



# Namibia

## Overview of legal system

The Constitution of the Republic of Namibia (the "Constitution") was adopted on 9 February 1990. This ended the era of parliamentary supremacy and substituted it with constitutional supremacy and the rule of law.

The legal system is based largely on Roman-Dutch law but is also highly influenced by South African common law. Most of Namibian law is not codified, and must be distilled from the evolving body of jurisprudence.

## Overview of laws applicable to mining activity

The legal framework for all mining operations in Namibia ("Mining Law") is made up of the Minerals (Prospecting and Mining) Act 33 of 1992 (the "Minerals Act") (as amended by Minerals (Prospecting and Mining) Amendment Act 8 of 2008), and Mines, Works and Minerals Ordinance 20 of 1968. The latter governs the health and safety regulations of the mines.

Other laws which may affect the mining industry include:

- The Minerals Development Fund of Namibia Act 33 of 1992;
- The Minerals Development Fund of Namibia Act 19 of 1996;
- The Diamond Act 13 of 1999
- The Environmental Management Act 7 of 2007 (EMA) and the Environmental Impact Assessment Regulations passed in terms of the EMA;
- The soil Conservation Act 76 of 1969;
- The Hazardous Substance Ordinance 14 of 1974;
- The Atmospheric Pollution Prevention Ordinance 11 of 1976;
- The Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981;
- The Forest Act 12 of 2001;
- The Atomic Energy and Radiation Protection Act 5 of 2005;
- The Labour Act 11 of 2007;
- The Affirmative Action (Employment) Act 29 of 1998;
- The Water Act 54 of 1956;
- The Local Authorities Act 23 of 1992; and
- The Income Tax Act 24 of 1981.

## Overview of applicable licences

- **Reconnaissance Licence**

The Minerals Act provides for the granting of reconnaissance licences. These are valid for a period of six months and may not be renewed. They may, however, be extended once, for a period of six months. They allow the holder to conduct regional investigations such as geophysical surveys and analysis of satellite images. They normally cover a large area, e.g. 1 million Ha. The application fee for the RL depends on the size of the area.

- **Exploration (Prospecting) Licence**

Prospecting licences are intended for detailed investigations such as geological mapping, ground geophysics, geochemical sampling, trenching, drilling, bulk sampling etc. Prospecting operations are conducted in terms of non-exclusive and exclusive prospecting licences. A non-exclusive prospecting licence is valid for a period of one year and is not renewable and the maximum area that a holder of a non-exclusive prospecting licence can cover may not be bigger than three hundred metres by six hundred metres (300m x 600m). An exclusive prospecting licence, on the other hand, is valid for a period of three years and may be renewed twice for a period of two years per renewal. The holder of an exclusive prospecting licence may apply for a mining licence over the prospecting area.

- **Mineral Deposit Retention Licence**

After conducting exploration under a prospecting licence, the EPL holder might find a deposit but may, for numerous reasons, not take the project to mining. In this case, the EPL holder may preserve their rights over the deposit by applying for a mineral deposit retention licence.

- **Mining Licence**

After a successful exploration program a prospective licence holder may wish to start mining, which a mining licence will grant them authority to do. Non-exclusive prospecting licence holders may peg a claim that is valid for three years and may be renewed for two years at a time. This gives the holder the exclusive mining right in the licence area for a period of 25 years or the life of the mine, with renewals valid for 15-year periods. The holder is required to demonstrate the financial and technical ability to develop and operate a mine. There are no restrictions on the nature of a legal entity holding the above licences.

All licences may be held by natural persons above the age of eighteen, close corporations or companies. A "close corporation" and a "company" are defined in the Corporations Act 26 of 1998 and Companies Act 28 of 2004 respectively.

## Restrictions on foreign ownership

Under the Foreign Investment Act 1993 (the “Foreign Investment Act”), a potential condition for the granting of a licence, an authorisation or an agreement for the granting of rights over natural resources is that the applicant shall have to accommodate the state, as joint holder or shareholder. Furthermore, under the Minerals Act, the Minister may grant a licence, or the renewal of a licence, subject to such terms and conditions as he may deem necessary. In light of the above, licences are often granted subject to the condition that there must be some local ownership (which can include a joint holding with Epangelo – the Namibian national mining company).

