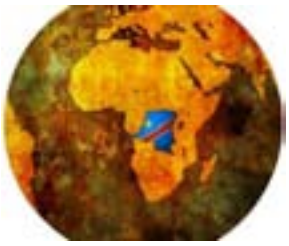
INVESTING IN THE

DEMOCRATIC REPUBLIC OF CONGO

-

A LEGAL GUIDE



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Foreword

The Democratic Republic of Congo is one of those rare countries deserving the global community's special attention. After being raised in the Kivu region (Bukavu), I knew my heart belongs on the African continent. My parents' passion for this amazing continent flows through my veins and I was very pleased to discover this same enthusiasm with my mentor Herman Lemaire. After graduating at the K.U. Leuven's Law Faculty it was Herman who encouraged me to become a lawyer passionate about Africa. As of day one, Herman's approach has been one of somebody who cherishes the African countries and their peoples, and I hope I will carry on this approach in my professional career.

This legal guide is the fruit of a very intense collaboration and is aimed at informing anybody interested in the Congolese legal framework. Trying to give an overview is a very ambitious target and the never ending legislative process must not be forgotten.

Lubumbashi, March 2012

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List of abbreviations

ANAPI	Agence Nationale pour la Promotion des Investissements
Anti-money laundering Law	Loi 04-016 du 19 juillet portant lutte contre le blanchiment des capitaux et le financement du terrorisme
Banking Law	Loi 003-2002 du 2 février 2002 relative à l'activité et au contrôle des établissements de crédit
BIT	Bilateral Investment Treaty
CIF	Cost Insurances and Freight
Code of Civil Procedure	Décret du 7 mars 1960 relatif au Code de procédure civile
Commercial Companies Decree	Décret du Roi-Souverain du 27 février 1887 portant Sociétés Commerciales
DGI	Direction Générale des Impôts
DGRAD	Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de Participation
DRC	Democratic Republic of the Congo
EIS	Environmental Impact Study
EMMP	Environmental Management Plan of the Project
FDI	Foreign Direct Investments
Farming Law	Loi du 24 décembre 2011 portant principes fondamentaux relatifs à l'agriculture
IBP	Impôts sur les Bénéfices et Profits
ICA	Impôt sur le Chiffre d'Affaires
ICSID	International Centre for the Settlement of Investment Disputes
IPR	Impôt Professional sur les Rémunérations
Income Tax Decree	Ordonnance-loi du 10 février 1969 relative aux contributions cédulaires sur les revenus
IP	Intellectual Property
Industrial Property Law	Loi 82-001 du 7 janvier 1982 portant propriété industrielle.
Labour Code	Loi 015-2002 du 16 octobre 2002 portant Code du travail
Land Code	Loi 73-021 du 20 Juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés
MIGA	Multilateral Investment Guarantee Agency
Mining Code	Loi 007/2002 du 11 juillet 2002 portant Code Minier
MRP	Mitigation and Rehabilitation Plan
OFIDA	Office des Douanes et Accises
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des affaires
PME	Petites et Moyennes Entreprises
PMI	Petites et Moyennes Industries
Social Security Decree	Décret-Loi du 29 juin 1961 portant la sécurité sociale
Telecommunications Law	Loi cadre 013-2002 du 16 Octobre 2002 sur les télécommunications en RDC
UA GCL	Uniform Act on General Commercial Law
VAT	Value Added Tax

Introduction

After more than fifty years of colonisation, the third largest country on the African continent gained its independence in 1960. Since then foreign investors have never ceased coming back to the Democratic Republic of the Congo (DRC) because there exists an attraction to this country, empowered with a vast potential wealth, amongst entrepreneurs coming from all over the globe. However, due to numerous conflicts foreign businesses restricted their activity in the DRC until the beginning of the democratic transition process early 2002.



We believe however, the DRC was, is, and will stay the beating pulse of Central African industrial activity and therefore we aim at giving an overview of the current investment framework without neglecting the DRC's decision to join the OHADA[1].

The first part of this exposé will briefly set out the general political and economic context of the DRC, whereas subsequently we will give an overview of the current legal framework governing foreign investments in the DRC.

[1] French acronym standing for "Organisation for the Harmonization of Business Law in Africa".

Brief overview of the political and economic context

1. Political



Being *'home to a vast potential of natural resources and mineral wealth*[2]*'*, the DRC is attempting an economic revival through adapting its legal framework to modern day investments. The democratic transition process (2001-2006) has known a happy outcome with the free, democratic and transparent elections allowing democratically elected leaders (President of the Republic, Members of Parliament and Provincial Councillors, Senators, Province Governors, etc.) to run the country. Therefore, after the 2006 elections the international community was facing a freshly installed government led by H.E. Joseph Kabila promising to uphold the principles of democracy and promoting foreign investment. As a result of the ensuing political stability, political risks (wars, political instability), economic risks (raiding, inappropriate economic measures) and social risks (strikes, riots and troubles) are considerably reduced. Furthermore, during the 2006 legislative period some prosperous initiatives were undertaken, such as the new 2006 Constitution and several investment related Codes. This is encouraging and allows to foresee a promising future and particularly with respect to investments in the DRC. However, the security situation is still quite worrying in some remote parts of the DRC, as e.g. in East Congo. In December 2011, the second ever free elections were held in the DRC confirming H.E. Joseph Kabila will remain President of the Republic for another 5 year term.

[2] Harbouring amongst others cobalt, copper, niobium, tantalum, petroleum, industrial and gem diamonds, gold, silver, zinc, manganese, tin, uranium, coal, hydropower and timber; U.S. Department of State, Bureau of African Affairs, 'Background Note: Democratic Republic of Congo'.

The Congolese legal system belongs to the civil law tradition, inherited by the former Belgian colonisation, and the following federal institutions exist within the Congolese State:

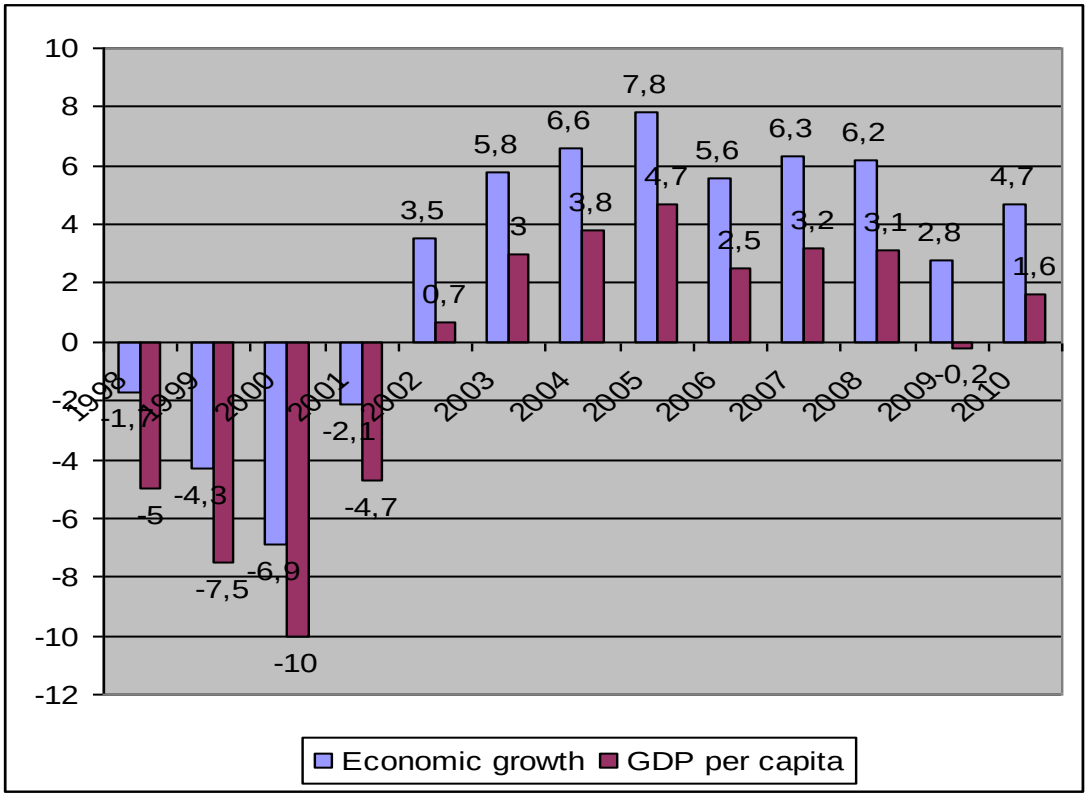
- the Presidency
- the Central Government
- a bicameral Parliament (*Sénat* and *Assemblée Nationale*)
- courts of justice with a Supreme Court (hierarchical system)

Next to this centralised structure, an important decentralisation process is supposed to take place granting decentralised authorities more power.

2. Economic

Ranked 187th out of 187 on the Human Development Index, the DRC still has a long road ahead. The GDP in 2010 was only 6790 million US$ with a GDP *per capita* of just 98,1 US$[3]. The latter accumulated with an average annual change in the consumer price index of more than 20% makes the average DRC population one of the poorest in the world. Furthermore, whereas in most countries we observed a positive growth of GDP per capita between 1980 and 2007, the DRC knew a negative growth of 4,3%[4]. However, since 2002 the GDP *per capita* is undergoing a positive growth and there exists an average economic growth of 2,5 % since 2002.

[3] http://www.bcc.cd/downloads/stat/evolacteco/evorec_06_10.pdf
[4] Http://hdrstats.undp.org/en/indicators/41.html.



Source: Congolese Central Bank[5]

Also on the scale of foreign direct investments (FDI), the DRC was doing worse than some of its neighbouring countries due to the financial crisis. Attracting a mere 951 million US$ of FDI in 2009, only representing 1,6% of a total of 58 565 million US$ investments in Africa, the need for attracting investors is imminent[6].

Nevertheless, since the third trimester of 2009 we notice a growth of activity in the DRC, especially in the mining sector.





[5] Banque Centrale du Congo - Direction des Statistiques; www.bcc.cd.
[6] Figures obtained from the 2008 World Investment Report of the UNCTAD, www.unctad.org/wir.

Global activity index			Sectorial index				
	Trimestral growth	Total	Mining	Manufacturing	Construction	Energy	Others
2008							
1st term	2,5	2,5	18,3	0,1	10,8	3,2	14,5
2nd term	6,7	9,4	3,2	5,5	8,4	-9,6	-5,4
3d term	-1,8	7,5	0,7	-6,6	-4,7	2,4	18,1
4th term	-1,1	6,2	-12,2	-3	-1,4	-2,4	0,3
2009							
1st term	-2,19	-2,19	-8,61	-2,95	-0,61	-2,12	-1,73
2nd term	-0,52	-2,69	-1,66	5,05	0,78	-1,27	***
3d term	2,09	-0,66	7,55	5,81	1,3	0,4	0,55
4th term	2	1,32	0,51	5,57	0,21	0,17	0,23

Source: Beltrade and the Congolese National Bank[7]

The latest data[8] show a strong recovery in the mining sector during the first semester of 2010. The production of copper has increased with 198,4 % as opposed to production in 2009[9] and also the extracting of cobalt knows an increase of 172,9 %[10]. Only the zinc production is turning out less favourable as opposed to 2009: a decrease of 58,3 % due to an instable supply of zinc oxide.

[7] Beltrade info, n° 22, juin 2010, www.beltrade-congo.be; www.bcd.cd.
[8] Obtained from a report of the Congolese Central Bank on the recent economical evolution dated June 2010, http://www.bcc.cd/downloads/stat/evolacteco/evorec_06_10.pdf.
[9] 173.736 (metric) tons end of April 2010 against 58.217 (metric) tons in April 2009.
[10] 28.150 (metric) tons against 10.316 (metric) tons during the first semester last year.

3. Conclusion

Showing the will to achieve a more stable and investor friendly environment, the Congolese government adopted several new codifications (e.g. investment code, mining code, forest code, …) and is preparing the future accession to the OHADA system[11]. As mentioned before, renewed activity in the mining sector, the source of most exports, boosted Congo's fiscal position and we believe business and economic prospects are expected to improve. The time has come for the DRC to come over all internal struggles and to take its seat in the international business community allowing the country to fully develop itself and become a key player on the African continent. Or as the World Bank puts it: "*Given the DRC's potential to be one of the richest countries on the African continent, meeting this potential requires peace and good governance*"[12].

[11] The Congolese Parliament ratified the accession to the OHADA Treaty on February 11, 2010; Loi n° 10/002 du 11 février 2010 autorisant l'adhésion de la République démocratique du Congo au traité du 17 octobre 1993 relatif à l'harmonisation du droit des affaires en Afrique.

[12] World Bank, *Democratic Republic of the Congo, Emergency Multisector Rehabilitation and Reconstruction Project* (EMRRP), Project Information Document, Report No PID D10904, Infoshop The World Bank, 15 janvier 2001 [PDF] http://www-wds.worldbank.org/.

DRC legislation

Whilst trying to describe the current status of the legislation in the DRC we immediately stumble upon the limits of our own intention of giving a clear brief description in order to inform possible investors and others interested in the DRC. Therefore we have to limit the scope of this overview and we will thus only clarify the most important regulations without entering into too much details.

This part is divided into different chapters corresponding to the different intervals when wanting to invest in a foreign country.

First of all one needs to get familiar with the general provisions of commercial law (**Chapter I – General commercial law**). Once entering the territory of a foreign State one often needs to set up a company in order to conduct business. The first question evidently consists of choosing the right type of commercial company (**Chapter II - Commercial companies in the DRC**).

Once able to operate, some questions will arise as to property titles (**Chapter III – Property Titles**), securities (**Chapter IV – Securities**), labour regulations (**Chapter VI - Labour laws**), and local tax and customs provisions (**Chapter V - Tax and customs**).

Foreign investors may also want to know whether the host country is attracting foreign investments and if there exists a system of incentives for / protection of foreign investors (**Chapter VII - The Investment Code**). Besides the Investment Code, the DRC also promulgated special regulations in relation with mining and quarry activities (**Chapter VIII - The Mining Code**) and in relation with forestry and agricultural activities (**Chapter IX – The Forestry Code and the Farming Code**). These codes will be treated separately because of their specific scope of application.

Finally, there are some specific regulations concerning banking activities (**Chapter X - Banking sector**), telecommunications (**Chapter XI - Telecommunications**), and arbitration (**Chapter XII – Arbitration**).

Finally, the guide deals in general terms with the accession of the DRC to the OHADA Treaty, and its impact on the current domestic legislation (**Chapter XIII – Accession to the OHADA Treaty**).

Previous to broaching the first Chapters, we want to point out that the government drafted the Investment Code and the Mining Code with the support of the World Bank, and an action plan for public enterprise reform is ongoing.



DR Congo National Assembly

Chapter I – General commercial law

General Congolese commercial law is very concise and dates back to the colonial era.



The most important sources are a decree from 1913, the Commercial Law Decree, on merchants and the proof of commercial commitments[13], and a decree dated March 6, 1951, and subsequent ordinances, on the commercial register[14].

1. Merchants and commercial acts

Any person who, on a professional basis, carries out commercial transactions is considered a merchant[15]. The reference made to 'on a professional basis' implies the person needs to undertake commercial acts on a regular basis, and as a source of income.

In order to determine what constitutes a commercial act the Commercial Law Decree sets out a non-exhaustive list of commercial acts comprising, a.o., sale and resale, renting activities, banking activities, construction, etc[16]. Furthermore, all commercial companies created within the Congolese territory in conformity with the Congolese Commercial Companies Code are considered to carry out commercial acts[17].

Noteworthy however is the necessity for married women to obtain the consent of their husband in order to conduct business[18].

The importance of being qualified as a merchant lies in the fact that merchants are subject to a variety of specific laws and regulations, and that they must keep books of account[19] and obtain a national identification number[20].

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[13]Decree dated August 2, 1913 on Merchants and the proof of commercial commitments, *Décret du 2 août 1913 relatif aux commerçants et de la prevue des engagements commerciaux*, further referred to as Commercial Law Decree.
[14] Decree dated March 6, 1951 on the commercial register, *Décret du 6 mars 1951 portant Registre du commerce*, and Ordinance dated February 7, 1979 on the new commercial register, *Ordonnance du 7 février 1979 portant nouveau register du commerce.*
[15] Article 1 Commercial Law Decree.
[16] Article 2 Commercial Law Decree.
[17] Article 3 Commercial Law Decree.
[18] Article 4 Commercial Law Decree.



Finally, some commercial activities are reserved for Congolese nationals or commercial companies fully owned by Congolese nationals[21].

2. Commercial register

2.1 General

A commercial register was introduced in the DRC by a Decree dated March 6, 1951[22] which has subsequently been complemented by other laws and regulations.

Commercial register – The Congolese registration procedure has two main characteristics. First of all, the registration has to occur preceding conducting business in the DRC[23]. One exception is made for public limited companies, who dispose of a term of two months after obtaining the presidential authorization to fulfil the obligation of registration. Secondly, no person may conduct other commercial activities than those mentioned in the register. These two obligations are however not being sanctioned in a direct manner. For example; persons conducting business without being properly registered merely fall within the scope of application of the laws prohibiting dishonest practices, and are in practice not often sanctioned.

New Commercial register – By ordinance dated 7 February 1979, the Congolese legislator wanted to break with the past and introduced a new commercial register ("NRC"). Actually, besides a mere alteration of the name, no important changes were introduced. All prior rules remained in force (such as the Decree dated March 6, 1951) and all persons registered with the "old" commercial register had to re-register with the new commercial register within six months after entry into force of the new ordinance. This meant that all old registrations would no longer be valid after this transitional period.

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[19] Decree dated 31 July 1929 on Books of Account, *Décret du 31 juillet 1912 portant livres de commerce*.
[20] Ordinance dated 13 August 1973 on the creation of a national identification number, *Ordonnance du 13 août 1973 portant creation d'un numéro d'identification national.*
[21] Article 5 of the Law dated 5 January 1973.
[22] Decree dated March 6, 1951 on the commercial register.
[23] Article 5 Decree dated March 6, 1951 on the commercial register.

2.2 Persons obliged to register

As previously mentioned, the Decree on the commercial register is still in force and article 2 of the latter stipulates that no one may conduct commerce in the DRC without being registered with the commercial register[24].

Foreign companies - The DRC legislation differentiates between Congolese and foreign natural or legal persons. Foreign companies (regardless of their statutory seat) opening an agency, a branch office, exploitation centre or any other place of business in the DRC are obliged to register with the commercial register. The demand for registration of foreign companies must be lodged with the Tribunal of Grand Instance of the district where the business establishment is situated. In case multiple establishments are being created, the company is free to choose in which district it desires to be registered.

Noteworthy is the fact that Congolese private limited companies fully owned by foreigners, and Congolese public limited companies of which all directors are foreigners, are considered foreign and need to conform with the above mentioned procedure as well.

Finally, registration with the commercial register entails a presumption of the status of merchant[25]. This presumption is especially important for natural persons since the status of merchant is being deducted from the fact that somebody carries out, on a professional basis, commercial acts. Commercial companies however, are created to carry out activities for consideration or financial gain, and are thus *ipso facto* merchants.

