



# Guinea

## Overview of legal system

Guinea is a civil law jurisdiction, meaning that the core principles of law are codified and serve as the primary source of law. The current Constitution of Guinea was approved by referendum on 19 April 2010 and formally adopted on 7 May 2010 (it is the fourth constitution of the country). As with most Franco-African countries, the Constitution of Guinea 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 Court Suprême (Supreme Court), the Cour des Comptes (Court of Accounts) and the Courts and Tribunals.

The OHADA legal system applies in Guinea – 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.

Guinea 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 key legislation governing mining activities in Guinea is the Mining Code adopted by the Conseil National de Transition (CNT) on April 8 2013 (Law L/2013/053/CNT), which amends the previous mining code (Law L/2011/006/CNT).

The President promulgated the Mining Code on April 17, 2013, by Presidential Decree D/2013/075/PRG/SGG.

The Mining Code offers multiple types of mining titles as discussed below.

### Types of licences

**Staking permits:** this authorisation is required to conduct reconnaissance activities and allows the prospecting of sites for three to six months. It is issued by the National Director of Mines on a proposal from Guinea's mining regulator, the CPDM (Centre de Promotion et de Developpement Miniers) after consultations with the National Directorate of Geology. A staking permit is renewable once, in accordance with the same terms as for its grant, for a further period of no more than six months.

**Exploration permits:** this permit is required to conduct exploration and it is issued by an order of the Minister of Mines on the recommendation of CPDM after consulting the Technical Committee on Mining Rights and Conventions (Comite Technique de Revue des Titres et Conventions Miniers). The maximum number of exploration licences that any one person can hold for any one substance is limited to three for bauxite and iron ore and to five for other substances.

The permit cannot be transferred, sold or used as collateral. Any direct or indirect change in the control of the company owning the permit should be submitted to the Minister of Mines for approval. Moreover, any acquisition of 5% or more of the company share should be submitted to the Minister of Mines for approval. Individual mining agreements can only supplement but not derogate from the provisions of the mining code. The industrial prospecting permit is granted for 3 years and can be renewed twice for 2 year periods. For each renewal the prospecting area is reduced to half. An individual cannot hold more than 3 prospecting permits for bauxite and iron ore within a maximum limit of 1050km<sup>2</sup>.

**Exploitation permits:** for smaller investments, as compared to a full mining concession. Under the Mining Code, an exploitation licence is granted for 15 years and upon non-commencement of work within a year of issuance, the monthly fine is GNF 10 million, imposed for the first 3 months with a monthly increase of 10% of the penalty amount thereafter.

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**Mining concessions:** is required to conduct larger mining activities. It is issued by a decree of the council of ministers on the proposal of the Minister of Mines after a consultation with the National Committee of Mines which agrees mining conventions with mining companies. Mining concessions are granted for 25 years and can be renewed for 10-year period. Under the Mining Code, the level of investment required for a mining concession to be obtained is USD 1bn for bauxite, iron ore and radioactive substances but has been reduced to USD 500m for other substances. This distinction allows for better reflection of the economic reality in terms of the size of investments required for non-bauxite and iron ore projects.

**Mining convention:** the granting of a mining concession and an exploitation permit must be accompanied by a mining convention. The maximum duration of a mining convention is 25 years, renewable for one or several periods of 10 years. Mining conventions are subject to an executive order and will be signed by the Minister of Mines, following the advice of the National Mining Committee and the authorization of the Council of Ministers. Mining conventions will then be submitted for the legal opinion of the Supreme Court and ratified by Parliament.

Additionally, since 2007, Guinea 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 Mining Code as long as they are registered in Guinea.

## Local content

Mining permit holders must enter into a Local Development Agreement with the local community under the terms established in a joint order by the Minister in charge of Mines and the Minister in charge of Decentralisation. The agreement must include provisions for training the local community, environmental protection and health measures, and social projects. The amount of the financial contribution to local development is set at 0.5% of the turnover of the company for bauxite and iron ore substances, and 1% for all other substances.

The mining legislation requires that the number of local employees should increase while the number of expatriate employees should decrease according to the various stages of the mining activities in terms of a prescribed formula.

The Mining Code also imposes certain training obligations and quotas. A Guinean national must be appointed as deputy managing director of a mining company as soon as it commences exploitation and within 5 years of that same date, a Guinean national must be appointed a managing director.

The new mining regime also provides for setting quotas for the sourcing of goods or services from Guinean-controlled firms, at up to 30% from the 11th year of exploitation onwards. Guinean mining companies are now required to file yearly reports on the use of local employees and businesses and must provide for training programmes including for recent graduates and at the request of the authorities, the training of staff overseas.

## Available structures for borrowing vehicles

Limited liability companies, public and private corporations and joint ventures are all forms of business in Guinea. There are no restrictions on the nature of a legal entity holding rights, however (as stated above) only a legal entity incorporated under Guinean law can hold a mining title or a mining concession. The types of company most commonly used in Guinea to hold a mining title are sociétés à responsabilité limitée (minimum capitalisation of approximately US\$10,000) or sociétés anonymes (minimum capitalisation of approximately US\$1,000).

