



ACCESSION OF THE DEMOCRATIC REPUBLIC OF CONGO TO THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

On June 26, 2013, President of the Democratic Republic of Congo (the “DRC”) Joseph Kabila promulgated Law No. 13/023 authorizing the State’s accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or the “Convention”).¹ This followed adoption of the law by the DRC’s legislative bodies.² Upon signature of the Convention, the DRC will become the 150th member State, reinforcing the global reach of this foundational treaty previously described as “the cornerstone of international commercial dispute resolution.”³ While this long-awaited step reinforces recent efforts by the DRC to establish a more stable and attractive climate for foreign investment, certain reservations made by the DRC in its accession to the Convention reflect the challenges that foreign companies may still face in seeking to participate in the development of the DRC’s economy, including its natural resources sector.⁴

The DRC’s accession to the Convention was first publicly contemplated in March 2011 and follows on other recent efforts by the Kabila administration to improve the country’s business climate.⁵ In 2012, the DRC acceded to the Organization for the Harmonisation of Business Law in Africa (“OHADA”), a pan-African organization created by treaty in 1993 that now comprises 17 mostly Francophone sub-Saharan States.⁶ Following ratification of the Treaty on the Harmonisation of Business Law in Africa (“OHADA Treaty”), OHADA member States are required to adopt and implement a number of Uniform Laws in the areas of commercial, corporate, insolvency, and arbitration law.⁷ In particular, following the DRC’s accession to OHADA, it was required to adopt and implement the Uniform Act on Arbitration (“UAA”), which is based on the UNCITRAL Model Law and provides for the recognition and enforcement of arbitral awards rendered in OHADA member States.⁸

The DRC's accession to the Convention thus builds upon the groundwork laid by its accession to OHADA and adoption of the UAA, but it extends the recognition and enforcement of foreign arbitral awards beyond the OHADA regional membership to awards rendered in most jurisdictions throughout the world. While Law No. 13/023 has not yet been published in the DRC's official gazette, the *Journal Officiel de la République Democratique du Congo*, early commentaries indicate that the DRC has made two unusual reservations not expressly authorized by the Convention that raise concerns as to the DRC's implementation of the Convention.

It is our understanding that the DRC's accession to the Convention is subject to a total of four reservations.⁹ The first two reservations—that it will apply the Convention only on the basis of reciprocity to awards made in other member States and that the dispute must be considered “commercial” under the national law of the DRC—are uncontroversial and expressly provided for by Article I(3) of the Convention.¹⁰

However, the DRC has made two other reservations that are not expressly authorized by the Convention. The first is that only arbitral awards made after the DRC's accession to the Convention may be enforced in the DRC.¹¹ While the Convention does not mandate retroactive application, interpretative commentaries and the drafting history of the Convention suggest that retroactivity was intended:

It may be suggested that this issue which is of particular importance to newly adhering States be clarified in the legislation implementing the 1958 Convention. As to the substance of such provision, a solution in favour of retroactivity seems recommendable in view of the basically procedural nature of the Convention and also in view of the fact that the Diplomatic Conference on the 1958 Convention rejected a proposal to make the Convention applicable only to awards made after its entry into force.¹²

More problematic still is the final reservation made by the DRC, which again is not expressly authorized by the Convention: that the Convention does not apply to disputes

related to immovable property situated in the territory of the DRC or rights related to such property, as defined under national law.¹³ As commentators have observed, this reservation could potentially exclude arbitral awards concerning the disposition of mining rights from enforcement under the Convention in the DRC, as mining rights are characterized as immovable property under DRC law.

The immovable property reservation, while not unprecedented in State practice, may provide cause for substantial concern due to the outsized influence of mining activity on the DRC's economy. Recent figures suggest that the natural resources sector, and particularly mining, accounts for around 15 percent of the DRC's annual gross domestic product, as well as the overwhelming majority of its export earnings.¹⁴ With mineral reserves estimated by some accounts at nearly US\$24 trillion,¹⁵ the immovable property exception may remove from the scope of the Convention those foreign arbitral awards that are most likely to be of economic significance in the DRC.

The immovable property reservation, if applicable to arbitral awards dealing with mining rights or other mining assets, presents foreign mining companies with activities in the DRC with three potential options in the event that they win an arbitral award against a DRC party:

1. The parties may select the DRC as the place of arbitration, and the foreign award creditor may seek confirmation and enforcement of the arbitral award in the DRC under the UAA.
2. The parties may select another OHADA jurisdiction as the place of arbitration, and the award creditor may seek recognition and enforcement of the arbitral award in the DRC under the UAA, which does not appear to be subject to the immovable property reservation.
3. The parties may select a non-OHADA jurisdiction as the place of arbitration, and the award creditor may seek recognition and enforcement of the arbitral award in any jurisdiction where the DRC party has assets, other than the DRC itself.

Each of these options may entail considerable risk for the foreign mining company, however. The first and second scenarios each present what is likely an unacceptable place of arbitration for the foreign company, and there may be a substantial risk of legal or political intervention by local authorities either during the arbitration proceeding itself or at the enforcement stage. The third scenario permits the parties to choose a neutral and mutually acceptable place of arbitration but raises the risk that the foreign party will not be able to locate assets of the award debtor to enforce against outside the DRC.¹⁶

Foreign companies considering doing business in the DRC should be aware that the country's accession to the Convention reflects its lingering indeterminacy as to whether it is ready to foster a stable and predictable framework for the promotion and protection of foreign investment, particularly in circumstances where the neutral application of law may adversely affect vested local interests.¹⁷ In particular, foreign mining companies should not anticipate that they will be able to enforce arbitral awards against assets located in the DRC, and they may need to rely on other measures to hedge against the risk of an unenforceable award.

