



# Burkina Faso

## Overview of legal system

Burkina Faso is a civil law jurisdiction, meaning that the core principles of law are codified and serve as the primary source of law. The Constitution for the Fourth Republic in Burkina Faso was approved by referendum on 2 June 1991, formally adopted on 11 June 1991 and amended several times until 2018. A referendum on the Constitution for the Fifth Republic in Burkina Faso is scheduled for March 24, 2019. As with most Franco-African countries, the Constitution of Burkina Faso 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 Cour de Cassation (Court of Cassation), the Cour des Comptes (Court of Accounts), the Tribunal des Conflits (Tribunal of Conflicts), the Conseil d'Etat (Council of State) and the courts and the tribunals instituted by the law.

The OHADA legal system applies in Burkina Faso – 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.

Burkina Faso 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 656 FCFA to 1 Euro.

Burkina Faso 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

The main laws applicable to mining activities are:

- the Mining Code adopted by the National Transition Council on 26 June 2015 and signed by the President on 16 June 2016 (the **“New Mining Code”**)
- the Council of Ministers adopted on 16 December 2016 seven application decrees which implement the Mining Code
- Burkina Faso is a member of WAEMU, which passed a Regulation No. 18/2003/CM/UEMOA dated 23rd December 2003 containing a Community Mining Code, and ECOWAS, which passed a Directive No. C/DIR3/05/09 harmonising guidelines and policies in the mining sector. In accordance with those two regulations, the New Mining Code creates an obligation for the holders of mining rights and their subcontractors to give “preference to companies from Burkina Faso for any contract for the supply of goods or provision of services on equivalent prices, quality and delivery terms”. The Mining legislation envisages different mining titles: exploration permit, industrial exploitation permit and semi-industrial artisanal exploitation permit. The activities of prospecting, traditional artisanal exploitation and exploitation for quarry substances are granted by administrative authorisations.

## Mining Convention and Mining Titles

With the New Mining Code, the Burkinabe government seeks to improve regulation and supervision of the mining industry. A technical commission is to be established to oversee the granting of exploration licences and mining conventions. Mining conventions are no longer required during the exploration phase and exploration licenses remain valid for a period of 20 years. By contrast, the duration of mining conventions has been reduced from 25 years (as in the previous mining code) to 20 years, but may be renewed for consecutive periods of 5 years (previously 10 years).

Licence holders are required to notify the Ministry of Mining of any significant changes in the feasibility study as regards production estimates. Failure to adequately amend the feasibility study could give rise to penalties ranging from 1% to 4% of the production value, depending on the magnitude of change. The New Mining Code provides for additional grounds for revoking mining titles, which include on-site employment of children, undue delay (of more than one year) or suspension of exploitation and non-renewal of licences upon expiration. Surprisingly, the New Mining Code suggests that the exploitation licence is a right in rem on immovable property which may only be subject to a pledge (and no longer a mortgage), which seems inconsistent with OHADA law.

A mining convention is only signed when an exploitation permit is granted and not during the exploration phase and its duration is 20 years (unless renewals are granted).

Additionally, since 2009, Burkina Faso 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 have to observe in order to be recognised as “EITI Compliant”. Countries implement the EITI Standard to ensure that the payment of taxes and other costs made by oil, gas and mining companies to Governments are fully disclosed. 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.

## Restrictions on foreign ownership

Any individual or legal entity of any nationality can carry out mining activities governed by the New Mining Code as long as they are registered in Burkina Faso and have an agent whose qualifications are lodged with the Administration of Mines.

## Local content

Under the New Mining Code, a local development fund and a rehabilitation and mine closure fund have been created. These funds are financed through a mix of a 1% monthly tax on exploitation production, State contribution and a mandatory annual contribution from mining companies based on environmental impact assessments. The New Mining Code also introduces several obligations in support of local businesses and employees. For example, it requires that mining companies give preference to qualified local employees, businesses and contractors. Similarly, mining companies are required to provide professional training to local managers. The government of Burkina Faso does not require investors to purchase materials from local sources.

