



# Ivory Coast / Côte d'Ivoire

## Overview of legal system

Ivory Coast 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 Ivory Coast was approved by referendum on 30 October 2016 and officially adopted on 8 November 2016 (it is the third constitution of the country). As with most Franco-African countries, the Constitution of Ivory Coast is heavily based on the 1958 French Constitution, considered 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 (that being 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 Cour Suprême (Supreme Court), the Cour des Comptes (Court of Accounts), the Cours d'appels (Appeal Courts), the tribunaux de Première instance (First Degree Tribunals), the tribunaux administratifs (Administrative Tribunals) and the Chambres régionales des Comptes (Regional Chambers of Accounts).

The OHADA legal system applies in Ivory Coast – 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.

Ivory Coast is part of WAEMU (or U EMOA 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" or "XOF") (which is expected to be replaced by the "Eco" in the coming years) is linked to the Euro at a fixed rate of 655,957 FCFA to 1 Euro

Ivory Coast 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

There are three main laws, namely:

- Law No. 2014-138 dated 24 March 2014, relating to the Mining Code, Decree No. 2014-397 dated 25 June 2014, which implements the new Mining Code;
- Order No. 2014-148 dated 26 March 2014, which provides for the fees, royalties and mining taxes; and
- the ministerial decree No. 002/MIM/CAB of 11 January 2016, relating to the granting and the renewal procedures of mining titles.

Other sources of law affecting the mining industry include:

- The Uniform Act Relating to General Commercial Law dated 15 December 2010 and the revised Uniform Act on Companies dated 15 January 2015 ;
- The Tax Code (Law No. 2003-206 dated 7 July 2003);
- The Environmental Code (Law No. 96-766 dated 3 October 1996);
- The Labour Code (Law No. 2015-532 dated 20 July 2015); and
- The Directive No. 18/2003/CM/UEMOA modified by the Directive 02/2009/CM/UEMOA of 27 March 2009.

Additionally, since 2008, the Ivory Coast has been a member of the Extractive Industries Transparency Initiative (EITI), an international organisation promoting and maintaining a global standard to assess the levels of transparency around countries' oil, gas and mineral resources. The EITI Standard comprises a set of requirements that governments and companies must adhere to become recognised as "EITI Compliant". Countries implement the EITI Standard to ensure full disclosure of taxes and other payments made by oil, gas and mining companies to governments. The EITI Standard, recently revised and replaced by the EITI Standard 2016, is the authoritative source on how countries can implement the global transparency standard for improving governance of natural resources.

## Types of licences

### Reconnaissance and exploration permit

Enables the permit holder to conduct exploration activities in connection with the substance for which the permit is granted. In case of discovery of one or more deposits of the specified substance within the geographical area covered by the permit, the permit also allows the holder of an exclusive right to apply for an exploitation permit at any time during the permit's validity period. The permit holder cannot conduct exploration on crop fields or hamper the irrigation of those fields.

The right to conduct reconnaissance is granted by a decree of the Minister responsible for Mines and Industry to a person or entity which has filed an application. The exploration permit is granted by presidential decree during a sitting of the Council of Ministers acting on a proposal from the Minister responsible for Mines and Industry. It is valid for a period of 4 years for exploration upon a surface of up to 98,842 acres (400 km<sup>2</sup>). Any person or entity that submitted an application which is in line with legal requirements may be granted an exploration permit. This permit can be renewed twice for a period of further 3 years.

### Mining permit

Grants the permit holder an exclusive right to conduct exploitation and marketing activities in connection with the substances for which the permit is granted. This permit provides the authorisation to transport extracted, concentrated substances or their derivatives, as well as the processing of the same substances in addition to their export. Under this permit, the holder may also build processing and refining plants for treatment purposes. The occupation of the surface of land by the permit holder is subject to mining regulations.

Artisanal mining permits and semi-industrial permits are granted by the Minister of Mines and Industry. An industrial mining permit is granted by a presidential decree during a sitting of the Council of Ministers, upon proposal by the Minister of Mines and Industry and following the provision of suitable evidence of the existence of relevant mineral deposits as indicated in the original exploration permit. Prior to the granting of the authorisation, an investigation as to the convenience or otherwise of the exploitation of the resources is required. Once this investigation is completed, the entity or the individual is entitled to an exploration permit. A person does not need to own or acquire an interest in the land in order to apply for, or hold, a mining permit. The exploitation license is granted for the life of the mine, up to a maximum period of 20 years, and the maximum term of successive renewals is fixed at ten years each.

