CLIFFORD CHANCE

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Selected key issues raised by the 2013 amendments to Guinea's Mining Code

As brought to your attention in our *Client Briefing - Guinea's new Mining Code: Significant changes in a key mining jurisdiction* dated September 2011, the National Transitional Council (*Conseil National de Transition*) (the "**CNT**")[1] of the Republic of Guinea ("**Guinea**") unanimously adopted a new mining code on 9 September 2011 (the "**2011 Mining Code**"), which replaced the 1995 mining code. The 2011 Mining Code very quickly came under close scrutiny and criticism from Guinean civil society, certain major Guinean political parties, international financial institutions, mining operators and other stakeholders, particularly with respect to its tax, customs and finance provisions. As a result, the CNT and the government have produced a series of amendments to the 2011 Mining Code which were adopted on 8 April 2013 (the "**Amendments**") (together, the 2011 Mining Code and the Amendments the "**New Mining Code**"). The New Mining Code has now entered into effect and acquired force of law through its promulgation by the presidential decree of 17 April 2013 (the "**Presidential Decree**"). This marks a further important step in Guinea's ongoing mining reform agenda. As the intention of Guinea is to apply and reflect the contents of the New Mining Code in all current and future mining conventions, existing and future investors as well financiers in the Guinean mining sector need to consider the impact of the Amendments and be prepared to address the issues they raise. This note considers a number of key issues raised by the Amendments.

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1. Uncertainty Regarding the Timeframe for the Revision of Mining Conventions

Following the Presidential Decree and pursuant to Article 4 of the Amendments, the applicable mining regime in Guinea is the 2011 Mining Code as amended by the Amendments.

New Article 217-I requires each holder of a mining title or authorisation (a "**Mining Company**") that is not in conformity with the New Mining Code to "*fully cooperate*" with Guinea with a view to arriving at agreed and signed amendments within twenty four (24) months of the "*publication*" of the Amendments in the Official Journal (the "**Review Period**").

However, the beginning of the Review Period has not been aligned with the date of the Presidential Decree, and the manner of the publication of the Amendments (which only refers to the year 2013, without identifying a specific publication date) creates uncertainty as to the start date of the Review Period.

2. Mining Conventions Review Programme

Guinea has launched a global program for the review, renegotiation and amendment of all existing mining conventions and mining titles, with the general intent of bringing them into line with the New Mining Code. Much to the discomfort of existing investors in the mining sector, the review and renegotiation applies across the board, even to those mining conventions and mining titles that have been duly executed and approved by previous governments and legislatures. There has been only a small number of exceptions – for example, Rio Tinto pre-empted the review process in relation to their giant Simandou iron ore development by entering into a voluntary bilateral adjustment of their mining convention with Guinea.

A list and copies of the mining conventions to be reviewed (the "**Challenged Mining Conventions**") under this process can be found on the following website: http://www.contratsminiersguinee.org/about/projets.html, and they are also due to be published in the Official Journal of Guinea. It also appears that the scope of the review process will extend beyond renegotiating commercial terms to the harmonisation of Challenged Mining Conventions with the New Mining Code.

Pursuant to Article 217 of the 2011 Mining Code, the review process aims to eliminate any terms contained in any Challenged Mining Conventions that are inconsistent with the New Mining Code, and new Article 217-I has clarified the timing for the entry into effect of the different amendments required to be made to the Challenged Mining Conventions.

For Challenged Mining Conventions entered into in "*strict compliance with the applicable law at the time of their execution*", new Article 217-I has created three (3) categories of amendments:

i. amendments with "*immediate effect*" (which relate to transparency, anti-corruption, transfer of interest in mining titles and related capital gains tax, environment, local communities, health and employee safety);

ii. amendments that can apply "*progressively*" over a period to be negotiated between Guinea and the investor, but which shall not exceed eight (8) years (which relate to training programmes, employment and preferences to Guinean nationals); and

iii. "*any other amendments*", for which the timing for implementation is open to negotiation between investors and Guinea (notably, those which relate to tax and customs, state participation, Guinea's right to transport and sale mineral substances, obligations to comply with the insurance code and foreign exchange regulations).

New Article 217-I gives flexibility to the investors and Guinea with respect to the implementation of the amendments required to conform the relevant Challenged Mining Convention with the New Mining Code, but it does not remove the requirement for investors and Guinea to agree to amendments to Challenged Mining Convention within the Review Period.

