

## **Renegotiating a Long Term Investment Contract: the Case of Mining Contracts in DRC**

Submitted to the Faculty of Law, Centre for Human Rights, International Development Law Unit, University of Pretoria, in partial fulfilment of the requirements of the Master of Laws (LLM) degree in International Trade and Investment law in Africa

**By LUKANDA KAPWADI**

Student number: 12207692

Prepared under the supervision of  
Prof Daniel Bradlow  
Faculty of Law, University of Pretoria

**31 May 2012**

## DECLARATION

I, LUKANDA KAPWADI, hereby declare that this mini-dissertation is my original work, and other works cited or used are clearly acknowledged in accordance with University requirements. This work has never been submitted to any university, college or other institution of learning for any academic or other award.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University supervisor.

Signed: .....

Olufemi Soyaju

University of Pretoria

Date .....

## **ACKNOWLEDGEMENTS**

The financial assistance of the Australian Government Overseas Aid Program towards my LLM studies is hereby acknowledged. The opinions expressed and conclusions arrived at are mine and should not be attributed to my sponsor.

## SUMMARY OF THE DISSERTATION

The flexibility of long-term investment contracts is a benefit to both an investor and the state for mitigating the effect of an unforeseeable event which negatively impacts on the viability of the contract. However, the aspect of sanctity of contract has often prompted rigid provisions with the underlying rationale that this gives investors security and predictability. In contrast, by virtue of the principle of fundamental change of circumstances, new trend has come to life in the field of extractive industries consisting of inclusion in the contract a provision that provides for renegotiation or adaptation of the existing agreement.

The reasoning behind the adaption technique is that parties should not be obliged to carry on a performance which would be unjustly onerous or fruitless due to a supervening unregulated event. The main criticism of this approach is that the claim for renegotiating an existing agreement which contains no renegotiation clause or insistence on a third party intervention for adapting such a contract amount to an undue interference. However, the manner in which contracts are negotiated in countries that exhibit poor governance or situation of army conflict challenges this view. The question asked is whether an unfair contract concluded with unelected government or leaders of military factions and subject to corruption can be allowed to survive without being revised.

The DRC, realizing this problem, undertook to renegotiate some of its mining contracts with specific objectives, such as; investor respect of legislation, use of local resources, social responsibility clauses, and evaluation of the input of the partners taking into account the equity shareholding with the public party holding not less than 51%. This has resulted in the termination and cancellation of certain contracts. Aggrieved investors filed several proceedings, but they dropped them, privileging an amicable settlement. Besides, the outcome of the renegotiation suggests that Congolese negotiators have not fully achieved the objectives set out at the start of the process.

Against this backdrop, the dissertation found that the Congolese mining sector is governed by a broad range of regulations and corresponding supervisory bodies. Constant suspicions of illegally mining exploitation prevail on the sector as a result of the ill enforcement of the aforesaid regulations, corruption and mismanagement. This study also found that

renegotiating an existing agreement is a common practice in commercial contracts. Major systems of law have dealt with when they confronted with the issue related to the non-performance of a contractual obligation. The stability of the contractual terms is must but, at the same time, a certain degree of flexibility is necessary to allow parties to adjust their relationship in case of imperfections, cultural differences or supervening of unforeseen events. However, to be effective, the renegotiation mechanism must be regulated for not fuelling unlimited demand of adaptation, therefore, instability of the contract.

The renegotiation of mining contacts in DRC was extremely politicised. However, both investor and Congolese sides have benefited from that differently. The Congolese government gave preference to short-term profits result to the expenses of the long-term improvements. By comparison, the majority of investors have secured their assets. Others have even increased them. An examination of the amended agreement that have been disclosed so far reveals that a lot issues remain unresolved, particularly with regard to the reasons that prompted the renegotiation. Moreover, parties to the aforesaid process did not attempt to regulate future demands of adaptation.

Based on these findings, the recommendation of the dissertation is that future mining agreements should include a renegotiation clause and regulate the intervention of a third party. The Congolese government should endeavour to lessen political interference throughout mining contract negotiations. It should also build negotiation skills among its representatives involved in that process. Investors should increase among them awareness of corporate social responsibility standards for preventing illegal exploitation of mining resources which, ultimately, results in triggering unilateral contract adjustment. The remaining issues in connection with the amended agreements should be resolved amicably for this approach is more likely to bring mutual satisfaction to both the Congolese state and investors.

## ABBREVIATIONS & ACRONYMS

- AIPN: Association of International Petroleum Negotiators
- BICC: Bonn International Centre of Conversion
- BCC: Banque Centrale du Congo
- CAMI: Cadastre Minier
- CEEC: Centre d’Evaluation, d’Expertise et de Certification des substances minérales précieuses et semi-précieuse
- CENCO: Conférence Episcopale nationale du Congo
- CEPMLP: Centre for Energy, Petroleum, and Mineral Law and Policy
- CN-ITIE/RDC: Comité National de l’Initiative pour la Transparence dans la gestion des Industries Extractives en République Démocratique du Congo
- DGDA: Direction Générale des Douanes et Accises
- DGI: Direction Générale des Impôts
- DGRAD: Direction Générale des Recettes Administratives, Judiciaires, Domaniales et de Participations
- DRC: Democratic Republic of Congo
- IIED: International Institute for Environment and Development
- IILJ: Institute for International Law and Justice
- IPIS: International Peace Information Service
- OFIDA: Office des douanes et Accises
- RAID: Rights & Accountability in Development
- SAESSCAM: Service d’Assistance et d’Encadrement du Small-Scale Mining
- SARL: Société par Actions à Responsabilité Limitée
- SARW: Southern Resource Watch
- SPRL: Société Privée à Responsabilité Limitée
- VCC: Vale Columbia Center on Sustainable International Investment

## TABLE OF CONTENTS

DECLARATION .....	i
ACKNOWLEDGEMENTS.....	ii
SUMMARY OF THE DISSERTATION .....	iii
ABBREVIATIONS & ACRONYMS .....	v
TABLE OF CONTENTS .....	vi
CHAPTER ONE	
INTRODUCTION .....	1
1.1 Background to the Study.....	1
1.2 Statement of the Problem.....	4
1.3 Research Question.....	8
1.4 Objectives/Significance of the Study .....	9
1.5 Definition of Concepts .....	10
1.6 Preliminary Literature Review .....	10
1.7 Research Methodology .....	13
1.8 Outline of Chapters .....	13
1.9 Scope and Limitation of the Study.....	13
1.10 Conclusion .....	14
CHAPTER TWO	
THE LEGAL FRAMEWORK OF THE MINING SECTOR IN DRC .....	15
2.1 Introduction.....	15
2.2 The Applicable Regulations to the Mining Sector in DRC .....	15
2.2.1 The National Law .....	15
2.2.2 The International Law.....	21
2.2.3 Extraterritorial Legislation.....	25
2.3 The Supervision of the Mining Regulation.....	26
2.4 The Enforcement of the Mining Regulation .....	28

2.5	Conclusion .....	29
CHAPTER TREE		
REGULATING THE RENEGOTIATION OF AN EXISTING AGREEMENT .....		30
3.1	Introduction .....	30
3.2	Renegotiability of Long-Term Investment Agreements: Stability vs Flexibility ....	30
3.2.1	Stability in the Contract (or Pacta Sunt Servanda) Principle.....	31
3.2.2	Flexibility in the Contract or Stability in the Relationship.....	33
3.2.3	Consequence of the distinction .....	35
3.3	Renegotiating an Investment Contract in Major Systems of Law .....	35
3.3.1	Common Law .....	36
3.3.2	Civil Law .....	38
3.3.3	International Law .....	41
3.4	Nature, Types and Conditions of Renegotiating an Existing Agreement .....	44
3.4.1	Nature and Scope of the Renegotiation .....	44
3.4.2	Types of Renegotiations .....	46
3.4.3	Conditions of Renegotiating an Existing Agreement .....	48
3.5	The Practice in International Arbitration .....	52
3.6	Conclusion .....	54
CHAPTER FOUR		
THE STATUS OF MINING CONTRACTS RENEGOTIATED .....		56
4.1	Introduction.....	56
4.2	Recalling the Context which Prevailed before the Mining Review .....	57
4.3	The Process Followed by the Congolese Government .....	60
4.3.1	The Audit of Mining Agreements.....	60
4.3.2	The Renegotiation of Mining Agreements .....	62
4.4	Appraisal of the Renegotiation Process .....	66
4.5	Remaining issues.....	67
4.6	Conclusion .....	68



CHAPTER FIVE

CONCLUSION AND RECOMMENDATION .....	69
5.1 Summary of Findings .....	69
5.2 Conclusion .....	69
5.3 Recommendations .....	71
BIBLIOGRAPHY .....	73
Books .....	73
Journals .....	73
Reports and Papers .....	77
Internet Sources .....	80
Mining Contracts Consulted .....	81
Legislations .....	81
International Instruments .....	82
Directory of Cases .....	82

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the Study

The Democratic Republic of Congo (DRC) is a central African country, member of several sub-regional organisations of which the South African Development Community (SADC). It is well known due to its exceptional endowment<sup>1</sup> in regard to mineral reserves. Indeed, its underground contains almost every valuable mineral -from precious resources such as diamond and gold to strategic minerals such as copper, cobalt, colombo-tantalite (coltan), uranium, cassiterite (tin ore), wolframite (tungsten ore), coal and oil.<sup>2</sup>

However, this country remains listed among the least developed in the world. Its wealth of raw materials scandalously contrasts with the poverty that suffers most of the population.<sup>3</sup> The profits generated from the exploitation of natural resources serve only to enrich investors and line the pocket of small group of senior politicians, top-level civil servants in the administration and managers of state-owned enterprises.<sup>4</sup>

The quest of Congolese natural resources has also fuelled one of the bloodiest, deadliest and most internationalised conflicts that Africa has seen, since the Second World War.<sup>5</sup> The economic profit gained from the exploitation of natural resources, often in an unlawful way,

---

<sup>1</sup> For instance, the DRC holds nearly 10% of the world's reserves of copper, nearly 33% of the world's reserves of cobalt, and 34% of the world's reserves of coltan , Global Witness Report, Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 to 2003, (December 2009) 5.

<sup>2</sup> See Global Witness Report, 'Same Old Story – A background study on natural resources in the Democratic Republic of Congo' (June 2004), Ecumenical Network Central Africa Report 'Uranium Mining in the DR Congo: A Radiant Business for European Nuclear Companies?' (June 2011) available at [www.oenz.de/.../Uranium Mining in the DRC OENZ June 2011](http://www.oenz.de/.../Uranium_Mining_in_the_DRC_OENZ_June_2011) accessed 14 October 2011, FinnWatch Report 'Connecting components, dividing communities: Tin production for consumer electronic in DR Congo and Indonesia' (December 2007), Mining Journal 'The Democratic Republic of the Congo, A supplement to Mining Journal' (March 2010) available at [www.miningjournal.com/ data/assets/...file.../DRC 2010scr.pdf](http://www.miningjournal.com/ data/assets/...file.../DRC_2010scr.pdf) accessed 28 September 2011, Enough Project Report 'A Comprehensive Approach to Congo's Conflict Minerals' (April 2009) available at [www.enoughproject.org](http://www.enoughproject.org) accessed 28 September 2011.

<sup>3</sup> International Crisis Group Africa Report No 114 'Escaping the Conflict Trap: Promoting Good Governance in the Congo' (July 2006) 4.

<sup>4</sup> Global Witness Report 'Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines' (July 2006) 4.

<sup>5</sup> See The UN Secretary-General 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of The Democratic Republic of Congo' U.N. Doc. S/2002/1146 (16 Oct. 2002), Global Witness Report 'Under-Mining Peace The explosive Trade in Cassiterite in Eastern DRC (June 2005) 8, Enough Project Report (April 2009), International Rescue Comity 'Conflict in Congo Deadliest Since World War II, Says The IRC'(2003) available at [www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37](http://www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37), accessed 21 October 2011

is an incentive to keep instability in a certain parts of the Country whereby mines are located.

The UN Expert Panel reports, NGOs and scholars, have abundantly documented the linkage between the pursuit of instability and the scramble for DRC's natural resources.<sup>6</sup> Taking into account these studies' outcomes, International Crisis Group has summarised as follows the way conflicting parties were making money through mining in complicity with corporations and small individuals:

- offering corporates monopolies in exchange for kickbacks,
- embezzling from state-run companies,
- creating joint ventures in which politicians were shareholders, and
- taking kickbacks on numerous contracts with terms unfavourable to the state.<sup>7</sup>

Following the accords bringing to an end the war,<sup>8</sup> foreign investors started coming along in the country to obtain mining contracts.<sup>9</sup> However, the way mining rights were allocating raised a lot of concerns. Large shares of profits were disproportionately provided for multinational corporations, whereas insignificant stakes were given to the Congolese state.<sup>10</sup>

The peace agreement between Congolese belligerents established a transitional government and assigned to the parliament the appointment of a commission to examine the validity of economic and financial contracts signed during the two wars (1996-1997 and 1998-2002). This commission came into being in 2004. It is known as the Lutundula Commission, after its President Christophe Lutundula.

---

<sup>6</sup> The UN Secretary General (2002), Amnesty International Report (April 2003) 7, Global Witness Report 'Under Mining Peace' (June 2005) 8, Björn Aust and Willem Jaspers 'From Resource War to Violent Peace, Transition in the Democratic Republic of Congo (DRC)' (2006) 10 *BICC*, D Montague 'Stolen Goods: Coltan and the conflict in the Democratic Republic of Congo' (Winter-Spring 2002) 103 *SAIS Review* Vol XXII No 1.

<sup>7</sup> International Crisis Group Report (July 2006) 6.

<sup>8</sup> Several agreements have been signed for the purpose of bringing about an end to the war in the DRC. The more decisive agreements were, namely: the Global and Inclusive Agreement, also known as the Sun City Agreement, signed in April 2002 between the Congolese government, the representatives of the rebel groups, the politic opposition and the civil society, and the Pretoria Accord, signed in July 2002 between the DRC and Rwanda. The agreement between Congolese belligerents profoundly changed the structure of the power. The President Joseph Kabila, who succeeded his father, shared power with four vice presidents designated respectively by Kabila's former government, the political opposition and the main rebel movement- the Congolese Rally for Democracy (RCD) and the Congo Liberation Movement (MLC).

<sup>9</sup> During this period, negotiations were undertaken and, in some cases, conventions were signed with the following private foreign companies: Swipco (Swiss), Lundin Group (Canada), Forrest-Outokumpo (Congo-Finland), Cluff Mining (UK), Banro (Canada), Mindev (Belgium-Canada), Barrick Gold (Canada), South Atlantic Resources (SAR, Canada), Union Minière (Belgium), Anvil Mining (Australia), Gencor-Isacor-Broken Hill (South Africa). See Assemblée Nationale 'Rapport de la Commission Spécial Chargée de l'Examen de la Validité des Conventions à caractère économique et financier conclues pendant les guerres de 1996-2003' (also known as Lutundula Commission Report) (2005) 6.

<sup>10</sup> See The World Bank 'Democratic Republic of Congo: Growth with governance in mining sector' Report No 43402-ZR, (Mai 2008) 50-51, Global Witness Report (July 2006) section VI.

In its final report submitted on June 2005, the Commission found that the majority of contracts signed during the war period were illegal or contributed little or nothing to the development of the country.<sup>11</sup> Therefore, it recommended that some of them be rescinded, and others be renegotiated.<sup>12</sup> Disappointingly, this report was never discussed by the parliament. The allocation of mining concession even increased afterwards, according to some observers.<sup>13</sup> This situation raised a lot of suspicion of corruption. The Transitional Government officials that acted had an interest to line their pockets in order to influence the outcome of the elections; whether by increased advertising, by buying votes outright or by bribing electoral officials to favour their party.<sup>14</sup>

In April 2007, just after the national wide elections and in response to the civil society's pressure, the Congolese government enacted a decree calling for the review of mining agreements and set up a commission to this end.<sup>15</sup> According to Article 2 of the said decree, the Commission's mission was firstly to examine partnership contracts concluded by the state and/or public companies with a private investor in the mining sector and assess their impact on the DRC's public companies and national development. Secondly to propose, if necessary, terms and conditions of their review with the aim of correcting any imbalances and related flaws.<sup>16</sup>

The Commission report, dated November 2007,<sup>17</sup> divided the reviewed contracts into three categories: category A, was for contracts that were to be unchanged; category B, dealt with contracts that needed to be renegotiated; and category C, was for contracts that were to be cancelled.<sup>18</sup> Of over 60 contracts subjected to the review, no single contract was classified in the category A. 22 contracts were assigned in category C, 39 contracts were put in category B.<sup>19</sup>

---

<sup>11</sup> See Assemblée Nationale (2005) 270.

<sup>12</sup> See Assemblée Nationale (2005) 270.

<sup>13</sup> See Human Right Watch Report 'Democratic Republic of Congo: Election in Sight, Don't Rock the Boat' (December 2005) 14, Global Witness Report (July 2006) 5.

<sup>14</sup> Human Right Watch Report (December 2005) 14.

<sup>15</sup> Arrêté ministérielle No 2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la revalidation des contrats miniers (2007)

<sup>16</sup> See Arrêté ministérielle (2007).

<sup>17</sup> The Commission report was made public in March 2008. See IPIS 'Democratic Republic of the Congo, Mining Contracts-State of Affairs' available at <http://www.ipisresearch.be/download.php?id=220> (8 November 2011), Mining Journal (2010) 5.

<sup>18</sup> Commission of review of mining contracts 'Task Force Report' tome I (November 2007) 4 available in French only [http://www.miningcongo.cd/pdf/TOME%201%20RAPPORT%20CRCM%20VERSION%20FINALE-%20270208%20&\\_h%C3%A9%C3%A8.pdf](http://www.miningcongo.cd/pdf/TOME%201%20RAPPORT%20CRCM%20VERSION%20FINALE-%20270208%20&_h%C3%A9%C3%A8.pdf) accessed 14 September 2011.

<sup>19</sup> See Commission of review of mining contracts (2007).

There is no clarity about the facts that followed the notification of the Congolese state reproaches and exigencies to the corporates. However, it has been noted that the Congolese government appointed a new task force to supervise,<sup>20</sup> depending on the case, the renegotiation and termination of the mining contracts. In August 2008 the Congolese mining Minister assigned to the task force the terms of reference that should govern the renegotiation or termination of mining contract. The terms of reference issued by the mining Minister recommended among others the payment of the duties due to the state, the investor respect of the Congolese legislation, the use of local resources, the insertion of social responsibility clauses, and evaluation of the input of the partners taking into account the equity shareholding with the public party holding not less than 51%.<sup>21</sup>

In December 2008, the Mining Minister announced the termination of the renegotiation process. Investors whose contracts were to be cancelled had negotiated new contracts.<sup>22</sup> The remaining contracts were alleged to have been successfully renegotiated.<sup>23</sup> In practice, the renegotiation process carried on with six principal mining corporates and ended up with the cancellation of a Canadian based corporate's contract, First Quantum Minerals (FQM). Almost US \$430 million is alleged to have already been invested.<sup>24</sup> FQM and its associates in the cancelled project reported the matter to arbitration tribunals. In January 2012, the said complainants surprisingly agreed a settlement.<sup>25</sup>

## 1.2 Statement of the Problem

The foregoing facts command a reflection on the state-investor contractual relationship in the context of long-term contracts. This relationship has often been characterized by an uninterrupted tension between the state and the investor. From the state's perspective, contractual commitments cannot supersede its sovereign prerogatives.<sup>26</sup> Therefore, as far as public interest is concerned, the state cannot be precluded from modifying or even

---

<sup>20</sup> The date of appointment of this task force remains unknown.

<sup>21</sup> An English version of these terms of reference is available at <http://www.atol.be/docs/ebib/TDR%20RENEGOCIATION%20ENGLISH.pdf> accessed 8 November 2011

<sup>22</sup> Congo Siasa, 'Congo's mining contracts still shrouded in secrecy', available at <http://congosiassa.blogspot.com/2011/04/congos-mining-contracts-still-shrouded.html>, accessed 8 November 2011.

<sup>23</sup> Mining Journal (2010) 5

<sup>24</sup> J Acharjee 'First Quantum Minerals says court upholds its \$2 billion Congo claim' (September 2011) available at [file:///H:/First%20Quantum%20Minerals%20says%20court%20upholds%20its%20\\$2%-20billion%20Congo%20claim.mht](file:///H:/First%20Quantum%20Minerals%20says%20court%20upholds%20its%20$2%-20billion%20Congo%20claim.mht) accessed 21 October 2011.

<sup>25</sup> FQM 'News Releases 05 Jan. 2012' available at <http://www.first-quantum.com>, accessed 15 February 2012.

<sup>26</sup> See DE Vielleville & BS Vasani 'Sovereignty over Natural Resources versus Rights Under Investment Contracts , Which one Prevails?' (2008) *Transitional Dispute Management*.

terminating an agreement.<sup>27</sup> From the investor's view, this is simply unacceptable. A contract should be governed by a predictable regime for it to be secured.<sup>28</sup> In the modern time, the state-investor tension is compounded by the necessity to align the contractual framework to the international standard<sup>29</sup> constantly evolving.

By nature, long-term contracts, agreements, projects, transactions -whatever term used- are particularly prone to be affected by events non-envisaged by the parties at the outset of the contractual relationship.<sup>30</sup> When parties negotiate such a contract, it is unlikely that they efficiently assess and predict every potential impact, on the contract, of factors such as the political situation, economic and social climate, geological and environmental conditions.<sup>31</sup> The outlined parameters may change radically during the implementation period, thereby, dramatically altering the economic benefits that contractual parties originally envisaged they would draw from the agreement. The continuation of the operation of the contract may then prove to be impracticable or no longer viable and ultimately command the termination of the contract.<sup>32</sup>

Another important future is that investors view the involvement of the state in an investment contract as the foremost risk that needed to be mitigated, due to the state's sovereign legislative power. Considering the mass of capital put in the investment contract, the unilateral modification of the game is considered to impact negatively on the contractual economic equilibrium.<sup>33</sup>

Great importance must be given to the stability of the contractual regime. An investor needs to be assured that the concluded contract will realise the expected benefits for their shareholders. In addition, it has to convince the sponsors of the project that it will bring sufficient benefit to pay back the loan.<sup>34</sup> Therefore, the respect of the terms of the agreement, in line with the principle of the sanctity of the contract, becomes a basic principle in the

---

<sup>27</sup> R Geiger 'The Unilateral Change of Economic Development Agreements' (1974) 89 *The International and Comparative Law Quarterly* Vol 23 No 1.

<sup>28</sup> A Faruque 'Validity and Efficacy of Stabilisation Clause: Legal Protection vs Functional Value' (2006) 322 *Journal of International Arbitration* vol XXIII No 4.

<sup>29</sup> H Mann 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' (October 2011) 7 *Investment Treaty News* IISD Issue 1 vol II.

<sup>30</sup> KP Berger 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators' (2003) 1347 *Vanderbilt Journal of Transnational Law* vol 36.

<sup>31</sup> JW Salacuse 'Renegotiating International Project Agreements' (2000) 1338 *Fordham International Law Journal* vol XXIV.

<sup>32</sup> See Th Waelde & A Kolo 'Renegotiation and Adaptation in the International Investment Projects: Applicable Legal Principle & Industry Practices' (2000) 1-2 *CEPML/Dundee* vol 5-3(a).

<sup>33</sup> KP Berger (2003) 1349.

