



ICLG

The International Comparative Legal Guide to:

Mining Law 2016

3rd Edition

A practical cross-border insight into mining law

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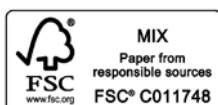
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EDITORIAL

Welcome to the third edition of *The International Comparative Legal Guide to: Mining Law*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of mining laws and regulations.

It is divided into two main sections:

Two general chapters. The first chapter discusses the mining of mixed minerals, and the second chapter provides an overview of the West African mining sector.

Country question and answer chapters. These provide a broad overview of common issues in mining laws and regulations in 42 jurisdictions. All chapters are written by leading mining lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Christopher Ian Stevens of Werksmans Attorneys, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates mining law?

The Law of the Kyrgyz Republic “On Subsoil” of 9 August 2012 (the “Subsoil Law”) determines the order of State legal regulation, competence of State authorities and local self-government, rights and obligations of individuals and legal entities as well as responsibility for violation of law. Subsoil is awarded for use for the following purposes:

- to conduct geological mapping and regional geological, geophysical and other scientific research;
- to perform geological prospecting activities;
- to perform geological exploration activities;
- to perform development of mineral deposits, including intake and use of underground water;
- to build and operate underground facilities not related to mineral development (storage of oil, gas and other substances and materials, disposal of hazardous substances, use of geothermal energy and other purposes);
- to form specially protected objects of scientific, cultural, historical, aesthetic, sanitary and healthcare, recreational and other uses (scientific testing and training areas, geological sanctuaries, caves and other underground hollows);
- to collect mineralogical and palaeontological specimens for commercial purposes; and
- to collect rock materials for decorative purposes and to use them as ornamental stones or construction materials.

Subsoil use rights are acquired under the licence, State registration, concession agreement, and production sharing agreement.

Depending on the significance of the deposit/licensed area, subsoil use rights may be granted on the basis of competitive bidding, auction and direct negotiations.

Competitions are held for deposits of national significance.

Auctions are held for deposits approved by the State Agency for Geology and Mineral Resources under the Government of the Kyrgyz Republic (the “Geology Agency”).

Subsoil use rights are granted through direct negotiations for the following deposits:

- deposits that are not included in the list of deposits to be auctioned;
- deposits for which two auctions were held, but were recognised as failed; and

- areas not connected with the geological study of subsoil and development of mineral deposits.

1.2 Which Government body/ies administer the mining industry?

The Government authorities responsible for the regulation and control of mining industry are:

- the *Government* administers and manages the State subsoil fund of Kyrgyzstan, approves technical regulations in mining and restricts and prohibits the use of natural resources in order to ensure national security, public safety and environmental protection;
- the *Ministry of Economy* is the authorised body for the development of public policy on subsoil use, including the legal acts in the mining sector and investment policy for subsoil;
- the *Geology Agency* is the authorised body for: the implementation of State policy on subsoil use, including a system for organising the right to use natural resources and land; attracting investment; maintaining the State balance of mineral reserves and State cadaster of deposits and occurrences of minerals; issuance, suspension and termination of subsoil use rights; examination of mining and geological projects; and controlling the use and protection of subsoil for geological study and industrial development of the subsoil;
- the *State Inspectorate for Technical and Environmental Safety* is the authorised body that supervises environmental and industrial security within the geological, mining and land leases and controls enforcement of environmental laws and industrial safety in the geological study and development of the subsoil; and
- the *State Agency on Environment Protection and Forestry* is the authorised body for implementation of policy and the regulation of relations in the sphere of environmental protection and use of natural resources, environmental safety and environmental management.

