DRC

INTRODUCTION

The legal system in the DRC is based on the civil law tradition influenced by Belgian law and since September 2012, the DRC is a member state of the Organization for the Harmonization of Business Law in Africa (OHADA).

The mining sector is regulated pursuant to the Mining Code ("**MC**") issued by the Law No. 007/2002 dated 11 July 2002 as supplemented by the Mining Regulation ("**MR**") issued by the Decree No. 038/2003 dated 26 March 2003.

A reform of the MC is expected, but this process is expected to take at least one year. Local experts have to work on the reforms of the code followed by international experts after which the government will have to finalize the reforms and to submit it to the Parliament, where sub-committees from National Assembly and Senate will study it. Lastly, the text will be subject to debates and voting. Such reform is expected to increase royalty regime and the percentage of shares required to be transferred to the State.

According to the MC, mineral substances, including artificial deposits, underground water and geothermal deposits on the surface or in the sub-soil or in water systems of the DRC are the exclusive, inalienable and imprescriptibly property of the State.

The MC provides for prospecting, exploration, mining, processing, transportation and marketing of mineral substances as well as artisanal mining of mineral substances and commercialization of the same.

The MC also provides for, among other things, legal, tax, customs and exchange control regimes, certain environmental provisions and provisions relating to land and property issues.

GENERAL

The main administrative authorities in charge of mining activities are:

- the Minister in charge of mines and quarries ("**Minister**") who is responsible for granting, renewing or cancelling mining licences and plays a general supervisory role.

- the Mining Registry in charge of processing applications for mining rights and their extension, their cancellation and withdrawal and their transformation into lease rights and securities on mining assets.

- the Directorate of Mines ("**Directorate**") in charge of inspecting and supervising mining activities with regard to health and safety, work practices, production, transport, sale and social matters;

- the Department in Charge of the Protection of the Mining Environment, which has powers regarding the definition and implementation of the mining regulations concerning environmental protection and the technical evaluation of the mitigation and rehabilitation plan, the environmental impact study and the environmental management plan.

According to Article 5 of the MC, any person is permitted to engage in non-artisanal exploration or exploitation of mineral substances within the DRC provided that he is a holder of a valid mining right granted by the relevant government authority.

Companies incorporated under foreign law are only eligible for mineral exploration titles (Article 23-3 of MC) but they must first elect domicile with an authorized mining and quarry agent and act through its intermediary in order to use such titles (Article 23-2 of MC). If such persons wish to operate a mineral deposit in an industrial manner, they are required to create a commercial company under DRC law (Article 26 of MR).

Rights are granted on a first-come, first-serve basis to any applicant who is eligible to hold a mining right. The following persons are ineligible to hold mining rights in the DRC:

a) persons legally incapacitated in accordance with Article 215 of the Family Code;

b) persons incapacitated by the MC because their professional duties are incompatible with mining, such as agents and state officials, judges, members of armed forces, police and security services and employees of public organizations authorized to undertake mining operations.

According to the MC, mineral deposits are considered as being extracted from either mines or quarries. Minerals extracted for use as raw materials for industrial purposes, or as a source of power, are considered as having been extracted from mines. Minerals extracted for use as construction materials are considered as having been extracted from quarries. This note focuses on the MC's regulations relating to mines.

Mining rights are acquired either by an individual or a company upon application in the prescribed form obtained at the Mining Registry (Art. 35 MC) and payment of a prescribed fee (Art. 37 MC). The processing of the application takes place in three stages (Art. 40 – 42 MC):

- the registrar's examination undertaken by the Mining Registry;

- a technical evaluation by the Directorate; and

- an environmental evaluation by the Department in Charge of the Protection of the Mining Environment.

At the end of the enquiry, the Minister decides whether or not to grant the right and transmits his decision to the Mining Registry (Art.10 MC), which then registers the right, if granted, and informs the applicant.

Should the Minister fail to communicate his decision to the Mining Registry in accordance with the procedural obligations detailed above, the right is deemed to have been granted and the applicant is entitled to require the Mining Registry to proceed with the registration of his right.

If the Mining Registry does not proceed with the registration within 5 working days of filing of the application, the applicant may obtain a judgment equivalent to a Mining Title (Art. 46 MC).

On an exceptional basis, the Minister may open to tender (open or by invitation) mining and quarry rights relating to deposits which have been studied, documented or possibly worked on by the State or its entities, and which is considered "an asset of significant known value" (Art. 33 MC).

The MC regulations pertaining to mines include exploration permits and mining permits, each of which is discussed in more detail below.

REGULATION OF EXPLORATION

The Mineral Exploration Title (Permis de recherche) entitles its holder the exclusive right, within the prescribed area and for its term of validity, to carry out mineral exploration for mineral substances defined in the Licence (Art. 50 MC).

The exploration Licence also confers to its holder the right to acquire an exploitation Licence for all or part of the substances which are the object of the Mineral Exploration Licence.

The exploration licence is a real and exclusive property right, which is assignable and transferable. Its maximum surface area is 400 km^2. Its holder and affiliates cannot hold more than 50 Licences, which is equivalent to 20,000 km^2.

This right is evidenced by a mining title called an "Exploration Certificate".

Duration and tenure

The application for the exploration Licence is filed by the submission of the prescribed form to the Mining Registry. The applicant must be eligible to hold the licence under the regulatory regime and is required to provide evidence of his financial capacity in terms of his eligibility, which relates to 10 times the total amount of the annual surface rights. This amount is payable for the last year of the first period of validity of the solicited exploration right. The applicant must also prepare a Mitigation and Rehabilitation Plan (MRP) which must be approved within 6 months following the delivery of the exploration licence before starting exploration.

The validity period of the exploration licence is 4 years, renewable twice for a period of 2 years at each renewal for precious stones and 5 years, renewable twice for a period of 5 years at each renewal, for other mineral substances.

The exploration licence expires on the last day of its term of validity if it has not been renewed or if it has not been transformed either into an Exploitation Licence or a Small Scale Mining Exploitation Licence.

The exploration licence/permit is renewable if its holder has not breached his obligations (payment of the annual surface rights fees and commencement of exploration works within the scheduled time) and submitted the required report concerning the exploration carried out in the former term of validity of the license.

Transformation

The holder of an Exploration Licence may any time request its partial transformation into a mining operating licence for a part of the surface area covered by one or several Exploration Licence(s) while retaining its exclusive rights to explore the rest of the area, subject to compliance with the MC.

REGULATION OF MINING EXPLOITATION

Mining exploitation may be undertaken under the authority of an Exploitation Licence, a tailings exploitation title or a small-scale mining title granted pursuant to the MC.

The Exploitation Licence (Permis d'exploitation) entitles its holder to the exclusive right to carry out, within the prescribed area and during its term of validity, exploration, development, construction and mining operations and exploitation work in connection with the mineral substances defined in the Licence (Art. 64 MC).

The Licence is a real and exclusive property right, which is assignable, transferable and which may be leased.

This right is evidenced by a mining title called a "Mining Certificate".

Duration and tenure

The applicant files his application for the Exploitation Licence with the Mining Register, which must include the following documents:

- a copy of the valid Exploration Certificate;
- a report on the outcome of the exploration work with regard to the nature, quality, volume and geographical situation of the mineral resources identified;
- a feasibility study concerning the exploitation of the deposit and a technical framework plan for the development, construction and exploitation/mining of the mine which must demonstrate the existence of an economically profitable deposit;
- an Environment Impact Statement ("**EIS**") and Environmental Management Plan of the Project ("**EMMP**"), which require prior approval;
- a report concerning consultations with the authorities of local administrative entities and the representatives of the neighbouring communities and a plan showing how the project will contribute to the development of the surrounding communities;

- a financial plan identifying the forecast sources of finance; and
- proof of payment of the filing fees.

In order to obtain an Exploitation Licence, the applicant is also required to provide an environmental rehabilitation plan for the site when the mine closes.

The company applying for the license must transfer 5% of its shares to Government. These shares are free of all charges and cannot be diluted. This percentage of shares required to be transferred to the government is likely to be increased with the expected revision of the Mining Code. It is unclear at this stage whether such a proposal will survive the lobbying from mining operators.

The State of the DRC may refuse to award an Exploitation Licence either if the feasibility study is rejected because of its non-conformity with the directive of the Ministry of Mines or the presence of a patent error and its non-conformity with the EIS, which could entail the EIS being definitively rejected or because the applicant's financial capacity is insufficient.

The Exploitation Licence is granted for 30 years and renewable for successive periods of 15 years subject to the conditions that its holder:

- has not breached his obligation of maintaining the validity of the Licence;
- demonstrates that he has not exhausted the deposit and provides evidence of the existence of financial resources required for the carrying out of the project;
- obtains the approval of the update of the EIS and the EMMP; and
- undertakes in good faith to actively continue with the mining exploitation.

The Licence for the Exploitation of Tailings ***(Permis d'exploitation des rejets)*** entitles its holder the right to exploit artificial deposits located within the prescribed area.

This right is evidenced by a mining title called a "Certificate of Exploitation of Tailings".

The term of validity of the Licence for the Exploitation of Tailings is 5 years renewable several times for the same duration.

The Small-scale Mine Exploitation Licence entitles its holder to carry out small-scale mining operations.

Small-scale mining operations refer to mining deposits that do not allow for economically viable large-scale mining exploitation and result from exploration work undertaken by the State or the holder of an Exploration Licence.

The Small-scale Mine Licence is a real and exclusive property right, which is assignable, transferable and which may be leased.

This right is evidenced by a mining title called a "Certificate of Small-scale Mining".

Lease Agreements

The lease consists of renting all or a part of the rights relating to a mining authorization in return of a payment agreement between the lessor and the lessee, for a fixed or indefinite period of time without the right to sublet.

Under the mining code it is only possible to obtain lease agreements in order to exploit mining deposits and not exploration rights.

First, and prior to the conclusion of any lease agreement, the lessee has to demonstrate his eligibility for the mining title in question.

Then, as is the case for the issuing of mining rights, the conclusion of the contract must be preceded by an examination carried out by the Mining Registry.

In order to be valid the agreement must include:

- an accelerated termination clause either in case the lessee fails to pay the taxes, duties and royalties owed to the State or in case of non-compliance with laws and regulations which have financial or administrative consequences which are detrimental to the lessor;

- clauses setting out the conditions for the maintenance and the reinvestment necessary for the appropriate exploration and development of the mining deposit;

- clauses setting out the joint and several liability of the lessor and the lessee with regard to the State.

In addition, and in order to be opposable to third parties, the lease agreement must be registered with and kept at the mining registry in accordance with the procedure provided for in the MR.

The term of validity of the lease agreement corresponds to the term of validity of the lessor's unexpired title.

Securities

The following assets may be mortgaged:

- Exploitation Licences, Exploitation Licences for Tailings, Small-Scale Mining Exploitation Licences in full or in part;

- the immovables by incorporation which are located within the mining exploitation perimeter, notably factories, installations and machines built for the concentration, treatment and the transformation of the mineral substances contained in the deposits; and

- the fixtures used in mining exploitation.

All mortgage contracts require the prior approval of the Minister. The process requires the filing of an application by the holder of a mining title or the mortgagee with the Mining Registry which carries out the registrar examination of the application, which is followed by the Directorate's technical evaluation which forms the basis of the Minister's decision. An approved mortgage is registered against the payment of a registration fee.

Forced execution of mortgages takes place in accordance with the provisions of substantive law.

Transfer

Mining rights may be wholly or partially transferred to a transferee, who is required to be eligible to apply and hold a mining right. The process requires review by the Mining Registry.

The transferee is liable for civil and criminal matters vis-à-vis third parties however he may be relieved from such liability if he can prove that either the damage was caused before the transfer occurred or that it is the cause of fraudulent exploitation by a third party.

ENVIRONMENTAL REGULATIONS

There is no Environment Code in DRC, but the MC provides for certain environmental obligations related to mining activities.

In addition, it is to be noted that a Forestry Code was enacted in the DRC and may apply in cases of exploration or exploitation of a deposit located in a forest.

Environmental studies

The issuing of mining rights requires the completion of prior environmental studies.

- The issuing of an exploration right requires elaboration of a Mitigation and Rehabilitation Plan ("**MRP**") by which the applicant undertakes to carry out certain measures to mitigate the impact of activities on the environment, as well as rehabilitation measures in the area where the activities will take place, and to provide a financial guarantee to cover or guarantee the conservation measures and rehabilitation costs of the environment;

- The granting of an exploitation right requires the elaboration of an EIS which is a prior scientific analysis of the foreseeable potential effects an activity will have on the environment, as well as an analysis of the acceptable levels thereof and the measures to be taken to ensure conservation of the environment; and an EMMP which is a programme for the implementation and monitoring of measures contained in the EIS in order to eliminate, reduce and possibly offset the damaging consequences of the project on the environment.

These studies have to be approved by the Department in charge of the Protection of the Mining Environment.

The holder of a mining right is liable for environmental damage only if he has not respected the provisions of these approved studies.

The MC does not provide for civil or criminal liabilities (including shareholder/director liability) and only provides for the suspension of mining activities and the confiscation of monies paid by the mining title holder as a guarantee in respect of its environmental obligations.

SAFETY AND HEALTH

Mineral Exploitation is subject to safety, health and protection measures decreed by the Mines Administration pursuant to prevent or remove causes of danger which the activity inflicts on public safety and health and in preservation of deposits, springs and public works.

The representatives of the Mines Administration have the capacity of Judicial Police Officers to investigate and ascertain any breach of the provisions of the MC and its implementing measures.

Holders of mining exploitation rights must publish the safety instructions and they must be made aware to the employees and any individuals who enter the mine site. The use of explosive substances is subject to special regulations.

In respect of the MC, any serious or fatal accident in a mine or pursuant to its related operations must be immediately notified to the Directorate of Mines and the competent administrative and judicial authorities.

LAND OWNERSHIP AND ANCILLARY INFRASTRUCTURES

Holders of mining rights must build and maintain the infrastructure required for the activities relating to the titles or the environmental authorizations relating thereto, which is subject to the competent administrative authority's consent and the local authority with territorial jurisdiction's consultation.

All public utility infrastructure built by the holder of a mining right which remains in place upon expiry of the term of validity of his right, becomes part of the State's public domain, except for a written and express agreement to the contrary between the holder and the State (Art. 214 MC).

Any modification that may render land unfit for cultivation or deprive its rightful owners of enjoyment of its surface rights due to mining activity, permits the rightful owner to request fair compensation, corresponding to the value or the rent of the land plus 50%.

COMMERCIAL COMPANIES REGIME

The DRC is a member state of the organisation of business law in Africa (OHADA). OHADA Uniform Acts entered into force in the DRC on the 12th September 2012. As a result, the DRC company law is now governed by the Uniform Act relating to Commercial Companies and Economic Interest Groups.