<sup>34</sup> Th Waelde & A Kolo (2000) 3.

investment process. Nonetheless, scholarly works showed that no legal system gives a stiff meaning to the principle of sanctity of contract.<sup>35</sup>

In an attempt to circumvent this obstacle, investors developed sophisticated provisions, generally known as ‘stabilization clauses’, to freeze the law of the host state for the duration of the contract.<sup>36</sup> From the investor’s perspective, the stabilisation provision strengthens the stability and the predictability of the contract endangered by the state power to change the condition of the contract unilaterally.<sup>37</sup>

However, this provision is deemed to infringe other international principles. For instance, it is considered to be inconsistent with state’s rights and obligations such as sovereignty over its natural resources,<sup>38</sup> the state’s obligation to regulate the protection of human rights by investors.<sup>39</sup> In addition to that, the stabilisation clause is considered to play a disincentive role for investors to meet acceptable business standard.<sup>40</sup> The downsides of the stabilization provision are compounded by the fact that it is sometimes subject to corruption or concluded with “governments that may not have been elected or may have military origins”.<sup>41</sup> Finally, this technique of freezing the domestic law has also proved ineffective;<sup>42</sup> hence not worth maintaining because an investor can reach an effective result by using a much friendlier means which preserves the business relationship with the host state.

The renegotiation clause seems to be a middle way solution between the absolute intangibility of the contractual regime and the need for states to exert their sovereign prerogatives. This clause may fulfil the same protection role than that of the stabilisation clause.<sup>43</sup> The investor can use it to restore the economic equilibrium breached by a unilateral act of the state.<sup>44</sup> Unlike the stabilisation clause which is exclusively aimed at protecting the investor, the renegotiation clause help both parties to an investment agreement to mitigate

---

<sup>35</sup> See R Geiger (1974) 78 and Th Waelde & A Kolo (2000) 4.

<sup>36</sup> PD Cameron (2006) 15.

<sup>37</sup> See PD Cameron (2006) 12 and A Faruque (2006) 321-322.

<sup>38</sup> KP Berger (2003) 1360-1361.

<sup>39</sup> A Shemberg ‘Stabilization Clauses and Human Rights’ (March 2008) viii research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights available at <http://www.ifc.org/ifcext/...StabilizationClausesandHumanRights/.../Stabiliz> accessed 28 October 2011.

<sup>40</sup> H Mann (2011) 7.

<sup>41</sup> H Mann (2011) 7.

<sup>42</sup> See JW Salacuse (2000) 1362, ZA Qurashi ‘Renegotiation of International Petroleum Agreements’ (2005) 264 *Journal of International Arbitration* vol XXII No 4, P Bernadini ‘Stabilization and Adaptation in Oil and Gas Investments’ (2008) 101 *Journal of World Energy Law & Business* vol 1 No 1.

<sup>43</sup> P Bernadini (2008) 98.

<sup>44</sup> JW Salacuse (2000) section IV/B.

the imperfection of the contract<sup>45</sup> stemming from deep imbalance of benefit, non-compliance with the domestic law or other relevant obligations at international level.

The only problem is that one cannot bring a contractual party that is still benefiting from an existing contractual regime to modify it without being accused of acting unlawfully. This is particularly true when the contract does not provide for the renegotiation mechanism.<sup>46</sup> The other party may agree to the demand of reviewing the existing contract, but it is unlikely that an agreement satisfying both parties' interests will be reached.<sup>47</sup> Even if a third party is called upon to intervene, specially an arbitral tribunal, the nature of the issue itself -whether a legal dispute or filling of gap in the contract,<sup>48</sup> and the competence of the tribunal<sup>49</sup> would be very difficult issues to overcome if parties did not cover them in the existing contract.

The case of the renegotiation of mining contracts in DRC raises the same kind of issues. Primary information pertaining to all the contracts affected by the renegotiation process is not yet available. Nonetheless, there is evidence that some targeted contracts did provide for a general stabilisation clause,<sup>50</sup> to restrict the legislative and administrative power of the Congolese state to amend the contractual regime. Others did include a specific provision for guaranteeing the freezing of economic advantages granted to the private companies for the duration of the contract, or the restoration of the economic equilibrium in case the latter was breached by any future act emanating from the Congolese state.<sup>51</sup>

The failure to agree new terms proposed by the Congolese government has led to the cancellation of the mining project developed by some investors and its allocation to a third party. Then, the question that is asked is whether this cancellation amount to an expropriation of the investors' permits and illegal possession of their investment.

---

<sup>45</sup> KP Berger (2003) 1360-1361.

<sup>46</sup> Th Waelde & A Kolo (2000) 2.

<sup>47</sup> KP Berger (2003) 1368-13670

<sup>48</sup> P Bernadini (2008) 108.

<sup>49</sup> JY Gotanda 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' (2003) 1462-1463 *Vanderbilt Journal of Transnational Law* vol 36.

<sup>50</sup> Convention between the state-owned enterprise Miba and BHP Billiton World Exploration Inc., convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd, Paru Ltd, Mboko Ltd, Mofia Ltd and Tembo Ltd, the agreement between the OBM B.V & Groupe Goeorge Forrest and the state-owned enterprise Gecamine available at [http://minesrdc.cd/fr/index.php?option=com\\_content&view=Article&id=92](http://minesrdc.cd/fr/index.php?option=com_content&view=Article&id=92), accessed 11 November 2011.

<sup>51</sup> Convention between the Congolese State and Anvil Mining NL, convention between the state-owned enterprise Gecamine and Kin-Forrest Ltd, convention between the state-owned enterprise Miba and De Beers Centenary AG, convention between the state-owned enterprise Okimo and Mwana Africa Holdings (PTY), available at [http://mines-rdc.cd/fr/index.php?option=com\\_content&view=Article&id=92](http://mines-rdc.cd/fr/index.php?option=com_content&view=Article&id=92), accessed 11 November 2011.



Furthermore, the terms of reference for renegotiation were, amongst others, respect of legislation, use of local resources, social responsibility clauses, termination of the contract and evaluation of the input of the partners taking into account the equity shareholding with the public party holding not less than 51%. However, the renegotiation of existing mining contracts undertaken by the Congolese government has not fully achieved the terms of reference set out at the commencement of the process.

### 1.3 Research Question

The study argues that the renegotiation or adaptation clause is a means of addressing imperfections of investment contracts stemming from the lack of common understanding of its terms<sup>52</sup> or non-conformity with the domestic regulation or public policy, as it happened in 2004 with existing Liberian timber concessions.<sup>53</sup> In addition to that, it shows that this mechanism can be used as a tool for mitigating the unregulated unforeseeable circumstances.<sup>54</sup> In case of supervening factors, it is preferable to preserve the business relationship by renegotiating the existing contract instead of terminating which may give rise to a lengthy and expensive arbitral process to decide upon the validity of the cancellation or any remaining contentious issues.

As already mentioned, the decision of the Congolese government to renegotiate the existing mining contracts concluded during the transitional period was justified on the premises that there was a lack of compliance with the Congolese regulation in force at the time the contracts were concluded. Secondly, there was a lack of legitimacy of the Congolese government officials and leaders of rebel factions that signed contracts on behalf of the

---

<sup>52</sup> Professor Salacuse has argued that, in course of the contract, "(...) numerous conflicts caused by the lack of common understanding can arise to threaten the very existence of the transaction. Here are few examples drawn from experience around the world:

- A small emerging-company in joint venture with a large U.S. multinational corporation feels much weaker than its partner and is therefore afraid that it will be taken advantage of. Consequently, in all dealings with the U.S. company, it is extremely guarded and slow to reach agreement, an attitude that is hampering the development of the venture. (...)
- A U.S. pharmaceutical firm with a long tradition of strong presidents and top-down management has acquired a Swedish firm with a management style that entails getting the whole management group's approval before making a big decisions-all are I batten, 'getting everybody in the boat,' according to the Swedes. The difference in style is causing severe internal conflict and the possible loss of talented managers and scientists.

None of these problems could have been solved by contractual provisions alone. None can be settled by invoking arbitration or other dispute settlement clauses. The best means of solving these problems is for the parties to these transactions to sit down together and refine their relationship through renegotiation of their underlying transaction." JW Salacuse (2000) 1339-1340.

<sup>53</sup> U4 Anti-corruption Resource Centre 'Corruption and Renegotiation of mining contracts' (November 2007) 4, available at <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156>, accessed 4 September 2011.

<sup>54</sup> KP Berger (2003) 1350-1355

Congolese state and the huge imbalance in the sharing of profit between the state or state-owned enterprises and investors.<sup>55</sup>

The fact that the renegotiation process has been launched although certain contracts did not provide for such a mechanism does not, in any event, dilute from its worth. As long as it can be proven that the contracts targeted in the renegotiation process were signed in infringement of Congolese regulations or subject to corruption, these contracts cannot be allowed to survive without revising them. If it turns out in the review process that the parties failed to agree, and the contract has to be cancelled, that cancellation cannot amount to expropriation entitling the payment of compensation to the investor. The dispossessed investor can refer the case to arbitration, but he cannot reasonably expect reparation for the arbitrations forum is not established to uphold unlawful rights.<sup>56</sup>

To supporting these arguments, the dissertation will use the following questions: (i) what is the legal frame work of the mining sector in DRC? (ii) Is it allowed, as a general principle, under the major legal systems and international law to renegotiate an existing mining contract? (iii) Under what circumstances should this be? Furthermore, the dissertation will analyse the nature of the process to be followed with regard to fairness, good will and transparency; and (iv) whether the terms and conditions under the renegotiated mining contracts confer any real benefits to the Government and people of Congo.

#### **1.4 Objectives/Significance of the Study**

Many authors have written on the subject of renegotiation of long-term investment contracts. However, very few works have been done with particular reference to DRC in the way that this research does. Therefore, the aim of this study will be to add academic value as well as inform policy makers and investors with respect to factors that ought to be taken into account in renegotiation of mining contracts. The objectives of the study are:

- (a) to consider what international law, arbitral awards and scholars say about renegotiation of an existing agreement whose clauses do not provide for such a mechanism and the consequence in case of failing to agree;

---

<sup>55</sup> See generally, Rights & Accountability in Development (RAID) 'Unanswered Questions: Companies, Conflicts and the Democratic Republic of Congo' (May 2004), Global Witness Report (July 2006) sections V & VI, Commission of review of mining contracts (2007) 4.

<sup>56</sup> H Raeschke-Kessler in collaboration with D Gottwald 'Corruption in Foreign Investment Contracts and Dispute Settlement between Investors, States, and Agents' (2008) 10 *The Journal of World Investment & Trade*.

- (b) with regard to the forgoing point, to assess the renegotiation process that took place in the DRC and the lessons that can be drawn;
- (c) to analyse the effect of the renegotiation process both on the State and the Investor; and
- (d) to examine the benefit or consequence of the renegotiation process on the local population.

## 1.5 Definition of Concepts

The concept of ‘renegotiation’ or ‘the renegotiation clause’ is deemed to mean the review of the existing contractual regime with the aim of accommodating the risks inherent in long-term contracts. Unless the context suggests otherwise, the notion of ‘adaptation’ or ‘the adaptation clause’ refers to the idea of adjusting an existing agreement. Depending on the circumstances, it will differ with that of renegotiation in the sense that it implies the intervention of a third party, often an arbitral tribunal, to adapt the terms of the contracts.

The notion of ‘flexibility of the contract’ advocated in this dissertation refers to all the mechanisms at the disposal of contractual parties to mitigate the effect of the unforeseeable event on their respective commitments. It generally encompasses the recourse to the technique of renegotiation or adaption of an existing agreement.

The concept of review or audit/revisitation of mining contract will refer to the first phase of the renegotiation process whereby the taskforce commissioned by the Congolese government outlined those of the mining contract that had to be renegotiated or cancelled. This phase lasted eight months, from April to November 2007. It did not include the adjustment of existing mining agreements.

## 1.6 Preliminary Literature Review

Several studies have been done on the nature, purpose, categories of renegotiation clauses.<sup>57</sup> These studies cover not only the issue relating to the adaptation of an existing agreement

---

<sup>57</sup> Th Waelde ‘Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development’ (Summer - Fall 1978) *Lawyer of the Americas* Vol 10 No 2 Symposium Issue: Legal Problems for Multinational Corporations *Inter-American Law Review*, V Poisson & M Vale ‘The Renegotiation of the 1982 Gas Contract between France and the USSR, Soviet and Eastern European Foreign Trade’ (Summer, 1988) *The CMEA in World Trade* Vol 24 No 2, Th Waelde & A Kolo (2000), JY Gotanda (2003), ZA AL Qurashi (2005), P Bernadini (2008), Maniruzzaman ‘The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry (2009) *Texas Journal of Oil, Gas, and Energy Law* vol 5 No 80, M Likosky ‘Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries’ (April 2009) *Transnational Corporations* Vol 18 No 1.

which does not provide for a renegotiation clause, but also that of enforceability and liability in case of failing to agree.<sup>58</sup>

The philosophy behind renegotiation is that the contractual relationship is more important than the formal contract document itself and that parties will make all efforts to let this relationship survive if and to the extent that it is in their interest to let the relationship survive – and sometimes send a signal to the outside world over the ‘reasonableness’ of the government or company in dealing with its partners on a long-term basis of mutual benefit and trust.<sup>59</sup>

In this perspective,

Rather than to view a long-term transaction as frozen in the detailed provisions of a lengthy contract, it may be more realistic and wiser to think of an international deal as a *continuing negotiation* between the parties to the transactions as they seek to adjust their relationship to the rapidly changing international environment in which they must work together.<sup>60</sup>

The parties’ choice to rely on a renegotiation clause may play a facilitative role in stabilizing long-term agreements such as international mining agreements, whose nature creates a high risk of instability.<sup>61</sup>

The existing literature clearly shows the lack of consensus in both scholarly opinions and arbitral awards with regard to the nature, validity, bindingness and enforceability of the renegotiation clause. Several schools of thought take sides on the issue. For the purpose of this study, these schools of thought have been classified in two groups. According to the first one,<sup>62</sup> the renegotiation or adaptation of the existing agreement should be carried out on condition that there is a specific provision providing for that. The investment contract being and remaining a concurrence of contractual parties’ will, no unilateral change of the agreed contractual regime can be undertaken even if the performance became onerous or fruitless for one the contractual parties. In contrast, the second school of thought<sup>63</sup> argues that even in the absence of such a provision, the renegotiation of the existing contract can be undertaken. The investment contract is seen as a framework within which parties negotiate continuously their relationship. This flexible approach has the advantage of leaving the sovereignty of the state intact.

---

<sup>58</sup> R Geiger (1974), JW Salacuse (2000), KP Berger (2003), H Mann (2011)

<sup>59</sup> Th Waelde & A Kolo (2000) 14.

<sup>60</sup> JW Salacuse(2000) 1362.

<sup>61</sup> ZA AL Qurashi (2005) 268.

<sup>62</sup> Th Waelde & A Kolo(2000) 1-2, JY Gotanda (2003) 1461, P Bernadini (2008)

<sup>63</sup> R Geiger (1974), JW Salacuse (2000) 1333, KP Berger (2003) 1377.

Notwithstanding, even those who argue that the renegotiation of an existing agreement can be undertaken without having been provided for in the contract, do recognize that the renegotiation of an existing agreement implies only an obligation of means. Parties are not required to reach an agreement.<sup>64</sup> Therefore, unless it is proved that the non-agreement was caused by the bad faith of the other side; the failing to agree does not constitute in itself a breach of obligation.<sup>65</sup>

The only problem is that the enforceability of the renegotiation clause is subject to two factors, namely its inclusion in the existing agreement and an express allocation of competence to the arbitral tribunal to adapt the contract.<sup>66</sup> This position has been clearly expressed by the arbitral tribunal in the AMINOL case:

[T]here can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to . . . modify a contract unless that right is conferred upon it by law, or by the express consent of the parties . . . arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal—constituted on the basis of a ‘compromissory’ clause contained in relevant agreements between the parties to the case . . . could not, by way of modifying or completing a contract, prescribe how a provision must be applied. For that, the consent of both parties would be necessary.

To circumventing this obstacle, Professor Berger advocates that parties should agree to permit an arbitral tribunal to modify the terms of the contract, for restoring the conditions which prevailed when they concluded the agreement.<sup>67</sup> For Professor Gotanda, such a solution can only be applied if one of the parties does not control the event that triggers the renegotiation or the adaptation process.<sup>68</sup>

None of the mentioned schools of thought touched on the renegotiation of an invalid contract. The reason could be that the solution given to such a problem in the domestic law to deem ineffective an illegal contract is the same used in international law. There is a compelling reason to support this view.<sup>69</sup>

Consequently, if a state decides to renegotiate a void contract but fails to reach an agreement, in its attempt to preserve the contractual relationship, the solution is to cancel the

---

<sup>64</sup> KP Berger (2003) 1367.

<sup>65</sup> JW Salacuse (2000) 1323.

<sup>66</sup> KP Berger (2003) 1379.

<sup>67</sup> KP Berger (2003) 1348-1350.

<sup>68</sup> JY Gotanda (2003) 1461

<sup>69</sup> Analysing the issue of corruption in international investment transactions, some commentators have argued that by virtue of Art. 5 § 2 b of the New York Convention, the arbitrator is obliged to render an internationally enforceable award and has to comply with international public policy. H Raeschke-Kessler in collaboration with D Gottwald (2008) 10.

illegal contract. In that circumstance, the unilateral decision of the state cannot amount to an unlawful act.

## **1.7 Research Methodology**

This paper is essentially a desk and library literature based research. It relies on the relevant primary and secondary sources of information pertaining to the topic. In addition, it widely recurses to historical and comparative approaches in analysing the facts surrounded the renegotiation process and its rationale. Primary sources of information include the: (a) Constitution of the Republic Democratic of Congo; (b) Congolese mining code, 1981; (c) Congolese mining code, 2002; (d) various mining agreements signed between the Congolese states-owned enterprises and mining corporates; and (e) published arbitral awards dealing with issues touching on renegotiation clauses.

Secondary sources of information include the:(a) relevant books and Journal Articles; (b) study reports on renegotiation clauses; (c) papers written by academics and researchers on issues relevant to the study; and (d)NGO's reports, speeches and daily newspapers containing information pertaining to the issues under discussion.

## **1.8 Outline of Chapters**

This study consists of five chapters.

Chapter one introduces the study.

Chapter two focuses on the legal framework of the mining sector in DRC.

Chapter three discusses the regulation of the renegotiation clause.

Chapter four focuses on the status of mining contracts after the renegotiation process.

Chapter five makes some concluding remarks for the study while at the same time offering some recommendations.

## **1.9 Scope and Limitation of the Study**

The study focuses on the renegotiation of mining contracts undertaken by the Congolese government between 2007 and 2010. Although the exploitation of natural resources in DRC has been widely documented, there was some limitation with regard to the access of renegotiated contract and full copies or texts of some international arbitration awards

relevant to the study. Hence, more reliance was placed on the summaries contained in some of the works referred proposal.

## **1.10 Conclusion**

This chapter discussed the introductory considerations to the dissertation. It covered the background surrounding the renegotiation process of mining contracts undertaken by the Congolese government between 2007 and 2010. It stressed the legal issues pertaining to renegotiating an existing investment agreement, including compliance with the principle of sanctity of contract, respect of national and international obligations that each contractual party may be subject to, failing to agree, conditions under which a third party should be called upon to adapt an existing contract and respect of the terms of reference that governed the renegotiation process undertaken by the Congolese government. Moreover, this chapter surveyed certain scholarly works renegotiation and adaptation of long-term investment contracts. Finally, this chapter outlined the dissertation's chapterisation.

## CHAPTER TWO

### THE LEGAL FRAMEWORK OF THE MINING SECTOR IN DRC

#### 2.1 Introduction

This chapter attempts to examine the relevant regulations an investor should abide by when he intended to operate in the Congolese mining sector lawfully. It essentially covers the pertinent national, international and extraterritorial regulations applicable to the mining operation. It also discusses the issue of supervision of the said regulations as well as their enforcement.

#### 2.2 The Applicable Regulations to the Mining Sector in DRC

The framework of the applicable regulations for the mining sector in DRC lies mostly in a set of multidisciplinary rules drawn from the national and international laws, contractual will of the parties expressed in accordance with the national law, and, to a certain extent, extra-territorial laws related to some segment of the mining operations and voluntary principles applicable to the industry.

##### 2.2.1 The National Law

At the national level, the mining code and its subsidiary mining regulations constitute the main source of the mining regulations. These texts were both drafted and respectively passed in 2002 and 2003, under the auspices of the World Bank. They are believed to be self-contained<sup>1</sup> rules in the sense that they cover almost every aspect<sup>2</sup> pertaining to the mining. In addition to these two texts, the mining regulation lies also in the Constitution of the Democratic Republic of Congo dated 18 February 2006, as amended on 20 January 2011, of which Article 34 sets the principles protecting the private property.

Nonetheless, there are a number of other regulations that cover issues outside the scope of the aforementioned texts but, still remain cardinal to lawfully operate in the mining sector in DRC. This is the case of the laws on commercial companies, the law on public enterprises,

---

<sup>1</sup> H André-Dumont 'Mining in the Democratic Republic of Congo' (June 2011) 37 *Rocky Mountain Mineral Law Foundation*.

<sup>2</sup> Such as: acquisition, transfer, operation and termination of mining and quarrying rights, environment protection, cultural heritage, protection of neighbouring communities, tax, customs and currency exchange incentives, force majeure, marketing and transport, pledges and mortgages, Government guarantees, etc.



as amended to date, the contract law, the land law, the labour code, the law of social security, the law against combating money laundering, etc.

Given that an assigned wording limits the breadth of this dissertation, it will only be possible to flesh out few of these regulations, focussing on the salient features in direct connection with the discussed topic.

### **2.2.1.1 The 2002 Mining Code**

The rules provided for into the 2002 Mining Code superseded those laid down by the 1981 Mining Law. Their purported aims were to address, amongst others, the issues related to the lack of clarity and attractiveness in the issuing of the mining rights witnessed in the former mining law. The intention was also to end tax exonerations that were disadvantageous to the Public Treasury.<sup>3</sup> In addition, the new Mining Code was designed to bring more transparency in the management of the mining sector.<sup>4</sup> The 2008 assessment report commissioned by the World Bank considers the novel code consistent with the international standard and a foundation for a sustainable development of the DRC's mineral resources.<sup>5</sup>

One of the big innovations of the new mining code is to suppress the contentious mining concession scheme provided for into the Mining Law of 1981<sup>6</sup>. This scheme subjected the ownership of mineral rights by private corporations to a partnership agreement with a state-owned enterprise or a specific agreement with the Congolese state. In the novel code such ownership is opened up without restriction to the private corporations, inasmuch as land for exploration and/or exploitation is vacant.<sup>7</sup> The 2002 Mining Code has made it possible for investors whose partnerships with the state-owned enterprises were fully compliant with the 1981 Mining Law to remain in force until their expiry; unless it takes option to subject the said partnership to the new the new code.<sup>8</sup>

The Article 3 of the new mining code lays down the principle of State ownership of the mining resources. Eligible individuals and corporations can acquire mining or quarrying

---

<sup>3</sup> H André-Dumont (Jaune 2011) 37.

<sup>4</sup> M Mazalto 'Réforme de la législation minière et rôle des institutions multilatérales de financement dans le développement du secteur minier en RDC' (2 April 2004) 8 Colloquium on Exploitation of Natural Resources in Conflict situations : International Liability and Prospect of Solution in DRC, Montréal (Canada).

<sup>5</sup> World Bank 'Democratic Republic of Congo: Growth with Governance in the Mining Sector' (Mai 2008) 17 report No 43402-ZR.

<sup>6</sup> World Bank (Mai 2008) 43.

<sup>7</sup> See Article 23 of the 2002 Mining Code.

<sup>8</sup> See Article 340 of the 2002 Mining Code.

rights on a first come, first serve basis, subject to compliance with the law.<sup>9</sup> However, the new Mining Code establishes a strict delineation between the ownership of the land and that of the mining rights.<sup>10</sup> The mining title holder is not necessarily entitled to the land above the mine, unless he applied for the ownership of the land.

