



ICLG

The International Comparative Legal Guide to:

Mining Law 2016

3rd Edition

A practical cross-border insight into mining law

Published by Global Legal Group, with contributions from:

Agnes Advokatbyrå
Ali Budiardjo, Nugroho, Reksodiputro
Allens
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Advogados Associados
TozziniFreire Advogados
Vieira de Almeida & Associados,
Sociedade de Advogados, RL
Werksmans Attorneys

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Contributing Editors
Christopher Ian Stevens,
Werkmans Attorneys

**Head of Business
Development**
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Managers
Maria Lopez

Sales Support Manager
Toni Hayward

Editor
Rachel Williams

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

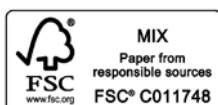
GLG Cover Image Source
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Printed by
Ashford Colour Press Ltd.
August 2015

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ISBN 978-1-910083-59-8
ISSN 2052-5427

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EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Mining Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of mining laws and regulations.

It is divided into two main sections:

Two general chapters. The first chapter discusses the mining of mixed minerals, and the second chapter provides an overview of the West African mining sector.

Country question and answer chapters. These provide a broad overview of common issues in mining laws and regulations in 42 jurisdictions. All chapters are written by leading mining lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Christopher Ian Stevens of Werksmans Attorneys, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Portugal

Vieira de Almeida & Associados,
Sociedade de Advogados, RL

Manuel Protásio



Filipa Serra



1 Relevant Authorities and Legislation

1.1 What regulates mining law?

As a Member State of the European Union, Portugal is subject to European legislation (please refer to question 14.2 below). The Portuguese legal system is integrated in the civil/continental law system, which means that the majority of legal provisions are comprised and enacted by statutes, written law being its primary source. The legal system is structured hierarchically and the Constitution is the leading legal instrument. The political bodies empowered to pass legislation are the Parliament and the Government. The Government has powers to legislate on all subjects that are not reserved to Parliament and enacts legislation under the form of Decree-Laws.

Until recently Mining Law was regulated by two Decree-Laws from 1990: Decree-Law 90/90, of March 16, which established the General Regime for the Discovery and Use of Geological Resources; and Decree-Law 88/90, of March 16, which established the Mineral Deposits Regulation.

In June 2015, the new Basis for the Legal Framework for the Discovery and Use of the Geological Resources Located in Portugal (including National Maritime Space) – Law 54/2015, of 22 June – was enacted, and revoked Decree-Law 90/90, of March 16 (“New Basis Geological Resources Law” or the “New Law”).

The creation of this new legal regime was included in the National Strategy for Geological Resources (ENRG-RM) – Council of Ministers Resolution 78/2012 – which envisaged the establishment of a new – more efficient – legal and institutional framework.

The Portuguese Government shall approve all complementary legislation within three months from the entry into force of the New Basis Geological Resources Law, notably the new mineral deposits legal framework. In the meantime, Decree-Law 88/90, of March 16, remains in force regarding everything which is not incompatible with the new law.

Mineral deposits are part of the Portuguese State public domain and, therefore, the relevant title/concession must be obtained before mining activity is commenced.

1.2 Which Government body/ies administer the mining industry?

The mining industry is presently (since 2014) administered by the Ministry of Environment, Territorial Planning and Energy (MAOTE), by the General Directorate of Energy and Geology

(DGEG) and, in relation to geological resources located in the national maritime space, by the General Directorate of Natural Resources, Security and Maritime Services. Notwithstanding the above, specific competencies governed by different authorities regarding health and safety, nature conservation and cultural heritage may also apply. ENRG-RM foresees the creation of a Mining Investor Support Desk within DGEG.

The Autonomous Regions of Azores and Madeira are responsible for the granting of rights over geological resources located in their territory.

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

In addition to mining laws referred in question 1.1 above, the mining activity must take into account environmental, tax and health and safety regulations, as well as specific legislation on tax and royalties. Legislation with a regional scope further applies in connection with mining activities in the Azores and Madeira autonomous regions.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

The New Basis Geological Resources Law introduced the concept of reconnaissance. To conduct reconnaissance, an entity must hold a prior evaluation right over area/areas designed for the exercise of activities for the use of metallic mineral deposits. Such right is granted under an administrative contract (with a maximum term of one year) and may be requested to DGEG by any entity with recognised technical, economic and financial suitability. Prior evaluation rights entitle the holder of such rights to develop studies to allow a better knowledge of the geological potential of the envisaged area, namely through the analysis of available information and samples taken from the area.

2.2 What rights are required to conduct exploration?

To conduct exploration of mineral deposits, one should have a prospecting and research right or an experimental exploitation right.