According to the OHADA Uniform Act on Commercial Companies, there are 6 types of commercial companies that have legal existence from the day of registration with the Commercial Registry:

Commercial companies with limited liability:

- Private limited liability company: **Société à Responsabilité Limitée (SARL)**
- Public limited or stock company: **Société Anonyme (SA)**; and

Commercial companies with unlimited liability:

- general partnership ("société en nom collectif – SNC");
- limited partnership ("société en commandite simple – SCS");
- OHADA also edicts some provisions governing joint ventures ("société en participation"); and
- facto partnership ("société de fait"), although both are not eligible for the registration at the Commercial Registry and do not have a legal existence in the strict sense.

Commercial companies with limited liability are the most commonly used company in the case of large investments, the SA notably. This note will focus below on the legal regime applicable to this type of company.

A minimum share capital of CFAF 10 million and CFAF 100 million in the case of a public offering is required.

The SA may be managed in two ways depending on its size, either by a managing director when there is a maximum of three 3 shareholders or by a board of directors when there are two (2) or more shareholders.

A sole Managing Director (MD) acting as chief executive officer running the company, taking all the day-to-day decisions on his own. Major decisions such as approval of the accounts or amendments of the Articles are also taken directly or ratified by this sole shareholder.

A Board of Directors is presided over by a Chairman who may have a casting vote.

The Board of Directors shall have a minimum 3 members and a maximum of 12 members. Two out of three members of the Board shall be shareholders of the company. The Board's decisions are taken during board meetings. The Board can be assisted by a General Manager for day-to-day decisions which do not require a board meeting. The Chairman of the Board can act as such General Manager or the General Manager can be a separate individual. Major decisions shall be ratified or directly taken in shareholders' meeting.

FOREIGN INVESTMENT REGIME

Mining activities are not governed by the general provisions of the Investment Code enacted by the Law No. 004/2002 dated 21 February 2002.

According to Article 3 of this Code, though the Investment Code is not applicable to the mines and hydrocarbons sector, investors in the mining sector are required to lodge a copy of their investment file with the National Agency for the Promotion of Investments *(Agence Nationale pour la Promotion des Investissements, ANAPI)*.

Investments in the mining sector are governed by the MC and the MR.

Import rules

According to the MC, the import of goods and products strictly for mining use, by the holder of the mining title, his affiliates and sub-contractors, benefit from the preferential regime, with import duties ranging between rates of 2% – 5% for the various phases of the project. Fuel, lubricants, reagents and consumer goods are subject to a single import duty of 3% throughout the duration of the project.

Before the commencement of work, the holder must submit a list including the number and value of all movable property, equipment, vehicles or mineral substances and other inputs expected to be imported. The list must be approved by a joint Decree issued by the Ministries of Mining and Finance, within 30 working days following the date of receipt of the letter of application for approval by the Ministry of Mining and the copy by the Minister of Finance.

The personal belongings of expatriate employees employed by the holder in connection with the project are exempt from import taxes and duties in accordance with customs legislation.

Export rules

A Ministerial Decree dated 5 April 2013 bans the export of copper concentrates and cobalt concentrates as well as merchant mining products that have humidity exceeding 25%. As it is a controversial decree with no date of entering into force, it will possibly be blocked, postponed or amended. If it is enforced, the mining sector, mining operators and the climate of investment in the DRC will be adversely affected.

Foreign exchange rules

The foreign exchange regime for mining activity in the DRC is governed by the MC.

The holder of a mining right benefits from the freedom to convert capital contributions and funds in the DRC at the best exchange rate offered by the authorized banks on a daily basis.

The holder is also authorized, after paying taxes and charges, transfer of revenue, current transfers and transfers of movement of capital, to make various numbers of payments and acquisitions in favour of non-residents, such as the payment of fees or commission of services rendered abroad and the payment of royalties and dividends.

In addition, foreign personnel residing in the National Territory, employed by the holder of a mining title, are guaranteed the free conversion and transfer of all or part of the amounts owed to them, provided that the interested parties have paid their taxes and various charges in accordance with the general legislation of the DRC. All such transfers of required funds must be undertaken through an approved bank under the condition that an exchange document is signed.

The holder who exports authorized mining products is obliged to open and manage what is called a "Main Account" with a foreign bank for the handling of funds that he is authorized to keep abroad.

The holders who exports commercial mining products must avail his main account for the servicing of foreign debt, receipts from his export sales up to a limit of 60%. The holder must also repatriate into his main national account held in the DRC, 40% of the receipts from exports within 15 days of receipt of these funds in the Main Account held abroad.

The holder must pay the Central Bank of the DRC exchange control duties of 2/1000 on any payment abroad made by the approved bank account(s) from banks in the DRC both for revenue and for expenses, with the exception of the repatriation receipts originating from the main account and any debit or credit transactions made from his main account, and transfers made for the servicing of foreign debt.

Bilateral investment treaties

The DRC has signed bilateral investment treaties (BIT) with the United States, the United Kingdom, Egypt, France, Guinea, Germany, Italy, Switzerland, Korea, South Africa and Benelux.

Each of these treaties provides for various investment protections to foreign investors.

EMPLOYMENT LAW

Employment law in the DRC is governed by the Employment Code enacted by Law n° 015/2002 dated 16 October 2002, which is under revision.

The Employment Code governs work relationships between employees and companies operating on the DRC's territory.

Practical formalities

All individuals or corporate bodies seeking to carry out an activity which requires the hiring of employees must make a declaration to the Employment Inspection bureau (Inspection du travail) and to the National Office for Employment (Office National de l'Emploi) 15 days prior to the commencement of the activity.

In the same way, when a new employee is hired, any employer must make a declaration concerning each employee to the National Office for Employment (Office National de l'Emploi) within 48 hours.

Employment contract

The employment contract is either permanent or for a fixed-term duration.

A fixed term contract may not exceed 2 years. No employee may conclude more than 2 fixed term contracts with the same company nor renew his contract more than 1 time (except for certain work listed by decree of the Minister of Labour). A fixed term contract may not be terminated before it reaches its term, except in the event of gross misconduct ("faute lourde").

Any employment contract, either fixed or permanent, may contain a probationary period which cannot exceed 6 months, and in the case of manual labourers without specialised skills, the probationary period is fixed at 1 month.

The termination of a permanent employment contract by the employer is conditioned by a valid reason (concerning the aptitude or the conduct of the employee, or the necessities of the functioning of the company) and a prior written notice of a minimum of 14 working days (increased by 7 days for each working year), except in the event of dismissal due to gross misconduct.

The statutory working week is 45 hours.

Employees' representation

Employees' representatives must be elected in all companies employing more than 20 employees.

Employees with similar or connected jobs may freely form a trade union.

Collective Bargaining agreements (CBA)

No specific CBAs exist for the mining sector. The National Inter-professional Bargaining Agreements is commonly used in the mining sector and others.

TAX REGIME

The taxation regime applicable to the permit holder is governed by the MC and the general tax code applicable in the DRC, and it subjects the permit holder to both general and specific taxes. The holder may also benefit from tax exemptions or specific provisions according to the MC. Moreover, some taxes, in particular the corporate tax, may be arranged in a way favourable to the permit holder as provided in the MC.

According to the MC, an operating mining company is liable for the below mentioned taxes.

Mining Royalties

The holder of a mining exploitation title is liable for mining royalties which are calculated on the basis of the amount of sales minus the costs of transport, analysis concerning the quality control of the commercial product for sale, insurance, and costs relating to the sale transaction.

The holder is liable for these royalties on all commercial products as of the effective date the exploitation begins.

Royalty's rates are set as follows:

– 0.5% for iron or ferrous metals;

– 2% for non-ferrous metals;

– 2.5% for precious metals;

– 4% for precious stones;

– 1% for industrial minerals, solid hydrocarbons and other substances not specified; and

– 0% for standard construction materials.

Income Tax

The holder is legally liable for:

- business tax on salaries payable by the employees at the general rate;
- tax on lease income in accordance with the provisions of substantive law;
- tax on investment income, in accordance with the general rules of DRC law, except for:
- interest paid by the holder concerning loans in foreign currency which are exempt;
- dividends and other distributions paid by the holder to his shareholders which are subject to tax at the rate of 10%.

Tax on profits

The holder is liable for tax on profits at the rate of 30%.

Value Added Tax

The holder is liable for Value Added Tax ("VAT") on sales made and services rendered on the National Territory.

General rate: 16%. Less than 16% for some products listed by the VAT legislation.

Exceptional Tax on the remuneration of expatriates

The holder is liable for the exceptional tax on expatriate remuneration at the rate of 10% determined in terms of the salaries generated by the work carried out or the position held by the expatriate employee in the DRC, and deductible from the taxable base of the tax on profits.

Other tax

Property tax: The holder is liable for property tax only on the properties for which tax on the surface area of mining and hydrocarbons concessions is not due.

Tax on Vehicles: The holder is liable for taxes on vehicles. However, taxes on vehicles are not payable on vehicles used for transporting people or materials, vehicles used for handling or traction, which are used exclusively within the mining project area.

Tax on the surface area of the mining and hydrocarbons concessions: The holder of an Exploration Licence is liable for a tax on the surface area of the mining concession.

Special road tax: The holder is liable for special road tax.

Tax treaties

DRC has signed tax treaties with South Africa, Switzerland, United Kingdom and the Republic of Zimbabwe. However, these tax treaties have either not come into force or have a very limited or specific scope.

ZAMBIA

INTRODUCTION

The Zambian legal system is based on the common law tradition. Most of its private and public law has followed the English legal system or have been heavily influenced by it. Zambian civil procedure is influenced by English law and is reliant upon many of the English civil procedures and practices.

Zambia's mining industry is principally regulated by the Government of Zambia through the Mines and Minerals Development Act No. 7 of 2008 (the "**Mines Act**") which repealed and replaced the Mines and Minerals Act Chapter 213 of the Laws of Zambia ("**Mines and Minerals Act**"). The Mines Act established the office of the Director of Mines, who generally supervises and regulates the proper and effectual carrying out of the provisions of the Mines Act. The Director of Mines is responsible for issuing and renewing large and small-scale mining licenses and plays a general supervisory role. The Mines Act also establishes the office of the Director of Geological Survey, who is generally responsible for issuing

and renewing prospecting licenses and prospecting permits. Matters relating to mine safety are supervised by a Director of Mines Safety. The Mines Act also established a Mining Advisory Committee (MAC), which advises the Minister of Mines, Energy and Water Development ("**Minister**"), the Director of Mines and the Director of Geological Survey in relation to matters prescribed by or under the Mines Act.

The principal laws regulating the mining industry are the Mines Act and the Environmental Management Act No. 12 of 2011 (the "**Environment Act**"). The primary regulatory body for the mining sector is the Ministry of Mines, Energy and Water Development (the "**Ministry**"). The Ministry has several departments that supervise activities within the sector. The Environment Act on the other hand, is administered by the Zambia Environmental Management Agency ("**ZEMA**").

All rights of ownership in searching for, mining and disposing minerals wheresoever located in Zambia are vested in the President of Zambia ("**President**") on behalf of Zambia. Any right, title or interest which any person may possess in or over the soil in, on or under which minerals are found is subject to the authority of the President.

GENERAL

Rights of prospecting for mining and disposing of minerals are acquired and held under or in accordance with the Mines Act. It is prohibited for a person to prospect for minerals or carry on mining operations or mineral processing operations except under the authority of a mining right or mineral processing licence granted under this Act.

The following mining rights are granted under the Mines Act;

(a) A prospecting licence;

(b) A large-scale mining licence;

(c) A large-scale gemstone licence;

(d) A prospecting permit;

(e) A small-scale mining licence; and

(f) An artisans mining right.

The non-mining rights that may be granted are a mineral processing licence and a gemstone sales certificate.

Mining rights and non-mining rights are acquired upon application in the prescribed form and following payment of a prescribed fee by either an individual or a company. Rights are granted on a first-come, first-serve basis to any applicant who is eligible to hold a mining right.

A mining right or non-mining right shall not be granted to an individual who;

(a) is under the age of 18 years;

(b) becomes an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any written law, or enters into any agreement or scheme of composition with creditors, or takes advantage of any legal process for the relief of bankrupt or insolvent debtors; or

(c) has been convicted, within the previous ten years, of an offense involving fraud or dishonesty, or of any offence under the Mines Act or any other law within or outside Zambia, and been sentenced therefore to imprisonment without the option of a fine or to a fine exceeding KR9,000 (equivalent of approximately US$1,676.45).

A mining right or non-mining right cannot be granted to or held by a company:

(a) which is in liquidation, other than liquidation which forms part of a scheme for the reconstruction of the company or for its amalgamation with another company;

(b) unless the company is incorporated under the Companies Act of Zambia;

(c) which has not established an office in Zambia; or

(d) which has among its directors or shareholders any person who would be disqualified as an individual in terms of (b) and (c) above namely an undischarged bankrupt or convict.

A holder of a mining right or mineral processing licence shall maintain an office in Zambia to which communications may be sent and shall give notice to the Director, the Director of Mines Safety and the Director of Geological Survey of that address and of any changes of that address. The use by a holder of an office of a consultant or other agent of the holder for any purpose related to the requirements of the Mines Act shall not be considered as an office.

REGULATION OF EXPLORATION

A person may only prospect for minerals upon obtaining a large-scale prospecting license or small-scale prospecting permit which grant the right of exclusive exploration for various minerals as indicated on the license or permit within the prospecting area.

Any document or transaction purporting to grant a mining right to any person not entitled to hold the right shall be void and of no effect.

A prospecting permit, small-scale mining license, small-scale gemstone license and an artisan's mining right cannot be granted to a person who is not a citizen of Zambia or a company which is not a citizen-owned company. A "citizen-owned company" is defined as being a company in which at least 51% of its equity is owned by Zambian citizens and in which Zambian citizens have significant control of the management of the company.

A prospecting permit cannot be granted over an area in excess of 300 cadastre units. A cadastre unit means a quadrilateral formed by the intersection of meridians and parallels with a distance equal to six sexagesimal seconds and that covers an average planimetric surface of three point three four zero hectares. We understand from inquiries at the Ministry that is approximately 10 sq km) on the other hand, a person and in the case of a company or its subsidiaries shall not hold large-scale prospecting licenses whose accumulated total area of more than 149,700 cadastre units (approximately 4,990 sq km).

Further, the holder of a prospecting license is obliged by statute to comply with the following statutory requirements which are conditions attached to the license:

(a) commence prospecting operations within 90 days, or such further period as the Director of Geological Survey may allow, after the date of the grant of the license;

(b) give notice to the Director of Geological Survey of the discovery of any mineral deposit of possible commercial value within 30 days of the discovery;

(c) expend on prospecting operations not less than the amount prescribed or required by the terms and conditions of the license to he so expended;

(d) carry on prospecting operations in accordance with the program of prospecting operations;

(e) notify the Director of Geological Survey of the discovery of the mineral to which the prospecting license relates within a period of 30 days of such discovery;

(f) backfill or otherwise make safe any excavation made during the course of the prospecting operations, as the Director of Geological Survey may specify;

(g) permanently preserve and safeguard any borehole in a manner directed by the Director of Geological Survey, and to surrender to government without compensation, the drill cores, mineral samples, the boreholes and any water rights in respect therefore, on termination;

(h) unless the Director of Geological Survey stipulates otherwise, remove within 60 days of the expiry of the prospecting license, any camp, temporary buildings or machinery installed or erected, or make good any damage occasioned to the ground on account of such removal;

(i) a holder of a prospecting licence shall keep and preserve such records as the Minister may prescribe relating to the protection of the environment;

(j) subject to the conditions of the prospecting licence and the approval of the Director of Geological Survey, expend on prospecting, in accordance with the prospecting programme, not less than the amount specified in the prospecting licence;

(k) submit to the Director of Geological Survey, at least quarterly, reports containing the information required under the licence and the Act.