Any investor in possession of a valid mining right can take part in exploitation of mineral substances specified in its permit. Nonetheless, non-Congolese nationals cannot engage into artisanal mining. The 2002 Mining Code establishes a clear distinction between mining rights and quarrying rights. Where Mining rights can be requested either for industrial purpose (industrial mining) or small-scale mining, such an option is not available for quarrying rights. The Articles 50 to 96 of the 2002 Mining Code lay down principles for industrial mining, whereas the Articles 97 to 108 provide rules for the small-scale mining. Moreover, the new Mining Code set rules for artisanal mining<sup>11</sup>.

Three types of industrial mining rights exist, namely research (exploration), exploitation (operation) and tailing exploitation permits. The small-scale mining category includes a sole mining right: the small scale mining exploitation permit. Although they nearly produce 90 per cent of the mineral exported by the DRC, the 2002 Mining Code does not provide for mining rights to artisans<sup>12</sup>. Provincial authorities deliver mere ‘digger’s card’, for the equivalent of U.S. \$ 25 per year, to authorize the diggers to mine in a special area called artisanal exploitation zone.<sup>13</sup> Finally, quarrying rights are rules by the Articles 229 to 167 of the new Mining Code. Two types of quarrying rights are present, namely the exploration licence of quarry products and the exploitation (operation) licence. This latter can be issued on temporary or permanent basis.

Number of requirements, of which the non-compliance with may result in cancelation of mining rights, affect the granting or maintenance of each and every one of the mining rights cited above. For instance, the new Mining Code limits the issuing of the exploration permit

---

<sup>9</sup> See Articles 23 to 27 of the 2002 Mining Code

<sup>10</sup> See Article 3 paragraph 3 of the 2003 Mining Code and G Bakandeja *Droit Minier et des Hydrocarbures en Afrique Centrale* (2009) 97 Larcier (eds), Vale Columbia Center on Sustainable International Investment (VCC) ‘Extractive Industries and Sustainable Development: The Challenges of Implementation’ (October 2010) 3 Background Notes of the Fifth Columbia International Investment Conference jointly organised by the Columbia Law School and The Earth Institute at University of Columbia on 27- 28 October 2010.

<sup>11</sup> See Articles 109 to 126 of the 2002 Mining Code.

<sup>12</sup> See World Bank (Mai 2008) 10 and 60.

<sup>13</sup> See G Bakandeja (2009) 116 to 118.and World Bank (2008) 60.

is subject to the submission of a proof of minimum financial capacity.<sup>14</sup> By contrast, it allows an investor to acquire the exploitation permit on the condition that the latter submits an application including, among others, a feasibility study together with a technical work plan and a rehabilitation plan. In addition, the new Mining Code requires an investor to demonstrate the existence of financial resources for carrying out its project from the building of facilities to the closure of mine, as well as the transfer of 5% free of charges and non-dilutable shares to the Government.<sup>15</sup>

Besides, the new Mining Code provides for environmental and safety provisions. The issuing of a temporary quarrying exploitation licence and the operation of an exploration permit are subject to the prior approval of a mitigation and rehabilitation plan (MRP). However, the granting of any other exploitation permits-tailing operation included, or licence is conditional on the prior approval of an environmental impact study (EIS) and an environmental management plan (EMP).<sup>16</sup>

Furthermore, any holder of a mining or quarrying right shall, subject to the nature of his mining or quarrying rights, commence the work within a specific time period-either six months, one or three years, of the date the title evidencing his right is issued.<sup>17</sup> A mining titleholder shall also pay the annual surface area fees per quadrangle relating to his title, before the deadline set by the law.

Lastly, the 2002 Mining Code provides for a strict liability<sup>18</sup> scheme, in the sense that the victim does not need to demonstrate the fault of the mining operator. The mere fact of proving a connection between the damage suffered by the victim and the mining operation is enough to trigger the compensation.<sup>19</sup> Moreover, without prejudice to the transferee's right of recourse against the transferor, both the transferor and the transferee bear the liability for damage causing before the transfer.<sup>20</sup>

---

<sup>14</sup> Some commentators have seen the amount required negligible and therefore worthy to be revised. See World Bank (2008) 17.

<sup>15</sup> Article 71 of the 2002 Mining Code.

<sup>16</sup> Articles 407 and 407 of the 2003 Mining Regulation.

<sup>17</sup> Article 197 of the 2002 Mining Code.

<sup>18</sup> Article 280 of the 2002 Mining Code.

<sup>19</sup> H André-Dumont (June 2011) 41.

<sup>20</sup> Article 192 of the 2002 Mining Code.

### 2.2.1.2 The Laws on Commercial Companies

The laws applicable to commercial companies operating in DRC encompass regulations mostly borrowed from Belgian or French law. The main regulations are: (a) the Decree of the King-Sovereign dated 27 February 1887 on commercial companies, as amended to date and its related regulations; (b) the Royal Decree of June 22, 1926 on companies limited by shares, as amended to date and its related regulations; (c) the Decree on the commercial registry enacted on March 06, 1951, as amended to date; (d) the Decree passed on August 13 1973 related to the national identification number; and to a certain extent, (e) the Decree enacted on June 09, 1966 pertaining to the notarized acts.

In accordance with the mining law, the laws on commercial companies do not stop a foreign investor from operating in DRC. The relevant features to point out, with regard to the mining operation, relate to the requirements an investor could be subject to when operating as a foreign company or incorporated subsidiary. According to the Articles 8 and 9 of the Decree of the King-Sovereign dated 27 February 1887 on commercial companies, as amended to date, a lawfully incorporated foreign company can operate in DRC, subject to the registration of its Articles of association with the commercial registry and the publication thereof in the official gazette. When operating as a subsidiary, an investor shall abide by the same conditions. In this latter instance, the registration is conditional upon the notarization of the Articles of association.<sup>21</sup>

As H André-Dumont wisely argued, investors mainly use two types of domestically incorporated company to carry on mining activities.<sup>22</sup> The first is the private limited liability company (*société privée à responsabilité limitée* “SPRL”). This company can amount up to a minimum of two shareholders but is not eligible to benefit from tax deductions for interest on shareholders’ advances.<sup>23</sup> The second is the company limited by shares (*société par actions à responsabilité limitée* “SARL”). This company is subject to a minimum of seven shareholders as well as a presidential decree approving its incorporation and main changes to its bylaws, additionally to the general conditions imposed to other categories of company.<sup>24</sup>

---

<sup>21</sup> Article 2 of the Decree of the King-Sovereign dated 27 February 1887 on Commercial Companies, as amended to date.

<sup>22</sup> H André-Dumont (Jaune 2011) 36.

<sup>23</sup> H André-Dumont (Jaune 2011) 36.

<sup>24</sup> Article 1 of the Royal Decree of June 22, 1926 on companies limited by shares, as amended to date.

### 2.2.1.3 The Contract law

As already mentioned, the new Mining Code suppresses the conventional scheme laid down by the 1981 Mining Law. There is no necessity to enter into a partnership with a state-owned enterprise for operating in the sector, given that the granting of mining and quarrying rights is done on the basis first come first serve. Nonetheless, the 2002 Mining Code has made it possible for any exploitation licence holder to lease and/or transfer its rights.<sup>25</sup> However, it does not give any model of contract to be used especially when the lessor or transferor is a state-owned enterprise.

The only existing guidance refers to a compulsory insertion in the contract of an accelerated termination clause in case the lessee fails to comply with the existing laws. In addition, the new Mining Code requires a clause of the joint and several liability of the lessor and the lessee vis-à-vis the State to be included in the contract as well as the clauses setting out the conditions for the maintenance and the reinvestment necessary for the appropriate exploration and development of the deposit.<sup>26</sup> Furthermore, the exploration permit holder is entitled to enter freely into an option contract<sup>27</sup> with a third party. Once again, the 2002 Mining Code gives no guidance in the hypothesis whereby one of the contracting parties is a state-owned enterprise.

Furthermore, the new Mining Code is silent on the issue whether a state-owned enterprise can enter into a public private partnership with an investor for operating the mining or quarrying right belonging to the former. No apparent ground exists to hold such a convention unlawful, inasmuch as it derives from a concurrence of contractual parties will. Notwithstanding, prospective contractual parties shall keep in mind that, without prejudice to the provisions provided for in the new Mining Code and in the Public Enterprises Law, their contract will be subject to the Contract Law.

In DRC, the Contract Law refers to Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations, as amended. This text contains provisions mostly inspired by the Napoleonic Code as it is the case of the majority of civil law countries. The Congolese contract law does not lay down so many specific rights and duties which shall be protected

---

<sup>25</sup> See the Articles 65, 89, 100, 137, 148 and 177 to 195 of the 2002 Mining Code.

<sup>26</sup> See Articles 177, 186 and 192 of the 2002 Mining Code.

<sup>27</sup> Which is mainly that conferring on the beneficiary the right to obtain a participation in the exercise of the mining exploitation right deriving from an exploration licence. See Article 193 of the 2002 Mining code.

and enforced; it rather comprehends a number of limiting principles, subject to which the contractual parties may create their own rights and duties. Then, the law will uphold only those rights and duties created in accordance with the principles thereof.

One of the prominent principles laid down by the contract law is that lawfully concluded agreements (conventions) hold the place of law for those who make them.<sup>28</sup> What results from this principle is, amongst others, that for a convention to be legally enforceable, it shall not contravene any existing law. Besides, according to the Article 8 of the same law, a contract is valid when: (a) There is a licit consent between contracting parties; (b) the said parties agree within their contractual capacity; (c) the agreement is based on a certain object; (d) the cause of the obligation is lawful. These principles are supplemented by those leading the types, proofs and termination of contractual obligations. Therefore, a mining agreement will be governed by the contractual will of the parties provided that it was expressed in accordance with the principles set out in the contract law. This is not the end for the mining project is sourced the principles of international law.

## **2.2.2 The International Law**

At the international level, the applicable law for the mining operation in DRC covers two categories of legislation namely: Hard law and soft law. The former encompasses specific legally binding obligations that delegate authority for interpreting and implementing the law<sup>29</sup>; whereas the latter refers to the hypothesis whereby “legal arrangements are weakened a long one or more of the dimensions of obligation, precision, and delegation.”<sup>30</sup> The soft law facilitates compromise, therefore, collaboration between actors with different interests, value, and degree of power.

### **2.2.2.1 The Hard Law**

The binding international principles applicable to the mine operating in DRC covers, without prejudice to the international treaties related to human rights, labour and environment issues, the multilateral and regional economic or investment treaties to which the State is party to or has adhered to namely, WTO, WIPO, ISCID, OHADA, SADC, etc. It specifically refers to

---

<sup>28</sup> Article 33 paragraph 1 of the Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations.

<sup>29</sup> KW Abbott and D Snidal ‘Hard and Soft Law in International Governance’ (Summer 2000) 421 *International Organization* No 54.

<sup>30</sup> KW Abbott and D Snidal (Summer 2000) 422.

the bilateral investment treaties signed by the Congolese state with other countries including Switzerland, USA, UK, France, Germany, Rep of Korea, Italy, Guinea, Egypt and Belgium.<sup>31</sup> Only four of these agreements have entered into force (those with France, Germany, Switzerland and the US).<sup>32</sup>

Some salient features can be raised in connection with investment treaties. The first is the principle of non-discrimination; the second is the fair and equitable treatment, and the third is the regulation of expropriation or takings and related compensation. In addition, investment treaties may provide for the strengthening of the legal value of the investment contracts by requiring the host state to respect its commitments vis-à-vis investors originated in the other state party to the investment treaty.<sup>33</sup> This kind of provision is known as ‘umbrella clause’.<sup>34</sup> The above list is just indicative and should not in any event be considered as being exhaustible salient features of investment treaties.

The non-discrimination principle underpins most treaties and agreements governing investments. It provides a two-pronged obligation: (a) a government shall not treat companies controlled by nationals or residents of another country no less favourable than domestic companies in like situations (national treatment); (b) or differentiate between foreign companies from different origin in like situations (most-favoured national treatment). It must be borne in mind that the principle of non-discriminatory does not suggest the host state to provide for advantages to foreign investors.<sup>35</sup>

The fair and equitable treatment of investors is a concept that has fuelled a lot of controversies between host State and capital importing State, for it was perceived as a likely ‘catch all’ provision that could be invoked in respect of almost any adverse treatment of an

---

<sup>31</sup> UNCTAD ‘Bilateral Investment Treaty’ available at <http://www.unctadxi.org/templates/docsearch.aspx?id=779> last updated 14 November 2011 accessed 16 February 2011.

<sup>32</sup> H André-Dumont (June 2011) 50.

<sup>33</sup> L Cotula ‘Investment Contracts and Sustainable Development How to make contract for fairer and more Sustainable natural resource investments’ (2010) 14 *IIED*.

<sup>34</sup> For more information on the umbrella clause, see Th Walde ‘The Umbrella (Or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on original Intentions and Recent’ (2004) *CEPMPL/Dundee*, SW. Schill ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’ (September 2008) *IILJ* Working Paper.

<sup>35</sup> For further information about the evolving, scope and implementation of the principle of non-discrimination see S Montt *State Liability in Investment Treaty Arbitration* (2009) Oxford & Portland (eds), NF Diebold ‘Non-Discrimination and the pillars of International Economic Law’ (2010) *IILJ* Emerging Scholars Paper 18, OECD ‘Non-Discriminatory Treatment for National and International Investors’ in Policy Framework for Investments, available at [http://www.oecd.org/document/29/0,3746,en\\_39048427\\_39049329\\_39634141\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/29/0,3746,en_39048427_39049329_39634141_1_1_1_1,00.html), accessed 17 February 2012.

investor.<sup>36</sup> The 2007 UNCTAD report on bilateral treaty, defines this principle as that providing a basic standard, detached from the host country's domestic law, against which the behaviour of the host country vis-à-vis foreign investments can be assessed.<sup>37</sup> It covers amongst other issues: (a) stability, predictability and consistency of the host state's legal framework; (b) protection of confidence and legitimate expectation of the investor; (c) administrative and judicial due process; (d) transparency; (e) reasonableness and proportionality.<sup>38</sup>

The regulation of expropriation or takings is also another salient feature of the international investment treaty that is worth mentioning. The concept of expropriation refers to “an outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person.”<sup>39</sup> It may even occur indirectly, from a decisive act that apparently did not imply any taking but turned out to deprive foreign investors of their property rights. Regardless of the way of its occurrence, a lawful expropriating act shall meet following requirements: (a) it must be enacted for a public purpose; (b) it must not be discriminatory; (c) it shall imply a prompt, full and adequate compensation to the dispossessed parties.

### 2.2.2.2 The Soft Law

The mining operation is subject to another broad type of international rule called soft law. As its name suggests, it consists of non-judiciable international standard mostly developed by subjects of international relations on a single or collaborative basis. It aims at enhancing the responsibility of corporations in almost every aspects of/ or impacted by their business operation, from the outset of the mining project to the closure of the mine. It covers various topics such as human rights, indigenous people and woman, labour, health and security, land use and displacement, transparency, reporting, etc.

---

<sup>36</sup> F Marshall 'Fair and Equitable Treatment in International Investment Agreements' *Issues in International Investment Law* (2007) 2 Background Papers for the Developing Country Investment Negotiators' Forum Singapore 1 – 2 October 2007 *IISD*.

<sup>37</sup> UNCTAD 'Bilateral Investment Treaties 1995 – 2006: Trends in Investment Rulemaking' (2007) 28 available at [http://www.unctad.org/en/docs/iteija20065\\_en.pdf](http://www.unctad.org/en/docs/iteija20065_en.pdf) accessed on 17 February 2012.

<sup>38</sup> See International Law Association (ILA) German Branch-Working Group, 'General Public International Law and International Investment Law A Research Sketch on Selected Issues' (December 2009) 14-22. For further information on the definition, evolving, scope, interpretation and implementation of the fair and equitable principle see OECD 'Fair and Equitable Treatment Standard in International Investment Law' (September 2004) available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf> accessed on 17 February 2012, R Dolzer & Chr Schreuer 'Principles of International Investment Law' (2008) Chapter 7 *Oxford University Press* (eds), UNCTAD (2007), F Marshall (2007).

<sup>39</sup> A Reinisch, 'Expropriation' in Oxford University Press (eds) *The International Handbook of International Investment* (2008) 408.



Although there is no hierarchy between existing international standards, an investor shall pay much more attention to those provided for within the instruments Congolese state and its home state have adhered to, as well as the standards specified by the lenders and to those that are widely accepted. In particular, the mining project shall comply with the standards set out by the OECD Guidelines for Multinational Enterprises, Extractive Industry Transparency Initiative (EITI), Kimberly Process, IFC Corporation's Policy on Environment and Sustainability, World Bank Pollution Prevent Abatement Handbook, Equator Principle. As in former instances, this list is just indicative and should not in any event be considered as providing a comprehensive survey of the existing standards.

The OECD Guidelines comprise a set of voluntary principles in all the major areas of any business operation, including employment and industrial relations, environment protection, information disclosure, combating bribery, consumer interests, science and technology, completion, and taxation. Its latest update completed in 2011 encompasses, among others, new recommendations on human rights consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.<sup>40</sup>

EITI is a multi-stakeholder initiative to monitor the flow of resource revenues in order to insure a sound natural resource management. It came into being in 2003, following the momentum of the U.K. government, several large extractive industry companies and other stakeholders. It commits participants to disclose payments to governments (or received by companies) consequent to the extractive industry operations in countries that have joined that initiative. Its framework encompasses twelve principles pertaining to resources management, transparency, accountability, sustainable economic growth, and sovereignty, and contains six criteria designed to ensure that signatories implementing the initiative comply with the defining standards. The DRC is an EITI candidate since February 2008.<sup>41</sup>

The Kimberley Process Certification Scheme (KPCS) is another multi-stakeholder instrument for extractive industry designed to stem the trade of conflict diamonds. It entered

---

<sup>40</sup>For further information see: OECD 'OECD Guidelines for Multinational Enterprises'(2011) *OECD Publishing* available at <http://dx.doi.org/10.1787/9789264115415-en> accessed on 12 January 2012.

<sup>41</sup> For more information please consult <http://eiti.org>.

into force in 2003, pursuant to UN General Assembly Resolution 55/56 of 1 December 2000, and concerns some 75 countries. DRC implemented the KPCS since May 31, 2003.<sup>42</sup>

The IFC Corporation's Policy on Environment and Sustainability, World Bank Pollution Prevent Abatement Handbook and the Equator Principle are performance standards developed by lenders. The two first standards provide benchmark used in a project financed by the IFC or World Bank. The Equator principle is applicable to project funded by commercial lender that have signed up to the principles.<sup>43</sup>

### **2.2.3 Extraterritorial Legislation**

The last group of principles applicable to the mining operation in DRC finds its origin into some extraterritorial legislation. It consists of foreign legislation that may impact on mining operation conducted by companies linked to the foreign state whereby the said legislation was enacted. Succinctly, one can mention the United States Foreign Corrupt Practices Act (FCPA) which makes it unlawful for certain classes of persons and entities to make payments to foreign government officials for the purpose of obtaining or retaining business. The UK Bribery Act also contains provisions that have an extraterritorial coverage. Lastly, the mining operation in DRC might be subject to the Cardin-Lugar provision in the US Dodd-Frank Wall Street Reform and Consumer Protection Act (known as Dodd-Frank Act). The Cardin-Lugar provision names an amendment to the Dodd-Frank Act submitted by Senators Cardin and Lugar- based on the Energy Security through Transparency Act (S. 1700) of 2009. Following this amendment, all listed extractive companies shall disclose their payments in all the countries where they operate.<sup>44</sup> Another key provision of the Dodd-Frank Act that is worth mentioning is the section 1502, which, in accordance with the EITI above mentioned, requires companies that utilize certain conflict minerals to conduct and report due diligence on their supply chains; in order to ascertain whether the sourcing of these minerals is supporting the on-going conflict in the Democratic Republic of Congo.

---

<sup>42</sup> See Arrêté ministériel n° 193/CAB.MINES-HYDRO/01/2003 du 31 mai 2003 portant application et suivi du programme international du processus de Kimberley en République Démocratique du Congo. For further information on the KPCS consult <http://www.kimberleytprocess.com>.

<sup>43</sup> For further information on the Equator principle consult <http://www.equator-principle.com>.

<sup>44</sup> Section 1504 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act.

### 2.3 The Supervision of the Mining Regulation.

The preceding section discussed the normative framework applicable to the mining operations in DRC. It has shown that the said normative framework includes, without prejudice to the contractual will of the parties, large number of national, international even extraterritorial laws. To make these regulations effective, there should be a body empowered to oversee the implementation of existing regulations, especially with regard to the issuing or withdrawal of the mining or quarrying licence. This body shall also look at the public-private partnerships the state-owned enterprises holding a mining title enter into. The same analysis should be undertaken with regard to the contracts signed with the lenders or insurers. Last but not least, the bodies supervising the acquisition of the legal personality should be examined.

It must be borne in mind that the Congolese mining legal framework does not empower a single regulatory body to supervise every segment of the mining operation. As a result, several institutions within and outside the Mining Ministry supervise the implementation of the mining regulations.<sup>45</sup> Notwithstanding, some issues, such as the compliance to the law of the public-private partnership whereby the state-owned enterprises entered into<sup>46</sup> or the contract signed between investors and lenders or insurers, witness an incredible lack of supervision. There is not either a well-established nexus of sharing information between existing supervisory bodies even between institutions attached to the Mining Ministry. Consequently, the lack of compliance with the law as well as the fraud is wildly disseminated in the Congolese mining sector.<sup>47</sup>

The main supervisory body<sup>48</sup> involves in the mining operation in DRC are:

- (a) The President of the Republic, who is solely entitled to (i) classify, déclassify or reclassify mineral substances as mines or as quarry products, or vice-versa; (ii) declare, classify or déclassify an area as a prohibited area for mining activities or quarry works; (iii) declare, classify or déclassify a mineral substance as a 'reserved substance'; and (iv) confirm the reservation of a deposit which is subject to tender pursuant to a Ministerial Decree. He exercises his powers by Ordinances passed on his own initiative or on the proposal of the Minister, after

---

<sup>45</sup> See World Bank (2008) 37.

<sup>46</sup> World Bank (2008) 41.

<sup>47</sup> G Bakandjeja (2009) 135 and 146 to 149, World Bank (2008) 41.

<sup>48</sup> See Articles 9 to 16 of the 2002 Mining Code, World Bank (2008) 37 to 39, G Bakandjeja (2009) 52 to 60 and H André-Dumont (June 2011) 47 to 49.

having obtained the opinion of the Geological Department or the Mining Registry.

- (b) The Minister of Mines, who has, amongst others, jurisdiction over (i) the granting, refusal and cancellation of mining rights; (ii) the creation of artisanal exploitation zones as well as the granting and withdrawal of approval for the purchasing of artisanal exploitation products; (iii) the supervision of the institutions, essentially public or semi-public entities, which carry out mining activities and quarry works. He exercises his powers by way of Decrees.<sup>49</sup>
- (c) The Governor of the Province is responsible for: (i) The issuing of traders' cards for artisanal exploitation products; and (ii) the decision to open quarries for the purposes of carrying out public utility works on public land.
- (d) The Head of the Provincial Mining Division has jurisdiction over (i) the issuing of artisanal miners' cards; and (ii) the granting of exploration rights for quarry products, and of permanent or temporary quarry exploitation rights for standard construction material.
- (e) The Mining Registry or *CAMI*, a semi-autonomous agency within the Ministry of Mines. It is in charge of administrative proceedings concerning the application for, and registration of mining rights, as well as the withdrawal, cancellation and expiry of those rights.
- (f) The Directorate of Mines is in charge of the monitoring and assessing of mining activities with regard to safety, health, work practices, production, transport, sale and social matters, and for establishing statistics, inspecting mining operations and other tasks.
- (g) The Small-scale and Artisanal Mining Extension Service or *SAESSCAM*. It is an office within the Mining Ministry which aims at facilitating and framing small-scale mining and artisanal mining.
- (h) The Diamond Expertise and Evaluation Office or *CEEC* is the official state agency responsible for evaluation and certification of diamonds. It is involved in the implementation of the Kimberley Process, and the valuation of the exported gold and diamond for ensuring that the government receives their fair market value. In any case, the affectivity of its operation remains questionable.
- (i) The Central Bank of Congo or *BCC* which has jurisdiction over foreign exchange control and exports.