- **Real Property**

Under Article 100 of the Constitution, all natural resources in, on or under the land vest in the State.

Article 16 of the Constitution of the Republic of Namibia grants the right to property to all persons in any part of Namibia. Persons may acquire, own and dispose of all forms of immovable and movable property. Namibian courts have held that property includes incorporeal property as well (and so may include mineral licences). However, Article 16(2) states that the State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation.

Namibia has signed Bilateral Investment Treaties that protects against expropriation with Angola, Austria, Cuba, Finland, France, Germany, Italy, Malaysia, the Netherlands, Spain, Switzerland and Vietnam. Agreements with China and Russia have been signed but are pending ratification. Namibia has signed the International Centre for Settlement of Investment Disputes Convention but has not ratified it.

Namibia is a member of the Multilateral Investment Guarantee Agency (MIGA). This makes direct foreign investment into the country eligible for MIGA’s risk insurance and credit enhancement products.

- **Intellectual Property Rights**

The Industrial Property Act, 2012 (the “Industrial Property Act”) was entered into force in August 2018. Patents are available by following a procedure which involves filing a request with the Registrar of Industrial Property. Trademarks and copyrights are available through filing an application with the Registrar of Industrial Property. There have been reported cases of enforcement of IPR by local law enforcement agencies.

Article 144 of the Constitution also incorporates the general rules of public international law and international agreements binding upon Namibia into the domestic legal system so long as the Constitution or an Act of Parliament has not provided for the rule. This implies that international law relating to IPR may be applicable within the Namibian legal system.

## Local content

The Namibian government has not set any localisation requirements in terms of goods and services.

## Available structures for borrowing vehicles

- **Private Liability Company**

A Namibian Private Limited Company only requires one director and one shareholder (up to a maximum of fifty shareholders) to be approved by the Companies Registration Office. The minimum paid-up capital required at incorporation is US\$ 1. After company setup, Private Limited Companies must submit annual audited financial statements to the Registrar.

- **Public Limited Company (PLC)**

Namibian PLCs are commonly used by investors who would like to trade shares on regulated commercial markets. The minimum paid-up capital required to complete the incorporation process is US\$ 1. PLCs must have seven subscribers at incorporation of the company. PLCs must appoint at least one director and one shareholder and submit annual audited financial statements to the Registrar.

- **Branch Office**

Foreign entities are allowed to establish and operate branch offices for their foreign companies. Its scope of operations is defined by the parent company. However, while legal liability is limited for Private Limited Companies and PLCs, the legal liability for branch offices is unlimited.

## Government free/earned carried interest in projects

The Government of Namibia's right to acquire a participating interest depends on the negotiations between the parties as it is not regulated by statute.

As is common in emerging markets, the lenders would want a direct relationship with the Government which has granted the mining concession to the borrower.

## Taxation of mining projects (including royalties)

- **Taxation**

Mining companies (other than diamond mining companies) must pay income tax at a rate of 37.5% on its taxable income. The tax rate of diamond mining licensee or services rendered on behalf of a diamond mining licensee is 50% plus a surcharge of 10%. A rebate is applicable in respect of diamond profits tax payable in terms of the Diamond Taxation Proclamation 1941, to the extent that such tax does not exceed the attributable normal tax.

An amendment to the Income Tax Act 24 of 1981 (the Income Tax Third Amendment Act 15 of 2011) introduces a tax on income from the alienation of a right or licence to explore, mine, or retrieve natural resources in Namibia, irrespective of where the transaction is concluded or where the payment is made. This includes income on the sale of shares in companies that hold such a right.

There is a capital gains tax on the sale of mining licences or right to mine minerals and the shares in a company holding such a licence/right.

- **Royalties**

The Minerals (Prospecting and Mining) Amendment Act amends the existing legislation by removing the maximum percentage of royalties that the Minister can charge on all minerals excluding precious stones and dimension stones and introducing the possibility of a windfall royalty that can be levied by the Minister on a holder of a mining claim, a non-exclusive prospecting licence or a mineral licence. These amendments concerning windfall taxes are applicable to all minerals. The Amendment Act also introduces a new type of royalty in respect of all minerals other than precious stones and dimension stone. It is not certain what the nature of this royalty is, but it could possibly be a penalty royalty.

