



ICLG

The International Comparative Legal Guide to:

Mining Law 2017

4th Edition

A practical cross-border insight into mining law

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Congo – D.R.

Benoit Tshibangu Ilunga



Tula Diana



Tshibangu Ilunga & Partners

1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Mining Code (Law n° 007/2002 dated July 2002) manages access to reconnaissance, deposits research, mining, small-scale mining and tailings mining. It also regulates the exploration for, processing, transportation and the sale of ores or quarry products and artisanal mining products.

1.2 Which Government body/ies administer the mining industry?

The Mining Code determines the offices of the country that are involved in the management or the enforcement of its provisions, namely the President of the country, the Minister of Mines, the Provincial Governor, the Head of Provincial Division of Mines, the Directorate of Mines, the Geology Department, the Mining Cadastre and the Protection of the Mining Environment Service.

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

The Mining Law of the D.R. Congo is mainly based on the Law (in its broadest sense the constitution, any laws enacted by the Parliament, and any decrees), general principles of law, customs, case-laws and doctrine.

However, some other sources impacting on the mining industry are: the Sureties Law (mortgage and pledge of the licences, etc.); tort laws; the Tax Law; the Exchange Law; the General Commercial Law; civil and administrative proceedings; and general commercial law.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

Mineral prospecting is free throughout the national territory. Anyone wishing to engage in prospecting must make a prior declaration to the Mining Cadastre (Registry).

The Mining Regulations set up the terms of the prior declaration of prospecting.

2.2 What rights are required to conduct exploration?

An Exploration Permit is needed to conduct exploration in the territory of the D.R. Congo.

2.3 What rights are required to conduct mining?

The exploitation of ores deposits is carried out by means of three types of rights: the Mining Licence; the Small-Scale Mining Licence; and the Tailings Mining Licence.

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

No. The same rules and procedures apply to all minerals and regardless of the type of land involved.

2.5 Are different procedures applicable to natural oil and gas?

Yes. Different procedures are applicable to oil and gas. Such matters are governed by the law relating to oil and gas.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 Are there special rules for foreign applicants?

Except for artisan mining, for which only locals are eligible, application conditions are the same for foreigners and locals. However, foreigners have to act through a quarry and mining agent acting as a *domus citandi*.

3.2 Are there any change of control restrictions applicable?

No. There are no restrictions on the change of control of interest.

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

Indigenous people (local communities) can undertake mining property on similar conditions as any persons. However, they

can undertake artisanal mining on areas within their traditional territories through the acquisition of an artisanal miners' card on an artisanal mining area established by the Minister of Mines on said indigenous geographical area.

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

Yes. The State has free carry rights to acquire 5% of the shareholdings.

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

There is a restriction with regards to foreign legal entities wishing to conduct mining in the D.R. Congo. To operate, they need to form a local subsidiary company and then elect a domicile to act as a quarries and mines agent, through whom they will act. All of the above needs to be completed six months before the expiry of their research rights.

4 Processing and Beneficiation

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

Decree n° 038/2003 of 26 March 2003, relating to the Mining Regulations, contains provisions relating to the export of raw minerals for processing or sale outside the National Territory: articles 218–221 are applicable in terms of industrial mining products and articles 238–241 are applicable with regards to the products of small-scale mines, their processing and marketing.

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

There are no restrictions on the export of minerals. The owner is fully exempted, at the exit of exports related to the mining project, of all customs duties and other levies.

5 Transfer and Encumbrance

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

There are no restrictions on the transfer of rights to conduct exploration and mining.

As for the reconnaissance, this is not considered a right in terms of the Mining Code of the D.R. Congo; therefore, it cannot be transferred.

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

See the answer to question 5.1 above.

The rights to conduct exploration and mining are capable of being mortgaged to raise finance.

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?

Reconnaissance is not a right in terms of the Mining Code. It cannot be subdivided.

The exploration permit (right) can be subdivided.

The mining right cannot be divided.

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

Yes, except for reconnaissance, which is not a right in terms of the Mining Code. Exploration and mining rights are capable of being held in undivided shares.

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

Yes, if he applies for the second minerals.

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?

Yes, he can (unless such right is expressly excluded from his licence).

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

No, there are not.

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?

Except for during reconnaissance, the holder can build processing plants, employees' camps, roads and offices. He can also build warehouses.

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 answer to this question was unavailable at the time of publication.

7.3 What rights of expropriation exist?

Subject to a prior fair indemnity, the holder can be expropriated only for public interest.

8 Environmental

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

During reconnaissance, one has to respect the ethical code established by the Mining Regulations.

During exploration, one should submit the mitigation plan and obtain its approval.

During mining, the holder of the mining right needs to have both an approved environmental management plan and an approved environment impact study.

The holder must declare any archaeological discoveries.

He also needs to publish safety warnings and be aware that the use of explosives is subject to special rules.

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

The holder of the mining licence has to make a deposit which will pay for rehabilitation of the mining environment.

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

The person conducting reconnaissance only has to inform the territorial authority about his departure.

The holder of a right has to close any holes or diggings made and rehabilitate the site.

8.4 Are there any zoning requirements applicable?

Yes, zoning requirements are applicable.

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?

The mining right holder outclasses the surface right holder. However, the latter can come back to his right at the end of the mining operations. The mining right holder has to pay indemnity to the surface holder.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Pursuant to section 207 of the Mining Code, mining is subject to security measures, health and protection enacted by special regulations.

The title holder must comply with any measures ordered by the Mining Administration to prevent or eliminate the causes of dangers to public health and safety, the conservation of mineral deposits, public water sources and public byways.

