Global Arbitration Review

The Guide to Mining Arbitrations

Editors
Jason Fry QC and Louis-Alexis Bret

Second Edition

The Guide to Mining Arbitrations

Second Edition

Editors
Jason Fry QC and Louis-Alexis Bret

Publisher
David Samuels

Account Manager
Bevan Woodhouse

Editorial Coordinator
Hannah Higgins

Head of Production
Adam Myers

Deputy Head of Production
Simon Busby

Copy-editor
Katrina McKenzie

Proofreader
Caroline Fewkes

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-578-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

CHAFFETZ LINDSEY LLP

CLIFFORD CHANCE

DWF LLP

GILBERT + TOBIN

KING & SPALDING LLP

NORTON ROSE FULBRIGHT LLP

QUAYSIDE CHAMBERS

SECRETARIAT

WHITE & CASE LLP

WOODS LLP

Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews, conferences and handy workflow tools, to name just a few. Visit us at www.globalarbitrationreview.com to find out more.

Being at the centre of the international arbitration community, we often become aware of fertile ground for new books – important topics yet to be covered. Recently, mining disputes emerged as one such gap.

One might blithely assume mining is little different from energy (for which we have *The Guide to Energy Arbitrations*). But as our editors Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face different risks. Unlike a lot of oil and gas exploration, mining projects are on-land and visible, meaning they depend on the blessing of their neighbours, and are more likely to become politicised. It is also much easier to value an early-stage oil and gas asset than a mine, which has implications for both damages and how stakeholders behave. And different substantive principles apply. The *lex mineralia* is not the *lex petrolia* and owes more to rulings from Australia and Canada than Texas.

But above all, the era of hydrocarbons is waning, while that of minerals and metals is in the ascendant. Copper, cobalt, lithium, silicon and zinc are at the heart of our evolution towards a cleaner planet. Without them and a growing array of other rare minerals – no batteries, circuit boards or solar panels, and one day, who knows, no future. But that, in itself, brings tensions to the endeavour.

For all these reasons, we thought it was high time we covered mining disputes in the esteemed GAR Guides series. The book you are reading – *The Guide to Mining Arbitrations* (second edition) – is the result. It is a practical, know-how text, organised in three parts:

- Part I identifies issues most salient in mining arbitrations, which tend to be driven by the unique nature of mining and metals as a business;
- Part II introduces select substantive principles that frequently arise; and
- Part III introduces some regional perspectives on mining arbitration.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*), and will soon be releasing books on investment treaty arbitration and evidence.

My thanks to the editors for their vision and energy in pursuing this project and to my Law Business Research colleagues in production for achieving such a polished work.

David Samuels
London
May 2021

Contents

Part III

Regional Issues in Mining Arbitration

11

Mining Arbitration in Africa

Philippe Hameau, Janice Feigher, Marc Robert and Chloé Deydier[1]

Introduction

Africa's economic growth has historically been linked to the fluctuation of commodity prices. Modern economy relies on a number of components derived from minerals such as copper, cobalt, bauxite, iron ore, tin, lithium and gold. For instance, smartphones and electric vehicles are powered by rechargeable lithium ion batteries, a component of which is cobalt. According to the African Natural Resources Centre of the African Development Bank, minerals account for an average of 70 per cent of total African exports and about 28 per cent of gross domestic product, and the potential for growth is immense.[2] The Democratic Republic of the Congo (DRC) alone contributes over half of the world's cobalt reserves.[3]

Against this background, some states and state-owned counterparts of mining investors in Africa have, in recent years, taken a series of measures perceived by investors as an attempt to force them to renegotiate their long-term agreements.

In particular, several African countries have amended their national legislation to significantly increase taxes and royalties on revenues derived from mining activities with immediate effect. Major changes to customs regimes and amendments to the regime of free-carried state participation in the equity of holders of mining titles were also introduced.

1 Philippe Hameau is a partner, Janice Feigher is counsel, Marc Robert is a senior associate and Chloé Deydier is an associate at Norton Rose Fulbright LLP. The authors wish to thank Edouard Papeil, international trainee, for his assistance in the preparation of this chapter.

2 'Catalyzing growth and development through effective natural resources management', African Natural Resource Center, African Development Bank, 2015–2020.

3 www.statista.com/statistics/264930/global-cobalt-reserves/; https://pubs.usgs.gov/periodicals/mcs2020/mcs2020.pdf, p. 51.

Some of the recent reforms eliminated or significantly reduced the scope of some stabilisation provisions and the possibility to resort to international arbitration as a dispute resolution mechanism.

In this context, tension exists between the stakeholders' diverging interests. On the one hand, some African states' declared objective is to better distribute revenue from mining activities to the local population. On the other hand, international investors are concerned that the increased resource nationalism in the region may significantly and adversely affect their return on investment, bearing in mind that mining is an extremely capital-intensive industry in which return on investment can only be expected in the long term. This is the reason why domestic mining codes typically include provisions that guarantee a stable tax and customs regime to investors over a protracted period, providing foreseeability on these heads of cost.

These legislative changes introduced by several African states to their national mining code have given rise to multiple disputes. International mining companies have[4] initiated, or may thus initiate, arbitration proceedings for breach of the stabilisation clause in the mining code or based on bilateral investment treaties.

In addition, in line with a global trend, some African countries recently introduced provisions in their mining legislation aimed at increasing transparency, safeguarding the environment, protecting the local workforce's human rights and employee rights and encouraging development and collaboration with local communities. International investors will need to factor in these new laws and regulations, which had been long called-for, in their business strategy.

Other bones of contention between state-owned entities and foreign investors relate to their respective rights under joint-venture (JV) agreements. The investing mining company contributes the capital investment, know-how and expertise to the JV, whereas the state-owned entity, which generally holds a minority shareholding, contributes the mining licences. African state parties have shown a growing dissatisfaction with the contribution or revenue balance in JV agreements, in particular regarding the underlying value of the mining title, particularly in greenfield projects. Indexation clauses and the basis for valuation of the licence (mining capacity versus actual extraction) are specific areas of concern. Mine shutdowns by investors in the presence of a slump in commodity prices is another source of litigation.

Faced with investors' reluctance to renegotiate the JV agreements on their terms, some state-owned minority shareholders may attempt to obtain the dissolution of the JV company before local courts, on the ground that it is undercapitalised, in breach of Organisation for the Harmonisation of Business Law in Africa (OHADA) law (where applicable). This strategy may enable the minority shareholder to exert further pressure on the investor or to eventually regain control over the mining titles that could then be allocated to another investor on other terms.

4 L Yong, 'Tanzania takes steps to settle mining dispute', Global Arbitration Review (GAR), 20 October 2017; T Jones, 'Second mining company takes on Tanzania', GAR, 14 July 2017; J Ballantyne, 'Mining company threatens treaty claim against Tanzania', GAR, 22 October 2018.