1.3 Describe any other sources of law affecting the mining industry.

The principal laws that regulate the mining industry are:

- the Subsoil Law of 9 August 2012;
- the Law “On Concessions and Concessionary Enterprises in the Kyrgyz Republic” of 6 March 1992;
- the Law “On Production Sharing Agreements” of 10 April 2002;

- the Law on “Coal” of 3 February 1999;
- the Law “On Oil and Gas” of 8 June 1998;
- the Law “On State registration of right for immovable property and transaction on it” of 22 December 1998;
- the Law “On Tailings and Mine Dumps” of 26 June 2001;
- the Law “On Environmental Protection” of 16 June 1999;
- the Law “On Pledge” of 12 March 2005;
- the Land Code of 2 June 1999;
- the Civil Code (Part I and II) of 8 May 1996 and 5 January 1998;
- the Regulations on the allocation of land plots for subsoil use, approved by the Government Resolution of 12 April 2006;
- the Regulation on the licensing of subsoil use, approved by the Government Resolution of 14 December 2012; and
- the Regulation on individual artisanal gold mining and organising the reception of placer gold in the territory of Kyrgyz Republic, approved by the Government Resolution of 29 January 2008 and other regulations.

2 Mechanics of Acquisition of Rights

2.1 What rights are required to conduct reconnaissance?

In order to conduct reconnaissance the prospective subsoil user shall obtain the licence for geological prospecting activities and the permit for use of land. The licence for geological prospecting activities provides the licensee an exclusive right to perform geological prospecting works for the declared types of minerals within the licensed area.

The subsoil use term under the geological prospecting activities is up to five years with the possibility of further extension according to the technical project.

The licensee shall follow the requirements of the laws, perform works in accordance with the licence agreements and timely provide reports and plans of work development for the forthcoming year to the Geology Agency.

2.2 What rights are required to conduct exploration?

In order to conduct exploration the prospective subsoil user shall obtain a licence for geological exploration activities and land use rights. The subsoil use right for geological exploration activities is granted for up to 10 years with the possibility of further extension according to the technical project.

The licence for geological exploration activities provides the licensee an exclusive right to perform geological exploration activities for the declared types of minerals within the licensed area.

The licensee shall follow the requirements of law, perform works in accordance with the licence agreements and timely provide reports and plans of work development for the forthcoming year to the Geology Agency.

2.3 What rights are required to conduct mining?

In order to conduct mining, the prospective subsoil user shall obtain a licence for development of mineral deposits and land use rights.

After the inventory of minerals and the State Commission of Reserves’ opinion, the licensee has the exclusive right to transform the licence for geological exploration activities into a licence for development of mineral deposits.

The licence is granted for up to 20 years with the possibility of further extension until depletion of the mineral reserves.

Under the licence, the licensee has the right for geological exploration of the subsoil within the licensed area, development and production of the minerals and sale, including export of minerals and their products.

2.4 Are different procedures applicable to different minerals and on different types of land?

The procedure of export from and import to the territory of the Kyrgyz Republic of ores, concentrates and tails containing precious metals and related recoverable metals is approved by the Government of the Kyrgyz Republic.

Mining and flushing of placer gold may be carried out by individual artisanal miners without obtaining a licence, except in areas with proven reserves, licensed areas, ore dumps and tailings of operating gold mining companies and territories within which are natural reserves, natural landmarks and places of cultural heritage.

2.5 Are different procedures applicable to natural oil and gas?

Exploration, development and production of oil and gas are possible on the basis of a concession granted on the basis of competitive bidding.

The concession fee depends on the natural value of the deposit at the moment of signing the concession agreement.

3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

3.1 Are there special rules for foreign applicants?

Foreign legal entities and individuals shall be treated equally as Kyrgyz legal entities and individuals. No discrimination on grounds of nationality or country of registration is allowed in obtaining and exercising subsoil use rights.

Pursuant to the Subsoil Law a foreign legal entity that is awarded the subsoil use right shall open a subsidiary with 100% equity participation in the Kyrgyz Republic for the purpose of obtaining/formalisation of the subsoil use licence.

