human and animal populations;
- avoiding the spread of disease; and
- promoting the rapid regrowth and renewal of plant species.

Article 404-bis of Decree No. 18/024 of 8 June 2018 indicates preventive measures to deal with exposure and contamination. Guidelines include analysing samples, monitoring waters and monitoring radioactivity in the air, dust, soil, plants, sediments, wildlife and food chains. Instructions are also provided regarding testing campaigns and site surveys.

Meanwhile, radiological surveys of the stations must include studies of natural radioactivity, monitoring of workers, waste management and radiation protection trainings. Furthermore, the mining industry must abide by a Code of Conduct (Annex IV of Decree No. 18/024 of 8 June 2018). For instance, the approved mining cooperative and the artisanal miner undertake to mitigate the impact of their activities on both fauna and flora, as well as the watercourses and water points, while making sure to comply with national, regional and international standards of transparency, traceability and certification for a responsible supply of minerals.

Moreover, Annex VIII provides environmental and social impact assessment directives. Article 49 of Annex VIII outlines measures to mitigate atmospheric emissions. These measures specifically deal with, for each type of contaminant, the quantity emitted, the flow rate, the gas temperature and the concentration of the contaminant. Treatment measures taken to prevent, eliminate or control the release of contaminants are presented. Guidelines are offered on where dry dust collectors should be used, the methods for their use and how to proceed with the disposal of the dust. The industry must also comply with a set of pollution thresholds (article 50 of Annex VIII). There are thresholds for indoor air pollution, dealing with contaminants such as arsenic, carbon monoxide, copper, hydrogen cyanide, hydrogen sulfide and nitrogen dioxide.

In addition, article 53 of Annex VIII gives a more detailed description of measures to mitigate the risks of pollution and water degradation. An applicant for a permanent mining or quarrying right can rely on these guidelines to reduce the risk of water degradation and pollution owing to mining activities. In fact, article 55 of Annex VIII offers guidelines on the destination of wastewater and other contaminants.

Consequently, it is forbidden to discharge sewage, dewatering water, mine discharges, waste or any other contaminant into surface waters and less than 100 metres from a source of drinking water or supplies for people or livestock. No stream, lake or river may be used for partial or total treatment. Dilution of wastewater is not permitted. While article 57 of Annex VIII offers guidelines on ways to reduce the use of freshwater, article 58 focuses on guidelines to protect groundwater, such as installing a groundwater monitoring network and checking the water tightness of storage areas for mine discharges. Finally, article 62 of Annex VIII offers guidelines on the management of discharges from mines.

Closure and remediation process

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

To close and remediate a mining project, the permit holder will have to submit a rehabilitation plan for the site after its closure 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

39 | 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

40 | 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 2002 Mining Code (as amended by Law No. 18/001, dated 9 March 2018) and the 2003 Mining Regulation (as amended by Decree No. 18/024, dated 8 June 2018), 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

41 | 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 of Mines can also grant an exploitation permit on waste products, which is not subject to an exploitation permit.

Use of domestic and foreign employees

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

Certain positions are reserved for Democratic Republic of the Congo nationals and local content rules apply. However, 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

43 | What are the principal community engagement or corporate and social responsibility (CSR) laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Democratic Republic of the Congo (DRC) is a full member of the Extractive Industries Transparency Initiative. The 2002 Mining Code (as amended by Law No. 18/001, dated 9 March 2018) also refers to some corporate social responsibility (CSR) obligations for permit holders.

Rights of aboriginal, indigenous or disadvantaged peoples

44 | 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

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

The DRC is a full member of the Extractive Industries Transparency Initiative.

ANTI-BRIBERY AND CORRUPT PRACTICES

Local legislation

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

The Democratic Republic of the Congo (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 Extractive Industries Transparency Initiative (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

47 | 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 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

48 | 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

49 | 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

50 | 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 Democratic Republic of the Congo (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;
- the Southern African Development Community;
- the African Continental Free Trade Area (AfCFTA) Agreement; 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 criteria of the Extractive Industries Transparency Initiative.

Finally, the DRC has been a member of the Organisation for the Harmonisation in Africa of Business Law (OHADA) since July 2012. The adherence to OHADA laws can only benefit further investment by providing companies willing to do business in the DRC with a single business law framework that supersedes existing national legislation, and that 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.

UPDATE AND TRENDS

Recent developments

51 | What were the biggest mining news events over the past year in your jurisdiction and what were the implications? What are the current trends and developments in your jurisdiction's mining industry (legislation, major cases, significant transactions)?

In 2019, notably:

- Shanghang-based Zijin Mining increased its stake in its local mining partner Ivanhoe Mines;
- Zhejiang-based Huayou Cobalt Co, Ltd terminated its investment in a cobalt mine operated by New Minerals Investment;

- Kamoto Copper Company (KCC), a subsidiary of Swiss-based Katanga Mining Limited, entered into an agreement with La Générale des Carrières et des Mines (Gécamines), its 25 per cent joint venture partner, to acquire from Gécamines a comprehensive land package covering areas adjacent to KCC's existing mining concessions; and
- Shenzhen-based Chengtun Mining Group Co negotiated the acquisition of 100 per cent shares of Australia's Nzuri Copper Limited.

In 2020, notably:

- US-based Chun Chan Capital Group completed an agreement to acquire the Misisi Gold Project;
- Singapore-based Trafigura Pte Ltd signed a trading agreement with state-owned company Entreprise Générale du Cobalt (EGC); and
- Henan-based China Molybdenum (CMOC) acquired 95 per cent shares of the Kisanfu copper-cobalt mine from US-based Freeport-McMoRan.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To the best of our knowledge, emergency measures and government initiatives that were implemented to support companies affected by the pandemic, primarily during the second quarter of 2020, have all expired and have not been renewed for 2021.



Olivier Bustin

ocb@vda.pt

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

Also available digitally

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