(l) a holder of a prospecting licence shall keep full and accurate records of the prospecting operations which should indicate:

(i) the boreholes drilled;

(ii) the strata penetrated with detailed logs of such strata;

(iii) the minerals discovered;

(iv) the results of any seismic survey or geo-chemical, geophysical and remote sensing data analysis;

(v) the result of any analysis or identification of minerals removed;

(vi) the geological interpretations of records maintained on the above matters;

(vii) the number of persons employed by the individual or company;

(viii) any other prospecting work;

(ix) the costs incurred; and

(x) such other matters as may be prescribed by the Minister in a Statutory Instrument.

Further, the holder of a prospecting permit shall furnish at least once in every three (3) months, digital and hardcopies of the records to the Director, Director of Geological Survey and Director of Mines Safety.

A person who:

(a) fails to keep any record or information required to be kept as required in (l) above;

(b) fails to supply any record or mineral samples to the Director of Mines, Director of Geological Survey and Director of Mines Safety in accordance with (l) above; or

(c) supplies any false or misleading record or information;

commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units (KR36,000) (approximately US$6,700) or to imprisonment for a period not exceeding two years, or to both.

The Mines and Minerals Development (General) Regulations, 2008 ("**Mines Regulations**") requires the holder of a licence or mining right, subject to the direction of the Mining Cadastre Officer, at the holders own cost, to obtain or update the perimeter beacons data and obtain a pegging certificate in a prescribed form.

The Mines and Minerals Development (General) (Amendment) Regulations 2013 passed on 8th February 2013 ("**SI 17 of 2013**") provide for annual prospecting expenditures set out in the sixth schedule to the regulations. A holder of a mining right shall submit annual prospecting expenditure statements accompanied by copies of the relevant transaction documents to the Director of Geological Survey. Further, holders of mining rights are also required to pay area charges on or before the anniversary of the grant of the mining right.

It is an offence to fail to expend the minimum annual prospecting expenditure and the licence holder is liable on conviction to a fine equal to the difference between the minimum annual prospecting expenditure and the amount actually expended on prospecting operations in that year if less than five hundred thousand penalty units (KR90,000) (approximately US$16,766) or a fine of five hundred thousand penalty units (KR90,000) (approximately US$16,766) if the difference between the minimum annual prospecting expenditure and the amount actually expended on prospecting operations in that year exceeds the equivalent of five hundred thousand penalty units (KR90,000) (approximately US$16,766).

A holder of a prospecting licence who defaults on payment of the prescribed area charges commits an offence and is liable on conviction to a fine of fifteen thousand penalty units (KR2,700) (approximately US$500) for each day that the holder is in default.

In addition to the penalties above, the Mines Act provides that a mining right or a non-mining right can be cancelled or suspended where the holder fails to comply with any requirement of the Mines Act or contravenes a condition of the mining right or non-mining right. The grounds on which a mining right and a non-mining right can be cancelled or suspended are discussed below.

Duration and tenure

Large-scale prospecting licenses and small-scale prospecting permits are granted for periods of two years and five years respectively. While small-scale prospecting permits are non-renewable, large-scale prospecting licenses may be renewed for a further period of two years but the total maximum period shall not exceed seven (7) years.

A holder of a prospecting licence may, not later than three months before the expiry of the prospecting licence, apply to the Director of Geological Survey for the renewal of the licence in the prescribed manner and form upon payment of the prescribed fee. The Director of Geological Survey shall renew a prospecting licence for such period, not exceeding two years where the holder of the licence:

(a) is not in breach of any condition of the licence or any provision of the Mines Act;

(b) undertakes to carry out during the renewal period an adequate programme of prospecting operations; and

(c) relinquishes at least fifty per centum of the initial prospecting area on the first renewal and at least fifty per centum of the balance on the second renewal.

The Director of Geological Survey may, where the Director of Geological Survey considers it necessary for the completion of a feasibility study commenced by a holder of a prospecting licence into the prospects for recovery of any mineral deposit and its commenced significance, renew the prospecting licence for a further period but not exceeding one year.

In the event that the holder of a large-scale prospecting license applies for a mining license over a prospecting area, the prospecting license continues to be effective until the date of renewal of the prospecting license or grant of the mining license, or the date on which such application is refused.

Transfer of licence and change of control

A holder of a prospecting license who intends to transfer a large-scale prospecting license or any interest therein is required to notify the Minister, not less than thirty days before the intended transfer.

The holder of a prospecting license is required to provide in the notification to the Minister, details regarding the transferee as would be required in the case of an application for a prospecting licence and the transferee is required to complete an application for a mining right as if the proposed transferee were applying for a mining right. Recent amendments to the Mines Act and the Property Transfer Tax Act chapter 340 of the Laws of Zambia ("**PTT Act**") requires the payment of property transfer tax on the transfer of a mining right or an interest therein. The rate of tax is ten percent (10%) of the realized value of the mining right. The receipt of payment of the property transfer tax and a tax clearance certificate is now required to be submitted with the application for transfer.

Where the Minister is satisfied that the proposed transferee is not disqualified from holding a prospecting license under the Mines Act, the Minister may approve the transfer of the large-scale prospecting license and notify the applicant accordingly. Upon transfer of a prospecting license, the transferee assumes and becomes responsible for all the rights, liabilities and duties of the transferor under the prospecting license for the unexpired period of the license.

A holder of a small-scale prospecting permit who intends to transfer, assign, encumber or deal with the permit in any manner, is required to apply to the Director of Geological Survey for approval therefore, providing prescribed particulars concerning the proposed transferee, assignee, or other party concerned.

If the application and proposed transferee meet the requirements of the Mines Act, the Director of Geological Survey may grant approval for the transfer, assignment, encumbrance or other dealing with the exploration permit for the unexpired period of the permit.

Decisions regarding the transfer of licenses or an interest therein must be referred to MAC for its advice prior to the transfer by the Minister, Director of Mines or Director of Geological Survey.

The transfer of a mining right or a change of control may also require approval of the Competition and Consumer Protection Commission ("**CCPC**") where thresholds under the Competition and Consumer Protection Act No 24 of 2010 ("**Competition Act**") are satisfied.

Consents may also be required for public companies that hold mining licences and in which the Government has an interest. This is discussed under Regulation of Mining Operations below.

REGULATION OF MINING OPERATIONS

Mining operations can only be undertaken under the authority of a large or small-scale mining license granted pursuant to the Mines Act.

Mining rights are granted on a first-come, first-served basis following successful application by a holder of a prospecting license and following payment of a prescribed fee.

A mining license grants wide and exclusive rights to mine, exploit and dispose of various minerals in a mining area as indicated on the license. The area covered by a large-scale mining license cannot exceed 7,485 cadastre units (approximately 250 sq km).

A holder of a large-scale mining license is required to comply with the following statutory obligations:

(a) develop the mining area and carry on mining operations with due diligence and in compliance with the holder's program of mining operations and environmental management plan;

(b) take all reasonable measures on or under the surface to mine the mineral to which the license relates;

(c) implement the local business development proposals attached to the license;

(d) employ and train citizens of Zambia in accordance with the proposals attached to the license;

(e) to comply with the proposed forecast of capital investment attached to the license; and

(f) demarcate the mining area and keep it demarcated in the prescribed manner;

Further, a holder of a mining licence shall maintain at the holder's office:

(a) complete and accurate technical records of the operations in the mining area;

(b) copies of all maps and geological reports, including interpretations, mineral analysis, aerial photographs, core logs, analysis and test results obtained and compiled by the holder in respect of the mining area;

(c) drill cores in respect of the mining area;

(d) accurate financial records of the operations in the mining area and such other books of account and financial records as the Director of Mines may require; and

(e) where the holder is engaged in any other activity not connected with the operations under the mining license, separate books of account from the operations under the license.

A holder of a mining right shall:

(a) permit an authorized officer at any time to inspect the books and records maintained in pursuance of s30(2)(a) of the Mines Act and deliver to the Director of Mines, without charge, copies of any part of the books and records as the Director of Mines may require;

(b) keep and preserve, as the Minister may prescribe, records in relation to the protection of the environment;

(c) submit to the Director of Mines such reports, records and other information as the Director may require concerning the conduct of the operations in the mining area; and

(d) furnish the Director of Mines with a copy of the annual audited financial statements within three months of the end of the financial year showing the profit or loss for the year and the state of the financial affairs of the holder at the end of each financial year.

A person who:

(a) fails to keep any record or information required to be kept under section 30 (2) of the Mines Act;

(b) fails to supply any record to the Director in accordance with section 30 (2) of the Mines Act; and

(c) supplies any false or misleading record or information;

commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units (KR36,000) (approximately US$6,700) or to imprisonment for a period not exceeding two years, or to both. The Mines Regulations require the holder of a licence or mining right, subject to the direction of the Mining Cadastre Officer, at the holders own cost, to obtain or update the perimeter beacons data and obtain a pegging certificate in a prescribed form.

SI 17 of 2013 has introduced further obligations on holders of mining rights which are discussed above. In addition, the holder of a mining licence or mineral processing licence shall submit to the Director of Mines not later than the 28th February in each year, a report on the operations carried out in the mining area and operations ancillary thereto during the previous year. The report should include:

(a) tonnage, type and grade of ore mined and its source;

(b) tonnages and grade of ore depleted from or added to reserves or moved from one category of ore reserve to another;

(c) a report on exploration work carried out within the mining area;

(d) the total footages of primary development, secondary development and exploratory drilling completed;

(e) calculations showing the ore recovery and waste dilution factors;

(f) the recovery percentages and efficiency of all mining and metallurgical processes and a metallurgical balance sheet showing the disposition of all metal and mineral products depleted from the ore reserves;

(g) a brief report on any research projects or major technical investigations carried out and results to date;

(h) operating cost sheet showing in detail the average cost of production expressed in cost per tonne of ore mined and treated and cost per unit of finished product;

(i) statement of work carried out on capital projects and expenditure thereon;

(j) quantities and grade of end products produced, quantities sold locally or exported and average selling prices;

(k) average number of employees broken into number and category of Zambian citizens and expatriates employed during the previous year;

(l) the holders compliance with the approved local business development programme; and

(m) a brief report on training carried out.

The holder of a mining licence or mineral processing licence shall submit to the Director of Mines not later than the last day of November in each year, a programme of operations in respect of the mining area for the ensuing year. The programme referred to in sub-regulation (1) shall include:

(a) an estimate of the tonnages and grades of ore or other material that will be mined or reclaimed and treated and their source;

(b) an estimate of primary and secondary development and exploratory drilling planned for the year;

(c) an estimate of the quantities of mineral products which will be produced, estimated average operating costs and anticipated selling prices for the year;

(d) details and estimated costs of any capital projects to be undertaken;

(e) a forecast of any changes anticipated in the mining methods, treatment processes or marketing arrangements;

(f) a statement of any research projects or major investigations to be carried out;

(g) the estimated number of staff and labour requirements, stating the number of and category of Zambians and expatriates to be employed;

(h) a brief preview of the training programme for the year; and

(i) a brief preview of the local business development programme for the year.

A small-scale license may be upgraded to a large-scale mining license at the discretion of the Minister.

Duration and tenure

Large-scale and small-scale mining licenses are granted for a term not exceeding twenty-five years and ten years respectively, and are renewable for similar terms. An application for renewal of a large scale mining licence must be made at any time not later than one year before the expiry of the licence while renewal of a small scale mining licence must be at least six days before expiry.

A holder of a large-scale mining licence may, at any time not later than one year before the expiry of the licence, apply to the Director of Mines for the renewal of the licence in respect of all or any part of the mining area. An application for renewal is made to the Director of Mines in the prescribed manner and form upon payment of the prescribed fee.

An application for renewal should include:

(a) a statement of the period, not exceeding twenty five years, for which the renewal is sought;

(b) details of–

- the latest proved, estimated and inferred ore reserves;
- the capital investment to be made in, and production costs and revenue forecasts in respect of, the period of renewal;
- any expected changes in methods of mining and treatment; and
- any expected increase or reduction in mining activities and the estimated life of the mine;

(c) a proposed programme of mining operations for the period of renewal; and

(d) where the renewal is sought in respect of part only of the mining area, a plan identifying that part.

The Director of Mines shall, where an application for renewal of a large-scale mining licence meets the requirements of the Mines Act, renew the large scale mining licence for a period not exceeding twenty five years. The renewal may be with or without a variation of the conditions of the licence.

An application for renewal of a large scale mining licence will be rejected where:

(a) the development of the mining area has not proceeded with reasonable diligence;

(b) minerals in workable quantities do not remain to be produced;

(c) the programme of the intended mining operations will not ensure the proper conservation and use in the national interest of the mineral resources in the mining area; or

(d) the applicant is in breach of any condition of the licence or any provision of the Mines Act.

The Director of Mines shall not reject an application on any ground referred to in paragraph (a) above, unless the Director of Mines has given the applicant the details of the default and the applicant has failed to remedy the default within three months of the notification. Similarly, he shall not reject an application under paragraph (b) above unless the Director of Mines has given the applicant an opportunity to make written representations thereon. Lastly, the Director of Mines shall not reject an application under paragraph (c) above unless the Director has notified the applicant and the applicant has failed to propose amendments to the proposed programme of mining operations within three months of the notification.

The period of renewal of a large-scale mining licence shall be such period, not exceeding twenty-five years, as is reasonably required to carry out the mining programme. The Director of Mines shall, on the renewal of a licence, attach to the licence the approved programme of mining operations to be carried out in the period of renewal.

A Holder of a mining right other than a holder of a prospecting licence or a prospecting permit or mineral processing licence shall apply to the Director of Mines Safety for an annual operating permit in the prescribed manner and form upon payment of the prescribed fee. The application will be granted where the application meets the requirements of the Mines Act and will be rejected if the holder of the mining right is in breach of any condition of the mining right or any provision of the Mines Act.

A mining right holder who conducts mining or mineral processing operations without an annual operating permit commits an offence and is liable, upon conviction to a fine of one million penalty units (KR18,000) (approximately US$33,532).

Transfer of licence and Change of Control

A large-scale mining license or any interest therein may not be transferred, assigned, encumbered or dealt with in any other manner without the approval of the Director of Mines.

If a license holder wishes to transfer, assign, encumber or deal in any manner with a large-scale mining license, the license holder is required to apply to the Minister giving prescribed particulars concerning the proposed transferee, assignee, or other party concerned. However, the right or interest transferred is only for the unexpired period of the license.

Recent amendments to the Mines Act and the PTT Act require the payment of property transfer tax on the transfer of a mining right or an interest therein. The rate of tax is ten percent (10%) of the realized value of the mining right. This tax has to be paid and a tax clearance certificate obtained so that these documents are submitted with the application to transfer.