The procedure for obtaining prospecting and research rights may be initiated by the interested parties, through the submission of an application, or by the Portuguese State, through a tender procedure. These rights may only be granted over available areas (except if there is no incompatibility between the concessions granted, or to be

granted, and the prospecting and research rights) and to legal entities who give proof of suitability and financial and technical capacity to perform these activities. The contract for prospecting and research activities has a maximum term of five years. A prospecting and research title gives the right to develop activities aimed at the finding of resources and the definition of their characteristics, until the determination of the economic value of any resources found.

If the discovered resources fail to have the necessary conditions to initiate their immediate and effective exploitation, the interested parties may submit an application for experimental exploitation rights. These rights are granted through an administrative contract, with a maximum legal term of five years, and entitle their holder to perform the same activities as those entrusted to a holder of an exploitation title.

2.3 What rights are required to conduct mining?

The right to exploitation of geological resources (mining) is granted by means of a concession (with a maximum term of 90 years) following a prior evaluation/prospecting and research/experimental exploitation agreement (if resources have been discovered) or, in case no such prior agreement exists, granted in respect of (i) available areas, or (ii) areas covered by prior evaluation, prospecting and research, experimental exploitation rights, in case these relate to different mineral resources and the different mining activities are compatible. A sample of the exploitation concession agreement shall be published in the Official Gazette. This concession entitles its holder to the right of exploitation for economic use of resources.

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

Complementary legislation to be enacted shall regulate the legal framework for the discovery and use of mineral deposits, as well as other geological resources, such as: water mineral resources; geothermal resources; and source water. To date, no different procedures have been applicable to the different mineral deposits or different types of land under the mining law.

2.5 Are different procedures applicable to natural oil and gas?

Yes. Hydrocarbons are expressly excluded from the New Basis Geological Resources Law (in line with the previous framework) and are regulated by specific regulations: DL 109/94, of 26 April.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 Are there special rules for foreign applicants?

No special rules for foreign applicants apply. Notwithstanding, under Portuguese corporate law, any foreign company not legally domiciled in Portugal that aims to undertake activity in Portugal for more than one year must create a permanent establishment in Portuguese territory. Moreover, in what concerns tax representation before the Portuguese Tax Authorities, the Portuguese Corporate Income Tax Code establishes that an entity that has neither its head office nor (place of) effective management in Portuguese territory, nor a permanent establishment situated therein, shall be required

to appoint a person or entity with residence, head office or (place of) effective management in that territory as its tax representative before the Portuguese Tax Authorities, in case it generates income in this territory. As an exception, companies resident for tax purposes in a Member State of the European Union, or a Member State of the European Economic Area (in the latter case, the exception applies insofar there is an administrative cooperation agreement in force between Portugal and the relevant EEA Member State) are not required to appoint a tax representative.

Foreign direct investment is not restricted under general Portuguese law. In respect of repatriation of profits and investment, there are no currency controls under Portuguese law and money can be freely transferred into or out of Portugal. Also, there are no restrictions on the remittance of profits or investments abroad.

3.2 Are there any change of control restrictions applicable?

No change of control restrictions are expressly provided by mining law. However, there are rules on the assignment of contractual positions in prior evaluation, prospecting and research, experimental exploitation and exploitation agreements (please refer to question 5.1 below).

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

No, there are not.

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

There are no free carry or similar rights under the law. However, the State may control or impose conditions on the exploitation of mineral rights in certain circumstances, notably for reasons of national or regional interest. Also, for public interest reasons, the MAOTE may exercise preferential rights in the acquisition of mineral deposits.

3.5 Are there restrictions on the nature of a legal entity holding rights?

Exploration concessions may only be granted to legal persons giving proof of technical, economic and financial suitability. Other than that, the law does not impose restrictions on the type of persons at stake. The Companies Code contemplates two forms of limited liability companies that are normally used for the purpose of developing mining projects in Portugal. Those corporate forms are the *sociedade anónima* (SA) and the *sociedade por quotas*.

4 Processing and Beneficiation

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

Yes. Under mining laws, any processing/commercialisation or beneficiation of products resulting from exploitation is subject to supervision by DGEG and/or by the relevant trading authorities (depending on the type of processing and trading at stake).

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

The export, sale or any other means of transfer (even free of charge) of any products which do not come from authorised exploitations, or which were not legally imported, is forbidden. The export of minerals or land samples may be made under a prospecting and research agreement for industrial analysis and tests if previously authorised by the MAOTE.

Although no restrictions arise from mining law, the export of ore or minerals must, at all times, be made in compliance with the terms of international treaties Portugal is a party to, which may introduce restrictions thereto.

5 Transfer and Encumbrance

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

The contractual position under prospecting and research, experimental exploitation and exploitation agreements may be transferred with the express authorisation of the MAOTE. Rights to conduct reconnaissance may not be transferred.

