

MINERALS AND MINING

THE LAW DIGEST

TOPIC: OVERVIEW OF THE MINING LAW

Contributor

David Yaw Danquah, Esq

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For further information please contact david@legalstonesolicitorsllp.com

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INTRODUCTION

Ghana has overtaken South Africa to become the largest gold producer and exporter in Africa. Gold is a major export commodity for Ghana and contributes significantly to Ghana's revenue. This precious metal contributes nearly 48% of the country's revenue.

RELEVANT LEGISLATIONS

The exploration of gold reserves in Ghana is governed by several laws within her jurisdiction which includes the following;

a. Substantive Legislation:

- i. The 1992 Constitution of the Republic of Ghana.
- ii. The Minerals and Mining Act 2006(Act 703) as amended by the Minerals and Mining (Amendment) Act 2015 (Act 900) (All together the Minerals and Mining Act).
- iii. The Minerals Income Investment Fund Act, 2018 (Act 978)
- iv. The Minerals Development Fund Act, 2016 (Act 900)

b. Substantive Regulations

- i. The Minerals and Mining (Licensing) Regulations, 2012 (L.I 2176)
- ii. The Minerals and Mining (Explosives) Regulations, 2012 (L.I 2177)
- iii. The Minerals and Mining (General) Regulations, 2012 (L.I 2173)
- iv. The Minerals and Mining (Compensation and Resettlement) Regulations, 2012 (L.I 2175)
- v. The Minerals and Mining (Support Services) Regulations, 2012 (L.I 2174)
- vi. The Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (L.I 2182)

c. Other legislative and regulatory provisions have relevance for mining operations in Ghana including the following;

- i. Companies Act, 2019 (Act 992)
- ii. Environmental Protection Agency Act, 1994 (Act 490)
- iii. Ghana Investment Promotion Centre Act, 2013 (Act 865)
- iv. Income Tax Act, 2015 (Act 896)
- v. Forestry Commission Act, 1999 (Act 571)
- vi. Water Resources Commission Act, 1996 (Act 522)
- vii. Ghana Geological Survey Authority Act, 2016 (Act 928)

These laws listed constitute the principal and subordinate legislation regulating the mining of industrial minerals, including gold in Ghana. It sets out the licensing regime for gold mining in Ghana, the rights of a mining leaseholder, as well as the objects and powers of regulatory institutions in the industry, including the Ministry of Mines and Natural Resources and the Minerals Commission, among others.

PRINCIPAL INSTITUTIONS REGULATING THE INDUSTRY

In terms of regulation, the Ministry of Mines and Natural Resources and the Minerals Commission of Ghana is the chief administrative bodies regulating the sector. They provide the framework for the conduct of explorations of gold in Ghana, as succinctly stated in the laws listed above.

However, the holder of a mineral right is required before undertaking an activity or operations under the

licence, to obtain the necessary approval and permits required from the Forestry Commission and the Environmental Protection Agency. This is significant in ensuring the protection of natural resources, public health, and the environment.

OWNERSHIP OF MINERAL RESOURCES

Under the principal Act, the Minerals and Mining Act, 2006 (Act 703), every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water-courses throughout the country, the exclusive economic zone or any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana. It is vested in the President in trust for the people of Ghana.

This reinforces the constitutional position of Ghana that the President holds all mineral in trust for the people.

TYPES OF MINING LICENSES IN GHANA

A. RECONNAISSANCE LICENCE HOLDER (RLH)

Subject to Act 703 and the Subordinate legislation listed above, a reconnaissance license confers on the holder and a person, exclusive right to carry on reconnaissance in the reconnaissance area for the minerals to which the reconnaissance license relates and to conduct other ancillary or incidental activity.

An applicant can also apply for restricted, which is for 12 months.

A holder of a reconnaissance license is not permitted to engage in drilling or excavation in the reconnaissance area.

A reconnaissance license granted is for an initial period of 12 months.

B. PROSPECTING LICENCE HOLDER (PLH)

The Minister responsible for mines may, on an application duly made by a qualified person and on the recommendation of the Minerals Commission, grant prospecting license in respect of all or any minerals specified in the application. The holder of a prospecting permit may in the exercise of the rights under the license, enter upon the land to which the licence relates to undertaking the following;

- i. Prospect for minerals in respect of which the licence is granted
- ii. Make boreholes and excavations that may be necessary for the prospecting operations,
- iii. Erect camps and put up temporary buildings needed for the prospecting operations and conduct other activity ancillary or incidental to the prospecting.

An applicant can apply for a restricted prospecting license, which is valid for 3years.

A prospecting license shall be granted for an initial period, not exceeding three years.

C. MINING LEASE (ML)

A holder of a reconnaissance license or prospecting license may, before the expiration of the license, apply for a mining lease in respect of all or any of the minerals, the subject of the permit and in respect of all or any one or more of the blocks which constitute the reconnaissance or prospecting area.

