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# **Disputes and their Resolution under the Mining Code 2002 of the Democratic Republic of Congo**

By Hubert André-Dumont\*

*The new Mining Code of the Democratic Republic of Congo (DRC), adopted in 2002, and its ancillary Mining Regulation, adopted in 2003, thoroughly modified and reshaped the legal system applicable to mining rights in the DRC, including 'mining' disputes and their resolution. In particular, the Mining Code 2002 organises three ways to resolve them, namely administrative recourse, judicial recourse and arbitral recourse. This article describes the recourse system as it is granted to mining title owners or applicants, or to the authorities of the DRC State.*

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## Context

### *Mining Code 2002*

The new Mining Code of the DRC, adopted in 2002,<sup>1</sup> and its ancillary Mining Regulation, adopted in 2003,<sup>2</sup> thoroughly modified and reshaped the legal system applicable to mining rights in the DRC.<sup>3</sup> It replaced, for mines and quarries, the Mining Law 1981<sup>4</sup> and the Mining Regulation 1967.<sup>5</sup> The purpose was to enact a comprehensive set of rules covering, on a self-contained basis, not only the definition, acquisition, operation and termination of mining (and quarry) rights but also issues related to mining such as environment protection, cultural heritage, marketing and transport of ore, pledges and mortgages, health and safety, tax incentives and customs duties, currency exchange, special guarantees from the State (eg stabilised legislation), *force majeure*, construction of infrastructure, sanctions for breaches and dispute resolution.

Before the Mining Code 2002, these additional issues were not dealt with specifically by the former mining legislation, but could, in certain cases, be dealt with in mining agreements, called 'mining conventions' in the DRC, concluded between the State and the investor pursuant to the rules set out in the Mining Law 1981 and the Mining Regulation 1967. The general rules relating to title granting, renewal and termination, reporting, neighbourhood relations, occupation of land, works, etc, remained applicable to mining conventions under such legislation. Mining conventions also covered certain aspects of labour issues, namely in respect of the hiring of expatriate employees and the training of the local workforce, in addition to the specific obligations of the investor in respect of the project. As stated in the Explanatory Memorandum of the Mining Code 2002,<sup>6</sup> the purpose of the new code was, in addition, to modernise the legal rules applicable to mining activities and to provide a comprehensive set of rules, to suppress the mining conventions and to provide a uniform system applicable to every operator and applicant, on a transparent and non-negotiable basis, while

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1 Law No 007/2002 of 11 July 2002 enacting the mining code (the 'Mining Code 2002'), available on the website of the 'Cadastré Minier' (Mining Registry) at: [www2.gaf.de/cami](http://www2.gaf.de/cami).

2 Decree No 038/2003 of 26 March 2003 enacting the new mining regulation (the 'Mining Regulation 2003').

3 The Mining Code 2002 also applies to quarry rights, which are mentioned here only *pro memore*.

4 Law No 81-013 of 2 April 1981 enacting general legislation on mines and hydrocarbons, which remains applicable to hydrocarbons (the 'Mining Law 1981').

5 Ordinance No 67-416 of 23 September 1967.

6 See the 'Exposé des Motifs' (Explanatory Memorandum) to the Mining Code 2002, in *Journal Officiel de la République Démocratique du Congo*, 15 July 2002, pp 5, 9 and 21.

trying to reduce government approval and discretion, in line with the reform efforts of many developing countries.<sup>7</sup> Nevertheless, all aspects could not be covered, and unless specifically governed by the Mining Code 2002, issues falling within the scope of other sets of rules, such as labour, immigration, corporate matters, etc, will apply.<sup>8</sup>

The main mining rights available to foreign investors under the Mining Code 2002 are the 'research permit'<sup>9</sup> (or exploration permit), the 'exploitation permit'<sup>10</sup> (or mining permit) and the 'tailings exploitation permit'.<sup>11</sup> Granting of mining rights is obtained on completion of the corresponding administrative procedure and is based on a 'first-come, first-served' principle. The applications for mining rights for a given 'perimeter' (demarcated surface area with indefinite depth) are registered in chronological order of their filing and, as long as an application is pending, no other application for the same perimeter, totally or partially, can be dealt with.<sup>12</sup> In exceptional cases, the Minister of Mines may submit to tender, open or by invitation, mining rights relating to a specific deposit.<sup>13</sup>

### *Resolution of mining disputes*

The DRC judicial system adheres to the rule of law enforced pursuant to established procedures,<sup>14</sup> by courts and tribunals<sup>15</sup> that are independent from the executive and legislative branches of the State.

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7 cf J Otto and J Cordes, *The Regulation of Mineral Enterprises* (RMMLF, Westminster, Colorado, 2002), pp 3-5.

8 For those mining conventions entered into and duly approved by Presidential decree pursuant to the Mining Law 1981 prior to the entry into force of the Mining Code 2002, and for which the title holder did not elect to opt for the Mining Code 2002, the Mining Law 1981 (and the Mining Regulation 1967) remains applicable – cf Article 343.a of the Mining Code 2002.

9 '*Permis de recherche*' – Article 50 of the Mining Code 2002.

10 '*Permis d'exploitation*' – Article 64 of the Mining Code 2002.

11 '*Permis d'exploitation des rejets*' – Article 86 of the Mining Code 2002.

12 Article 34 of the Mining Code 2002.

13 Article 33 of the Mining Code 2002.

14 Inter alia, in civil and commercial matters: the Decree of 7 March 1960 enacting the Code of Civil Procedure; Law No 82-020 of 31 March 1982 enacting the Code of Judicial Organisation and Competence; Ordinance-Law No 82-017 of 31 March 1982 relating to the procedure before the Supreme Court.

15 Mainly the 'Tribunaux de Grande Instance' (Tribunals of Great Instance) in first resort, the 'Cours d'Appel' (Courts of Appeal) in appeal, and the recently re-created 'Cour de Cassation' (Supreme Court, formerly, the 'Cour Suprême de Justice') in last resort – cf Law No 82-020 of 31 March 1982 enacting the Code of Judicial Organisation and Competence. There are one or more Courts of Appeal for each province and two for Kinshasa, and there are several Tribunals of Great Instance in Kinshasa and one in each main city of each province.

For the purpose of this contribution, 'mining disputes' are those disputes and issues of a civil or administrative nature, such as disputes between a mining title holder and a surface right holder, or claims to obtain the registration of a mining right, arising exclusively under the Mining Code 2002 and the Mining Regulation 2003. As a result, mining disputes do not include those infractions and penalties under Title XIII of the Mining Code 2002,<sup>16</sup> which are nearly all of a criminal nature sanctioned by specific penalties, and are enforced by the DRC criminal courts and tribunals pursuant to DRC criminal procedural rules.

Other parts of the Mining Code 2002 provide the type of recourse system granted to the State and to a title holder<sup>17</sup> and organises three ways to resolve mining disputes or threats over mining rights, depending on the nature of such threat or dispute. Thus, Title XIV of the Mining Code 2002 deals with the various forms of recourse that are available to the State and to a title holder under the Mining Code 2002,<sup>18</sup> namely administrative recourse, judicial recourse or arbitral recourse (both domestic and international arbitration), and provides lists of those matters for which each type of recourse is available. In addition, certain other parts of the Mining Code 2002 have provisions providing for the type of recourse actually available in certain specific matters.<sup>19</sup> It is regrettable that these matters were not listed in the provisions of Title XIV, as this would have rendered it fully comprehensive.