Another recent trend is the increased reliance by states and state-owned entities on environmental issues as well as the treatment of such issues by arbitral tribunals. Recent case law tends to show that compliance with domestic legislation aimed at protecting the environment could become a requirement for an investor to claim protection of its investment in international arbitration. Could this be the sign of the emergence of an international environmental public order?

This chapter also considers the impact of security threats on mines and the extent of states' possible obligation to protect foreign investments from unlawful activities.

As this publication goes to press, the mining industry has so far navigated the coronavirus pandemic relatively unscathed, compared to other industries. This is in part due to the specificities of the sector (isolated sites, open-pit mining). The disruption caused by the pandemic has, however, given rise to multiple contractual disputes, which also affect mining projects and companies.

Recent mining law reforms on the African continent and investors' response: a host of disputes

Changes in regional and domestic legislation

Regional mining codes

Over the past 20 years, a number of African states have undertaken various regional integration initiatives with a view to harmonising their mining legislation, developing a common regional mining policy and facilitating the development of cross-border mining projects. In particular, the Economic Community of West African States (ECOWAS),[5] the Economic and Monetary Community of Central Africa (EMCCA)[6] and the West African Economic and Monetary Union (WAEMU)[7] have each adopted, or are in the process of adopting, a regional mining code:

- the ECOWAS adopted a mining code in 2009. A supplementary act was approved on 29 June 2019;
- the EMCCA introduced the Community Mining Code on 28 July 2017, which is still to be ratified by its Member States; and
- the WAEMU adopted its Community Mining Code[8] on 23 December 2003, which is currently under review by the WAEMU Member States.[9]

5 Fifteen countries are members of the Economic Community of West African States (ECOWAS): Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

6 Six countries are members of the Economic and Monetary Community of Central Africa: Cameroon, the Central African Republic, the Democratic Republic of the Congo (DRC), Gabon, Equatorial Guinea and Chad.

7 Eight countries are members of the West African Economic and Monetary Union (WAEMU): Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal and Togo.

8 Regulation No. 18/2003/CM/UEMOA.

9 WAEMU Commission, Press Release dated 29 June 2019.

These regional mining codes provide for harmonised principles and regulations, transparency in the management of mining revenues and the fair and reasonable redistribution of revenues in favour of local communities living in the areas where the mines are exploited. They also impose on their Member States obligations in relation to the sound governance of the mining industry, set tax and exchange rates favourable to investments, and provide for mechanisms aimed at safeguarding the environment through rehabilitation schemes to be implemented at the end of mining operations.

With a view to further enhancing regional cooperation and collaboration, ECOWAS and WAEMU are currently discussing the adoption of a 'convergence protocol', which will promote the coordination and harmonisation of their actions in several areas, including mining.[10] Some outstanding issues are yet to be addressed in contemplated future reforms of these regional mining codes.[11] Because of these regional initiatives, several Member States of the above-listed organisations have undertaken a far-reaching reform of their domestic mining legislation to directly implement these regional standards and other requirements.[12]

Domestic changes in mining legislation

Between 2013 and 2020, the following countries issued bills or introduced significant reforms of their mining legislation: Burkina Faso,[13] Cameroon,[14] the DRC,[15] Gabon,[16] Guinea,[17]

10 ECOWAS website, 'ECOWAS–UEMOA Partnership: A meeting to discuss economic competition issues regarding the Regional Market', 16 February 2021.

11 For instance, the forthcoming reform of the WAEMU Mining Code should, among other things, incorporate the following amendments: non-stabilisation of issues relating to human rights, health, safety, security, employment, environmental and social aspects and all related duties, taxes and charges; provisions aimed at ensuring the efficient management of the state's participation in the capital of operating companies; improvement of the rules governing the issue of subcontracting: see WAEMU Press Release, 'Reunion des ministers chargés des mines sur le projet de code minier communautaire révisé de l'UEMOA', 29 June 2019.

12 In theory, regional mining codes prevail over the domestic law of their Member States. Therefore, one of the key points of the ongoing reviews of, for example, Niger's 2006 and Togo's 1996 mining codes, is specifically to harmonise domestic law with the provisions of the ECOWAS Mining Code; *Africa Intelligence*, 'Vers une baisse des taxes pour favoriser l'investissement minier', 25 February 2020; *Africa Intelligence*, 'Le code minier de la Cedeao bientôt réalité?', 18 June 2019. However, in practice, certain new mining codes only incorporate part of the provisions of the regional mining codes, such as the Malian Mining Code, which incorporates several provisions of the WAEMU Mining Code.

13 Law No. 036-2015/CNT, adopted in June 2015 to replace the 2003 Mining Code.

14 Law No. 2016/017, enacted on 14 December 2016.

15 Law No. 18/001, dated 9 March 2018 and new mining regulations, dated 9 June 2018.

16 Law No. 037/2018, dated 11 June 2019 replaced former Law No. 017/2014, dated 30 January 2015.

17 Law No. L/2011/006/CNT, dated 9 September 2011, subsequently amended by Law No. L/2013/053/CNT, promulgated by Decree No. D/2013/075/PRG/SGG replaced the 1995 Mining Code in June 2013. In addition, four decrees entered into force in January 2014 along with numerous other reforms that imposed further obligations on mining investors.

the Ivory Coast,[18] Kenya,[19] Madagascar,[20] Mali,[21] Mozambique,[22] Namibia,[23] Senegal,[24] Sierra Leone,[25] Tanzania,[26] Zambia[27] and Zimbabwe.[28]

This chapter provides a panorama of the main types of changes introduced in a selection of African countries.

Taxation policies

A majority of the revised domestic mining legislation significantly increased the investors' tax burden by creating additional taxes and amending the rates of existing taxes. These generally provide for the payment by mining operators of:

- fixed fees for the granting or renewal of mining titles;[29]
- annual surface royalties, which vary according to the surface area of the mining title;[30]

18 Law No. 2014-138, dated 24 March 2014 replaced the 1995 Mining Code, along with implementation Decree No. 2014-397, dated 25 June 2014.

19 Adoption of a new mining law in 2016, which was the first major revision of its mining legislation since the 1940s, along with several regulations in 2017: the Mining (Reporting of Mining and Mineral Related Activities) Regulations, the Mining (National Mining Corporation) Regulations, the Mining (Strategic Minerals) Regulations, the Mining (Mine Support Services) Regulations, the Mining (Community Development Agreement) Regulations, and the Mining (Award of Mineral Rights by Tender) Regulations.

20 Approval by the government of a draft bill amending the provisions of the 2005 Mining Code on 20 November 2019, which was due to be discussed by the Parliament between March and May 2020. However, the legislative process has been considerably delayed by the recent measures taken in relation to covid-19.

21 Law No. 2020-010, dated 11 May 2020 ratified Decree No. 2019-022/P-RM, dated 27 September 2019, thereby replacing the 2012 Malian Mining Code. In addition, adoption of implementation Decree No. 2020-0177/PT-RM, dated 12 November 2020.

22 Approval of Mining Law No. 20/2014 and Mining Decree No. 31/2015 along with the new Specific Regime of Taxation and Fiscal Benefits for Mining Operations Law.

