



Botswana

Overview of legal system

The origins of the law in Botswana can be traced back to the founding of the Bechuanaland Protectorate in 1885. The High Commissioner legislated by proclamation in 1909 that the laws then in force in the Cape Colony (now South Africa) would apply to Botswana as far as circumstances in the country allowed. The common law in force in the Cape Colony was Roman-Dutch law as interpreted by the Cape Colony's high courts and when promulgated it was further influenced by English law. This is the basis of the common law that is applied in Botswana today. This common law subsists side by side with legislation, judicial decisions and customary law (as applied to tribesmen) as the sources of law in Botswana.

With regards to the current legal market, there are a few well-established law firms which dominate Botswana's legal market and which are highly regarded. These firms are often part of international alliances and pan-African legal networks are also a notable feature of the market. There are also numerous local firms without any international capacity and their number is increasing rapidly. Botswana's court system is well regarded when compared with neighbouring jurisdictions and the country ranks highest in Africa on Transparency International Corruption Perceptions Index.¹ There are also functioning arbitration bodies operating in the jurisdiction.²

Overview of laws applicable to mining activity

The main legislation that regulates the mining industry in Botswana is the Mines and Minerals Act Cap 66:01 ("MMA"). The Mines, Quarries, Works and Machinery Act Cap 44:02 provides for the safety, health and welfare of persons engaged in activities related to mining, prospecting or quarrying.

The Ministry of Mineral Resources, Green Technology and Energy Security administers the mining industry in Botswana and the Department of Mines is responsible for enforcing the provisions of the relevant legislation.

All minerals in Botswana vest in the state and no person may prospect or mine minerals save under the terms of a licence issued by the Ministry of Mineral Resources, Green Technology and Energy Security under the MMA.

¹ Transparency International: 2016 Rank – 35/176.

² Chambers Global Practice Guides: Banking & Finance 2018, pg 66

Prospecting Licence

Prospecting licences allow the holder to enter onto any land to which the licence relates (which cannot exceed an area of 1,000km²) They may then prospect this land for the stated mineral, drill bore holes, make excavations, erect camps and put up temporary buildings for machinery necessary for prospecting purposes. The licence holder is not allowed to remove any mineral (other than for testing or valuing in Botswana) without the prior written consent of the Minister. The rights granted under a prospecting licence are narrower than the rights under a mining licence and the MMA obliges the licence holder to: (i) commence prospecting within three months of issuance of the licence; (ii) carry out prospecting operations only in accordance with the terms of the prospecting licence; and (iii) notify the Minister within 30 days of any discovery.

A prospecting licence is issued for three years with two options to renew, with each renewal period not exceeding two years. The prospecting licence may be renewed beyond this seven year period only if a discovery has been made and evaluation work has not yet been completed, despite proper efforts being made. A prospecting licence may not be cancelled, even in the event of non-compliance with its terms, unless notice has been given to the holder to rectify the default. At the end of the term of the prospecting licence, unless a renewal has been granted, the holder must vacate the area and restore the land to substantially the condition it was in prior to the prospecting

Retention Licence

The holder of a prospecting licence can apply to the Minister for a retention licence in respect of the area and mineral covered by the prospecting licence.

This entitles the holder to keep the area to which the licence relates for future mining operations and to continue prospecting within the retention area. This is designed to ensure continuity between: (i) the expiry of the prospecting licence and completion of the prospecting programme; and (ii) the time when mining can start for profit.

A retention licence must be applied for no less than three months before the expiry of the relevant prospecting licence. They are granted for two periods not exceeding three years each.

Mining Licence

A mining licence holder may enter any land to which the mining licence relates and take all reasonable measures on or under the surface to mine the mineral stated on the licence. This allows the holder to erect the necessary equipment, plant and buildings to allow for mining, transporting, treating, smelting, or refining minerals. It also allows the holder to prospect for the mineral which the licence relates to within his mining area.

The holder of a mining licence is obliged to: (i) commence production on or before the date stated in the licence; (ii) develop and mine mineral in accordance with the programme of mining operations in the licence; (iii) demarcate the mining area and submit a diagram of the mining area to the Minister within three months; (iv) keep and maintain an address in Botswana; and (v) notify the Minister as soon as work begins at the mine for profit.

A mining licence, once granted, is valid for the period reasonably required to carry out the mining activities but, in any event, for not longer than 25 years.

Restrictions on foreign ownership

There are no restrictions on foreign ownership of businesses. This would apply equally to companies wishing to establish mining operations in Botswana.

Ownership of Real Property

There are three main categories of land in Botswana: freehold land, state-held land and tribal land. There are no restrictions on the sale of freehold land to foreigners, but only around 5% of land in Botswana is freehold. Tribal land (which accounts for 70% of land in Botswana) and state-held land (which accounts for around 25% of land in Botswana) cannot be sold to foreigners. Tribal and state-held may be leased or subleased from current leaseholders.

Local content

The MMA provides that holders of mineral concessions employ Botswana citizens to the maximum extent possible and to provide them with training. Preferential treatment should also be given to materials and products made in Botswana as well as services located in Botswana and owned by Botswana citizens.

The MMA further provides that if a person has rights to mine or prospect a certain area and they require exclusive use of this area then they shall, if requested by the landowner or lawful occupier, obtain a lease or other rights to use the area. The terms of such agreement is to be reached between the parties. Indigenous and/or ethnic communities have no specific statutory or other legal rights with regards to mining projects on their lands.

Available structures for borrowing vehicles

Limited Liability Company ("LLC")

An LLC incorporated in Botswana must appoint one director (who must be resident in Botswana) and one shareholder (who does not need to be resident in Botswana) and there are no requirements as to the minimum amount of paid-up share capital and USD\$1 will suffice.