[24] Article 2 Decree dated March 6, 1951 on the commercial register.
[25] Article 3 Decree dated March 6, 1951 on the commercial register.

Chapter II - Commercial companies in the DRC

When starting a business in the DRC, the first step is to decide upon which legal status is being sought after. There are three different possibilities. First of all, creating a *commercial company* has the advantage of creating a distinct legal personality and often offers protection to the own patrimony of the managers. Secondly, one may opt for becoming an *independent worker* which means there is no need for a separate legal entity nor contribution, but the independent worker is fully liable and his own patrimony will be guaranteeing possible debts. Finally, a *non-profit organization* can be created when making profits isn't the goal of the endeavour, but this form will not often be chosen by foreign investors.

Although a future accession to the OHADA Treaty will have a significant impact on the legislation governing commercial companies in the DRC, an overview of the current situation is necessary as long as we bear in mind the situation might change in the future.



1. Types of commercial companies

When choosing to conduct business through a commercial company, the DRC laws[26] recognize five different types of companies and any investor willing to operate in the DRC under a distinct corporate personality has to choose out of this exhaustive list: (1) a partnership firm, (2) a limited partnership, (3) a private limited company, (4) a public limited company, and (5) a cooperative company. Remarkably, there is no

[26] King-Sovereign Decree of February 27, 1887 and Decree dated Juin 23, 1960: *Décret du Roi-Souverain du 27 février 1887 portant Sociétés Commerciales*, further referred to as the Commercial Companies Decree.

possibility to create a "one person" commercial company, thus necessiting the need for multiple associates when operating in the DRC.

1.1 Partnership firm

The partnership firm - *société en nom collectif* - is created under corporate name by two or more natural persons who are personally liable for the firm's obligations[27]. The corporate name must respond to the name of one or more of the associates and there will be no separate legal personality created.

Participation - Since a partnership is concluded *intuitu personae*[28] the shares held by the associates are inalienable without prior approval of all associates, and the company will cease to exist upon decease of one of the associates. Although the partnership form is created because of the other associates, the articles of association may nevertheless assign a successor in case of decease or regulate the possible retirement of one of the associates[29].

Management - The partnership firm *can* be managed by one or more associates, or even by a non-associate, who's powers are determined by the articles of association[30].

Liability - The liability of the associates is really far reaching because a former associate remains liable for the contractual obligations of the partnership entered into when he still was an associate, and even for those obligations entered into after he left if the counterparty was not in the know of the change in composition of the associates. Similarly, a new associate becomes liable for all the partnership's obligations, even those entered into before he became an associate[31].

1.2 Limited partnership

The limited partnership - *société en commandité simple* - links two or more associates with joint and full liability whilst the silent partners' liability is limited to their

[27] Article 14 Commercial Companies Decree.
[28] Principle which means the company was created because of the personal qualities of the other associates.
[29] Article 17 Commercial Companies Decree.
[30] Article 21 Commercial Companies Decree.
[31] Articles 18 and 19 Commercial Companies Decree.

respective contributions. Also with this type of commercial company, the corporate name must contain the name of one or more of the fully liable associates[32].

Participation - The shares of the limited liable associates are freely transferable unless otherwise specified in the articles of association[33].

Management - The limited partnership *must* be managed by one or more managers, chosen amongst the unlimited liable associates, who's powers are determined by the articles of association[34].

Liability - The liability of the unlimited liable associates is similar to the liability of the associates in a partnership firm (see *supra*). The liability of the limited liable associates however, is limited to their respective contributions and third parties can only force them to fulfil their contribution obligations.

1.3 Private limited company

The private limited company - *société privée à responsabilité limitée* - is probably the most often used type of commercial company, offering their associates a liability limited to their respective contributions[35]. Distinct to a public limited company (see *infra*), the private limited company does not issues shares for general subscription, and the latter can be transformed into a different type of commercial company without having to create a new legal entity[36].

Creation - Any private limited company's articles of association must be drawn up and certified in due legal form containing information about the company relating to e.g. the founding associates, the corporate purpose, the amount of the social capital, and the persons allowed to legally bind the company[37]. The corporate purpose must be precisely described and may not concern insurance, nor capitalisation and savings activities[38].

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[32] Articles 26 and 27 Commercial Companies Decree.
[33] Article 30 Commercial Companies Decree.
[34] Article 31 Commercial Companies Decree.
[35] Article 36 Commercial Companies Decree.
[36] Article 42 Commercial Companies Decree.
[37] Article 45 Commercial Companies Decree.
[38] Article 41 Commercial Companies Decree.

Associates – A minimum of two associates is required to set up a private limited company, without them needing to be a merchant. Since Congolese law does not explicitly prohibits legal persons to be associates of a private limited company, the question if legal persons may be shareholder should be positively answered.

Participation - The company's social capital exists out of contributions made by the associates who receive nominative shares in return, allowing them to exercise their shareholders' rights and granting them the right to benefit from the company's profits[39]. There is no minimum amount of the social capital and information about the shareholders must be centralized in a shareholder's register which is held at the seat of incorporation of the private limited company[40]. However, the social capital must be sufficient for conducting the envisaged business and, except for contributions in kind who are always fully due, half of the contributions in cash must be paid-up at the incorporation[41]. Finally, the shares are freely transferable to all persons mentioned in the articles of association, whereas transfers to other persons must be agreed by the existing shareholders during a general meeting[42].

Management - The private limited company is being managed by one or more authorised representatives, associates or not, called managers[43]. The managers are appointed in the articles of association or by the general assembly and each have the right to fully bind the company in relation to its corporate purpose[44]. Their power to represent the company and their mandate is only limited by the corporate purpose set out in the articles of associations[45], and therefore it is important to limit and clearly specify the corporate purpose. However, the disadvantage of appointment in the articles of association is the very rigorous procedure for altering the latter and therefore we recommend to appoint managers through the general assembly of shareholders.

[39] Article 51 Commercial Companies Decree.
[40] Articles 40 and 55 Commercial Companies Decree.
[41] Articles 40, §2-3 Commercial Companies Decree.
[42] Article 57 Commercial Companies Decree.
[43] Article 64 Commercial Companies Decree.
[44] Articles 65 and 68 Commercial Companies Decree.
[45] Article 68 Commercial Companies Decree.

General assembly - It groups all shareholders and has the power to modify the articles of association[46]. Every share entitles its holder to one vote ("one share one vote" principle) and decisions are taken by a simple majority vote without a quorum requirement[47]. In order to change the articles of association however, shareholders holding 50% + 1 of the shares must be present and the vote is taken by a two third majority of the shareholders present at the meeting[48].

Liability - Besides the associates' liability limited to their respective contributions, the associates signing the articles of association and the active managers at the time of a capital increase are considered founding shareholders incurring a joint liability upon them for e.g. payment of the balance of the subscribed capital[49].

1.4 Public limited company

The public limited company[50] - *société par actions à responsabilité limitée* - is created by the subscription for shares which are freely negotiable. Similar to the private limited company, the associates' liability is limited to their contribution, *i.e.* the price at which they originally obtained their shares. Nevertheless, creating a public limited company is subject to a Presidential authorisation[51], which may take a long time to obtain and is outdated in view of business necessities nowadays.

Presidential authorization – The required presidential authorization, a decision deliberated in the council of Ministers and signed by the President of the Republic, is a prescription of public policy and can be invoked by any person having an interest to do so. This authorization entails legal capacity and the following conditions must be met for the authorization to be granted[52]:

(1) Notarial act: the articles of association must be signed by all founding associates before a notary. In practice however, the articles of association are

[46] Article 78 Commercial Companies Decree.
[47] Articles 79 and 87 Commercial Companies Decree.
[48] A 4/5 majority is required for changing the corporate purpose or the nationality of the company; article 87 Commercial Companies Decree.
[49] Article 103 Commercial Companies Decree.
[50] Also referred to as joint stock company.
[51] Royal Decree dated June 22, 1926 on public limited companies; *Arrêté Royal du 22 juin 1926 portant sociétés par actions à responsabilité limitée - Autorisation - Conditions*.
[52] Royal Decree dated June 22, 1926 on public limited companies.

drafted by one or a group of founding associates who then pass the original document on to the other associates for signature. The problem with this method is that the notary will not be able to verify the authenticity of all signatures;

(2) A minimum of seven founding associates is mandatory. Whereas this condition will not pose any problems at the time of creation, the question remains what happens if during the course of the company's life, the number of shareholders drops below seven. In principle the consequence is the dissolution of the company. Given the far-reaching consequences of this interpretation of the law, current practice sanctions this abnormality with "legal inadequacy". This means that nor the shareholders, nor the company itself can invoke or take advantage of the legal status of a public limited company;

(3) The social capital must be fully subscribed and every contribution must be effectively placed for one fifth;

(4) The social capital must be sufficient for the envisaged corporate purpose, which can be seen as a sort of minimal financial requirement;

(5) Finally there are certain obligatory mentions in the articles of association in relation to the corporate purpose, the shareholders, corporate name, etc. The most important one is the mention of the life of the company which may not exceed thirty years, except for companies entitled to a mining concession which may be incorporated for the duration of the concession;

(6) Finally, a practice by which the founding associates draft a financial plan is becoming recurrent. Although not a legal requirement, submitting a financial plan will help to obtain the Presidential authorization.

Absence of uniform legislation – Besides the necessity of a Presidential authorization there is also no uniform law governing this type of commercial company, creating massive loopholes in the applicable legislation. First of all, the general provisions from the Commercial Companies Decree are applicable, which are

thirteen very broad provisions. Secondly, there are five specific legislative texts each governing a small aspect of public limited companies leaving us with a giant gap in the regulatory framework. Therefore, current practice shows the articles of association have to deal with almost every aspect imaginable to avoid lacunas. Also, with a view on the future accession to the OHADA Treaty, many articles of association are already drafted in conformity with the OHADA's Uniform Act on Commercial Companies when not in contradiction with current legal provisions.

1.5 Co-operative company

Finally, the co-operative company - *société cooperative* - also requires the authorisation of the competent administrative authority and requires at least ten local associates[53]. This type of company is destined for Congolese nationals who exclusively want to promote their common economic interests.

2. Legal and administrative requirements

Due to the Presidential authorisation required for creating a public limited company, and the restricted protection of the personal capital in a partnership, the private limited company is the most common type of commercial company used by foreign investors in the DRC. In the following paragraphs we will set out the general administrative procedure for setting up a company, with an emphasis on private limited companies.

2.1 Pre-registration phase

Before a private, or public, limited company can be incorporated in the DRC, there are several conditions to be met. In the following paragraphs the administrative requirements will be briefly set out.

2.1.1 Private limited companies

When setting up a private limited company, the following administrative requirements will need to be met:

1. The articles of association must be notarized[54];

[53] Decree dated March 24, 1956 on Co-operative companies, *Décret du 24 mars 1956 portant Coopératives*, further referred to as Co-operative Companies Decree.
[54] Article 43 Commercial Companies Decree *juncto* Article 1 of Law 66-344 dated June 9, 1966.

2. Within a period of six months after constitution, the articles of association must be deposited with the clerk of the Commercial Court's office[55]. Since February 2010, the articles of association will be published in the Official Journal and/or on its website, and they are freely consultable at the archives of the Commercial Court's clerk[56];
3. Publication of the articles of association in the Official Journal[57];
4. Registration of the commercial company in the New Commercial Registry[58];
5. Acquisition of an Import-Export Number[59];
6. Acquisition of the national Identification Number[60];
7. Obtaining the authorization to conduct business[61] (this formality is only obligatory when a company is considered being foreign, *i.e.* when the social capital is to a large extent owned by nationals of a foreign State). However, on February 28, 2010 a bill has been deposited in Parliament abolishing the requirement of prior approval to conduct business, but it still has to be adopted.

Complying with these formalities amounts to an overall cost of up to an equivalent of 3.500 US $ and should be achieved in a delay not exceeding three months.

2.1.2 Public limited companies

In addition to the above mentioned formalities, there are two additional formalities to be complied with when setting up a public limited company; (1) authorization by Presidential Decree[62], and (2) the articles of association must be signed by at least seven founding shareholders[63]. The costs for setting up a public limited company are similar to those relating to a private limited company, although the costs for the

[55] Article 2 Commercial Companies Decree as amended by Law dated February 7, 2010 modifying the Commercial Companies Decree .
[56] Loi du 27 février 2010 modifiant et complétant le Décret du Roi Souverain du 27 février 1887 sur les sociétés commerciales.
[57] Article 5 Commercial Companies Decree .
[58] Article 2 of Decree dated March 6, 1951 on the creation of the Commercial Register.
[59] Article 3 of Departmental Order 140/003 dated January 9, 1987 setting the conditions for obtaining the Import Export Number.
[60] Article 1 of Order 73-326 dated August 13, 1973 on the creation of the national identification number.
[61] Article 2 of Law 73-009 dated January 5, 1973 on the conduct of commerce, as amended by Law 74-014 dated July 10, 1974.
[62] Article 6 Commercial Companies Decree.
[63] Article 1 Royal Decree dated June 22, 1926 on public limited companies.

Presidential authorization will need to be added. Due to the amount of intervening official services however, this procedure takes up quite a long time

2.2 Registration of commercial companies

After compliance with the aforementioned formalities, a new, foreign owned, company also has to be registered with the New Commercial Register. In order to fulfil this requirement of registration, the following formalities apply:

1. Deposit of the notarized articles of association at the City Hall (original and three copies);
2. Publication of the articles of association in the Official Journal (if not yet done at incorporation of the new company);
3. Deposit a dossier concerning the future manager with the *Guichet Unique* of the ANAPI consisting of the following documents:
    (a) A photocopy of his identity card;
    (b) An extract of his criminal record;
    (c) An attestation of residence;
    (d) An attestation the future manager is not a civil servant;
    (e) And three signatures of the latter on duplicator copy paper.
4. Submittal of a written demand of future place of incorporation to the commercial court's clerk.
5. Prove of majority ownership of the shares by foreign nationals and authorisation to conduct commerce.

A measure abolishing the need to provide an extract of the criminal record, the attestation of residence, and the attestation of non-civil service of the manager is currently in the pipeline in order to simplify the procedure of registration.

2.3 Final remarks

The procedures and legislation governing commercial companies in the DRC are rather outdated and dispersed but all this might change if the OHADA treaty enters into force in the DRC. Since the OHADA Treaty and its accompanying Uniform Acts are direct applicable in each member State, the DRC laws governing commercial companies will be immediately replaced by the modern OHADA law, ensuring a more stable and accessible legal environment for commercial companies operating in the DRC.

Chapter III - Property titles

1. Land tenure

Land tenure is organised by the Land Code[64] creating a distinction between ownership of the land and ownership of the right to use the land. The soil belongs exclusively to the Congolese State and all natural or legal persons can obtain a right of possession by means of a concession contract[65]. These concessions can be obtained either free of charge or against payment.

1.1 Land concessions

The Land Code is dividing the different kinds possession rights into three categories; (1) concessions in perpetuity, (2) ordinary concessions, and (3) land easement. We will give a brief overview of the two different types of concessions in the following paragraphs.



1.1.1 Concessions in perpetuity

A concession in perpetuity grants its beneficiary the right to enjoy his land eternally, as long as the conditions for the granted concessions are being met, and in order to be eligible for this kind of concession the applicant must be a natural Congolese national[66]. The concession contract stipulates the parties' respective rights and obligations in addition to the prescriptions of the Land Code.

Obligations - Whenever the concession was granted against payment, the concessionaire is held to pay levies and the agreed price for the concession[67]. The

[64] Loi 73-021 du 20 Juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés.
[65] Articles 53 and 61 Land Code.
[66] Articles 80 to 82 Land Code.
[67] Articles 84 and 92 Land Code.

State on the other hand has the main obligation to safeguard the concessionaire's undisturbed use of his concession for the remaining of its validity[68].

Rights - The main right of the concessionaire, as stipulated in the Land Code, is the right to construct, to plant, and to dispose of any constructions or plants which were already present or which he constructed or planted after obtaining the concession. Furthermore the concessionaire becomes the rightful owner of everything incorporated on his land for the duration of his concession[69]. This means a concessionaire may construct a building on his land, of which he will become the owner for as long as his concession is granted, and can be compared with building and planting rights.

Termination - A concession in perpetuity can only cease to exist in very specific situations, as set out in the Land Code[70]. And in case an expropriation takes place, the concessionaire will be indemnified for any buildings and other constructions of which he is the owner.

1.1.2 Ordinary concessions

Beside the concessions in perpetuity, which can only be granted to Congolese nationals, the Land Code also provides for ordinary concessions to be granted to foreign individuals and to Congolese or foreign companies, which take the form of a land lease, building lease, usufruct, right of common, or rent[71].

Land lease[72] **-** The right to have *full* enjoyment of a piece of land belonging to the State, under the obligation to maintain the land value and to pay a duty. This right is granted for renewable 25 year terms and can only be revoked by the State under specific conditions. In practice these concessions are being renewed almost automatically to *e.g.* foreign investors having construed buildings on the land for which they obtained a land lease.

[68] Article 85 Land Code.
[69] Articles 96 and 97 Land Code.
[70] Article 101 Land Code.
[71] Articles 109 to 144 Land Code.
[72] In French "*emphytéose*".

Building lease[73] **-** Also granted for renewable 25 year terms, the right to enjoy a piece of land belonging to the State grants its beneficiary all the rights a usufructuary is granted. However, the beneficiary may not dispose of any buildings on his land except in specific circumstances.



Usufruct[74] **-** The right of usufruct allows its beneficiary to use and enjoy the land, besides the State, but with the obligation to keep the land in its original state. Once again, this right is also granted for renewable 25 year terms but ends upon decease of its beneficiary (*intuitu personae*).

Right of common[75] **-** Granted for a renewable 15 year term, the right of common allows its beneficiary and his family to live or create a warehouse on the premises.

Rent[76] **-** A rent can only be accorded for 3 years and is often used as preparation for another kind of concession and doesn't confer much rights upon the tenant.

Many foreign investors are constructing buildings in the DRC and are aware of this outdated land tenure regulation. However, in practice the 25 year term concessions are being (automatically) renewed. Concessions are also easily transferable.

1.2 Obtaining a concession

The procedure for applying for a concession is not set out in the Land Code itself, but in a separate implementing measures decree[77]. This decree sets out rules for concurrence in applications, submittal of the demand, renewal, and buying back of concessions.

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[73] In French "*superficie*".
[74] In French "*usufruit*".
[75] In French "*usage*".
[76] In French "*location*".
[77] Ordonnance 74-148 du 2 juillet 1974 portant mesures d'exécution de la loi 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés.

2. Intellectual property

All matters concerning intellectual property are governed by the Industrial Property Law[78] which creates special intellectual property rights conferring important prerogatives upon its beneficiaries. µ



Scope - The Industrial Property Law is not applicable to the protection of literary and artistic property and in order to benefit from its protection foreigners residing outside the DRC must be nationals from countries party to the International Union for the Protection of Industrial Property. In case the latter wouldn't apply, a foreigner will still benefit from the protection in case of reciprocity of protection between the DRC and their respective home State[79].