---

<sup>49</sup> For more information about the Minister of mine, see <http://mines-rdc.cd> .

- (j) The National Comity of The EITI or *CN-ITIE/RDC* which is in charge of the monitoring of the implementation of the principles and criteria of the Extractive Industries Transparency Initiative.
- (k) The institutions supervised by the Finance ministry (namely *DGI*, *DGRAD* and *DGDA* previously called *OFIDA*) which are in charge of the collection of taxes, duties and royalties.<sup>50</sup>
- (l) The President of the Republic and the Commercial Registry's Clerk who are respectively empowered with regard to the acquisition of legal personality of companies shaped into *SRPL* and *SARL*.

## 2.4 The Enforcement of the Mining Regulation

The normative frameworks applicable to the mining operation are enforced first and foremost by supervisory bodies mentioned in the preceding section. These bodies are empowered to implement the law related to their speciality. Unfortunately, this is not the case in the ground. Supervisory bodies are very often remiss in aligning mining operation with the applicable law. The 2008 World Bank report on the mining sector in DRC clearly stated this:

[T]he monitoring and evaluation of work performed by [exploration] permit holders is non-existent. The Directorate of Mines, which is nominally responsible for inspections, does not have the personnel, equipment, or presence in the mining areas to conduct the inspections. As a result, the Government is largely ignorant of a company's compliance with its work program obligations, stipulated in the Mine Law (...).The situation is particularly acute with respect to compliance with environmental, health, and safety standards. In addition, (...) permits may change hands or be leased to other companies without the knowledge of the Government and in violation of the Mine Law.<sup>51</sup>

In addition to the supervisory bodies, laws applicable to the mining operation are enforced by national courts and tribunals. According to the Article 46 of the 2002 Mining Code, if the Mining Registry does not proceed to the registration of mining or the quarrying right within the conditions and time frame set forth therein, the applicant can seek the granting of mining or quarrying rights by submitting a request to the competent Tribunal. The Article 315 of the

---

<sup>50</sup> See World Bank (2008) 24 to 28.

<sup>51</sup> World Bank (2008) 23.

2002 Mining Code numbers supervisory body decisions which can be challenged before an administrative court, grounding on the new Mining Code provisions. I must be noted that any aggrieved party-participant or affected by the mining operation, can seek the relief by filing a case to the competent Tribunal grounding upon other applicable legislations.

Lastly, domestic or international arbitral tribunal can enforce mining regulations<sup>52</sup> subject to mining related matters that are excluded from their competence.<sup>53</sup> This recourse operates as a last resort after the exhaustion of the local remedies. In addition, when it occurs within an international forum, it shall take place in French; refer to the provisions of the 2002 Mining Code and laws of DRC, and to its own rules of procedure.

## 2.5 Conclusion

This chapter discussed the regulations an investor willing to lawfully operate in the mining sector in DRC should abide by. It showed that the mining operation is not governed by a single rule but a broad range of regulations including national, international and extraterritorial laws. This chapter also examined the issue of supervision and enforcement of the applicable regulations. As with the governing laws, the Congolese mining sector witnesses a large number of supervisory bodies. However, these latter are often remiss to align operating mines with the applicable law. In addition, this chapter showed that the enforcement of the mining regulations occurs at the judicial and non-judicial level, through the proceedings filed before national courts and tribunals as well as national and international arbitral fora.

---

<sup>52</sup> See Articles 46, 57 and 317 of the 2002 Mining Code. For further information see H André-Dumont 'Dispute and their Resolution under the Mining Code 2002 in the Republic Democratic of Congo' (November 2007) 362 to 371 *Journal of Energy & Natural Resources Law* Vol 4 No 4.

<sup>53</sup> According to the Article 319 of the 2002 Mining Code, the recourse to international arbitration shall be done under the ICSID forum.

## CHAPTER THREE

### REGULATING THE RENEGOTIATION OF AN EXISTING AGREEMENT

#### 3.1 Introduction

The two preceding chapters respectively examined the introductory considerations to this study and the legal framework applicable to the Congolese mining sector. While chapter four considers the status of the mining contracts renegotiated by the Congolese government between 2007 and 2010, this chapter examines the principles surrounding renegotiation of an existing agreement. It attempts to respond to such questions as: does renegotiation an existing commitment acceptable in law? If so, which conditions should govern a sound renegotiation of an existing contract?

This chapter also examines, among others, the conceptual, theoretical and practical advantages of a flexible long-term investment contract approach rather than that in which contractual parties cannot modify the existing regime impacted by an unforeseen event. It discusses the jurisprudential, economic and political reason underpinning the renegotiation of an existing agreement. It argues that, subject to the feature of the applicable law, a long-term investment contract should provide for a renegotiation clause, for any subsequent request of renegotiation to be lawful. The important argument, it asserts, is that the flexibility of the contractual regime brings more stability in the host state investor relationship.

#### 3.2 Renegotiability of Long-Term Investment Agreements: Stability vs Flexibility

The concept of renegotiation, as an international agreement management tool, came into being in the second half of the last century as a result of the tension between investors and developing countries endowed with natural resources.<sup>1</sup> While the former always sought stability guaranty to secure their up-front investment, the latter looked for a bigger control over their non-renewable natural resources. The host state-investor tension extended even to developed world where the increasing of profit in natural resource sector has triggered adjustments in the contractual regime, mainly by way of new windfall taxes measures or

---

<sup>1</sup> Th Walde 'Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development' (Summer-Fall 1978) 275-278 *Lawyer of the Americas* Vol 10 No 2 Symposium Issue: Legal Problems for Multinational Corporations

increasing royalties.<sup>2</sup> Renegotiating an existing contract reveals also tension between the compulsory nature of the legal instrument of the contract and the economic difficulties to abiding by contractual commitment, in supervening of a substantial change of circumstances badly impacting on the project profitability.<sup>3</sup> Long-term contract requires particular tool to mitigate risks pertaining to its nature, such as long duration, large amount of up-front capital necessity, stakeholder interest and the commodity price volatility and host government intervention.

### 3.2.1 Stability in the Contract (or *Pacta Sunt Servanda*) Principle

The stability in the contract (or *Pacta Sunt Servanda*) principle refers to a classical theory according to which a contract shall be honoured for it is an expression of parties' free will. It derives from natural justice<sup>4</sup> and economic necessity<sup>5</sup> which convey the idea that nothing can be done without reliable promises. It is a cardinal principle of contract law recognized worldwide. International Law embodied it in Articles 26 of the Vienna Convention of Law of Treaties and 1.3 of the UNIDROIT Principles of International Commercial Contracts. Congolese law provided the said principle in Article 33 paragraphs 1 to 3 of the Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations.

The principle of sanctity of contract applies to agreements between states, but also to those between host state and investor. In the context of mining contract between host state and investor, it suggests that the agreed regime should be implemented to the letter no matter how cumbersome it may prove to be. This interpretation seems to be unproved yet. No legal system gives a stiff meaning to the sanctity in the contract principle.<sup>6</sup> This is because "there has been an increase in the number of vitiating factors the law of contract recognises, based on the acceptance of the idea that the law should take into consideration the relative

---

<sup>2</sup> See E Engel & R Fischer 'Optimal Resource Extraction Contracts under Threat of Expropriation' (2008) 1 *Cowles Foundation for Research in Economic* Cowles Foundation Discussion Papers 1636, M Maniruzzaman 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (August 2009) 86 *Texas Journal of Oil, Gas, and Energy Law* Vol 5 No 1.

<sup>3</sup> Th Walde & A Kolo 'Renegotiation and Contract Adaptation in the International Investment Project: Applicable Legal Principles & Industry Practices' (2000) 3 *CPML/Dundee* Vol 5-3(a).

<sup>4</sup> H Wehberg 'Pacta Sunt Servanda' (October 1959). 775 *The American Journal of International Law* Vol 53 No 4.

<sup>5</sup> PJ Mazzacano 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance: the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2011) 6 *Nordic Journal of Commercial Law*.

<sup>6</sup> See R Geiger 'The Unilateral Change of Economic Development Agreements' (1974) 78 *The International and Comparative Law Quarterly* Vol 23 No 1, Th Waelde & A Kolo (2000) 4, M Sornarajah *The International Law on Foreign Investment* (2004) 421 Second Edition Cambridge (eds).



bargaining strengths of the parties”.<sup>7</sup> These factors are sourced in the classic contract law<sup>8</sup> whereby parties to a contract could be relieved from their commitments in case of duress or strong taking advantage of the weak. In International Law, the limits to the said principle stem from the notion of fundamental change of circumstances (or *rebus sic stantibus*) as provided for in Article 62 of the Vienna Convention on Law of Treaties. The UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) provide the same kind of counter-principle to the *pacta sunt servanda* in the notion of hardship and force majeure as stipulated in its Articles 6.2.1-2 and 7.1.7. The same is to be said with regard to Article 79 of the Convention of International Sale Good (CISG) which provides for excuses in case of non-performance. When the common law counter-balances the *pacta sunt servanda* principle with theories such as frustration, hardship, estoppel, public interest; the civil law jurisdictions limit the aforesaid principle by theories such as lésion, imprévision, force majeure, etc.<sup>9</sup>

However, investors involved in long-term agreements with developing counties<sup>10</sup> are inclined to perceive exceptions to the *pacta sunt servanda* principle as risks that lessen the predictability of the contract; in particular, its legal certainty.<sup>11</sup> In light of this purported weakening of the contractual commitment, they developed special clauses aimed at freezing the contractual regime over the course of its implementation, called stabilization clauses<sup>12</sup>. These clauses play the role of a risk-mitigation tool that protects investments from what investors perceive as ‘sovereign or non-commercial’ risks, namely changes in law, nationalization, expropriation, nullification of the contract pursuant to the national law, etc. Lenders consider them as an essential prerequisite to the ‘bankability’ of the project in certain market. They shield investment from discriminatory and arbitrary measures that might impact it adversely. Sometimes, they even act as an incentive for attracting investors.

---

<sup>7</sup> M Sornarajah (2004) 421

<sup>8</sup> Th Waelde & A Kolo (2000) 4

<sup>9</sup> For developments in these major systems of law, see R Geiger (1974) 78-101, J Hermida ‘Convergence of Civil Law and Common Law Contracts in the Space Field’ (2004) 17-21 *Hong Kong Law Journal* vol 34 Part 2, PJ Mazzacano (2011) 12-54.

<sup>10</sup> For historical evolvement of the contractual stability management, see PD Cameron ‘Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors’ (2006) 15 *AIPN*.

<sup>11</sup> A Faruque ‘Validity and Efficacy of Stabilisation Clauses: legal Protection vs. Functional Value’ (2006) 322 *Journal of International Arbitration* Vol 23 No 4.

<sup>12</sup> For further information on the nature, scope, implementation and interpretation of stabilization clauses, see Th Waelde & G Ndi ‘Stabilizing International Investment Commitments: International Law Versus Contract Interpretation’ (1996) *International Law Journal* 216, PD Cameron (2006), A Faruque (2006), A Shemberg ‘Stabilization Clauses and Human Rights’ (March 2008) research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights available at <http://www.ifc.org/ifcext/.../StabilizationClausesandHumanRights/.../Stabiliz> accessed 28 October 2011.

Notwithstanding, stabilisation clauses seem to conflict with other international principles. For instance, they clash with state's rights and obligations such as sovereignty over its natural resources, the state's obligation to regulate the protection of human rights and environment by investors.<sup>13</sup> In addition, the stabilisation clauses tend to play a disincentive role for investors to meet acceptable business standard.<sup>14</sup> They also raise the issue of compliance with existing legal framework.<sup>15</sup> On occasion, they are concluded with unelected government<sup>16</sup> or entity that is not empowered to undertake such a commitment.<sup>17</sup> The stiffest provisions are believed to have been subject to corruption.<sup>18</sup> Last but not the least, this technique of freezing the contractual regime has also proved ineffective.<sup>19</sup>

In practice, stabilisation clauses do not invalidate a host state's unilateral action. At best, they make it unlawful so as to impact the amount of compensation that a tribunal might award.<sup>20</sup> Therefore, the recourse to a flexible contractual management tool seems unavoidable for balancing the aforementioned flaws.

### 3.2.2 Flexibility in the Contract or Stability in the Relationship

To focus on the protection of legitimate expectations of an investor who commits a significant capital in the project is understandable, although quite fruitless due to the volatility of the extractive industry sector. In the negotiation of a natural resource agreement, no party can capture all the surrounding facts that might impact on the viability of the investment. Usually, the agreement is concluded based on speculative assumptions about the geological area, input costs, output, rate of return, cost of compliance with the legal framework, labour, taxation rate and other financial charges.<sup>21</sup> In case these projections turned out to exceed what parties expected at the signature of their contract, host state may

---

<sup>13</sup> Th Waelde & G Ndi (1996) 230, A Shemberg (March 2008) viii.

<sup>14</sup> H Mann 'Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result' (October 2011) 7 *Investment Treaty News* IISD Issue 1 vol II.

<sup>15</sup> PD Cameron, (2006) 13.

<sup>16</sup> H Mann (October 2011) 7.

<sup>17</sup> P Bernadini 'Stabilization and Adaptation in Oil and Gas Investments' (2008) 99 *Journal of World Energy Law & Business* vol 1 No 1.

<sup>18</sup> H Mann (October 2011) 7.

<sup>19</sup> See JW Salacuse 'Renegotiating International Project Agreements' (2000) 1362 *Fordham International Law Journal* vol XXIV, ZA Al Qurashi 'Renegotiation of International Petroleum Agreements' (2005) 264 *Journal of International Arbitration* vol XXII No 4, P Bernadini 'Stabilization and Adaptation in Oil and Gas Investments' (2008) 101 *Journal of World Energy Law & Business* vol 1 No 1.

<sup>20</sup> PD Cameron (2006) 15, Professor Bernadini argued that 'similar award was issued under an ICSID arbitration on 30 November 1979 in *AGIP SpA v People's Republic of Congo Brazzaville* (ICSID Case No ARB/77/1), reprinted (in the English translation) in 1 ICSID Rep 306 et seq (1993). The same conclusion was reached by the *Aminoil* award of 24 March 1982'. See P Bernadini (2008) 101.

<sup>21</sup> See Th Waelde & A Kolo (2000) 15 and ZA Qurashi (2005) 263.

feel giving away its non-renewable natural resources and therefore, seek the renegotiation of the agreed regime. This attitude is not exclusive to the host state. An investor, likewise, may find itself in a position where asking for renegotiation could be the only gateway to escape the devastated effect of a marginal geological discovery or collapse in the commodity price at the international market.<sup>22</sup> An investor might also seek renegotiation when fiscal impositions became onerous. Such a renegotiation is not often publicly reported, investors and host state preferring not to set a precedent.<sup>23</sup> Renegotiating an existing agreement is inherent to natural resource projects.<sup>24</sup>

Undoubtedly, it is imperative to ensure stability in the contractual terms but, at the same time, a certain degree of flexibility is necessary to allow parties to adjust their relationship in supervening of an unforeseen event.<sup>25</sup> Some scholar argued: “it is idle to freeze the position of the parties for long periods to conditions that become so out of date. Either parties will include renegotiation provisions in their contracts or they will act as if they were there.”<sup>26</sup> This position depicts the reality on the ground. No party to a long-term agreement could keep implementing a commitment he acknowledges having given, but of which he draws no benefit. Certainly, he would seek either its adjustment or its termination. If parties agree to terminate their contract or one of them withdraws, that will also destroy their relationship which would have been mutually profitable otherwise.<sup>27</sup> Such a fiasco will raise criticism about the managerial capacities of both parties and affect the confidence that stakeholders may have on them.<sup>28</sup>

A flexible approach of the contractual relationship can also be useful in a situation where parties by virtue of their differing cultures, understand and perceive the basis of a business relationship in totally different ways.<sup>29</sup> In Asian countries, for instance, business executives consider the relationship between parties as a pillar of a business transaction. Frequent adjustments of such a relationship reflect their cultural conception of a business contract.<sup>30</sup> African businessmen also tend to give preference to the relationship with their partners. By

---

<sup>22</sup> Th Waelde & A Kolo (2000) 21.

<sup>23</sup> Th Waelde & A Kolo (2000) 22.

<sup>24</sup> See Th Walde (Summer-Fall 1978) 273-279, Th Wälde ‘Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law’ (2008) 66-69 *Journal of World Energy Law & Business* Vol 1 No 1.

<sup>25</sup> JW Salacuse (2000) 1327.

<sup>26</sup> D Vagts ‘Coercion and Foreign Investment Rearrangement’ (January 1978) 22 *The American Journal of International Law* Vol 72 No 1.

<sup>27</sup> Th Waelde & A Kolo (2000) 1.

<sup>28</sup> Th Waelde & A Kolo (2000) 22-23.

<sup>29</sup> JW Salacuse (2000) 1329.

<sup>30</sup> JW Salacuse (2000) 1329-1330.

contrast, western businessmen are inclined to consider “the transaction as set in the concrete of lengthy and detailed contract, without possibility of modification”.<sup>31</sup> It is imperative to find a middle ground which can satisfy all parties.

### 3.2.3 Consequence of the distinction

The salvage of the contractual relationship is a pragmatic attitude in the mitigation of investment risks stemming from cultural differentiation or the happening of an unforeseen event. Notwithstanding, when entering into their contractual relationship, parties should define conditions under which the renegotiation might occur. Any situation should not give right to adjustment of an existing agreement; otherwise the choice of a flexible approach in the risk management will fuel unlimited demand of adaptation, and result in instability of the contractual regime. As the underneath discussions will show, there should be a renegotiation clause in the contract, if not, the applicable law should give guidance on whether and to what extent an existing contract could be renegotiated. In the absence of such prudential measures, the unilateral adjustment of an existing agreement may amount to an indirect expropriation entitling the aggrieved party to compensation.<sup>32</sup>

### 3.3 Renegotiating an Investment Contract in Major Systems of Law

The legal framework of the renegotiation or adjustment clause depends on the applicable law to a given contract. If parties opt for the national law, this latter will apply exclusively, subject to the issues of expropriation and compensation which might fall in the competence of international law, as far as state responsibility<sup>33</sup> for the property rights of aliens is concerned. Alternatively, parties may agree on the exclusive application of international law.<sup>34</sup> Lastly, parties may choose a combined solution including the internal law, national law and industry practices.<sup>35</sup> In DRC, by virtue of Article 320 of the new Mining Code, parties willing to operate in the mining sector have a compelling obligation to refer to the Congolese law as the applicable law to their contract. Notwithstanding, as developments in

---

<sup>31</sup> JW Salacuse (2000) 1330.

<sup>32</sup> For development on indirect expropriation, see A Reinisch ‘Expropriation’ in Oxford University Press (eds) *The Oxford Handbook of International Investment Law* (2008) 420 - 451.

<sup>33</sup> Th Waelde & A Kolo (2000) 23.

<sup>34</sup> This hypothesis seems not to be contentious. Different opinions take side on whether public international law alone can govern all aspects of contractual relationship between a government and a foreign investor. See M Sornarajah (2004) 416-429, R Geiger (1974) 80-83.

<sup>35</sup> ZA Al Qurashi (2005) 269.

Chapter two showed, international law and extraterritorial legislations may also be applied to a certain extent.

When difficulties arise in the identification of the legal rules- in case the law applicable to the contract is a combination of the national and international law, the solution will normally be found by applying the rules which are common to those different systems of law.<sup>36</sup> What do the main systems of law say about renegotiating an existing commitment?

### 3.3.1 Common Law

Common law systems- especially English law, are known with prominence on detail contractual drafting. Its traditional position regarding the change of an existing commitment due to imperfections or the supervening of an unforeseen event is quite rigid. The common law principle regarding contractual commitments is that a positive obligation to do a thing must be performed, or compensation must be paid for not doing so.<sup>37</sup> Over the time, this position has evolved to recognize the doctrine of discharge in limited circumstances- through notions such as implied terms, frustration, impossibility, hardship or impracticability.<sup>38</sup> Of the Common law worlds, Anglo-American jurisdictions appear to have adopted the most progressive approach with regard to the excuse for non-performance.

#### 3.3.1.1 English Law Jurisdictions

English law is hostile to the notion of change in circumstances or impracticability to perform. It “has placed greater emphasis on certainty and *pacta sunt servanda*, even though the result has occasionally been harsh on one of the parties.”<sup>39</sup> For instance, English courts have held this: “an unanticipated 88 per cent increase in the cost of goods to be supplied, or a rise in the price of raw materials to manufacture paper, or in freight costs of the seller that made the transaction unprofitable, are not grounds to discharge a contract.”<sup>40</sup> Similarly, in *British Movietonews* case, after the Court of Appeal had upheld the argument based on the

---

<sup>36</sup> Th Waelde & A Kolo argued that ‘arbitrators have a natural tendency to select those principles which are international and are seen as a reflection of an international consensus, while they are likely to disregard principles of national law which are inconsistent with generally recognised principle of international law.’ See Th Waelde & A Kolo (2000) 24

<sup>37</sup> Sir D Hoghes Parry *The Sanctity of Contract in English Law* (1959) 47 Stevens & Sons Limited (eds)

<sup>38</sup> PJ Mazzacano (2011) 17.

<sup>39</sup> PJ Mazzacano (2011) 31.

<sup>40</sup> PJ Mazzacano referred to *S. Instone & Co. Ltd. v. Speeding Marshall & Co. Ltd.* (1916), 33 T.L.R. 202, *E. Hulton & Co. Ltd. v. Chadwick Taylor & Co. Ltd.* (1916), 33 T.L.R. 202, *Blythe & Co. v. Richards, Turpin & Co. Ltd.* (1916), 85 L.J.K.B. 1425, PJ Mazzacano (2011) 30.

supervening of unanticipated turn of events to discharge parties of their contractual commitments, the House of Lord reversed this judgment. Lord Simon observed this:

[T]he parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made.<sup>41</sup>

English courts accept to discharge parties of their contractual commitments in a very narrow situation.<sup>42</sup> The reason given to this rigidity is that Common law countries did not experience the same degree of war-time destruction as did civil law countries in continental Europe.<sup>43</sup>

### 3.3.1.2 Anglo-American Jurisdictions

Anglo-American jurisdictions have taken a more flexible approach to the issue of excuse for non-performance. This approach is called ‘commercial impracticability’ and is provided in section 2-615 of the Uniform Commercial Code (UCC) and section 268(2) of the Restatement (second) of Contracts. According to this theory, party can withdraw from a contract or seek its adjustment when his cost of performance has increased so dramatically that his original commitment has become economically unviable.<sup>44</sup> A mere increase in the cost cannot discharge a party of his obligations. The performance shall become excessively onerous to trigger the excuse of impossibility.<sup>45</sup> The underpinning idea is that when a change was unpredicted at the signature of the contract, to coerce a party to keep operating the contract would lead him or his investment into bankruptcy.<sup>46</sup> However, the tendency among American Courts is that without a renegotiation or adjustment clause provided for in the contract, parties cannot expect to obtain relief of their obligations for the unforeseen difficulty is believed to have been accepted implicitly.<sup>47</sup> This situation prompted professor Mazzacano’s comment that US courts tend to follow the traditional approach of the *pacta sunt servanda* despite the enactment of the UCC and Restatement (second).<sup>48</sup> Nevertheless,

---

<sup>41</sup> *British Movietonews Ltd. v. London and District Cinemas* (1952) A.C. 166 [H.L.]