23 The 1992 Minerals (Prospecting and Mining) Law has been under review since 2018 due to extensive consultation with mining actors, and is yet to be enacted.

24 Adoption of a new mining code, which came into force on 8 November 2016 to replace the 2003 Mining Code. In addition, adoption in 2017 of an implementation decree. See C Asselineau, A Thibaud, 'Senegal: A new mining decree to complete the 2016 mining code', Norton Rose Fulbright, www.nortonrosefulbright.com/en/knowledge/publications/8fe5cfeb/senegal-a-new-mining-decree-to-complete-the-2016-mining-code, May 2017.

25 A draft bill amending the provisions of Sierra Leone's Mining Code (the 2009 Mineral and Mines Act) was published in January 2019 and is currently under review.

26 Since 2015, several laws have significantly increased government control over mining operations in the country (e.g., the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017).

27 The 2015 Mines and Minerals Development Act No. 11 repealed and replaced the 2008 Mines and Minerals Development Act No. 7.

28 Zimbabwe is currently in the process of amending the 1961 Mines and Minerals Act [Chapter 21:05] through the Mines and Minerals Amendment Bill to notably foster rapid growth in the mining sector, thereby strengthening the country's economy. One of the major issues the bill is likely to tackle relates to the porous nature of the registration of mining titles, out of which many disputes appear to have arisen.

29 For example, in Burkina Faso, Cameroon and Senegal: the new legislation introduced a significant increase of entry fees.

30 For example, in Burkina Faso and Cameroon: the rate varies between 10 Central African francs per square meter per year and 100 Central African francs per square kilometre per year. The annual superficial royalty

- proportional royalties, which vary depending on the value of the extracted mineral products;[31]
- a special contribution to a local development fund, the amount of which is based on a percentage of either (1) the mining company's monthly turnover excluding taxes or (2) the value of the products extracted during the month;[32]
- a capital gains tax on the transfer of mining titles;[33] and
- export royalties.[34]

The reforms generally provide for the distribution of royalties to the government, the county authorities and local communities.[35]

Certain pieces of mining legislation have also created specific taxes, such as:

- a special tax on excess profits, defined as profits made when a commodity exceeds the price used in the bankable feasibility study by a certain percentage;[36]

in relation to an operating permit is set at a minimum of 2 million Central African francs for a small mine and 4 million Central African francs for an industrial mine; Gabon: under the 2015 Mining Code, this tax ranged from 1,000 Central African francs to 5,000 Central African francs per square kilometre per year for research permits, 100,000 Central African francs per square kilometre per year for exploitation permits, and 120,000 Central African francs per square kilometre per year for concessions. Under the new Mining Code, the rate of this tax remains unchanged for research permits. However, as the new Mining Code obliterates any references to concession titles, it operates a new distinction for surface tax rate and differentiated small-scaled exploration permits (with fixed rates ranging from 5 million Central African francs to 9 million Central African francs, depending on the surface) from large-scaled exploration permits (with fixed rates ranging from 5 Central African francs to 13 million Central African francs for 10-year exploration permits and from 6 million Central African francs to 15 million Central African francs for 20-year exploration permits); Kenya; Senegal: payment of 50,000 Central African francs per hectare for small mining permits and 250,000 Central African francs per square kilometre for other mining permits.

31 Burkina Faso and Cameroon: monthly royalties include (1) a tax on mineral extraction of quarrying products, the amount of which varies depending on the volume of extracted materials, and (2) an ad valorem tax on extracted mining materials, proportional to the value of the extracted products, the percentage of which depends on the nature of the extracted products; the DRC: royalties have been increased from 2 per cent to 3.5 per cent for precious metals, and up to 10 per cent for strategic minerals such as cobalt, and calculated on the gross market value of the products; Gabon: the rate of the proportional mining royalty is to be set in mining conventions. The new Mining Code provides for a rate of from 5 per cent to 10 per cent for base metals and other substances (while under the 2015 Mining Code, the range was 3 per cent to 5 per cent), and 5 per cent to 8 per cent for precious substances (while under the 2015 Mining Code, the range was 5 per cent to 8 per cent for precious metals and 8 per cent to 10 per cent for precious stones); Senegal: instead of the previous 3 per cent fixed rate applicable regardless of the ore, the new Mining Code provides for increased royalty rates varying from 1.5 per cent to 5 per cent, depending on the ore.

32 Burkina Faso: the rate of this contribution equals 1 per cent of the mining company's monthly turnover excluding taxes or 1 per cent of the value of the products extracted during the month.

33 For example, in Burkina Faso: the rate of this tax equals 20 per cent of the amount paid.

34 For example, in Tanzania: the new legislation introduced a 2 per cent increase on export royalties of gold and silver.

35 For example, the new Kenyan Mining Code provides for royalties to be distributed as follows: 70 per cent to the government, 20 per cent to county authorities and 10 per cent to local communities.

36 For example, in the DRC and Mali. See C Asselineau, 'Major changes to the mining code of the Democratic Republic of Congo', Norton Rose Fulbright, February 2018.

- a progressive royalty in the case of an important increase in the selling price of mineral products;[37]
- a tax on capital gains arising from the direct or indirect transfer of mining rights;[38]
- an income tax on revenues arising from services provided by non-resident entities to mining companies;[39]
- a mandatory contribution of investors to a local development fund;[40] and
- an income tax on tolling and processing as well as production.[41]

The absence of payment by mining companies of certain of these new taxes led to the withdrawal by the authorities of their mining titles.[42]

State prerogatives

Most revised mining codes either created,[43] maintained[44] or increased the rate of free-carried state participation in the equity of mining companies.[45] Several mining codes also give the state the right to acquire additional equity.[46]

Certain states have also adopted measures allowing them to retrieve areas subject to mining titles. For instance, the 2018 Tanzanian Mining (Mineral Rights) Regulations abolished retention licences (i.e., licences granted to mining companies that identified valuable mineral deposits that could not be immediately developed due to technical constraints, adverse market conditions or other economic factors) granted to investors prior to 10 January 2018 without providing for a replacement classification. Instead, the rights over all areas under retention licences were immediately transferred to the government.[47] To date, at least three mining companies have initiated ICSID arbitration proceedings to challenge the cancellation of their retention licences.[48] In addition, the 2017 Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act grants the government authority to renegotiate the terms of investor–state agreements deemed 'unconscionable' by Parliament. Refusal by the investor to renegotiate such terms within the allocated period will deprive the mining agreement of any effect.