2.1 Inventions

Inventions may be accorded protection by issuing a patent to the inventor. Of course, in order to benefit from a patent, every invention must be the result of an innovative process and should be "new"[80]. This condition makes reference to an innovative process and the novelty of the invention:

Innovative process - Briefly put, a process is considered innovative if the process is not comprised in the current state of the art. This means all processes unknown to the greater public at the day of application for a patent.

Novelty of the invention- Similar to the innovative process, its product (the invention) may not form part of the current state of the art. Therefore, a product is

[78] Loi 82-001 du 7 janvier 1982 portant propriété industrielle.
[79] Articles 1 and 3 Industrial Property Law.
[80] Article 6 Industrial Property Law.

considered new whenever part of its characteristics cannot be found in other preceding similar products.

Patents grant their beneficiaries a temporary exclusive exploitation right and, according to DRC law, take the form of either an inventive patent, an importation patent, or a perfection patent:

Inventive patents - This concerns inventions which, at the date of application, had never been patented before.

Importation patent - Whenever an invention had been patented abroad before, the holder of the patent abroad will only be allowed to obtain an importation patent in the DRC.

Perfection patent - This patent refers to situations where a patent has already been accorded, but the holder wants to protect any improvement of his already patented invention.

Finally, the Industrial Property Law mentions an exhaustive list of inventions for which a patent can never be obtained[81], and creates a regime of "incentive licences" for useful discoveries throughout a non-innovative process of an unknown application of already existing products[82].

Acquisition of IP titles - In order to file an application, the file must contain certain information in relation to *e.g.* the author, previous foreign patents, a clear description of the invention, etc. This file must be presented by the author or his proxy and foreign applicants are even obliged to act through an authorized Congolese agent[83].

Decision - Once the file is submitted, the competent authority must decide upon the request within a delay set at 3 months for national demands, and 5 months for demands carried out abroad. Noteworthy, the competent authority is not obliged to conduct a preliminary research as to the existence, novelty nor the accuracy of the description before deciding upon granting a patent. However, during this period,

[81] Article 12 Industrial Property Law.
[82] Articles 13 to 14 Industrial Property Law.
[83] Articles 16 to 19 Industrial Property Law.

applicants are allowed to modify their demand however, which is also a good opportunity to adjust erroneous applications.

Duration - Once a patent is granted, the beneficiaries will enjoy a protection which lasts 20 years[84]. Given the ancillary character of importation and perfection patents, their lifespan is subject to the validity of the main patent to which they refer.

2.2 Trademarks



The protection of trademarks is set out in articles 127 to 152 of the Industrial Property Law, and many of the aforementioned principles apply to trademarks as well.

Costs - The costs regarding the registration of a trademark in the DRC are as follows:

- Purchase of an application form: 20 $US
- Trademark application tax: 100 $US
- Surcharge: 10 $US
- Prior art search: 80 $US

Duration of application - The duration between the filing and the receipt of the trademark registration certificate is approximately as follows:

- Three weeks between the filing and the receipt of the record of the application at the Ministry of Industry
- Five to six months from the filing in order to obtain the registration certificate signed by the Minister of Industry.

Registering a trademark in the DRC seems easy when you read the law but, practically speaking, it takes time and a lot of efforts in order to speed up the process.

[84] Patents for pharmaceutical inventions however, are only being accorded for a 15 year term.

Chapter IV – Securities

Congolese security law, with its civil law based approach, divides all security interest into two categories based on a distinction between (1) personal security and (2) real securities[85]. This distinction is made because personal securities aim to introduce an additional guarantor for the original debtor's obligations, whereas real securities operate as a right *in rem* granting a creditor a right over an asset.



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1. Personal security

The only personal security recognised by the Congolese Land Code is called suretyship (*cautionnement*). This is a security by which a third party guarantees to perform the obligations of the original debtor, the so called principal, in case of the latter's default vis-à-vis the creditor[86]. Therefore, the obligations of the security giver are subordinated to the obligations of the principal debtor. In other words, the suretyship is dependent upon the existence of the underlying obligations[87] and the security becomes extinct by fulfilment of the underlying obligations by, or release of, the debtor.

[85] Loi n° 73/021 du 20 juillet 1973, further referred to as Land Code.
[86] Article 337 Land Code.
[87] Article 338 Land Code.

2. Real securities

2.1 Pledge and warrant

2.1.1 Pledge[88]

By means of a pledge over moveable goods, the pledgee (creditor) holds possession of the latter as security for an underlying debt.

Formal requirements - There are no specific perfection requirements in relation to a pledge[89]. Such pledge is valid against the debtor and third parties by the mere fact of the agreement being entered into and the dispossession of the pledgor from the goods. No registration is required.

Constituent elements - One of the constituent elements is the necessity of dispossession[90], which means either the pledgee or an agreed third party must hold the goods. Furthermore, the Land Code also installs a presumption of dispossession whenever the pledged goods are in the pledgee's warehouses. Therefore we may assume the dispossession requirement will also be met for as long as the pledged goods are in the warehouses of an agreed third party.

Future goods - In most civil law jurisdictions, pledge agreements cannot cover future goods. Since the Congolese Land Code does not explicitly excludes future goods from its scope of application we advocate, as is the case under current Belgian jurisprudence, for the possibility to replace pledged goods with new goods. Of course, such substitution should occur immediately and the substitution goods must be of the same value as the substituted goods.

Enforcement – A creditor may never dispose of the pledged goods on his own initiative. Whenever the debt has not been paid back on time, the pledgee is obliged to send a formal notice requesting payment (using a bailiff to do so), and request the authorisation from the court to have the goods sold[91]. Any clause granting the pledgee

[88] Articles 322 – 336 Land Code.
[89] Article 325 Land Code.
[90] Article 326 Land Code.
[91] Article 329 Land Code.

to dispose of the pledged goods without sending formal notice and a judge's intervention are null and void[92].

2.1.2 Warrant[93]

A warrant is a 'commercial' security over moveable goods since only goods belonging to a merchant may be subject to a warrant[94]. A third party holder takes possession of the goods and issues two copies of such receipt: the warrant and a certificate (the '*cédule*'). The two copies, together, give right of free disposal of the goods[95]. The warrant alone represents the possession of the goods and the certificate alone represents the right to dispose of the inventory pledged by the warrant. Therefore, since the warrant and the certificate may only be issued by a third party holder, the warrant requires the prior dispossession of the goods [96].

Enforcement - If the debtor does not pay the secured debt, the warrant holder is obliged to send a formal notice requesting payment (using a bailiff to do so), and request the authorisation from the court to have the goods sold[97].

2.2 Business pledge

The possibility to pledge a business was brought into existence by Royal Decree dated 19 January 1960[98]. The plegde over a business will cover all valuables constituting the business and, in order to avoid the possessory character of pledges, inventory may be included into a pledge over the business[99]. However, the inventory can only be pledged up to 50% of its value from time to time.

A business pledge is constituted by private or public deed, and must be registered in order to be opposable to third parties. Finally, in order to benefit from a pledge over

[92] Article 331 Land Code.
[93] *Décret du 20 mars 1923 relatif aux warrants*, further referred to as the "Warrant Decree".
[94] Article 1 Warrant Decree.
[95] Article 6 of the Warrant Decree.
[96] Article 2 Warrant Decree.
[97] Article 19 Warrant Decree.
[98] *Arrêté Royale du 19 janvier 1960 relatif au gage de fonds de commerce, escompte et gage de la facture commerciele,* further referred to as the "Business Pledge Decree".
[99] Article 2 Business Pledge Decree.

the business, the pledgee must be a registered credit institution in the DCR and the pledgor's business must be located in the RDC[100].

2.3 Mortgage[101]

A mortgage is concluded by authentic deed to secure a debt by real property through the use of a mortgage note which evidences the existence of the loan and the encumbrance of that realty through the granting of a mortgage which secures the loan.

Immovable property (both by nature as by destination) can be subject to a mortgage. Noteworthy is the fact that the Land Code implements a presumption that any sales contract in relation to immoveable property contains the consent of all parties to contract a mortgage in respect of that property[102].

[100] Article 8 Business Pledge Decree.
[101] Articles 250 – 321 Land Code.
[102] Article 263 Land Code.

Chapter V - Labour law

Labour law is one of the domains of Congolese law which has recently been subject to codification. A Labour Code[103] was introduced on October 16, 2002 applicable to all employees as well as to all employers operating in the DRC.



1. Localization

Similar to the laws of other African States, DRC labour law promotes the hiring of nationals. Therefore protective regulations towards national workforce have been laid down and expatriates are treated on a different basis than nationals with respect to hiring conditions, work cards, resident permits and payment of income tax. Furthermore, the percentage (of the total workforce) of foreign remunerated workers allowed in a company operating in the DRC is fixed by law and may never exceed 15% [104].

A Ministerial Decree dated October 26, 2005 has fixed the maximum authorized percentage of foreign workers, within the limits set out by the Labour Code, per sector and per category of workers[105]:

[103] *Loi 015-2002 en date du 16 octobre 2002 portant Code du travail*; further referred to as Labour Code.
[104] Article 185 Labour Code.
[105] *Arrêté Ministériel n°12/CAB-MIN/TPS/112/2005 du 26 octobre 2005.*





Sector	Professional categories	Supervisors	Managerial personnel
Agriculture	2 %	2,5 %	2 %
Extractive industry	2 %	2,5 %	2 %
Industrial enterprises	2 %	2,5 %	2 %
Construction and Public work	2 %	2,5 %	2 %
Electricity, water and sanitary	2 %	2,5 %	2 %
Commerce	0 %	2 %	2 %
Banking, insurance and real estate	0 %	2 %	2 %
Transport	0 %	2 %	2 %
Services	0 %	2 %	2 %
New technologies (ICT)	0 %	2 %	2 %

In addition, an exemption regarding the rates may be granted by the Minister of Employment and Social Foresight by means of a decree, on the basis of a corresponding and motivated advice issued by the National Commission of the Employment of the Foreigners, not exceeding 50 % of the legally authorized maximum, and the number of foreign workers may never exceed 15 %.

These maximum rates concern remunerated foreign workers having an employment contract with a Congolese company.

Finally, certain functions in these sectors are even exclusively reserved to Congolese nationals[106]. A list of positions reserved to Congolese nationals can be found as Annex I.

2. Hiring expatriate workers

2.1 Work Permit

Any employer willing to hire an expatriate is to file with the regional Employment Office a dossier consisting of[107] :

- the application for an expatriate work card;
- a draft employment contract;
- the CV of the contemplated expatriate employee;
- evidence of the professional skills and expertise of the applicant;
- the job description;
- a list of the company's expatriate employees;
- the training, advance training and professional adjustment programmes;
- and a copy of the letter of application for the expatriate work card.



After submitting this dossier, the expatriate worker must apply for an expatriate work card, upon which the National Commission of Hiring Expatriate Workers[108] will decide. Once the work card is granted, the expatriate worker can obtain a visa for settlement with employment purpose as laid down by current employment regulations. If granted, the visa is issued for the same duration as the work card[109]. In case of termination of the employment contract, the expatriate worker must be repatriated or find another job that would provide proof for holding the work card.

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[106] *Arrêté départemental du 31 mars 1986 déterminant la liste des emplois interdits aux étrangers*.
[107] Article 5 of the *Arrêté départemental du 21 janvier 1987 déterminant les conditions d'engagement des expatriés*.
[108] Commission Nationale de l'Emploi des Etrangers.
[109] Article 9 of Order no. 87-281 of 13 August 1987 on implementing measures of Order-Act no. 83-033 of 12 September 1983 on Alien's Police.

2.2 Visa

The following visas for expatriate workers are being issued[110]:

- The *visa d'établissement de travail* has a validity of 1 to 2 years depending on the validity of the work permit (carte de travail).
- A *visa d'établissement de travail spécifique* can be delivered for a period not exceeding one year and is not renewable.

Furthermore, the *Commission Nationale de l'Emploi des Etrangers* is not allowed to accept or examine any dossier of a prospective expatriate worker who would only have a tourist visa, a temporary-stay visa or a family reunion visa[111].

3. Employment contracts

The labour code sets out the minimum requirements to be met by employers towards employees and stipulates that any clause according a less favourable treatment is null and void[112]. Any employment contract should be evidenced in writing, mention certain details, and in absence of a written contract the employee may prove by all legal means including witnesses the existence and the scope of the contract.



3.1 Duration

Every employment contract shall either be a fixed term contract or an open-ended contract. In absence of a written contract the contract shall be presumed open-ended until evidence of the contrary in writing.

[110] Http://www.dgm.cd/delivrance.php.

[111] *Arrêté départemental du 21 janvier 1987 déterminant les conditions d'engagement des expatriés*.
[112] Article 37 of the Labour Code.

In view of protecting employees, a fixed term contract cannot exceed a period of two years, reduced to one year if the employee is married and separated from his family, or when he is widower/widow or divorced and separated from any children under his custody. Furthermore, a fixed term contract can only be renewed once[113] and any violation of the requirements set out in this section leads to the immediate conversion into an open-ended contract.

3.2 Probation period

The labour code stipulates that every employment contract can be accompanied with a probation period as long as this period is evidenced in writing and does not exceed a period of 1-6 months depending on the specialization of the employee. The probation period may not exceed 1 month for an unskilled labourer without specialization, and 6 months for the other employees. Any stipulated longer duration will be automatically reduced to the allowed maximum.

3.3 Annual leave

After having obtained 1 year of service, the labour code grants employees a right to remunerated annual leave. The length of annual leave is being calculated in relation with the age of the employee[114]:

- minimum 1 day of leave per full month of service for employees older than 18 years
- minimum 1,5 day of leave per full month of service for employees younger than 18 years

This will increase with 1 day per month for every period of 5 years of service for the same employer or substitute employer.

3.4 Termination of contract

Every employment contract can be terminated by both the employer and the employee but termination cannot be done freely and is subject to a strict regime[115]. This regime differs in relation with the duration of the contract and in relation to the party who is

[113] There are some exceptions in case of seasonal work and other situations to be determined by Ministerial Decree.
[114] Article 141 of the Labour Code.
[115] Articles 61 to 78 Labour Code.

terminating the contract. Finally, there exist two exceptions to the general regime in case there was a probation period, or if the contract is ended by reasons of gross misconduct.

3.4.1 Open-ended contracts

Termination by the employer - In the first place, open-ended contracts can only be terminated by an employer on grounds of a valid motive concerning the aptitude or the behaviour of the employee in relation to his work, or because of business necessities. In case a termination was found invalid by the courts the employee has the right to be reinstated, in absence of which he will be entitled to reparation which may not exceed an amount equal to 36 times his latest monthly wage. Secondly, when discharging an employee, the employer has to take into account a notice which may not be less than fourteen working days, increased by seven working days for every full year of employment.

Termination by the employee - Termination of employment contract by the employee is not subject to the requirement of a valid motive since this rule is aimed at protecting employees against arbitrary dismissal. On the other hand, also employers deserve a degree of certainty that their employees will not leave their job from the one day to the next. Therefore employees also have to take into account a notice period which is half as long as the one an employer should have observed in case he would have ended the contract.

3.4.2 Fixed term contracts

Fixed term contracts always end by expiration of the term for which they were initially concluded, and any clause stipulating the possibility of giving notice is null and void. Therefore, every premature termination of fixed-term contracts gives rise to compensation[116].

3.4.3 Probation periods and gross misconduct

Sometimes there exist reasons calling for immediate termination of contract. Therefore the foregoing has to yield in case termination of contract is the result of a probation period or gross misconduct.

[116] Article 70 Labour Code.

Probation period - In case an employment contract contains a probation period, both parties are allowed to terminate their contractual relationship for any valid reason concerning the aptitude or the behaviour of the other party. However, also in these situations termination is subject to a three days' notice[117].

Gross misconduct - Finally, any employment contract may be immediately terminated when gross misconduct is at hand[118]. Gross misconduct refers to a situation in which no party, exercising all reasonable and usual care, can demand the adverse party not to break the contract. The Labour Code gives a non-exhaustive list of examples of gross misconduct and further states that any compulsory redundancy because of gross misconduct must be notified within fifteen days after discovery of the facts constituting the gross misconduct.

4. Social security



In the DRC there exists an obligatory system of social security covering social benefits in case of work related accidents or illness, pensions, and family allowance[119]. In relation to these matters the competent authority is the National Social Security Institute[120], and any employer is obliged to send, within eight days after hiring an employee, a demand to join the social security system which has to include certain information[121].

4.1 Employer's contribution

The social security contribution is due by the employer on a monthly basis, is calculated on the basis of the legal minimum wage or on the basis of the actual wage

[117] Article 71 Labour Code.
[118] Article 72 Labour Code.
[119] Article 1 Social Security Decree.
[120] Article 4 Social Security Decree; Insitut National de Sécurité Sociale (INSS).
[121] Articles 6 and 7 of *Arrêté départemental du 10 avril 1978 relatif à l'affiliation des employeurs, à l'immatriculation des travailleurs ainsi qu'aux modalités et conditions de versement des cotisations de la sécurité sociale*.

if the latter is higher than the legal minimum, and consists of the following contributions[122]:

- a 3,5 % contribution for pensions
- a 1 % contribution for professional risks
- a 16,7 % contribution for social benefits

Thus, an amount of 21,2 % of the employee's wage must be paid as contribution to the social security system by the employer.

4.2 Social benefits

The social security system covers social benefits received in relation to professional risks, pensions, and family allowance. In the following paragraphs we will briefly elucidate these three concepts.

Professional risks - The **s**ocial benefits received in relation to work related accidents or illness fall within the scope of the rules governing professional risks[123]. A work related accident is defined as every accident incurred to an employee because or as a result of performing his work, and by extension, also accidents incurred on the direct way to, or from, the workplace. The professional illnesses falling within the scope of the professional risks system are set out in a special decree[124].

Pensions - In the DRC, the retirement age is set at 65 for men, and 60 for women[125]. In order to benefit from the pensions system, the beneficiary must have stopped every activity as an employed person and must prove at least sixty months of contributions during the last forty trimesters. Once eligible for a pension, the amount is set at sixty percent of the average monthly income of the periods in which the beneficiary made contributions to the pensions system.

Family allowance - Any employee subject to the Social Security system is entitled to a dependent-child allowance. However, in practice these allowances are not being remitted by the State and therefore we will not further discuss this issue.

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[122] Articles 18 and 19 *ibid*.
[123] Articles 20 to 30 Social Security Decree.
[124] Decree of June 9, 1966 on Professional illness, *Ordonnance du 9 juin 1966 portant Sécurité sociale - Liste des maladies professionnelles.*
[125] Article 38 Social Security Decree.

Chapter VI - Tax and customs

1. Framework

First of all, the DRC's tax and duties system is based on a three-pillar structure. Three public offices, each possessing different competences, are responsible for the tax and dues system in the DRC.

Direction Générale des Impôts[126] **-** The Directorate-General for taxation is responsible for all matters relating to the basis, control, recovery and disputes of taxation in the DRC. These competences are exclusive and the DGI only has to give account for their actions to the Minister of Finance[127].