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

Pursuant to sections 210 and 211 of the Mining Code, title holders are liable for the publication of safety regulations and must adhere to the special regulations on the use of explosives. Articles 492–494 of the Mining Regulations also state the same.

11 Administrative Aspects

11.1 Is there a central titles registration office?

The Mining Cadastre (Registry) is the competent authority for the granting various licences in the mining industry.

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

Pursuant to Articles 312–320 of the Mining Code, appeals are open to the holder and to the Government. There are three kinds of appeals: administrative; judicial; and arbitral appeals.

12 Constitutional Law

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

Law n° 007/2002 of 11 July 2002 relating to the Mining Code governs the prospecting, exploration, exploitation, processing, transportation and marketing of minerals, as well as products of artisanal mining.

Thus, mineral rights organised by the Mining Code are the Exploration Licence, the Exploitation Licence, the Small-Scale Mining Exploitation Licence, and the Tailings Exploitation Licence. In turn, these are reported by the Exploration Certificate, the Operating Certificate, the Petite Mines Operating Certificate and the Tailings Exploitation Certificate.

12.2 Are there any State investment treaties which are applicable?

No, there are not.

13 Taxes and Royalties

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

Article 220, the tax and customs regime applicable to mining activities, is defined in Title IX of the Mining Code. This has set up a single tax and customs arrangement which is applicable to all operators within the mining sector and all small-scale mining operators without any exception. This system excludes all other forms of taxation, present and future. From the entry into force of the Code, only the following are applicable to the holder: contributions; customs duties; taxes; royalties; and other taxes due

to the Treasury on the terms specified therein. However, research activities for quarry products or quarrying are subject to the tax and customs system of common law.

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

Apart from other charges, the Mining Code has introduced the mining royalty. This has to trim the price resulting from the sale of marketable products after the deduction of certain expenses, which are exhaustively listed in the Code. The rate varies according to the nature of the substances.

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?

No, there is not. Provinces are paid by the Government through the retrocession procedure on the royalty.

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?

No, there are not.

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?

Yes, the Code organises the partial or total waiver procedure of a mining right.

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?

In accordance with section 62 of the Mining Code, on the occasion of each renewal of his research permit, the Exploration Licence holder automatically waives 50% of the area covered by his permit.

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

In order to ensure that his mining right remains valid, the holder must begin any works within the time stated and pay the surface area fees relating to his title every year before the deadline set in the Code. Failure to fulfil one of these obligations will result in the the owner forfeiting his mining right.



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Although his core practice remains M&A and sureties in the mining sector, insurance and banking, he also actively practises due diligences in connection with M&A on mining licences, sureties, general investments, tax, competition litigation, arbitration and IP as well.

He has been involved in the following projects:

- NAMAQWA project (2007) – Scale: US\$230 million; Completion time: three weeks; Year: 2007. Was listed in LSE.
- ZONGO II HYDROPOWER project (2011) – Scale: US\$360 million Completion time: two weeks; Year: 2011. Retained by China Gezhouba Group Co., Ltd via DLA Piper Hong Kong under financing by the CHINA EXPORT IMPORT BANK.
- LIQUESSO HYDROPOWER project (2012–2013) – Scale: US\$120 million; Completion time: two months; Year: 2012–2013; in Congo-Brazzaville.
- CICI LOMBARD project (2014) – reinsurance project Scale: US\$270 million Completion time: three months; Year: 2013–2014.
- KAMOA INTEREST ACQUISITION BY ZIJIN (2015) – Scale: US\$412 million, Completion time: one week; Year: May 2015. Mr. Tshibangu was retained via DLA Piper, Hong Kong branch.



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She has participated in the following commissions, seminars and conferences:

- 12 June 2012: conference on the New York Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards;
- 4 June 2011: Information seminar for the DRC held at the World Bank by the United Nations Commission on International Trade Law (UNCITRAL);
- "Protection against the actions of vulture funds", held at the World Bank, Brussels-Kinshasa by videoconference;
- "Recognition and Enforcement of Foreign Arbitral Awards: the New York Convention of 1958";
- 20–21 April 2011: International Symposium of Kinshasa organised by the Higher Council of Notaries, the Euro-African Institute for Economic Law (INEADEC), the Association of French speaking Notaries and the Ministry of Justice and Human Rights, in the theme "the OHADA law, Notary and investment security in Africa".
- Participation in the drafting of the Mining Code project;
- 30 April to 23 May 2002: Defense of the Mining Code project at the Legislative Constituent Assembly/Transitional Parliament (ACL/PT) in Lubumbashi; and
- 22–23 April 2002: Attended the Seminar on the contribution of mining to the recovery in economic activity in the Democratic Republic of Congo; at the Grand Hotel (Pullman) in Kinshasa.



Tshibangu Ilunga & Partners ("TI&P") is a full service law firm with its main office in Kinshasa, D.R. Congo.

The firm also operates in Brazzaville, Lubumbashi, Matadi, Kolwezi, Matadi, and Goma.

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Our experienced attorneys and lawyers focus mainly on following key sectors: Mining and Commodities; Corporate; Financial Institutions; Energy (hydropower and solar); Transport; Telecommunications; Intellectual Property; Competition; and Commercial law.

Our licence covers French speaking countries in Africa OHADA, mainly: the D.R. Congo; Congo-Brazzaville: Brazzaville, Pointe-Noire, etc.; Ivory Coast: Abidjan; Comoros: Moroni; Mali: Bamako; Niger: Niamey; Cameroon: Yaounde and Douala; Gabon: Libreville; Central African Republic: Bangui; Burkina Faso: Ouagadougou; Benin: Porto Novo; Chad: N'Djamena; Senegal: Dakar; and Togo: Guineas.

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