## Government free/earned carried interest in projects

The State has free carried interest rights and is automatically entitled to free participation up to 15% of the share capital of each mining company in Guinea, with the option of purchasing an additional 20% stake. That shareholding of the State cannot be diluted (by any increase of the share capital of the company or otherwise).

The State also has the right to acquire a supplementary participation for cash according to the terms agreed with each relevant mining company within the scope of the Mining Concession. This acquisition option may be scheduled over time but may be exercised only once. The total participation held by the State may not exceed 35%. The rights also entitles the State to sell its cash participation without the other shareholders benefitting from a pre-emption right.

Also, a shareholders' agreement in the project company will identify decisions that cannot be adopted without prior consultation with the State, which may entail veto rights in favour of the State.

## Taxation of mining projects (including royalties)

The standard corporate tax rate is 35%, whereas mining companies are subject to a reduced corporate tax rate of 30%. Capital gains realised by resident companies are subject to corporate income tax at the standard rate.

### *Extraction Tax*

A tax on extraction applies to mineral substances other than precious metals and is set at 3% for iron ore, 3% for base metals, 0.075% for bauxite, at rates varying between 3.5% and 5% for diamonds, and at rates varying between 1.5% and 5% for other precious stones and gemstones. The tax rate varies by mineral substance and depends on the ore grade, weight of the mineral substance extracted, and the appropriate price index.

### *Production Tax*

A tax on the production of precious metals is set at 5% for silver, gold, platinum, palladium and rhodium.

### *Customs duties*

The rate of customs duties payable, during the exploitation phase, for some goods that are intended for on-site processing of mined substances into finished or semi-finished products is 5%.

The rate of customs duties applicable, during the exploitation phase, for some that aim at the extraction and processing of raw mineral substances goods is 6.5%.

### **Export Tax**

Mineral substances extracted in Guinea which are exported in their crude state, without having previously been processed into semi-finished or finished products in Guinea, will be subject to a specific export tax. The basis of the export tax is the value of the mineral substances exported, and ranges from 0.075% for bauxite to 2% for iron ores and other non-ferrous substances. Precious stones and other gemstones are also subject to an export tax rate that ranges from 1.5% for industrial production of precious stones other than diamonds to 3% for industrial production of diamonds. Precious metals are exempt from this export tax.

### **Royalties**

Any holder of a Mining Permit is subject to the annual payment of surface royalties, which is in proportion to the surface area in the Mining Permit or Authorisation. The surface royalty ranges from USD 10/km<sup>2</sup> for an exploration permit to USD 150/ km<sup>2</sup> for a mining concession. The surface royalty increases for subsequent renewals.

Under the Mining Code companies licensed to operate in the mining sector may enjoy several tax and customs incentives during the different phases of their mining projects.

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

For residents and non-residents of Guinea, withholding tax is levied at 10% for dividends and interests paid. Withholding taxes for royalties and fees stand at 15%.

### **F/X issues**

Guinea is subject to local exchange control regulations (including Law L/2000/006/AN regulating the financial transactions between Guinea and other countries (the "**Law**") and Instruction no. 112/DGAEM/RCH/00 of the Central Bank of the Republic of Guinea (CBRG) on financial relations between Guinea and other countries (the "**Instruction**").

Pursuant to Article 2 of the Instruction, no specific authorisation must be obtained by foreign and local companies to open onshore accounts in foreign currency. However, the opening of offshore foreign currency accounts by Guinean companies is subject to a prior authorisation from the CBRG.

According to Article 184 of the Mining Code and the Instruction, holders of a mining title and their direct subcontractors must repatriate, within a maximum of ninety (90) days from the date of the shipment (unless otherwise authorised by the CBRG), all export proceeds resulting from sale of mineral substances on bank accounts of the CBRG opened abroad with reputable financial institutions.

Article 8 of the Law provides that payments relating to financial or commercial transactions between a resident and a non-resident shall be made through a local bank (*banque de la place*).

While there is generally no regulatory approvals required for financing transactions made in Guinea, the Instruction provides that the relevant local bank shall be provided with a draft of the relevant loan

agreement before its execution, so that the local bank ensures that it complies with the “prevailing international conditions” (formal control only). The loan agreement shall be provided by the local bank to the CBRG for information (no response is required).

Although there have been no recent changes to remittance policies, it is difficult to obtain foreign exchange in Guinea’s economy. Guinea has experienced significantly weakened liquidity levels due to government mismanagement, populist policies, corruption, a decrease in mining revenue due to political unrest, and dwindling foreign aid levels.

Individuals or legal entities making foreign investments in Guinea are guaranteed the freedom to transfer the original foreign capital, profits resulting from investment, capital gains on disposal of investment, and fair compensation paid in the case of nationalization or expropriation of the investment, to any country of their choice.

## 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 Guinea 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 Guinean 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 Guinea, 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 Guinea (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 Guinea. 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 pledge) is at least 1% of the secured amount (in relation to the tax authorities). In addition other stamp duties (to be determined by the local registry – RCCM) may also apply.

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