Office des Douanes et Accises[128] **-** The Office for customs and excise taxation is competent in the fields of collection of duties, surveillance of State borders, and finding custums and accises infractions[129].

Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de Participations[130] **-** The Directorate-General for fees, dues and royalties is also placed directly under the authority of the Minister of Finance and its mission includes the collection of all fees, dues and royalties due in the DRC[131].

Secondly, the Congolese tax system has not been subject to a decent codification to say the least. Contrary to the well written and coherent Investment or Mining Code, the Congolese tax law is scattered over several legislative texts, some even dating back to the Mobutu era. One guiding principle however can be found throughout this dispersed legal framework; the principle of territoriality (source based). This means that taxes are levied on income generated within the DRC, whether the generating entity is Congolese or foreign.

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[126] Further referred to as DGI.
[127] Articles 1 and 3 of Decree dated March 2, 2003 on the creation of a Directorate-General for taxation, *Décret du 23 mars 2003 portant creation de la Direction Générale des impôts.*
[128] Further referred to as OFIDA.
[129] Article 4 of Ordonnance dated May 15, 1979 on the creation of the national office for customs and excise taxation, *Ordonnance du 15 mai 1979 portant creation et statut d'un établissement public dénommé l'Office des douanes at accises, en abrégé l'OFIDA*.
[130] Further referred to as DGRAD.
[131] Article 3 of Decree dated December 27, 1995 on the creation of a Directorate-General for fees, dues and royalties, *Décret du 27 décembre 1995 portant creation, organisation et fonctionnement de la Direction générale des recettes administratives, judiciaries, domaniales et de participations.*

2. Applicable taxes

In an attempt to give a brief overview, the Decree Law dated February 10, 1969 relating to income tax[132] describes the main income tax requirements (further referred to as Income Tax Decree). Most income related taxes are governed by this text but there are also other taxes set out in specific regulations. Given the complexity and scale of the DRC tax regime, an overview will be given of the most important taxes.

A summary comprising all taxation rates discussed can be found at the end of this section.

2.1 Income related taxes

As previously mentioned, the income related taxes are set out in the Income Tax Decree, and its subsequent modificatory texts, which comprises (1) a professional income tax, (2) a tax on rental revenue, and (3) a tax on moveable property.

For the application of the Income Tax Decree we must first draw attention to the distinction that is being made between national and foreign companies. Under this Decree, a foreign company is considered as any company which has not been created according to the laws and regulations of the DRC and which isn't incorporated or doesn't has its principal place of business in the DRC. This is relevant since other laws and regulations often already consider a company incorporated in the DRC foreign whenever a certain percentage of the shares is held by foreign nationals.

2.1.1 Professional income

The professional income tax comprises both a corporate tax, as a progressive income tax submitting all income generated in the DRC to taxation, whether the taxpayer has its principal place of business in the DRC or not. The taxable basis comprises the following:

(a) the profits of every industrial, commercial, agricultural or development company;
(b) all remunerations of natural persons paid by a third party without the existence of an employment contract;
(c) all income generated out of any liberal profession;
(d) and all income generated out of any job not mentioned in the above.

[132] Ordonnance-loi du 10 février 1969 relative aux contributions cédulaires sur les revenus.

The taxable income is then calculated on this taxable basis, after deduction of professional expenses[133]. In the following paragraphs both the corporate tax and the progressive income tax will be briefly discussed.

Corporate tax[134] **-** A corporate tax is levied on all profits generated out of activities of commercial companies conducted by their office(s) located in the DRC. Of course there are several deductible professional expenses such as e.g. rent, maintenance related costs and employee's salaries. With relation to foreign companies however, any deductible cost has to be made in relation with acquiring profits through an office located in the DRC since expenses made abroad or not deductible on the profits generated within the DRC[135]. Finally, the tax rate is set at 40 % on the taxable income of both national as foreign companies[136].

Progressive Income Tax[137] **-** A progressive income tax is levied on all remunerations of natural persons paid by a third party without the existence of an employment contract, and on income generated out of a liberal profession. The applicable tax rate varies between 3 % on the lowest and 50 % on the highest tax bracket, with a cap on the total amount of taxation set at 30 % of the taxable income[138]. The highest tax bracket of 50 % is, according to current exchange rates[139], applicable to all income above an equivalent of 2605 US $.

2.1.2 Rental revenue tax

The tax levied on revenues out of renting immoveable properties located in the DRC are due by all property owners or holders of a right *in rem* in immoveable property, and is set at a rate of 22 % [140].

2.1.3 Tax on moveable property

Finally, the Income Tax Decree also creates a tax on moveable property[141], with a taxation rate set at 20 %, imposed upon income out of moveable property generated

[133] Articles 27 and 29 Income Tax Decree.
[134] *Impôts sur les Bénéfices et Profits* (IBP).
[135] Article 72 and 73 Income Tax Decree.
[136] Article 83 Income Tax Decree.
[137] *Impôt Professional sur les Rémunérations* (IPR).
[138] Article 84 Income Tax Decree.
[139] The relevant amount in Congolese Francs is set at 2.331.600 FC.
[140] Articles 10 and 11 Income Tax Decree.

within the DRC[142]. Therefore, payments of interests and dividends are subject to a 20 % tax.

2.2 VAT

A new VAT-law has recently been enacted and replaced the former tax on goods and services since the first of January 2012[143]. This value added tax is due on the provision of goods or services in the DRC and is set at 16%.

Scope of application – The value added tax is due on all transactions issuing from a commercial activity against payment carried out by a taxable person. Taxable transactions include the sale of goods, the provision of services, and importation within the DRC.

Exemptions - Some exemptions include, *a.o.*, second hand goods, the sale of agricultural equipment, importing pharmaceutical products, and importing mining equipment.

Taxable persons[144] – In order to be subject to the VAT, an annual turnover of approximately 88.000 US$ (the equivalent of 80.000.000 Congolese Francs at the exchange rate of March 2012) is required. However, all liberal professions are subject to VAT regardless of their annual turnover. Finally, taxable persons residing abroad must designate a representative residing in the DRC who is held jointly and severally liable for payment of the tax.

Assessment, collection, and repayment – All taxable persons must make a monthly declaration with the DGI before the 15th of the month following the month in which the taxable transactions arose. Whenever the deductible VAT exceeds the output tax during a given month, the difference will not be repaid immediately but will be deducted during the following months until the credit is exhausted.

Bookkeeping - All taxable persons have to keep regular accounts, have to issue invoices whenever dealing with another person subject to the VAT-regime.

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[141] *Impôt mobilier* (IM).
[142] Article 26 Income Tax Decree.
[143] Ordonnance-loi n° 10/001 du 20 août 2010 portant institution de la Taxe sur la Valeur Ajoutée.
[144] Articles 13 and 14 VAT-law.

2.3 Other taxes

Besides the income related taxes, there exist several additional taxes created by special laws and regulations. Noteworthy are the following taxes:

Expatriate workers tax - Any employer hiring an expatriate worker will have to pay a tax on the latter's monthly gross earnings. This tax is due by the person or company paying the wages and the taxation rate is set at 25 % [145].

Tax on motor cars and circulation tax - There also exists a tax levied on motor cars and circulation thereof which is levied on a yearly basis.

2.4 Double taxation convention concluded between the DRC and Belgium

Very recently, a double taxation convention between the DRC and Belgium[146] has been signed and entered into force since January 2012. Aim is to diminish trade barriers between the two countries by creating an advantageous fiscal framework.

The convention has a big potential for Belgium since this convention is the only fiscal convention concluded by the DRC. Therefore, foreign investors might want to consider acting through Belgian subsidiaries whenever investing in the DRC.

The convention with respect to taxes on income and on capital is applicable to some of the most important Congolese taxes[147]: the rental revenue tax, the tax on moveable property, the corporate tax, and the professional income tax. Therefore, any resident of Belgium gaining income (other than interest, dividends, or royalties) or possessing capital subject to taxes in the DRC, will not be taxed on the same income or capital in Belgium. Tax levied on interests or royalties in the DRC will be deducted from the taxable basis in Belgium[148].

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[145] *Ordonnance Loi du 10 février 1969 relative à l'impôt sur les rémunérations versées par les employeurs à leur personnel expatrié*.
[146] Convention entre le Royaume de Belgique et la République Démocratique du Congo en vue d'éviter la double imposition et de prévenir la fraude et l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune.
[147] Article 2 of the convention.
[148] Article 22 of the convention.

2.5 Summary of applicable tax rates

Corporate Tax	40 %
Progressive Income Tax	3 % - 50 %
Rental Revenue Tax	22 %
Tax on moveable property	20 %
Expatriate Workers Tax	25 %
Value Added Tax	16 %
Tax on motor cars	5 - 44 Ff.
Circulation tax	6 - 45 Ff.

3. Customs

The Congolese customs regime was until recently based on two texts dating from the colonial era; the Decree dated 29 January 1949 and Ordinance nr. 33/9 dated 6 January 1950. Following a modernisation process under impulse of the Directorate General of Customs and Excises, a new Customs Code has been proclaimed by the President by means of Ordinance-Law nr. 10/002 dated 20 August 2010 which entered into force on the 21st of February 2011 (hereafter referred to as "Customs Code"). This new Customs Code tries to modernize in some innovative ways and aims at pushing back the long waiting periods that go hand in hand with declarations at the customs administration.

Declarations – Besides the normal regime where a declaration must be done three days after the arrival of the goods[149], a new regime allowing declarations prior to arrival of the goods has been installed[150], thus allowing to anticipate and facilitate the release of goods. Moreover, there is also a possibility to make a provisional or incomplete prior declaration and, if necessary, modify the latter[151]. Surprisingly, all declarations are foreseen to be made electronically (also in the light of the

[149] Article 113 Customs Code.
[150] Article 114 Customs Code.
[151] Article 124 Customs Code

modernization process) but in absence of a new computerized customs system, declarations may still be done in writing[152].

Representation – One of the other novelties is the possibility to have a representative take care of the customs formalities[153]. However, as far as declarations are concerned, the Congolese legislator maintains a monopoly for authorized customs agents ("*commissionaire en douane agree*"), who have to be legal persons incorporated in the DRC[154]. This approval of authorized customs agent is granted on a personal basis, leading to the necessity that any person representing the legal entity must also obtain an authorization to do so.

[152] Article 120 Customs Code.
[153] Article 7 Customs Code.
[154] Articles 7 and 117 Customs Code.

Chapter VII - The Investment Code

Many developing countries draw up investment codes in view of a double purpose. First of all, it is in the interest of the economic and social development of developing countries, and secondly, the existence of an investment code (partially) abolishes the legal uncertainty of (foreign) investors. The first Congolese Investment Code dates back to 1969, and was succeeded by the 1979, and the 1986 Code which eventually led to the adoption of Law n° 004/2002 dated February 21, 2002 concerning the Investment Code[155]. The adoption of this new Investment Code was necessary in the light of creating an attractive legal framework assuring confidence in the investment climate in the DRC[156].



1. Objectives

The preamble of the Investment Code, entitled "Survey of Motives", speaks very broadly of the reasoning behind the new code and can be summarised as follows; the State only supplies the legal framework leaving the task to create economic development to the private sector, and entrusting civil society with human development. This preamble is of course mere philosophical and the actual objectives can be found in its first article which describes the purpose of the Investment Code as follows: "*setting out the conditions, advantages and general rules applicable to direct investments, both domestic as well as foreign, made in the DRC in all sectors which have not been expressly excluded by law nor reserved for State actors*".

[155] D.J. MUANDA NKOLE WA YAHVA, *Analyse du nouveau code en République Démocratique du Congo*, … retrieved on the website www.memoireonline.com.
[156] Based upon the wording of C. MALINGUMU SYOSYO, "Les investissement se tournent vers la RDC", *Journal Le Potentiel*, n° 3437, 31 mai 2005, p. 12.

2. Scope of application

There exists a limitation to the scope of application both in relation to the type of activities as to the characteristics of the company applying to benefit from the Investment Code.

First of all, article 3 lists some sectors that are being excluded from the scope of application: *i.e.* mines and oils, banks, insurance and reinsurance, arms manufacturing and connected military activities, production of explosives, assembly of military and paramilitary materials and equipment or security devices, and commercial activities, since investments in these sectors are governed by special laws and codifications (e.g. the Mining Code)[157]. Nevertheless, *all* investors are obliged to deposit a copy of their investment dossier at the *Agence Nationale pour la Promotion des Investissement* (further referred to as "ANAPI"), notwithstanding their domain of activities[158].

Secondly, the Investment Code reserves the benefits of its application to investments meeting certain characteristics. Aimed at attracting and, subsequently, protecting investments, a distinction had to be made between investments which need such level of protection and other, often smaller, investments. Therefore, in order to benefit from the Investment Code, the investment must meet the following conditions[159]:

(a) being a commercial entity created by Congolese law
(b) relate to an amount of at least 200.000 US$
(c) promise to train the local personnel
(d) promise to respect all laws relating to the protection of the environment and human life
(e) guarantee an added value of 35% or more.

Once falling within the scope of application, the Investment Code applies a general regime of advantages (contrary to the old codes which created an amalgam of different advantages), varying in duration depending on the industrialisation of the region where the investment is made[160].

[157] This list is exhaustive.
[158] Article 3, last paragraph Investment Code.
[159] Article 8 Investment Code.
[160] Varying from three to five years; article 9 Investment Code, see *infra*.

The Investment Code applies to both national as foreign investments and offers some specific guaranties to foreign investors[161]. Therefore the code sets out criteria to determine if an investment is national or foreign; the investment is considered being a Foreign Direct Investment (FDI) as soon as 10% of the participation is contributed by a foreign national[162]. For these purposes, every natural person not having the Congolese nationality, or having a double nationality but residing abroad, and every legal entity having its seat of incorporation abroad, is being considered a foreign direct investor [163].

Finally, realising the minimum requirement of 200.000 US$ is relatively high for many smaller investors and wanting to promote the industrialisation of the country, the Investment Code also grants some advantages of the general regime to Small and Medium Enterprises and to Small and Medium Industries (referred to as PME and PMI throughout the code) if their investment amounts to a sum between 10.000 and 200.000 US$[164].

3. Advantages and protection granted to foreign investors

3.1 Advantages



As previously mentioned, the duration of the period during which the advantages are being granted is determined in relation with the region where the investment is made. Decreasing the duration in more industrialised regions of the country the period of application is set at 3 years in Kinshasa, 4 years in Bas-Congo, Lubumbashi, Likasi and Luozi, and 5 years in the rest of the country[165]. Furthermore, one has to take into

[161] See *infra* 3.2 Protection.
[162] Article 1, c) Investment Code.
[163] Article 1, e) Investment Code.
[164] Article 2, h) Investment Code, and articles 19 to 22 Investment Code.
[165] Article 1, f) *juncto* article 9 Investment Code.

account that the fiscal and customs related advantages set out in the Investment Code will *only* be granted once[166].

3.1.1 Customs related advantages

Articles 10-12 set out the customs related regime and a distinction is made between investments of public interest and other investments. Strangely enough the Investment Code doesn't define "public interest", but it can be assumed reference is made to investments contributing to public needs and the development of the country (e.g. road infrastructure, the building of hospitals and schools, etc).





Authorized investments of public interest are, apart from administrative taxes, completely excluded from any importation duties on new machinery & tools and duties on spare parts not exceeding 10% of the CIF value of the equipment for which spare parts are needed, after approval by the ANAPI.

Other authorized investments are, apart from the 5% administrative customs tax on the CIF value of the imported goods, completely excluded from any other importation duties on new machinery & tools, and duties on spare parts not exceeding 10% of the CIF value of the equipment for which spare parts are needed, if these machinery, tools, and spare parts are necessary for equipping a new or existing company.

Nevertheless, the exemption for authorized investments will only be accorded if one of the following conditions is met:

(a) the concerned good may not have been fabricated in the DRC;
(b) the price of an identical national product exceeds more than 10% of the price of the imported product.

[166] Article 18 Investment Code.

Furthermore, second hand heavy equipment, vessels and airplanes are completely excluded from any importation duty, and authorized investors planning to export final or adapted products in conditions favourable for the balance of payments, are excluded from export duties[167].

3.1.2 Tax advantages

The Investment Code also grants several tax advantages in relation to the tax on professional income[168], the tax on incorporation and increase of capital[169] of commercial companies[170], the tax on rental income[171], and the tax on domestic goods and services[172]. Setting out all details of these tax exemptions falls outside the scope of this work.

3.2 Protection

3.2.1 The Investment Code

The protection of investors is set out in articles 23 to 30 and articles 37-38 of the Investment Code and relate to well-known principles in international investment law.

The following protection mechanisms are explicitly granted to investors:

National Treatment: the foreign investor is guaranteed to benefit from the same treatment as Congolese investors, although on the condition of reciprocity;

Just and Equitable Treatment: the Congolese State ensures foreign investors they will be treated in a just and equitable way in conformity with the principles of international law;

Recognition of intellectual property: the Investment Code confirms intellectual property is being recognized and guaranteed by the Constitution of the DRC;

[167] Article 12 Investment Code.
[168] Article 13 Investment Code.
[169] The exoneration of the tax on increase of capital, however, is only granted for authorized public limited companies.
[170] Article 15 Investment Code.
[171] Article 16 Investment Code.
[172] Article 17 Investment Code.

Compensation upon expropriation: the Investment Code prohibits direct and indirect expropriation, except when justified by reasons of public interest in which case a just compensation is due[173];

Money transfers: the Investment Code guarantees certain money transfers abroad related to the investment.

Dividends: transfers abroad of dividends and profits generated by dividends which have been reinvested in the company are being guaranteed.

Arbitration: when a dispute related to the foreign investment or the protection granted to investors arises, an amicable settlement shall first be sought, in absence of which[174] the dispute shall be settled by arbitration in accordance with the national rules of arbitration or certain other international rules[175].

These guarantees are the minimum offered by the Congolese State to foreign investors and one should always verify if there doesn't exist a Bilateral Investment Treaty according a broader protection to the foreign investor.

3.2.2 Protection granted to all investors[176]

Besides the Investment Code, some additional protection can be found in other legislative texts. The new Constitution, for example, states the Congolese State will encourage and watch over the security of private investments, both domestic as foreign[177]. Also the Law on Commercial Courts[178] contributes to an increased protection of businesses by establishing a system of partial lay justice[179]. Having a

[173] The problem of interpretation of what is "just" is being avoided by stipulating a just compensation is one based upon the current market value of the assets that have been expropriated, determined in an adversary procedure.
[174] Within a delay of 3 months.
[175] E.g. the ICSID rules.
[176] Not just to those benefiting from the Investment Code, but to all economic operators in the DRC.
[177] Constitution de la République Démocratique du Congo, 18 février 2006, article 34: La propriété est sacrée. L'Etat garantit le droit à la propriété individuelle ou collective, acquis conformément à la loi ou à la coutume. Il encourage et veille à la sécurité des investissements privés, nationaux et étrangers. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et moyennant une juste et préalable indemnité octroyée dans les conditions fixées par la loi. Nul ne peut être saisi en ses biens qu'en vertu d'une décision prise par une autorité judiciaire compétente.
[178] Loi n° 002/2001 du 3 juillet 2001 portant création, organisation et fonctionnement des tribunaux de commerce.
[179] Article 3 states that in every chamber there are seated one professional judge and 2 laymen having a certain business experience.

professional judge and laymen looking into an investment related case has the advantage that the laymen will look at the case from a business perspective and will be able to influence a judgment by adapting it to modern day business life. Finally, the DRC's membership of MIGA[180] offers an often forgotten protection to investors, although MIGA can help investors and lenders to deal with risks by insuring eligible projects against losses relating to: currency transfer restrictions, expropriation, war and civil disturbance, breach of contract, and non-honouring of sovereign financial obligations.