Royalties are calculated based on the market value, and the determination of market value is prescribed by the Minerals Act. A royalty levy is payable by the licence holder on the market value of any mineral or group of minerals won or found in the course of any prospecting or mining operations carried on.

## Withholding tax on interest and dividends. Possible structures to mitigate withholding on interest

- **Dividends**

Dividends paid to a non-resident that holds 25% or more of the Namibian payer company are subject to Non-resident Shareholders' Tax (NRST) at 10% unless the rate is reduced under a tax treaty. Dividends paid to a non-resident that holds

less than 25% of the Namibian payer company are subject to a 20% NRST unless the rate is reduced under a tax treaty.

- **Interests**

Both residents and non-residents are taxable on Namibian interest income, subject to certain exemptions and tax

treaty relief. Namibian-registered banks and unit trust management companies are required to withhold 10% from interest accruing to an individual, trust, or a non-Namibian company.

- **Royalties**

Royalties paid to a non-resident are subject to a withholding tax of 10% unless the rate is reduced under a tax treaty.

- **Branch remittance tax**

Profit distributions by local branches are not subject to NRST or other branch profits tax. However, were local branches distribute profits via dividends, it will be subject to NRST.

## F/X issues

Namibia is part of the Common Monetary Area (CMA). This group consists of Namibia, Lesotho, South Africa and Eswatini. There are no Exchange Control restrictions between the member states.

Non-residents of the CMA are required to obtain exchange control permission to obtain loan funds from abroad (but not for equity funding), as well as payment of royalties, technical and management fees, etc. It is advised that all foreign investments are registered with the Bank of Namibia.

Transfers of dividends or profits can be made freely and without prior approval except where companies are owned 75% or more by non-residents who have utilised local borrowing facilities. In these cases, prior approval must be obtained before remittance. It must be evidenced that the distributions have accrued as a result of trading or from income from investments. This would normally require an auditor's certificate.

Foreign capital introduced into Namibia may be repatriated to its country of origin.

## Hedging

There is no ISDA opinion available which would address the enforceability of the termination, bilateral close-out netting and multi-branch 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 Namibia 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 Namibian 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 security

Security can be taken over both immovable and movable assets. For Security Bonds, they rank in the order in which they were executed but a waiver of this priority is possible.

- **Movables**

Effective security can be created by:

- (a) Handing the security over to the creditor by way of a possessory pledge. If the debtor fails to fulfil its obligation to the creditor, the creditor has a legal right to sell the pledged property in execution. The pledge will not be valid without the delivery of the assets. Where delivery is not feasible, a symbolic transfer is possible provided the pledge is granted control over the pledged asset. In the event of the debtor's insolvency, the creditor enjoys the preference on the proceeds of the pledged property.

- (b) Registering a notarial bond over the secured movable asset where delivery of the asset is not possible. A creditor may register a general notarial bond over all of the movable assets of the debtor, or a specific notarial bond over an identified asset of the debtor. A notarial bond is prepared by a notary public and must be executed at the Deeds Registry by the debtor (or duly authorised attorney) and attested by the Registrar of Deeds.

Security can also be taken to secure a future debt or a combination of an existing and a future debt via a mortgage or a notarial bond.

- **Immovables**

Security over immovable property is taken by registering a mortgage bond over such property. In accordance with the legal principle of *superficies solo credit*, everything that is permanently attached to the property forms part of the property and will also be covered by the mortgage bond. A mortgage should in principle be entitled to realise the property over which the mortgage bond was registered for the very purpose of securing the debt on which it sued for.

## Cost of granting security

Stamp duty is payable at 0.2% on the issue or transfer of shares. Shares listed on the Namibian Stock Exchange are exempt from this duty.

Stamp Duty is also imposed on the acquisition of immovable property and a range of other instruments. For property with a value over N\$ 600,001, it will be N\$10 for every N\$ 1,000. Where immovable property is purchased by a corporate body or a trust, the duty will be N\$ 12 for every N\$ 1,000 or part thereof.

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