3.2 Are there any change of control restrictions applicable?

In case of a change in ownership shares when there is a change of participants in an amount of 10% or more, an extra payment in proportion to the share of the property must be paid, except for a change in ownership shares in companies listed on the stock exchanges as well as in case of the transfer of shares in a company as a result of universal legal succession. The licensee shall notify the Geology Agency about the change in ownership shares; otherwise the subsoil use licence is subject to annulment.

3.3 Are there requirements for ownership by indigenous persons or entities?

There are no requirements for ownership by indigenous persons and/or entities.

3.4 Does the State have free carry rights or options to acquire shareholdings?

According to the Law “On Strategic Objects of the Kyrgyz Republic” dated 23 May 2008, in case the owner intends to sell the strategic object, regardless of the ownership form, the Government of the Kyrgyz Republic has the preemptive right to purchase the strategic object.

3.5 Are there restrictions on the nature of a legal entity holding rights?

The law does not contain such restrictions.

4 Processing and Beneficiation

4.1 Are there special regulatory provisions relating to processing and further beneficiation of mined minerals?

The Kyrgyz Republic has the preferential right to receive the product share if the conditions for such transfer are provided under the concession agreement.

According to the Law “On Precious Metals and Stones” dated 14 May 1998, the State monopoly extends to operations relating to nuggets of precious metals. In addition, the Government and the National Bank of the Kyrgyz Republic have the preemptive right to purchase refined precious metals at the primary market.

4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

There are no restrictions. In case of import or export of ores and concentrates of precious metals, the Geology Agency issues an expert opinion. The laws do not prohibit imposition of restrictions on the export of minerals; therefore, the Government and/or Parliament may adopt an act restricting the export of minerals.

5 Transfer and Encumbrance

5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

A licensee, after two years from the date of implementation of the technical project for the development of the deposit, has the right to transfer the licence to third parties provided it guarantees their compliance with the terms of the effective licence agreement.

5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged to raise finance?

A licensee has a right to mortgage the subsoil use right with the consent of the Geology Agency. Enforcement of the mortgage agreement is possible not earlier than six months from the date of its State registration. In case of transfer of the licence to a third party as a result of foreclosure, the licence shall be reissued in the name of the mortgagor.

6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

Licence rights may not be divided. However, the laws do not prohibit the licensee from attracting contractors to implement particular types of work and create other companies, consortiums, etc.

6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

The law prohibits joint ownership of subsoil use rights.

6.3 Is the holder of a primary mineral entitled to explore or mine for secondary minerals?

A licensee holding the subsoil use right for a particular mineral is not entitled to conduct prospecting, exploration and mining activities in relation to secondary minerals. In order to conduct prospecting, exploration and mining activities in relation to secondary minerals the licensee must obtain a separate licence.

6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

As already mentioned above, the licence for prospecting, exploration and development grants the licensee the exclusive right to conduct prospecting, exploration and development works on the declared types of minerals within the licensed area. Thus, the licensee is not entitled to exercise rights over residue deposits.

According to the Law “On Tailings and Waste Dumps” dated 26 June 2011, storage and disposal of waste is carried out only in special storage facilities. The territory of tailings is under a strict regime, where any kind of economic activity is prohibited. Tailings and waste dumps are subject to registration.

6.5 Are there any special rules relating to offshore exploration and mining?

There are no specific rules in relation to offshore exploration and mining.

7 Rights to Use Surface of Land

7.1 What are the rights of the holder of a right to conduct reconnaissance, exploration or mining to use the surface of land?

Surface rights for subsoil use purposes are granted for temporary use only. Surface rights shall be granted simultaneously with subsoil use rights by the Geology Agency for the term of the licence. Starting from 2012, holders of prospecting and exploration rights no longer require lease agreements and shall only obtain the written consent of the regional State authority or local self-governments.

Subsoil users may not be denied the surface right. If the land is assigned to another licensee that previously received a licence, the new licensee shall agree the land use terms with its owners.