4. ANAPI

Given the desire to attract more foreign investors, a National Agency for Investment Promotion (ANAPI) was created in 2002 on the basis of the Investment Code[181]. Being a public technical institution provided with a legal status the goal was to set up a "one-stop shop" in terms of investments in the DRC. ANAPI's mission is on the one hand to decide upon approval of investment projects falling within the scope of application of the Investment Code[182], and on the other hand to ensure the promotion of investments both domestically as abroad[183].

4.1 Approval of investment projects

Whenever an investor wants to benefit from the Investment Code he has to file an application for authorization with the ANAPI who will, for their part, submit the file accompanied by an advice to the Ministry of Planning and to the Ministry of Finance after thoroughly examining the application. Unfortunately, the exact competence of each Ministry has not been defined, which ignores the otherwise well achieved need for certainty and transparency, and a clash of competences is always possible although this has not yet occurred. After submittal, a decision has to be given within thirty

[180] Http://www.miga.org.
[181] Article 4 Investment Code.
[182] Although the ANAPI has to receive a file of *all* intended investment projects on the territory of the DRC, it only has the authority to decide upon the authorization of investments falling *within* the scope of application of the Investment Code.
[183] More ample information can be found on ANAPI's website, www.anapi.org.

working days, in absence of which the authorization is deemed granted. In case of refusal, the negative decision has to be motivated[184].

4.2 The promotion of investments

In order to facilitate the implementation of new investments in the DRC, a "one-stop shop", called *Guichet Unique*, was created within the ANAPI to provide several services to investors. The advantage of this *Guichet Unique* lies in the fact that it centralizes a various number of public agencies, limiting the red tape when realising a new investment. Within the *Guichet Unique*, services from the following Ministries or agencies can be obtained: the Ministry of Economics, the Ministry of Post and Telecommunications, the Ministry of Foreign Commerce, the Ministry of Transportations, the Ministry of Employment, DGRAD, DGI, OFIDA, the Real Estate Title Agency, the Directorate General of Migration, the commercial Court of Appeal's registry, and the National Office. Thanks to this "one-stop shop", investors are able to fulfil, at one central agency, all requirements for creating a new company or business.

Besides offering services to investors, the ANAPI also promotes the image of the DRC and plans strategies for attracting foreign investments. For example, their website[185] actually has a section called "8 good reasons to invest in the DRC" and a section called "Business opportunities in the DRC".

[184] Article 6 Investment Code.
[185] http://www.anapi.org.

Chapter VIII - The Mining Code

In 2002, the Congolese Parliament adopted new legislation governing one of the country's main sources of income: the mining and quarry industry. The new Mining Code[186] was drafted with support from the World Bank and met several concerns of present and future mining companies. During a seminar on the influence of the mining activity on the revival of the Congolese economy, one of the first reactions towards the new Mining Code was as follows: "*The international community is very encouraged by the new Mining Code (...), and she wants to play a key role in the first investments as an impartial intermediary which reassures as well the private as the public sector. And this will have a positive effect on other investors and moneylenders*"[187].



1. Scope of application and eligibility

As a preliminary remark we must point out that mining activities are explicitly excluded from the scope of application of the previously discussed Investment Code[188], and therefore these activities are exclusively governed by the new Mining Code which sets out a uniform mining regime.

The Congolese Mining Code, as do many other mining codes, makes a clear distinction between ownership of mineral materials and surface exploitation rights. In no way may a holder of surface rights avail himself of his title to claim any right of

[186] Loi n° 007/2002 du 11 juillet 2002 portant Code Minier, further referred to as Mining Code.
[187] E. MUKENDI WAFWANA, *Rapport du séminaire sur la contribution du secteur minier à la reprise rapide de l'activité économique congolaise*, 22 au 23 avril 2002, Kinshasa, mai 2002, http://www.worldbank.org.
[188] Article 3 Investment Code.

ownership whatsoever over the deposits of mineral materials, including the underground water and geothermal deposits which his concession may contain[189].

The Mining Code regulates the following activities; the prospecting, exploration, exploitation, processing, transportation and sale of mineral materials. As opposed to the preliminary geological work, exploration and extraction of liquid or gaseous hydrocarbons, as well as the activities or operations relating to thermal or mineral waters, which are excluded from the scope and are governed by special laws[190].

Of course, in order to benefit from the Mining Code, one needs to be eligible to obtain mining or quarry rights. Any Congolese individual or legal entity having mining as its corporate purpose and having its administrative office in the DRC is eligible to obtain these rights. Foreign individuals or legal entities[191] however, are required to elect domicile with an authorized mining and quarry agent located in the DRC, and must act through this intermediary[192]. The Mining Code also excludes certain categories of persons from eligibility but this article relates mostly to officials and those not having obtained legal capacity yet[193].

2. Role of the State

By issuing a new Mining Code in 2002, the DRC wanted to create a stable investment environment for foreign investors and therefore the Mining Code sets out the powers and constraints of the Congolese State in order to provide security of title and certainty of process. Therefore, the principal role of the State is to promote and regulate the development of the mining industry by the private sector[194].

Nevertheless, the President[195], the Minister in charge of mines and quarries[196], and (in a lesser extent) the provincial Governors[197] have rather comprehensive competences. The President is e.g. competent for classifying, declassifying or reclassifying: (1)

[189] Article 3 Mining Code.
[190] Article 2 Mining Code.
[191] No requirement as to corporate purpose has been set with regards to foreign legal entities.
[192] Article 23 Mining Code.
[193] Article 27 Mining Code.
[194] Article 8 Mining Code.
[195] Article 9 Mining Code.
[196] Article 10 Mining Code.
[197] Article 11 Mining Code.

mineral materials as mines or as quarry products, (2) an area as a prohibited area for mining activities or quarry works, and (3) a mineral substance as a "reserved substance". Also the Minister in charge of mines and quarries has far reaching powers which include e.g. (1) the granting or refusal of mining and/or quarry rights for mineral materials other than standard construction materials, (2) the cancellation or withdrawal of mining and quarry rights, (3) the authorization to export unprocessed ores, and (4) the approval of mine and quarry agents.

Finally, there exists a Mining Registry[198] centralising information regarding: (1) the application for the granting of mining and quarry rights, (2) granted and refused mining and quarry rights, (3) cases of withdrawal, cancellation and expiry of mining or quarry rights, (4) transformation and lease of rights, and (5) securities on mining assets.

3. Mining and quarry rights

First of all we need to clarify the difference between mines and quarries since the Mining Code makes a distinction between mining and quarry rights, both subject to different regimes. The decision on this classification is made by the President of the Republic, on his own initiative or on the proposal of the Minister, after having obtained the opinion of the Directorate of Geology of the Ministry of Mines[199].



The following are classified as quarries: deposits of non-metallic mineral materials, which can be used in the ceramics industry as building materials, ballasting materials and road building materials, to improve land cultivation. These deposits include in particular: sand, chalk, gravel, limestone and cement, laterite, fullers earth, clay, fossil

[198] Article 12 Mining Code.
[199] Article 4 Mining Code.

resins and diatomite, with the exception of marble, granite, phosphates, nitrates, alkaline salts and other associated salts. All deposits of mineral materials not classified as quarries will be treated as mines.

In order to find out if mineral resources are at hand at a certain location, prospects may be conducted before applying for mining and quarry rights (*3.1 Prospects*). When applying for a permit, whether it would be for exploration or exploitation purposes, the applicant has to follow a general procedure of application (*3.2 How to apply for mining and quarry rights)*. Then the applicant must apply for an exploration permit if he wishes to pursue any activity to further identify the existence of a mineral deposit, demarcate it, evaluate the quality and quantity of the reserves, as well as to identify the technical and commercial possibilities of exploiting them (*3.3 Exploration permits*). Finally, an exploitation right must be obtained when carrying out, from an identified deposit and by means of surface and/or underground works, extraction of mineral materials from a deposit or a non-naturally occurring deposit and, if applicable, the processing thereof in order to use them or sell them (*3.4 Mining exploitation* and *3.5 Quarry exploitation*).

3.1 Prospects

Prospects are described as follows: *any activity pursuant to which a person carries out exploratory work, by studying the information available, by close or remote observation, by taking and analysing samples found on the surface, in sub-surface areas or in the water system, in particular by using geological and geochemical techniques, including various methods such as remote sensing, in order to discover indications of the existence of a mineral deposit for economic or scientific purposes*[200].

Anyone who wishes to undertake mineral prospecting is free to do so but must make a preliminary declaration with the Mining Registry[201]. Within five days following the receipt of the prospect declaration, in case there was a positive decision, the Mining Registry issues a prospection certificate which is valid for the extent of an administrative territorial unit for a duration of two years, and cannot be renewed.

[200] Article 1 Mining Code.
[201] Article 17 Mining Code.

However, a successive prospection certificate can be obtained for the same plot of land. If the Mining Registry fails to issue a prospection certificate within the aforementioned delay, the receipt for the prospect declaration will be deemed as a prospection certificate. However, this certificate does not constitute a mining or quarry right and does not confer any priority for obtaining the latter[202].

Once obtained a prospection certificate, the holder must nevertheless abide by certain obligations:

(a) Compliance with the applicable regulation which applies with regard to protection of the environment;
(b) Informing the local authority of his arrival in and his departure from each administrative district where he is carrying out his Prospecting work;
(c) Not carrying out any exploration or exploitation activities;
(d) Compliance with the regulations with regard to the taking of samples.

3.2 How to apply for mining and quarry rights

3.2.1 Priority of processing principle

The normal application procedure[203] is one of "first come first serve" since the applications for mining or quarry rights for a given area are registered in the chronological order of their submission[204]. In order to ensure this priority of processing principle, no other application relating in whole or in part to the same area can be processed as long as an earlier application is being processed.

3.2.2 Composition and examination of the application file

The application file must include an application form, duly completed and signed, the applicant's identity card and the other documents required according to the specific type of mining or quarry right applied for[205]. The application file, and all the documents it comprises, must be drawn up in French.

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[202] Article 18 Mining Code.
[203] There also exist mining and quarry rights subject to tender. However, this procedure will only be exceptionally followed if the public interest so requires: article 33 Mining Code.
[204] Article 34 Mining Code.
[205] The application procedure set out here is the general system and depending on which type of permit has been applied for, additional documents may be required; see articles 58, 69, 143 and 154 Mining Code.

Application form - The application form can be obtained at the Mining Registry, and must always include the following general information[206]:

(a) The identity, the nationality, the domicile and the coordinates of the applicant and/or of its agent if the application is submitted by the latter.
(b) In the case of a legal entity; the name of the firm, its nationality, the registered headquarters and, if applicable, the location where exploitation takes place and/or the identity of its agent if the application is submitted by the latter;
(c) The professional and legal status of the applicant and the address of the registered headquarters of the legal entity, if applicable;
(d) The type of mining or quarry right applied for;
(e) Indication of the mineral materials for which the mining or quarry right is being applied for;
(f) The geographical location of the perimeter applied for;
(g) The number of quadrangles making up the surface area of the perimeter applied for;
(h) The identity of the applicant's affiliated companies;
(i) The nature, number and surface area of the perimeters of the mining or quarry rights already held by the applicant and its affiliated companies in the DRC.

Examination - The applicant submits said file to the Mining Registry and the registrar of the Mining Registry will determine the admissibility of the application[207] and will start an examination[208] of the file within 10 working days after submission of the file. This examination consists of verifying a certain legal requirements related to eligibility of the applicant and the number of rights being applied for. Subsequently, in case of application for an exploitation right[209], a technical and environmental evaluation will take place before a decision on granting mining or quarry rights takes place.

3.2.3 Decision to grant or refuse rights

After receiving the application, accompanied by the opinion of the Mining Registry and if required also the technical and environmental opinions, the Minister of mining and quarries takes a decision. This decision will be sent to the Mining Registry which notifies the applicant of the outcome. The decision to grant or to refuse the rights

[206] Article 35 Mining Code.
[207] The conditions which must be met for the file being accepted upon submittal are set out in article 38 Mining Code.
[208] The complete procedure of examination is set out in articles 40 to 49 Mining Code.
[209] Article 55 Mining Code excludes the necessity of technical and environmental evaluations for the application of exploration permits.

applied for must be taken within 30 working days after receipt of the file by the Mining Registry.

3.3 Exploration permits

The Mining Code defines exploration as follows: *any activity pursuant to which the holder of a mineral or quarry exploration right attempts, based on indications of the existence of a mineral deposit, and by means of surface or underground works, in particular using geological, geophysical and geochemical techniques, including various methods such as remote sensing, to identify the existence of a mineral deposit, to demarcate it, and to evaluate the quality and quantity of the reserves, as well as the technical and commercial possibilities of exploiting them*[210].

There exists a distinct exploration permit for both mining and quarry activities, possessing a different scope and characteristics, and therefore we will deal with each permit separately explaining their main characteristics. As a preliminary remark we should also point out that with quarry exploration, the term authorization is being used instead of permit.

3.3.1 Mining exploration

Scope - The exploration permit for mining activities entitles its holder the exclusive right, within the area on which it is granted for and for the term of its validity, to carry out mineral exploration work related to mineral materials for which the permit has been granted, and for associated substances if the holder applies for an extension of his permit. However, in no event may the holder of the exploration permit proceed to exploiting activities[211].

Restrictions - The mining exploration right is evidenced by a certificate and is valid for a period of 4 years for precious stones (renewable twice for a period of 2 years), and 5 years for other mineral materials (renewable twice for a period of 5 years)[212]. Every renewal however, will only cover 50 % of the surface area of the original permit[213] in the view of limiting the scope of existing explorations and allowing new

[210] Article 1 Mining Code.
[211] Article 50 Mining Code.
[212] Article 52 Mining Code.
[213] Article 62 Mining Code.

explorations to commence. Furthermore, exploration permits cannot refer to an area exceeding 400 square kilometres and no natural or legal person, together with its affiliated companies, may hold more than fifty exploration permits in the DRC[214].

Extension - As previously mentioned, each permit relates to certain mineral materials and before proceeding to actively explore for mineral materials other than those for which the exploration permit has been granted, the holder must obtain an extension of his permit to include these other substances. Such extension will automatically be granted if (a) the exploration permit is valid, and if (b) the holder describes what leads him to believe in the existence of the mineral materials for which the extension of the permit is being applied.

Transformation - The holder of an exploration permit has the possibility to transform its permit into multiple exploration permits, or into an exploitation permit.

The holder of an exploration permit may request the transformation of its original exploration permit into multiple exploration permits. The following conditions must be met:

(a) The original exploration permit is still valid;
(b) Only the quadrangles covered by the original permit may be covered by the new exploration permits;
(c) A single exploration permit may not cover more than 471 quadrangles;
(d) The holder must have paid all surface area fees during the term of validity of the original exploration permit;

The part of the perimeter which is not transformed remains subject to the terms and conditions of the original exploration permit. The duration of these multiple permits equals the period of validity of the initial permit which has not yet expired.

Besides transforming an exploration permit into multiple permits, the holder of an exploration permit may also request the transformation of the latter into an exploitation permit (*see 3.4.1 Mining exploitation*).

[214] Article 52 Mining Code.

3.3.2 Quarry exploration

Scope - As with mining exploration, a quarry exploration authorization entitles its holder the exclusive right, within the area on which it is granted for and for the term of its validity, to carry out mineral exploration work related to mineral materials for which the permit has been granted, and for associated substances if the holder applies for an extension of his authorization. However, in no event may the holder of the exploration authorization proceed to exploiting activities[215].

Restrictions - The quarry exploration right is evidenced by a certificate and is valid for a period of 1 year, renewable once[216]. This authorization cannot refer to an area exceeding 4 square kilometres and no natural or legal person, together with its affiliated companies, may hold more than ten exploration authorizations in the DRC[217].

Extension - The Mining Code doesn't mention the possibility of extension for quarry exploration authorizations and the holder of the authorization will have to apply for a new authorization if he wants to actively explore for other mineral materials.



3.4 Exploitation

The Mining Code describes exploitation as "*any activity by means of which a person carries out, from an identified deposit, and by means of surface and/or underground*

[215] Article 136 *juncto* 50 Mining Code.
[216] Article 138 Mining Code.
[217] Article 139 Mining Code.

works, extraction of mineral materials from a deposit or a non-naturally occurring deposit and, if applicable, processing thereof in order to use them or sell them"[218].

3.4.1 Mining exploitation

Throughout the Mining Code, a distinction is made between (1) Mining exploitation, (2) Exploitation of tailings, (3) Small-scale mining exploitation, and (4) Artisanal mining. Given the scope of this guide, we shall only handle the characteristics of the general mining exploitation regime.

Application procedure - Applicants have to send their file to the Mining Registry following the procedure described in 3.2 and they have to attach certain additional documents to their application[219]. The granting of the permit is subject to certain conditions[220]:

(e) Demonstration of the existence of a deposit which can be economically exploited, by presenting a feasibility study, accompanied by a technical framework plan for the development, construction and exploitation work for the mine.

(f) Demonstration of the availability of financial resources required for carrying out the project, according to a financial plan for the development, construction and exploitation work of the mine, as well as a rehabilitation plan for the site after the mine is closed. This plan specifies each type of financing, the sources of the planned financing and justification of their possible availability;

(g) Obtain in advance the approval of the project's Environmental Impact Study and the Environmental Management Plan.

(h) Transfer to the Congolese government of 5% of the shares in the registered capital of the of the local entity that will carry out the exploitation. These shares must be free of all charges and cannot be diluted.

Thus, investors must take into account that, before a new exploitation permit is granted, any company must transfer 5% of the local entity applying for the permit to the Congolese government.

[218] Article 1 Mining Code.
[219] Article 69 Mining Code.
[220] Article 71 Mining Code.

The granting of the permit will only be rejected if the feasibility study is rejected, if the applicant's financial capacity is insufficient, or if the Environmental Impact Study has definitively been rejected[221].

Scope - The exploitation permit entitles its holder to the exclusive right to carry out, within the area for which it has been granted, and during its term of validity, exploration, development, construction and exploitation works in connection with the mineral materials for which the permit has been granted, and associated substances if he has applied for an extension[222].

Restrictions - The mining exploitation right is evidenced by a certificate and is valid for a period of 30 years, renewable for additional periods of 15 years each[223]. But no natural or legal person, together with its affiliated companies, may hold more than fifty exploitation permits in the DRC[224].