Where an application and proposed transferee meet the requirements of the Mines Act, the Minister is required to grant approval to the transfer, assignment, encumbrance or other dealing with the large-scale mining license or interest therein.

A small-scale mining license or any interest therein may not be transferred, assigned, encumbered or dealt with in any other manner without the approval of the Director of Mines, to whom an application to transfer the license should be made giving the prescribed particulars concerning the proposed transferee, assignee, or other party concerned.

This tax has to be paid and a tax clearance certificate obtained so that these documents are submitted with the application to transfer.

Where an application and transferee meet the requirements of the Mines Act, the Director should grant approval to the transfer, assignment, encumbrance or other dealing with the small-scale mining license or interest therein for the unexpired period of the license.

Decisions regarding the transfer of licenses or an interest therein must be referred to MAC for its advice prior to the transfer by the Minister, Director of Mines or Director of Geological Survey.

The transfer of a mining right or a change of control may also require approval of the CCPC where thresholds under the Competition Act are satisfied.

Public Companies whose shares are registered under the Securities Act, Chapter 354 of the Law of Zambia ("**Securities Act**") are also regulated by the Securities Act. Takeovers or Substantial requisitions of Companies regulated by the Securities Act must be undertaken in accordance with the Securities (Takeovers and Mergers) Rules (the "**Takeover Rules**") issued pursuant to the Securities Act.

The Takeover Rules set an acquisition threshold of 35 percent of the voting rights of a company as the trigger for a mandatory offer. The person acquiring shares in the company must make a 35% mandatory offer to the other shareholders unless an exemption is obtained from the Securities and Exchange Commission. Prior to obtaining the SEC waiver, SEC will need to be satisfied that minority shareholders would not be interested in exercising their rights under the mandatory offer requirements. Fees are payable for an application for authorisation or waiver. Further the involvement of a stock exchange and a stockbroker may be required which entails additional fees.

In terms of section 36 of the Securities Act, dealings in securities must be done through a securities exchange such as the Lusaka Exchange ("Luse"). A notification shall be filed to Luse where any dealings in securities occur and fees to Luse and a broker shall also be paid.

PRE-EMPTION RIGHTS

The State does not have pre-emption rights over areas that are subject to a mining right.

Therefore, as long as a person obtains the necessary consent from the Ministry, they are free to transfer, assign, encumber or deal with their mining rights in any other manner they deem fit, subject to the requisite regulatory approvals.

ENVIRONMENT

Regulatory Framework

Environmental protection is governed by the Environment Act which repealed the Environmental Protection and Pollution Control Act Chapter 204 of the Laws of Zambia (the "**Repealed Act**"). The Environment Act provides for integrated environmental management and the protection and conservation and the sustainable management and use of natural resources.

The Environment Act also provides for the continued existence of the Environmental Council of Zambia ("**ECZ**") which was established under the Repealed Act and has since been renamed as the ZEMA which is mandated to among others, administer, monitor and enforce measures for the protection of the environment and the prevention of pollution under the Environment Act.

Any developer seeking to undertake any project that may have an effect on the environment is required to obtain the written approval of ZEMA. The implementation of such project must be in accordance with any conditions attached in granting such approval.

A developer seeking to undertake prospecting, exploration or mining operations is required to prepare and submit an environmental project brief.

Where ZEMA in consultation with the Ministry of Mines, is satisfied that a project is unlikely to have significant impact on the environment or that the project brief discloses sufficient mitigation measures, ZEMA will issue their approval subject to certain conditions, where applicable.

If, however, ZEMA considers that the project is likely to have an adverse impact on the environment, it may direct that an Environmental Impact Statement ("**EIA**") should be prepared by the developer. The EIA would be required, even if the developer is undertaking any project as part of a previously approved project. Failure to submit a project brief or EIA or to comply in any way constitutes an offense that is punishable either by way of fines or imprisonment. Mining and Mineral processing operations require an EIA.

The approved project brief forms the basis of the Environmental Management Plan. Holders of mining rights are, as a condition to the license, required to execute the environmental management plan and conduct mining operations only upon meeting the requirements of the Environment Act and obtaining an annual operating permit.

The holder of the mining right (meaning the entity in whose name a mining right is registered) is strictly liable for any harm or damage caused by mining operations and shall compensate any person whom the harm or damage is caused. Where any harm or damage is caused to the environment or biological diversity, compensation shall include the cost of reinstatement, rehabilitation or clean-up measures which are incurred and where applicable, the costs of preventative measures. Liability also attaches to the person who directly contributes to the act which results in the harm or damage where there is more than one person responsible for the harm or damage, liability is joint and several.

Environmental Protection Fund

It is a requirement under the Mines Act and a condition to the grant of a mining right for mining right holders to make cash contributions to the Environmental Protection Fund ("**EPF**") on an annual basis based on the results of an EPF audit undertaken every year.

The rehabilitation cost estimate is required to be lodged with the EPF as a cash contribution over a period of five (5) years.

There are certain concessions that may be granted against the lodgment of the full cash contribution. The concession applicable depends on the developer's environmental performance and classification. The concessions applicable are as follows:

(a) category 1 – 95% of the full rehabilitation cost;

(b) category 2 – 90% of the full rehabilitation cost; and

(c) category 3 – 80% of the full rehabilitation cost.

Instead of lodging the full assessed cost in cash over a period of five years, a mine developer is, depending on its performance, entitled to the concessions set out in (a) to (c) above such that only 5% in the case of category 1, 10% in the case of category 2 and 20% in the case of category 3, of the full assessed cost is payable in cash.

The table below sets out the cash contributions payable as result of the concessions:

	Category 1	Category 2	Category 3
Concession	95%	90%	80%
Cash contribution (of which 20% is to be lodged every year over a period of 5 years)	5%	10%	20%

In order to grant a concession against lodgment of the full assessed cost in cash, the Ministry requires that mine developers lodge a bank guarantee or bond to secure the payment of the balance of the assessed cost (i.e. the concession amount). The concession amount may be secured by way of standby letters of credit or bank guarantee.

The amount payable in cash depends on the category under which the mine is classified. The developer is required to lodge 20% of the cash amount each year.

However, the cash contribution must be deposited with the EPF over a period of five years. In the case of new projects, the cash contributions must be lodged beginning from the year the mining operation is commissioned, while in the case of existing mines, upon the submission of an acceptable environmental management plan.

Proof of financial capability to complete the rehabilitation of the mining area is a pre-requisite for classification under category 3. Although new projects are generally supposed to be classified under category 3, they can upon demonstration of capability be rated as category 2.

Notwithstanding the establishment of the EPF, the responsibility of land rehabilitation works, mine closure works and the costs associated with such works rests with the mining company and not the Government. Rehabilitation works must be undertaken upon closure of the mine, the mining company is entitled to a refund from the EPF contributions less any monies owed to the Government.

The EPF is designed to protect the government against the risk of having to expend its own resources on the rehabilitation of a mining area in the event a holder of a milling license fails to do so. The EPF also serves as assurance to the Director of Mines Safety that a mining right holder will execute the environmental impact statement in line with the Environmental Management Plan.

HEALTH AND SAFETY

In Zambia, matters relating to health and safety in the mines are regulated by the Mines Act and the Occupational Health and Safety Act No. 36 of 2010 (the "**OHS Act**"). The provisions of the Acts are supplemented by the provisions of Mining Amendment Regulations 1973 (the "**Mining Regulations**") which provide guidelines for officials and employees in the mining industry in respect of health and safety.

The regulatory bodies responsible for mine safety and health are the Occupational Health and Safety Institute established under the OHS Act and the Mines Safety Department under the Ministry Resources. These institutions administer, monitor and enforce measures relating to health and safety contained in the OHS Act and the Mines Act and the Mining Regulations.

Under the OHS Act, the mines are under a duty to ensure the health, safety and welfare of the employees and place and maintain employees in environments adapted to the employee's physical, physiological and psychological ability. A breach of the provisions of the OHS Act will attract a fine or a term of imprisonment.

In respect of the Mines Act and Mining Regulations, the Director of Mines or the Director of Geological Survey, in deciding whether or not to grant any mining right or mineral processing license, takes into account that there is no harm to human health. The grant of such mining right or mineral processing license is required to include such conditions as may be prescribed, by way of statutory instrument, in relation to the protection of human health.

The holder of the mining right (meaning the entity in whose name a mining right is registered) is strictly liable for any harm caused to human health by mining operations or mineral processing operations.. Liability also attaches to the person who directly contributes to the act which results in the harm or damage where there is more than one person responsible for the harm or damage, liability is joint and several.

PROPERTY RIGHTS

Expropriation

Under the Zambian Constitution, property of any description cannot be compulsorily acquired unless under the authority of an Act of the Parliament which provides for payment of adequate compensation. One exception to this provision allows for the possession or acquisition of any mineral, mineral oil or natural gas, or any right accruing by virtue of any title or license for the purpose of searching for or mining and mineral, mineral oil or natural gas. Where however, there is a failure to comply with any provision of the law relating to such title or license, the exercise of such rights or the development or exploitation of any mineral, such property may be compulsorily repossessed without payment of adequate compensation. The repossession must nevertheless be in accordance with the provisions of the Mines Act, failing which the repossession may be deemed unconstitutional and subject to challenge in the courts of law.

Cancellation/suspension of a mining right

The Directors of Mines or Geological Survey may cancel a mining license on the grounds that the license holder:

(a) contravenes a condition of the mining right;

(b) fails to comply with any requirements of the Mines Act relating to the mining right;

(c) fails to comply with a direction lawfully given under the Mines Act;

(d) fails to comply with a condition on which any certificate of abandonment of the mining area is issued or on which any exemption or consent is given under the Mines Act;

(e) is convicted on account of safety, health or environmental matters;

(f) in the case of large-scale mining license, has failed to carry on mining operations in accordance with its proposed plan of mining operations and the gross proceeds of sale of minerals from the mining area in each of any three successive years are less than half of the deemed turnover applicable to that license in each of those years;

(g) is convicted for giving false information on recovery of ores and mineral products, production costs or sale; or

(f) is considered by the Director to be using wasteful mining practices and fails to cease such practices or remedy any damage causes thereby within the time specified by the Director.

The Director of Mines or Director of Geological Survey cannot cancel a mining right on any of the grounds in (a) to (c) above unless notice of default has been issued to the mining right holder and such mining right holder has failed to remedy the default following the expiration of a period of 60 days.

Before the Director of Mines or Director of Geological Survey can exercise his power to cancel or terminate a mining right, he is required to refer the matter to the MAC for consideration. The MAC is under the obligation to consult any person who is likely to be affected by the termination or cancellation of the license. Although the advice of the MAC is not binding, the Director of Mines or Director of Geological Survey must furnish MAC with a statement in writing where he proposes to deal with a matter otherwise than in accordance with MAC advice. A mining right holder aggrieved by the decision of the Director with respect to the cancellation of a mining right can appeal to the Minister and, subsequently, the High Court of Zambia. The Mines Act does not provide guidance as to the status of the mining right during the period that the appeal is pending determination nor the stage at which a mining license is finally deemed to be cancelled.

Surface rights and access

There is a distinction under Zambian law between a surface right and a mining right, which distinction may affect how a mining right is exercised.

Surface rights and mining rights are clearly distinct concepts administered under separate and distinct legal frameworks. Surface rights may only be granted under the Lands Act (the "**Lands Act**"), under which the term 'land' is defined to exclude any mining right as defined in the Mines Act and include any interest in land whether virgin, bare or with improvements. All land (as defined under the Lands Act) is vested perpetually in the President in trust for the people of Zambia who are generally granted a leasehold tenure of up to 99 years.

A mining right on the other hand, may only be granted under the Mines Act which vests all such rights in the President on behalf of the people of Zambia.

Where surface rights independent of the mining right pre-date the mining right, the mining right holder is entitled to exercise such rights with the consent of the surface right holder. The mining right may not be exercised on any land which is the site of, or which is within 180 meters of, any inhabited, occupied or temporarily uninhabited house or building unless the consent of the owner of such land is obtained.

In the event of the owner of such land unreasonably withholding consent to access the area as a result of which a dispute arises, the Director of Mines may require that the matter be settled by arbitration.

The surface right holder is entitled on demand, to fair and reasonable compensation from the mining right holder for any disturbance of such surface right referred to above and failure to pay such compensation by the mining right holder has to be referred to arbitration. A demand for compensation does not, however, entitle the surface right holder to prevent or hinder the exercise by the mining right holder of access to the area pending the determination of the compensation to be paid. A claim for compensation is statute barred if not made by the surface right holder within three years from the date such claim accrued.

The holder of a surface right or occupier thereof which is subject to a mining right can only retain, in a case where there is no building or structure on a pre-existing surface right, the following rights unless an access agreement between the mining right holder and the surface right holder provides otherwise:

(a) the right to use and access water;

(b) the right to graze stock; and

(c) the right to cultivate the surface of the land.

Such rights cannot, however, be exercised in such a way by the surface right holder that interferes with the proper working of the mining right and any buildings or structures on such surface right can only be erected by the surface right holder with the consent of the mining right holder. Where consent is unreasonably withheld, the Director of mines may grant the consent.

Mineral exports, sales and processing

In the case of a holder of a mining license, the right to undertake mineral processing is an incident of the right to carry on mining operations.

In the absence of a mining license, a person intending to undertake mineral processing must apply to the Director of Geological Survey for a mineral processing license. Once granted, the mineral processing license entitles its holder to exclusive rights to carry on mineral processing operations over the area covered by the license.

The sale of minerals recovered in the process of mining operations is a right incidental to a mining license. However, an export permit is required for all exports of minerals, ores or mineral products.

The government has the right to check actual volumes of minerals declared by mining companies before exportation.

IMMIGRATION

Foreign employees working in the mining and other sectors in Zambia must hold a valid employment permit. Employment permit applications must be completed and approved before arrival into the country. Other permits of importance include a temporary employment permit, investors permit and business permit.

INVESTMENT

Investment in Zambia is largely promoted by the Zambia Development Agency (the "**ZDA**") created pursuant to the Zambia Development Agency Act No. 6 of 2008 (the "**ZDA Act**"). There are various incentives available to investors who hold investment licenses, permits or certificates of registration issued by the ZDA under the ZDA Act.

Incentives under the ZDA Act are largely limited to priority products, priority sectors, rural enterprises and businesses operating in Multi-Facility Economic Zones, which do not include mining Notwithstanding the foregoing, an investor in the mining sector may in practice enter into an Investment Promotion and Protection Agreement ("**IPPA**") with the government, under which various incentives may be provided through the ZDA's declaration of its investment as an identified sector under the ZDA Act.

The ZDA board screens all investment applications for which incentives are requested and usually makes its decision within thirty (30) days of submission. Applicants have the right to appeal investment board decisions.

TAX

Taxation in Zambia is governed by the Income Tax Act Chapter 323 of the Laws of Zambia ("**Income Tax Act**"), Customs and Excise Duty Act Chapter 322 of the Laws of Zambia ("**Customs Act**"), the PTT Act and the Value Added Tax Act, Chapter 331 of the Laws of Zambia ("**VAT Act**").