Jones Day will continue to closely watch developments in the DRC's legal framework and would be happy to discuss any questions or concerns you may have regarding the protection of investments and commercial rights in the DRC, including through the arbitration of disputes and the structuring of foreign investments to maximize protections under investment treaties and contracts.

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ENDNOTES

- 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, June 10, 1958, *available at* http://www.uncitral.org/uncitral/en/uncitral__texts/arbitration/NYConvention.html.
- 2 *Id.*
- 3 Jason Fry, *Foreword*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION xxx (Kronke et al. eds., 2010).
- 4 The DRC's mineral wealth has been estimated to be around US\$24 trillion. M.J. Morgan, *Mining in Africa; Democratic Republic of Congo*, AFR. BUS., Feb. 1, 2009, *available at* [http://www.thefreelibrary.com/DR+Congo's+\\$24+trillion+fortune.-a0193800184](http://www.thefreelibrary.com/DR+Congo's+$24+trillion+fortune.-a0193800184).
- 5 Alison Ross, *DRC says yes to OHADA but is still to sign New York Convention*, GLOBAL ARB. REV., July 11, 2012, *available at* <http://globalarbitrationreview.com/news/article/30680/drc-says-yes-ohada-sign-new-york-convention/>.
- 6 *Id.* The OHADA member States are: Benin, Burkina Faso, Cameroon, Central African Republic, Republic of Congo, DRC, Chad, Comoros, Equatorial Guinea, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo.
- 7 OHADA Treaty, Arts. 2, 7-9, *available at* <http://www.jurisint.org/ohada/text/text.01.en.html>.
- 8 UAA, Art. 31: "The recognition and exequatur shall be refused where the award is manifestly contrary to international public policy of the member states." *Available at* http://barreaulttoral.org/bibliotheque/ohada2004__english/uniforms__acts/arbitration.pdf.
- 9 Douglas Thomson, *DRC signs up to New York Convention*, GLOBAL ARB. REV., July 11, 2013, *available at* <http://globalarbitrationreview.com/news/article/31736/drc-signs-new-york-convention/>.
- 10 Article I(3) states:

When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to difference arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.
- 11 Thomson, *supra* note 9.
- 12 *Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), ¶ 14, UN Doc. No. A/CN.9/168 (Apr. 20, 1979).
- 13 *Id.* It should be noted that this reservation is not entirely without precedent. Norway and Tajikistan have both made reservations regarding the application of the Convention in cases concerning immovable property. See UNCITRAL, *Status Table: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral__texts/arbitration/NYConvention__status.html. See also Kyriaki Karadelis, *Tajikistan accedes to the New York Convention*, GLOBAL ARB. REV., Aug. 30, 2012, *available at* <http://globalarbitrationreview.com/news/article/30790/tajikistan-accedes-new-york-convention/> (Tajikistan's reservations "obviously diminish the effect of the accession") (internal quotations omitted).
- 14 Thomas Yager, *The Mineral Industry of Congo (Kinshasa)*, U.S. GEOLOGICAL SURVEY 2011 MINERALS Y.B., *available at* <http://minerals.usgs.gov/minerals/pubs/country/2011/myb3-2011-cg.pdf> (In 2010, the mining and mineral processing sector accounted for an estimated 15.5 percent of DRC's gross domestic product; of total exports of US\$8.48 billion, cobalt accounted for 45 percent of the total value of such exports; copper, 37 percent; crude petroleum, 8 percent; diamonds, 4 percent; and tin, 2 percent).

The mining sector was at one point a more significant contributor to the gross domestic product of the DRC, but prolonged political instability and armed conflict have taken a heavy toll on the sector, reducing mining output. *Democratic Republic of Congo: Extractive Industries*, REVENUE WATCH INSTITUTE, <http://www.revenue-watch.org/countries/africa/democratic-republic-congo/extractive-industries>. In one illustration, the DRC's state-owned copper company, Gécamines, experienced peak annual output of 500,000 tons in the 1980s, as compared to 35,150 tons in 2012. Michael J. Kavanagh, *Gecamines May Seek Partner to Develop Congo Copper Sites*, Bloomberg (Jan. 31, 2013, 10:21 PM), <http://www.bloomberg.com/news/2013-01-31/gecamines-may-seek-partner-to-develop-congo-copper-sites.html>.
- 15 *Business in the Democratic Republic of Congo: Murky Minerals*, THE ECONOMIST, May 18, 2013, *available at* <http://www.economist.com/news/business/21578076-how-bad-it-murky-minerals> (in the 2012 "Doing Business" analysis conducted by the World Bank, the DRC scored fifth from last on "ease of doing business" and tied for last place with Niger in the "human development" category).
- 16 It is recommended that foreign companies contemplating transactions with a DRC counterparty or a place of performance in the DRC consult with an international law firm such as Jones Day in cooperation with a DRC-qualified counsel when drafting and negotiating international dispute resolution provisions in their contracts.
- 17 Foreign mining companies should also be aware that the DRC has signaled its intention to alter its mining code in order to provide the government with a substantially larger stake in foreign-backed mining ventures. The DRC announced a proposal in October 2012 that would increase its stake in mining ventures from five percent to 35 percent on a prospective basis, and to levy a 50 percent tax on so-called "super profits," which are defined as profits made when a commodity's price is more than 25 percent greater than at the time of the project's feasibility study. In November 2012, the DRC government announced that it would undergo negotiations with mining companies and the World Bank and International Monetary Fund regarding the proposed revisions to its mining code. Pascal Fletcher & Ed Stoddard, *DRC to negotiate mining code changes*, REUTERS, Nov. 7, 2012, <http://www.mineweb.com/mineweb/content/en/mineweb-fast-news?oid=161549&sn=Detail>.

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