The boundaries and dimensions of land for subsoil are defined by the technical project or technological scheme of groundwater selection.

7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have vis-à-vis the landowner or lawful occupier?

The holders of prospecting and exploration rights shall obtain the written consent of the land owner.

The holder of mining rights, in obtaining the land for use, must enter into a lease agreement, in which the parties agree the term of use, the amount of lease payment, land reclamation issues and other conditions at their discretion. The lease agreement is subject to mandatory State registration if the agreement is concluded for three years or more.

7.3 What rights of expropriation exist?

The Constitution of June 27, 2010 and the Civil Code provide that nationalisation shall be conducted on the basis of the law, with compensation of the property cost and other losses. Nationalisation of property is conducted exclusively for the purposes of ensuring State security and defence.

8 Environmental

8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

Before commencing prospecting, exploration and mining operations, State environmental expertise must be conducted and a positive expert opinion of the prospecting, exploration and mining work programme must be issued by the State Agency on Environmental Protection and Forestry. Conducting of prospecting, exploration and mining operations without a positive expert opinion is a basis for termination of subsoil use rights.

The length of the State expertise depends on the complexity of the project and shall not exceed three months.

8.2 What provisions need to be made for the closure of mines?

For closure of a mine the licensee must file an application to the Geology Agency justifying the closure, and attach all documents pertaining to the mine operation (licences, technical project, opinions of competent authorities, etc.). The technical project shall include measures for reclamation of the land and subsoil and environmental protection. For the purposes of land reclamation, the licensee shall allocate funds to the reclamation fund on a monthly basis from the beginning of the geological exploration or development of the deposit. The reclamation fund must be kept in accounts opened with banks of the Kyrgyz Republic and cannot be used for other purposes.

8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

The licensee shall carry out reclamation of the land, eliminate the mining property or ensure preservation and maintenance of mining property in a safe and accident-free condition before transferring it to a subsequent holder of subsoil use rights. In addition, the licensee shall hand over the geological information and other documents to the Geology Agency.

Reclamation of land shall be carried out in accordance with the technical project and at the expense of the reclamation fund. In case of creation of tailings, these territories should be transferred to local authorities only after completion of reclamation. The procedure of reclamation of lands and mining objects shall be established and approved by the Government; however, the Government has not yet established the procedure.

8.4 Are there any zoning requirements applicable?

Pursuant to amendments made to the law in 2012, a special category of lands, under which there are explored deposits (State Reserve of Deposit Lands), was created.

If mineral reserves are found on lands that are not lands of the State Reserve of Deposit Lands, the Government, based on the proposal of the Geology Agency, transfers them into the category of State Reserve of Deposit Lands.

9 Native Title and Land Rights

9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

This is not applicable in Kyrgyzstan.

10 Health and Safety

10.1 What legislation governs health and safety in mining?

Principal health and safety laws that apply to mining include:

- the Law “On Technical Regulation on Industrial Safety” of 16 November 2013;
- the Law “On Mandatory Insurance of Civil Liability of an Operator of Hazardous Production Facilities” of 4 August 2008; and
- the Law “On Industrial Explosives” of 22 May 2006.

10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Under the law, owners, employers and managers shall ensure a healthy and safe work environment and employees shall follow the health and safety requirements provided by the law.

11 Administrative Aspects

11.1 Is there a central titles registration office?

All rights for immovable property, which include minerals, shall be registered in the Unified State Register of Rights to Immovable Property which is maintained by the State Registration Service under the Law “On State Registration of Rights to Immovable Property and Transactions Therewith” dated 22 December 1998.

Pledge of movable property, which secures an obligation in the amount defined by the Law “On Pledge” dated 12 March 2005, is also subject to mandatory registration in the Pledge Registration Office.

11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Administrative decisions related to mining activities can be appealed in the competent courts regarding economic and administrative cases.