Income Tax Act

Under the Income Tax Act, corporate tax on mining companies holding a large-scale mining license and carrying on mining of base metals is generally charged at 30% per annum. In addition to income tax, there is a variable profit tax payable which is intended to capture any windfall gains that may arise in the mining sector (and which replaced the windfall tax) payable at a rate not exceeding 15%. Companies that do not hold large-scale mining licenses and do not carry out mining activities are charged the usual corporate tax at 35% per annum. Withholding tax at a rate of 15% is also charged on dividends, rentals, royalties, bank interest, and management and consultancy fees. Withholding tax on payments to non-

residents of Management and Consultancy fees and payments to non-residents of royalties attracts withholding tax of 20%.

Customs and Excise Duty Act

Exportation of goods might attract export duty under the Customs Act, depending on the nature of goods. Exports of copper ore and concentrate attract export duty of 10%. Import duty and import value added tax is also payable on certain goods under the Customs Act.

Value Added Tax Act

Export of goods from Zambia is considered to be a zero-rated supply. The tax authorities may require evidence that the export of goods from Zambia is by or on behalf of a taxable supplier.

Royalties

Mineral royalties are payable at the rate of 6% of the gross value of industrial and energy minerals produced and 6% of the norm value of base metals produced. Mineral royalties for precious metals and gemstones is payable at the rate of 6% of norm value and gross value respectively.

Tax relief

Investment in mining and prospecting attract the following income tax deductions:

(a) capital expenditure allowances of 25% on plant, machinery and commercial vehicles, 20% on non-commercial vehicles, and 5% on industrial buildings;

(b) prospecting expenditure deductions, under special circumstances;

(c) mining expenditure deductions, under special circumstances;

(d) mining expenditure on a non-producing mine; and

(e) mining expenses incurred by a mine or irregular production close to the end of its life.

A holder of a mining right is exempt from customs and excise duties and VAT in respect of all machinery and equipment required for exploration or mining activities.

Remission

There is currently no restriction in respect of the amount of profits, dividends, or royalties that may be externalized by mining companies, although a withholding tax of 15% and 20% is levied as noted above.

Interest payments on debt made to mining companies are subject to thin capitalization rules and also transfer pricing rules where interest rates between related parties are not at arm's length. Previously, interest payments by mining companies to related parties such as inter company financing arrangements were not subject to transfer pricing rules under the Income Tax Act, Chapter 323 of the Laws of Zambia ("**Income Tax Act**"). The Minister of Finance and National Planning ("**Minister of finance**") in his 2013 budget announced the introduction of a provision to subject interest payments on debt made by mining companies to transfer pricing rules. This was effected by an amendment to the Income Tax Act. The Income Tax (Amendment) Act, 2012, which came into operation on 1st January 2013, repealed the restriction on the application of transfer pricing rules to interest payment by mining companies. This entails that mining companies are now subject to greater scrutiny of intercompany arrangements by the Zambia Revenue Authority ("**ZRA**") which under the transfer pricing rules has power to make an assessment on Income of a business engaged in related party transactions.

Tax stability agreements

Prior to the enactment of the Mines Act, investors were able to enter into Development Agreements with the Government under which concessions where provided generally in the form of suspensions or reductions of all applicable taxes and tax stability periods. Following the enactment of the Mines Act, however, the Development Agreements ceased to be binding on the Republic and the Minister could no longer enter into any agreement relating to the grant of mining rights. The Zambian Government is currently in discussions with previous holders of Development Agreements in order to resolve disputes precipitated by their abolishment.

CURRENCY EXCHANGE, EXCHANGE CONTROLS AND REPATRIATION OF PROFITS

Following the liberalization of Zambia's economy in the early 1990s, the Exchange Control Act and ancillary regulations were repealed in January 1994.

There is a restriction on 'over-the-counter' cash transactions of foreign currencies in bureau de changes, which limits such transactions to US$5,000 (or equivalent) per person per business day. This directive, however, does not affect normal bank transactions or transfers.

The regulatory environment regarding currency control is still developing. Previously there was no exchange control. The new Patriotic Front Government that came into office at the end of 2011 has demonstrated an intention to regulate the use of foreign currency in Zambia and to monitor foreign currency payments into and out of Zambia. The extent of the regulation of foreign currency is not known and the extent of regulation cannot be determined.

In May 2011 the Government issued Statutory Instrument No. 33 of 2012 ("**S.I. 33 of 2012**") which made it illegal to pay in foreign currency for domestic transactions. The statute was not clear and after clarification notes from the Bank of Zambia Statutory Instrument No. 78 of 2012 ("**S.I. 78 of 2012**") was passed which amended S.I. 33 of 2012. While clarifying what an international transaction was S.I. 78 of 2012 expressly made it illegal to set pricing for domestic transactions based on indexing to a foreign currency. This law may have an effect of the Target Company's ability to set its pricing linked to foreign currency when selling or buying from other Zambian registered companies.

More recently, the Bank of Zambia (Amendment) Act No 1 of 2013 ("**BOZ Act 2013**") was enacted. The BOZ Act 2013 provides that the Bank of Zambia may, to promote the efficient operation of the foreign exchange system, take measures to monitor:

(a) Foreign exchange inflows and other outflows and amounts remitted;

(b) Imports and exports of goods and other inflows and outflows;

(c) International transactions in services;

(d) International transfers to or from non-residents;

(e) Profits or dividends received in respect of investments abroad;

(f) Borrowings and trade credits from non-residents;

(g) Investment in the form of equity and debts securities abroad;

(h) Receipts of both principal and interest on loans to non-residents; and

(i) International money transfers into and out of Zambia.

In light of this, the Bank of Zambia (Monitoring of Balance of Payments) Regulations, 2013, (the "**Regulations**") have been enacted to provide for the implementation of measures to monitor the import and export of goods and services, financial capital and any financial transfers to and from Zambia. The Regulations have introduced the requirement that exporter, importer or foreign investor shall open and maintain a foreign currency denominated account with a financial service provider licensed under the Banking and Financial Services Act, ("**FSP**").

Foreign investors seeking to enjoy the incentives accorded to them under the Zambia Development Agency Act, 2006 (the "**ZDA Act**") are required to deposit their 'pledged capital' into the foreign currency account. However, what amounts to "pledged capital" is not defined under the Regulations or under the ZDA Act and as such clarification from Bank of Zambia ("**BOZ**") would be required as to what amount needs to be deposited.

The Regulations also cover transactions in respect of the import or export of goods or services whose value exceeds the equivalent of ten thousand dollars, With respect to imports, the Regulations require that importers open and maintain a foreign currency account with a FSP. The Regulations further require that any person that makes a foreign exchange payment for imported goods or services shall submit the import and remittance monitoring form to a FSP.

The import and remittance monitoring form shall contain a declaration that the funds sent abroad will have corresponding prescribed genuine support original documents will be made available to the FSP and the acquittal documents (e.g. customs clearance) will be availed the FSP within 60 days.

With respect to exports, the Regulations set out the requirement for exporters to remit the proceeds of exports into the foreign currency account within 60 days of the date of the shipment of any goods. Therefore, exporters will have to ensure that they receive payment for exports within 60 days of shipment and such proceeds are in the foreign currency account held with a FSP.

An exporter shall also be required to complete the export proceeds monitoring forms which contain a declaration that the foreign currency proceeds of the sale have been deposited or will be received within 60 days. However, it appears that the requirement to complete the export proceeds monitoring forms does not apply to the export of services as it appears to only relate to the export of goods.

The Regulations also provide that certain payments to a foreign bank account or non-resident person shall be processed through a FSP. With respect to the payment of dividends in foreign exchange, the Regulations require that the following documents are submitted to the FSP –

(a) a board resolution of the declaration of the dividend;

(b) a tax clearance certificate issued by the Zambia Revenue Authority in the name of the business paying the dividends;

(c) evidence of payment of applicable taxes on the dividends concerned;

(d) evidence of payment of corporate or income tax;

(e) where tax is zero-rated, whether under the provisions of any written law or agreement, or where withholding tax is exempt, a withholding tax exemption letter or dispensation in the nature of a "limited deduction direction" issued under the hand of the Commissioner-General; and

(f) audited accounts certified by an accountant registered with the Zambia Institute of Chartered Accountants.

Where the payment to foreign bank account or non-resident in foreign exchange is either a royalty, management fee, technical fee, commission or consultancy fee, such a payment will be required to be accompanied by the following documents:

(a) tax clearance certificate;

(b) an invoice in the name of the declared recipient of the funds;

(c) the agreement governing the payment of royalties or management fees;

(d) where tax is zero-rated or withholding tax is exempt, a withholding tax exemption letter or dispensation in the nature of a "limited deduction direction" issued under the hand of the Commissioner-General;

(e) evidence of payment of applicable taxes; and

(f) management or audited accounts certified by an accountant registered with the Zambia Institute of Chartered Accountants.

For payments relating to imports, including those eligible for capital allowance under the Income Tax Act, exceeding in value the amount of one hundred thousand United States Dollars or the equivalent in any foreign currency, an invoice or invoices in the name of the declared recipient of funds have to be made available to the FSP.

With respect to credit financing, the Regulations require that any person who obtains any foreign exchange loan or letter of credit from a non-resident lender shall report the borrowing to BOZ. The report to BOZ shall be supported by a repayment schedule and, in the case of an existing or proposed debt service remittance obligation, proof of a signed facility or loan agreement between the borrower and the lender.

In respect of foreign exchange denominated loan obligations contracted by a subsidiary from a parent company, shareholder, partner or affiliated entity, the subsidiary shall provide a FSP with a a signed facility, loan or similar agreement and shall disclose the rate of interest and tenure of the loan and the repayment schedule.

Further, a person who contracts a private external debt shall register the obligation with a FSP, and the FSP shall register the debt with the BOZ. Therefore, in addition to the report to be submitted to the BOZ in respect of the foreign exchange loan obligation, the loan should be registered with a FSP and BOZ.

Where the Regulations are breached, the person who contravenes any provision of the Regulations commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding ten years, or to both.

However, the regulations do not appear to introduce any foreign exchange restrictions.

EMPLOYMENT

The Employment Act is the principal law governing employment in Zambia but there are specific laws governing various aspects of employment law, such as the Minimum Wages and Conditions of Employment Act which sets minimum conditions applicable to certain categories of employees, Industrial and Labor Relations Act, the Workers Compensation Act and the National Pension Scheme Act.

Zambia also applies common law principles and doctrines of equity to employment matters, subject to statutory law.

Employment contracts

The terms of an employment contract are principally determined by the agreement of the parties, which must comply with the minimum terms and condition prescribed by statute.

The law recognizes oral and written contracts, as well as collective agreements in the case of unionized employees.

Oral contracts

Oral contracts, which include daily, weekly and monthly contracts, are recognized under the Employment Act Chapter 268 of the Laws of Zambia ("**Employment Act**") and may not exceed a period of six months. They may be terminated by either party through verbal or written notice, such notice period depending on the length of the contract. A party to an oral contract may also terminate the contract by payment of a sum equal to an employee's wages. Thus, for example, one month's salary would be paid in lieu of notice for a monthly contract.

All employers who engage employees on oral contracts are required by law to maintain a record of oral contracts for every employee employed under an oral contract. A record of contract is in a prescribed from and contains information including employees' name, sex, nationality, date of engagement and type of contract. Every record of oral contract shall be prepared in duplicate and a copy given to the employee. Failure to comply with these requirements is an offence. Further, where a dispute arises pertaining to the conditions of the oral contract, an employee's statement as to the nature of the terms and conditions shall be receivable as evidence of such terms and conditions where the employer fails to produce such a register.

Written contracts

Every contract exceeding a period of six months must be in writing and executed by the parties signing or affixing a thumb or fingerprint thereto. Contracts of Foreign Service and any contract for the performance of specific work which cannot be completed within six months are also required to be in writing.

A written contract must contain the full names of the employer and employee, the name of the business and place of engagement, date of engagement, date of commencement, wages payable under that contract, and the nature of employment. Written contracts can be terminated by expiry of the term, death of the employee, or in any other manner in which a contract may be lawfully terminated, for instance by giving notice of termination or payment of salary in lieu of notice.

Written contracts can either be for a fixed period or permanent, i.e. until an employee reaches retirement age.

Minimum Wages and Conditions of Service

There are categories of protected employees in Zambia under the Minimum Wages and Conditions of Service Act, Chapter 276 of the Laws of Zambia ("**Minimum Wages Act**"). The regulations issued under the Minimum Wages Act provide for minimum wages and conditions of service that an employer must comply with in relation to protected workers.

Obligations of employers in relation to statutory deductions

An employer is under an obligation to make deductions from the wages payable to employees in respect of pension contributions to the National Pension Scheme Authority ("**NAPSA**"). Under the National Pension Scheme Act (the "**NAPSA Act**"), every person, firm, institution or association registered as a taxpayer with employment contracts must register as a contributing employer.

Contributions must be accompanied by supporting documentation showing an employee's identity, length of employment and earnings. It is an offense under the NAPSA Act for an employer to fail to remit contributions to NAPSA, the penalty for which is a fine and/or imprisonment.

Similarly, employers have an obligation to subscribe to and make contributions to the Workers Compensation Fund, which was established to provide for the compensation of workers disabled by accidents occurring or diseases contracted in the course of employment, as well as to dependents of workers who die as a result thereof.

An employer may also deduct a reasonable amount from an employee's wages to cover any amount in repayment of a loan made by the employer to the employee or in such instances where loss of property has been occasioned by the employee's willful neglect.

Union Membership

Under the Industrial and Labor Relations Act, every employee has the right to be a member of a trade union within the sector, trade, undertaking, establishment or industry in which that employee is engaged.

Employees also have the right to take part in the activities of a trade union and are entitled to leave of absence for the purpose of attending union meetings, which should not be unreasonably withheld by the employer. The only employees exempted from union membership are members of the armed and security forces and judiciary.

According to the law, every person employing 25 or more employees eligible to be members of a trade union must register with the Commissioner of Labor within three months from the commencement of operations. Furthermore, it is the obligation of the employer to enter into a recognition agreement with a trade union within three months of registration with the Commissioner of Labor.

SOUTH AFRICA

INTRODUCTION

While South African mining law is not codified and a body of common law remains applicable, the industry is today largely regulated by the Mineral and Petroleum Resources Development Act 2002 ("**MPRDA**") which was promulgated by the South African legislature with the intention that it forms the base of a new regulatory framework for the industry. The MPRDA must be read with the Regulations made in terms of the MPRDA, published in 2004; the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry ("**the Mining Charter**") published in 2004; the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry ("**the Amendment to the Charter**"); the Codes of Good Practice for the Minerals Industry ("**the Code**") published in 2009; and the Housing and Living Conditions Standard for the Minerals Industry ("**the Standard**") published in 2009.