Extension - Each permit relates to certain mineral materials and before proceeding to actively exploit other mineral materials, the holder must obtain an extension of his permit to include other associated or non-associated substances. Such extension will automatically be granted for associated substances if the holder of the licence demonstrates that they are located together with the substances for which the permit has been granted, and that they are in such a state of association that it is necessary to extract them simultaneously[225].

Processing and transportation - The holder of the permit, or his processing or transformation entity, is free[226] to process or transform the mineral materials and he is free to transport or store the mining products originating from his exploitation area[227].

Sale - The holder of the permit is equally free to sell his products to the customers of his choice and at freely negotiated prices. However, the exportation of unprocessed ores for treatment outside the DRC is subject to the approval of the Minister of mining

[221] Guidelines on how these conditions are being evaluated can be found in article 73 Mining Code.
[222] Article 64 Mining Code.
[223] The conditions for successive renewal are set out in article 80 Mining Code.
[224] Article 68 Mining Code.
[225] Article 77 Mining Code.
[226] There only exists an exception in relation to artisanal exploitation products.
[227] Articles 83 and 84 Mining Code.

and quarries. The approval will furthermore only be granted if the applicant can demonstrate that (1) it is impossible to treat the substances within the DRC at a cost which is economically viable for his mining operations, and (2) that there are advantages for the DRC if the exportation were authorized[228].

3.4.2 Quarry exploitation

Classifications - There exist four categories of quarry exploitations; (1) permanent open quarries, either on public land or on an area held by a third party for commercial exploitation by private individuals; (2) quarries which are open temporarily, either on public land or on an area held by a third party for commercial exploitation by private individuals; (3) quarries which are open temporarily on public land for public works; and (4) quarries which are open temporarily by the occupant who is properly authorized, or the owner of a property for non-commercial exploitation or exclusively for his own personal use[229]. In the following paragraphs we will only discuss quarries for commercial exploitation[230].

Application procedure - Applicants have to send their file to the Mining Registry following the procedure described in 3.2 and they have to attach certain additional documents to their application[231].

The granting of the authorization for the exploitation of a permanent open quarry is subject to the following conditions:

(a) The demonstration of the existence of a deposit by submitting a feasibility study, together with a technical plan for the development, construction and exploitation work of the quarry.
(b) Proof of the existence of the financial resources required for carrying out the project in accordance with the financing plan for the development, construction and exploitation work of the quarry, as well as the rehabilitation of the site upon closure. This plan specifies each type of financing, the planned sources of financing and proof of their potential availability .
(c) Obtain the prior approval of the Environmental Impact Study and the Environmental Management Plan of the project.
(d) Provide proof of the consent of the surface right holder, if the surface area which is subject to the application is located within his property;

[228] Article 85 Mining Code.
[229] Article 132 Mining Code.
[230] The relevant articles for quarries for public or non-commercial use are articles 133 and 134 Mining Code.
[231] Article 151 Mining Code.

(e) If the area applied for is located within the area of a valid exploitation mining right, proof of the consent of the holder of said right must be provided, or his refusal in bad faith must be proven.

The application can only be refused in case one of the following situations poses itself: (1) the feasibility study is rejected, (2) the applicant's financial capacity is insufficient, (3) the Environmental Impact Study has definitively been rejected, (4) the owner of the surface rights refuses in good faith to give his consent to open the quarry, or (5) the holder of a mining exploitation right has refused in good faith to give his consent to open a quarry within the area his mining right relates to.

The authorization for the exploitation of a temporary open quarry will be granted to the first eligible person complying with the following conditions[232]:

(a) Demonstration of the existence of a deposit which can be economically exploited by submitting a technical plan for the exploitation work in the quarry and a Mitigation and Rehabilitation Plan relating to it;
(b) if the quarry is located in an area which is covered by a land title held by a third party, the written consent of the latter to open the quarry is required;
(c) if the quarry is located in an area which is covered by an exploitation permit held by a third party, the written consent of the latter to open the quarry, or proof that his consent was refused in bad faith is required.

Scope - Exploitation authorizations for both temporary as permanent open quarries entitle its holder the exclusive right to carry out, within the area for which they have been granted, and during their term of validity, exploration, development, construction and exploitation works in connection with the mineral materials for which the authorization has been granted, and other substances if the holder has applied for an extension[233]. Moreover, the exploitation authorization for a temporary open quarry also has to mention the quantity of the substances to be extracted, the duties to be paid as well as the conditions for occupation of the sites necessary for sampling and related activities, and any quantity exceeding the determined volume can be confiscated or may be subject to additional taxes[234].

[232] Article 159 Mining Code.
[233] Article 146 and 147 Mining Code.
[234] Article 147 Mining Code.

Term - The term of validity for quarry exploitation authorization varies depending on the type of quarry; (1) authorizations for permanent open quarries are valid 5 years and can be renewed, whereas (2) authorizations for temporary open quarries are only valid 1 year without possibility of renewal[235].

Extension - The extension of a valid authorization to include other substances than those for which the permit was originally granted is subject to the same conditions as when applying for a new exploitation authorization, and the extension will only be valid for the remaining period of the already existing exploitation authorization[236].

Sale - The holder of the authorization is free to sell marketable products originating from his quarry to the customers of his choice at freely negotiated prices[237].

[235] Article 149 Mining Code.
[236] Article 162 Mining Code.
[237] Article 167 Mining Code.

4. Obligations and protection

Once having obtained a mining or quarry right, the holder of the right is held by certain obligations. Firstly we will discuss obligations related to the validity of a mining or quarry right, and secondly there exist several obligations relating to mining and quarry activities themselves. Of course, as counterpart the Congolese State also explicitly makes guarantees towards investors in the Mining Code[238].

4.1 Obligations relating to the validity of mining and quarry rights

In order for the right to remain valid the holder is under the obligation to commence the works, and under the obligation to pay the annual surface area fees[239]. In case the holder of the right fails to fulfil any of these obligations, he might be deprived of his mining or quarry right by means of a forfeiture decision[240].

Commence the works - The holder of a mining exploration permit is obliged to start exploration works within 6 months after issuance of his title, whereas the holder of an mining exploitation permit may commence the development and construction works within a delay of 3 years as of issuance of his right.

Surface area fees - In order to cover the costs of the services and the management related to mining and quarry titles, annual surface area fees per quadrangle are charged for each title issued. These fees are to be paid in Congolese Francs to the Mining Register and are calculated as follows[241]:

- *Mining exploration permit*: an equivalent to 3,068 USD per Sq for the first two years of the first term of validity; an equivalent to 31,692 USD per Sq for the third to fifth year of validity; an equivalent to 52,1 USD per Sq for the sixth to tenth year of validity; and, an equivalent to 149,223 USD per Sq for the eleventh to fifteenth year of validity.
- *Quarry exploration authorization*: an equivalent to 5,114 USD per Sq per year.
- *Mining exploitation permit*: an equivalent to 511,096 USD per Sq per year of validity of his title.
- *Temporary quarry exploitation authorization*: duties determined on a case-by-case basis.

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[238] These guarantees are important since the guarantees offered by the Investment Code are not applicable to the mining industry; article 3 Investment Code.
[239] Article 196 Mining Code.
[240] However, this decision remains open to appeal via arbitration; article 289 *juncto* 317 and following Mining Code.
[241] Article 199 Mining Code, as amended by *Décision n° CAMI/044/2008du 16 octobre 2008 portant ajustement des montants des droits, taxes, impôts et amendesprévus dans le code et règlmement minier.*

- *Permanent quarry exploitation authorization*: an equivalent to 204,436 USD per Sq per year.

4.2 Obligations relating to mining and quarry activities

Any person carrying out exploration or exploitation works has to take into account certain obligations relating to the protection of the environment[242], the protection of the cultural heritage[243], safety and health regulations[244], and the infrastructure[245] of the works. Most of these obligations are dealt with in the Mining Regulations, and other specific regulations.



Force majeure - However, any event which is unforeseeable, unavoidable, insurmountable and outside the control of the holder, preventing it, despite its best efforts, from executing its obligations in full or in part or causing a significant delay in the execution thereof, constitutes a case of force majeure. The following events in particular are considered as cases of force majeure: wildcat strike, riots, insurrection, civil unrest, social conflicts, government action without legal support, sabotage, natural catastrophe, fire, acts of war or circumstances attributable to war.

4.3 Guarantees for investors

In order to attract investors the DRC has set out a scheme of guarantees relating to e.g. foreign exchange, exports, freedom of business, expropriation, stability, and the possibility of appeal against government decisions.

[242] Articles 202 to 204 Mining Code.
[243] Articles 205 to 207 Mining Code.
[244] Articles 207 to 211 Mining Code.
[245] Articles 212 to 214 Mining Code.

Foreign exchange - The holder of mining rights is authorised to make certain transfers abroad in favour of non-residents, after deduction of taxes and fees, which are directly related to authorised mining activities[246].

Exports - On the condition of compliance with the current exchange regulations, any holder of mining or quarry titles is authorized to freely export and sell his production on the markets of his choice. Furthermore, the holder is free to keep income from export sales in foreign currency, without an obligation to convert them into national currency[247]. Finally, there also exists a clause of more favourable treatment stating any more favourable exchange regulations entering into force after the Mining Code will be immediately applicable.

Freedom of business - The DRC guarantees e.g. the investor's right to freely dispose of his assets and to organise his business as he deems fit, free circulation for their personnel and their products on the national territory, freedom to import goods and services necessary for his activities, etc[248].

Expropriation - A prohibition on expropriation without fair compensation is inserted in the Mining Code[249].

Stability - The State guarantees that the provisions of the Mining Code can only be modified if the code itself is subject to legislative amendments adopted by Parliament. However, the rights deriving from an exploration or exploitation permit valid at the time of the enactment of such a legislative modification remain acquired and inviolable for a ten-year period: (1) from the date of the entry into force of the legislative modification for the valid exploitation permits existing as of that date, and (2) from the date of the granting of the exploitation permit subsequently granted by virtue of a valid exploration licence existing on the date of entry into force of the legislative modification[250].

[246] A list of authorized transfers is set out in article 264 Mining Code.
[247] Articles 266 to 273 Mining Code.
[248] Article 273 Mining Code.
[249] Article 275 Mining Code.
[250] Article 276 Mining Code.

The right of appeal - Both the holder of a title as well as the State have the right to administrative, judicial and arbitral appeal as set out in Title 14 of the Mining Code[251].

5. Lease and assignment of rights

Adapting to the needs of modern day business life, the Mining Code provides for the possibility of leasing and assigning mining and quarry rights. Since mining and quarry rights, as expressed in mining and quarry Permits, are real and exclusive property rights, it is possible to lease and assign these rights, although under the restrictions set out in the Mining Code.

5.1 Lease

According to the Mining Code, leasing means the following; "*to rent for a fixed or indefinite period, without the right to sublet, all or part of the rights relating to a mining or quarry right in return for a payment agreed to by the lessor and the lessee*"[252].

Only exploitation[253] rights can be leased and any lease must be registered with the Mining Registry. This registration serves a double purpose: firstly it allows the authorities to verify if all conditions are met for the lease to be valid, and secondly registration assures the enforceability of the lease against third parties.

Conditions - In order to be valid, the lease must include an accelerated termination clause (1) in case the lessee fails to pay the taxes, duties and royalties owed to the State, or (2) in case of non-compliance with laws and regulations having detrimental financial or administrative consequences for the lessor[254]. Furthermore, any lease must include clauses relating to maintenance and several and joint liability vis-à-vis the State. Finally, the registrar will also examine if the lessee would be eligible to apply for the mining or quarry right himself[255].

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[251] Articles 312 to 320 Mining Code.
[252] Article 1 Mining Code.
[253] The Mining Code explicitly excludes exploration rights in article 177 read together with articles 51 and 137 Mining Code.
[254] Article 177 Mining Code.
[255] Article 178 and 179 Mining Code.

Registration fee – Whenever an exploitation right is being leased, a registration fee must be paid to the Mining Registry which amounts to:

- Mining exploitation permit: 1203,00 USD.
- Permanent quarry exploitation authorization: 601,60 USD.

5.2 Assignment of rights

The Mining Code establishes a different regime for conveyance deeds on the one hand, and transfer deeds on the other hand. Whereas conveyance refers to a situation where the mining or quarry right is being sold, transfer relates to situations of succession after decease and merger or fusion of companies.

5.2.1 Conveyance

Both mining exploitation rights, as well as quarry exploitation rights may be conveyed in whole or in part[256]. A conveyance deed is final and irrevocable, and its validity will be reviewed by the registrar of the Mining Register who will issue a new mining or quarry right in case of a partial conveyance[257]. Furthermore, registration also strengthens enforceability vis-à-vis third parties. As a final remark it is important to mention that a conveyance does not relieve the initial holder from his obligations towards the State[258].

Registration fee – Whenever an exploitation right is being conveyed, a registration fee must be paid to the Mining Registry which amounts to:

- Mining exploitation permit: 1203,00 USD.
- Permanent quarry exploitation authorization: 601,60 USD.

5.2.2 Transfer

Both mining as well as quarry exploitation rights may be transferred in whole or in part pursuant to a contract of merger and by reason of death[259]. The same review by the registrar applies as with conveyance deeds, and also in this case registration is

[256] Quarry exploration rights are excluded from the possibility of conveyance, article 137 and 182 Mining Code.
[257] Article 183 and 184 Mining Code.
[258] Article 186 Mining Code.
[259] Quarry exploration rights are excluded from the possibility of transfer, article 137 and 187 Mining Code.

needed to render the transfer opposable against third parties[260]. However, the transferee remains liable for all the obligations of the initial holder of the right.

Registration fee – Whenever an exploitation right is being transferred, a registration fee must be paid to the Mining Registry which amounts to:

- Mining exploitation permit: 1203,00 USD.
- Permanent quarry exploitation authorization: 601,60 USD.

5.2.3 Option

Finally, the possibility of an option contract on exploration permits and authorizations allows possible investors to obtain a participation in the exercise of the mining or permanent quarry exploitation right when the holder of the permit or authorization decides to obtain an exploitation right[261]. The rules governing transfers will be applicable whenever an option is called[262]. A registration fee must be paid to the Mining Registry which amounts to 240,64 USD.

6. Securities

The Mining Code's explanatory statement affirms that securities create an important lending instrument allowing holders of mining or quarry rights to obtain sufficient funds to finance their activities. And this is why a special regime of mortgages and pledges especially aimed at financing mining activities[263], complementing the general securities regime described in chapter IV, was created.

6.1 Mortgages

The following assets can be mortgaged: mining exploitation permits and permanent open quarry exploitation authorizations, immovable assets by incorporation which are located within the mining area (in particular factories, installations and machines built for the concentration, treatment and the transformation of the mineral materials), and the fixtures used for exploitation of the mines[264]. Any mortgage requires ministerial

[260] Article 189, 190 and 191 Mining Code.
[261] Article 193 Mining Code.
[262] Article 195 Mining Code.
[263] Articles 168 to 176 Mining Code.
[264] Article 168 Mining Code.

approval and the debts guaranteed by the mortgage must relate to the mining activity for which the mortgage has been approved[265].

Approval procedure - The request for approval should be filed with the Mining Registry and should contain the following documents: (1) the mortgage deed which must mention the amount or the estimate of the debt to be guaranteed, and (2) a certified and full copy of the mining permit and its enclosures[266]. The file is then transmitted to the Directorate of Mines which will check within 10 days whether the subject of the mortgage deed is actually to secure the financing of mining activities in the area covered by the mining permit in order for the Minister of Mines to take a decision within 45 days. In case of refusal, the decision must be motivated, and a request can only be rejected if[267]:

- the value of the mortgage is lower than the amount of the debt to be secured;
- the purpose of the mortgage is not to secure a debt linked to the mining activity conducted in the area covered by the mining title;
- the amount of the financing is trivial;
- the creditor is not eligible to hold mining rights;
- the mining title is no longer valid.

In case of approval, the mortgage is registered with the Mining Register and mentioned on the back of the mining title. A registration fee must be paid which amounts to 1.203 USD for taking a mortgage on a mining exploitation permit, and 601,60 USD for taking a mortgage on a permanent open quarry exploitation authorization[268]. Finally, an appeal can be brought against a decision of refusal.

Enforcement - The creditor is entitled to enforce the mortgage in case of default of the debtor to comply with his obligations towards the creditor under the financing agreement[269]. As opposed to general securities law, the Mining Code's securities regime authorizes a creditor to take possession of the secured asset (*i.e.* the mining or quarry right) upon default by the debtor on the condition that the creditor would be

[265] Article 170 Mining Code.
[266] Article 169 Mining Code.
[267] Article 170 Mining Code.
[268] *Décision n° CAMI/044/2008du 16 octobre 2008 portant ajustement des montants des droits, taxes, impôts et amendesprévus dans le code et règlmement minier.*
[269] Article 172 Mining Code.

eligible to apply for such a right. However, given the fact that a foreign legal entity is not allowed to hold mining exploitation permits in its own name, foreign legal entities should set up a local subsidiary in order for the transfer to take place. When a creditor is not eligible, he is granted a period of six months, either to comply with the requirements of eligibility, or to be replaced by an eligible person or entity.

6.2 Pledges

Marketable products originating from the mineral deposits may be pledged and these pledges are governed by general law[270] (*see Chapter IV – Securities*).

7. Tax and customs regime

The new Mining Code sets out a uniform tax and customs regime applicable to all holders of mining rights, without distinction. Noteworthy however, is the fact that the holders of quarry rights are subject to the general tax and customs regime and do *not* profit from the favourable fiscal provisions of the Mining Code[271].



7.1 General provisions

Affected taxpayers - Every holder of mining rights, as well as its affiliated companies and exclusive sub-contractors, are subject to the tax and customs regime for all their mining activities carried out in the DRC.

Exhaustive, exclusive and stability - The new Mining Code sets out all the applicable taxes and dues to the exclusion of all other forms of taxation. Therefore, the holder of a mining Permit will only be subject to taxes and dues which are mentioned explicitly in the Mining Code. Furthermore, to ensure the stability of this

[270] Article 176 Mining Code.
[271] Article 219, paragraph 4 Mining Code.

legislation, the Mining Code stipulates that the tax and customs regime valid at the time of the enactment of a possible legislative modification remains acquired and inviolable for a ten-year period (1) from the date of the entry into force of the legislative modification for valid exploitation permits existing as of that date, and (2) from the date of the granting of the exploitation permit subsequently granted by virtue of a valid exploration licence existing on the date of entry into force of the legislative modification[272]. The only exception to the latter refers to the situation where more favourable legislation would be enacted[273].

7.2 Customs

The current Mining Code makes a distinction in taxation in accordance with the different phases of the mining activity; exploration, construction & development of the mine, and exploitation. And in the view of facilitating the application of this beneficial customs regime, the applicant must, before commencing the works, submit a list including the number and value of all moveable property, equipment, vehicles, mineral materials and other inputs which he wants to be governed by the preferential customs regime. This list must be approved by the competent authorities within 30 working days, and shall be deemed accepted when no decision has been taken within this delay[274].

Pre-exploitation phase[275] **-** All goods and products mentioned in the list and imported by the holder of the mining title strictly for mining use are subject to import duties of 2 %.