37 For example, in Mali.
38 For example, in Mozambique.
39 For example, in Mozambique.
40 For example, in Senegal: the rate of this contribution is fixed at 0.5 per cent of the turnover of the company.
41 For example, in Zambia: income tax of 30 per cent.
42 A Ross, 'Congo threatened with US$27 billion claim over revoked mining licence', GAR, 11 March 2021.
43 For example, in Kenya: 10 per cent for large-scale mining projects.
44 For example, in Burkina Faso: 10 per cent; Gabon: 10 per cent; Senegal: 10 per cent; Tanzania: 16 per cent of all mining projects and up to 15 per cent of mining companies.
45 For example, in the DRC: increase from 5 per cent to 10 per cent.
46 For example, in Burkina Faso: optional right subject to an agreement found with the investor; Gabon: optional participation right of up to 25 per cent in the operating company; Kenya, Mozambique and Senegal: right for the state to acquire additional shares up to 25 per cent of the share capital.
47 C Sanderson, 'Tanzania threatened with third claim over mining licences', GAR, 20 January 2020.
48 'Australian miner launches claim against Tanzania', GAR, 30 September 2020; T Jones, 'Tanzania threatened with gold mining claim', GAR, 13 January 2020'; Winshear Press Release, 'Winshear Commences International Arbitration Proceedings Against the Government of Tanzania', 14 July 2020; J Ballantyne, 'Tanzania faces latest claim over mining reforms', GAR, 11 January 2021.

Development and collaboration with local communities

One of the stated aims of the mining reforms is to involve local communities in the mining operations and redistribute part of the revenues paid by mining companies to local communities and regional development plans, thereby allowing neighbouring communities to benefit from social, cultural, industrial and technological advances. The following provisions were, inter alia, introduced in the new mining laws:

- requirement for prior consent of local communities and local authorities before carrying out mining operations in the area;[49]
- allocation of part of the royalties paid by mining operators to the financing of regional development plans or local community development endowments;[50]
- setting up of schemes benefiting neighbouring communities, with a view to improving their living conditions on the one hand, and the relations of the population with mining companies on the other;[51]
- compensation of local communities for their relocation;[52] and
- in-company training for local populations.[53]

Such measures are aimed at avoiding potential conflicts, such as the current dispute in Guinea involving local communities, supported by three non-governmental organisations that filed a complaint before the World Bank against a mining company as they deemed the financial compensation they had received was not adequate in light of the scale of the project.[54]

Obligations imposed on investors in relation to the environment and transparency

As environmental risks and pervasive corruption are threats inherent to all mining projects, the mining law reforms have implemented new provisions to enhance the protection of the environment and increase transparency in the management of mining operations and revenues.

The following are of particular note:

- transparency: publication (1) in the official gazette, of all mining titles, authorisations, mining agreements,[55] reports on mining activities, operations, revenues and production volumes;[56] and (2) on the mining company's website, of the closure and rehabilitation plan for each mine;[57] and

49 For example, in Kenya.

50 For example, in Burkina Faso: allocation of 25 per cent of the royalties paid; in the DRC: mining companies must contribute 0.3 per cent of their turnover to a local community development endowment.

51 For example, in Cameroon and the DRC: companies should develop 'specifications' in consultation with local communities.

52 For example, in the DRC.

53 For example, in Guinea and Kenya.

54 Negotiations between the local communities and the mining company are ongoing: *Africa Intelligence*, 'La Compagnie des bauxites de Guinée ouvre les négociations avec ses riverains', 9 March 2021; *Africa Intelligence*, 'Après AngloGold, les ONG taclent CBG sur les compensations', 2 April 2019.

55 For example, in Burkina Faso, Cameroon, Mali, Kenya and Senegal.

56 For example, in Kenya and Senegal.

57 For example, in Mali.

- the environment:
  - applications for mining titles may be subject to: (1) the submission of a mining and environmental impact assessment, a hazard risk study and a social and environmental management plan to be implemented at the end of the mining operations;[58] (2) the submission of a feasibility or approval statement issued by the minister in charge of the environment[59] or an environmental certificate;[60] (3) the opening of a trust,[61] escrow account[62] or any other financial security[63] to guarantee the implementation of rehabilitation and preservation plans for the environment at the end of the mining operations; and (4) a certificate of compliance with ethical and good governance principles and requirements as enacted by the Extractive Industries Transparency Initiative and the Kimberley Process and best practices enacted by the Minamata Convention on the use of mercury;[64] and
  - regular performance of an audit on environmental risk management.[65]

Certain countries, such as Zimbabwe, have recently taken other decisions to enhance the protection of the environment. In September 2020, the government announced its decision to forbid coal mining in all national parks[66] with immediate effect, thereby cancelling all mining titles held in national parks. The government announced an additional ban on mining along most riverbeds.[67]

Protection of human and employee rights

African states have also endeavoured to implement measures aimed at holding mining companies accountable for human rights violations and protecting their citizens. The following requirements are noted in particular:

- the issuance by mining companies of a statement committing to undertake to respect and protect human rights, including the right to a sufficient standard of living and decent living conditions;[68]

58 For example, in Cameroon, Gabon and Kenya.

59 For example, in Burkina Faso and Gabon.

60 For example, in the DRC.

61 For example, in Burkina Faso.

62 For example, in Mali: this obligation is reserved for holders of large mine operating permits.

63 For example, in Kenya.

64 For example, in Mali.

65 For example, in Burkina Faso: holders of industrial mining permits are to perform an audit on environmental risk management every two years; Senegal: the state may appoint independent firms to perform audits on the accounts, facilities and infrastructures of any mining company.

66 This ban stems from a legal action carried out by the Zimbabwe Environmental Law Association (ZELA) following a research study on the impact, nature and extent of coal mining activities in protected forests and wildlife areas in Zimbabwe. ZELA had used the Hwange National Park, Zimbabwe's largest national park, as a case study. On the basis that mining would permanently damage the ecology of the park, ZELA challenged the development of coal mining in the Hwange National Park and requested the court to reverse a previous decision that had allowed Chinese firms to explore the Hwange National Park for coal.

67 M Chingwere, 'Govt clears air on riverbed mining', *The Herald*, 2 February 2021.

68 For example, in Burkina Faso.

- the obligation to enter into arrangements compliant with certain policies, laws and regulations and expressly prohibiting corruption, child labour, environmental pollution and the violation of workers' rights;[69]
- mandatory subscription to an insurance policy aimed at covering any damages resulting from mining activities[70] or mandatory contribution to an industrial civil liability fund;[71]
- the obligation to set up security, hygiene and health measures for the benefit of mine workers;[72] and
- an increase of the minimum wage of certain classes of low-wage workers, including miners,[73] and the expansion of severance and gratuity payments.[74]

In addition, in reaction to the covid-19 crisis, various African states have adopted laws listing the measures to be implemented by companies and establishing punitive measures on companies that fail to comply with health regulations protecting employees.[75]

Stabilisation provisions

To ensure the quick and effective enforceability of the new provisions against mining companies, several African states have either limited or completely wiped out the stabilisation guarantees provided for under the previous mining legislation. Consequently, foreign investors holding mining titles may no longer rely on the previous tax and customs regime guaranteed by their mining agreements, or may do so under limited circumstances.