The general trend of the Mining Code 2002, which aims at providing 'fast-track' procedures for the granting of mining rights, is reflected in some of the available recourses, in particular by the abbreviation of the set time periods for certain types of administrative recourse and for one specific judicial recourse.<sup>20</sup>

However, as will be seen, a certain number of inconsistencies and loopholes entail that further clarification is useful, if not necessary, to afford greater certainty to the recourse system that was set up, and to render it attractive and efficient.

Unfortunately, there is no published case law yet available that could assist in providing such clarification. As will be seen below in 'Judicial recourse', 'Application to mining matters', only very few cases specifically deal with recourse issues under the Mining Code 2002. Moreover, apart from a few

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16 Articles 299 to 311 of the Mining Code 2002, including, inter alia, fraud, corruption, etc.  
17 cf 'Title holder' below.

18 Articles 312 to 322 of the Mining Code 2002.

19 cf, eg, Articles 46, 62, 72, 80, 170, 279 and 289.

20 Explanatory Memorandum to the Mining Code 2002, in *Journal Officiel de la République Démocratique du Congo*, 15 July 2002, pp 29-30.

ICSID arbitration<sup>21</sup> cases, which are not relevant for this contribution, there is no published case law concerning mining disputes under the Mining Law 1981 mainly because, until the mid-nineties, the few DRC mining operators were state-owned companies or joint ventures in which the state-owned companies or the State had majority or important minority stakes, which generally solved disputes out of court. Between the takeover of the country by President Laurent-Désiré Kabila in 1997 and the entry into force of the Mining Code 2002, enacted by his son President Joseph Kabila, no relevant case law appears to have been published. Accordingly, the review contained in this article cannot actually be illustrated with cases. There were a few unpublished cases with a limited application, however, as mentioned below in 'Judicial recourse', 'Application to mining matters', point (1).

### *Title holder*

Article 1.53 of the Mining Code 2002 defines the title holder as any person in whose name a mining right is granted and a mining title is issued, and who carries out directly or through third parties the operations authorised pursuant to his mining title, and considers the lessee of a mining title as a title holder.

Although Article 312 of the Mining Code 2002 mentions that its forms of recourse are available to the 'title holder' (and to the State), it seems beyond discussion that, where applicable, eg in matters relating to the granting, renewal, forfeiture, etc, of mining rights, the 'title holder' should also mean the applicant or former title holder. For international arbitration, however, this interpretation is not as straightforward since consent to international arbitration needs to be given in writing by the title holder 'on receipt' of his mining title.<sup>22</sup>

### **Administrative recourse**

#### *Overview*

The general DRC legal system provides for a specific type of recourse against acts of public administrations within the framework of the exercise of their public services activities. It is governed<sup>23</sup> by Ordinance-Law No 82-017 of 31 March 1982 relating to the procedure before the Supreme Court of Justice

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21 For a definition of ICSID, see 'International arbitration' below. These few cases are available on the internet ([www.worldbank.org/icsid/cases](http://www.worldbank.org/icsid/cases)).

22 Article 319 of the Mining Code 2002 – cf 'International arbitration' below.

23 Article 313 of the Mining Code 2002 – cf also 'Judicial recourse – overview' below.

and by Ordinance-Law No 82-020 of 31 March 1982 enacting the Code of Judicial Organisation and Competence. This recourse is known as 'administrative recourse'. It consists either in a request made before:

- a Court of Appeal for annulment for breach of the law of an act or decision of regional and local administrative authorities and decentralised organisations under the control of such authorities;<sup>24</sup> or
- the Supreme Court to obtain the annulment for breach of the law of acts, regulations or decisions of the central authorities and from the decentralised organisations under the control of such central authorities.<sup>25</sup>

A request for annulment before the Supreme Court is subject to the claimants justifying that 'the act, decision or regulation questioned causes damage to them and that it was taken "in breach of the forms either substantial, or sanctioned by nullity",<sup>26</sup> or taken pursuant to an abuse or misuse of authority'.<sup>27</sup> A condition to the admissibility of this recourse is that a claim with the concerned authority must first have been made in order to request a cancellation or modification of the questioned act.<sup>28</sup> Only thereafter can the request for annulment be lodged with the Supreme Court, and this within three months of the rejection, totally or partially, of the claim, no decision being equivalent to rejection.<sup>29</sup>

The appeal of the decisions of the Courts of Appeal is filed before the Supreme Court.<sup>30</sup>

No appeal is possible for recourses brought before the Supreme Court of Justice since the Supreme Court renders its decision as a last resort.<sup>31</sup>

The claim for damages is dealt with simultaneously, when the damage cannot be entirely compensated by the annulment.<sup>32</sup>

The administrative section of the Supreme Court of Justice is also competent as a first and last resort, where no other competent jurisdiction is available, for the demands for damages relating to the compensation of

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24 Articles 146 and 147 of Ordinance-Law No 82-020.

25 Article 147 of Ordinance-Law No 82-020.

26 The 'breach of the forms either substantial, or sanctioned by nullity' is a typical civil law concept that allows a party to seek the annulment of an act or decision when the formalities ('forms') imposed by law are not complied with and where the law provides that such formalities are either substantial (ie absolutely required) or that in the event they are not complied with. The act concerned can be declared null and void.

27 Article 87 of Ordinance-Law No 82-017.

28 Article 88 of Ordinance-Law No 82-017.

29 Article 89 of Ordinance-Law No 82-017.

30 Article 148 of Ordinance-Law No 82-020.

31 Article 147 of Ordinance-Law No 82-020; Article 29 of Ordinance-Law No 82-017.

32 Article 149 of Ordinance-Law No 82-020.

exceptional damage resulting from a measure taken or ordered by the central authorities, the provinces or the local entities.<sup>33</sup>

### *Application to mining matters*

Except for the cases of those specific provisions of the Mining Code 2002 relating to judicial recourse<sup>34</sup> and to registration by judicial means of mining titles,<sup>35</sup> administrative recourse remains available against administrative acts of administrative authorities pursuant to or in breach of the provisions of the Mining Code 2002 or of the Mining Regulation 2003. Such administrative recourse is governed by the general rules applicable under DRC law, as seen in 'Administrative recourse – overview' above. Article 313 of the Mining Code 2002 refers in particular to the provisions of Articles 146 to 149 and 158 of the above cited Ordinance-Law No 82-020 of 31 March 1982 enacting the Code of Judicial Organisation and Competence, and to Ordinance-Law No 82-017 of 31 March 1982 relating to the procedure before the Supreme Court of Justice, both as modified and supplemented since then.

