

# A brief overview of mining in Senegal

By Alban Dorin and Lara Welsh

## Overview of Senegalese legal system

Senegal is a civil law jurisdiction, meaning that the core principles of law are codified and serve as the primary source of law. The Constitution of Senegal, adopted by constitutional referendum on 7 January 2001, is the fourth constitution of the country (after those of 1959, 1960 and 1963). As with most Franco-African countries, the Constitution of Senegal is heavily based on the 1958 French Constitution, considered as being the 'Mother Constitution'.

Whereas in a common law legal system (such as England and Wales) judicial cases are regarded as the most important source of law (giving judges an active role in developing rules), in civil-law systems codes and statutes are designed to cover all eventualities and judges have a more limited role - to apply the law to the case in hand. To ensure consistency, courts in common law jurisdictions abide by precedents set by higher courts examining the same issue, whereas in a civil law system past judgments are really no more than a (loose) guide.

The judicial branch consists of the Conseil Constitutionnel, the Conseil d'Etat, the Cour de Cassation, the Cour des Comptes and the Courts and Tribunals.

The OHADA legal system applies in Senegal – OHADA is a uniform system of business laws adopted by 17 west and central African nations. OHADA stands for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organisation for Harmonisation of Business Law in Africa) and was created on 17 October 1993.

OHADA provides for a uniform system of business law directly applicable in its Member States through "Uniform Acts" which have been largely inspired by French law. These Uniform Acts cover matters such as corporate law, security, insolvency, arbitration and recognition of foreign courts' decisions.

Senegal is part of WAEMU (or UEMOA in French) - The West African Economic and Monetary Union – which is an organisation of 8 West African states established to promote economic integration among countries that share the CFA franc as a common currency. The CFA Franc (FCFA) is linked to the Euro at a fixed rate of 655,957 FCFA to 1 Euro.

It is also part of ECOWAS - The Economic Community of West African States - which is a regional group of 15 West African nations created to promote economic integration across the region.

## Overview of laws applicable to mining activity

US\$5 billion was invested in Senegal's mining sector from 2000 to 2013 and the Government wants Senegal to become one of Africa's top seven gold producers, with an annual production of 17 tonnes of gold by 2020. With this in mind, President Macky Sall made mining industry reform one of his priority areas following his election in early 2012. Recognising the great significance that the mining industry holds for Senegal, his goal is to increase foreign investment in the mining sector thereby increasing its contribution to Senegalese GDP.



**Alban Dorin**

Counsel, Paris

E: [adorin@mayerbrown.com](mailto:adorin@mayerbrown.com)

T: +33 1 53 53 18 51



**Lara Welsh**

Senior Associate, London

E: [lwelsh@mayerbrown.com](mailto:lwelsh@mayerbrown.com)

T: +44 20 3130 3449

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The Parliament of Senegal passed a new Mining Code (No. 27/2016) on 30 October 2016 (the **“New Mining Code”**). The New Mining Code applies to new applications, with the provisions of the 2003 Mining Code (the **“Previous Code”**) continuing to apply to existing permits. The passing of the New Mining Code follows a three year consultation and legislative drafting process and introduces many initiatives that have been used within the region. The bill was presented to the President for promulgation on 8 November 2016 (law n° 2016-32).

Whilst the framework of the mining regime remains substantially the same, key changes from the Previous Code include:

- Type and length of mining permits  
Under the Previous Code the distinction between a ‘mine permit’ and a ‘mining concession’ caused confusion for investors. The New Mining Code hopes to simplify these titles. Under the New Mining Code a company can apply for a ‘small mine permit’ or a ‘mining permit’.

A ‘small mine permit’ will be limited to a daily treatment capacity of 500 tonnes of minerals and a mining area of 500 hectares. It will be issued for an initial term of 5 years (increased from 3 years under the Previous Code). It may be renewed for 3 years at a time, with no limit on the number of renewals. A ‘small mine permit’ holder must commence mining operations within 3 months of the small mine permit being granted.