The drafting of new Article 217-I, however, implies that certain mining conventions may not have been entered into in "*strict compliance with the applicable law at the time of their execution*". It remains unclear which Challenged Mining Conventions the Guinean authorities believe fall into this category and, for those that do, the timetable for the application of their amendments (assuming that they can be validly amended). The general approach taken so far seems to have been to deal with some of the easier Challenged Mining Conventions first to gain some momentum for the process and then to move on to review the more strategic and more challenging ones.

Parties whose mining conventions are listed on the website mentioned above, as well as their financiers, should now (i) consider whether the relevant mining conventions were entered into "*in strict compliance with the applicable law at the time of their execution*" and (ii) identify provisions that may be inconsistent with the New Mining Code and the extent to which these might be open to negotiation under the review process.

New Article 217-I provides that if the investor and Guinea have not reached an agreement on amendments to be made to their mining conventions within the Review Period, they shall meet again to assess the "*issues agreed and issues not agreed, in order to sign promptly an amendment to their mining convention, which is adapted to the economic terms of the project or the mining exploitation*". However, the New Mining Code does not provide for specific consequences or sanctions on the project, the mining convention, the mining titles, or the investors' activities in Guinea in the event that an investor and Guinea have not reached such an agreement within the Review Period.

Moreover, the Amendments require investors in Challenged Mining Conventions to "*fully cooperate*" with Guinea with a view to arriving at agreed and signed amendments to their conventions within the Review Period, but assessing the degree of "*cooperation*" of an investor in the review process will be a difficult task in cases of dispute. It will be interesting to see to what extent the current depressed phase of commodity cycle results in a flexible approach to discussions on the part of Guinea.

The amendment agreement to a Challenged Mining Convention will only be valid and effective after it has been (i) approved by the Council of Ministers, (ii) signed by the Minister in charge of mines, (iii) subject to a legal opinion from the Supreme Court of Guinea, and (iv) ratified by the National Assembly.

The review process raises legal and political risk issues (not unlike those faced by mining companies in Indonesia and the Democratic Republic of Congo following the adoption of new mining legislation) for investors and financiers to consider in the context of any investment in the mining sector in Guinea. We note that this attempt to revise mining conventions in Guinea is not the first, but this time Guinea seems to have given itself greater means of conducting the review on a global scale, and the review program is explicitly envisaged in new Article 217-I. At this stage it remains difficult to predict how many disputes will arise from the review process and how these will be resolved, but it is difficult to imagine that no challenges will emerge where investors face significantly altered economic terms.

3. Publication of Mining Conventions

New Article 217-II requires all mining conventions and their amendments to be made freely available on the website mentioned above.

This Article also provides that all confidentiality clauses in published mining conventions that would otherwise prevent publication are deemed to be void. New mining conventions will also be published in the same manner, and, going forward, investors should keep this in mind when negotiating mining conventions in Guinea. That said, new Article 217-II only refers to the publication of mining titles and mining conventions. It does not require, for example, the publication of joint venture agreements, share purchase agreements or other shareholders' arrangements.

The publication of mining conventions and mining titles is intended to enhance transparency and harmonisation in the mining sector. It does, however, raise certain issues. For example, counterparties of Guinea under the Challenged Mining Conventions may view such publication as a disclosure of confidential price sensitive information and, irrespective of the terms of Article 217-II, could potentially seek recourse for breach of earlier confidentiality provisions.

4. Taxes and Royalties

The 2011 Mining Code imposed certain taxes on the sales of mineral substances extracted in Guinea and the Amendments provide, inter alia, further clarification as to calculation and payment terms.