However, for mining matters, which are governed by the Mining Code 2002,<sup>36</sup> certain time limits imposed on the claimant are abbreviated, specifically in cases of refusals to grant mining and/or quarry rights and approvals or enforcement of mortgages.<sup>37</sup>

The abbreviated time limits require that the preliminary claim of the claimant before the administrative section of the Supreme Court of Justice must be made with the authority concerned within 30 days of the date of publication or personal notification of the administrative act concerned, instead of three months.<sup>38</sup> The request for cancellation of the act concerned itself must be lodged within 20 days, instead of three months, of the date the total or partial rejection of the claim was notified.<sup>39</sup> As seen in the

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33 Article 158 of Ordinance-Law No 82-020.

34 cf Articles 315 and 316 of the Mining Code 2002 – cf 'Judicial recourse' below.

35 cf Article 46 of the Mining Code 2002 – cf 'Peculiarities' below.

36 For mining conventions entered into and duly approved by Presidential decree pursuant to the 1981 Mining Law prior to the entering into force of the Mining Code 2002, the title holders could elect, within nine months of the entry into force of the Mining Code 2002, either to keep their mining conventions or to opt for the application of the provisions of the Mining Code 2002 in their entirety in lieu of their mining conventions – cf Article 340 of the Mining Code 2002.

37 Article 314 para 3 of the Mining Code 2002.

38 Article 314 of the Mining Code 2002 shortening the time limit of Article 88 of Ordinance-Law No 82-017 of 31 March 1982.

39 Article 314 of the Mining Code 2002 shortening the time limit of Article 89 of Ordinance-Law No 82-017 of 31 March 1982.

preceding subsection, the administration has three months to notify its decision; failing such a decision, the preliminary claim will be considered as rejected.<sup>40</sup> As a result, the maximum period within which recourse can be lodged is halved.<sup>41</sup>

Further, the time limit to file a reply brief and for filing the administrative documents is 15 working days as from the notification of the request, instead of one month. The same time limit applies to the advice from the General Attorney of the Republic and any extension of time granted may not exceed 12 working days.<sup>42</sup>

In any case, the judgment of the Supreme Court of Justice must be rendered within 30 working days of the date on which the case was heard.

The Explanatory Memorandum<sup>43</sup> of the Mining Code 2002 mentions that these abbreviated time limits were enacted in order to avoid jeopardising the principle of timeliness that governs the Mining Code 2002 and to allow any second interested party to lodge its own request concerning the same perimeter.

### ***Peculiarities***

Certain administrative acts are expressly excluded from administrative recourse as stipulated by the Mining Code 2002, namely the registration of mining rights by judicial means in the event the Mining Registry ('Cadastre Minier') does not proceed with the registration of the mining right pursuant to the provisions of the Mining Code,<sup>44</sup> and a series of matters listed by Article 315 of the Mining Code 2002, such as the refusal of transfer of title by the Mining Registry in the case of assignment or lease, encroachment between holders of mining titles and some other administrative acts.

In any case, as referred to above in 'Administrative recourse – overview' above, acts of the administration in general are subject to administrative recourse, even though this is not specifically provided for in the Mining Code 2002 (except for specific matters that are excluded from administrative

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40 Article 89 of Ordinance-Law No 82-017.

41 From a maximum 275 days to 142 days – cf Articles 88 and 89 of Ordinance-Law No 82-017 of 31 March 1982, the time limits of which were amended by Article 314 of the Mining Code 2002.

42 Article 314, para 2 of the Mining Code 2002 setting the time limits under Article 79 of Ordinance-Law No 82-017 of 31 March 1982.

43 Explanatory Memorandum to the Mining Code 2002, in *Journal Officiel de la République Démocratique du Congo*, 15 July 2002, pp 29-30.

44 Article 46 of the Mining Code 2002 – cf 'Peculiarities' below.

recourse as seen above), such as decisions of the validation commission of mining titles<sup>45</sup> or decisions of the Minister of Mines relating to the transformation<sup>46</sup> or conformation<sup>47</sup> of mining perimeters.

## Judicial recourse

### *Overview*

The courts in charge of judging a dispute or an appeal against a decision concerning the matters set out in the Mining Code 2002 must apply the common procedure as well as all the general principles of law that apply to judicial matters. As a result, the procedure applicable is the ordinary procedure before the courts<sup>48</sup> as organised by the DRC codes of judicial procedure,<sup>49</sup> criminal procedure<sup>50</sup> and procedure before the Supreme Court of Justice.<sup>51</sup> The substantive law applicable will be the Mining Code 2002 and the Mining Regulation 2003.

As set out in 'Peculiarities' below, specific shorter time limits than those provided in ordinary civil procedure are put in place for one particular case, namely that provided by Article 46 of the Mining Code 2002 in respect of recourse against a failure to register a mining right.

Judicial recourse offers an advantage to the applicants as they benefit from additional jurisdictional levels.<sup>52</sup> Indeed, when it involves recourse submitted to a Court of Appeal (which can be appealed before the Supreme Court), administrative recourse is still deprived from the lower level of jurisdiction, since it cannot be appealed as a first resort before a Tribunal of Great Instance. Administrative recourse is even more restricted when it involves decisions of the central authorities, in that the recourse is (after

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45 Such decisions are taken pursuant to Article 336 *et seq* of the Mining Code 2002.

46 Article 339 of the Mining Code 2002.

47 Article 340 para 3 of the Mining Code 2002 and Article 593 *et seq* of the Mining Regulation 2003.

48 Article 316 of the Mining Code 2002. It should be noted that Article 316 contains a drafting mistake where it refers to recourse 'against a judicial decision relating to the matters' provided in Article 315, while this in fact concerns recourse 'relating' to such matters (and not only against judicial decisions), the appeals against a decision on such recourse being governed by the ordinary rules applicable in judicial matters.

49 Ordinance-Law No 82-020 enacting the Code of Judicial Organisation and Competence and Decree of 7 March 1960 enacting the Code of Civil Procedure.

50 Decree of 6 August 1959 enacting the Code of Criminal Procedure.

51 Ordinance-Law No 82-017 relating to the procedure before the Supreme Court of Justice.

52 Article 316 of the Mining Code 2002: possibility of appeal of the decision of the Tribunal of Great Instance before the Court of Appeal, and further possibility of recourse in '*cassation*' for breach of the law before the Supreme Court of Justice.

the prior request for cancellation or modification)<sup>53</sup> submitted from the outset to the Supreme Court without any opportunity of further appeal.<sup>54</sup>

*Application to mining matters*

As already mentioned in 'Resolution of mining disputes' above, there is no published case law concerning mining disputes submitted to and resolved by DRC courts and tribunals. The only known cases are apparently a few cases where judicial recourse was exercised to obtain registration of mining titles (see point (1) below).