The LLC must have a registered office in Botswana and appoint a qualified company secretary who must submit audited financial statements within five months of the year end. It can take up to 10 weeks to complete the incorporation process for an LLC.

Public Limited Company ("PLC")

A PLC incorporated in Botswana must appoint at least two directors (of whom one must be resident in Botswana) and seven shareholders of any nationality. These must also be natural persons. There are no requirements as to the minimum amount of paid-up share capital and USD\$1 will suffice.

The PLC must have a registered office in Botswana and must submit audited financial statements within five months of the year end. The PLC must appoint an auditor as well as a company secretary. It can take up to 14 weeks to complete the incorporation process for a PLC.

Branch or representative offices

A Botswana branch may be 100% foreign owned and is allowed to engage in business activities related to the parent company within Botswana. At least one director (who must be resident) and one shareholder are required to incorporate a branch in Botswana. The corporate rate tax for branches incorporated in Botswana is 30% thus making it a less tax efficient option. It can take up to 16 weeks to establish a branch office in Botswana.

A Botswana representative office may be established solely for the purposes of carrying out market research and promoting the business of the parent company. It may not engage in commercial activities.

Government free/earned carried interest in projects

Upon issuing a mining licence, the Botswana government has the option of acquiring an up to 15% working interest participation in the mining project and will inform the applicant as to whether or not it will exercise its option.

If the government does decide to issue its option, it will be issued with a single special share at par with the right to appoint two directors and to receive all dividends and other distributions in respect of its working interest percentage. It will also be obliged in the same manner as other shareholders to contribute its working interest percentage.

Taxation of mining projects (including royalties)

Corporate tax is levied on income generated in Botswana at a rate of 22%. Other forms of taxation on companies involved in mining include an additional form of income tax and the payment of royalties.

The Income Tax Act has a designated schedule for mining. It provides that mining profits will be taxed at a rate specific to each business involved in mining. The annual tax rate is calculated according to the formula $(70 - (1000/X))$ where X is the profitability ratio of the company (generally calculated with reference to taxable income as a percentage of gross income). This is provided that the tax rate is not less than the corporate tax rate. There are numerous deductions which can be applied by a mining company for the purposes of calculating the annual tax rate, including permitted allowances for mining capital expenditure, payments to a mine rehabilitation fund, head office expenses, and certain interest payments.

The MMA provides that the holder of a mineral concession is liable to pay royalties to the Botswana government on any mineral obtained by them in the course of the exercise of their rights. The royalties payable are a percentage of the gross market value and are currently: (i) 10% for precious stones; (ii) 5% for precious metals; and (iii) 3% for other minerals or mineral products. Gross market value is defined as the sale value receivable at the mine gate in an arm's length transaction without any discount, commissions or deductions applied.

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

Withholding tax is payable on interest only. The current withholding tax rates applicable to interest payments are 10% for residents and 15% for non-residents, subject to any Double Taxation Avoidance Agreement that may be in place.

Withholding tax is not applicable in relation to payments of interest to an International Financial Services Centre Company, a banking company or a financial institution receiving such interest in its ordinary course of business.³

F/X issues

There are no foreign exchange controls and no restrictions on capital outflows through financial institutions. Restrictions and controls regarding foreign currency exchange only apply when engaging in the business of foreign exchange. A business must be licensed under the Bank of Botswana Act (CAP 55:01) to transact in foreign exchange.⁴

Hedging

There is currently no ISDA netting opinion available for Botswana which would address the enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 and 2002 ISDA Master Agreements. However, this does not mean such provisions would not be enforceable and if necessary a legal opinion from a local counsel in Botswana could 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 Botswana company or another group company located in a jurisdiction where the enforceability of such provisions have been confirmed in an ISDA opinion.

Nature of available security⁵

Security is available over a wide range of assets, including immovable and moveable property, and intangible assets such as IP, shares, receivables, cash accounts and stock in trade.

Immovable property, which would be freehold land or land held by way of a long-term lease exceeding ten years, can be secured by way of a mortgage bond. This must be prepared by a conveyancer and registered with the Registrar of Deeds.

Moveable property and receivables may be secured by a general notarial bond, a deed of hypothecation or a pledge. A general notarial bond is a mortgage by a borrower of all its tangible moveable property which gives a creditor limited statutory preference above the claims of concurrent creditors in respect of

³ Chambers Global Practice Guides: Banking & Finance 2019

⁴ Chambers Global Practice Guides: Banking & Finance 2018, pp 59

⁵ Chambers Global Practice Guides: Banking & Finance 2018, pp 61

the free residue of a debtor's estate on insolvency. It must be prepared by a notary and registered with the Deeds Registry. A deed of hypothecation is a form of statutory pledge and is only available to "authorised creditors" upon application to the Minister of Finance and Economic Development. It must be prepared by a notary or conveyancer and registered at the Deeds Registry.

Intangible assets may be secured by way of a cession over the assets in the creditor's favour. This may be by way of an out-and-out cession (i.e. title to the property is transferred to the chargor subject to the chargee's right to have the property transferred back) or by way of a cession in security (i.e. title remains with the chargee unless there is a default).

An equivalent to a floating charge is recognised in Botswana. A universal or similar security interest over all present or future assets of a company may be provided in the form of a general notarial bond or deed of hypothecation. It is also possible to guarantees under Botswana law.

Cost of granting security

There are no notable tax considerations, such as stamp duty, involved in taking security in Botswana. Costs are limited to a nominal notarial fee, conveyancing fees (if applicable) and registration fees.

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