Under the Amendments, for all metals other than precious stones, the tax is due and payable no later than the 15th day of the month following extraction. For precious stones, the tax is due and payable on the date of valuation by the National Bureau of Expertise. The applicable tax rate varies by mineral substance and its calculation depends on the grade (or concentration) of an ore mineral, the weight of the mineral substance extracted and the applicable price index. Article 161 of the 2011 Mining Code provided a detailed table setting out a specific rate for each mineral substance, and we note that the Amendments modify the rate and basis of calculation for certain mineral substances. For example, the rate for bauxite has been reduced to 0.075%, calculated on the basis of "*LME-3 months seller price per tonne of primary aluminium for a bauxite with Al2O3 at 40%*", while under the 2011 Mining Code the rate was 0.55%, calculated on the same basis but for "a standard bauxite with Al2O3 at 50%". The rate for iron ore has been increased to 3% under the Amendments, calculated on the basis of "*the price of iron ore (measured by Platts China Iron Fines CFR 62%) minus transportation costs (measured by Baltic Exchange Capesize Index Route C-3 Tubarao/Qingdao)*", from 1.5% under the 2011 Mining Code, calculated on the basis of "*LME-3 months seller steel billet price*").

These rates and new payment timetables will directly affect the net revenues of mining companies, and no doubt investors and financiers will scrutinise them carefully to determine their impact on cash flow, rates of return on investment and potential debt service capacity.

5. Foreign Exchange Regulations

Restricted access to foreign exchange and/or obstacles to transfers of hard currency abroad will have an impact on how Guinean mining transactions are structured. In particular, when structuring transactions, investors and lenders will need to scrutinise the central bank and currency control regimes to determine, *inter alia* the ability of mining companies to open offshore accounts and retain funds offshore, to remit payments to creditors overseas[2], to effect repayments and prepayments of loans (as well as fees, commissions, and other sums due to financiers under finance documents), to make and remit dividends overseas, to repay shareholders' loans and to obtain governmental approval for loans from foreign financiers in foreign currency to a Guinean mining company.

Article 184 of the New Mining Code makes an important change to the foreign exchange regulations by imposing an obligation on mining companies to "*repatriate all export proceeds resulting from the sales of the mineral substances on accounts of the Central Bank of the Republic of Guinea, opened abroad with reputable financial institutions*". It further provides that appropriate arrangements shall be entered into with the Central Bank of Guinea (the "**Central Bank**") to organize the opening of such accounts, how payments are authorized and how they will be operated.

Historically, the applicable foreign exchange regime was quite liberal, and for each mine the regime was usually set out in the relevant mining convention. Guinea's 1995 mining code required that mining conventions be ratified by the National Assembly in order to be effective and binding on Guinea. This requirement was interpreted by Guinean legal counsel as meaning that the provisions of ratified mining conventions would prevail over all contradictory provisions of Guinean law, including foreign exchange regulations, as a mining convention ratified by the National Assembly was treated as a special statute derogating from the general law. Mining conventions would, therefore, normally address foreign exchange issues, sometimes through derogations from the generally applicable foreign exchange regulations.

Article 18 of the 2011 Mining Code (unchanged by the Amendments) provided that mining agreements could only "*supplement*" but not derogate from the provisions of the 2011 Mining Code, thereby eliminating the possibility of including in a mining convention the type of derogations from the generally applicable regulatory provisions that were possible under the 1995 mining code. Article 184 of the New Mining Code will, therefore, automatically apply to all mining companies operating in Guinea. Note, however, that for existing mining conventions entered into in "*strict compliance with the applicable law at the time of their execution*", new Article 217-I provides that the timing for the application of the amendments to be made in relation to foreign exchange matters can be negotiated between the investor and Guinea.

The drafting and practical application of Article 184 of the New Mining Code are unclear and will raise issues that should be carefully addressed by investors and financiers when structuring a transaction and mining operations. For example, how are the financial institutions selected with whom the export proceeds account is to be opened (and can the financiers or the borrower change such financial institutions without the consent of the Central Bank)? Are these accounts single purpose? If not, and money being fungible, how will the export proceeds accounts and the Central Bank's own accounts be segregated (and, depending on the jurisdiction of the holding bank, how will such segregation be effected)? What rights does the Central Bank have over the credit balance of the credit export proceeds accounts (can it set-off obligations due by mining companies to Guinea, such as tax liabilities)?

What security can be granted to financiers over the export proceeds accounts and will financiers be able to block payments from such accounts? What type of cash management investments will mining companies be allowed to make from the balance of the export proceeds accounts?