The Mining Code 2002 and the Mining Regulation 2003 provide for judicial recourse in certain specific cases, and inter alia.<sup>55</sup>

- (1) Registration of the mining right in the case of failure of the Mining Registry.<sup>56</sup> According to local counsel,<sup>57</sup> the Tribunal of Great Instance of Kinshasa-Ngombe rendered a few unpublished judgments implementing this type of recourse.
- (2) Refusal by the Mining Registry to transfer a title in case of transfer or lease.<sup>58</sup>
- (3) Overlaps between title holders of mining rights.
- (4) Confiscation of the guarantee or the provision for site rehabilitation in favour of the Administration of Mines.
- (5) Imposition of fines in cases of failure to submit reports or of irregular document keeping and penalties for late payment of the mining royalties.
- (6) Disputes between the title holders and the occupants of the land. However, Article 281 paragraph 3 of the Mining Code 2002 provides that arbitration<sup>59</sup> is *also* permitted. This obviously means domestic arbitration since it involves local third parties and not the DRC State. Moreover, it should not preclude the title holder from exercising as a last resort international arbitration against the DRC State in the event he contends that the law was wrongfully applied.<sup>60</sup>

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53 Article 88 of Ordinance-Law No 82-017 cited above in 'Administrative recourse – overview'.

54 cf 'Administrative recourse – overview'.

55 cf Article 315 of the Mining Code 2002.

56 Article 46 of the Mining Code 2002.

57 The author would like to thank attorneys Lambert Djunga and Emery Mukendi Wafwana, both members of the Kinshasa Bar, for their patient research at the clerk's offices of the Kinshasa-Ngombe Tribunal of Great Instance and Court of Appeal.

58 In addition, Article 178 of the Mining Code 2002 and Article 373 of the Mining Regulation 2003 refer, for leases, to Article 46 of the Mining Code 2002, which deals with recourse against failures of registration of mining rights as is set out in 'Peculiarities' below.

59 Article 281 wrongly qualifies arbitration in such a situation as a 'non-jurisdictional way of settlement'.

60 cf 'Application to mining matters' below.

- (7) Disputes concerning compensation for expropriation. However, Article 275 of the Mining Code 2002 provides for judicial recourse *or* arbitration. In fact, international arbitration should be available in any case as a last resort in addition to judicial recourse.<sup>61</sup>
- (8) Disputes due to cases of *force majeure*. However, Article 89 of the Mining Regulation 2003 provides for administrative recourse *or* arbitration. This additional option granted by the Mining Regulation 2003 is questionable since Article 315 of the Mining Code 2002 stipulates that disputes relating to the cases of *force majeure* are subject to judicial recourse (and implicitly to further international arbitration if need be, as mentioned above), while there is no legal ground allowing the Mining Regulation 2003, which is a decree that is lower in the hierarchy of norms, to provide for recourse other than that imposed by the Mining Code 2002.

As commented in the last three cases cited above, a certain number of inconsistencies require clarification.

### *Peculiarities*

As seen above,<sup>62</sup> a special judicial procedure applies as recourse against the failure of the Mining Registry to proceed with the registration of a mining right.<sup>63</sup> In this case only, a derogation is provided, namely the abbreviation of the set time limits. This derogation matches the 'fast-track' procedures of the Mining Code in such a way that short-set time limits are imposed on the President of the Tribunal to fix the hearing and to render a judgment that will, as the case may be, be considered as equivalent to a mining title. Thus, within 48 hours of the receipt of the request from the applicant, the President of the Tribunal must fix a date for the hearing and notify the applicant and the Public Attorney. The Public Attorney must render advice verbally at the hearing. The case cannot be postponed and the judgment must be rendered within 72 hours of the hearing. Provided the underlying paperwork<sup>64</sup> is in order, this procedure is relatively straightforward and serves as a way to

<sup>61</sup> *Ibid.*

<sup>62</sup> 'Application to mining matters' para (1) above.

<sup>63</sup> Article 46 of the Mining Code 2002. It should be noted that Article 315 of the Mining Code 2002 refers to the judicial recourse 'without prejudice to the provisions of Article 46'. Since Article 46 provides for a specific matter subject to judicial recourse, the judicial recourse under Article 315 is not provided '*without prejudice*' but '*in addition*' to the one provided in Article 46.

<sup>64</sup> eg, for an exploitation permit, that the conditions set out by the Mining Code 2002 are duly complied with, such as those of Articles 69 to 71, including, inter alia, the approved environmental impact study.

circumvent a failure of the administration to proceed. In any case, the judgment obtained is equivalent to a mining title.<sup>65</sup>

One may wonder why the Mining Code 2002 excludes certain administrative acts and issues, such as the one cited above and the other ones mentioned above in 'Administrative recourse', 'Peculiarities', from administrative recourse and submits them to judicial recourse instead. Indeed, judicial recourse cannot result in the annulment of an administrative decision. What it can lead to, in general, is the obtention of damages from the failing administration, or daily fines, where appropriate, and/or the non-application (instead of an annulment) of a decision contrary to legislation or regulation, such as the Constitution, the Mining Code 2002 or the Mining Regulation 2003. The Explanatory Memorandum to the Mining Code 2002 does not mention why the above-mentioned administrative acts or issues were withdrawn from administrative recourse. Presumably, the reason was because judicial recourse allows an additional jurisdictional level to be available.<sup>66</sup> Similar solutions exist in some other matters of DRC law, such as recourse in certain specific cases against (administrative) decisions from the land titles registrar or of the labour inspector.<sup>67</sup>

## Arbitral recourse

### *Overview*

#### *Scope*

'Subject to the provisions relating to administrative and judicial recourse, to breaches, penalties and sanctions set forth by the present Code, disputes that might arise from the interpretation or application' of the Mining Code 2002 may be settled either by domestic or international arbitration.<sup>68</sup> As such, the rules of the game are relatively strictly set, in such a way that, according to the Explanatory Memorandum of the Mining Code 2002, certain matters cannot be submitted to arbitration from the outset, namely those relating to breaches, penalties and sanctions,<sup>69</sup> as well as the matters

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65 Article 46, last para of the Mining Code 2002.

66 cf 'Judicial recourse – overview' above.

67 cf Article 244 of the Land Law No 73-021 of 20 July 1973 and Article 258, para 5 of the Labour Code, Law No 015-2002 of 16 October 2002; cf the main legal comment on the DRC legal mining system in the monograph on DRC mining law by E Mukendi Wafwana, *Droit Minier*, tome I (Brussels: Bruylant, 2005), in particular No 814, p 319.

68 Article 317 of the Mining Code 2002.

69 cf the Explanatory Memorandum to the Mining Code 2002, in *Journal Officiel de la République Démocratique du Congo*, 15 July 2002, p 30.

specifically excluded from arbitration<sup>70</sup> since they are to be brought through a specific procedure, as will be explained below in 'Application to mining matters'. Nevertheless, unless it would totally deprive the arbitral recourse of any effectiveness,<sup>71</sup> the phrase 'to breaches, penalties and sanctions set forth by the present Code' should not be construed separately from the phrase 'provisions relating to administrative and judicial recourse', meaning that recourse to arbitration is available except for those breaches, penalties and sanctions set forth by the Mining Code 2002 that are first<sup>72</sup> subject, pursuant to specific provisions of the Mining Code 2002, to administrative or judicial recourse. This appears to be the only logical explanation and meaning to be given to the above phrase commencing with the words 'Subject to'.