Of particular note, the following states have limited the scope of the stabilisation guarantee:

- Burkina Faso: stabilisation guarantee of the tax and customs regime for the lifetime of the mine, with a maximum set at 20 years;
- Cameroon: stabilisation guarantee of the tax and customs regime for specific periods of time depending on the type of mining title;
- the DRC: reduction of the stabilisation guarantee from 10 years to five years;
- Gabon: limitation of the scope of the stabilisation guarantee to cover only the tax regime and no longer the customs regime, and introduction of a 10-year cap;
- Mali: reduction of the stabilisation guarantee of the tax and customs regime from 30 years to 20 years; and
- Senegal: reduction of the scope of stabilisation agreements: stabilisation clauses can be included in mining conventions for the exploitation phase provided they are limited to the tax and customs regime.

---

69 Imposed notably by the Tanzania 2020 Natural Wealth and Resources (Permanent Sovereignty) (Code of Conduct for Investors in Natural Wealth and Resources) Regulations.

70 For example, in Cameroon.

71 For example, in Gabon.

72 For example, in Cameroon.

73 For example, the 2018 revision of the Zambian Minimum Wage and Conditions of Employment Act 276.

74 For example, the Zambian Employment Code Act No. 3 of 2019.

75 For example, the Zambian Public Health Act (Laws, Volume 17, Cap. 295) and the Public Health (Infected Areas) (Coronavirus Disease 2019) Regulations Statutory Instrument No. 22. Failure to comply with these instruments may be sanctioned by a fine or imprisonment, or both.

The following states have completely discontinued the stabilisation guarantee:

- Mozambique: discontinuation of the tax stabilisation provisions provided for under the previous Mining Code; and
- Tanzania: express prohibition of stabilisation clauses in investor–state agreements, except if they are confined to specified time periods that cannot span the lifetime of a mine; are renegotiable; or provide for compensation by the state of the costs paid by the investors to comply with the new laws.

Dispute resolution

Two states have notably implemented new dispute resolution provisions pertaining to the settlement of mining disputes: Mali and Tanzania.

The new Malian Mining Code introduced for the first time a mechanism for the settlement of mining disputes, pursuant to which any disputes other than of a purely technical nature arising between the holder of a mining title or the holder of a quarry authorisation and the state shall be settled (1) by the competent Malian courts, (2) by a regional arbitral tribunal constituted under Malian law, or (3) by an international arbitral tribunal if expressly provided by the mining convention.

The Tanzanian Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 aims at ensuring that natural resources disputes be heard by local courts under Tanzanian law, and expressly provides for the right to cancel mining agreements containing dispute resolution clauses applying foreign laws or selecting foreign forums.[76] The Tanzanian government expressed a particular hostility towards international mining arbitration, which it considers biased. However, in February 2020, following a string of international arbitrations initiated by foreign investors over the cancellation of their retention licences,[77] the Tanzanian National Assembly passed a bill to enact a new Arbitration Act. This bill maintains the general prohibition on the use of international arbitration for natural resources disputes, except where the law and the seat of arbitration are Tanzanian. Although this new bill aims at encouraging the use of arbitration in mining disputes, commentators expressed some scepticism towards the effectiveness of the mechanism offered, as it fails to mention the New York Convention and leaves significant room for court intervention.[78]

National preference

New mining legislation may also include measures to foster local economies by promoting the use of local skills, locally produced services and materials and favouring local subcontractors. In this context, additional restrictions may be imposed, notably on exchange

76 L Yong, 'Tanzania takes steps to settle mining dispute', GAR, 20 October 2017; J Ballantyne, 'Mining company threatens treaty claim against Tanzania', GAR, 22 October 2018.

77 To date, three ICSID arbitration claims have been filed against Tanzania in relation to the cancellation of retention licences, namely by Canadian Winshear Gold in July 2020, Nachingwea UK Limited, Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) in October 2020, and Canadian Montero Mining and Exploration Ltd in February 2021.

78 iResolve, 2020, 'Comments on the Arbitration Bill 2020', www.iresolve.co.tz/webmak2/wp-content/uploads/2020/02/iResolve-Comments-on-Arbitration-Bill-2020.pdf.

control, on the choice of contractors[79] or bans on mineral exports.[80] Mining legislation may also expressly provide for an obligation for permit holders to give preference to local subcontractors, suppliers and employees in their operations, as well as provide training for capacity transfer.[81]

Certain acts have also submitted the application to mining titles either to the prior constitution of a local company under domestic law,[82] to the prior election by the foreign applicant company of residence in the country,[83] or to a set minimum share of participation of nationals of the host country in the equity of newly constituted mining companies.[84] Mining legislation may also require the listing on a local stock exchange of a minimum percentage of the equity of mining projects.[85]

Mining companies' main arguments to protect their investments

In the wake of these recent changes in legislation, several mining companies have initiated, or may initiate, arbitration proceedings against African states or state-owned entities to protect their investments. Strategies may vary but the main arguments that could be raised revolve around the reliance upon the stabilisation provisions contained in the mining or investment codes or within the JV agreements by reference to the doctrine of legitimate expectations. They may also refer to the doctrine of acquired rights or the doctrine of indirect expropriation.[86]

79 For example, in the DRC: C Asselineau, 'Major changes to the mining code of the Democratic Republic of Congo', Norton Rose Fulbright, February 2018; the Senegalese government has also held workshops to consider the adoption of a law protecting local content in the mining industry: *Africa Intelligence*, 'Contenu local: les miniers redoutent une loi similaire au pétrole', 10 March 2020.

80 For example, in Tanzania: L Yong, 'Tanzania takes steps to settle mining dispute', GAR, 20 October 2017; and the DRC.

81 For example, in the DRC: *Africa Intelligence*, 'Le ministère veut enfin relever la part des sous-traitants locaux', 24 December 2019; Zambia; Guinea: the new mining legislation provides for mandatory minimum quotas for international companies to resort to local workforce; and Kenya: local communities need to be involved as much as possible in the mining operations, and mining companies are to give preference to materials, products, services and workforce from Kenya.

82 The new Mining Code of the Gabonese Republic now requires that a company under Gabonese law be constituted for a mining title to be granted, while it was possible under the previous code for applications to be presented by both individuals and legal entities.

83 For example, in Mali.

84 For example, the new DRC mining legislation has created a new requirement for at least 10 per cent mandatory participation of DRC individuals in the equity of newly constituted mining companies: C Asselineau, 'Major changes to the mining code of the Democratic Republic of Congo', Norton Rose Fulbright, February 2018.

85 For example, Kenyan mining law requires the listing on a local stock exchange of a minimum of 20 per cent of the equity of large-scale mining projects.

86 Philippe Hameau, Janice Feigher, Marc Robert and Chloé Deydier, 'Mining Arbitration in Africa', *The Guide to Mining Arbitrations*, First Edition, 2019, www.globalarbitrationreview.com/edition/1001343/the-guide-to-mining-arbitrations-first-edition.

Mining arbitration in Africa: hot topics

JVs with state parties: a delicate balance between contribution and revenues

Foreign investments in the mining sector in Africa often follow a pattern whereby mines are operated through a JV between a foreign investor and a state or state-owned entity. The latter brings or lends mining titles to the JV and the foreign investor provides funding, resources and the expertise necessary for both the exploration and exploitation phases. The parties' respective obligations are set forth in a JV agreement.