6. Pre-emption Right and Approval of Sale Price

Under Article 138 of the 2011 Mining Code, Guinea granted itself (or any entity acting on its behalf) a general pre-emption right over the production of a Mining Company, up to the percentage of its participation in that Mining Company (cf. for further details on state participation our *Client Briefing - Guinea's new Mining Code: Significant changes in a key mining jurisdiction* dated September 2011). The pre-emption right can only be exercised at an offer price that is higher than the FOB price at the time the pre-emption right is exercised, and in this case the price is negotiable between Guinea and the Mining Company.

New Article 138-II has created a specific regime for Guinea's pre-emption right if the sale of mineral substances is concluded in a "*non-competitive market*" or "*between affiliates*". In these circumstances, Guinea can exercise a pre-emption right at a price of "*105% of the FOB price*" at the time of the sale if it finds - on the basis of "*actual and reliable data*" (*données fiables et concrètes*) - that a Mining Company has sold its production at a price that is lower than the market price (*prix de pleine concurrence*) for a continuous period of three (3) months or more. However, the right for Guinea to exercise this specific pre-emption right can be avoided if the Mining Company submits to the Ministry of Mines and the Ministry of Finance, for approval, the prices or pricing formula contained in the Preliminary Sale Agreement (*Convention d'Achat Préalable*) or any other similar agreements relating to price in a long term offtake agreement, as negotiated between the Mining Company and any potential buyer. Failure by the Ministry of Mines and the Ministry of Finance to object to the proposed prices or pricing formula within one (1) month of their submission will result in a deemed approval of the pricing structure proposed in the relevant offtake agreement. Crucially, from the date of Guinea's express or deemed approval and for the rest of the term of the relevant offtake agreement, Guinea can no longer exercise its pre-emption right under Article 138-II of the New Mining Code.

This new feature of the New Mining Code aims to ensure that sales of mineral substances "*between affiliates*" or concluded in a "*non-competitive market*" are at market price. Precisely what in these circumstances would constitute "*actual and reliable data*" (*données fiables et concrètes*) permitting Guinea to question the pricing in the relevant offtake agreements remains unclear. It also appears that this determination is left to the sole discretion of Guinea, although it shall be noted that the Amendments contemplate the enactment of implementation regulations to define the conditions for the exercise of this right.

If a Mining Company is going to sell mineral substances to its "*affiliates*" or in circumstances which risk being deemed to be a "*non-competitive market*", it will have to decide whether:

i. to engage in up-front discussions with Guinea (and the potential buyers) for the approval of the pricing structure (and, therefore, eliminate any possibility for future questioning by Guinea of the sale price); or

ii. not to engage in such discussions with Guinea (and, therefore, leave the door open to an assessment by Guinea as to whether the sale price is in line with the market price) but be prepared to demonstrate to Guinea, if challenged, that the sale price is not lower than the market price for a continuous period of three (3) months or more.

Seeking actual or deemed approval of pricing will, in practice, give Guinea "*a seat at the table*" for price discussions between a Mining Company and its potential buyers, which will affect these discussions. It may prove particularly difficult if multiple buyers, or complex commercial arrangements for offtake are involved or if there is a fear that highly confidential commercial information may enter the public domain.

Conclusion

The applicable regime in the mining sector in Guinea has yet to stabilise and uncertainties remain on important issues. Although the need for amending the 2011 Mining Code was widely acknowledged, the jury is still out on how investors (particularly listed mining companies with substantial assets in Guinea), banks and the markets will respond to the Amendments.

However, we note that some of the issues raised above (such as the mining conventions review programme) fall within the current trend of resources nationalism in the mining sector around the world and are not specific to Guinea. Similar positions have been taken by a number of other countries in Africa, Asia, and Latin America, but also in more mature mining jurisdictions, such as Australia. Issues relating to the structuring of investments (such as the impact of the new taxes on mineral resources or the exchange control issues) will require that investors, financiers and their advisors be creative and the current uncertainty regarding the application of the new rules will likely delay some investment and make financing more difficult to obtain. Given the quality of the mining resources available in Guinea, these issues are ones that, hopefully, will be overcome with time. What is clear, however, is that addressing these issues will need to be done in close cooperation with Guinean authorities, and they will play a key role in determining the success of the Guinean mining reform program.

NOTES

[1] The CNT acts in lieu of Guinea's legislature until a parliament is elected, and the new National Assembly is expected to be in place before the end of 2013.

[2] For example, whether loans need to be disbursed in the country first in order for a mining company to be allowed to pay foreign currency abroad.

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