The idea behind the setting up of arbitration for mining disputes lies in the will of the legislator to provide investors with a form of dispute resolution that can usually be found in mining conventions,<sup>73</sup> and also to try to attract those mining operators who benefited from mining conventions on the enactment of the Mining Code 2002 to voluntarily adhere to the Mining Code 2002 and to renounce their mining agreements.<sup>74</sup> Indeed, for mining conventions entered into and duly approved by Presidential decree pursuant to the 1981 Mining Law prior to the entry into force of the Mining Code 2002, the title holders could elect, within nine months of the entry into force of the Mining Code 2002, either to keep their mining conventions or to opt for the application of the provisions of the Mining Code 2002 in their entirety in lieu of their mining conventions.<sup>75</sup>

Obviously, arbitration cannot resolve a certain number of disputes that an investor may encounter. Thus, it cannot result in an administrative act being annulled by the arbitrators as it could under administrative recourse as set out in 'Administrative recourse – overview' above. Moreover, an arbitral

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70 Namely, recourse against a refusal to grant a research permit, which is subject exclusively to administrative recourse – cf Article 57 of the Mining Code 2002, or those specifically awarded to judicial recourse – cf Article 46 of the Mining Code 2002.

71 An unofficial English translation of the Mining Code 2002 in circulation provides, in respect of Article 317: 'Subject to the provisions relating to administrative and judicial appeals, and subject to the breaches, penalties and sanctions set forth by the present Code, ... .' This translation is misleading as it seems to withdraw 'penalties and sanctions' from arbitration, which could be understandable, but also alleged 'breaches', which would ruin the purpose of arbitration as a way to resolve disputes arising from the interpretation or application of the Code.

72 In any case, international arbitration will remain available as a last resort.

73 cf the Explanatory Memorandum to the Mining Code 2002, *ibid.*

74 E Mukendi Wafwana, *op cit*, No 817, p 320.

75 cf Article 340 of the Mining Code 2002.

decision cannot be equivalent to a mining title as could a judicial judgment as set out in 'Peculiarities' above. An arbitral tribunal will only be capable of determining whether or not a breach of the Mining Code 2002 has been committed, in what way the relevant provision of the Mining Code 2002 should be construed and/or what damages should be paid, to whom and to what extent. As a result, for example, in an issue related to the granting of an exploitation permit,<sup>76</sup> although the arbitral decision will not be equivalent to a mining title, it could condemn the DRC State to pay significant damages and daily fines until the title is actually delivered.

The arbitral tribunal will have to refer to the provisions of the Mining Code 2002, the laws of the DRC and to its own procedural rules.<sup>77</sup>

As regards domestic arbitration, it is unclear whether the '*ex aequo et bono*' settlement is possible, as an '*amiable compositeur*' (amicable settlor), that is, according to fairness and not necessarily with regard to the legal rules. Indeed, although this is allowed by Article 178 of the Code of Civil Procedure provided the parties agree to it in the arbitration clause or agreement,<sup>78</sup> it appears that Article 178 is not included<sup>79</sup> in the provisions of the Code of Civil Procedure referred to in Article 318 of the Mining Code 2002 on domestic arbitration procedure. Moreover, it would seem that since there is no arbitration clause or agreement necessarily to be concluded, such possibility is excluded, unless the parties actually conclude an arbitration agreement.

As regards ICSID international arbitration, *ex aequo et bono* settlement is authorised if the parties so agree.<sup>80</sup> It is not necessary that the parties agree to it in the arbitration clause or agreement, which implies that they can agree to it by letter, or in their respective briefs, even during the course of the hearings.<sup>81</sup> For an alternative international arbitration under Article 319, last paragraph, of the Mining Code 2002, that would not be based on an international treaty ratified by the DRC, it is not certain that this solution is applicable, since a decision *ex aequo et bono* could be deprived of the *exequatur* (or enforcement order) in the DRC because such a method of

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76 cf Article 72 of the Mining Code 2002.

77 Article 320 para 2 of the Mining Code 2002.

78 Article 178 of the Code of Civil Procedure (Decree of 7 March 1960).

79 See 'Domestic arbitration' below

80 cf Article 42.3 of the ICSID Convention; Course 2.6 on Dispute Settlement 'Applicable Law', 2003, issued by the United Nations Conference on Trade and Development available on [www.unctad.org](http://www.unctad.org), pp 29-31; M Hirsch, *The Arbitration Mechanism of the ICSID* (Boston: Graham & Trotman, 1993), p 153.

81 cf ICSID Case Arb 77/2 (*B & B v Congo*, 1 ICSID Rep 330 (1993), where damages were awarded *ex aequo et bono* as compensation for the nationalisation of a plastic bottle factory.

settlement was not expressly allowed since the provision of the Code of Civil Procedure<sup>82</sup> authorising it is not referred to in the relevant provision of the Mining Code 2002,<sup>83</sup> as mentioned above.

Eventually, the question may be raised as to who, for the DRC, could validly agree on an *ex aequo et bono* settlement.<sup>84</sup>

Further, it appears that, in those matters where arbitration is available, it is available *in addition*<sup>85</sup> to administrative or judicial recourse. This is particularly true for international arbitration under the ICSID Convention, which should always be available as a last resort, as set out below in 'Application to mining matters'.

Lastly, the arbitration is set up without the signing of an arbitration clause or agreement containing the usual minimum standards, such as the number of arbitrators, the place and language of the arbitration, the procedural rules and the possibility or not of an appeal. As will be seen below, these issues, intended to be covered by the Mining Code 2002, can still pose problems.

#### *Domestic and international arbitration*

The Mining Code 2002 allows both domestic arbitration and international arbitration. Contrary to what is generally provided in contractual provisions providing for arbitration, the Mining Code does not provide for the number of arbitrators, for the place<sup>86</sup> of the arbitration or for the Tribunal of Great Instance that would be territorially competent for domestic arbitration to decide on incidents concerning the arbitration.<sup>87</sup> If this does not pose a problem for an ICSID arbitration because the ICSID rules overcome this absence of provisions, it will certainly be an issue for domestic arbitration because the parties will need to request the Tribunal of Great Instance to complete these missing terms notwithstanding the risks associated with depending on local judges, and when the purpose is precisely to prevent them interfering.

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82 Article 178.

83 Article 318.

84 cf 'Representation of the State and the serving of notices and writs of summons' below.

85 cf 'Application to mining matters' below and E Mukendi Wafwana, *op cit*, No 828, p 324.

86 Article 320 of the Mining Code 2002 only provides, for international arbitration, that it will take place 'at the place agreed upon by the State and the title holder'. Accordingly, a disagreement will entail the need for some judicial intervention, at least in the cases of domestic arbitration. This provision also raises an issue for international arbitration as will be seen below – cf 'International arbitration' below.

87 Such incidents are, eg, the appointment of the arbitrator(s), the extension of the time of their assignment if need be, the challenging of an arbitrator, etc.

In relation to the territorially competent Tribunal of Great Instance having to decide on incidents related to the arbitration, Article 166 of the Code of Civil Procedure provides that, in the absence of agreement of the parties, the competent tribunal is the one chosen 'by the most diligent party' (ie by the party who acts first). This can obviously lead to strange situations if the tribunal chosen is one that has absolutely no objective connections with the localisation of the dispute. The main DRC legal author in mining matters mentions that, based on Articles 321 and 322 of the Mining Code 2002, which deal with representation of the State and notifications of procedural acts to the State, the territorially competent tribunal should be the one in the jurisdiction of which the Minister of Mines (or the Chief of the Provincial Division of Mines for those few matters within his competence) has his office.<sup>88</sup> This should be clarified, *de lege ferenda*.