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

The creation of mortgages is only authorised over rights arising from a concession for exploitation – and over the mining annexes – as security of credits/loans for the exploitation works, and shall be previously communicated to DGEG.

The enforcement of said mortgage shall follow the rules of the Code of Tax Procedure and Proceedings and of the Civil Procedure Code until the moment of the auction, which shall be executed by DGEG through public tender.

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

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

The option to subdivide rights to conduct reconnaissance, exploration and mining is not provided for, nor forbidden, in the mining laws.

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

The New Basis Geological Resources Law introduced the possibility for holders of different concession titles to request the creation of a *Agrupamento de Concessões*, which will be allocated with the rights and obligations resulting from their capacity as concessionaires, based on neighbourhood or contiguity, the ownership by the same economic group, the similarity or complementarity of the exploited geological resources and/or the benefits for the commercialisation or preparation of products. Furthermore, the law does not prevent

the association of entities for the purposes of acquiring mining rights and, in this context, joint undivided holdings may be considered to be permitted.

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

Usually, concession agreements are not entered into for a specific type of mineral, but for several minerals available in the concession area. If this is not the case, the concessionaire may request an amendment to the concession agreement in order to include such new mineral, however, this will be subject to approval by the competent authorities.

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

The law does not establish any specific rights over the residue deposits and they may generally be explored if they have an economic value. There is, however, a legal obligation to adequately manage and ensure that the waste generated is treated at the site – by means of a specific licensing procedure – or alternatively, is sent to a duly licensed facility for final destination and treatment. A waste management plan, in order to guarantee that waste is adequately managed, must be drawn up.

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

The New Basis Geological Resources Law is now applicable to all discoveries and use of geological resources located within the national territory, including the ones located in the Portuguese National Maritime Space (which is defined under Law 17/2014, of April 10 and comprises the seashore, territorial waters, exclusive economic zone and continental platform beyond 200 maritime miles). In the maritime space, mining activities shall be subject to the granting of a title for private use.

7 Rights to Use Surface of Land

7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

Prospecting and research and experimental exploitation right holders have the right to temporarily use the land necessary for the performance of works (and establishment of the facilities) and the granting of those rights is accompanied by the creation of an administrative easement over the relevant area. The holders of a concession agreement (exploitation right) may obtain, by means of an administrative act, the necessary administrative easements for the exploitation of resources. In certain circumstances, neighbouring land may be subject to said easement.

These administrative easements have the maximum legal term of seven years, without prejudice to the possibility of continuing to occupy land with the consent of the owner of the land.

Also, the holders of a concession agreement have preference rights in the acquisition or transfer *in lieu* of the land located in the concession area, as long as the acquisition is necessary for the exploitation.

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

The holder of a prospecting and research right must compensate any third parties for all damages directly caused by the research activities and implement the relevant security, environmental protection and landscape recovery measures, even after the end of activities.

The holders of experimental exploitation and concession exploitation rights shall compensate any third parties for the damages resulting from exploitation, and shall implement environmental protection and landscape recovery measures.

The temporary use of the necessary land by holders of experimental exploitation rights entails the payment of compensation to the owners of the land.

Also, the creation of administrative easements may give rise to the payment of compensation.

7.3 What rights of expropriation exist?

The holders of a concession exploitation agreement may request the urgent expropriation, by reasons of public utility, of the land necessary for the performance of works and installation of facilities, even if it is located outside the covered area.

8 Environmental

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

The main environmental authorisations applicable to mining activities are: (i) a favourable environmental impact assessment declaration – issued under the environmental impact assessment legislation; or (ii) a favourable (more simplified) environmental assessment declaration – issued according to Natura 2000 legislation. The type of authorisation shall depend on the size, location and area occupied by the operation at stake.

Specific authorisations, such as the licensing for the use of water resources, shall also be necessary.

8.2 What provisions need to be made for the closure of mines?

A guarantee shall be delivered together with the prospecting and research, experimental exploitation and exploitation agreements in order to ensure compliance with the contract, landscape recovery and closure of mines.

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

Closure obligations include the removal of all constructions and installations, the removal and sending of all waste to a final destination in a duly licensed facility, and the environmental recovery of the area according to an environmental and landscape recovery plan previously approved by the authorities.

8.4 Are there any zoning requirements applicable?

Mining operations may only be carried out in areas designated for these activities in the applicable municipal zoning plans or in areas where mining is considered compatible with the use foreseen in the municipal zoning plan. In some cases, the municipal plan may not be completely updated in relation to special zoning plans approved by the Government determining legal restrictions for environmental purposes and, therefore, said plans and restrictions must also be taken into account.

9 Native Title and Land Rights

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

No, it does not.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Health and safety in mining is governed by Decree-Law 162/90, of 22 May, which approves the General Health and Safety at Work in Mines and Quarries Regulation.