Other important pieces of legislation include the Precious Metals Act 2005, the Diamonds Act 1986, the National Water Act 1998 ("**the NWA"**), the National Environmental Management Act 1998 ("**NEMA**"), the National Environmental Management Air Quality Act 2004 ("**the Air Quality Act**"), the National Environmental Management Waste Act 2008 ("**the Waste Act**"), the Mineral and Petroleum Resources Royalty Act 2008 ("**the Royalty Act**"), the Mine Health and Safety Act 1996 ("**the MHSA**") and the Mining Titles Registration Act 1967.

The mining industry is regulated at a national level. According to Section 3(1) of the MPRDA, the mineral resources of South Africa are a common heritage of the people of South Africa and the State, acting through the Minister of Mineral Resources, is the custodian of these resources. The MPRDA came into force on 1 May 2004 and replaced the Minerals Act 1991, in terms of which it was possible for private individuals to hold mineral rights or titles to minerals.

GENERAL

The Department of Mineral Resources ("**the DMR**") is the primary administrator of the mining industry on behalf of the State. The three important divisions of the DMR for purposes of mineral regulation are the following: the Directorate, Mineral Development; the Health and Safety Inspectorate; and the Mining Titles Registration Office.

All applications for the various types of mining authorizations must be made to the regional office of the DMR and are processed in the regional offices before they are sent to the Head Office for approval. When the Minister considers applications received on the same date, she must give preference to applications received from 'historically disadvantaged persons'. Once prospecting and mining rights have been granted and notarially executed, they must be registered at the Mineral and Petroleum Titles Registration Office. This office serves as a specialized registry in relation only to mining titles and documents incidental thereto. The Inspectorate of Health and Safety is charged with the responsibility of ensuring that mining operations and mining works are both safe and healthy.

REGULATION OF PROSPECTING RIGHTS AND MINING RIGHTS

Under Sections 21 and 28 of the MPRDA, holders of prospecting and mining rights are required to submit certain prescribed information in relation to their activities to the DMR. This information includes prescribed monthly returns regarding mining and prospecting operations as well as audited annual financial reports and annual reports in relation to compliance with the requirements to introduce historically disadvantaged South Africans to the minerals industry (the Black Economic Empowerment ("**BEE**") requirements). In addition, and in terms of the standard terms and conditions of mining rights, holders of such rights are required to maintain books, plans and records in respect of mining operations and to furnish such reports as the DMR may require. Every holder of a mining right is supposed to furnish monthly returns in accordance with the MPRDA and also give the DMR plans for future mining activities.

In order for an applicant to be granted prospecting and mining rights, an applicant must apply in the prescribed manner together with the prescribed non-refundable application fee. Sections 16 and 17 apply to applications for prospecting rights while Sections 22 and 23 apply to applications for mining rights. The applicant must apply at the regional office of the DMR in the region in which the land to which the application relates is situated. The essential requirements for applying for a prospecting right are that an applicant must prove both financial and technical ability to conduct prospecting operations optimally in accordance with the prospecting work programme. In addition, the applicant must show that the prospecting operations will not lead to environmental degradation. This is normally done by way of an Environmental Management Plan (EMP), which is approved by the DMR. The procedure for applying for mining rights is similar to the aforementioned procedure. The main difference between the two procedures is that in respect of mining rights, an applicant must also comply with the Black Economic Empowerment (BEE) requirements and also provide a Social and Labour Plan as part of the application process. The Social and Labour Plan is a document designed to transform the South African mining industry from its discriminatory past and to counter the reality that when most mining operations shut down, the host areas go from being vibrant economies to very marginalized economies. Mining companies must have programmes designed to transform and empower employees as well as the host communities from a developmental as well as a socio-economic point of view to make sure that the host community can sustain itself after the end of life of mine.

The MPRDA does not impose deadlines by which the DMR must have granted prospecting and mining rights. It only provides deadlines by which an applicant must have taken certain administrative steps before its application can be assessed. This is an inherent weakness in the MPRDA and, consequently, it takes the DMR anything from a couple of months to a couple of years to grant or refuse applications.

Section 5 of the MPRDA provides that prospecting and mining rights are limited real rights, binding throughout the world. These rights are notarially executed and are registrable at the Mineral and Petroleum Titles Registration Office. These rights are subject to standard terms and conditions that are not negotiable and have been predetermined by the DMR. By and large, the terms and conditions of prospecting and mining rights follow the MPRDA provisions but, as can be expected, the terms and conditions tend to go beyond the statutory provisions.

Duration and tenure

Prospecting rights are granted for a period of anything between 12 (twelve) months and 5 (five) years. These rights are renewable once for a period not exceeding 3 (three) years. Mining rights are granted for a period up to 30 (thirty) years and are also renewable.

Since prospecting and mining rights are limited real rights, they enjoy all the benefits of real rights and are attended by the legal incidents attaching to real rights. For instance, and in terms of the doctrine of constructive notice, once prospecting and mining rights are registered at the Mineral and Petroleum Titles Registration Office, the whole world is presumed to know of their existence and registration.

Transformation of prospecting rights to mining rights

Section 19 grants the prospecting right holder the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question.

Small Scale Mining

Section 27 of the MPRDA provides that a mining permit may only be issued if the mineral in question can be mined optimally within a period of 2 (two) years and the mining area in question does not exceed 1.5 hectares in extent.

Additional Permits and Licences

There are various additional permits and licences that are required by different types of mining operations in South Africa.

Some permits are sector-specific and others are of general application. Depending on the nature and type of the mining operations in question, it may be necessary for the holder of the mining rights to also apply for and be granted a separate environmental authorization in terms of the NEMA, as well as various other environmental permissions. In addition, and in terms of the NWA, the holder of a mining right requires a Water Use licence to be able to use water for purposes of mining operations. Mining companies are required to have a certificate in respect of explosives manufacturing sites, should they operate an explosives manufacturing site. In addition, they are required to have an Explosive licence in cases where explosives magazines are handled. Depending on their operations, mining companies may also require a Nuclear Installation or Vessel licence and the certification of registration under the Nuclear Regulatory Act (NRA). Mining companies are also required by the Air Quality Act to have an Atmospheric Emissions licence. Various provincial and local government town planning laws may also require that mining companies be appropriately zoned for the purposes of conducting mining operations before such operations are implemented on a specified piece of land.

Transferability of rights

Section 11 provides that a prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of changes of controlling interest in listed companies. Prospecting and mining rights are thus transferable to either individuals or companies subject to the consent of the Minister in terms of Section 11 of the MPRDA.

This consent is not required in respect of encumbrance by mortgage of right or interest as security to obtain a loan or guarantee for the purpose of funding or financing a prospecting or mining project by a bank or financial institution on request by the Minister, if the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage is subject to ministerial consent.

Closure and remediation of mining projects

A holder of a mining right is obliged to have an environmental management programme that ensures that the mining operations will not result in unacceptable pollution, ecological degradation or damage to the environment. A right holder must make financial provision for the rehabilitation or management of negative environmental impact caused by mining operations. There are a number of methods that are prescribed for making the requisite financial provision. A holder may choose to contribute an amount into an approved environmental rehabilitation trust established in accordance with Section 37A of the Income Tax Act 1962. A holder may alternatively procure a financial guarantee from a South African registered bank or other bank or financial institution approved by the Director General guaranteeing the financial provision relating to the environmental management programme. A holder may also deposit the financial provision into an account specified by the DMR. Lastly, the holder may use any method of financial provision that the Director General may approve from time to time. In practice, mining companies have bought financial instruments from insurance companies to support their rehabilitation obligations. The DMR has approved some of these products and mining companies can use them without further dealings with the DMR. In all other instances where mining companies wish to procure financial instruments from insurance houses, it is prudent for them to first get the approval of the DMR before they do so. The most popular methods of financial provision are the establishment of the environmental rehabilitation trust or providing financial guarantees by banks or registered financial institutions.

The holder of a mining right remains responsible for all environmental liability, pollution or ecological degradation and the management thereafter until the Minister has issued a closure certificate to the holder concerned in terms of Section 43 of the MPRDA; for this, the holder must apply to the Minister. The holder of a mining right can apply for a closure certificate upon the occurring of any of the following:

1. the lapse, abandonment or cancellation of the mining right in question;

2. the cessation of mining operations;

3. the relinquishment of any portion of the land on which mining operations occurred; or

4. completion of the prescribed closing plan to which the mining right relates.

If the holder of a right wants to apply for a closure certificate upon the completion of mining operations, the prescribed closing plan must be completed, after which the holder must apply for a closure certificate within 180 (one hundred and eighty) days. Such application must be accompanied by a prescribed environmental risk report.

The closure plan must contain the following:

1. description of the closure objective and how the objective relates to the operations and its environmental and social setting;

2. a summary of the results of the environmental risk report detailing and identifying the residual and latent impact;

3. a summary of the results of progressive rehabilitation undertaken;

4. a description of the methods to decommission each operation and the mitigation or management strategy proposed to avoid, minimise and manage residual or latent impact;

5. details of any long term management and maintenance expected;

6. details of proposed closure costs and financial provision for monitory maintenance and post closure management; and

7. technical appendices supporting the closure plan.

EMPOWERMENT

BEE is one of the strategic measures adopted by the Government of South Africa ("**the Government**") to redress the legacies of apartheid. The apartheid system was designed to restrict black people from any or meaningful participation in the South African economy. Wealth was confined to a racial minority. The result was an economic structure, still in existence today, which excludes the vast majority of black South Africans.

In recent years the Government set about adopting strategies and policies that would include the participation of the majority of South Africans in its economy.

One such strategy was BEE. The strategy was formally recognized through the submission of the Integrated National BEE Strategy Report by the BEE Commission to President Thabo Mbeki in 2001. This submission culminated in Government's publication of the policy document on a strategy for Broad-Based BEE in 2003. Finally, on 21 April 2004, the BEE Act came into being.

In terms of Section 2 of the MPRDA, its objects are, *inter alia*, to:

"(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.".

In terms of Section 100(2)(a) of the MPRDA, the Minister of Mineral and Energy (now Mineral Resources) was obliged to develop a Broad-Based Socio-economic Empowerment Charter within 6 (six) months of 1 May 2004. On 11 October 2002, and as a result of a tripartite process (involving government, labour and the mining industry), the Mining Charter was signed by the representatives of the participants of the tripartite process. By GNR 1639 of 13 August 2004, the Mining Charter was gazetted as the charter contemplated in Section 100(2)(a) of the MPRDA. The Mining Charter was envisaged to set the framework and timetable, amongst other things, for the entry of historically disadvantaged persons into the mining sector in South Africa.

In terms of the Mining Charter, stakeholders agreed to reconvene after 5 (five) years in order to review the progress and to determine further steps, if any, which needed to be taken. At the end of the 5 (five) year period contemplated in the Mining Charter, the DMR started a "review" process. This process included stakeholders in what is known as the Mining Industry Growth, Development and Employment Task Team ("**MIGDETT**"). At the end of the MIGDETT review process on 20 September 2010, by General Notice 838, the Amendment of the Mining Charter was published.

There is some confusion in the market about the status of the 2010 Mining Charter. Some commentators hold the view that the Amendment to the Mining Charter is a "replacement" of the Mining Charter. Others argue that it is an "amendment to" the Mining Charter. Yet others argue that it is an "amended" charter (i.e. it retains the existing Mining Charter and adds new provisions to it). The better view is that the Amendment to the Mining Charter is not a replacement of the Mining Charter. In fact, the two instruments interrelate and must be read together.

The definitions section of the Amendment to the Mining Charter introduces a litany of new definitions in an attempt to tackle the inadequacies of the Mining Charter. Significantly, the Amendment to the Mining Charter does not define "HDSA Companies" and "Ownership of a business" (which definitions are contained in the Mining Charter).

The objectives of transforming the mining industry are sought to be met through the attainment of specific transformation goals contained in the Original and the 2010 Mining Charters. These include "ownership". In paragraph 4.7 of the Mining Charter ownership is measured with regard to "active involvement" (ownership or control of 51% or strategic joint venture or partnerships of 26%) or "passive involvement" of between 0 to 100% ownership with no involvement in management. In paragraph 2.1 of the 2010 Mining Charter, the primary ownership compliance target is described in the following terms: ("*a minimum target of 26 per cent ownership to enable meaningful participation of HDSA by 2014*"). In the Scorecard to the 2010 Mining Charter, the description of the ownership target is in the following terms: "minimum target for effective HDSA ownership" and is divided into two measures, namely "meaningful economic participation" (target of 26%) and "full shareholder rights" (target also 26%).

The terms "effective ownership" and "meaningful economic participation" are defined in the 2010 Mining Charter, but the term "full shareholder rights" is not. "Effective ownership" is defined as "the meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities". Meaningful economic participation is defined as follows:

"Meaningful economic participation" includes, inter alia, the following key attributes–

– *BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;*

– *Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities in order to structure the BEE financing in a manner where a percentage of the cash-flow is used to service the funding of the structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested interest over the life of the transaction in order to facilitate sustainable growth of BEE entities.*

– *BEE shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;*

– *Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions"."*

As described above, the requirements under the Amendment to the Mining Charter for compliance with the ownership targets are difficult to ascertain. The target is stated variously as "26 per cent ownership to enable meaningful economic participation by HDSA"; "effective HDSA ownership of 26%"; 26% "meaningful economic participation"; and 26% "full shareholder rights". Apart from the fact that the target is stated in different ways, there is the problem that while the term HDSA is generally used in those formulations to refer to the beneficiaries, the defined term "BEE entity" is used in the definition of "meaningful economic participation", as are the undefined terms "BEE transactions", "BEE entrepreneurs", "BEE partner" and "BEE" (referring to persons).

The term "BEE entity" is defined as "an entity of which a minimum of 25% + 1 vote of share capital is directly owned by HDSA as measured in accordance with flow through principle". That term, in addition to being used in relation to "meaningful economic participation", is used in the measurement of the procurement targets under the 2010 Mining Charter.

Unfortunately, neither the Mining Charter nor the Amendment to the Mining Charter specifies how the 26% HDSA ownership in a measured entity is to be calculated. The only reference to the flow-through principle is in the definition of BEE entity in the 2010 Mining Charter, and there is no reference to the modified flow-through principle, unlike in the Codes published in terms of the Broad Based Black Economic Empowerment Act.

The Mining Charters are not easy to interpret. They contain inconsistencies that are internal to each of them and also as against one another. Despite this, they have to be interpreted in a way that best gives meaning to them. Our view is that, the ownership requirement of 51% (which is contained in the Mining Charter) has not been replaced and continues to exist. To interpret the effect of the Amendment to the Mining Charter otherwise does not seem to be in keeping with the object of transforming the mining industry.

All mining companies must have 26% BEE ownership by 2014.

The Mining Code

Section 100(1)(b) of the MPRDA required the Minister within 5 (five) years from the effective date of the MPRDA, to develop a code of good practice for the minerals industry. On 29 April 2009, the Mining Code was published in the Government Gazette. The mining industry reacted with (justified) alarm to the Mining Code. The purpose of the Mining Code is to set out administrative principles in order to facilitate the effective implementation of the Mining legislation and to enhance the implementation of the Mining Charter.