Exploitation phase - Upon the effective commencement of exploitation activities, all goods and products mentioned in the list and imported by the holder of the mining title strictly for mining use are subject to import duties of 5 %.

Extension works[276] **-** When, after the start of exploitation works, investing in the expansion of the mine the holder of the mining title may benefit from the preferential tariff of 2 % for the equipment, tools and items to be imported for the extension work,

[272] Article 221 Mining Code.
[273] The so called "More Favourable Treatment" clause: article 222 Mining Code.
[274] Article 225 Mining Code.
[275] Article 232 Mining Code.
[276] Article 233 Mining Code.

provided he files an application with the Mining Registry and demonstrates that the future work intends to increase the production capacity of the mine by at least 30%.

Exports - Besides some exceptions concerning the export of mineral samples, the holder of a mining title is completely exempted from all customs duties and other taxes for exports in relation to the mining project[277].

7.3 Tax regime

As mentioned previously, the Mining Code institutes an exhaustive tax regime[278] and mentions all taxes and dues applicable to the mining sector:

Surface area tax - The holder of a mining exploration or exploitation Permit is subject to a tax on the surface area of his mining concession at a rate, payable in Congolese Francs, equivalent to 0.04 USD per hectare for the *first year* (0.02 for exploration), 0.06 USD per hectare for the *second year* (0.03 for exploration), 0.07 USD per hectare for the *third year* (0.035 for exploration), and 0.08 USD per hectare for each *subsequent year* (0.04 USD per hectare for exploration)[279].

Property tax - is due according to the normal tax system on properties for which the surface area tax is not applicable (see *infra*).

Tax on vehicles - is due according to the normal tax system (see *infra*) and all vehicles used exclusively within the mining compound for carrying people or materials and for handling or traction are exempted.

Mining royalties - The holder of a mining permit is subject to royalties calculated on the basis of the income out of sales, minus deductible costs, bearing in mind the selling price must be equal to or higher than the price that could have been obtained from selling the product to a non-affiliated entity[280]. The mining royalties are set at a rate of 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

[277] Article 234 Mining Code.
[278] Articles 236 to 262 Mining Code.
[279] Article 238 Mining Code.
[280] Article 240 Mining Code.

other substances not specifically mentioned, and 0% for standard construction materials.

Withholding tax - The tax on income generated out of moveable property is also set at 20 %, with the exception of interest paid on loans in a foreign currency. Also, the withholding tax on dividends and other distributions to shareholders is set at 10 %.

Corporate tax - Whereas the general regime sets a 40 % tax on all income generated out of activities exercised in the DRC, the Mining Code lowers this to 30 % for income generated out of mining activities, and thus encourages business in this sector. Furthermore, the Mining Code sets out the rules governing depreciation and deductible costs in order to determine the net profit on which the corporate tax is applicable[281].

VAT – The mining activity is subject to VAT (see chapter VI.2.2. above).

Expatriate workers tax - Finally, the expatriate workers tax is set at 10 % of the salary generated by the work carried out in the DRC, as opposed to the general regime which applies a rate of 25 %.

[281] Articles 248 to 258 Mining Code.

8. Summary table of mining and quarry rights

8.1 Mining exploration permit

Validity	Competent authority	Examination: type & timing	Time limit to commence the works	Financial capacity	Annual surface duty	Lodging fees
Four years, renewable twice for a period of two years, for precious stones; Five years, renewable twice for a period of five years, for other mineral materials.	Exploration Certificate is being granted or refused by the Minister of Mines, within thirty working days as of the date of receipt of the file sent by the Mining Registry.	The Mining Registry proceeds with the its examination within a maximum period of ten working days as of the date of filing of the application. NB : The application for an Exploration Certificate is not subject to technical and environmental evaluations.	The holder of an Exploration Certificate must commence the exploration within a period of six months as of the date the title evidencing his right has been issued.	The minimum financial capacity required equals ten times the total amount of the annual surface duties payable for the last year of the first period of validity of the exploration permit applied for.	*Mining Exploration Permit*: an equivalent to 3,068 USD per Sq for the first two years of the first term of validity; an equivalent to 31,692 USD per Sq for the third to fifth year of validity; an equivalent to 52,1 USD per Sq for the sixth to tenth year of validity; and, an equivalent to 149,223 USD per Sq for the eleventh to fifteenth year of validity	US$ 0,06$ per Sq.

8.2 Quarry exploration authorization

Validity	Competent authority	Examination: type & timing	Time limit to commence the works	Financial capacity	Annual surface duty	Lodging fees
One year, renewable once for the same period.	Quarry Exploration Certificate is being granted or refused by the Head of the Provincial Mines Division, within a period not exceeding twenty working days as of the date of receipt of the file.	The Mining Registry proceeds with the its examination within a maximum period of ten working days as of the date of filing of the application.	NA	The minimum financial capacity required equals five times the total amount of the annual surface duties per square payable for the term of validity of the quarry exploration authorization.	US$ 5,114 per Sq per year.	US$ 0,12 US$ per Sq.

8.3 Mining exploitation permit

Validity	Competent authority	Examination: type & timing	Time limit to commence the works	Financial capacity	Annual surface duty	Lodging fees
Thirty years, renewable several times for a duration of fifteen years.	Exploitation Certificate is granted by the Minister of Mines within a period not exceeding thirty working days, as of the date of receipt of the application sent by the Mining Registry: (1) If the registrar's recommendation is unfavourable, the Minister makes a decision to reject the application within a period of fifteen working days; (2) If the technical opinion is unfavourable but the registrar's opinion is favourable, the Minister makes a preliminary and conditional decision to reject or approve within a period of thirty working days. (3) If both the registrar's and the technical opinion are	The Mining Registry proceeds with the its examination within a maximum period of ten working days as of the date of filing of the application. The technical evaluation of an admissible application is performed within a period not exceeding sixty working days as of the date of receipt the file sent by the Mining Registry to the Directorate of Mines. The environmental evaluation of the EIS and the EMPP in relation to an admissible application is carried out within a period not exceeding a hundred and eighty working days, as of	The holder of an Exploitation Certificate must commence the development and construction works within a period of three years as of the date the title evidencing his right is issued.	NA	US$ 511,096 per Sq per year.	US$ 601,60 US$ per Certificate.

	favourable but the environmental opinion has not been issued yet, the Minister makes a preliminary and conditional decision within a period of twenty working days and postpones his final decision to grant or refuse the Exploitation Licence until he has received the environmental opinion. The Minister makes and sends his reasoned decision to grant or refuse the Exploitation Certificate to the Mining Registry within a period of thirty working days, as of the date he receives the environmental opinion sent by the Mining Registry.	the date the application file is sent by the Mining Registry Directorate to the department responsible for the protection of the mining environment of the Ministry of Mines.				

8.4 Authorization for temporary quarry exploitation

Validity	Competent authority	Examination: type & timing	Time limit to commence the works	Financial capacity	Annual surface duty	Lodging fees
One year, not renewable.	The authorization is granted or refused within 45 working days pursuant to a decision made by : a) The Head of the Provincial Mines Division, for standard construction materials; or b) The Minister, based technical advice of the Directorate of Mines and prior advice by the Ministry of Land Affairs, as well as the local administrative authorities in case of the other quarry substances.	The Mining Registry proceeds with the its examination within a maximum period of ten working days as of the date of filing of the application.	NA	NA	Duties determined on case-by-case basis	NA

8.5 Authorization for permanent quarry exploitation

Validity	Competent authority	Examination: type & timing	Time limit to commence the works	Financial capacity	Annual surface duty	Lodging fees
Five years, renewable several times for the same period.	The authorization is granted or refused within 45 working days pursuant to a decision made by : a) The Head of the Provincial Mines Division, for standard construction materials; or b) The Minister, based technical advice of the Directorate of Mines and prior advice by the Ministry of Land Affairs, as well as the local administrative authorities in case of the other quarry substances. If the registrar's recommendation is unfavourable, the competent authority renders its decision to reject the application within a period of fifteen working days; If the technical opinion is unfavourable, the competent authority renders its decision to reject or to grant a preliminary and conditional approval within a period of thirty working days; If both the registrar's and the technical opinion are favourable, but the environmental opinion has not yet been	The Mining Registry proceeds with the its examination within a maximum period of ten working days as of the date of filing of the application. The technical evaluation is carried out within a period which may not exceed forty-five days as of the date of receipt of the file sent by the Mining Registry. The environmental evaluation of the EIS and the EMMP is carried out within a period not exceeding one hundred and eighty days as of the date of receipt of the file sent by the Mining Registry.	The holder of an Authorization for Permanent Quarry Exploitation must commence the works within a period of six months from the date the title evidencing his right is issued.	NA.	US$ 204,436 per Sq per year.	NA

	rendered, the competent authority renders its preliminary and conditional decision within a period of twenty working days and postpones its final decision to grant or to refuse Authorization for Permanent Quarry Exploitation until it has received the environmental opinion. The competent authority renders and sends to the Mining Registry its decision to grant or its reasoned decision to refuse the Authorization for Permanent Quarry Exploitation within a period of thirty days as of the date the environmental opinion sent by the Mining Registry is received by the competent authority.					

Chapter IX – The Forestry Code and the Farming Law

1. Forestry Code

The Forestry Code was also enacted in 2002 to pay heed to two concerns. On the internal plan there was an imminent need to reform the out-dated 1949 forestry legislation. The external concerns relate to the international recognition of the importance to protect the environment. Therefore the DRC wanted to enact a new Forestry Code guided by modern principles of forest-resources policymaking.





The Forestry Code does not offer a special, more favourable, regime in order to attract investors but simply adapts the existing forestry regulation to modern day needs. Therefore there is no article defining who is eligible of a special treatment, as opposed to the Investment Code and the Mining Code. This code is aimed at defining the regime applicable to preserve, exploit and value forest resources within the DRC . Moreover, this code wants to promote the rational and durable use of the DRC's forest resources, in view of preserving the ecosystem for future generations. Nevertheless, an overview of its main characteristics remains important in the scope of this guide since many investors are conducting forestry activities, and need to know what is allowed and how they might obtain a forestry concession.

1.1. Forests: status, forest rights and protection

Prior to broaching the rules governing forest concessions and exploitation permits, the Forestry Code defines the status of the forests and sets out the appropriate level of protection to preserve them. Forests are being defined as: "*Terrains covered by a plant formation consisting of trees and bushes apt to provide forest products, protect the wild fauna, and which exercises a direct or indirect effect on the soil, the climate,*

or the waterways". Similar to the Mining Code, there is also a strict distinction between ownership of the resources and the right to exploit the resources; the State remains the owner of the forests but private parties can exploit them[282].

1.1.1 Status

All forests are being divided into three categories in function of the legislator's degree of intervention. Depending on the level of protection the legislator accords to each type we can distinguish: classified forests (*forêts classées*), protected forests (*forêts protégées*), and permanent exploitable forests (*forêts de production permanente*)[283].

Classified forests - These forests are subject to a, especially ecologically orientated, restrictive legal regime and belong to the public domain of the State. The following forests are e.g. classified: national parks, botanical gardens and arboreta. Classification and declassification happens through Ministerial Decree.



Protected forests - Possible of being subject to concessions, but limited in time; concessions may not exceed 25 years and are renewable if the concession contract allows so[284].

Permanent exploitable forests - As already revealed by its name, the permanent exploitable forests are not subject to many restrictions. Being composed of multiple forest concessions, free from any ownership claims, the concessions are destined to be placed on the market[285].

[282] Article 7 Forestry Code.
[283] Article 10 Forestry Code.
[284] Article 21 Forestry Code.
[285] Article 23 Forestry Code.

In a view of transparency and centralization, the Forestry Code also creates a national and provincial forest register[286] mentioning amongst others: the decrees of (de)classification of forests, forest concession contracts.

1.1.2 Forest rights

There exists a forest right, derived from traditional customs and usages, belonging to the populations living within or close by a forest as long as their right is being used for domestic purposes and the exercise thereof does not infringe DRC laws and public policy[287]. Commercialisation of products extracted from the forests is therefore strictly forbidden unless the products are listed by the provincial Governor.

Finally, since forest concessions are also allowed (although temporarily) in protected forests, the neighbouring peoples can still exercise their traditional forest rights on the concession as long is this remains compatible, and the concessionaire may not demand compensation because of any inconveniences this may incur[288].



1.1.3 Protection

The protection of forests essentially deals with the damaging or destruction of forests through *e.g.* illegal exploitation, fires and deforestation.

Deforestation - We must especially amplify on the protection against deforestation since every deforestation must be compensated, at own expenses, by a similar reforestation[289]. Also, prior to commencing a deforestation, a deforestation permit

[286] Article 28 Forestry Code.
[287] Article 36 Forestry Code.
[288] Article 44 Forestry Code.
[289] Article 52 Forestry Code.

must be obtained with the Governor or the Minister[290] and this permit will, if approved, only be delivered upon payment of a deforestation tax[291].



1.2 Forest concessions

1.2.1 Eligibility and allocation

Eligibility - Every person willing to obtain a forest concession must meet the following requirements[292]: (1) being domiciled (natural persons) or incorporated (legal entities) in the DRC, and (2) deposit caution-money with a financial institution operating in the DRC to guarantee any future liability incurring because of the forestry activity. The deposit can also be replaced by a bank guarantee if preferred, and the amount of the caution-money is determined in function of the value or the surface area of the concession.

Allocation - Every concession is being offered by an invitation to tender and the allocation of concessions on mutual agreement is very exceptional and must be well argued and approved by the Minister[293].

1.2.2 Concession contracts

A concession contract gives the right to exploit the surface of the forest if the authorization for exploitation (see *infra*) has been given. Although a concession

[290] Depending on the size of the planned deforestation.
[291] Article 54 Forestry Code.
[292] Article 82 Forestry Code.
[293] Articles 83 and 86 Forestry Code.

contract confers a right to the concessionaire, the latter is not allowed to rent or assign his concession right without prior approval of the Minister responsible for forests[294].

1.3 Forestry exploitation

Forestry exploitation not only covers the usual activities of logging and harvesting forest products, but also covers the use of the forest for cultural, touristic or recreational use[295], and is subject to a prior authorization which is strictly personal and cannot be rented nor assigned[296]. The rules governing exploitations can be found jointly in the Forestry Code and a Ministerial Decree[297].

Logging permits are delivered for a concession not exceeding 1.000 hectare and the holder may be beneficiary of multiple permits at a time[298]. Furthermore the validity period is set at a maximum of one calendar year.

Once a concession has been granted the concessionaire is obliged to commence exploitation works within 18 months after signature of the concession contract. After this delay he may be given notice by the government administration to start exploitation within 12 months. If even after this additional period the concessionaire still hasn't commenced works, his concession rights are automatically revoked[299].

1.4 Tax regime

There exists an additional forestry tax regime independent of the normal tax regime due by every concessionaire or exporter of forest products[300]. These taxes are set out in separate Ministerial Decrees and comprise the following dues and taxes: (1) dues on the surface area of the concession, (2) a logging tax, (3) an exportation tax, (4) a deforestation tax, and (5) a reforestation tax.

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[294] Articles 90 and 95 Forestry Code.
[295] Article 96 Forestry Code.
[296] Article 98 Forestry Code.
[297] Ministerial Decree dated October 3, 2002 on forest exploitation measures (*Arrêté Ministériel du 3 octobre 2002 portant mesures relatives à l'exploitation forestière*) and further referred to as Exploitation Decree.
[298] Article 7 Exploitation Decree.
[299] Article 115 Forestry Code.
[300] Article 120 Forestry Code.

2. Farming Law

The 24th of December 2011, a Farming Law[301] has been proclaimed, envisaging the promotion and growth of the agricultural production in order to guarantee food security and rural development. The Farming Law is completely in line with the government's agricultural policy and aims at covering the national agricultural needs, and schooling of local farmers.



Scope of application – The Farming Law applies to all agricultural exploitation, research and training, and the financing and commercialising of agricultural activities. Stock farming, fishery and aquaculture however, are excluded from the scope of application[302].

Nationalistic – The Farming Law is a rather nationalistic instrument and the State retains permanent sovereignty over all natural and plant genetic resources for food and agriculture. Furthermore, the first part of the law is dedicated to installing an institutional framework contributing to the government's agricultural policy[303].

Acquisition of farm land - One of the most discussed articles of the Farming Law is article 16, reserving the acquisition of farm land to Congolese nationals or Congolese companies of which the majority shareholders are Congolese nationals. Any agricultural concessionaire has until June 24, 2013 in order to conform with the new law[304], frightening many (foreign) farmers what will happen to their concessions after this date. Since the Farming Law doesn't make a clear distinction between existing

[301] *Loi n 11/022 du 24 décembre 2011 portant principes fondamentaux relatifs à l'agriculture.*
[302] Article 2 Farming Law.
[303] See articles 6 to 9 Farming Law.
[304] Article 82 Farming Law.

and future concessions, the risk exists article 16 will be applied to existing concessions. Although governmental authorities already stressed article 16 will not be applied to existing concessions, this article will however impede any expansion of existing concessions in the future.

Chapter X - Banking sector

The DRC financial system is very fragmented and the three main sectors constituting a financial system are backlogged. These sectors are the intermediation sector (banks and non-banks), the capital market and micro-finance institutions. Therefore the informal sector has penetrated all the economic activities. However, the government has undertaken an incentive policy for micro-finance with the introduction of financial intermediaries in order to fight against the under-penetration of bank services in the country.



1. Banking law

Although the financial regulations are backlogged, all credit institutions are governed by the Banking Law[305] creating a uniform regime for all enterprises conducting banking activities on a regular basis. The Banking Law's importance should therefore not be underestimated since institutions falling within its scope are entrusted with a monopoly on banking activities[306].

1.1 Scope of application

One of the innovations of the Banking Law is the fact that it declares itself applicable to all enterprises exercising banking activities, instead of giving a definition of credit institutions. But once an enterprise is conducting banking activities on a regular basis, it will be classified as one of the five recognized categories of credit institutions.

The banking activities are divided into three sub categories; (1) Public fund raising, (2) credit transactions, and (3) payment management.

[305] *Loi n° 003/2002 du 2 février 2002 relative à l'activité et au contrôle des établissements de crédit*.
[306] Article 19 Banking Law.

Public fund raising - Any activity where funds are being retrieved from third parties, especially through deposits, in order to use them for personal use but under the obligation to return the funds[307].

Credit transactions - This generally refers to situations where somebody places, for pecuniary consideration, funds at the disposal of somebody else[308].

Payment management - Finally, payment management refers to the management of all activities related to instruments allowing to transfer funds[309].

However, credit institutions are not limited to these three activities. Besides these main activities, credit institutions are equally allowed to conduct connected activities such as *e.g.*: exchange transactions, issue of commercial paper, equity participation, etc[310].

As previously mentioned, once an enterprise is conducting one of these banking activities on a regular basis, it will fall within the scope of the Banking Law and it will be classified as one of the following credit institutions: bank, savings and loans cooperative, savings bank, specialized financial institution, or financing company[311].