<sup>42</sup> Contractual parties can escape from their commitments under the notion of Frustration. For further development see R Stone *The Modern Law of Contract* (2002) 5<sup>th</sup> Ed Cavendish publishing limited, H G Beale et al *Contracts case and materials* (2008) 5<sup>th</sup> Ed Oxford University Press, PJ Mazzacano (2011).12-36, R Geiger (1974) 87-91.

<sup>43</sup> See PJ Mazzacano (2011) 30, E Ch Zaccarria ‘The Effects of Changed Circumstances in International Commercial Trade’ (2005) 138 *International Trade & Business Law*.

<sup>44</sup> See Th Waelde & A Kolo (2000) 25, PJ Mazzacano (2011) 32.

<sup>45</sup> PJ Mazzacano (2011) 33.

<sup>46</sup> ZA Al Qurashi (2005) 271.

<sup>47</sup> Th Waelde & A Kolo (2000) 25, E Ch Zaccarria (2005) 144.

<sup>48</sup> PJ Mazzacano (2011) 37.

the important thing to keep in mind here is that US law recognises the renegotiability of long-term contracts.

### 3.3.2 Civil Law

The excuse for non-performance of contractual commitment was developed in a different line in civil law jurisdictions. Although civilian lawyers had stated the *pacta sunt servanda* principle as their common law counterpart, they seemed to have given emphasis to the exception of that rule, namely the *rebus sic stantibus* principle.<sup>49</sup> According to this principle, a contract is valid as long as the underlying circumstances which were essential at its formation have continued to exist.<sup>50</sup> The popularity of the *rebus sic stantibus* in civil law jurisdictions is deemed due to efforts to deal with the devastation caused by several wars in Europe.<sup>51</sup> The underlying reasoning of the approach taken by civil law jurisdictions is that parties could not bargain to the impossible even if this was the term of the contract.<sup>52</sup> This does not mean that civil law system offers to parties an easy escape from their contractual commitments. There are conditions that contractual parties shall meet to benefit of the excuse for non-performance or contractual adjustment. These conditions are enshrined in theories such as *Wegfall der Geschäftsgrundlag*, *imprévision*, and to a certain extent *lesion*.

#### 3.3.2.1 German principle of *Wegfall der Geschäftsgrundlag*

The German principle of *Wegfall der Geschäftsgrundlag* (disappearance of the transaction's basis) suggests that when unforeseen events have radically changed an essential condition of the contract, the foundation thereof has been destroyed; therefore, the parties are no longer bound to their original contractual obligations.<sup>53</sup> This doctrine is sourced in paragraph 242 of the *Bürgerliches Gesetzbuch* (BGB)- the German civil code, which requires that agreements shall be implemented in good faith.<sup>54</sup> To hold a burden party liable for its commitments of which unforeseen events have severely affected the financial equilibrium amounts to perform an agreement in bad faith. Unlike in Common law system, German courts have the power to adapt the contract to the changed circumstances. As professor R Geiger stated these courts "are willing not only to supplement, but also to alter express contractual terms to

---

<sup>49</sup> PJ Mazzacano (2011) 36-37.

<sup>50</sup> Th Waelde & A Kolo (2000) 26.

<sup>51</sup> PJ Mazzacano (2011) 38.

<sup>52</sup> PJ Mazzacano (2011) 38.

<sup>53</sup> See R Geiger (1974) 91, E Ch Zaccarria (2005) 149.

<sup>54</sup> See R Geiger (1974) 92, E Ch Zaccarria (2005) 149.

permit an adjustment according to the presumed intent of the parties or to objective standards of fair dealing and good Faith.”<sup>55</sup> Alternatively, German courts may consider a premature termination of the contract if there is no ground to keep it alive. The 2001 amendment to the German civil code codified the courts’ practice of adaptation.<sup>56</sup>

### 3.3.2.2 French Theory of Imprévision

As with the preceding principle, the theory of imprévision is a variation of the *rebus sic stantibus* principle. It refers to an implied condition in contracts, with the French Government or administrative entity, according to which the continuation of the performance depends on the existence of fundamental circumstances contemplated by the parties.<sup>57</sup> Those external factors shall be independent of the parties’ will and mostly affect the financial balance of the contract.<sup>58</sup> As professor Maniruzzaman argued, “the rationale behind the doctrine of imprévision is that the public interest requires that State contracts be performed and that private entities should not be discouraged from contracting with the government.”<sup>59</sup>

It was for the purpose of insuring the continuation of the public service that the *Conseil d’Etat* (the French administrative Supreme Court) developed and expounded for the first time this theory in its judgment related to the case ‘*Gaz de Bordeau*’ on the 30 mars 1916.<sup>60</sup> Afterwards, there were several attempts to extend the theory of *imprévision* in civil contract, although the French civil code has not provided for such a provision expressly. Consequently, French civil courts have regularly rejected the extension of this theory to civil contract.<sup>61</sup> The leading decision in this regard was issued by the *Cour de Cassation* (the French Civil Supreme Court) in the case ‘*Canal de Craponne*’. The Court sustained this:

*Dans aucun cas, il n’appartient aux tribunaux, quelque équitable que puisse paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants.*<sup>62</sup> The courts cannot - even in the interest of equity - take into consideration the time and circumstances in

---

<sup>55</sup> R Geiger (1974) 93.

<sup>56</sup> Article 313 of the BGB. See PJ Mazzacano (2011) 48, R Geiger (1974) 93, E Ch Zaccaria (2005) 149.

<sup>57</sup> PJ Mazzacano (2011) 44.

<sup>58</sup> S Culda ‘The Theory of Imprevison’ (2010) 52 *Fiat Iustitia* No 2.

<sup>59</sup> M Maniruzzaman ‘State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law’ (1992) 153 *Journal of International Arbitration* Vol 9 No 4.

<sup>60</sup> M Maniruzzaman (1992) 153.

<sup>61</sup> R Geiger (1974) 94.

<sup>62</sup> *De Galiffet c. Commune de Pélassane (Canal de Craponne)*, Civ. 6 mars 1876, in Fr. Terré et Y. Lequette (eds) *Les grands arrêts de la jurisprudence civile* (2000) n° 163 Dalloz tome 2.



order to modify these agreements, and to substitute new clauses for those which have been freely accepted by the contracting parties.<sup>63</sup>

The theory of *imprévision* allows the adjustment or termination of the contract when the threat on its economic viability is irreversible otherwise. Despite the reluctance of French civil courts to extend its application to civil contract, this theory has been embodied in a number of civil codes of other countries.<sup>64</sup>

### 3.3.2.3 Civil Theory of Lesion

Unlike the aforementioned principles, the civil theory of the lesion is not a variation of the *rebus sic stantibus* principle, but, as with the latter principle, it allows the aggrieved party to seek adjustment of its existing obligations. The civil notion of the lesion refers to the situation whereby one of the contractual parties suffers a prejudice in result of the gross disparity between the value of the performance he is indebted and that he will obtain in return.<sup>65</sup> Without prejudice to the freedom of contract, the rationale of this theory is that the parties entering into a bargain without full and fair awareness of what is involved shall have their property protected.<sup>66</sup> The theory of the lesion is not to be confused with that of *imprévision*.<sup>67</sup> While the latter focuses on the economic viability of the contract during the performance of the contract, the former emphasizes on the viability of the contract at its formation. The civil lesion theory is closed to the common law notion of unconscionability though it does not operate the same way. In the occurrence of the civil lesion, the court can rescind the contract upon request of the aggrieved party.<sup>68</sup> In DRC, this theory is embodied in Article 131 *bis* of the Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations, as amended.

---

<sup>63</sup> Translated by the Institute for Transnational Law  
[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/french/case.php?id=1186](http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1186) accessed 12 April 2012.

<sup>64</sup> See 'Article 269 of the Polish Civil Code of 1932, Articles 1467–1469 of the Italian Civil Code of 1946, Article 147 of the Egyptian Civil Code of 1948, Article 107 of the Algerian Civil Code, Article 388 of the Greek Civil Code, Article 212 of the Czechoslovak Civil Code, Articles 3183–3185 of the Ethiopian Civil Code.' As quoted by M Maniruzzaman (1992) 155.

<sup>65</sup> WL Church & N Katouzian 'Lesion Contracts: A Comparative Review' (1975) 13 *Tehran Law Review* No 12.

<sup>66</sup> AH. Angelo & EP. Ellinger 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1992) 474 *Loyola of Los Angeles International and Comparative Law Review* Vol 14.

<sup>67</sup> WL Church & N Katouzian (1975) 14.

<sup>68</sup> For development see AH. Angelo & EP. Ellinger (1992) 460-501, WL Church & N Katouzian (1975) 13-47, J Hermida (2004) 18.

### 3.3.3 International Law

The preceding developments indicated that it is questionable that parties choose international law as a sole applicable law of their investment agreement. The more realistic hypothesis is that this law may be called upon as an adjunct to the national law. With regard to the issue of renegotiating an existing commitment, it is worth mentioning that international law admits the principle of *rebus sic stantibus* as an excuse for non-performance, irrespective of its inclusion in the contract.<sup>69</sup> The principle or/and its variations are found in Articles 62 of the Vienna convention, 79 of the CISG and 6.2.1-2 and 7.1.7 of the UNIDROIT Principles.

#### 3.3.3.1 Excuse for Non-Performance in the Vienna Convention

The Article 62 of the Vienna Convention<sup>70</sup> sets out the conditions under which a party may invoke a fundamental change of circumstances. When these conditions are met, the aggrieved party has a right to request withdrawal or renegotiation of his obligations. However, as some scholars pointed out the carefully worded of the aforesaid Article suggests that its application is limited to exceptional cases for shielding the stability of international agreements as the Article 26 of the same treaty provides for.<sup>71</sup> In the *Gabcikovo-Nogymoros* case, the ICJ stated this:

A fundamental change of circumstances must have been unforeseen; the existence of circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the parties to be bound by the Treaty. The negative and conditional worded of Article 62 of the Vienna convention on law of treaties is a clear indication, moreover, that the ability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases<sup>72</sup>

---

<sup>69</sup> See Th Waelde & A Kolo (2000) 35, ZA Al Qurashi (2005) 277.

<sup>70</sup> '1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- ( a ) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- ( b ) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- ( a ) if the treaty establishes a boundary; or
- ( b ) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

<sup>71</sup> ZA Al Qurashi (2005) 277-278.

<sup>72</sup> *Gabcikovo-Nogymoros project*, Award, 25 September 1997, 37 I.L.M. 162 (1998)

### 3.3.3.2 Excuse for Non-Performance in the CISG

The Article 79 of the CISG<sup>73</sup> deal with the change of circumstances, even though it does not contain any national concepts, namely frustration, hardship, *imprévision*, *wegfall der geschäftsgrundlag*, etc.<sup>74</sup> It reflects the negotiators' endeavours to find a middle ground position between the civil law and common law effect of the change in circumstances principle.<sup>75</sup> For professor Mazzacano, this Article "is more than just a compromise provision; it is a self-contained, independent, concept that must be read and interpreted without reference to domestic legal principles."<sup>76</sup> In the *Scafom International B.V. vs Lorraine Tubes* case which was brought before the Belgian Supreme Court, it was decided:

[T]his provision (Article 79 of the CISG) expressly covers force majeure cases as events exempting from performance, it does not implicitly exclude the relevance of less than force majeure situations such as hardship. (...) [A]n unforeseen change of circumstances leading to a substantial alteration of the contractual equilibrium might, under specific circumstances, constitute an event exempting from performance according to Article 79<sup>77</sup>

The CISG does not give clear guideline to what would happen to the contract after an impediment beyond a party control has been acknowledged.<sup>78</sup> Notwithstanding, the last subparagraph of the Article 79 of the aforementioned convention stipulates that parties remain free to adopt any other remedy apart from the payment of damages. Therefore, one may deduce that the adjustment mechanism can be called upon as a mitigating tool, even within the CISG framework, in case of supervening of an unforeseen impediment that is beyond the control of contracting parties.

### 3.3.3.3 Excuse for Non-Performance in the UNIDROIT Principles

Unlike the preceding convention, the UNIDROIT Principles of International Commercial Contracts (PICC) is not a binding international instrument. Despite that, practitioners have

---

<sup>73</sup> Article 79 of the CISG (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.(...)

<sup>74</sup> See PJ Mazzacano (2011) 48, E Ch Zaccarria (2005) 163, A Veneziano 'UNIDROIT Principles and CISG : Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court'. (2010) 139 *Revue de Droit Unifié*.

<sup>75</sup> E Ch Zaccarria (2005) 162, PJ Mazzacano (2011) 49.

<sup>76</sup> PJ Mazzacano (2011) 49.

<sup>77</sup> As quoted by A Veneziano (2010) 139, Cass., 19 June 2009, *Scafom International BV v. Lorraine Tubes S.A.S*

<sup>78</sup> E Ch Zaccarria (2005) 167.

regarded them “as a useful restatement of the *lex mercatoria*.”<sup>79</sup> There are also believed to serve as a supplement to the CISG, by virtue of Article 7 (2) of the CISG,<sup>80</sup> insofar as they are part of the general principles applicable to international obligations.<sup>81</sup> The PICC’s drafters took a flexible approach in tackling the issue of extraordinary events beyond the control of contracting parties, by contrast to the drafting of the equivalent provision in the CISG. The PICC regulates the issue of impediment beyond the control of contracting parties towards two different notions, namely: the hardship and force majeure.

The section of the PICC dealing with the notion of hardship starts with the reaffirmation of the necessity for each of the contractual parties to fulfil its commitments even when these latter becomes more onerous. Then it provides for the definition<sup>82</sup> and effects of the hardship. Among the effects of the hardship concept defined in Article 6.2.2 of the PICC, is worth mentioning the entitlement of the disadvantaged parties to seek adjustment of its commitments.<sup>83</sup>

The second notion in the PICC that deals with the issue of impediment beyond the control of contracting parties is force majeure. As with the hardship, the drafters defined and gave the effect of the force majeure within the PICC framework.<sup>84</sup> However, the occurrence of force majeure does not give rights to adjustment of the contract. It only exempts the party who

---

<sup>79</sup> FR Fucci ‘Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts : Practical Considerations in International Infrastructure Investment and Finance’ (April 2006) 9 paper presented to the spring meeting of the American Bar Association.

<sup>80</sup> MJ Bonell ‘The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law’ (2002) 343-.353 *Revue juridique Thémis* 36.

<sup>81</sup> See ICC Award No 7375 of 5 June 1996, ICC Award No 8261 of 27 September 1996 ICC Award No 7365 of 5 May 1997, as quoted by MJ Bonell (2002) 344-345.

<sup>82</sup> Article 6.2.2 of the PICC “There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.”

<sup>83</sup> Article 6.2.3 (1) of the PICC.

<sup>84</sup> Article 7.1.7:

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

invokes it from performing its obligations, without prejudice to the right of the other party to terminate the contract or to withhold performance or request interest on money due.<sup>85</sup>

### **3.4 Nature, Types and Conditions of Renegotiating an Existing Agreement**

The foregoing developments showed that major legal systems of law have provided for mechanisms - with different level of flexibility, to deal with the unforeseen change of circumstances. To the exclusion of the Vienna Convention that might not be seen convenient for state-investor relationships, an examination of the CISG and PICC suggest that the international investment law has reached a consensual position on this issue. Only the supervening of an exceptional and unpredictable change of circumstances can excuse parties for their contractual commitments. However, as professor Russi pointed out, “in long-term contracts, complete relief from the duty to perform may turn out as an inappropriate solution, in light of the complexity of the relationship - which makes it hardly replaceable - and of the costs and financial obligations already incurred by the parties.”<sup>86</sup> Thus, the reliance on the adjustment mechanism to mitigate the impact of a fundamental change of circumstances shall be clearly defined for none of the contractual parties act arbitrarily when invoking the aforesaid impediment.

#### **3.4.1 Nature and Scope of the Renegotiation**

In long-term contracts, the concept of renegotiation refers to a mechanism, enshrined either in a contractual clause or the applicable law, according to which the supervening of an unpredictable event rendering the performance impracticable for one side requires both parties to seek a solution to preserve their relationship. It also covers the case whereby, in the absence of such an enshrinement, parties seek a common solution to an unpredictable fundamental change of circumstances grounding on the notion of hardship or force majeure.<sup>87</sup> However, this latter approach seems to be quite limited for international arbitrators are reticent to adjust an existing agreement without a specific contractual basis.<sup>88</sup>

---

<sup>85</sup> Article 7.1.7 (1) and (4) of the PICC.

<sup>86</sup> L Russi ‘Chronicles of a Failure: From a Renegotiation Clause to Arbitration of Transnational Contracts’ (2008) 6 *Italian Legal Scholarship Unbound* Working Paper No 2008-11/EN.

<sup>87</sup> Th Waelde & A Kolo (2000) 34. For the distinction between hardship and force majeure, see L Russi (2008) 6, ZA Al Qurashi (2005) 279-285, Th Waelde & A Kolo (2000) 34-35.

<sup>88</sup> KP Berger ‘Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators’ (2003) 1353 *Vanderbilt Journal of Transnational Law* vol 36.

It has been stated this:

It is not for the Arbitral Tribunal to question the motives or judgement of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties' agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism.(...) The arbitrators cannot usurp the role of government officials or business leaders. They have no political authority, and no right to presume to impose their personal view of what might be an appropriate negotiated solution. Whatever the purity of their intent, arbitrators who acted in such a fashion would be derelict in their duties, and would create more mischief than good. The focus of the Arbitral Tribunal's inquiry has been to ascertain the rights and obligations of the parties to the particular contractual arrangements from which its authority is derived.<sup>89</sup>

Parties to a long-terms contract are, in principle, responsible for their own interests. They should take precautions against adverse changes in the circumstances by agreeing on renegotiation clauses at the outset of their relationship. If they fail to do so, force majeure or hardship concepts may not serve as a substitute for their negligence, and will not serve as a pretext for diluting the *pacta sunt servanda* principle.<sup>90</sup> The stability in the contractual regime remains the fundamental of international business transactions.

The endeavours to bring flexibility in the host state-investors' long-term relationships necessitate the control of the mechanism of adaptation that is to be relied on. In principle, there is no inherent limitation of the scope of the renegotiation clauses, aside from those expressly agreed upon by the parties.<sup>91</sup> Notwithstanding, practice in international business transactions does not provide a large array of general renegotiation provision inserted into a contract. Investors fear that such an insertion might undermine their legitimate expectation of stability.<sup>92</sup> To circumvent this obstacle, parties should not only agree upon specific events that trigger the renegotiation, but also to determine the level above which the negative impact of the said events will be considered exceeding the reasonable limit.<sup>93</sup> In any event, they should keep in mind this:

[T]he function of [the renegotiation] clauses is limited to adapting the contract to the changed circumstances. They do not justify a restructuring of the entire contract (...) Renegotiation clauses

---

<sup>89</sup> UNCITRAL Award of 4 May 1999, 25 Y.B. COM. ARB. 13, 61 (2000), as quoted by KP Berger (2003) 1353.

<sup>90</sup> ICC AWARD No 1512, reprinted in Jarvin & Yves Derains, Collection of ICC Arbitral Awards 1974-1985 (1990) 4.

<sup>91</sup> L Ruissi (2008) 5, ZA Al Qurashi (2005) 288.

<sup>92</sup> Th Waelde & A Kolo (2000) 35.

<sup>93</sup> L Russi (2008) 7.

should not result in a commercial advantage to one of the parties, but instead, function either to maintain or to restore the commercial balance of the contract to adjust to changed circumstances.<sup>94</sup>

### **3.4.2 Types of Renegotiations**

Professor Salacuse identified three types of renegotiations that may take place in the context of long-term contracts, namely: the post-deal renegotiations, intra-deal renegotiations, and extra-deal renegotiations.<sup>95</sup>

#### **3.3.2.1 The Post-Deal Renegotiations**

The post-deal renegotiations cover the situation whereby both parties meet to negotiate the conditions of the extension or renewal of their relationship at the expiration of their contract, though legally free from their preceding commitments to go their own ways. At the first glance, these renegotiations may seem to look like those parties undertook at the signature of their original contract, but in practice, they differ in approaches and results.<sup>96</sup> Unlike the context in the first negotiation, the expired contract may contain a provision that compels parties to renegotiate in good faith the renewal of their contract or precludes them from entering into negotiations with a third party until the post-deal renegotiations have failed. The willingness of the parties to reach an agreement will be influenced by what they had learnt in their preceding relationship<sup>97</sup>

#### **3.3.2.2 The Intra-Deal Renegotiations**

The second type of renegotiations refers to the intra-deal renegotiations. As its name suggests, this model of renegotiations covers the situation where parties, at the outset of their relationship, acknowledge the necessity to insert into their contract a mechanism of adjustment for mitigating the contractual risk stemming from the supervening of unpredictable events beyond their control or imperfection in the contract.<sup>98</sup> It also designates the situation where both parties, acknowledging the existence of implicit minor renegotiation clauses in their contract, agree to mitigate practical issues that arise towards their on-going relationship.<sup>99</sup> The intra-deal negotiation includes several other hypothesis,

---

<sup>94</sup>. KP Berger (2003) 1365.

<sup>95</sup> JW Salacuse (2000) 1320.

<sup>96</sup> JW Salacuse (2000) 1321.

<sup>97</sup> JW Salacuse (2000) 1323- 1324.

<sup>98</sup> JW Salacuse (2000) 1327- 1330.

<sup>99</sup> JW Salacuse (2000) 1327- 1331.

apart from the acknowledgment of minor implicit renegotiation clauses. For instance, they may refer to the case where, without mentioning negotiations or renegotiations, parties agree to meet periodically with a view to considering in good faith whether their contract is still operating fairly to each of them and with the aim at further discussing in good faith any problems arising from the practical operation of their project.<sup>100</sup> The intra-deal renegotiations may also include the automatic adjustment mechanism, such as the price indexation clauses, for adapting the contract price.<sup>101</sup> Lastly, they may designate an open term-provision in the contract that enables parties to delay the discussion of certain matters at a later time after the signature of the contract. As professor Salacuse indicated, the negotiations that may occur thanks to the open-term clause are not in *stricto sensu* renegotiations for “the parties have not yet agreed to anything (...)”.<sup>102</sup> Notwithstanding, parties may use this opportunity to obtain the review of certain aspects of their contractual regime.<sup>103</sup>

### 3.3.2.3 The Extra-Deal Renegotiations

The last type of renegotiations refers to the extra-deal renegotiations. Unlike the preceding category where the adjustment of an existing contract is sought by both sides, extra-deal renegotiations encompass situation where one party insists on adapting the terms of a presumed valid contract that does not provide for an express provision authorizing renegotiation.<sup>104</sup> Earlier developments showed that the party that failed to take advantage of the agreed regime will tend to rely on the notion of force majeure or hardship in order to trigger the renegotiation. Additionally, the said party may find rooms to adjust his commitments in the provisions of the applicable law.<sup>105</sup> The only problem is that such an approach of adapting existing agreements is unlikely enforceable. Indeed, when confronted by a demand of adaptation which is not expressly envisaged in the contract, English law jurisdictions are reluctant to interfere in what contractual parties agreed upon. By contrast, civil law jurisdictions tend to be more flexible with regard to the issue of fundamental change of circumstances that renders the performance impracticable for one side. In some cases, civil judges not only can supplement, but also alter the contractual parties’ will for enabling the balance of performances burdened by either side to meet the standard of good

---

<sup>100</sup> W Peter et al *Arbitration and Renegotiation of International Investment Agreements* (1995) 79 Kluwer Law International (eds).

<sup>101</sup> L Russi (2008) 3.

<sup>102</sup> JW Salacuse (2000) 1333.

<sup>103</sup> JW Salacuse (2000) 1333.

<sup>104</sup> JW Salacuse (2000) 1335.