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

Both employers and employees must comply with health and safety conditions set out in article 2 and 3 of Decree-Law 162/90, of 22 May. The main obligations are imposed on the employer who is required to inform the employee (and in certain situations to publicise or make available easily accessible information) on all health and safety measures imposed by law.

11 Administrative Aspects

11.1 Is there a central titles registration office?

DGEG is the competent authority for this purpose.

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

The general law applies, meaning that, depending on the administration body and decision, administrative decisions may be subject to a claim or opposition against the public body that has taken the decision, in certain cases to an hierarchic appeal (within the public administration) and generally subject to administrative appeals before judicial courts.

12 Constitutional Law

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

The Portuguese Constitution determines which assets are to be considered public domain goods. Ordinary law regulates the terms and conditions and the limits for the use of such goods.

Under the New Basis Geological Resources Law, geological resources are divided into public domain goods (mineral deposits, natural mineral waters, mineral industrial waters, geothermal resources, geological resources located in the seabed and subsoil of the national maritime space) and private assets (mineral masses, source water).

12.2 Are there any State investment treaties which are applicable?

As mentioned above, Portugal is a Member State of the European Union and is subject to European legislation.

13 Taxes and Royalties

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

No, there are not. Companies carrying out exploration and mining activities in Portugal will be subject to the general provisions foreseen in the Corporate Income Tax Code.

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

No, there are no general rules concerning royalties payable to the Portuguese State. Royalties may, nevertheless, be negotiated in the context of the exploitation and exploitation agreements.

14 Regional and Local Rules and Laws

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

Please note that municipal planning requirements form the basis of planning and zoning regulations (which, once adopted, constitutes national law).

In any case, please note that the granting of rights regarding prospecting and research, experimental exploitation and exploitation shall occur following mandatory consultation with the relevant municipalities, which will be promoted by DGEG and the answers published on the DGEG website.

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

Yes, there are. Portugal has been a member of the European Union since 1986, and has been integrated in the Eurozone since its implementation. Therefore, it is subject to European legislation. Accordingly, national law is in line with the European applicable common norms (principle of primacy of European law over internal law), and European Community laws are directly applicable without the need to be ratified by Parliament.

15 Cancellation, Abandonment and Relinquishment

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

The suspension of exploitation may be authorised by DGEG due to *force majeure* reasons or when it refers to resources considered to be an adequate reserve of other resources in exploitation by the concessionaire. The suspension is valid for one year and cannot be extended for more than five years.

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

The holder of prior entitlement rights must, upon expiry of the administrative contract, inform DGEG if it wishes to relinquish the area or request the granting of prospecting and research/exploration rights, experimental exploitation rights or mining/exploitation rights.

At each extension of the contract for prospecting and research activities, the holder of the title shall be required to make available part of the area initially covered by that title, pursuant to the terms and conditions set out in each administrative contract.

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

The prospecting and research, experimental exploitation and exploitation agreement may be terminated by the State on the basis of failure to comply with legal and contractual obligations. Additionally, in respect to the concession exploitation agreement, the Portuguese State may make use of its redemption right (*resgate*).

**Manuel Protásio**

Vieira de Almeida & Associados,
Sociedade de Advogados, RL
Av. Eng. Duarte Pacheco, 26
Lisboa, 1070-110
Portugal

Tel: +351 21 311 3400
Fax: +351 21 311 3406
Email: mp@vda.pt
URL: www.vda.pt

Manuel Protásio joined Vieira de Almeida & Associados in 1991 and is the head of the Projects – Infrastructures, Energy & Natural Resources practice group. In such capacity he has participated and/or led the teams involved in most of the transactions carried out by the firm to date on the power (including the renewable energies), oil & gas, mining, road, transport, water and wastes sectors. He has also been actively working in regulation and public procurement procedures of those sectors.

**Filipa Serra**

Vieira de Almeida & Associados,
Sociedade de Advogados, RL
Timor Plaza, Rua Presidente Nicolau Lobato
Unidade 433, Comoro, Dili
Timor-Leste

Tel: +670 331 1418
Fax: +670 331 1317
Email: fqs@vda.pt
URL: www.vda.pt

Filipa Serra joined Vieira de Almeida & Associados in 2007 and is currently an Associate in the Projects – Infrastructures, Energy & Natural Resources practice group. In such capacity she has been involved in several transactions in Portugal, mainly focused on the mining sector, energy sector and infrastructures & transport sector. She has also been working in regulation and public procurement procedures of those sectors. Filipa has been actively assisting international investors in the new upcoming mining sector in Portugal. She is currently based in VdA's office in Dili, Timor-Leste, working as a legal consultant.



VIEIRA DE ALMEIDA
& Associados Sociedade de Advogados, R.L.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

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