## 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 all forms of business in Burkina Faso. There are no restrictions on the nature of a legal entity holding rights, although only a legal entity incorporated under Burkinabe law can hold a mining title or a mining concession. The types of company most commonly used in Burkina Faso to hold a mining title are sociétés à responsabilité limitée or sociétés anonymes.

## Government free/earned carried interest in projects

The State's free equity participation under the New Mining Code is maintained at 10%. However the State can now also acquire additional equity if it reaches an agreement with the mining company in accordance with the provisions of the Uniform Act on Companies.

The New Mining Code creates a 'preferential' dividend status whereby the State has priority in the distribution of dividends and is paid before any other allocation of distributable profits.

## Taxation of mining projects (including royalties)

The New Mining Code introduced several tax regime changes at the exploration and exploitation phases. Significantly, a 20% capital gains tax has been imposed on the transfer of mining titles, except where the transfer is to a company created for the sole purpose of holding an exploitation license. The standard corporate income tax rate is 27.5% (under the New Mining Code there has been an increase of the corporate income tax rate from 17.5% to 27.5% during the exploitation phase). Capital gains arising from the disposal of fixed assets and shares are normally included in taxable income for half the original capital gains amount. Under the previous Mining Code, companies are guaranteed stability of the tax regime but

the taxes likely to have the most impact - mining taxes, royalties and duties - are excluded from this stability guarantee. The New Mining Code continues to exclude these taxes and also reduces the stability guarantee of the included taxes from the duration of the permit to a maximum period of 20 years.

A surface tax is to be paid annually by any title or authorisation holder, based on the occupied land area and the duration of the title or authorisation.

Proportional royalties related to the value of extracted or sold products are based on the value and nature of the extracted products.

Under the New Mining Code, mining licence and industrial operations permit holders are to contribute, as a special contribution, 1% of their monthly turnover (excluding VAT), or 1% of the value of the products extracted during the month.

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

Interest paid to residents is taxed at 25%. This rate is reduced by half (12.5%) for income from deposit accounts and current accounts with a bank or financial broker. The rate applicable to other interest and similar payments is normally 6%. Dividends paid to residents are taxed at a standard rate of 12.5%.

Withholding tax (WHT) applies to dividends, royalties and payments to non-resident companies for services rendered in Burkina Faso. Interest paid to non-resident companies is subject to WHT at a maximum rate of 15% under the UEMOA tax treaty. Under the tax treaty with France, interest is taxed in the sourcing state giving rise to a tax credit in France.

**Dividends:** Dividends paid to non-residents are taxed at a standard rate of 12.5%. This is always the case, save where double taxation agreements are in place. For example, under the tax treaty with France, non-resident companies are subject to WHT at a maximum rate of 15%; under the UEMOA tax treaty, 10% of dividends gross amount; and under the Tunisia tax treaty, 8% of dividends gross amount.

Director's fees and other products distributed to shareholders by operating enterprises that are set up as commercial companies are subject to a 12.5% or 6.25% withholding tax, which the recipient may credit against corporate income tax.

**Non-resident contractor fees:** in the mining sector, companies are subject to a withholding tax at the standard rate of 20% of the amount paid to a provider of services that is not registered in Burkina Faso. A reduced rate of 10% applies to mining companies but only for operations directly linked to mining activity.

**Interest:** a withholding tax applies to interest at the standard rate of 25%.

**Royalties:** Withholding tax applies to royalties at a rate of 20%.

## F/X issues

Within the CFA Franc zone the transfer of funds is free. There are no exchange controls between Burkina Faso 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 Burkinabe 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 Burkina Faso 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.

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.

Exchange control regulations apply in Burkina Faso. Subject to compliance with foreign exchange regulations foreign investors have the right to transfer, in the currency used at the time of the investment, profits, all types of proceeds from the invested capital, proceeds from liquidation or realisation of their assets and salaries.

## 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 Burkina Faso 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 Burkinabe 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

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 Burkina Faso, 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 Burkina Faso (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 any buildings and fixed structures (including future buildings) located in Burkina Faso. 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 Crédit 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

Generally, the costs for registering security with the local council registry is set at 1% of the secured amount.

Notarial registration duties may also apply.

Mortgages are subject to a 1.05% registration tax and notarisaton costs.

Notarial fees can generally be negotiated.

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