<sup>105</sup> KP Berger (2003) 1355.



faith.<sup>106</sup> Moreover, the upset party can invoke provisions of international instruments, namely the PICC and to a certain extent the CISG, to justify the recourse to extra-deal renegotiations, subject to specific conditions.<sup>107</sup> In case of conflict, the willingness to reach an agreement or to pursue a legal remedy will ultimately depend on the parties' evaluation of the profitability of either option.<sup>108</sup>

### 3.4.3 Conditions of Renegotiating an Existing Agreement

It is of the great importance that parties willing to bind in a long-term relationship define the conditions that should give right to renegotiation at the signature of their agreement. Preceding developments stressed the necessity of adopting a flexible contractual approach in long-term relationship. They also reaffirmed one of the primary goals of contracting, namely to provide “predictability and certainty for the parties.”<sup>109</sup> To avoid conflict between these two objectives – stability and flexibility in their contract, parties shall control the mechanism which leads to renegotiation. Professor Berger suggested some key points parties should look upon when drafting their agreement, namely:

1. the definition of events triggering the duty to renegotiate (trigger events);
2. the exact content of the contractual obligations, in particular
  - the question of an obligation to negotiate as well as
  - the question of an obligation to reach a (particular?) result;
3. the legal consequences of failure to fulfil the contractual obligation to negotiate;
4. the enforceability of the obligation to negotiate before an international arbitral tribunal, in particular the authority of the tribunal to adapt the contract to the changed circumstances in lieu of the parties.<sup>110</sup>

The underneath comments will develop these issues in three prongs. The first point will be discussed under the heading of the triggering events. The second issue will be examined

---

<sup>106</sup> R Geiger (1974) 93.

<sup>107</sup> ZA Al Qurashi (2005) 279-285, Th Waelde & A Kolo (2000) 34-35, E Ch Zaccarria (2005) 167, A Veneziano (2010) 145.

<sup>108</sup> JW Salacuse (2000) 1336.

<sup>109</sup> Interim Award in Case No 1694 of 1996, reprinted in 23 Y.B. COM.ARB. 97, 110 (1998), as cited by JY Gotanda 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' (2003) 1464 *Vanderbilt Journal of Transnational Law* vol 36.

<sup>110</sup> KP Berger (2003) 1361.

under the heading of parties' obligations, and the last issues will be partially covered under the heading of the duty to negotiate as well as in the paragraph that will follow.

### 3.4.3.1 The Triggering Events

There is no one fit all formula for defining the events that give right to renegotiation.<sup>111</sup> Notwithstanding, the effectiveness of the process depends on preconditions parties clearly set out in order to start a consensual adjustment.<sup>112</sup> Studies in natural resources contracts<sup>113</sup> revealed the existence of two main approaches with regard to the drafting of triggering events.<sup>114</sup>

The first approach refers to the case where parties avoid detailing events but prefer relying on a general review clause that will bring about renegotiation. This approach stems from the complexity to capture all unforeseen events that might affect the commercial balance of parties' future agreement.<sup>115</sup> The other reason is the difficulty to determine the extent to which the aforesaid impact will have to be considered crossing the level of triviality to trigger the renegotiation. Therefore, if the drafting of a general renegotiation clause seems to meet the need of flexibility advocated above, it addresses the issue of stability imperfectly. Indeed, it gives way to spurious demands for renegotiation<sup>116</sup> and fuels seeds of conflict amongst parties in determining whether the triggering event has occurred. In addition, a general review clause may "cast doubt on the efficacy and enforceability of such a clause."<sup>117</sup> For these reasons, a lot of modern investment contracts rely on the notions of hardship and force majeure rather than provide for a general renegotiation clause.<sup>118</sup>

The second method of drafting a triggering event encompasses the case where parties agree to begin the adaptation procedure at the occurrence of isolated or conjunctive events identified more precisely in the clause.<sup>119</sup> Unlike the preceding approach, this method has the advantage of identifying, more precisely, the starting point of the renegotiation process. However, it envisages the latter for limited circumstances.

---

<sup>111</sup> ZA Al Qurashi (2005) 289.

<sup>112</sup> KP Berger (2003) 1362.

<sup>113</sup> For model of renegotiation clauses see KP Berger (2003) 1358 – 1360., ZA Al Qurashi (2005) 286 – 287.

<sup>114</sup> KP Berger (2003) 1362.

<sup>115</sup> KP Berger (2003) 1362.

<sup>116</sup> Th Waelde & A Kolo (2000) 35.

<sup>117</sup> ZA Al Qurashi (2005) 290.

<sup>118</sup> See Th Waelde & A Kolo (2000) 35, KP Berger (2003) 1363.

<sup>119</sup> KP Berger (2003) 1362.

### 3.4.3.2 The Parties' Obligations in the Renegotiation process

The mere fact for one side to come to the table of negotiation is not sufficient to operate the renegotiation clause inserted into a contract. Parties should think to attach to such a clause a certain number of obligations- good faith, in particular the notion of fairness and reasonableness that derive therefrom,<sup>120</sup> that are to be fulfilled towards the process of adaptation. Renegotiation clauses “are not empty shells. Rather, by agreeing to the clause, both parties are legally obliged to cooperate in the renegotiation procedure in an efficient manner, i.e. in a manner aimed at successfully negotiating a solution.”<sup>121</sup> The arbitral tribunal in the *AMINOIL* case summarised the content of the parties' obligations as follows:

[Neither side has neglected] the general principles that ought to be observed in carrying out an obligation to negotiate, - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a preserving quest for an acceptable compromise.<sup>122</sup>

Taking into account scholarly works pertaining to the issue, Professor Berger listed some conducts which should feature parties in the renegotiation process:

1. Keeping to the negotiation framework set out by the clause;
2. Respecting the remaining provisions of the contract,
3. Having regard to the prior contractual practice between the parties,
4. Making a serious effort to reach agreement,
5. Paying attention to the interests of the other side,
6. Producing information relevant to the adaptation,
7. Showing a sincere willingness to reach a compromise,
8. Maintaining flexibility in the conduct of negotiations,
9. Searching for reasonable and appropriate adjustment solutions,
10. Making concrete and reasonable suggestions for adjustment instead of mere general declarations of willingness,

---

<sup>120</sup> See W Peter et al (1995) 244, KP Berger (2003) 1363- 13645.

<sup>121</sup> KP Berger (2003) 1364.

<sup>122</sup> See *Kuwait v. Am. Indep. Oil Co.*, Final Award, Mar. 24, 1982, 21 I.L.M. 976, (1982) 1014, as quoted by KP Berger (2003) 1364-1365.

11. Avoiding rushed adjustment suggestions,
12. Giving appropriate reasons for one's own adjustment suggestions,
13. Obtaining expert advice in difficult and complex consensus proceedings,
14. Responding promptly to adjustment offers from the other side,
15. Making an effort to maintain the price-performance relationship taking into consideration the parameters regarded as relevant by the parties,
16. Avoiding an unfair advantage or detriment to the other side ("no profit – no loss" principle),
17. Prohibition on creating established facts during negotiations except in emergency situations (ban on 'escalation' strategies),
18. Maintaining efforts to reach agreement over an appropriate length of time, and
19. Avoiding unnecessary delays in the consensus proceedings.<sup>123</sup>

Parties can utilise these guideline principles as a starting point to build a regime convenient for them, subject to the principle of good faith and especially the concept of fairness and reasonableness that derive therefrom.<sup>124</sup>

### **3.4.3.3 The Duty to Negotiate and its Enforceability**

The question that arises throughout the process of renegotiation is whether parties are compelled to reach an agreement. At the domestic level, there is not a clear cut answer. English law jurisdictions appear reluctant to admit the existence of such an obligation, whereas civil law jurisdictions - especially German law, do acknowledge it as long as the renegotiation criteria and aim have been spelled out.<sup>125</sup> Internationally, there seems to be a prevailing unanimous opinion on the matter. "Renegotiation clauses only contain an obligation on the parties to make the best possible effort to reach an agreement (...). They do not, however, require the parties to actually reach an agreement."<sup>126</sup>

The duty to renegotiate becomes a justiciable obligation when it brings into play the notions of good faith and its derivatives. However, the mere fact of not reaching an agreement does

---

<sup>123</sup> KP Berger (2003) 1365 – 1366.

<sup>124</sup> KP Berger (2003) 1366.

<sup>125</sup> See JW Salacuse (2000) 1322- 1323, KP Berger (2003) 1367.

<sup>126</sup> KP Berger (2003) 1367, see also *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. (1982) 1004, *Wintershall A.G. v. Gov't of Qatar*, 28 ILM 798, (1989) 814, Permanent Court of International Justice In re *Ry. Traffic between Lithuania and Poland*, P.C.I.J., Series A/B, 116, *North Sea Continental Shelf (F.R.G. v. Den.)*, 1969 I.C.J. 4, 47 (Feb. 16).

not constitute *per se* a breach of the said duty. It may turn out to be so if it is proved that the other side acted in bad faith. That very case may give the aggrieved party the entitlement to claim compensation.<sup>127</sup> For instance, a party does not infringe the duty to renegotiate when he rejects the other side's proposals grounding on normal commercial judgement.<sup>128</sup> By contrast, the failing to agree that results from the refusal to inter negotiations, despite the existence of the triggering event is to be considered a breach of obligation to renegotiate.<sup>129</sup> The same applies to the case where a party takes "insufficient cooperative steps vis-à-vis the standard set by good faith"<sup>130</sup>; such as "where proceedings are unjustifiably delayed, (...) negotiations are intentionally obstructed or (...) proposals by one side are obviously rejected for reasons other than normal business judgment."<sup>131</sup>

### 3.5 The Practice in International Arbitration

The logical consequence of failing to agree when the renegotiation was conducted in good faith is that the contract will remain in force. The principle of *pacta sunt servanda* will apply to the contract as initially agreed.<sup>132</sup> However, when the disagreement is sourced in the conditions of the renegotiation clause, parties may call upon an arbitrator to determine whether the alleged triggering events have met the requirement set forth in the contract. The arbitrator may also be requested to determine the extent to which the adjustment will restore the contractual equilibrium. The possible outcomes<sup>133</sup> will depend on the substance of the request filed by the parties. Indeed, a request consisting in a mere conflict of interpretation does not raise the same issues than that involving a demand to supply an alternative contractual regime to that in force.<sup>134</sup>

International arbitrations are reluctant to adapt a contract in the absence of a specific provision in the contract empowering the *ad hoc* arbitral tribunal thereof.<sup>135</sup> Therefore, alongside the renegotiation clause, a long-term contract should provide for an arbitration clause that expressly confers "the power to adapt the agreement and determine the manner for its exercise as well as the limits of the arbitrator's authority in that regard."<sup>136</sup> This

---

<sup>127</sup> JW Salacuse (2000) 1323, see also PICC Article 6.2.3.

<sup>128</sup> KP Berger (2003) 1368.

<sup>129</sup> L Ruissi (2008) 14.

<sup>130</sup> L Ruissi (2008) 14.

<sup>131</sup> KP Berger (2003) 1369.

<sup>132</sup> ZA Al Qurashi (2005) 292, see also PICC Article 6.2.3 (2)

<sup>133</sup> For further development see P Bernadini (2008) 106 – 110, KP Berger (2003) 11370- 1377.

<sup>134</sup> L Ruissi (2008) 16.

<sup>135</sup> KP Berger (2003) 1353.

<sup>136</sup> P Bernadini (2008) 107.

position has been recalled in the AMINOIL case: “an arbitral tribunal ...could not, by way of modifying or completing the contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.”<sup>137</sup> A mere reference to arbitration in case of disagreement is not sufficient to imply the empowerment of the arbitral tribunal to adapt the contract, unless is particularly granted.<sup>138</sup> Nevertheless, the reference to certain texts,<sup>139</sup> especially those which provide for the third’s party power either to terminate the contract or to adapt it with the aim of restoring its equilibrium may be sufficient to confer such a power to an arbitrator.<sup>140</sup> This is to recall that the choice of the applicable should be made carefully.

However, even when parties empowered the arbitral tribunal to adjust their agreement, doubts may rise regarding the jurisdictional power of the said tribunal.<sup>141</sup> Some procedural rules, such as the ICSID convention, do not expressly authorize an arbitral tribunal to undertake a contractual adjustment on behalf of the parties. It is crucial, when choosing an arbitral forum, to make sure that the *lex arbitri* does not prohibit the adaptation of contracts by an arbitrator.<sup>142</sup> In addition, it is worth noting the distinction between the function of settling a dispute in an adjudicatory context and that of filling a gap in the contract.<sup>143</sup> The former is of an adjudicatory nature- therefore, enforceable under the New York convention of 1958, whereas the latter is deemed of a contractual nature.<sup>144</sup>

Scholars hold divergent opinions regarding the existence of a ‘dispute’ or ‘legal dispute’ when examining the issue of adapting a contract throughout arbitral proceedings.<sup>145</sup> For Professor Berger, a dispute exists when an arbitral tribunal “is not called upon to make a creative legal decision but rather to decide the rights and obligations of the parties.”<sup>146</sup> Parties should “make it clear that they wish to transfer to the tribunal this ‘creative competence’ which goes beyond normal dispute adjudication”.<sup>147</sup> For this end, they should

---

<sup>137</sup> Kuwait v. Am. Indep. Oil Co., Final Award, Mar. 24, 1982, 21 I.L.M. 976, (1982) paragraph 76.

<sup>138</sup> P Bernadini (2008) 107.

<sup>139</sup> For instance the Article 6.2.3 (4) of the PICC or relevant domestic regulations in certain countries.

<sup>140</sup> P Bernadini (2008) 107.

<sup>141</sup> KP Berger (2003) 1372.

<sup>142</sup> P Bernadini (2008) 107.

<sup>143</sup> For further development, see P Bernadini (2008) 108, KP Berger (2003) 1370-1378, L Ruissi (2008) 25-27,

<sup>144</sup> P Bernadini (2008) 108.

<sup>145</sup> by JY Gotanda (2003) 1465, G Delaume ‘ICSID Arbitration Proceedings: Practical Aspects’(1985) 567 *Pace Law Review Paper* 195.

<sup>146</sup> KP Berger (2003) 1372.

<sup>147</sup> KP Berger (2003) 1372.

allocate an express competence to the arbitral tribunal to adapt the contract.<sup>148</sup> This is the position the arbitral tribunal adopted in the Aminoil case:

[T]here can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to (...) modify a contract unless that right is conferred upon it by law, or by the express consent of the parties (...) arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal—constituted on the basis of a ‘compromissory’ clause contained in relevant agreements between the parties to the case(...) could not, by way of modifying or completing a contract, prescribe how a provision [for the determination of the economic equilibrium] must be applied. For that, the consent of both parties would be necessary.<sup>149</sup>

### 3.6 Conclusion

This chapter discussed the way renegotiation of an existing agreement should be carried out. In the context of natural resources, parties conclude their agreement based on speculative assumptions about the geological area, input costs, output, rate of return, cost of compliance with the legal framework, labour, taxation rate and other parameters. This backdrop renders ‘flexibility and stability’ of a long-term contract complementary objectives. Surely, the stability of the contractual terms is must but, a certain degree of flexibility is necessary to allow parties to adjust their relationship in case of imperfections, cultural differences or supervening of unforeseen events. The salvage of the contractual relationship is the pragmatic attitude in the mitigation of investment risks.

This chapter indicated that parties should include a renegotiation clause in their contract, if not, the applicable law should give guidance on whether and to what extent an existing contract could be renegotiated. Any situation should not give right to renegotiation; otherwise the choice of a flexible approach in the risk management will fuel unlimited demand of adaptation, and result in instability of the contractual regime. Alternatively, the prerequisite of having renegotiations clauses into a contract precludes unilateral adjustments of one side and long proceeding of the other side to seek compensation.

This chapter showed also that the concept of renegotiating an existing agreement is not a novel one. Major systems of law have dealt with when they confronted with the issue related to the non-performance of a contractual obligation. The solutions emanating from domestic and international contractual regulations confirm that the mechanism of adapting an existing

---

<sup>148</sup> P Bernadini (2008) 107.

<sup>149</sup> See *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. 976, 1016 (1982).

agreement to the change of circumstances is not an uncommon practice in commercial contract.

However, to be effective, this technique must hinge upon some conditions, including the definition of the triggering events, the legal content of the obligation to renegotiate as well as its enforceability. Lastly, alongside the renegotiation clause, parties to a long-term contract should provide for an arbitration clause that expressly confers the power to adjust the existing agreement and define the manner for its exercise as well as the limits of the arbitrator's authority in that respect.



## CHAPTER FOUR

### THE STATUS OF MINING CONTRACTS RENEGOTIATED

#### 4.1 Introduction

This chapter examines the status of the mining contracts renegotiated by the Congolese government between 2007 - 2010. After the principles surrounding the renegotiation of an existing agreement were introduced in Chapter 3, where approaches taken by major system of law and conditions governing a sound renegotiation of an existing agreement were examined, this chapter appraises the renegotiation process that took place in the DRC. The aim here is to assess the aforesaid process analysing its effect upon both the Congolese state and investors, and examining its benefit on the local population.

The preceding Chapter advocates the pre-existence of a renegotiation clause in the contract defining, amongst others, the triggering events, rights and obligations of the parties throughout the process of renegotiation as well as the enforceability thereof. As this Chapter will show, the mining contract renegotiated in DRC did not provide for such mechanisms. A quick glance at the litigious contracts reveals that some included a general stabilisation clause restricting the legislative and administrative power of the Congolese state to amend the established contractual regime.<sup>1</sup> Others provided for a provision guaranteeing the freezing of economic advantages granted to investors for the duration of the contract or restoration of the economic equilibrium, in case this latter was breached by any act emanating from the Congolese state.<sup>2</sup>

Notwithstanding, it is difficult to come to a conclusion that the renegotiation of mining agreements undertaken by the Congolese government was arbitrary, though unilaterally decided. The general premise, according to which there should be a renegotiation clause inserted into the contract for any subsequent demand of adaptation to be lawful, falls short of proving valid in the very case vitiating factors affect the contract. One of the advantages of

---

<sup>1</sup> Convention between the state-owned enterprise Miba and BHP Billiton World Exploration Inc., convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd, Paru Ltd, Mboko Ltd, Mofia Ltd and Tembo Ltd, the agreement between the OBM B.V & Groupe Goeorge Forrest and the state-owned enterprise Gecamine available at [http://minesrdc.cd/fr/index.php?option=com\\_content&view=Article&id=92](http://minesrdc.cd/fr/index.php?option=com_content&view=Article&id=92), accessed 11 November 2011.

<sup>2</sup> Convention between the Congolese State and Anvil Mining NL, convention between the state-owned enterprise Gecamine and Kin-Forrest Ltd, convention between the state-owned enterprise Miba and De Beers Centenary AG, convention between the state-owned enterprise Okimo and Mwana Africa Holdings (PTY), available at [http://mines-rdc.cd/fr/index.php?option=com\\_content&view=article&id=92](http://mines-rdc.cd/fr/index.php?option=com_content&view=article&id=92) accessed 11 November 2011.

the renegotiation process undertaken by the Congolese government is to consolidate the idea that the salvage of the contractual relationship is the pragmatic attitude in the mitigation of investment risks. However, it failed to achieve its objectives and benefit the local population. The reason may be a combination of technical, strategic and political factors.

## **4.2 Recalling the Context which Prevailed before the Mining Review**

From independence to the first half of 1990s, the state-owned enterprises<sup>3</sup> dominated Congolese mining sector. They enjoyed a monopoly over large surfaces of exploration and exploitation ground including the most valuable mining deposits known.<sup>4</sup> Far from taking advantage of this position, these enterprises were mismanaged and finally became moribund. Then, in an attempt to redress them, the Congolese government decided to privatize half of their assets, with the encouragement of the international financial institutions.

In 1995, the Congolese state started negotiations with a number of mining firms, including: Swipco, Lundin Group, Cluff Mining, Banro, Mindev, Barrick Gold, South Atlantic Resources, Union Minière, Anvil Mining, Gencor, Iscor and Broken Hill, in view to sell them the mining rights the state-owned enterprises failed to exploit. As a result of the said process, Gécamines entered into a joint-venture with the Lundin Group for the exploitation of the Tenke-Fungurme project, Anvil Mining was granted a cobalt and silver deposit of almost 13 000 square kilometres. Likewise, while Okimo was conceding gold exploitation surfaces of 2 000 and 82 000 square kilometres respectively to Mindev and Barrick Gold Corporation, Sominki (a state-owned enterprise) was acquired by a consortium including Banro Resources Corporation and a Belgian corporation Mines d'Or du Zaïre (MDDZ).<sup>5</sup>

However, as commentators have pointed out, the majority of mining contracts concluded that time was with junior companies, without any capacity to develop a large scale project but only interested in speculating in mining titles on the international market.<sup>6</sup> The rebellion that started in September 1996 and ended up a year later with the overthrow of the President Mobutu worsened the situation. Mining contracts were signed for rewarding those of the

---

<sup>33</sup> Including: Gécamines (Générale des Carrières des Mines), MIBA (Minière de Bakanga), Sominki (Société Minière et Industrielle du Kivu), Okimo (Office des Mines d'Or de Kilomoto), EMK-Mn (Entreprise Minière de Kisenge-Manganèse, SODIMICO (Société de Développement Industriel et Minier du Congo).

<sup>4</sup> See The World Bank 'Democratic Republic of Congo: Growth with governance in mining sector' Report No 43402-ZR, (Mai 2008) 40.

<sup>5</sup> Assemblée Nationale 'Rapport de la Commission Spécial Chargée de l'Examen de la Validité des Conventions à caractère économique et financier conclues pendant les guerres de 1996-2003' (also known as Lutundula Commission Report) (2005) 6.

<sup>6</sup> The World Bank (Mai 2008) 46 & 50.

multinationals that logistically had supported the rebellion, instead of benefiting the Congolese state and its population.<sup>7</sup> In 1998, just two years after the leader of the first rebellion became President, a second rebellion started with almost the same involvement of multinationals in the supply of military equipment and service to rebel groups.<sup>8</sup> When this second rebellion officially ended, in 2002 with the signature of the Global and Inclusive Agreement, also known as the Sun City Agreement, several concerns arose about the legality of the agreements signed with leaders of different rebel factions.<sup>9</sup>

In light of these concerns, the Congolese National Assembly commissioned a special committee in 2004 to survey the validity of economic and financial contracts signed during the two wars (1996-1997 and 1998-2002), the Lutundula Commission. The report<sup>10</sup> submitted in June 2005 found that the majority of contracts signed during the war period were illegal or contributed little or nothing to the development of the country. For instance, it highlighted contracts in which the state had agreed to tax exemptions of joint ventures for periods of 15 to 30 years. The report also denounced the failure of conducting feasibility studies as well as interference of high level politicians in the negotiation process. Moreover, it found that joint ventures with state-owned enterprises have failed to resolve the social problems of the population in an adequate manner. In fact, the companies that were borne out of the partnerships were incapable of absorbing the staffs of the public enterprises that work on the sites and their installations. Finally, the report recommended that some of these contracts be rescinded and others be renegotiated. In addition, it suggested that no new mining concessions be granted during the remaining transitional period until a new government is in power after elections.<sup>11</sup>

Disappointingly, the report was never discussed by the parliament. The allocation of mining concession even increased afterwards, according to some observers. Indeed, the transitional government officials who acted had interest to line their pockets in order to influence the outcome of the elections; whether by increased advertising, by buying votes outright or by

---

<sup>7</sup> Assemblée Nationale (2005) 6 - 7.

<sup>8</sup> The UN Secretary-General 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo' U.N. Doc. S/2002/1146 (16 Oct. 2002) 12.

<sup>9</sup> See Rights & Accountability in Development (RAID) 'Unanswered Questions: Companies, Conflicts and the Democratic Republic of Congo' (May 2004) 18, Global Witness Report 'Under-Mining Peace The explosive Trade in Cassiterite in Eastern DRC' (June 2005) 8, International Crisis Group Africa Report No 114 'Escaping the Conflict Trap: Promoting Good Governance in the Congo' (July 2006) 6 - 7, Human Right Watch Report 'Democratic Republic of Congo: Election in Sight, Don't Rock the Boat' (December 2005) 14.