A restricted mining lease can be granted, as well. This is for fifteen years.

A mining lease shall be for an initial term of thirty years or for a lesser period that may be agreed with the applicant.

The mining lease permits its holder to engage in reconnaissance and prospecting.

GOVERNMENT PARTICIPATION IN MINING LEASE

Where a mineral right is for mining or exploration, the Government of Ghana shall be entitled to 10% free carried interest in the rights and obligations of the mineral operations in respect of which the government shall not make a financial contribution. The government is, however, not precluded from obtaining further participation in mineral operations that may be agreed with the holder.

GRANT OF MINING LICENCE IN GHANA

Except for small-scale mining rights that can be granted to an individual as provided for under Act 703, only corporate bodies incorporated in Ghana under the laws of the Republic of Ghana shall be given a mineral right in Ghana. A license for small-scale mining is, however, granted only to a citizen of the Republic of Ghana who has attained the age of 18 years and is registered by the office of the Minerals Commission in an area designated and known as the District Office. No foreigner under any circumstances is allowed to participate in the small-scale mining industry.

FOREIGN OWNERSHIP, MINIMUM CAPITAL REQUIREMENT, AND RESTRICTIONS

Foreign entities can hold mineral rights in Ghana by incorporating a company in Ghana with its object, among others been mining and exploration activities. The Ghana Investment Promotion Centre Act, 2013 (Act 865), prescribes the minimum capital threshold for non-Ghanaians for participation in various sectors of the economy, including that of mining.

The law provides, that where the foreign investor has a Ghanaian partner, the foreign investor is required to invest a foreign capital of not less than TWO HUNDRED THOUSAND UNITED STATES DOLLARS (US\$200,000.00) in cash or capital goods relevant to the investment or a combination of both by way of equity participation and the person who is a citizen must hold not less ten %of the equity.

However, where the foreign investor wholly owns the company, the law, as stated provides, that the investor must invest a minimum of not less than FIVE HUNDRED THOUSAND UNITED STATES DOLLARS (US\$500,000.00) to have the company incorporated and licensed by the Centre.

It is important to stress that under the mining laws of Ghana, a foreign investor is not mandated to have a partner to participate in the mining industry as pertains to the oil and gas, gaming, and other sectors of the economy.

This, therefore, means that an incorporated company with equity participation held wholly by non-Ghanaians shall be entitled to own mineral rights in Ghana.

RESTRICTIONS

The only restriction to participate in the mining industry in Ghana by an entity incorporated by a foreigner is that it cannot engage in operations relating to industrial minerals unless it commits in its proposed program to invest at least TEN MILLION UNITED STATES DOLLARS (US\$10,000,000.00) in the operations.

Industrial minerals mean basalt, clay, granite, gravel, gypsum, laterite, limestone, marble, rock, sand, sandstone, slate, talc, salt, and other minerals as the Minister of Mines may from time to time declare.

ASSIGNMENT AND JOINT VENTURE ARRANGEMENTS OF MINERAL RIGHTS

The law requires that a mineral right shall not in whole or part be transferred, assigned, or mortgaged or otherwise encumbered or dealt in any manner without the prior approval of the Minister responsible for mines. The approval, however, shall not be unreasonably withheld or given subject to unreasonable conditions.

This therefore demonstrates, that a foreign entity that meets all requirements set out under Act 703, the Companies Act and the Ghana Investment Promotion Centre Act, shall with the approval of the Minister responsible for Mines be entitled to partner an indigenous Ghanaian company with a mineral right to explore for the minerals in Ghana.

The law states that within 30 days of receipt of an application for approval of an assignment of mineral rights and or any arrangement, be it mortgage or joint ventures arrangement, the Minister shall be required to give written reasons for approval or rejection of that arrangement. However, if the Minister fails to do so, then the Minister shall upon a request by an applicant give written reasons to the applicant for the failure to communicate a decision on the application. This subsequent communication from the Minister shall reach the applicant within 14 days of receipt of the request from the applicant.

INCENTIVES AND BENEFITS OF A HOLDER OF MINERAL RIGHTS

The holder of a mining lease is entitled to several incentives and benefits in Ghana. Among them, the holder is entitled to capitalization of expenditure on reconnaissance and prospecting approved by the Minister on the advice of the Minerals Commission, where the holder starts the development of the commercial find. The holder of a mineral right is further entitled to additional benefits including the following;

- i. Exemption from payment of customs import duty in respect of plant, machinery, equipment, and accessories imported specially and exclusively for the mineral operations;
- ii. Exemption of staff from payment of income tax on furnished accommodation of the mine site;
- iii. Immigration quota in respect of the approved number of expatriate personnel; and
- iv. Personnel remittance quota for expatriate personnel free from the tax imposed by an enactment regulating the transfer of money out of the country.