This widespread corporate structure can lead to a number of disputes between the JV partners, which frequently arise out of the shifting balance between each party's contribution to the JV and revenues, particularly when projects transition from exploration to production.

An example of disputes commonly encountered is the determination of the underlying value of the mining titles contributed by the state or state-owned party and the associated compensation. This issue is all the more salient in greenfield projects as the value of mineral resources available in the perimeter covered by the mining title is, to a large extent, unknown to the parties at the time the JV agreement is negotiated. As a result, state parties may claim that they are entitled to an adjustment of their compensation in the course of the life of the mine, should the underlying value of the mining titles evolve, either through an adjustment mechanism contractually agreed by the JV partners or by way of a contract review that is often unilaterally imposed by the state party.

To ensure that the underlying value of their mining titles is factored into their remuneration, African minority shareholders also tend to include clauses providing that a portion of their revenues will be indexed by reference to mineral resources or ore reserves identified during the life of the mine within the perimeter of the mining titles. These clauses, often insufficiently detailed, are a typical source of disputes before arbitral tribunals. Indeed, resources determination, even when it is conducted in accordance with internationally recognised standards such as the JORC Code,[87] the NI 43-101[88] or the PERC[89] can lead to lengthy discussions and inconsistent results. Clauses indexing a state party's revenues to the identification of resources therefore often result in complex expert determination challenges before arbitral tribunals. Parties should therefore be mindful when drafting JV agreements of being as specific as possible about the process for the determination of the resources, which may serve as a basis for the calculation of the state party's revenues. In addition to a clear reference to the chosen standard for reporting the exploration results, the parties may, for instance, agree on the most common parameters to be used for such reporting (such as references to the determination of commodity long-term prices, pit slopes and mining costs) as well as its periodicity.

Another issue that is commonly raised regarding JV revenues indexed on the capacity of the permits is that investors often legitimately consider that they should not be compensating the state party for resources that will not be extracted. Indeed, whereas mining

87 The Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves.

88 The Canadian National Instrument 43-101 Standards of Disclosure for Mineral Projects.

89 The Pan-European Reserves and Resources Reporting Committee Standard.

companies may explore a large part of their permit area and further identify a large part of their permit resources, they rarely mine the whole perimeter of their permit as mine plans usually focus on the most cost-effective locations.

One way to avoid these debates would be to provide for compensation clauses that do not depend on the capacity of the permit area but only on production, such as royalties on sales or production sharing mechanisms. However, from the state party perspective, having a part of the revenues disconnected from production and linked to the resources that it contributed to the JV may also be considered as an important negotiation point as it may allow the state party to shield some of its revenues from metal prices fluctuation.

Another trend in arbitration arising out of JV agreements with state parties revolves around the tendency of mining companies to curtail exploration and production when commodity prices plummet or fall below a break-even point.[90] Such decisions, which can go as far as shutting down mines pending resumption of price growth,[91] may be incompatible with the state parties' expectations and in some cases may even breach foreign investors' contractual undertakings. Investors' contribution to the JV typically involves obligations to conduct exploration, issue a feasibility study, develop community projects, build infrastructures or reach certain levels of production. State parties have no interest in seeing the mining permits that they contributed to the JV being kept on hold.

Disputes may also arise out of the revenue stream paid by the JV to contractors and subcontractors, in particular for mining operations, transport and sales. One trend in JV agreements is including provisions aimed at regulating the use of contractors and subcontractors and allowing for both the investor and the state party to propose their services. State parties, when they have operating services, which is rarely the case, are usually less equipped than private contractors to provide the services required in the mining industry. State parties may therefore be unable either to propose the services required by the JV or to compete with the services that their JV partners or third parties can offer. These situations are a common source of dispute as state parties may be frustrated by not being able to contract with the JV, and may seek to obtain compensation for missed opportunities. From the investor's perspective, however, it appears legitimate to not compensate a state party for work it did not perform.

Parties should also be cautious when referring to amounts of investment, be it in their JV agreements or in ancillary documents such as feasibility studies. Indeed, these references could be interpreted as contractual undertakings and give rise to disputes if and when the investor is unable to achieve the expected results or to honour the promised investments. The ongoing dispute between an Indian mining group and the Zambian government regarding an alleged underinvestment in their JV is a recent example. In this case, the dispute even escalated into a more serious situation as the Zambian government went as far as appointing a provisional liquidator with the aim of liquidating the JV.[92]

90 'Senegal wins first round against ArcelorMittal', GAR, 9 September 2013.

91 'Glencore deals mining blow to African copper producers', *Financial Times*, 8 September 2015.

92 Reuters, 'In blow to Vedanta, Zambian court rules KCM liquidator to stay in post', 6 January 2021; *Financial Times*, 'Zambia ramps up war of words with mining company Vedanta', 5 February 2020. See also J Ballantyne, 'Mining venture brings ICSID claim against Zambia', GAR, 8 June 2020.

These JV agreements, because they usually govern long-term projects, are indeed subject to many vicissitudes including metal price fluctuation and changes of government, which make it challenging, if not impossible, to maintain a good relationship for their whole duration, and are therefore an unlimited source of disputes.

Disputes relating to the undercapitalisation of JVs

There has recently been an important trend towards the development of disputes relating to the dissolution of JVs on the initiative of the minority partner emanating from the state in which the JV operates.

Mining is known to be extremely capital-intensive. The financial needs are very heavy during the kick-off phase of the project and the first returns on investment can only be expected after several years. This is especially true for greenfield projects, in which the exploration period is complemented by the infrastructure construction period and the project launch phase.

The company investing in the project will therefore necessarily accumulate losses for several years before making its first sales and profits.

JVs usually involve an investor bearing all the financial costs of the project alone whereas the state party generally benefits from an anti-dilution clause allowing it to maintain the same equity regardless of the changes that may affect the share capital of the JV. Such configuration is an incentive for the investor to favour debt financing (usually through shareholder loans) over capital increases since such increases would be solely financed by the investor while proportionally benefiting its partner. Indeed, shareholder loans have priority over capital, and are therefore reimbursed before the capital. Consequently, since the JV will pay out dividends only in the very distant future, it is understandable that the investor prefers debt financing, especially if it is adequately remunerated.

Thus, the investor shall have its loans reimbursed and its interests paid before the distribution of dividends, and sometimes even before the JV is able to distribute dividends.

However, accumulated losses and debt financing have the effect of automatically reducing the JV capital and – at least for OHADA Member States – of triggering a legal recapitalisation obligation. It is on this recapitalisation obligation that some minority partners in JVs have recently relied, to request the dissolution of the JV.

Such dissolution, if it were to be imposed, would have the effect of allowing the minority partner to regain control over its mining licences and operate them directly, or enter into a new JV with another investor under more favourable terms while the initial investor would lose all of its investment in the project.