1.2 Central Bank's authorization

Of course not every enterprise may conduct banking activities and therefore the Congolese Central Bank has to grant the authorization to conduct banking activities on a regular basis within the DRC[312]. Besides granting authorization, the Central Bank is also the monitoring agency with far reaching powers able to revoke authorizations.



[307] Article 6 Banking Law.
[308] Article 7 Banking Law.
[309] Article 8 Banking Law.
[310] Article 9 Banking Law.
[311] Article 2 Banking Law.
[312] Articles 10 to 18 Banking Law.

1.2.1 Conditions

The demand for authorization is subject to several conditions which must be fulfilled by the applicant:

Legal entity - Every applicant must be a legal entity in justifying a minimal paid up capital, and must answer to a local or general economic need. The banking companies must be incorporated in the form of a "*société par actions"*

Application file - The applicant's file must consist of the following documents; the articles of association, a list of shareholders and directors, an assessment of the planned activities, a detailed overview of the technical and financial structures the credit institution is willing to set up, and all other elements meaningful for the Central Bank's decision.

The Central Bank will verify if the applicant's file meets the requirements of the Banking Law and will take its decision within 90 days after reception of the application.

1.2.2 Revocation

The Central Bank can revoke her authorization to conduct banking activities on the following grounds; if the credit institution (1) renounces its authorization, (2) no longer fulfils the approbation conditions, (3) hasn't begun its activities within 12 months following its approbation, or (4) has ceased its activities for more than 6 months. Of course, the Central Bank can always revoke any authorization on grounds of violation of the Banking Law. Finally, revocation entails scrapping from the list of authorized credit institutions and the latter will enter into liquidation.

2. Anti-money laundering law

With a view to fighting money laundering and the financing of terrorism, the DRC enacted an Anti-money laundering Law[313] in 2004. This law imposes certain obligations upon credit institutions whenever a transfer is being made of which the origin is vague, or when the amount exceeds the equivalent of 10.000 US $.

[313] Loi n° 04/016 du 19 juillet portent lutte contre le blanchiment des capitaux et le financement du terrorisme.

2.1 Scope of application

Money laundering - The anti-money laundering law describes money laundering as one of the following *intentionally* committed acts:

(a) any conversion, transfer or manipulation of goods as to conceal or cover up the illegal origin of those goods, or helping anybody engaged in such acts to avoid judicial consequences;

(b) concealing or covering up of the true nature, origin, location, movement, or ownership of goods;

(c) the acquiring, holding or using of goods by a person in the know, or a person who should reasonably have known, about the illegal origin of the goods.

The term 'goods' is defined as wide as possible as to include any kind of (im)moveable, (in)tangible, or (ir)replaceable goods.



The anti-money laundering law applies to every natural or legal person who, as part of his usual business activities, is engaged in any kind of financial transactions. This already wide definition is being enforced by an article stipulating that the application of the law can be extended to any other group of professionals or enterprises whenever it has been established this group is engaged in money laundering activities[314].

2.2 Prevention

The *leitmotiv* of the law is prevention and therefore all credit institutions are obliged to keep information on the true identity of their clients, report any suspicious transactions, and keep records of financial transactions which must be handed over to the Congolese Central Bank upon request. Furthermore, whenever an intermediary is

[314] Article 4 Anti-money laundering Law.

being consulted, the latter is not allowed to invoke any professional secrecy by which he might be bound[315].

Besides these general obligations, the anti-money laundering law also imposes additional obligations to specific categories of businesses such as credit institutions, exchange offices, and casinos[316].

2.3 Repression

There exists a special Financial Information Cell possessing special investigation powers within the Ministry of Finance which operates in close cooperation with the Congolese Central Bank. Whenever this cell is of the opinion there are reasons to believe an infringement exists, a report is being sent to the public prosecutor's office who will decide on starting a formal investigation.

In case a formal investigation is started, the judicial authorities are competent to seize any goods in relation with the infringement, or to order any preservation measure upon any goods up for seizure.

Once it is certain an infringement has been committed, there are several penal and confiscatory sanctions applicable[317].

[315] Articles 5 to 12 Anti-money laundering Law.
[316] Articles 14 to 16 Anti-money laundering Law.
[317] Articles 34 to 50 Anti-money laundering Law.

Chapter XI - Telecommunications

The main legislative text governing the telecom sector in the DRC is the Telecommunications Law[318]. This law issues all principles, rules and institutions regulating telecom activities, networks, and services. However, due to the increasing technological evolution this law isn't adapted to current day needs, and operators are still faced with a certain amount of unfair competition in the telecom sector.



1. Market regulators

The DRC telecommunications sector is governed by two regulators each possessing specific tasks. First of all, the Minister of Telecommunications is competent for determining the general policy and for issuing the regulatory framework governing the sector[319]. Secondly, the National Regulatory Authority ("*Autorité de regulation de la poste et des telecommunications"* or "*ARPTC*") can be seen as a watchdog[320].

2. Telecom licences

2.1 Concession licence

In order to be allowed as a telecom operator in the DRC, a future operator has to apply for a licence with the Minister of Telecommunications. Every legal person obtaining an exploitation licence must however take the form of a Public Limited Company, of which at least 30% of the social capital is held by Congolese nationals. Furthermore this licence will set out the nature of the activity, and will also determine the framework for execution of the granted concession[321].

[318] Loi cadre n° 013-2002 du 16 Octobre 2002 sur les télécommunications en RDC.
[319] Articles 5 to 7 Telecommunications Law.
[320] Article 8 Telecommunications Law.
[321] Articles 19 to 20 Telecommunications Law.

2.2 Public network operator

The Public Network Operator is granted exclusive rights to render telecom services within the DRC and all other operators are operating as concessionaires[322]. This temporary exclusivity is granted over the only network to which all concessionaires must be interconnected to transit their national and international telephone traffic. However, a concessionaire may exceptionally obtain authorization to possess his own network for handling long distance and international calls[323].





[322] Article 36 Telecommunications Law.
[323] Article 38 Telecommunications Law.

Chapter XII - Arbitration

The Congolese justice system is considered as highly corrupted. The real problem is the lack of means, and knowledge, to uphold the law. Magistrates are badly paid, have no access to decent legal libraries, and have to work in very remote places. Reason why most investors opt for arbitration as means of dispute settlement.

The Congolese Code of Civil Procedure[324] sets out a framework in articles 159 to 201. These are mandatory rules in relation to arbitration clauses (articles 159 to 174), ground rules for arbitral procedures (articles 175 to 177), and arbitral awards and their execution (articles 178 to 194).

However, there is no governmental arbitration centre, but some private initiatives have been put into place in conformity with the mandatory rules of the Code of Civil Procedure: the "Centre d'Arbitrage du Congo - CAC" founded by former President of the national Bar, and the "CENACOM" which is the arbitration centre of the "Fédération des Entreprises Congolaises - FEC".

1. Advantages of arbitration

Free choice of arbitrators - The main advantage of arbitration is the ability for the parties to freely choose the arbitrators. The Code of Civil Procedure allows two different possibilities: designation by virtue of an arbitration clause in the contract[325] or by a subsequent special agreement when a dispute arises[326].

Final decision – An arbitral award is a final decision of which the parties are free, by prior agreement, to exclude the possibility of appeal[327].

2. Some concerns

Although arbitration is by far the best dispute settlement mechanism when operating in the DRC, there are still some concerns in relation to possible interventions of the State. The Code of Civil Procedure makes it possible for the courts to intervene in the arbitral procedure:

[324] Decree dated March 7, 1960, on the Code of Civile Procedure.
[325] Articles 160 and 161 Code of Civil Procedure.
[326] Article 165 Code of Civil Procedure.
[327] Article 187 Code of Civil Procedure.

- Article 161: whenever the arbitration clause is silent about the procedure of designation of the arbitrators, the President of the Tribunal of First Instance will designate one or three arbitrators.
- Article 163: in case of urgency, and prior to the creation of arbitral tribunal, parties are able to apply for the adoption of interim measures.
- Article 190 to 194: under some limited circumstances the nullity of the arbitral award can be applied for with the Court of Appeal.

3. International arbitration

The DRC State, the state owned companies and Congolese operators can validly accept international arbitration (ICC, UNCITRA) and their specific rules.

The DRC adhered to the Geneva Convention of 26 September 1927 on the execution of foreign arbitration awards but not yet to the New-York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards.



Chapter XIII - Accession to the OHADA Treaty

Since 1993, there exists an international organization promoting uniform business law in Africa given birth to by the signing of the OHADA[328] Treaty on October 17, 1993 in Port Louis, Mauritius. Until this date sixteen African countries had signed the treaty and since the approval of the latter by the DRC National Assembly[329] on February 11, 2010 the number of Member States will soon reach seventeen[330]. The DRC's accession will be complete after having deposited the act ratifying the DRC's accession to the OHADA Treaty with the government of Senegal, sixty days after which, the OHADA system will have full effect within the DRC. The formal deposit is likely to take place in the course of 2012.

The harmonization process introduced by the OHADA system is already bringing real benefits to investors elsewhere in Africa, and the DRC's accession will certainly have a positive impact on the legal and judicial environment.



1. Purpose and objectives

Before the coming into existence of the OHADA system, the business legislation of many African countries was frozen since the early sixties which led to a major hap in the national business legislation and a backlog with regard to current business life needs.

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[328] French acronym for *Organization for the Harmonization of Business Law in Africa*.
[329] *Loi n°10/002 du 11 février 2010 autorisant l'adhésion de la RDC au traité OHADA.*
[330] The current Member States are : Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, the Republic of the Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Guinea-Conakry, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

The OHADA Treaty is therefore aiming at harmonizing certain areas of business law in the Member States, and moving towards more economic integration and harmonization.

These simple and effective regulations will facilitate cross-border trade between the Member States and contribute to more legal certainty and security, thus restoring a climate of confidence and attracting international investors.

2. Uniform Acts and the Common Court of Arbitration and Justice

The harmonization process is mainly being achieved by the enactment of uniform acts which are directly applicable and binding in all Member States notwithstanding any contrary provision of national law. Therefore, applicable legislations in the OHADA sphere consist of the Uniform Acts, and the national provisions which do not contravene the OHADA legislation.

There are currently eight different Uniform Acts in areas of general commercial law; commercial companies and economic interest groups; securities; simplified recovery procedures and enforcement measures; collective insolvency proceedings; arbitration; transport of goods by road; and accounting law.

In order to prevent these Uniform Acts from being interpreted in a different manner depending on which Member State's judicial boddies are applying them, the OHADA Treaty has installed a system of supranational supervision by a Common Court of Arbitration and Justice[331]. The Member State's courts have jurisdiction in both first and appellate instance, whereas the Common Court of Arbitration and Justice can be seized to render a reversal judgment, thus ensuring a uniform interpretation of the OHADA legislation.

3. Impact of a future accession on the DRC's legal framework

The Uniform Acts are directly applicable and binding in all Member States. The DRC's accession to the OHADA system will impact on the following matters in the DRC's business law: (1) general commercial law; (2) commercial companies and economic interest groups; (3) securities; (4) simplified recovery procedures and

[331] Articles 13 to 20 of the OHADA Treaty (Port-Louis).

enforcement measures; (5) collective insolvency proceedings; (6) arbitration; (7) transport of goods by road; and (8) accounting law.

Annexes

Annex I - List of positions reserved to Congolese nationals.

Agricultural sector

– Secrétaire de direction (bilingue ou trilingue)
– Assistant de direction
– Directeur administratif
– Caissier
– Conducteur des engins agricoles
– Agent de plantation
– Gérant adjoint de plantation
– Assistant vétérinaire
– Médecin vétérinaire
– Mécanicien engins légers
– Électricien bâtiment
– Électricien autos
– Conducteur des travaux adjoint
– Conseiller juridique ou économique
– Chef de service approvisionnement
– Comptable
– Directeur du personnel
– Directeur commercial
– Assistant médical
– Documentaliste
– Programmeur informatique
– Soudeur
– Ajusteur
– Chef de service statistique
– Agronome
– Directeur des achats des produits agricoles locaux
– Opérateur sur machines informatiques
– Chef de service contentieux
– Ferrailleur
– Directeur des relations publiques

Industrial enterprises

– Secrétaire de direction (bilingue ou trilingue)
– Assistant de direction
– Attaché de direction
– Directeur administratif
– Directeur financier adjoint
– Électricien bâtiment
– Électricien autos
– Mécanicien autos
– Conseiller juridique, économique et financier
– Chef de services statistique
– Opérateur sur machines de traitement des données
– Opérateur sur machines comptables et à calculer
– Tisserand
– Tanneur
– Comptable
– Caissier
– Directeur commercial
– Assistant médical
– Tailleur
– Couturier
– Secrétaire conducteur
– Programmeur informatique

Extractive industry

– Secrétaire de direction (bilingue ou trilingue)
– Assistant de direction
– Attaché de direction
– Directeur administratif
– Conducteur des engins miniers
– Électricien bâtiment
– Électricien autos
– Conducteur des travaux adjoint
– Conseiller juridique ou économique
– Comptable
– Investigateur
– Assistant médical
– Programmeur informatique
– Soudeur (sous-eaux)
– Ajusteur
– Mécanicien autos
– Chef de service statistique
– Directeur des achats des produits locaux
– Opérateur sur machine comptable et à calculer
– Directeur
– Directeur des ventes
– Chef de carrière
– Chef équipe préparation mines
– Directeur du personnel
– Directeur des relations publiques
– Opérateur sur ordinateur électrique
– Documentaliste
– Caissier
– Chef de service contentieux
– Ferrailleur

Construction and Public work

– Secrétaire de direction
– Attaché de direction
– Assistant de direction
– Directeur administratif
– Directeur financier adjoint
– Conducteur des travaux adjoint
– Conseiller juridique, économique et financier
– Directeur commercial
– Assistant médical
– Secrétaire traducteur
– Programmeur informatique
– Adjoint au chef de chantier
– Charpentier
– Électricien bâtiment
– Électricien engins léger
– Caissier
– Documentaliste
– Opérateur sur machines comptables
– Directeur du personnel
– Directeur des relations publiques
– Soudeur
– Ajusteur

– Conducteur de presse à imprimer
– Conducteur de four
– Conducteur machines à couler
– Documentaliste
– Directeur du personnel
– Directeur des relations publiques
– Mécanicien
– Serrurier
– Chef de services statistiques
– Opérateur sur machines informatiques
– Plombier

Electricity, water and sanitary

– Secrétaire de direction
– Attaché de direction
– Assistant de direction
– Directeur administratif comptable
– Électricien
– Électricien autos
– Mécanicien
– Documentaliste
– Directeur du personnel
– Directeur des relations publiques
– Directeur commercial
– Directeur des achats des produits locaux
– Directeur assistant
– Chef de services statistiques
– Opérateur sur machines informatiques
– Opérateur sur machines comptables et à calculer
– Ajusteur
– Caissier
– Soudeur

Banking and insurance

– Secrétaire de direction
– Attaché de direction
– Assistant de direction
– Directeur administratif
– Comptable
– Directeur commercial
– Directeur des ventes
– Directeur des achats
– Gérant adjoint
– Directeur assistant adjoint
– Chefs de services approvisionnements
– Conseiller économique
– Conseiller juridique
– Secrétaire traducteur
– Programmeur
– Directeur du personnel
– Mécanicien
– Assistant médical
– Soudeur
– Ajusteur
– Chef de services statistiques
– Électricien bâtiment
– Opérateur sur machines informatiques
– Opérateur sur machines comptables
– Opérateur sur ordinateur
– Agent commercial
– Caissier
– Chef de service code
– Conducteur engins de manutentions
– Responsable service clairs-constat
– Chef d'entrepôt
– Documentaliste
– Directeur des relations publiques

Transport

– Secrétaire de direction
– Assistant de direction
– Attaché de direction
– Directeur administratif
– Conducteur engins/routiers/transport
– Conseiller juridique, économique et financier
– Caissier
– Chef de service code
– Conducteur engins de manutentions
– Responsable services clairs-constat
– Chef d'entrepôt
– Documentaliste
– Directeur des relations publiques
– Inspecteur des services voyageurs
– Comptable
– Directeur commercial
– Directeur des ventes
– Programmeur informatique
– Soudeur

Services

– Secrétaire de direction
– Attaché de direction
– Assistant de direction
– Directeur administratif
– Comptable
– Directeur des ventes
– Directeur des achats
– Gérant adjoint
– Chef des services approvisionnements
– Conseiller juridique, économique et financier
– Caissier
– Secrétaire traducteur
– Programmeur
– Mécanicien
– Soudeur
– Ajusteur
– Chef de service statistique
– Électricien bâtiment
– Pharmacien

– Ajusteur
– Chef de services statistiques
– Directeur des achats
– Chef des approvisionnements
– Caissier
– Directeur du personnel
– Opérateur sur machines informatiques
– Opérateur sur machines comptables
– Documentaliste
– Directeur du personnel
– Directeur des relations publiques



Andreas Van Impe

Andreas is a member of the Brussels Bar specializing in commercial law in general and in company and association law in particular.

Andreas studied law at the K.U.Leuven where he obtained his masters degree in the field of international law. During the penultimate year of his studies he attended the university of Bordeaux Montesquieu IV.

After graduating, Andreas gained experience at several international organizations and organized an economic mission to Burundi in close cooperation with the CBL-ACP (Chamber of Commerce, Industry and Agriculture, Belgium-Luxembourg-Africa-Caribbean-Pacific).

As a corporate lawyer, Andreas worked at the Brussels office of DLA Piper where he was part of the Africa Team working with Herman Lemaire. There, he gained experience in various aspects of Congolese commercial and company law, and OHADA law. He also travelled to central Africa several times to attend to clients in person.

Recently, Andreas temporarily joined the Lubumbashi Bar in the framework of an exchange programme between the Brussels Bar and the Lubumbashi Bar, specializing in natural resources law.

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Herman Lemaire

Herman is a partner in the Corporate practice group and in the Africa Department of De Wolf & Partners. He works at the Brussels office.

Herman focuses on general commercial law, corporate law, mergers and acquisitions and restructuring in both international and domestic fields.

As a corporate lawyer dealing with mergers and acquisitions, Herman advises clients on legal audits, the negotiation and drafting of shareholders, share purchase and joint ventures agreements, as well as all ancillary agreements linked to these transactions. He also assists and represents clients in composition procedures and acts as a liquidator of companies.

Since many years, Herman's activities mainly focus on legal affairs in Central Africa countries in the bank, steel, energy supply, mining, telecom, real estate, commercial and transport sectors. He acts as legal adviser to various private and public operators as well as liquidator of banking companies in the Democratic Republic of Congo.

Herman actively takes part to the privatization process of DRC state owned enterprises in the transport and mining sectors.

He often stays in Kinshasa, working with De Wolf &Partners' local team, Lubala & Associés.

Having an in-depth knowledge of OHADA law, he is also active in several other African countries.

Herman is a member of CBL-ACP (Chamber of Commerce, Industry and Agriculture, Belgium-Luxembourg-Africa-Caribbean-Pacific) and of the BCECC (Belgian-Chinese Economic and

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Herman is the author and co-author of articles on corporate law, mergers and acquisitions, distributorships and African business law. He was a speaker at conferences on Belgian corporate law and Congolese business law.

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