The Mining Code does not replace the key legislation and laws relating to the minerals and the petroleum industry but serves as a statement of present policy providing an overview and confirmation of the existing mineral and mining policy that is in place. The applicability and the enforcement of this Code cannot be divorced from the MPRDA and the Original and 2010 Mining Charters and the key legislation in relation to the measurement of the socio-economic transformation of the mining industry. The Code can be amended by the Minister when there is a change in mining policy and legislation.

Unfortunately, the content of the Mining Code departs fundamentally from its purpose in several material respects and furthermore seeks, impermissibly, to attach legal sanctions to failures to comply with the Mining Code.

Section 100(1)(b) does not permit the Minister to establish obligations in addition to those which have already been imposed by the MPRDA, the Mining Charter or other legislation. To the extent therefore that the Mining Code seeks to do so, it is ultra vires the Minister's powers. As the Mining Code itself explains, its purpose is to facilitate the implementation of the existing legislation by setting out the Minister's policy.

We are aware that the Chamber of Mines and the DMR have agreed to resolve the issues in respect of the Mining Code through the Minerals and Mining Development Board and to then commence a public participation process in respect of the Mining Code before it is republished.

SOCIAL CONSIDERATIONS

The MPRDA recognizes the need to promote local and rural development and the social rise of communities affected by mining. An applicant for a mining right is therefore required to compile a Social and Labour Plan that includes a Human Resources Development Plan, a Local Economic Development Plan, as well as a process for managing downscaling and retrenchment. The purpose of a Social and Labour Plan is to:

1. promote employment and advance the social and economic welfare of all South Africans;

2. contribute to the transformation of the mining industry; and

3. ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.

ENVIRONMENTAL REGULATIONS

The MPRDA provides that any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development. Sustainable development requires that social, economic and environmental factors be integrated into planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.

Section 37 of the MPRDA provides that certain principles set out in the NEMA (which include considerations relevant to sustainable development) serve as a guideline for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

Environmental compliance

In the case of a prospecting right, an applicant must submit an Environmental Management Plan (EMP) to the relevant regional manager. The EMP must be submitted within 60 (sixty) days from the date on which the regional manager instructs that it be submitted. In the case of a mining right, an applicant must conduct an Environmental Impact Assessment (EIA) and submit an EMP to the regional manager. Such an EMP must be lodged for review and approval within 180 (one hundred and eighty) days of the date on which the regional manager instructs that it be submitted.

A holder of a prospecting right cannot commence prospecting operations without an approved EMP. Similarly, a holder of a mining right cannot commence mining operations without an approved EMP. Sometimes prospecting and mining operations require the undertaking of additional activities that may not commence without prior approval in terms of the various environmental laws. In terms of NEMA, an environmental authorization must be obtained from the Department of Environmental Affairs in order to undertake certain listed activities.

Depending on the nature and scale of the activity, either a Basic Assessment or a Scoping and Environmental Impact Assessment must be undertaken in order to obtain environmental authorization. The NWA requires that a Water Use licence be obtained from the Department of Water Affairs for undertaking certain water uses. A Waste Management licence from the Department of Environmental Affairs is required under the Waste Act in order to undertake waste management activities. Where there will be a release of atmospheric emissions, an atmospheric emissions licence must be obtained under the Air Quality Act.

Further to legislation directly related to environmental management, there is legislation such as the Hazardous Substances Act, 15 of 1973 ("the HSA"), which governs matters that may indirectly have an effect on the environment. In terms of the HSA, a licence is required where certain hazardous substances will be sold, used or installed.

Third-party rights

Extensive provision is made for consultation of interested and affected parties. The MPRDA requires an applicant who prepares an environmental management plan or programme to investigate, assess and evaluate the impact of the proposed mining operations on the socio-economic conditions of any person who might be directly affected by mining operations. NEMA requires that the interests, needs and values of interested and affected parties be taken into account. The concerns raised by interested and affected parties must be reported on and addressed. Furthermore, the MPRDA requires that the owner or occupier of the relevant land be notified and consulted prior to the commencement of mining operations or any incidental work.

Duty of care

The environmental laws create a duty of care towards the environment to which a prospecting or mining right applicant or holder must adhere at all times.

SAFETY AND HEALTH

The protection of the health and safety of employees and other persons at mines is provided for in the MHSA and its regulations. An applicant for a prospecting or mining right must show the ability to comply with the provisions of the MHSA. The right holder is required to implement the procedures prescribed by the MHSA, which regulates all matters pertaining to the health and safety of any person at a mine or within a mining area. The definition of "mining area" and "mine" in Section 1 of the MPRDA are sufficiently wide to cover adjacent and non-adjacent areas on which operations incidental to mining take place.

LAND OWNERSHIP AND ANCILLARY INFRASTRUCTURES

South Africa has an efficient system of registration of title to land, based on a land survey system. Each portion of land is determined by a diagram prepared by a surveyor and registered in the Surveyor General's Office. This gives rise to a certain and definite basis of registration of land.

Pursuant to the land survey, property registers have been established in the various Deeds Registries within the different Provinces of South Africa. Those registers are properly indexed and are now accessible electronically, the originals of title deeds and other documentation having been digitised. The deeds registries are established under the relevant government department, and all fall under a Chief Registrar of Deeds.

Given the definite underlying survey system, the property registers are very accurate and create a definite form of land registration. All ownership of land is recorded in a Deeds Registry.

Ownership of land is evidenced by a title deed issued by the Deeds Registry, which will record the owner's details and the conditions under which the land is held. These conditions are normally imposed by local authorities and by private agreement.

If ownership is not registered in a deeds registry, then it is most likely that ownership of the property has not passed. Transfer of ownership of property is also evidenced by registration in the deeds registry. The law applicable to the transfer and registration of land is, in the first instance, the Deeds Registries Act 47 of 1937, together with its regulations. There are a number of other statutes that govern the ownership and transfer of land, but in essence, there is no restriction on ownership of land in South Africa and any natural person or juristic person may own land. A statutory legal framework for real estate in South Africa gives rise to a definite and comprehensive legislative framework within which property is owned. Actual ownership vests in the owner and not the state.

It is possible to own units in buildings through the Sectional Titles Act 95 of 1986. These are known as Sectional Title Units, and are registered in a deeds registry, by reference to a sectional title plan, prepared by a Surveyor registered with the Surveyor General. Both the Deeds Registries Act and the Sectional Titles Act create the environment and legislative framework within which properties are transferred from one party to another.

Property rights are protected in the Constitution of South Africa 1996. The Bill of Rights in the Constitution restricts the deprivation of property, except in the case of expropriation in terms of a law of general application, and then must be subject to compensation, which must be agreed by the affected persons or approved by a court. That compensation must be just and equitable and generally requires that regard be given to the fair value principle.

There is a process of restitution of land to persons dispossessed of land through racially discriminatory laws, which is governed by the Restitution of Land Rights Act 22 of 1994 ("**RLRA**").

BUSINESS ENTITIES REGIME

There are various investment vehicles available to investors interested in setting up a business in South Africa. The decision as to which is appropriate will depend on numerous factors, including the need for limited liability and tax considerations. The most commonly utilised entity is the limited liability company, which is governed by the Companies Act 71 of 2008 ("**Companies Act**").

Two types of companies are recognised in the Companies Act. These are the 'profit company' and the 'non-profit company'. A 'profit company' will include state owned companies, privately owned companies (in terms of which the company's constitutional document and the memorandum of incorporation ("**MOI**") must prohibit the offer of shares to the public), personal liability companies (in terms of which the directors and the company are jointly and severally liable for contractual debts) and public companies. The second category of companies is 'non-profit companies'.

Profit Limited Liability Companies

A limited liability company is generally the most suitable investment vehicle. The most common type of limited liability company in South Africa is the private company (as opposed to the public company). Both public and private companies are regulated by the Companies Act.

The following are salient characteristics of private companies: separate legal personality and limited liability; a private company is not obliged to appoint an auditor (unless required to do so in terms of the Companies Act, the Regulations to the Companies Act or the company's MOI), however, the company can elect to comply voluntarily with the accounting requirements contained in Chapter 3 of the Companies Act; there is no requirement that there be local shareholders or directors; the company's MOI must restrict the right to transfer the shares of the company and prohibit any offer to the public for the subscription of any shares or debentures of the company; a private company must have a minimum of one shareholder and at least one director; a quorum at meetings of shareholders where there is more than two shareholders is three shareholders with voting rights. Voting rights in a private company may be unequal; private companies are identified by the words "Proprietary Limited" or "(Pty) Ltd" after the name of the company; and the incorporation of a private company involves the reservation of a company name, the filing of the MOI of the company (the constitution of a company), written consent of auditors to act for the company (if any), notice of the company's registered office and the submission of a register of directors. The process of incorporation itself takes on average 1 to 2 (one to two) months. However, this is largely dependent on the time taken by the Companies and Intellectual Property Commission ("**CIPC**") to effect the registration.

The following are salient characteristics of public companies: a minimum of one shareholder and three directors; the company's MOI do not restrict the right to transfer shares of the company; the quorum for general meetings where there are more than two shareholders, three shareholders with voting rights; and companies are identified by the suffix "Limited" or "Ltd".

Personal Liability Companies

Companies may be incorporated in terms of Section 8(2)(c) of the Companies Act. In short, companies incorporated in terms of this section shall provide, in terms of the MOI, that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office. Persons practising in professions, such as attorneys and accountants typically make use of Section 8(2)(c) of the Companies Act. Companies incorporated under Section 8(2)(c) are identified by the suffix "Incorporated" or "Inc.". Certain interest groups are currently lobbying for the introduction of limited liability partnerships.

Branch Office (External Company)

A foreign company not wishing to incorporate a subsidiary in South Africa may set up a branch office. The key requirements and characteristics of a branch office are the following: the foreign company must register as an "external company" within 20 (twenty) business days after it first begins to "conduct business, or non-profit activities", as the case may be, within South Africa; a foreign company "conducts business or non-profit activities" in terms of Sections 23(2) and 23(2A) if that foreign company is a party to one or more employment contracts within the Republic; or subject to Subsection (2A) (as summarised below), is engaging in a course of conduct, or has engaged in a course or pattern of activities within South Africa over a period of at least 6 (six) months, such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within South Africa; when applying the test described above, a foreign company must not be regarded as "conducting business activities, or non-profit activities, as the case may be, within the Republic" solely on the ground that the foreign company is or has engaged in one or more of the following activities: holding a meeting or meetings within South Africa of the shareholders or board of the foreign company, or otherwise conducting any of the company's internal affairs within South Africa; establishing or maintaining any bank or other financial accounts within South Africa; establishing or maintaining offices or agencies within South Africa for the transfer, exchange, or registration of the foreign company's own securities; creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within South Africa; securing or collecting any debt, or enforcing any mortgage or security interest within South Africa; or acquiring any interest in any property within South Africa; a notarially certified copy of the memorandum and articles or association (constitutional documents) of the parent company must be filed with CIPC to effect registration; external companies must comply with the Companies Act by appointing a South African auditor if required to do so, and by submitting statutory returns; there is no need to appoint a local board of directors, but simply one person residing in South Africa to accept service of any process and notices; and accounting records similar to those prescribed for local companies must be kept in respect of the local operations.

Partnerships

A partnership is not a legal entity distinct from the persons comprising the partnership, including for income tax purposes. However, for Value Added Tax ("**VAT**") purposes, a partnership is a person and therefore registers as a vendor in its own name. Every partner in a general partnership is liable jointly and severally for all the debts and obligations of the partnership.

Business Trusts

A business trust is constituted by the lodgement of a deed of trust with the Master of the High Court of South Africa. Trusts obtain separate legal personality only for certain purposes, such as for taxation, and perpetual succession is usually provided for in the deed of trust. Ownership of the trust assets vests in the trustees who are limited to a maximum of 20 persons. Limited liability can be achieved via the business trust. Trusts are regulated by the Trust Property Control Act 57 of 1988 and are at present subject to a higher rate of income tax at 40% and capital gains tax at an effective rate of 20%.

Sole Proprietorship

A sole proprietorship does not give rise to separate legal personality, perpetual succession or limited liability. There are few formal requirements for the establishment and maintenance of a sole proprietorship.

Non-profit Companies

Companies may also be incorporated under the Companies Act which regulates the incorporation of non-profit companies/associations not for gain. Such companies must have as a public benefit object or an object relating to one or more cultural or social activities, or communal or group interests and must apply all of its assets and income to advance its stated objects.

Salient features of the Companies Act

The Companies Act contains alterable, unalterable and default provisions. Alterable provisions are those provisions that can be varied in the MOI. The unalterable provisions will not be capable of being varied, thus the provisions of the Companies Act will prevail in those instances. Where the alterable provisions are not varied in the MOI, the default provisions of the Companies Act will apply.

The provisions of the 2008 Companies Act are, in most instances, peremptory over other legislation save for seven names statutes. In the event of an inconsistency between the 2008 Companies Act and any other national legislation, both Acts will apply concurrently to the extent possible. The following seven statutes will however prevail over the 2008 Companies Act where there is a conflict:

1. Auditing Profession Act;

2. Labour Relations Act;

3. Promotion of Access to Information Act 2 of 2000;

4. Promotion of Administrative Justice Act 3 of 2000;

5. Public Finance Management Act;

6. Securities Services Act; and

7. Banks Act.

Naturally, the 2008 Companies Act, like all other legislation, is subject to the Constitution of the Republic of South Africa 1996 (the "**Constitution**").

The Companies Act codifies director's duties so as to make more accessible knowledge of the standards to which directors are held. These duties are categorised into fiduciary duties and the duty of care, skill and diligence. Reliance is however still placed on the common law's development and interpretation of these duties and the liability that flows from a failure to fulfil them.

A business judgment test is included, in terms of which a director will be deemed to have complied with the duty of care, skill and diligence and his/her fiduciary duties if he/she took reasonably diligent steps to become informed of the matter; he/she has no material personal financial interest in the decision in question or, in the alternative, has disclosed any such interest; and he/she reasonably believed and did in fact believe that the decision was in the best interest of the company.

In addition, the Companies Act highlights employee activism. Employees are entitled, in terms of Section 20(4) of the Companies Act, to bring an application for an interdict against the directors of a company if such directors propose to do something inconsistent with the Companies Act. Furthermore Section 165 of Companies Act empowers employees and any other individual seeking to protect a legal right (subject to certain requirements), to bring a derivative action on behalf of a company against delinquent directors for the recovery of loss or compensation of damage to the company.

The Companies Act also includes a Business Rescue regime. In terms of the regime the management of an insolvent company or a company that may imminently become insolvent may institute certain proceedings to facilitate the rehabilitation of the Company. This is in line with international trends to attempt where possible to rehabilitate rather than liquidate companies that are in financial distress.

Takeover Provisions in terms of the Companies Act

The Takeover Provisions (contained in Sections 117 to 127 of the Companies Act and Chapter 5 of the Regulations thereto) apply to an "affected transaction" (or offer which would give rise to an affected transaction) involving a "regulated company".

Regulated companies include public companies, state-owned companies and any private company in which 10% or more of the issued securities have been transferred (other than by transfer between or among related or inter-related persons) within a 24 month period immediately before the date of a particular affected transaction, or if the MOI of such private company expressly provides that the company and its securities are subject to the Takeover Provisions.