Investors, therefore, bear a substantial risk from a substantive law standpoint. Procedural issues arising out of the commencement of legal proceedings before local courts despite the existence of an arbitration agreement may also arise.

The basis for the recapitalisation obligation

The Uniform Act on Commercial Companies and Economic Interest Group (UACCEIG) includes several provisions applicable to commercial companies. In substance, the UACCEIG provides that if a company's equity capital falls below half of the share capital as a result of recorded losses, the governing bodies of the company shall call a shareholders' general meeting to decide on the dissolution of the JV.

If the dissolution is not pronounced, the JV is required to restore its equity capital within two years of the end of the financial year in which the losses were recorded.[93]

If the reconstitution of the equity capital does not occur within such period, any interested person may request the relevant court to rule on the dissolution of the JV.

The equity capital reconstitution can be achieved through a capital increase in cash or through the conversion of receivables into capital.

Thus, the investor that – in most of the JVs – contributes alone to capital increases without being able to dilute its minority partner will be compelled to convert all or part of its shareholder loans to meet the recapitalisation obligation.

However, such capital increase can only be decided by a qualified majority. That is to say, the agreement of the minority shareholder is generally needed for the capital increase to be voted.

A minority state-owned shareholder refusing to vote in favour of the capital increase can therefore jeopardise the process and expose the company to a risk of dissolution.

To overcome the opposition of the state-owned partner that refuses to vote – without any apparent good reason – the capital increase as required by the UACCEIG, the investor may require the appointment of a special purpose trustee with the mission of voting in favour of the capital increase instead of the reluctant shareholder. The investor may also argue that such refusal constitutes an undue use of minority powers and must therefore be sanctioned.

Procedural issues

Dissolution requests have recently been introduced upon the initiative of state-owned companies (i.e., the minority partners in JV companies) in African countries.

Typically, the state-owned partner argued that the JV equity had been inferior to half of the share capital for more than two years.

Many of these disputes eventually settled, and it will therefore not be possible to know what the courts' ruling on the requests for dissolution would have been.

Nevertheless, one can still legitimately question whether, in the presence of an arbitration clause in both the JV agreement and the by-laws of the JV, local courts would have had jurisdiction over the dissolution request.

In these instances, the state-owned companies referred the dispute to local courts on the basis of the (real or perceived) home country advantage. However, that does not mean that the investor could not have triggered the arbitration clauses set out in the various agreements signed with its partner or in the JV by-laws.

Although the arbitrability of a dissolution application has been debated, nothing, in our view, should prevent an arbitral tribunal from ruling on this issue even if the claim is based on a statutory provision rather than on a JV agreement or the company's by-laws.

93 For *sociétés anonymes*, see Article 664 et seq. of the Uniform Act on Commercial Companies and Economic Interest Group.

The growing prevalence of environmental issues in arbitration proceedings

In recent years, African states have increasingly raised environmental issues as a defence to investors' claims in the framework of mining arbitration proceedings.

In 2018, an ICSID tribunal declined jurisdiction over a claim filed by subsidiaries of a Canadian mining company against Kenya on the basis of violations by the Kenyan authorities of environmental local laws in the attribution of the mining licence.[94]

The tribunal in this case ruled that the ICSID Convention and UK–Kenya bilateral investment treaty (BIT) both imply that investments should be lawful to ensure protection.[95]

The tribunal concluded that in light of the violation of Kenyan environmental laws, the licence was void *ab initio* and that it was without jurisdiction.

An application for annulment was filed in February 2019.

Similar arguments may have to be addressed in an ICSID proceeding initiated in 2018 by US claimants against the Republic of Rwanda under the US–Rwanda BIT over a cancelled mining concession.[96] The Minister of Mines declared in the press that the licence was cancelled after the group 'failed to meet the contractual obligation to invest the agreed amount to increase production' and breached regulations 'by polluting the environment'. Proceedings are currently pending.[97]

Climate change-related arbitration is another potential area of dispute in the region.

Security threats and the protection from the host states

Often located in regions of political and security instability, African mines have been the subject of attacks by various groups including international terrorist organisations as well as local militia.

Examples of security incidents involving African mines are indeed frequently reported. To name just a few: employees of French companies were kidnapped near a uranium mine in Niger in 2010 and the same mine suffered a suicide car bombing attack in 2013; a North American gold mining company also suffered a series of attacks by armed rebels in its mine in the DRC, including the kidnapping of employees for several weeks in 2019; a convoy transporting workers of another North American gold company in Burkina Faso was ambushed in 2019, killing 39 people and wounding 60 others.

---

94 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 October 2018. See also 'Kenya defeats mining claim after local law violation', GAR, 23 October 2018.

95 'The Tribunal does not agree simply to interpret the Mining Act so as to facilitate the issue of mining licences. There may be cases where (as here) issuance of a mining licence conflicts with the broader purposes of the Mining Act and the broader Kenyan legislative framework. . . . The Tribunal concludes that for an investment such as a licence, which is the creature of laws of the Host State, to qualify for protection, it must be made in accordance with the laws of the Host State. . . . The claimed rights flow from a document which has no legal existence or effect, and cannot therefore give rise to compensable rights. . . . The Tribunal concludes that for an investment to be protected on the international level, it has to be in substantial compliance with the significant legal requirements of the host state', ibid., paras. 310, 319 and 321.

96 T Jones, 'Rwanda faces second ICSID claim', GAR, 25 June 2018.

97 www.italaw.com/cases/7112.

Security threats can result in tremendous losses for mining companies, going as far as forcing them to curtail or even suspend operations, and in some extreme situations to evacuate.

Despite some of the security risks being known and well documented, it is sometimes argued that as foreign investors entitled to operate in a normal and predictable business and legal environment, mining companies should also be entitled to a minimum level of security from the host states. Such claims are usually grounded on the full protection and security standard, which appears in most bilateral investments treaties and is generally interpreted as including a positive obligation for the state to protect foreign investments from unlawful activities. The state's obligation to protect foreign investments has thus been interpreted as an obligation to exercise due diligence in light of the circumstances of the case (in particular, the level of development and stability of the state, the availability of resources, foreseeability of the threat).[98]

These types of claims, for lack of due diligence of the host state in protecting mines from security incidents, are not only theoretical. In the wake of the Arab Spring, an ICSID tribunal has already ruled that the Arab Republic of Egypt breached its obligation to exercise due diligence with regard to the applicable protection and security standard by failing, despite several warnings, to prevent saboteurs from damaging pipelines belonging to claimants.[99] The multiplication of security threats across Africa,[100] and the tendency of mine sites to be located in isolated remote areas that are difficult to protect from armed groups, could result in the development of such claims.