The classical issue where a state is involved, and that relates to immunity of jurisdiction and immunity of execution, is partly resolved by Article 320, paragraph 4 of the Mining Code 2002, which provides that the DRC State waives any right of immunity of jurisdiction and of immunity of execution for cases where the *exequatur* or enforcement of an arbitral award is sought before any tribunal or court within the DRC or in the country of origin of the title holder.<sup>89</sup> Unfortunately, this does not include other countries where the DRC State would have assets.

*Domestic arbitration.*<sup>90</sup> Domestic arbitration is organised according to the procedure set out in the DRC Code of Civil Procedure.<sup>91</sup> However, the Mining Code 2002 only refers to Articles 159 to 174 of the Code of Civil Procedure, while its provisions concerning arbitration extend to Article 194. Does this mean that the provisions of the Code of Civil Procedure relating to procedure (Articles 175 to 177) and the possibility to settle *ex aequo et bono*<sup>92</sup> (Articles 178 to 182) and to execution/enforcement and appeal (Articles 183 to 194) do not apply to the arbitral award? It seems that they are to be considered inapplicable since Article 320 of the Mining Code 2002, titled 'Arbitration rules and decisions', covers these items as it provides that the arbitral tribunal has to refer to the provisions of the Mining Code 2002, to the laws of the DRC and to its own procedural rules,<sup>93</sup> that the arbitral

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88 cf E Mukendi Wafwana, *op cit*, No 820, p 321.

89 cf Article 320, para 3 of the Mining Code 2002.

90 Article 318 of the Mining Code 2002.

91 Article 318 of the Mining Code 2002, which refers to Articles 159 to 174 of the Decree of 7 March 1960 enacting the Code of Civil Procedure.

92 cf 'Scope' above where the scope of arbitral recourse is set out.

93 Article 320, para 2 of the Mining Code 2002.

decision is enforceable<sup>94</sup> and that its *exequatur* (or enforcement order) can be requested before any competent tribunal or court in the DRC pursuant to the forms provided for by the Code of Civil Procedure, or pursuant to the rules applicable in the country of origin of the title holder.<sup>95</sup> Accordingly, it could be considered that the provisions of Article 320 of the Mining Code 2002 are self-contained and replace the provisions of Articles 175 to 194 of the Code of Civil Procedure. However, one could infer that Article 320 applies only to international arbitration<sup>96</sup> since its first paragraph refers to Article 319 of the Mining Code 2002, which deals exclusively with international arbitration. This is an additional issue that could need to be clarified, in particular because an appeal against the arbitral decision is allowed under Article 187 of the Code of Civil Procedure, which is not the case under Article 320 of the Mining Code 2002.

Neither the Mining Code 2002 nor the Mining Regulation 2003 provides that the parties may – or should – appoint an arbitrator. Shall the arbitrator(s), therefore, be compulsorily appointed by the President of the Tribunal of Great Instance<sup>97</sup> on the request of the most diligent party?<sup>98</sup> Indeed, Article 161, paragraph 4 of the DRC Code of Civil Procedure provides specifically that ‘in the absence of any provision in the arbitration clause relating to the designation of the arbitrators, the proceedings are entrusted to one or three arbitrators designated by the president’ of the competent tribunal. It is unclear whether this prevents the parties from actually concluding an arbitration clause or agreement<sup>99</sup> to avoid the arbitrator(s) being appointed by the President of the Tribunal of Great Instance, in order to make sure that the arbitrator(s) will be the right person(s), fully competent and impartial.

Lastly, until the constitution of the arbitral tribunal, the parties may, in case of emergency, request provisional measures before the competent tribunal.<sup>100</sup>

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94 Article 320, para 3 of the Mining Code 2002.

95 Article 320, para 3 of the Mining Code 2002.

96 With respect to ICSID arbitration, these issues are addressed by the ICSID Convention, namely in respect of procedure (Articles 41 to 47, ICSID Convention), arbitral award (Articles 48 to 52) and *exequatur* (Articles 53 to 55). Accordingly, the argument that Article 320 applies only to international arbitration is not relevant.

97 In relation to the territorial competence governing the jurisdiction of the relevant Tribunal of Great Instance, see the beginning of this subsection.

98 Article 161, para 4 and Article 166 of the Code of Civil Procedure.

99 See, however, objections as to the validity of such an arbitration clause or agreement referred to in ‘Scope’, in the paragraph before the penultimate one.

100 Article 163 of the Code of Civil Procedure.

*International arbitration.*<sup>101</sup> This recourse is available to the 'title holder'.<sup>102</sup> A question arises, though, whether this also covers recourse against a rejection of a renewal or a withdrawal of a mining title. Indeed, can the 'justiciable', or person seeking recourse, still be qualified as being a 'title holder' in such a situation? This will definitely require further clarification.

Provided that the title holder is a national of another contracting state according to the terms of Article 25 of the ICSID Convention or considered as such,<sup>103</sup> legal disputes with the state may be submitted to an ICSID arbitration by the most diligent party.<sup>104</sup> Those title holders who are not nationals of a country that is a party to the ICSID Convention may submit disputes to any arbitration tribunal of the title holders' choice, but they must notify the state of the name, address and regulations of the arbitral tribunal on the date on which the mining title is issued at the Mining Registry.<sup>105</sup> It may, however, occur that ICSID would declare that the case does not fall within its jurisdiction, eg because it is not an 'investment dispute' or not a 'legal dispute'.<sup>106</sup> No alternative international arbitration is provided for those cases but the other types of recourse of the Mining Code 2002 will be available, namely administrative recourse, judicial recourse or domestic arbitration.<sup>107</sup>

As a rule, consent to arbitration is supposed to be given in writing. In particular, Article 25.1 of the ICSID Convention requires the parties to consent in writing to submit their dispute to an ICSID arbitration.<sup>108</sup> While the Mining Code 2002 provides that the title holder should consent on receipt of the mining title<sup>109</sup> to such arbitration (or to the alternative international arbitration for nationals of non-ICSID Member States), no provision deals with any consent from the state. As a result, one should

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101 Article 319 of the Mining Code 2002.

102 Article 319, para 2 of the Mining Code 2002. See also, for further comments, 'Title holder' above.

103 The ICSID Convention extends its scope to local subsidiaries of foreign investors that therefore can qualify as being considered as a 'national of another contracting state' – cf Article 25.1 of the ICSID Convention of 18 March 1965.

104 Article 319, para 1 of the Mining Code 2002.

105 Article 319, para 3 of the Mining Code 2002.

106 As required by Article 25.1 of the ICSID Convention.

107 Cf Articles 312 and 318 of the Mining Code 2002.

108 Written consent to ICSID arbitration may be given (i) directly from an arbitration clause, (ii) through a bilateral investment treaty, or (iii) through the national legislation of the state where the investment is made – cf Course 2.3 on Dispute Settlement 'Consent to Arbitration', 2003, issued by the United Nations Conference on Trade and Development available at [www.unctad.org](http://www.unctad.org).

