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November 2011

NEW MINING CODE IN ANGOLA

ANGOLAN LEGAL NEWS – NEW MINING CODE APPROVED



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I - MAJOR INNOVATION

The recently approved new Mining Code was published by Law no. 31/11, of 23 September 2011.

This law was preceded by effective mining activities laws dispersed in several pieces of legislation, which it revoked, such as Law 1/92, of 17 January 1992, setting forth the legal framework for Mining and Geologic Activities (the “Mining Law”), and Law 16/94, of 7 October 1994, setting forth the specific Diamond Law, this mineral receiving a different and more protectionist treatment.

The main feature of the new Mining Code is that aims to achieve the unification of all legal provisions and material, procedural and regulatory principles covering mining activities within a sole Code, only excluding reconnaissance, prospection, research, appraisal and exploitation of gaseous and liquid hydrocarbons.

Another feature of this code is that, as consideration for granting mining exploitation and trade concession rights, the State is given the right to participate in the “appropriation of the mining product” either (i) by means of, at least, a 10% participation in the share capital of the concessionaires, through a State held company, or (ii) by participation in kind in the mining product produced in proportions to be defined throughout the production cycles, the State’s share increasing

with the increase of the Internal Rate of Return (IRR). A combination of both these types of State participation may also be applied.

The new Mining Code brings us to an evolved Angolan reality, with shown concern for sustainable development – including protection of local communities -, environment and, as an inheritance from the past, for national defence and national interest.

Obligations of training of nationals by the concessionaires and national market protection through the mandatory preference on the use of national materials, services and products conditioned to a maximum 10% difference on price and

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a further 8 days delay on delivery date when compared to foreign offer are also included in the menu.

Further, and although foreseen as to be applied subsidiarily to the new Mining Code, a new Private Investment Law (LIP) is to be enacted soon. It is anticipated that the LIP will require foreign companies to negotiate all tax benefits and incentives and to enter into a contract with the relevant governmental body. It should be mentioned that the envisaged minimum investment amount falling under the scope of the LIP, is of USD 1 million.

II - TRENDS AND REGIME

As expected, the new Mining Code maintains State ownership of all mineral resources located in the soil, subsoil, internal waters, territorial sea seabed, in the exclusive economic zone (EEZ) and on the continental shelf. However, definition of coastal rights is no longer left to guess, a specific reference to Part XII of UNCLOS convention regarding interpretation of the attribution of prospection, research, appraisal and exploitation mining rights in territorial waters, continental shelf and EEZ being made, and a specific part of the Code is dedicated to mining activities and licensing in sea areas.

To note that all sea or land areas under Angolan jurisdiction regarding which title has not yet been granted for carrying out other activities or are not limited to specific activities, are considered as available for mining concession rights.

Access to Mining Titles is opened to any individual or company, national or foreign, by means of submission of a request for this purpose before the competent Ministry or another State body to be defined, or by means of launching of public tender by the competent State body.

Whenever the request is not subject to the public tender procedure, rights shall be granted on a first-come first served basis, technical and financial capacities for the development of the mining activities having to be evidenced.

Information requests on areas for the concession of mining rights may be submitted to the mining cadastre

services for the purposes, information being foreseen as to be provided within a 90-day term if the said request includes all the necessary legally defined data on the type of mineral, identification of the entity requesting such information, etc.

Further to the referred right of the Angolan State to participate in mining exploitations as a compensation for the concession of mining rights, the new Mining Code innovates with the creation of a sole Mining Investment Contract to be negotiated with the competent Negotiation Commission, yet to be created, and following which the applicable licensing title is issued.

The Mining Investment Contract shall contain the rules for the 3 phases of the mining process: prospection, appraisal and exploitation, in opposition to the previously foreseen 2-contract system (e.g., one for prospection and another for the exploitation phase), and a strengthening of the guarantees regarding the access to rights of trade of the minerals by the titleholders to mining titles.

Investment in mining prospection and exploitation activities – strategic minerals aside - is covered by a specific regime, subject to the execution of a public law investment contract, approved by the competent Minister by means of Executive Decree. Should the projected investment exceed in Kz 27,034,883.7 UCF (at the conversion of 1 UCF= Kz 88, presently equivalent to USD 25 Million), such approval shall be subject to approval by the President of the Republic.

Mining rights exploitation concession contracts are to be negotiated with the competent Negotiation Commission, yet to be created.

In case previous prospection is required, two contracts shall be executed for concession of mining rights i.e., an Investment Contract for Prospection – including reconnaissance, prospection, research and appraisal and an investment Contract for Exploration.