There are no limitations on the scale of operations under a ‘mining permit’. A mining permit will be issued for an initial term of between 5 and 20 years, depending on the mineral reserves identified and the investment required - this is less than the maximum 25 years for an initial permit under the Previous Code. Mining permits will be renewable as many times as necessary until the resource is exhausted. Holders of

‘mining permits’ must commence mining operations ‘as soon as possible’. No specific timeframe is included but the New Mining Code states that, if operations have not commenced within one year of the date of entry into force of the mining permit, the permit holder will be liable to penalties of US\$ 100,000 per month for the first 3 months and increasing thereafter. If the permit holder has not commenced work within 24 months the State may revoke the mining permit.

Mining companies still need to enter into a mining convention at the same time as the permit is granted. The convention must be published on the website for the Ministry of Mines following execution. It cannot derogate from the provisions of the New Mining Code, but may supplement them, and it must detail the rights and obligations of the parties, including the stability of the legal conditions under which the mining title was granted.

- Fees, royalties, taxes and tax relief  
One of the key objectives of the New Mining Code is to increase revenues to the government from the mining sector. See ‘Taxation of mining projects’ below for further details.

- Introduction of production sharing agreements  
The New Mining Code permits the state of Senegal and a mining company to enter into a production sharing agreement, giving the mining company the exclusive right to research and mine a particular area and recover the cost of doing so from sale of the mined substance. The profits from the sale of the product are split between the State and the mining company in the amount specified in each individual agreement. Where a production sharing agreement exists, the mined substance will not be subject to the quarterly mining tax outlined below.

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- Enhanced social and environmental obligations

The New Mining Code introduces an obligation for mining title holders to contribute annually to a local development fund in the amount of 0.5% of sales, minus 'annual fees' (unspecified). The purpose of the local development funds is to promote the economic and social development of local communities residing around mining areas, and must include women's empowerment projects. The introduction of a local development component has been a common theme in recent years in African jurisdictions, for example Mali and Guinea have also introduced compulsory local development contributions.

'Small mine permit' holders (who had no obligations regarding rehabilitation costs under the Previous Code) must provide a guarantee as security for rehabilitation costs under the New Mining Code.

In addition to rehabilitation obligations, under the New Mining Code all mining title holders are required to:

- i) respect, protect and implement human rights in areas affected by mining operations;
- ii) respect the provisions of the Forestry Code where the mining title has been granted over a "classified forest zone"; and
- iii) respect the principles and obligations under the Extractive Industries Transparency Initiative (EITI), such as declaring all payments made to the State to the EITI authorities.

- Penalties

The New Mining Code lists various potential infractions which may be penalised including non-payment of taxes, health and safety violations and illegal mining activity or storage, transport or sale of mineral substances.

- Transparency

Under the New Mining Code mining companies, as well as the State, are subject to more thorough audits. All mining revenues due to the State will be published in publicly available statements. In addition to abiding to the principles of EITI the State is free to appoint independent firms to audit mining companies.

*Other laws affecting the mining industry:*

- » The Civil Code
- » The revised Uniform Act relating to general commercial law dated 15 December 2010;
- » Law n°2001-01 enacting the Environmental Code, dated 12 April 2001;
- » Law n°98/03 dated 8 January 1998, enacting the Forest Code and its implementing decree dated 20 February 1998; and
- » Regulation n°09/2010/CM/UEMOA dated 1 October 2010.

### Restrictions on foreign ownership

The mining permit must be held by a company incorporated under Senegalese law. Under the Previous Code, foreign investors were not permitted to own 100% of the shares in a Senegalese company. This restriction has been removed under the New Mining Code.

### Local content

Mining title holders may freely choose their suppliers, sub-contractors and service providers as well as their partners. However, mining title holders and their suppliers and sub-contractors shall use, whenever possible (i) services and material originating from the Republic of Senegal and (ii) products made or sold in the Republic of Senegal, provided these services and products are available at

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competitive conditions regarding their price, quality, warranties and time delivery. Mining title holders have to develop and publish an annual procurement plan. See also ‘*Enhanced social and environmental obligations*’ above.

### Available structures for borrowing vehicles

Limited liability companies, public and private corporations and joint ventures are all forms of business in Senegal. There are no restrictions on the nature of a legal entity holding rights, however (as stated above) only a legal entity incorporated under Senegalese law can hold a mining title or a mining concession. The type of company most commonly used in Senegal to hold a mining title are *sociétés à responsabilité limitée* or *sociétés anonymes*.