109 Article 319, para 2 of the Mining Code 2002.

imply that the written consent of the State derives from the Mining Code 2002 itself and is a sort of advance consent<sup>110</sup> that is sufficiently explicit and unequivocal, without the need for any additional expression of consent.<sup>111</sup> However, this is only an offered consent, which will need to be accepted by the investor to become operative.<sup>112</sup> According to Article 319 of the Mining Code 2002, the title holder has to accept such arbitration 'upon receipt of the mining title'. Therefore, even though the Mining Code 2002 does not provide for a sanction in the event the consent is not given on receipt of the mining title, it is advisable to do this as soon as possible in order to have a binding and irrevocable mutual commitment on the part of both the DRC State and the title holder, and be protected especially against a change of legislation in that respect.

A party is not required to exhaust all domestic recourses before launching the international arbitration procedure, since this condition is not required by the Mining Code 2002.<sup>113</sup>

International arbitration is set to take place in the French language at the place agreed on by the government and the title holder.<sup>114</sup> This may cause a problem since both the ICSID Convention and the ICSID Arbitration Rules<sup>115</sup> provide that the place of proceedings is 'at the seat of the (ICSID) Centre' (which is at the World Bank) and that any other place needs prior approval from the arbitration tribunal after consultation with the Secretary General of the Centre.

Finally, an issue may exist with respect to the arbitration rules and decisions as referred to in Article 320 of the Mining Code 2002, discussed in 'Domestic arbitration' above, since the rules of arbitration of the international arbitral tribunal may overlap and possibly contradict its provisions. Thus, this is for example the case for the *exequatur*, at least for what concerns an ICSID arbitration: the arbitral award should be enforceable in any ICSID Contracting State,<sup>116</sup> and not just in the DRC or in the country of origin of

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110 cf K Nathan, *The ICSID Convention* (New York: Juris Publishing, 2000), p 117.

111 cf M Hirsch, *The Arbitration Mechanism of the ICSID* (Boston: Graham & Trotman, 1993), p 52.

112 cf ICSID Course 2.3 'Consent to Arbitration', ICSID 2003, cited above, pp 11-15 and the ICSID cases cited therein.

113 cf Article 26 of the ICSID Convention.

114 Article 320, para 1 of the Mining Code 2002.

115 Articles 62 and 63 of the ICSID Convention and Article 13(3) of the ICSID Rules of Arbitration.

116 cf Article 54 of the ICSID Convention, and Course 2.9 'Binding Force and Enforcement', 2003, issued by the United Nations Conference on Trade and Development available at [www.unctad.org](http://www.unctad.org), p 11 and the ICSID cases cited therein.

the investor.<sup>117</sup> This could possibly be a case concerning the interpretation or the application of the ICSID Convention to be settled by the International Court of Justice.<sup>118</sup>

### *Application to mining matters*

Despite the above-mentioned reservations,<sup>119</sup> which imply that the relevant recourse can be exercised only if another recourse is not expressly provided for by a specific provision, it appears that a choice between the various types of recourse is expressly allowed in certain matters, such as for instance:

- refusal to approve the event of *force majeure*,<sup>120</sup>
- refusal to grant an exploitation permit;<sup>121</sup>
- refusal to renew an exploitation permit;<sup>122</sup>
- compensation for expropriation;<sup>123</sup>
- resolution of disputes with occupants of the land;<sup>124</sup> and
- forfeiture.<sup>125</sup>

Arbitral recourse is, however, not available as recourse against a refusal to grant a research permit, which is submitted to administrative recourse only.<sup>126</sup>

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117 As is stated in Article 320, para 3 of the Mining Code 2002.

118 Under Article 64 of the ICSID Convention, such a case can be brought only by a Contracting State, in this case either by the country of origin of the investor, or by the DRC.

119 cf 'Scope' above.

120 Article 89 of the Mining Regulation 2003: administrative recourse *or* arbitration. This is a questionable solution since Article 315 of the Mining Code 2002 stipulates that disputes relating to the event of *force majeure* are subject to judicial recourse – and implicitly to further international arbitration if need be, while there is no legal ground allowing the Mining Regulation 2003, which is a decree that is lower in the hierarchy of norms, to provide any other recourse – cf 'Application to mining matters' point (8) above.

121 Article 72 of the Mining Code 2002: judicial recourse *or* arbitration. International arbitration should remain available in addition, beyond judicial recourse.

122 Article 80 of the Mining Code 2002: arbitration. However, account should be taken that Article 80 of the Mining Code 2002 refers to Articles 317 to 320 of the Mining Code 2002 and that since Article 317 indicates that the arbitral recourse applies 'subject to the administrative and judicial recourse', it can be inferred that administrative recourse remains available.

123 Article 275 of the Mining Code 2002: judicial recourse *or* arbitration. International arbitration should remain available in addition, beyond judicial recourse.

124 Article 281 of the Mining Code 2002 – cf 'Application to mining matters' point (6) above.

125 Article 289 of the Mining Code 2002, which refers to Articles 317 to 320: since Article 317 indicates that the arbitral recourse applies 'subject to the administrative and judicial recourse', it can be inferred that administrative recourse remains available.

126 Article 57, para 2 of the Mining Code 2002.

The reason is, as mentioned already,<sup>127</sup> that the 'fast-track' system in effect commands that the case be settled without delay in order to allow a new application for the same perimeter to be dealt with.<sup>128</sup> In this case, no international arbitration will be available in addition since the conditions of it will not be met, since the *justiciable* will not be a 'title holder' as required.<sup>129</sup>

Arbitral recourse is only admitted for disputes relating to the interpretation or the application of the Mining Code 2002.<sup>130</sup> It is not admitted for disputes concerning any subject matter not addressed by the Mining Code 2002, such as, for instance, matters relating to social security for local workers or work permits for expatriates.

Further, it appears from a strict interpretation of the provisions of Article 312 of the Mining Code 2002 that international arbitration is available in addition to administrative and judicial recourse,<sup>131</sup> in such way that in the event the applicant has serious reasons to believe that the law was wrongly applied, he can sue the DRC State before an international arbitral tribunal and obtain damages. This is perfectly in line with the purpose of the ICSID Convention, which is to provide a means to protect investments in developing countries. This is nevertheless limited to cases where a mining title was actually granted, since the ICSID (or alternative) arbitration is only available to a *justiciable* who actually obtained a mining title.<sup>132</sup>

For what concerns domestic arbitration, it appears that the uncertainties are such that it is probably not an advisable route to follow. In addition, it seems that domestic arbitration under the Code of Civil Procedure is often a source of disputes that end up before local courts anyway. Is it to avoid this that only part of the relevant provisions of the Code of Civil Procedure, namely Articles 159 to 174 (leaving out Articles 175 to 194) was referred to in Article 318 of the Mining Code 2002?<sup>133</sup>

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127 cf 'Application to mining matters' above, last para.

128 cf the Explanatory Memorandum to the Mining Code 2002, in *Journal Officiel de la République Démocratique du Congo*, 15 July 2002, pp 29-30; E Mukendi Wafwana, *op cit*, No 811, p 318.