An Investment Contract for Prospection grants its titleholder a pre-emption right for the execution of the second phase Investment Contract for Exploration, the terms and conditions for this second phase being possibly included in the first phase Prospection Contract.

As regards the mining titles available to access mining activities, the current Mining Code enunciates the following 4 types of titles:

- (i) Prospection title, for reconnaissance, prospection, research and appraisal of mineral resources;
- (ii) Exploration title, for exploitation of mineral resources;
- (iii) Mining Licence, for the prospection or exploitation of mineral resources for construction works; and
- (iv) Mining Pass, for small-scale mining activities.

Submission procedures or tender procedures referred above shall be complied with and legal guarantees are set forth as assisting mining titles titleholders, such as registration of the title, compliance with the delays foreseen for decision of title grant, and exclusivity of the Exploitation titles granted, jointly with attribution to Prospection title titleholders of a derived exploitation right of mineral resources revealed during the prospection phase. Only the specifically foreseen exceptions to this derived right are applicable for the purposes of limitation of such acquired exploitation right.

Should the mining title and activities be developed under any type of partnership, e.g., by means of an incorporated or unincorporated joint venture, the underlying agreement shall be subject to prior approval by the competent bodies and the joint venturers shall expressly declare their joint responsibility for the fulfilment of the contractual obligations regarding the exercise of the mining rights, before the Angolan State.

This Code further states that preference should be granted to Angolan partners or companies in these commercial partnerships, following the terms of the Law on Promotion of Angolan entrepreneurship or any other legislation with the same scope defining the concept of “national” individual and/or company.

For the purposes of access to mining activities, a guarantee of compliance with the agreed contractual obligations is demanded. This guarantee may be rendered by bank guarantee or by any

Other rights and obligations applicable to the (prospective) mining right title holder and to the Angolan competent public entities are foreseen in this content complete Mining Code, such as the type of contractual regime and specificities to be therein included, tax and permitted deductions, customs regime, crimes and penalties.

other means accepted by law. The guarantee shall amount to up to 2% of the amount of the foreseen investment in the reconnaissance, prospection, research and appraisal phase, this percentage being increased to up to 4% in the exploitation phase. Guarantees are to be delivered before execution of the contract providing the mining title rights.

This Mining Code also includes (i) a mandatory reimbursement of the capital invested within a 5-year term, the permitted reimbursement period being of 7 years at the most, jointly with (ii) the prohibition for the exploitation costs to overcome 50% of the exploitation revenues, (iii) the 35-year maximum exploitation rights period to be granted – possibly extendable for a 10-year delay, and (iv) the Industrial tax applied to the mining industry being proposed to be decreased from 35% to 25%.

One basic and important change of this Mining Code is that it bears a distinction between minerals qualified as ordinary and strategic.

The new Mining Code produces, in its Annex I, the qualification of the minerals as strategic or ordinary.

The Council of Ministers is also granted the powers to qualify determined minerals as strategic. Minerals are deemed strategic following their importance to the Country, namely due to their economic impact in the country's economic and social development, as well as pursuant to military security and international market demand.

In case of strategic minerals a more protectionist approach with more intervention from the State is taken, including a criminal regime with imprisonment sanctions. The State is the owner of all rights to Strategic Minerals, mining of these minerals being exercisable exclusively either by a public owned company, assuming the role of a national concessionaire, or by an autonomous public institution with mining strategic activity regulatory competences.

Titleholders of mining rights are guaranteed the freedom to dispose of and trade the extracted minerals, under the rules and procedures included in the Project Mining Code.

Standard obligations regarding mining activities apply, including compliance with the applicable laws, the submitted exploitation programme and maintenance of activities – except if suspension was officially authorised or imposed -, compliance with environmental impact assessment impositions and environmental protection measures to be implemented.

Environmental obligations are thus set forth, jointly with the payment of an environmental guarantee.

Title holders to Mining Rights must, among other obligations, ensure the local hiring and training of Angolan technicians and workers, as well as compliance with health and safety rules.

Local communities affected by mining projects have the right to negotiate the type and amount of compensation to be paid by titleholders to mining concessions whenever this type of compensation is more favourable than the legally established financial compensation.

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Mining titles may be transferred upon express authorization by the competent State body or national concessionaire (yet to be created or powers to be granted to an already existent entity fulfilling the legal requirements). In the case of strategic minerals, the Council of Ministers shall be the entity with competence for provision of such authorisation.

This newsletter was prepared by a multidisciplinary team made up of Angolan lawyers from GLA – Gabinete Legal Angola and Portuguese lawyers from PLMJ. This team was brought together under an agreement for international cooperation and membership of PLMJ International Legal Network, in strict compliance with applicable rules of professional ethics.