## Restrictions on foreign ownership

Any type of company, whether foreign or local may apply for and be granted a mining title. If a foreign entity applies for a mining title, upon its granting, the foreign entity must set up a local entity in order to conduct the mining activities.

Any acquisition of a participation exceeding 5% in a company holding a mining title shall be notified to the Ministry of Mines. The approval of the Ministry of Mines shall be obtained for the acquisition of the majority of the shares of a company holding a mining title.

## Onshore requirements

There are no requirements for ownership by indigenous persons or entities, the laws only provide that the Government may promote indigenous ownership. Note that the holder of a mining permit must set up development funds for local communities to which they must contribute 0.5% of their turnover.

## Available structures for borrowing vehicles

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

## Government free/earned carried interest in projects

The State has free carry rights and is automatically entitled to 10%, of the share capital of each mining company holding an exploitation licence in the Ivory Coast. That shareholding of the State cannot be diluted (by any increase of the share capital of the company or otherwise). Any additional State participation can be negotiated, with the maximum total state contribution set at 15% (regardless of the 10% of free participation). This limit does not take into account shares which may be held by state-owned companies in the share capital of the exploitation company and does not apply to mining companies where the State has invested as from the exploration stage.

## Taxation of mining projects (including royalties)

Commercial companies are subject to a standard tax rate of 25% of profits made. VAT is payable at the standard rate of 18%. A holder of a mining permit is entitled, among others, to the following tax advantages and incentives:

- exemption of payment of up to 50% of the registration fees for capital increase in a mining company;
- exemption from import duties including value added tax on import of materials, machinery and equipment for mining activities; and
- exemption from exportation tax of the mine products.

## Royalties

An ad valorem tax is payable per trimester on the company's turnover minus transport and refining costs. The rate varies from 3 to 6 per cent for gold, and such rate depends on the price per ounce of gold (from USD 1,000 to above USD 2,000). The rate is:

- 4 per cent for precious metals (other than gold) and for solid energy-producing substances and industrial minerals;
- 3 per cent for phosphate, mineral salts, precious and semi-precious stones,
- 3.5 per cent for base and non-ferrous metals,
- between 1.5 per cent and 3.5 per cent for iron and related minerals and manganese,
- 5 per cent for radioactive minerals; and
- 1 per cent for mineral water.

The Mining Law also provides for different taxes depending on the type of permit granted. A holder of a reconnaissance permit will pay USD 1 tax per hectare per year; a holder of an exploration permit will pay a tax that of USD 6 to USD 30 per hectare per year and; a holder of the mining permit USD 2 to USD 500 per hectare per year.

## Withholding tax on interest and dividends

Withholding tax applies to certain payments, including dividends paid to both residents and non-residents at a rate of 10% for distributions paid by listed companies and 15% on distributions that are exempt from the tax on industrial and commercial profits; otherwise, the rate is 15%. Interest paid to residents and non-residents is taxed at 25% on bearer bonds, 10% on long-term government bonds and 5% on other bonds. The rate applicable to other interest and similar payments is normally 18% (subject to any double taxation treaties that apply).

Withholding tax of 15% is levied on dividends (IRVM). In the case of interest, a rate of 18% is levied; for businesses, this is revised down to 16.5% on bank deposit interest and for individuals, the rate is further reduced to 13.5%.

In terms of royalties, licence fees and management and service fees paid by Ivorian companies to foreign companies, 20% of withholding tax is levied (BNC tax). However, treaties with Belgium, Canada, France, Germany, Italy, Norway, Switzerland and the United Kingdom provide a maximum BNC rate of 10% whereas the tax treaty between member states of the West African Economic and Monetary Union (UEMOA) provides a maximum BNC rate of 15% on royalties.

## F/X issues

Within the CFA Franc zone the transfer of funds is free. There are no exchange controls between Ivory Coast and the other countries which belong to the CFA Franc zone.

In line with UEMOA regulations, most financial operations must be performed through authorised (locally licensed) intermediary banks. Specific authorisations must be obtained to open offshore accounts or onshore foreign currency accounts.

In addition, pursuant to the UEMOA regulations onshore and offshore accounts in foreign currency held by Ivorian entities are subject to an approval of the Minister of Finance (acting with a prior consent of the BCEAO (Central Bank of the UEMOA)). In practice, the opening of offshore or onshore accounts in a foreign currency may prove difficult.

All revenues from the sale of minerals must be repatriated to Ivory Coast within one month from the due date of payment, which in turn must occur within one hundred and twenty (120) days from the date of shipment.

The national currency XOF is linked to the euro at a fixed exchange rate and unlimited convertibility to the euro is guaranteed.