129 cf Article 319, paras 2 and 3.

130 Article 317 of the Mining Code 2002.

131 'The title holder and the State are granted the right to exercise recourse through the administrative, judicial and/or arbitration means set forth in this Code': the use of the expression 'and/or' allows a cumulation, to a certain extent, of the recourses made available. cf also E Mukendi, *op cit*, Nos 828 and 829.

132 cf the conditions imposed by Article 319, paras 2 and 3.

133 cf 'Domestic arbitration' above.

### Representation of the State and the serving of notices and writs of summons

In all administrative, arbitration and judicial proceedings where the State is involved, either as claimant or as a defendant, it will be represented by the 'person in charge'<sup>134</sup> of the Administration of Mines or his local agent both within the country and abroad.<sup>135</sup>

The Administration of Mines means the entire set of the services of the public administration in charge of mines and quarries.<sup>136</sup> Although this is not specifically provided, it should, logically, include the Mining Registry,<sup>137</sup> which is a public service mainly in charge of administering mining rights.<sup>138</sup> For issues within the competence of the Mining Registry, it has its own legal personality<sup>139</sup> and it is represented, for the application of the provisions of the Mining Code 2002 and the Mining Regulation 2003, by its Director General.<sup>140</sup> Accordingly, the correct representation of the Mining Registry should not be an issue. However, for the other divisions of the Administration of Mines, the problem could be to identify the right 'person in charge' and make sure that he or she has all relevant and useful powers, for instance to agree on certain procedural aspects.<sup>141</sup>

Irrespective of this, any notice related to any judgment, recourse or other procedural act should be served exclusively on the State at the office of the Minister of Mines or at the office of his local representative.<sup>142</sup> Any notice served at any other location in the DRC or abroad will be null and void.<sup>143</sup> This rule is exclusively for the purposes of the service of writs of summons or of notices or other procedural acts relating to administrative, judicial or arbitral proceedings related to recourse. It is not supposed to be used for other purposes, such as filings of request or preliminary claims, which need

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134 The original French provision – Article 321 of the Mining Code 2002 – mentions '*le Responsable*' (ie the person in charge) without any further clarification.

135 Article 321 of the Mining Code 2002.

136 Article 1.3 of the Mining Code 2002.

137 And for certain cases also the Minister of Mines and the Governor of the Province – cf Articles 10 and 11 of the Mining Code 2002.

138 Article 12 of the Mining Code 2002 – cf also the Explanatory Memorandum, *op cit*, p 7.

139 Article 12 of the Mining Code 2002.

140 Article 18 of Decree No 068-2003 of 3 April 2003 enacting the bylaws, organisation and functioning of the Mining Registry.

141 eg for arbitration as set out in 'Domestic and international arbitration' above.

142 Article 322 of the Mining Code 2002, para 1.

143 Article 322 of the Mining Code 2002, para 2.

to be made with each relevant authority<sup>144</sup> mentioned in the Mining Code 2002 or in the Mining Regulation 2003. These provisions solve the problem resulting from a possible confusion as to the relevant body on whom to serve notice, owing to the variety of authorities concerned that form the 'Administration of Mines'.

### Conclusion

The following inconsistencies or inaccuracies will need further clarification, either by legislation, which is preferable, or by case law, which is not binding in the DRC but is a useful interpretation tool:

- (1) The 'title holder', as referred to in Article 312 of the Mining Code 2002, should also mean, where applicable, the applicant or the former title holder and the lessee. This interpretation is not as straightforward for international arbitration.<sup>145</sup>
- (2) As regards the choice between the various types of recourse, a certain number of inconsistencies in the Mining Code 2002 command clarification, as certain interferences between judicial recourse and arbitral recourse may create confusion.<sup>146</sup>
- (3) In relation to the choice of arbitration, the Mining Code 2002 does not provide, as an arbitration clause would normally, for the number of arbitrators, for the place of arbitration or for the Tribunal of Great Instance, which would be territorially competent to decide on incidents concerning the arbitration.<sup>147</sup> Moreover, the appointment of the arbitrator(s) for domestic arbitration could pose a problem.<sup>148</sup>
- (4) Domestic arbitration is organised according to a procedure set out in the Code of Civil Procedure. However, the above-mentioned Article only refers to Articles 159 to 174 of the Code of Civil Procedure, while its provisions concerning arbitration extend to Article 194. It raises questions concerning the application of Articles 175 to 177 (procedure), 178 to 182 (*ex aequo et bono* settlement and arbitral award) and 183 to 194 (enforcement and appeal).<sup>149</sup>

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144 cf the various divisions of the mines administration such as the 'Cadastré Minier' (Mining Registry), the Directorate of Mines, the Provincial Directorate, etc, and the Minister of Mines or the Governor of the Province.

145 cf 'Context' and 'International arbitration' above.

146 cf 'Judicial recourse', 'Application to mining matters' and 'Arbitral recourse', 'Application to mining matters' above.

147 cf 'Domestic and international arbitration'.

148 cf 'Domestic arbitration' above.

149 *Ibid.*

- (5) International arbitration will take place in the French language at the place agreed to by the government and the title holder. This may cause a problem regarding the rules relating to the 'place of proceedings' in the ICSID Convention and the ICSID Arbitration Rules.<sup>150</sup>
- (6) An issue may exist in respect of Article 320 of the Mining Code 2002, and more particularly the rules applicable to the arbitration itself, possibly for domestic arbitration and more probably for international arbitration since the rules of arbitration of the international arbitral tribunal may overlap and possibly contradict its provisions.<sup>151</sup>
- (7) In the same way, the process of *exequatur* is problematical. Indeed, under the Mining Code 2002, *exequatur* is available only in the DRC or in the country of origin of the investor.<sup>152</sup>
- (8) Valid representation of the DRC State may raise concerns as to the right 'person in charge', in particular when an agreement on procedural aspects is at stake.<sup>153</sup>

The above list is not exhaustive as practice may reveal other issues, while on the contrary it may reveal that some of the above listed issues do not in fact pose a problem.

As seen above, the recourse system organised by the Mining Code 2002 generally lacks cohesion and consistency and the issues listed above could create serious legal uncertainty.

In addition, it is debatable whether judicial or arbitral recourses are the most appropriate to question an administrative act where the most appropriate solution would be to obtain its annulment, when in fact the judicial recourse or the arbitral recourse cannot achieve this (although they can achieve solutions leading to similar effects, for instance by ordering the non-application of the decision). Judicial recourse, however, offers an additional jurisdictional appeal level, while international arbitration affords a certain safeguard. Domestic arbitration appears to be the less suitable recourse and should not be recommended.

It is advisable, at any rate, *de lege ferenda*, to provide a certain number of improvements to address the above-mentioned inconsistencies and inaccuracies, in order to render the recourse system more coherent and more efficient and reassure investors in that respect.

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150 cf 'Domestic arbitration' and 'International arbitration' above.

151 cf 'Domestic arbitration' and 'International arbitration'.

152 cf *ibid.*

153 cf 'Representation of the State and the serving of notices and writs of summons' above.