An affected transaction is defined in the Companies Act and includes the disposal of all or the greater part of the assets/undertaking of a regulated company; an amalgamation/merger involving a regulated company; a scheme of arrangement between a regulated company and its shareholders; an acquisition of (or announced intention to acquire) a beneficial interest in any voting securities of a regulated company amounting to 5% (or any other particular multiple of 5%) of the issued securities of a class; an announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by the acquirer (or a concert party); a mandatory offer or a compulsory acquisition as contemplated in the Companies Act.

Affected transactions involving regulated companies are subject to regulation by the Takeover Regulation Panel ("**TRP**"), which is charged with the enforcement of the Takeover Provisions. The Takeover Provisions set out compulsory compliance and disclosure requirements in respect of affected transactions, which may include mandatory offers and compulsory acquisitions.

Upon disclosure of an affected transaction to the TRP, the TRP may issue a compliance certificate if it is satisfied that the requirements of the Takeover Provisions have been met in relation to an offer/ transaction. The TRP also has the power to exempt an offeror to an affected transaction or an offer from the application of the Takeover Provisions. The obligation to ensure compliance with the Takeover Provisions lies with the offeror, and the offeror may not give effect to an affected transaction unless the TRP has issued a compliance certificate in respect of the transaction, or granted an exemption for that transaction.

FOREIGN INVESTMENT REGIME

South Africa has a system of exchange control regulation. Exchange control is regulated under the Currency and Exchange Act 9 of 1933 and the Exchange Control Regulations 1961. The system is not unique to South Africa but very few countries now operate a system of exchange control. The exchange control regulations in South Africa control the flow of money both in and out of South Africa. They affect every transaction, regardless of what amount is transferred and who the sender or recipient of the money is. The Reserve Bank of South Africa is the repository of the power in relation to exchange control and oversees all capital in and out flows; it has designated power to authorized dealers to oversee and regulate the market on behalf of the bank.

The following are the key features of the exchange control regulations: (1) they apply to transactions of any size; (2) no South African resident may effect a transfer of money without prior approval; (3) no company or legal entity may effect transfer without prior approval; (4) only authorized dealers are allowed to effect currency transfer; and (5) all outward payments may only be made for permissible reasons and under conditions that are approved by the authorized dealers on behalf of the Reserve Bank. Although there is no general prohibition of money transfer, all money transfer transactions are subject to the approval of authorized dealers.

All domestic and foreign investment in South Africa enjoys the same protection. There are no special features or categories of protection afforded to foreign investment. In addition to the normal investment protections applicable generally in South Africa, and under the Royalty Act, the Minister of Finance is empowered to enter into fiscal stability agreements that guarantee investors that the royalty rate applicable at the time of entering into the stability agreement will remain in place for the term of the investment.

There is no general prohibition against the use of foreign labour and service in the South African mining sector, but the normal human capital restrictions that apply to the employment of foreigners are applicable in South Africa. For instance, every foreign person who seeks employment in South Africa must apply for and be granted a work permit. Generally, work permits are not granted to those job seekers whose skills are easily obtainable in South Africa.

The South African economy is regulated by a fairly liberal set of regulations, which impose a limited number of restrictions. Consequently, there is nothing to stop mining companies from procuring services from foreign entities or persons. The only limitation is found in the procurement provisions of the mining charter in terms of which mining companies must procure 70% of their services from "BEE entities". This means that foreign services providers who do not have BEE ownership can only participate in 30% of the procurement opportunities available.

Processing of extracted minerals

In relation to the processing of extracted minerals, any operations conducted to process minerals must comply with the national environmental, water and air quality laws designed to protect the environment against the adverse effects of mineral processing operations. This means that any processing operations must have some form of environmental management authorization (under the MPRDA or under NEMA), a Water Use licence under the NWA as well as an Atmospheric Emissions licence under the Air Quality Act. The processing of precious metals as well as diamonds may require beneficiation or similar licence in terms of the Precious Metals Act as well as the Diamonds Act.

Import of equipment and machinery

The Mining Charter requires international suppliers of capital goods in the mining industry to contribute 0.5% of their South African annual profits to a social development fund aimed at developing mining communities. This requirement imposes a restriction on the ability of the international or multinational suppliers of capital goods in regard to the enjoyment of the profits they make in South Africa.

In addition to this, and in terms of the Customs and Excise Act No. 91 of 1964 multinational suppliers of capital goods must pay a customs duty, which is a percentage of the value of the goods.

There is no general regulation regarding the importation of machinery in South Africa. The South African Bureau of Standards obviously imposes various standards on all machinery that is imported into the country. Further, all used or second-hand goods (including machinery) are subject to import control measures.

Sale, import and export of extracted or processed minerals

There is no general restriction in relation to the sale of extracted or processed minerals in South Africa. The pro forma standard terms and conditions of mining rights in South Africa have a clause dealing with conditions and disposal of minerals; the holder of the mining right must dispose of all minerals or products derived from the exploitation of the minerals at competitive market prices (i.e., non-discriminatory prices or non-export parity prices).

In addition, the government has made beneficiation of minerals in South Africa a priority matter. Section 26 of the MPRDA provides that any person who intends to beneficiate any mineral mined in South Africa outside the country may only do so after written notice and consultation with the Minister. The intention here is to promote local beneficiation. In addition to this, there are various tax incentives for local beneficiation. Concomitantly, mining companies may pay an increased tax rate for beneficiating minerals abroad.

EMPLOYMENT LAW

The main laws governing the employment relationship are the:

Labour Relations Act 66 of 1995 ("LRA")

This governs protections for employees against unfair dismissal and unfair labour practices in employment, and regulates the resolution of disputes between employers and employees, as well as strikes, lockouts and the relationship between employers and trade unions.

Basic Conditions of Employment Act 75 of 1997 ("BCEA")

This sets minimum conditions of employment for employees, with a few exclusions such as unpaid volunteers working for a charity. These minimum terms and conditions apply to any contract of employment unless either a more favourable term has been negotiated or is provided for in another law, or a term has been excluded under the BCEA's variation or exemption provisions.

Minimum terms and conditions for specific sectors or industries are often regulated separately, either through bargaining councils set up for specific industries (if agreements are negotiated between representative employers and unions), or sectoral determinations (sector-specific rules) published by the Minister for Labour (usually after consultation with all interested parties). South African employment laws are mandatory for any employees that fall within their jurisdiction. Therefore, they apply to foreign nationals working in South Africa. This is the case even if the foreign nationals are working here illegally. South African employment laws generally do not apply to nationals working abroad. However, they may apply to a South African national who works abroad temporarily on secondment, especially if the employment contract provides for this.

Employment Equity Act of 1998 ("EEA")

The EEA is aimed at redressing the imbalances which for many years applied in the employment sphere. It is also clear that the general purpose of the Act is to foster democracy in the workplace and to ensure equality in the workplace (Section 1).

In terms of the provisions of Section 31 an employee or a trade union representative may bring an alleged contravention of the Act to the attention of any person including:

1. another employee;
2. an employer;
3. a trade union;
4. a workplace forum;
5. a labour inspector;
6. the Director-General; or
7. the commission.

Skills Development Act of 1999

The Act aims to provide an institutional framework to devise and implement national, sector and work-place strategies to develop and improve the skills of the South African workforce; to integrate those strategies within the National Qualifications Framework contemplated in the National Qualifications Framework Act 2008; to provide for learnerships that lead to recognised occupational qualifications; to provide for the financing of skills development by means of a levy-financing scheme and a National Skills Fund; and to provide for and regulate employment services; and to provide for matters connected therewith.

Permits Required By Foreign Employees

There are a number of changes to the prevailing Immigration Law which have been approved by Parliament, but these are not currently in effect. Foreign employees must obtain a work permit, except where they can take advantage of the following mechanisms: visitor's visas with consent to work (for placements up to 90 days, with the option of one renewal in-country for a further 90 days, to provide services or to attend business meetings or provide training in South Africa); exchange permits either as part of a recognised exchange programme or in the case of foreigners aged 25 years or younger, for any employment which does not exceed the period of one year. A period of mandatory physical absence from South Africa may be imposed upon expiry of the exchange permit; obtaining consent to work on a retired person's permit; part-time work of up to 20 hours per week on a study permit authorising study at a recognised tertiary institution (unlimited employment during vacation periods). Foreign employees do

not require a separate residence permit, as a work permit confers the right to temporarily work and reside in South Africa. Accompanying family members require temporary residence permits allowing them to reside with the main work permit holder or to study, as appropriate. There are various categories of work permits, including general work permits which allow a foreigner to compete in the open market against South African citizens and permanent residents for employment; intra-company transfer permits which allow for employees to be transferred from a business abroad to a local branch, subsidiary or affiliate; exceptional skills permits which are granted to candidates who possesses special expertise and know-how in relation to a particular industry; quota permits which allow for the employment of a certain number of foreigners annually within specific professional categories which have been identified as skills shortage areas; corporate permits which are granted to companies to allow them to employ a predetermined number of foreigners in specific positions. Applications in each of these permit categories require that particular supporting documents must be filed.

A foreigner can apply for consent to study whilst employed in South Africa on a work permit. Permits are obtained by applying to the South African consulate office in either the employee's country of ordinary residence or home country. If there is no consular office, permits are obtained by applying by courier to either the closest South African foreign mission (that is, the nearest South African embassy in another country) or the Department of Home Affairs in South Africa. The application must be to the office that has jurisdiction over the area in which the employee will work.

Application times vary widely, depending on the type of permit applied for and the country in which the application is lodged. It can take between five days and two months to obtain a work, residence or study permit. Applications at most consulate offices take thirty days to process. US, Canadian and EU applications are generally processed within 10 (ten) to 30 (thirty) days, while countries in the Far East usually take 6 (six) to 8 (eight) weeks to process an application.

TAX REGIME

Royalties

Section 3(2) of the MPRDA provides that the state may determine and levy a fee or consideration payable by holders of mining companies for the exploitation of the mineral resources. In 2008, Parliament passed the Royalty Act, which gives effect to Section 3(2)(b) of the MPRDA. The Royalty Act thus implements the concept of state custodianship of mineral resources in that it provides compensation sometimes referred to as a "resource rent", to the state (as custodian) for the country's permanent loss of nonrenewable resources.

Section 2 of the Royalty Act provides that a person that wins or recovers a mineral resource from within South Africa must pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource, which applies only to resources recovered in South Africa. The obligation to pay this royalty is only triggered by first transfer of the mineral resource. The requirement that the mineral resource must have been won or recovered has the consequence that no royalty will be imposed in respect of unmined mineral resources in the ground when land is transferred or when a prospecting right, exploration right, mining right or production right is transferred because in those circumstance the mineral resources have not yet been won or recovered from the land.

There is no fixed royalty percentage. Instead, a formula-based royalty is imposed by Section 4 of the MPRDA. Section 9 provides rollover relief where a mine of which a mineral stockpile or a residue stockpile forms a part or where such a mineral stockpile or residue stockpile that, in itself, constitutes a going concern, is disposed of as a going concern or as part of a going concern that is capable of separate operation.

The Royalty Act does not contain any exemption, set-off or deduction of royalties that continue to be payable to communities or certain other persons in terms of Item 11 in Schedule II to the MPRDA, against state royalties. The origin of the royalties payable to communities is that the communities were the holders of the mineral rights in respect of their land. As such they conferred on mining companies the right to mine for minerals on their land in return for a royalty, this being achieved in various ways such as mineral leases or cessions of mining leases.

Item 11 in Schedule II to the MPRDA makes a special arrangement insofar as communities (and certain other persons) are concerned: royalties payable to communities continue to be payable notwithstanding that the communities" mineral rights were taken away and notwithstanding that the mineral resources that previously vested in the communities now fall under the custodianship of the state. In essence, therefore, the state stipulated that the mining companies should, instead of paying the state as custodian of the mineral rights, pay the state's creditors – the communities – the royalties of which the state had deprived the communities and thus now owes to the communities.

Until recently, South African mining companies used to pay private royalties to the holder of old order mineral rights. Since the old order mineral rights are now extinct, the basis for paying private royalties has also fallen away.

Taxes

In the period between 2002 and 2010, a number of new mining laws have been introduced or revised. New legislation has been introduced for precious metals and the existing legislation for diamonds has been amended. The health and safety legislation has also been amended and the MPRDA has been passed as the new principal regulatory legislation in the mining industry. In addition, new mineral royalty legislation has also been passed. All of this necessitated an alignment of the tax legislation to respond to the new mineral regulatory regime. This resulted in various amendments to the Income Tax Act 1962 between the period 2004 and 2011. Most of the tax provisions for the mining sector are outlined in the Income Tax Act. Its key provisions are the following:

Income tax

The standard corporate income tax rate for all mining companies except gold miners averaged 28 per cent between 2008 and 2011. Until recently, mining companies were also required to pay secondary tax on companies of 10% of the net amounts of dividends declared. This tax has now been replaced by a withholding tax on dividends paid to shareholders.

A gold mine's taxable income is derived from a formula that takes account the ratio of profits to revenue. As profits rise, the state takes a larger portion in tax; if the company makes no profit (or low profits at around 5% of revenues), the state receives no tax but shareholders can still receive dividends during this time.

Capital expenditure allowance

South African law offers generous capital expenditure allowances to mining companies.

Considerable capital expenditure by mining companies can be fully deducted against tax including spending on prospecting, mining equipment and shaft sinking, development, general administration and management prior to commencement of production.

Mining companies are allowed to deduct this capital expenditure in the year in which they occur. The Income Tax Act also provides further capital allowances for gold mines, which are deducted against capital expenditure and which serve as an incentive for new mining development. The allowance is calculated as a percentage of capital expenditure ranging from 10% to 12% per year, depending on the mine. Mining companies can also offset against their taxes the obligatory environmental rehabilitation expenditure. Mining companies can also carry forward any losses for an indefinite period and set these off against future profits. There are new restrictions on the repatriation of profits.

Ringfencing

The Income Tax Act has ring-fencing provisions that allow capital expenditure in relation to a mine to be restricted to a taxable income of that mine and not to other mines owned by the same company. The Minister of Finance can, however, rule that company costs can be offset against another mine. In such event, mining companies can then transfer up to 25% of the capital expenditure from unprofitable mines to offset income from profitable mines.

VAT

Value added tax is applied at the standard rate of 14% but all exports are zero-rated.

Since most mineral production is exported, this means that mining companies not only pay no VAT on those exports but are also entitled to a refund for all the input taxes paid by them. This is a major gain for gold and diamond companies, for instance, who export virtually 100% of their products.

Diamonds

As part of the government's beneficiation strategy, and to promote local beneficiation, there is a 5% export duty on rough diamonds that are being exported for processing.

Duties

Mining companies pay normal duties (such as transfer duty for the transfer of prospecting and mining rights), customs duty for importing goods and the like.

Other fees

Holders of rights are expected to make financial resources available to implement their social and labour plans.

In addition to this, and in terms of the regulations to the MPRDA, various fees are payable in respect of applications for rights, administrative appeals in terms of the MPRDA, prospecting fees, renewal fees and the like.