### Government free/earned carried interest in projects

The state has a 10% free participation in the mining company at the exploitation stage and may negotiate for itself an additional participation in the capital of the mining company.

### Taxation of mining projects (including royalties)

Most of the tax provisions included in the Previous Code were transferred to the General Tax Code so investors are no longer able to rely on the mining code as the key source of information on the fiscal and customs regime.

Under the New Mining Code entry fees for the grant of permits have increased. An annual surface royalty payable by all title holders has been introduced. The annual surface royalty for a ‘small mine permit’ is FCFA 50,000 per hectare and for a ‘mining permit’ is FCFA 250,000 per square kilometre.

The specific ‘mining tax’ (which was included in the Previous Code) has been retained, but under the New Mining Code its application has been revised such that all authorised mining activities are subject to a quarterly mining tax levied on the market value of the commercialised product. The rate varies according to the mineral substance being mined, for example iron ore (concentrate 5%, locally processed 2%) and gold (1.5%).

Various tax benefits contained in the Previous Code have been revised in the New Mining Code. During the period commencing on the date of entry into force of the mining permit or small mine permit and ending on the first date of commercial production (the **“Investment Period”**) the mining title holder will be exempt from most taxes and fees including VAT and the COSEC port charge. Several taxes have been carved out from this exemption (as compared to the Previous Code) including the community levy. The provisions of the Previous Code which exempted mining title holders from export tax have been removed such that export tax is now payable in respect of products mined within the mining permit area from the date of entry into force of the mining title.

The mining title holder can freely export extracted mineral substances, their concentrates, their primary products and other derivatives (subject to completion of legal formalities) and there is an exoneration from exportation tax.

Resident corporations are subject to tax on their worldwide income. The standard rate of corporate income tax is 30%, which is imposed on net profits (after deduction of allowable expenses and charges). Capital gains are treated as operating profits and included in the corporate income tax base. VAT is 18% for all products and services. There is a fixed payroll tax of 3% of taxable gross salary.

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### Withholding tax on interest and dividends

Dividends paid to a resident or non-resident are subject to a 10% withholding tax unless (in the latter case) the rate is reduced under a tax treaty. Interest on loans paid to a resident or non-resident company or individual is subject to a 16% withholding tax (unless reduced under a tax treaty). Royalties and technical service fees paid to a foreign entity are subject to a 20% withholding tax, unless reduced under a tax treaty.

Borrowers could consider structuring a loan with a foreign holding company as Borrower, in a jurisdiction which has a double tax treaty with Senegal, for example Mauritius - but this is not without issues.

### F/X issues; ability to hold foreign currency; ability to maintain offshore accounts

All proceeds from the sale of minerals must be repatriated to Senegal within 30 days of receipt.

Within the CFA Franc zone the transfer of funds is free. There are no exchange controls between Senegal and the other countries which belong to the CFA Franc zone (including France).

In line with UEMOA regulations, most financial operations must be performed through authorised (locally licensed) intermediary banks, for example SGBS or Ecobank. In order to open offshore accounts or onshore foreign currency accounts approval of the Minister of Finance (with a prior consent of the BCEAO (Central Bank of the UEMOA)) is required. In our experience the ministry is reluctant to grant consent for offshore accounts or onshore foreign currency accounts and so in practice the opening of offshore accounts may prove difficult.

There is the possible exception in the UEMOA regulations which arguably permits the opening of a foreign currency account in France without consent (since France is within the 'zone franc'). The position is not clear in this regard – there are differing views on how/whether this works, especially given that onshore foreign currency accounts require approval.

### Cost of granting security

The costs for registering security vary depending on the type of security but generally the stamp duties payable in connection with the registration with the RCCM of a local security (such as a pledge) is 0.25% of the registered secured amount (if the secured amount exceeds €1.5 million), with a cap on registration fees of €75,000.

A Borrower may try to negotiate with Lenders a cap on the amount of fees payable by it in relation to registration and notarial fees. We are aware that certain mining conventions also contain provisions which exempt the Lender(s) from the payment of stamp duties (though this may not be respected in practice).

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