<sup>10</sup> Assemblée Nationale (2005)

<sup>11</sup> Assemblée Nationale (2005) 270.

bribing electoral officials to favour their party.<sup>12</sup> The contracts that have been signed during the transition period were considered extremely unfavourable for the DRC and suspected to have been tainted by corruption. Some of the joint ventures the state-owned enterprises entered into were signed thanks to a blatant conflict of interest.<sup>13</sup> Others were concluded in total lack of transparency, either on the basis of flawed or non-existent international tendering procedure.<sup>14</sup>

A survey commissioned by the World Bank found many of these contracts divergent from international practice.<sup>15</sup> It also pointed out the failures of supervisory bodies to enforce the law with respect to labour, environment, health and safety issues.<sup>16</sup> This survey noted, however, that other contracts were conform to international standards but required certain additions or supplements such as operating agreements, accounting practices, and internal governance procedures.<sup>17</sup> These developments corroborate the idea that it was widely recognised, both at the national and international level, that the Congolese mining sector has been and continues to be characterised by high levels of fraud, corruption and obfuscation as well as a disregard for the right of the Congolese population to benefit from the country's natural wealth.<sup>18</sup>

Against this backdrop, the Congolese government enacted a decree calling for the review of mining agreements and set up a commission to this end in April 2007, just after the national wide elections. Article 2 of the ministerial Decree stipulates that the Commission's mission is to examine the partnership contracts concluded by the state and/or public companies with private investors in the mining sector and assess their impact on the DRC's public companies and national development. In addition, it recommends the commission to propose, if necessary, terms and conditions of their review with the aim of correcting any imbalances and related flaws.<sup>19</sup> The Congolese government did question neither the renegotiability of the existing mining agreements nor did it concern over the willingness of investors to adjust the

---

<sup>12</sup> Human Right Watch Report (December 2005) 14

<sup>13</sup> Global Witness Report 'Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines' (July 2006) 37.

<sup>14</sup> Rights & Accountability in Development (RAID) Report 'Key Mining Contracts in Katanga: The Economic Argument for Renegotiation' (April 2007) 4.

<sup>15</sup> The World Bank (Mai 2008) 47.

<sup>16</sup> The World Bank (Mai 2008) 23 & 63.

<sup>17</sup> The World Bank (Mai 2008) 47.

<sup>18</sup> Global Witness Report 'the Congolese mining sector in the balance: lack of transparency risks undermining review of mining contracts' (October 2007) 4.

<sup>19</sup> Arrêté ministérielle No 2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la re-visitation des contrats miniers (2007).

existing regime. It merely took a unilateral decision, using its sovereign prerogatives, for attempting to restructure almost the entire agreements, as a result of civil society and international NGOs pressure.

### **4.3 The Process Followed by the Congolese Government**

The use of the adjustment mechanism in the Congolese context aimed at aligning mining agreements, especially those signed during the transitional period, to what the Congolese government perceived as an acceptable standard. To come to this end, The Congolese government followed a two-step approach. First, it commissioned a taskforce for assessing existing agreements, the audit (or review/ revisitation) of mining agreements. Secondly, it appointed another taskforce for renegotiating or cancelling those of the mining contracts that were non-compliant to what the Congolese government perceived as an acceptable standard.

#### **4.3.1 The Audit of Mining Agreements**

Few official documents have been disclosed with regard to the setting up of the ad hoc Commission to review mining contract. The ministerial Decree which announces this audit (or review/revisitation) outlines merely the objectives of the said Commission, namely:

- to examine the partnership contracts concluded by the state and/or public companies with private investor in the mining sector and assess their impact on the DRC's public companies and national development;
- to propose, if necessary, terms and conditions of their review with the aim of correcting any imbalances and related flaws.

This ministerial Decree does not include the Commission's terms of reference, nor does it set the scope and conditions of the review process. Nonetheless, the Commission adopted its terms of reference which, unfortunately, has not been made public.<sup>20</sup> The Commission was entirely composed of members of the government and civil servant including, amongst others, representatives of the Presidency, the Prime Minister's office, the Ministry of Mines, the Ministry of Finance and several others ministries.

---

<sup>20</sup> A Global Witness report suggest that these terms of reference was drawn from 'Guidelines for the Revision of Mining Contracts in DRC: the Quest for Justice, Fairness, Transparency and Accountability' published by the Southern Africa Resource watch. The draft terms of reference that has been disclosed to the aforesaid organisation listed five main aspects, namely: (1) the distribution of share capital within joint venture, (2) the breakdown of the allocation of revenues from joint venture companies, (3) the respect of social clause, (4) the disempowerment of statutory management bodies of the joint venture company in favour of operating company, the subsidiary of the majority partner, (5) the confidentiality clause with respect to the principles of the Extractive Industries Transparency Initiative. Global Witness report (October 2007) 5-6.

Article 3 of the ministerial Decree setting up the Commission stipulates that the Commission can resort to external expertise, without giving additional details. In accordance with this Article, the report submitted by the Commission acknowledges the assistance of national and international non-governmental organizations.<sup>21</sup> The national organisations that participated in the process were appointed by the Congolese government as mere observers. Commentators have noted that the opportunity for Congolese NGOs to provide meaningful input toward the process was limited in practice.<sup>22</sup> Of the five organisations selected by the Congolese government, only one, *Avocats Verts*, could be considered to be an ‘activist’ NGO working for the protection of rights. The other committed Congolese NGOs as well as networks of NGOs that have been working on mining issues in DRC for many years, failed to be chosen.<sup>23</sup> The local population living in mining areas was not involved in the process of assessing mining agreements.

At the time mining agreements underwent the audit, the CAMI, the governmental body empowered to issue mining permits and keep appropriate records, have already issued over 3 000 mining rights, of which no less than 416 were issued to the state-owned enterprises.<sup>24</sup> Notwithstanding, The review commission assessed only 63 mining agreements, including 57 partnership with state-owned enterprises and 6 contracts involving the Congolese state. Up until the writing of this chapter, there has been no disclosure on how the Commission chose these agreements and if the process of auditing them included any prioritization. The Commission report divides the reviewed agreements into three categories: category A, was for agreements that were to be unchanged; category B, dealt with agreements that needed to be renegotiated; and category C, was for those that were to be cancelled.<sup>25</sup> Of the whole agreements subjected to the review, no single agreement was classified in the category A. 23 agreements were assigned in category C, 40 agreements were put in category B.<sup>26</sup>

---

<sup>21</sup> Commission de Revisitation des Contrats Miniers ‘Raport des Travaux’ tome 1 (Novembre 2007) 5 available in French only [http://www.miningcongo.cd/pdf/TOME%201%20RAPPORT%20CRCM%20VERSION%20FINALE-%20270208%20&\\_h%C3%A9%C3%A8.pdf](http://www.miningcongo.cd/pdf/TOME%201%20RAPPORT%20CRCM%20VERSION%20FINALE-%20270208%20&_h%C3%A9%C3%A8.pdf) accessed 14 September 2011. The outside expertise came from three organisations, namely: Carte Centre, Open Society Initiative for Southern Africa (OSISA), both not-for-profit organisations, and Companies Benjamin de Rothschild.

<sup>22</sup> Global Witness report (October 2007) 17.

<sup>23</sup> Apart from *Avocat Vert*, following organisations were selected by the Congolese government: the *Centre d’études pour l’action sociale (CEPAS)*, a Jesuit research, and study centre focusing on social issues), the *Conférence Episcopale nationale du Congo (CENCO)*, National Bishops’ Conference), the *Fédération des Entreprises Congolaises (FEC)*, Federation of Congolese Businesses), the *Association Nationale des Entreprises du Portefeuille (ANEP)*, National Association of Public Companies).

<sup>24</sup> The World Bank (Mai 2008) 41.

<sup>26</sup> Commission de Revisitation des Contrats Miniers (November 2007) 4.

Listed per public partner, the picture is as follows:

<b>Public Partner</b>	<b>Category B</b>	<b>Category C</b>
<b>State</b>	3	3
<b>EMK-Mn</b>	1	1
<b>Miba</b>	6	/
<b>Okimo</b>	6	3
<b>Sakima</b>	1	5
<b>Sodimico</b>	1	5
<b>Gécamines</b>	22	6
<b>Total</b>	40	23

The Commission report did not provide for clear recommendations on the manner renegotiations should be carried out, nor did it provide for guidelines with regard to the obligations of the parties whose contracts have to be cancelled. In addition, it did not refer acts of illegality that it disclosed to the relevant judicial authorities. Its report did not identify new problems in the mining contracts concluded in DRC, apart from those that have already been detected by NGOs and the Lutundula Commission. The Commission's mandate ended with the notification of its findings to respective companies. The Congolese government appointed a new task force for proceeding with renegotiation.

#### **4.3.2 The Renegotiation of Mining Agreements**

Unlike the preceding stage, the Congolese government has disclosed the terms of reference applicable to the task force that proceeded with the renegotiation and cancellation of mining agreement.<sup>27</sup> These terms of reference encompass 15 headings, of which 14 deal with renegotiation.<sup>28</sup> The developments underneath the latter headings reveal that the Congolese government attached a lot of importance to the financial and management aspects of the

<sup>27</sup> Ministry of Mines 'Terms of Reference for the Renegotiation and/or the Termination of Mining Contracts (August 2008). An English translation is available at <http://www.atol.be/docs/ebib/TDR%20RENEGOCIATION%20ENGLISH.pdf> accessed 22 March 2012.

<sup>28</sup> Namely: (a) preliminaries to the renegotiation, (b) evaluation of the inputs of the partners, (c) financial repercussions in the short, medium and long term, (d) financing of projects, (e) rate of remuneration of the projects, (f) respect of legislation, (g) control of the movements of shares or parts, (h) effective participation in the daily management of the partnership, (i) taking into account the blocking minority, (j) respect of the obligations of the partners, (k) Use of local resources, (l) Contracts or partnerships concluded on the basis of calls for tender, (m) Social responsibility clauses, (n) Applicable law in case of dispute, (o) Termination of contracts.

mining projects. The expected standard in this respect included, amongst others, the increase of the state-owned enterprises' shares in the targeted joint ventures up to 51% of the capital stock, involvement of representatives of the Congolese side in the operational and management bodies, adjustment of the profit redistribution, and supplement of the transfer bonus (also called key money or *pas de porte*) paid for access to reserves.<sup>29</sup>

The presumed intent of the Congolese government to get fair bargains and align the contentious agreements with the Congolese laws contrasts with certain suggestions in the terms of reference. The blatant example of this ambiguity is the case of the moratorium for the deposit of the feasibility study and that to pay the duties due to the state or state-owned enterprises with regard to surface rent, royalties and other duties before the start of the renegotiation.<sup>30</sup> According to Article 69 of the 2002 Mining Code, the granting of an exploitation permit is, among others, subject to the submission of a feasibility study. Articles 196 and 197 of the same code stipulate that the validity of mining rights depends on the commencement of the operations within the time six months' time following the issuance of the title evidencing the mining and the payment of the surface area fees relating to the mining title, each year before the deadline specified in Article 199 of this code. The mining Code provides for sanctions in case of failing to meet these requirements.<sup>31</sup> In light of these provisions, the legality of the aforesaid moratorium is questionable.

The terms of reference give no guideline in connection with the human rights and environmental aspects of the mining operation. The developments under the headings referring to the termination of the contract are silent with regard to the rights and obligations of the Congolese side after the cancellation of a mining agreement.

As far as the researches undertaken for the purpose of this dissertation are concerned, the contracts involved in the Congolese renegotiation process did not provide for a clause enabling the use of the adaptation mechanism in the way described in the preceding chapter.<sup>32</sup> Nonetheless, some contract did provide for a general review clause subjecting the adjustment of the contractual provisions to a common agreement of the parties:

---

<sup>29</sup> Ministry of Mines (August 2008) 1 - 4.

<sup>30</sup> Ministry of Mines (August 2008) 1 & 6.

<sup>31</sup> According to Article 289 of the 2002 Mining Code, the failure to pay surface rights fees and to start work within the deadline set forth under the law constitutes a cause of forfeiture of mining rights.

<sup>32</sup> A clause which defines the conditions of carrying out the renegotiation including, among others, the triggering events, rights and obligations of the parties throughout the process as well as the effect of the failure to agree.



*La présente convention ne peut être amendée ou modifiée que par un écrit signé par toutes les parties ou par leurs successeurs et cessionnaires autorisés respectifs.*<sup>33</sup>

The present agreement cannot be amended or modified that by a writing agreement by all the parties or their respective authorized successors and the transferees.

Others did provide for a stabilization clause freezing wholly or part of the contractual regime, or seeking the economic balancing of the contractual benefits:

*L'Etat garantit pendant toute la durée de la présente convention, à Anvil Mining Zaïre (congo), à ses actionnaires étrangers et, à son ou ses gestionnaires et à leurs sociétés affiliées, à ses mandataires sociaux et à ses agents salariés expatriés et ses bailleurs de fonds et assureurs, la stabilité de la législation et réglementation zaïroise (congolaise) en vigueur à la date de la signature de la convention et notamment dans les domaines judiciaire, foncier, fiscal, des conditions de séjour, de mouvement et de travail des étrangers, de la sante, de la protection et de la réglementation minière.*

*Aucune disposition législative ou réglementaire prenant effet à une date postérieure à la date de la signature de la convention ne peut avoir pour conséquence de restreindre et de diminuer les avantages particuliers ou entraver l'exercice des droits résultant de la présente convention*<sup>34</sup>

The State ensure Anvil Mining Zaire (Congo), his foreign shareholders, administrators and their affiliated companies, his social representatives, foreign workers, financiers and insurers, the stability of the current Zairian (Congolese) rules and legislations, during the term of this agreement, in particular fields such as judiciary, land law, fiscal law, conditions of stay, movement and work of foreigners, health and safety, and mining regulations.

Any legislative or regulatory measure coming into effect after the signature of this agreement cannot amount to restrict and impair specific advantages or hinder the exercise of the rights resulting hereunder.

*L'exactitude de chaque stipulation, déclaration et garantie, ainsi que l'engagement de les respecter, constituent pour chacune des parties une condition déterminante de la signature du présent contrat.*

*Il ne peut être renoncé, en tout ou en partie, à une de ces stipulations, déclarations et garanties que par la partie en faveur de la quelle la stipulation, la déclaration ou la garantie est faite comme stipulé au présent article, pour autant que CMSK continue d'exister. Chaque partie s'engage à tenir indemne et à indemniser l'une ou l'autre partie de tout dommage résultant de toute violation d'une stipulation, déclaration ou garantie quelconque contenue dans le présent contrat.*<sup>35</sup>

The accuracy of every condition, statement and guarantee, as well as the commitment to respect them, constitute for each of the parties a determining condition of signing this contract.

They cannot be given up, in all or part, one of these conditions, statements and guarantees that by the party in favour of which the condition, statement or guarantee is made as stipulated in the present article, as far as CMSK stills existing. Each party makes a commitment to hold unchanged and to indemnify the one or the other party of any damage resulting from any violation of a condition, statement or any guarantee contained hereunder.

---

<sup>33</sup> Article 20.1 of the convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd, Paru Ltd, Mboko Ltd, Mofia Ltd and Tembo Ltd for the development of the Tenke Fungurume Mining project.

<sup>34</sup> Article 34 of the convention between the Sate and Anvil Mining NL for the development of the Dikulushi-Kapulo mining project.

<sup>35</sup> Article 24 of the convention between the state-owned enterprise Gécamines and Enterprise General Malta Forrest for the development of the Luiswishi mining project.

Similarly, Article 22.6 of the convention between the State, state-owned enterprise Gécamines and Congo Mineral Development (a First Quantum's subsidiary) for the development of the Kingamyambo Musinoi tailing project:

*Si conformément à l'article 18 du présent contrat une décision définitive de la cour d'arbitrage de la chambre de commerce internationale constate que l'Etat a imposé à KMT ou aux parties contribuant au financement un prélèvement fiscal ou parafiscal anormal ou excédant ce qui existait à la date de la signature du présent contrat et si, dans les trente jours de cette décision arbitrale, l'Etat n'a pas remboursée le prélèvement trop perçu à celui qui l'a payé, et si aucune autre solution n'est trouvée, l'Etat et Gécamines s'engagent à prendre en charge le montant des prélèvements trop perçus en autorisant KMT et les parties contribuant au financement à faire jouer la compensation avec toutes avances, paiements, primes et/ou distributions quelconques payables par KTM ou par CMD à l'Etat et/ou Gécamines en vertu du présent contrat, étant entendu que tout remboursement ultérieur par L'Etat sera, dans ce cas, immédiatement remboursé à Gécamines .*

If, in accordance with Article 18 of this contract, the Court of arbitration of the International Chamber of Commerce issues a final award noticing that the State imposed on KMT or parties contributing to finance the project an abnormal tax or administrative levy exceeding what that existed at the date of the signature of this contract and if, within thirty days of this arbitral award, the State has not paid back the excessive tax collected to the one who paid it, and if no other solution is found, the State and Gécamines make a commitment to bear the excessive burden tax by authorizing KMT and the parties contributing to finance the project to apply compensation with whatever advances, payments, and either any bonus payable and distributed by KTM or CMD to the State and/or Gécamines by virtue of the present contract, being understood that any later refund made by the State, in this respect, will immediately be paid back to Gécamines.

The above listed contractual provisions are far from exhaustive. They may suffice, however, to reveal some of the legal issues that arise from the approach taken by the Congolese government. The shared characteristic between these clauses is that the decision to renegotiate any provision of the existing mining agreements should have been a consensual one. In any event, it should have not consisted in attempting to restructure the mining agreements in their whole.<sup>36</sup>

In September 2008, the taskforce appointed by the Congolese government entered negotiations with the companies that were notified of the Review Commission's findings. This taskforce also renegotiated some of the partnerships which should have been cancelled.<sup>37</sup> The conditions surrounding this choice remain unknown. A large number of companies accepted to adjust their mining agreement, though to a lesser degree than that suggested in the terms of reference. Others rejected the Congolese government's demand, at

---

<sup>36</sup> For further development in connection with this issue, see 3.4.3 Conditions of Renegotiating an Existing Agreement in Chapter tree above.

<sup>37</sup> SARW/CENCO 'Rapport de l'Atelier sur l'Evaluation du Processus de Revisitation et de Renégociation des Contrats Miniers' (14 décembre 2009) 6.

the first instance but, later on, agreed upon tiny adjustments. The most difficult negotiations were with six firms, including AngloGold Ashanti, Banro, First Quantum, Freeport-McMoRan, Gold Fields and Mwana Africa.<sup>38</sup> These firms reached an agreement with the Congolese side in August 2009, with the exception of First Quantum of which the contract were cancelled.<sup>39</sup>

The salient features that can be drawn from the renegotiation include, of available data,<sup>40</sup> amongst others, the increase of the State-owned enterprises' share in the partnership from less than 20 to around 30%, but there are some exceptions,<sup>41</sup> the involvement of representatives of the state-owned companies in the management bodies of the partnership,<sup>42</sup> the increase in the amount of the transfer bonus and royalties.<sup>43</sup>

#### 4.4 Appraisal of the Renegotiation Process

From the above examination of the processes followed by the Congolese government, it became quite clear that the outcome of the renegotiation does not correspond to what one may call a success, with regard to the objectives set forth in the terms of reference. Notwithstanding, this attempt to bring fairness and compliance with the Congolese laws into existing mining agreements have opened up the Congolese mining sector to a new era whereby traditional taboos are little by little given up. For the first time, mining agreements have been made public by the Congolese government. Some of the mining agreements the State and/or state-owned enterprises entered into before and after the renegotiation process can be consulted on the website of the Mining Ministry.<sup>44</sup>

The Congolese renegotiation process showed also that the absence of a renegotiation clause does not dilute the worthiness of the adjustment demand. No a single company requested to adjust its agreement did reject the Congolese state's demand, although the existing agreements did not provide for a specific renegotiation clause. Far from using this legitimate

---

<sup>38</sup> Mining Journal 'The Democratic Republic of the Congo, A supplement to Mining Journal' (March 2010) 5 available at [www.miningjournal.com/\\_\\_\\_data/assets/...file.../DRC\\_2010scr.pdf](http://www.miningjournal.com/___data/assets/...file.../DRC_2010scr.pdf) accessed 28 September 2011.

<sup>39</sup> Mining Journal (2010) 6.

<sup>40</sup> Including the few contracts published in the website of the Congolese Ministry of Mine [http://mines-rdc.cd/fr/index.php?option=com\\_content&view=article&id=166&Itemid=126](http://mines-rdc.cd/fr/index.php?option=com_content&view=article&id=166&Itemid=126), public speeches of government representatives, information disclosed by private companies and NGOs involved in the mining sectors in DRC.

<sup>41</sup> Gécamines' shares in the Tenke Fungurume project increased from 17.5 % to 20. By contrast, the initial OKIMO's stake in the Moto gold project, 30 % of the stock share, decreased to 13.78%, as a result of the sale of half thereof to the private partner.

<sup>42</sup> Article 5 of the amended Tenke Fungurume project.

<sup>43</sup> Statement made by the Minister of mine representative in a workshop organised by SAWR and CENCO the 14 December 2009, SAWR/CENCO (14 décembre 2009) 6-7.

<sup>44</sup> <http://minesrdc.cd>.

exception, they all entered negotiations and adjusted some provisions of their contracts. Both the Congolese and investors sides used the renegotiation mechanism for attempting to valid the agreements they entered into. It is not surprising that the benefit drawn from these contractual adjustments was not limited to the Congolese side.<sup>45</sup> These facts truly consolidate the idea that the salvage of the contractual relationship is the pragmatic attitude in the mitigation of investment risks. However, as previously showed, the legal issues arising from the case where parties fail to agree cannot be overcome to the satisfaction of the side that seeks the adjustment, if the original contractual regime does not provide for an adjustment mechanism and regulate the intervention of a third party.

The renegotiation of mining contracts in the DRC showed that the mining sector is extremely politicised. The investor and Congolese sides have benefited from this condition with different fortune. The negotiators that acted on behalf of the Congolese side were politicians, without appropriate skills to handle the renegotiation process successfully. The Congolese government forwent external expertise, at this critical stage of the process.<sup>46</sup> Of the data gathered towards this study, it seems that the Congolese negotiators did not take advantage of their best alternative (Batna) either to reach a mutually satisfactory agreement or walk away to a better alternative. A report submitted by one of the NGOs involved in the renegotiation process corroborates this conclusion: “the government sought short-term benefits at the expense of long-term improvements”.<sup>47</sup> Finally, the overall process of renegotiation does not appear to meet a reasonable standard of transparency. The final report of the renegotiation process has not been published so far. Besides, of the few amended agreements available on the Mining Ministry’s website, it looks that the parties did not attempt to regulate future demand of adaptation.

#### **4.5 Remaining issues**

The renegotiation process that took place in DRC left a lot of unresolved issues, with regard to the reasons that prompted it. These issues cover, amongst others, the non-renegotiated

---

<sup>45</sup> The blatant example in this respect is the motor gold project where the investor secured his initial stake of 70% and went even further in acquiring the two third remaining shares from the state-owned company Okimo.

<sup>46</sup> The Carter Center ‘The Mining Review in the Democratic Republic of the Congo: Missed Opportunities, Failed Expectations, Hopes for the Future’ (3 April 2009) available at

[http://www.cartercenter.org/news/pr/drc\\_040309.html?printerFriendly=true](http://www.cartercenter.org/news/pr/drc_040309.html?printerFriendly=true) accessed 22 March 2012.