## Hedging

There is no ISDA opinion available which would address the enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 and 2002 ISDA Master Agreements. This does not mean that such provisions would not be enforceable and if necessary, a legal opinion from a local counsel in Ivory Coast can be sought to confirm this. Alternatively (or if such enforceability cannot be confirmed), a back-to-back hedging structure can be put in place with a shareholder of a Ivorian company or another group company located in a jurisdiction where the enforceability of such provisions has been confirmed in an ISDA opinion.

## Nature of available collateral security for loans

The revised OHADA Uniform Act on Security Law (the “**Uniform Act**”) adopted on 15 December 2010 brought substantial changes to the existing security legislation and made secured lending more streamlined and effective (note that the Uniform Act governs all security created on or after 16 May 2011 - all security created before 16 May 2011 will continue to be governed by the former Uniform Act). Whilst the Uniform Act allows lenders to take security over a broad range of assets in Ivory Coast, it does not regulate all types of security (e.g. security over mining titles). That will be set out in the mining code for the particular jurisdiction - sometimes the mining title is considered as a movable asset, and sometimes an immovable asset, and it can be difficult to obtain security in practice as there is no specific registry.

There is no concept under the Uniform Act similar to an English-law style floating charge covering all or most of a company’s assets. Generally each type of asset is subject to a specific security with different creation and perfection requirements. Under the Uniform Act, it is possible to take security over future assets and to secure future debts if such future assets or future debts are sufficiently identified.

Generally, the local security package granted in connection with a project financing includes:

### (a) Pledge of shares or financial instruments (nantissement de valeurs mobilières et comptes titres):

Share security is usually taken in respect of any material companies in Ivory Coast (i.e. those holding mining titles) which will allow the lenders to foreclose on the pledged shares upon the occurrence of an event of default under the relevant financing. The Uniform Act also provides that a pledge can be taken in respect of the shares of a company or its securities account (which includes any securities/shares credited to the securities account and any cash proceeds such as dividends).

### (b) Pledge over bank accounts (nantissement de compte bancaire):

This type of security covers the onshore bank accounts to which the pledgor has day-to-day access. The pledgor is generally allowed to use funds in the account until an event of default occurs. Upon enforcement, the creditors will be entitled to receive the credit balance of the bank account.

### (c) Mortgages (hypothèque):

Mortgages can be taken over the mining permit any buildings and fixed structures (including future buildings) located in Ivory Coast. Although the Uniform Act regulates this security, mortgages remain very dependant upon local law and practice. Mortgages must be notarised and recorded with the mortgage registry in order to be perfected.

### (d) Security over receivables (cession/nantissement de créances):

The Uniform Act provides that a claim against a third party can be assigned or pledged. This allows the lender to take security over receivables governed by local law (for example intercompany receivables or project receivables).

Enforcement procedures have been streamlined and improved following recent amendments to the Uniform Act. As a result, upon an enforcement event the secured lenders are generally vested with the three following enforcement options:

(a) sale of pledged assets at public auction (which can generally take place 8 days after formal notification to debtor);

(b) petition to court for appropriation of an asset (which will take place once a court-appointed expert has valued it); and

(c) self-appropriation of the pledged asset without a court order (if agreed between the parties in the relevant pledge agreement). In other words, should the relevant pledgor fail to pay an amount on its due date, the creditor may automatically (without court order) become the owner of the pledged assets after a certain period. The pledged assets must then be valued by an expert and if that value exceeds the amount of the relevant secured liabilities, the pledgee must repay the excess amount to the pledgor. Certain restrictions apply if the debtor granting the security is a non-professional. Self-appropriation of mortgaged properties is also recognised by the Uniform Act provided that the mortgagor is a legal entity and that the building is not used for habitation purposes.

Registration can be carried out at the request of the creditor, the securities trustee or the grantor of the security interest. The perfection process varies in respect of each category of security, but generally the process can be summarised as follows:

- (i) approval of the security by the appropriate corporate entity granting the security;
- (ii) registration of security with the local tax authorities and local Registre de Commerce et du Cr dit Mobilier "RCCM" (note that neither cash collateral agreements nor independent guarantees need to be registered with the RCCM); and
- (iii) for most security, notification to the relevant pledged debtors (by bailiff or simple notification) and any applicable account banks.

## Cost of granting security

The registration costs may vary depending on the security but generally the stamp duties payable in connection with the registration with the RCCM of a local security (such as a pledge) is 0.02% of the registered secured amount.<sup>1</sup>

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<sup>1</sup> This note provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek advice before taking any action with respect to the matters discussed herein.

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