Conclusion

In the coming years, the fast-evolving landscape of mining arbitration in Africa may be a fertile ground for developments on hot topics in international arbitration. An issue that may increasingly become a source of dispute is whether international sanctions imposed on a party to a mining contract or group of contracts constitute a valid excuse for the other party to suspend performance of its obligations or terminate the contract. The issue has already given rise to heated debates in another context and resulted in decisions of the French courts that could potentially be relevant or persuasive in the framework of a mining arbitration involving civil law African countries. The Paris Court of Appeal thus ruled that a debtor on whom economic sanctions had been imposed, leading to a freeze of its assets, could not claim that such sanctions were external circumstances, making it impossible for

98 *Asian Agricultural Products Ltd. v. Republic of Sir Lanka*, ICSID Case No. ARB/87/3, Final Award, para. 77; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, para. 81; *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, paras. 380–85.

99 *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on liability and heads of loss, paras. 283–91.

100 In particular, in countries such as Mali, Niger, the Central African Republic, the DRC, Burkina Faso, Nigeria, Sudan and Chad.

it to pay. The Court of Appeal found that the debtor's actions may have partly led to such sanctions and refused to exonerate the debtor from an increase on the applicable interest.[101] The French Supreme Court upheld the ruling of the Court of Appeal on this issue.[102]

The health and economic crisis caused by the coronavirus pandemic also gives rise to a series of potential arbitration claims and issues of force majeure in the mining industry. Although to date mining has not been hit as hard as other sectors,[103] the pandemic has had a ripple effect, leading to multiple breaches of contract; disruption in travel, transportation and supply chains; fluctuation of demand for commodities; a drop in productivity caused by government-ordered lockdowns or shutdowns; more difficult access to lending, which has caused delays in the framework of construction contracts and in the delivery of materials; and the inability of suppliers to perform or pay for work.

101 *Bank Sepah v. Overseas Financial Ltd and Oaktree Finance Ltd*, Paris Court of Appeal, No. 17/02093, 8 March 2018.

102 French Supreme Court, Plenary session, Nos. 18-18.542 and 18-21.814, 10 July 2020.

103 Mark Baker, Cara Dowling and Patrick Aana, 'Global overview of disputes trends in the mining and metals sector (Part 1): Volatility as the new normal', Norton Rose Fulbright, International Arbitration Report, Issue 15, November 2020.

Appendix 1

The Contributing Authors

Philippe Hameau
Norton Rose Fulbright LLP

Philippe Hameau is a dispute resolution and litigation lawyer based in Paris. With more than 30 years in practice, Philippe has extensive experience in international arbitration and litigation, with a particular focus on financial institutions and infrastructure, mining and commodities. Philippe has significant experience as counsel in both investor–state and commercial contract disputes under all the leading institutional rules, including those of ICC, ICSID and UNCITRAL. He also sits as arbitrator in ad hoc arbitration proceedings.

His Supreme Court background gives him an exceptional knowledge of the procedural rules of the French courts. He also has substantial experience with regard to OHADA law and arbitration proceedings in Africa.

He taught civil and commercial law at the University of Paris II and the University of Paris V and regularly gives lectures at various universities in France.

Philippe has been designated Acritas Star 2019 in the *Global Elite Law Firm Brand Index* published by Acritas, based on his clients' feedback.

Philippe holds a DEA in private law from the University of Paris II – Panthéon-Assas (1983) and graduated from the Institut de Droit des Affaires (1983). He is a member of the Paris Bar (1991). He won the first prize for oral pleading at a contest organised by the Supreme Court's Bar Association (1991).

Janice Feigher

Norton Rose Fulbright LLP

Janice Feigher is a dually qualified solicitor and *avocat*. She has extensive experience of arbitration proceedings conducted under all major arbitral rules governed by various procedural and substantive laws. She regularly appears before tribunals in both ad hoc and institutional arbitrations. She also handles international arbitration-related court proceedings (injunctive relief, annulment, enforcement).

Her practice focuses on the mining, energy, aerospace, telecommunications and hospitality sectors. She has particular experience in disputes in the OHADA region, North Africa and Europe. In 2017, she was seconded to the in-house legal department of a major player in the energy sector.

She was a co-chair of the CFA40, the French Arbitration Committee's under 40 group, from 2017 to 2020.

Janice was designated as a Rising Star in Commercial Arbitration for France by Euromoney (Legal Media Group) in 2016, 2017 and 2018, and features as a Future Leader in the 2018, 2019, 2020 and 2021 editions of *Who's Who Legal: Arbitration*.

Before joining Norton Rose Fulbright, Janice worked in the dispute resolution departments of international law firms in London, Rome and Paris.

She is a graduate of the universities Paris I – Panthéon-Sorbonne and King's College London, where she obtained a double degree in English law and French law.

Janice regularly publishes articles and speaks in conferences on international arbitration. She has published several articles on OHADA arbitration.

She speaks French, English and Italian.

Marc Robert

Norton Rose Fulbright LLP

Marc Robert is a dispute resolution lawyer based in Paris. He specialises in international arbitration as well as commercial litigation (domestic and cross-border).

Marc has a breadth of experience in cross-border disputes, particularly in the energy, mining and construction sectors.

Marc has been involved and led teams in both pursuing and defending claims under the arbitration rules of the major arbitrational institutions including those of ICC and ICSID and ad hoc arbitrations under the UNCITRAL rules. He also has experience of the French courts in both stand-alone and ancillary litigation, enforcement proceedings, and interim and injunctive relief, and is a court-appointed forensic expert.

Marc also specialises in OHADA law and disputes in the OHADA region.

Marc holds an LLM from McGill University, Canada, and a master's in international law from the University of Panthéon-Sorbonne, France. He has been a member of the Paris Bar since 2010. He is fluent in French and English.

Chloé Deydier

Norton Rose Fulbright LLP

Chloé Deydier is a dispute resolution and litigation lawyer based in Paris, with a particular focus on international commercial arbitration.

Her practice focuses on the mining, energy, oil, telecommunications and hospitality sectors. She has particular experience in disputes in the OHADA region, North Africa and Europe. Before joining the practice, Chloé was an intern in two major companies in the music and energy industries. She also worked at the London office of another international law firm. Chloé has been a member of the Paris Bar since 2017. She holds a MOOC in domestic and international arbitration from the University of Montpellier (2017), a master's degree in litigation and contracts from the University of Nanterre (2014) and a master of laws (LLM) in European Union economic law from the University of Reading. She is fluent in French and English.

Norton Rose Fulbright LLP
40 Rue de Courcelles
75008 Paris
France
Tel: +33 1 5659 5000
Fax: +33 1 5659 5001
philippe.hameau@nortonrosefulbright.com
janice.feigher@nortonrosefulbright.com
marc.robert@nortonrosefulbright.com
chloe.deydier@nortonrosefulbright.com
www.nortonrosefulbright.com

Mining is booming – and with it mining disputes. *The Guide to Mining Arbitrations* fills a gap in the literature on those disputes. It offers practical know-how in three parts: the risks and issues mining companies confront; the substantive principles at work; and the regional variations that must be taken into account – written by some of the leading names in mining arbitration.

Visit globalarbitrationreview.com
Follow @garalerts on Twitter
Find us on LinkedIn

an LBR business

ISBN 978-1-83862-578-8