<sup>47</sup> The Carter Center (3 April 2009)

agreements kept secretly,<sup>48</sup> appraisal and valuation of mineral asset granted to private companies.<sup>49</sup> Similarly, amended agreements cannot be deemed fully compliant with the Congolese laws in respect of, amongst others, the tender procedures, granting of tax exemption, submission of the feasibility studies and deadline for the payment of the surface area rent, royalties and others duties. In addition, there is a lot of public concern over new agreements that the Congolese government has been concluded since the enactment of the ministerial Decree calling for the review of mining agreements.<sup>50</sup>

## 4.6 Conclusion

This chapter discussed the status of mining contracts renegotiated by the Congolese government. First, it recalled that the Congolese mining sector has been and continues to be characterised by high levels of fraud, corruption and obfuscation as well as a disregard for the right of the Congolese population to benefit from the country's natural wealth. Then, it examined the steps followed by the Congolese government for renegotiating existing agreements. This chapter showed that the overall process was extremely politicised and did not meet a reasonable standard of transparency. At this critical stage of the renegotiation process, the Congolese government forwent external cooperation. Although the final report has not been published, the available data suggest that the Congolese government gave preference to short-term profits result to the expenses of the long-term improvements. By contrast, the majority of the investors have secured their assets. Others have even increased them. The examination of some of the amended agreements reveals that a lot issues remain unresolved, particularly with regard to the reasons that prompted the renegotiation. Last but not the least, parties to the aforesaid process did not attempt to regulate any future demand of adaptation.

---

<sup>48</sup> It is worth recalling that the renegotiation of mining contracts involved only 63 agreements. At the time this process started, the CAMI has already issued over 3 000 mining rights, of which no less than 416 were issued to the state-owned enterprises, see The World Bank (Mai 2008) 41.

<sup>49</sup> In an attempt to address this issue, the Great Britain announced that investigation will be carried out with regard to the involvement of British-connected shell companies and London-listed mining groups in opaque deals to acquire prime mining assets in the Democratic Republic of the Congo, see S Goodley & J Borger 'Mining firms face scrutiny over Congo deals'(8 Mai 2012) *The Guardian*, available at <http://www.guardian.co.uk/business/2012/may/08/mining-firms-congo-deals>, accessed 20 Mai 2012.

<sup>50</sup> For instance, the case of the infrastructure for minerals deal with Chinese companies – strongly criticized by the IMF for it implied new massive debt.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.1 Summary of Findings

The aforesaid developments revealed that parties conclude a long term agreement based on speculative assumptions, which may turn out to be untrue. This factor justifies the recourse to renegotiation clauses for allowing parties to adjust the original contractual regime in case of imperfection or supervening of unforeseen events. Renegotiating an existing agreement is a common feature of international business transactions and does not necessarily conflict with the contract stability. However, to be effective, parties should regulate it at the outset of their relationship. Any situation should not give right to the adjustment; otherwise, the choice of this flexible approach in the contractual risk management will fuel unlimited demand of adaptation, and result in instability of the contract. If a contract does not provide for a renegotiation clause, its adaptation is still possible so long as the applicable law regulates that issue. In addition, the absence of a specific clause regulating the intervention of a third party may hinder this latter in adjusting the contentious agreement on behalf of the parties.

With regard to the Congolese context, this study revealed that constant suspicions of illegally mining exploitation have prevailed on the Congolese mining sector as a result of ill-enforcement of the applicable regulations, corruption and mismanagement. These suspicions prompted national and international call for renegotiating mining agreements concluded in DRC. The dominant position according to which there should be a renegotiation clause inserted into the contract or applicable law should regulate the issue for any subsequent demand of adaptation to be lawful, falls short of proving valid in the very case vitiating factors affect the contract. Both the Congolese and investors sides used the renegotiation mechanism for attempting to legitimate the agreements they entered into, but the final result showed that either side did not meet this expectation.

#### 5.2 Conclusion

This dissertation examined the renegotiation of long term contract with a particular emphasis on the mining contract renegotiated in DRC. It aimed at adding academic value as well as informing policy makers and investors with respect to factors that ought to be taken into account in renegotiating an existing agreement. To come to this end, this study intended to

consider what major legal system, arbitral awards and scholars say about renegotiation of an existing agreement whose clauses do not provide for such a mechanism and the consequence in case of failing to agree. It also envisaged assessing the renegotiation process that took place in the DRC and analysing these effects.

Following the introductory considerations developed in chapter one, the second chapter of this study showed that a broad range of regulations including national, international and extraterritorial laws has governed the mining operation in DRC. This chapter also examined the issue of supervision and enforcement of the aforementioned regulations. It showed that as with the governing laws, the Congolese mining sector witnesses a large number of supervisory bodies. However, these latter are often remiss to align operating mines with the applicable law. In addition, this chapter showed that the enforcement of the mining regulations occurs at the judicial and non-judicial level, through the proceedings filed before national courts and tribunals as well as national and international arbitral fora.

The third chapter indicated that parties conclude a long-term agreement, in the context of natural resources, based on speculative assumptions about the geological area, input costs, output, rate of return, cost of compliance with the legal framework, labour, taxation rate and other parameters. It is unlikely these factors will turn out to be true. There should be, therefore, a mechanism for mitigating the ill effect of the aforesaid assumptions. Undoubtedly, stability of the contractual terms is must, but a certain degree of flexibility is necessary to allow parties to adjust their relationship in case of imperfections, cultural differences or supervening of unforeseen events. Ultimately, the salvage of the contractual relationship is the pragmatic attitude in the mitigation of investment risks.

Parties should include a renegotiation clause in their contract, if not, the applicable law should give guidance on whether and to what extent an existing contract could be renegotiated. Any situation should not give right to renegotiation; otherwise the choice of a flexible approach in the risk management will fuel unlimited demand of adaptation, and result in instability of the contractual regime. Alternatively, the prerequisite of having renegotiations clauses into a contract precludes unilateral adjustments of one side and long proceeding of the other side to seek compensation.

Notwithstanding, to be effective, the mechanism of renegotiation must hinge upon some conditions, including the definition of the triggering events, the legal content of the obligation

to renegotiate as well as its enforceability. Lastly, alongside the renegotiation clause, parties to a long-term contract should provide for an arbitration clause that expressly confers the power to adjust the existing agreement and define the manner for its exercise as well as the limits of the arbitrator's authority in that respect.

The fourth chapter recalled the conditions surrounding mining exploitation in DRC. It examined the process followed by the Congolese government and appraised its outcome. This chapter revealed that the renegotiation process was extremely politicised. Notwithstanding, both Congolese and investor sides have benefited from that differently. Congolese government gave preference to short-term profits result to the expenses of the long-term improvements. By contrast, the majority of investors have secured their assets. Others have even increased them. The entire process did not meet a reasonable standard of transparency. An examination of the amended agreements that have been disclosed so far reveals that a lot issues remain unresolved, particularly with regard to the reasons that prompted the renegotiation and regulation of future demands of adaptation.

### **5.3 Recommendations**

It is obvious that both Congolese and investor sides can benefit from the mechanism of contractual adjustment. To play its role effectively, the trigger of this mechanism should not be under the control of one side. It is crucial that future contracts include a renegotiation clause and regulate the intervention of a third party; otherwise the recourse to the contractual adjustment will bring instability in the contractual regime.

The Congolese government should endeavour to lessen political interference throughout mining contract negotiations. Future negotiations should also seek long term improvement instead of short term benefit. To this end, administrative staff that used to negotiate mining agreements should be trained in the field of negotiation. Alternatively, investors should increase among them awareness of corporate social responsibility standards for preventing illegal exploitation of mining resources which, ultimately, results in triggering unilateral contract adjustment. Notwithstanding, Congolese government's unilateral decision of the renegotiating amended mining agreements has potential to contravene the country's investment image. Therefore, an amicable solution should be sought for bringing mutual satisfaction to both the Congolese state and investors.



## **Word Count & Microsoft Word Version**

Without footnotes: 22, 445

With footnotes: 29, 380

Microsoft Word 2010

## BIBLIOGRAPHY

### Books

A Reinisch, 'Expropriation' in Oxford University Press (eds) *The International Handbook of International Investment* (2008)

G Bakandeja wa Mpungu *Droit Minier des Hydrocarbures en Afrique Centrale* (2009) Larcier (eds)

H Raeschke-Kessler in collaboration with D Gottwald 'Corruption', in Oxford University Press *The Oxford Handbook of International Investment Law* (2008).

M Sornarajah *The International Law on Foreign Investment* (2004) Cambridge (eds) Second Edition

R Dolzer & Chr Schreuer 'Principles of International Investment Law' (2008) Chapter 7 *Oxford University Press* (eds)

S Montt *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generatio*' (2009) Oxford and Portland (eds)

Sir D Hoghes Parry *The Sanctity of Contract in English Law* (1959) Stevens & Sons Limited (eds)

W Peter et al *Arbitration and Renegotiation of International Investment Agreements* (1995) Kluwer Law International (eds)

### Journals

A Faruque 'Validity and Efficacy of Stabilisation Clauses: legal Protection vs. Functional Value' (2006) *Journal of International Arbitration* Vol 23 No 4

A Veneziano 'UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court'. (2010) *Revue de Droit Unifié*

AH Angelo & EP Ellinger 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1992) *Loyola of Los Angeles International and Comparative Law Review* Vol 14

D Montague ‘Stolen of Goods: Coltan and the Conflict in Democratic Republic of Congo’ (Winter–Spring 2002) *SAIS Review* vol XXII No 1

D Vagts ‘Coercion and Foreign Investment Rearrangement’ (January 1978) *The American Journal of International Law* Vol 72 No 1

DE. Vielleville & BS. Vasani ‘Sovereignty over Natural Resources versus Rights Under Investment Contracts; Which one Prevails?’ (2008) *Transitional Dispute Management*

E Ch Zaccarria ‘The Effects of Changed Circumstances in International Commercial Trade’ (2005) *International Trade & Business Law*

G Delaume ‘ICSID Arbitration Proceedings: Practical Aspects’(1985) *Pace Law Review* Paper 195

H André-Dumont ‘Dispute and their Resolution under the Mining Code 2002 in the Republic Democratic of Congo’ (November 2007) *Journal of Energy & Natural Resources Law* Vol 4 No 4

H André-Dumont ‘Mining in the Democratic Republic of Congo’ (June 2011) *Rocky Mountain Mineral Law Foundation*

H Mann, ‘Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result’ (October 2011) *Investment Treaty News* IISD Issue 1 vol II

H Raeschke-Kessler in collaboration with D Gottwald ‘Corruption in Foreign Investment Contracts and Dispute Settlement between Investors, States, and Agents’ (2008) *The Journal of World Investment & Trade*.

H Wehberg ‘Pacta Sunt Servanda’ (October 1959). 775 *The American Journal of International Law* Vol 53 No 4.

J Hermida ‘Convergence of Civil Law and Common Law Contracts in the Space Field’ (2004) *Hong Kong Law Journal* vol 34 Part 2

JW Salacuse ‘Renegotiating International Project Agreements’ (2000) *Fordham International Law Journal* vol XXIV

JY Gotanda 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' (2003) *Vanderbilt Journal of Transnational Law* vol 36

KP Berger 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators' (2003) *Vanderbilt Journal of Transnational Law* vol 36

KW Abbott and D Snidal 'Hard and Soft Law in International Governance' (Summer 2000) *International Organization* No 54

L Russi 'Chronicles of a Failure: From a Renegotiation Clause to Arbitration of Transnational Contracts' (2008) *Italian Legal Scholarship Unbound* Working Paper No 2008-11/EN

M Likosky 'Contracting and Regulatory Issues in the Oil and Gas and Metallic Minerals Industries' (April 2009) *Transnational Corporations* Vol 18 No 1

M Maniruzzaman 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (August 2009) *Texas Journal of Oil, Gas, and Energy Law* Vol 5 No 1

M Maniruzzaman 'State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law' (1992) *Journal of International Arbitration* Vol 9 No 4

Mining Journal 'The Democratic Republic of the Congo, A supplement to Mining Journal' (March 2010) available at [www.miningjournal.com/\\_data/assets/...file.../DRC\\_2010scr.pdf](http://www.miningjournal.com/_data/assets/...file.../DRC_2010scr.pdf) accessed 28 September 2011.

MJ Bonell 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2002) *Revue juridique Thémis* 36

NF Diebold 'Non-Discrimination and the pillars of International Economic Law' (2010) *IILJ Emerging Scholars Paper* 18

P Bernadini 'Stabilization and Adaptation in Oil and Gas Investments' (2008) *Journal of World Energy Law & Business* vol 1 No 1

PJ Mazzacano 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance: the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2011) *Nordic Journal of Commercial Law*

R Geiger 'The Unilateral Change of Economic Development Agreements' (1974) *The International and Comparative Law Quarterly* Vol 23 No 1

S Culda 'The Theory of Imprevison' (2010) *Fiat Iustitia* No 2

S Goodley & J Borger 'Mining firms face scrutiny over Congo deals'(8 Mai 2012) *The Guardian*, available at <http://www.guardian.co.uk/business/2012/may/08/mining-firms-congo-deals> accessed 20 Mai 2012

SW. Schill 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (September 2008) IILJ Working Paper

Th Waelde & A Kolo 'Renegotiation and Adaptation in the International Investment Projects: Applicable Legal Principle & Industry Practices' (2000) *CEPML/Dundee* vol 5-3(a)

Th Waelde & G Ndi 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) *International Law Journal* 216

Th Walde 'Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development' (Summer-Fall 1978) *Lawyer of the Americas* Vol 10 No 2

Th Walde 'The Umbrella (Or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on original Intentions and Recent' (2004) *CEPMPL/Dundee*

V Poisson & M Vale 'The Renegotiation of the 1982 Gas Contract between France and the USSR, Soviet and Eastern European Foreign Trade' (Summer, 1988) *The CMEA in World Trade* Vol 24 No 2

WL Church & N Katouzian 'Lesion Contracts: A Comparative Review' (1975) *Tehran Law Review* No 12

ZA Al Qurashi 'Renegotiation of International Petroleum Agreements' (2005) *Journal of International Arbitration* vol XXII No 4

## Reports and Papers

Andrea Shemberg ‘Stabilization Clauses and Human Rights’ (March 2008) research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights available at

<http://www.ifc.org/ifcext/...StabilizationClausesandHumanRights/.../Stabiliz>, accessed 28 October 2011.

J Acharjee ‘First Quantum Minerals says court upholds its \$2 billion Congo claim’ (September 2011) available at

[file:///H:/First%20Quantum%20Minerals%20says%20court%20upholds%20its%20\\$2%-20billion%20Congo%20claim.mht](file:///H:/First%20Quantum%20Minerals%20says%20court%20upholds%20its%20$2%-20billion%20Congo%20claim.mht) accessed 21 October 2011

Assemblée Nationale ‘Rapport de la Commission Spécial Chargée de l’Examen de la Validité des Conventions à caractère économique et financier conclues pendant les guerres de 1996-2003’ (2005) also known as Lutundula Commission Report

Björn Aust and Willem Jaspers ‘From Resource War to Violent Peace, Transition in the Democratic Republic of Congo (DRC)’ (2006) 10 *BICC*

Commission de Revisitation des Contrats Miniers ‘Rapport des Travaux’ tome 1 – 2 (Novembre 2007)

Congo Siasa ‘Congo’s mining contracts still shrouded in secrecy’ available at

<http://congosiasa.blogspot.com/2011/04/congos-mining-contracts-still-shrouded.html> accessed 8 November 2011

E Engel & R Fischer ‘Optimal Resource Extraction Contracts under Threat of Expropriation’ (2008) *Cowles Foundation for Research in Economic* Cowles Foundation Discussion Papers 1636

Ecumenical Network Central Africa Report ‘Uranium Mining in the DR Congo: A Radiant Business for European Nuclear Companies’ (June 2011) available at [www.oenz.de/.../Uranium Mining in the DRC OENZ June 2011](http://www.oenz.de/.../Uranium%20Mining%20in%20the%20DRC%20OENZ%20June%202011) accessed October 14 2011

Enough Project Report ‘A Comprehensive Approach to Congo's Conflict Minerals’ (April 2009) available at [www.enoughproject.org](http://www.enoughproject.org) accessed 28 September 2011

F Marshall 'Fair and Equitable Treatment in International Investment Agreements' Issues in International Investment Law (2007) 2 Background Papers for the Developing Country Investment Negotiators' Forum Singapore 1 – 2 October 2007 *IISD*

FinnWatch Report 'Connecting components, dividing communities: Tin production for consumer electronic in DR Congo and Indonesia' (December 2007)

FR Fucci 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance' (April 2006) paper presented to the spring meeting of the American Bar Association

Global Witness Report 'Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines' (July 2006)

Global Witness Report 'Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 to 2003' (December 2009)

Global Witness Report 'Same Old Story – A background study on natural resources in the Democratic Republic of Congo' (June 2004)

Global Witness Report 'the Congolese mining sector in the balance: lack of transparency risks undermining review of mining contracts' (October 2007)

Global Witness Report 'Under Mining Peace, The Explosive Trade in Cassiterite in Eastern DRC' (June 2005),

Human Right Watch Report 'Democratic Republic of Congo: Election in Sight, Don't Rock the Boat' (December 2005)

Human Right Watch Report 'Democratic Republic of Congo: Election in Sight, Don't Rock the Boat' 15 December (2005)

International Crisis Group 'Escaping the Conflict Trap: Promoting Good Governance in the Congo' (July 2006). Africa Report No 114

International Law Association (ILA) German Branch-Working Group ‘General Public International Law and International Investment Law a Research Sketch on Selected Issues’ (December 2009)

IPIS ‘Democratic Republic of the Congo, Mining Contracts-State of Affairs’ available at <http://www.ipisresearch.be/download.php?id=220> accessed 8 November 2011

L Cotula ‘Investment Contracts and Sustainable Development How to make contract for fairer and more Sustainable natural resource investments’ (2010) *IIED*

M Mazalto ‘Réforme de la législation minière et rôle des institutions multilatérales de financement dans le développement du secteur minier en RDC’ (2 April 2004) Colloquium on Exploitation of Natural Ressources in Conflict Situations: International Liability and Prospect of Solution in DRC, Montréal (Canada)

OECD ‘Fair and Equitable Treatment Standard in International Investment Law’ (September 2004) available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf> accessed on 17 February 2012

OECD ‘Non-Discriminatory Treatment for National and International Investors’ in Policy Framework for Investments, available at [http://www.oecd.org/document/29/0,3746,en\\_39048427\\_39049329\\_39634141\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/29/0,3746,en_39048427_39049329_39634141_1_1_1_1,00.html), accessed 17 February 2012\

OECD ‘OECD Guidelines for Multinational Enterprises’ (2011) *OECD Publishing* available at <http://dx.doi.org/10.1787/9789264115415-en> accessed on 12 January 2012

PD Cameron ‘Stabilisation in Investment Contracts and Change of Rule in the Host countries: Tools for Oils and Gas Investors’(2006) *AIPN*

Rights & Accountability in Development (RAID) ‘Unanswered Questions: Companies, Conflicts and the Democratic Republic of Congo’ (May 2004)

Rights & Accountability in Development (RAID) Report ‘Key Mining Contracts in Katanga: The Economic Argument for Renegotiation’ (April 2007)

SARW/CENCO ‘Rapport de l’Atelier sur l’Evaluation du Processus de Revisitation et de Renégociation des Contrats Miniers’ (14 décembre 2009)



The Carter Center ‘The Mining Review in the Democratic Republic of the Congo: Missed Opportunities, Failed Expectations, Hopes for the Future’ (3 April 2009) available at [http://www.cartercenter.org/news/pr/drc\\_040309.html?printerFriendly=true](http://www.cartercenter.org/news/pr/drc_040309.html?printerFriendly=true) accessed 22 March 2012.

The UN Secretary-General ‘Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo’ (16 October 2002) UN. Doc. S/2002/1146

The World Bank ‘Democratic Republic of Congo: Growth with Governance in the Mining Sector’ (Mai 2008) report No 43402-ZR

U4 Anti-corruption Resource Centre U4 Expert Answer: "Corruption and Renegotiation of mining contracts’ (November 2007) available at <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156>, accessed 4 September 2011

Vale Columbia Center on Sustainable International Investment (VCCI) ‘Extractive Industries and Sustainable Development: The Challenges of Implementation’ (October 2010) Background Notes of the Fifth Columbia International Investment Conference jointly organised by the Columbia Law School and The Earth Institute at University of Columbia on 27- 28 October 2010

## **Internet Sources**

FQM ‘News Releases 05 Jan. 2012’ available at <http://www.first-quantum.com>, accessed 15 February 2012

International Rescue Comity Report, "Mortality in the Democratic Republic of Congo, An on Going Crisis", available at <http://www.rescue.org/resource-file/irc-congo-mortality-survey-2007>, accessed November 04, 2011

International Rescue Comity, "Conflict in Congo Deadliest Since World War II, Says The IRC", (2003), available at [www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37](http://www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37), accessed October 21, 2011

International Rescue Comity, "Conflict in Congo Deadliest Since World War II, Says The IRC", (2003), available at [www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37](http://www.rescue.org/.../conflict-congo-deadliest-world-war-ii-says-irc-37), accessed October 21, 2011

UNCTAD 'Bilateral Investment Treaties 1995 – 2006: Trends in Investment Rulemaking' (2007) 28 available at [http://www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf) accessed on 17 February 2012

UNCTAD 'Bilateral Investment Treaty' available at <http://www.unctadxi.org/templates/docsearch.aspx?id=779> accessed 16 February 2011

World Bank, "Emergency Early Recovery Project", available at [www.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P075660](http://www.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P075660), accessed 5 November 2011

## **Mining Contracts Consulted**

Agreement between the OBM B.V & Groupe Goeorge Forrest and the state-owned enterprise Gecamine.

Convention between the Congolese State and Anvil Mining NL

Convention between the Congolese State, State owned enterprise Gecamine and Congo mineral development Ltd

Convention between the state-owned enterprise Gecamine and Kin-Forrest ltd, convention between the state-owned enterprise Miba and De Beers Centenary AG

Convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd, Paru Ltd, Mboko Ltd, Mofia Ltd and Tembo Ltd

Convention between the state-owned enterprise Miba and BHP Billiton World Exploration Inc

convention between the state-owned enterprise Gécamines and Enterprise General Malta Forrest

## **Legislations**

Arrêté ministériel n° 193/CAB.MINES-HYDRO/01/2003 du 31 mai 2003 portant application et suivi du programme international du processus de Kimberley en République Démocratique du Congo

Arrêté ministérielle No 2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la revisitation des contrats miniers (2007)

Congolese Mining Code, 1981

Congolese Mining Code, 2002

Constitution of the Republic Democratic of Congo

US Dodd-Frank Wall Street Reform and Consumer Protection Act

## **International Instruments**

Convention on the Settlement of Investment Disputes between States and National of other States

UNIDROIT Principles of International Commercial Contracts

United Nations Convention on Contracts for the International Sale of Goods

Vienna Convention on Law of Treaties

## **Directory of Cases**

*AGIP Company vs People's Republic of the Congo Brazzaville*, Award, 30 November 1979, 21 I.L.M. 726 (1982)

*Amoco International Finance Corporation vs Iran*, Iran 9U.S.C.T.R. vol 15 (19879II), Award No. 31095693 of 14 July, 1984

*Kuwait vs American Independent Oil Company (AMINOIL)*, Final award, March 24, 1982, 21 I.L.M. 975, 1982

*De Galiffet c. Commune de Péliissane (Canal de Craponne)*, Civ. 6 March 1876 in Fr. Terré et Y. Lequette (eds) *Les grands arrêts de la jurisprudence civile* (2000) n° 163 Dalloz tome 2

*British Movietonenews Ltd. v. London and District Cinemas* (1952) A.C. 166

*Gabcikovo-Nogymoros project*, Award, 25 September 1997, 37 I.L.M. 162 (1998)

*Traffic between Lithuania and Poland*, P.C.I.J., Series A/B, 116

UNCITRAL Award 4 May 1999, 25 YB. COM. ARB. 13, 61 (2000)

ICC AWARD No 1512, reprinted in Jarvin & Yves Derains, Collection of ICC Arbitral Awards 1974-1985 (1990) 4