DISPUTE RESOLUTION

There are ample provisions under the mineral and mining laws when it comes to the resolution of disputes in Ghana. The law urges all players in the mining industry to make efforts to have all disputes resolved through mutual discussions.

However, where a dispute arises between a holder of a mineral right who is a citizen and the Republic in respect of a matter expressly stated under Act 703, such a dispute shall be referred for resolution. If same is not resolved amicably within 30days of the dispute arising or a more extended period as agreed between the parties, the difference may be submitted by a party to the conflict to arbitration for settlement under the Alternative Dispute Resolution Act, 2010 (Act 798) or any other enactment of such nature that may be in place.

On the other hand, where a dispute arises between a holder who is not a citizen and the Republic in respect of a matter expressly stated under Act 703, such a dispute or question shall be referred for resolution, and if the same is not resolved amicably within 30days of the dispute arising or a more extended period as agreed

between the parties, the difference may be resolved using any of the following mechanism;

- a. Under international machinery for the resolution of investment dispute as agreed to by the parties, or
- b. If the parties do not reach an agreement under (a) within 30days or a more extended period as may be agreed between the parties, the matter may be submitted to arbitration under the following;
 - i. Firstly, the framework of a bilateral or multilateral agreement on investment protection to which the Republic and the country of which the holder of the mineral right is a national are parties, or
 - ii. Secondly, if no agreement contemplated by subparagraph (i) exists, the rules of procedure for arbitration of the United Nations Commission on International Trade Law, UNCITRAL Rules.

Ghana has signed and ratified investment treaties with Denmark, the United Kingdom, China, Germany, Malaysia, the Netherlands, and Switzerland, among others. These investment treaties generally protect investments of nationals from the contracting parties.

It is important to note further that each agreement granting mineral rights shall make provision on the method of resolution of the dispute that may arise under the contract.

STABILITY AGREEMENT

To guarantee the investments by mining companies, the Minister may enter with a stability agreement with the holder to ensure that the holder of a mining lease, shall for a period not exceeding 15years from the date of the contract be affected by a new enactment, order or an instrument.

A stability agreement, however, needs the ratification of Parliament of Ghana.

LOCAL LEGAL REPRESENTATIVE (LLR)

The foreign entity should have access to legal representation before it seeks to incorporate a company for the application of mineral rights in Ghana. Most especially when the foreign entity aims to enter into a joint venture with a Ghanaian company having a mineral right in Ghana, not only will the local legal representative conduct due diligence on the local company to ascertain the veracity of its mineral lease. Most importantly, the lawyer will also be expected to educate and or proffer sound professional advice to the foreign entity on any changes in the laws and regulations governing the acquisition of mineral rights in Ghana.

Also, the legal representative shall police the processes leading to the incorporation of the company with the Registrar Generals Department, registration with the Ghana Investment Promotion Centre, and the application of the mineral rights from the Minerals Commission of Ghana. Timely legal advice must be obtained from a lawyer with knowledge and working experience in Minerals and Mining in Ghana.

The Legal Representative shall also be responsible for the formulation and the drafting of agreements to govern all transactions in Ghana. This is intended to secure the interest of the parties to the transaction and ensure that their reasonable expectation is meet at the end of the day.

NOTES ON CONTRIBUTOR



Mr David Yaw Danquah is the founder and Managing Partner of Legalstone Solicitors LLP, a boutique law firm in Ghana with a concentration on Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, Real Estate and Construction Law, and Commercial Arbitration.

He heads the firm's practice areas of focusing are Corporate and Commercial, Mining and Infrastructure, Debt Recovery and Restructuring, and Commercial Arbitration.

David has advised on numerous investment and mining-related transactions. He also has assisted countless international entities in establishing their operations in Ghana, and through his firms, offers support services to those entities. He has an impeccable record of providing technical savvy and exceptional client services.

David is a graduate of Kwame Nkrumah University of Science and Technology (KNUST), Kumasi, where he received his Bachelor's Degree in Law (LL. B) and the Ghana School of Law, where he studied and received a Post Graduate Qualifying Certificate in Law (PQCL). He holds a Certificate in Negotiation Mastery from Harvard University. Presently, he is pursuing an LL.M Degree in International Dispute Resolution at the prestigious Queen Mary University of London, United Kingdom.

David is a member of the Ghana Bar Association, Association of International Petroleum Negotiators (AIPN) and Institute of Energy Law (IEL) based in Houston, U.S.

LEGALSTONE SOLICITORS LLP

Website:

www.legalstonesolicitorsllp.com

Email:

info@legalstonesolicitorsllp.com
david@legalstonesolicitorsllp.com

Ghana Post GPS:

GA-417-3770