The Geology Agency may consider the case through the administrative procedure according to the Law “On Administrative Procedures” dated 1 March 2004. An administrative case shall be considered within a period not exceeding one month. In exceptional cases the term may be extended for not more than one month. Decisions on administrative cases considered under the Law “On Administrative Procedure” may be appealed before the competent courts.

12 Constitutional Law

12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

Under the Constitution, the subsoil is an exclusive property of the Kyrgyz Republic and under special state protection. Property, including subsoil use rights, is inviolable. No one shall be arbitrarily deprived of his property. Seizure of property against the will of the owner is allowed only by court decision.

Forcible seizure of property without a court decision is allowed in cases stipulated by law, in order to protect national security, public order, the health, safety or morals of the population and rights and freedoms of others. The legality of such seizure is subject to mandatory consideration by the court.

12.2 Are there any State investment treaties which are applicable?

Currently, the Kyrgyz Republic has signed agreements on encouragement and protection of investments with 23 states.

Also, the rights of investors are protected by the Law “On Investments in the Kyrgyz Republic” of 27 March 2003.

13 Taxes and Royalties

13.1 Are there any special rules applicable to taxation of exploration and mining entities?

Pursuant to the Tax Code of 17 October 2008, subsoil use taxes include a bonus (a one-time payment for the subsoil use right for prospecting, exploration and development of mineral deposits) and a royalty (a recurrent payment for the use of subsoil for development purposes and/or selection (extraction from the subsoil) of groundwater).

The tax base for the calculation of the bonus is the amount of geological reserves and expected resources registered in the State cadaster of deposits and occurrences of minerals of the Kyrgyz Republic, and the drilling depth of water wells. The bonus rate is set by the Government on all types of minerals on the classification table, depending on: the degree of exploration and value; the scale of the deposits and/or occurrences of minerals; the size of the area for the search of minerals; and the drilling depth of water wells.

The tax base of the royalty is:

- revenue, excluding VAT and sales tax, received from the sale of mineral resources or the products received as a result of mineral resources processing;
- in-kind volume of products sold; and
- volume of the underground water withdrawn according to water gauges, except for specialised water supply organisations.

Royalty rates are as follows:

- for gold, silver and platinum taking into account the increase in reserves:
 - a) for deposits with reserves of more than 10 tonnes – 5%;
 - b) for deposits with reserves from 3 up to 10 tonnes – 3%;
 - c) for deposits with reserves of less than 3 tonnes – 1%;
- for organisations specialising in water supply – 5%;
- for gypsum – 6%;
- for natural stones for production of facing materials – 12%; and
- for coal and lignite – 1%.

On September 17, 2012 amendments to the Tax Code entered into force, according to which taxpayers involved in activities for the mining and sale of gold ore, gold concentrate, gold alloy and refined gold shall not pay profit tax. The said taxpayers shall pay tax on income at a rate ranging from 1% up to 20% (depending on the world price for one troy ounce), applied to:

- revenue (excluding VAT and sales tax) from the sale of gold alloy and refined gold; or
- the value of the gold in the gold-bearing ore and gold concentrate, calculated on the basis of world prices in accordance with the procedure established by the Government.

13.2 Are there royalties payable to the State over and above any taxes?

In addition, the Subsoil Law, the Law “On Non-tax Payments” dated 14 April 1994 and the Regulation on the procedure of calculation and payment of the licence withholding fee, approved by the Government Resolution of 14 December 2012, establish the obligation of the licensee to pay a licence retention fee (payment for the retention of a licence).

There are also fees for access to geological information and for issuance of a licence.

14 Regional and Local Rules and Laws

14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

No, there are not.

14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

On 21 May 2015 by the Law No.111, the Kyrgyz Republic ratified international treaties on accession to the Treaty on the Eurasian Economic Union of 29 May 2014.

15 Cancellation, Abandonment and Relinquishment

15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

The Subsoil Law provides as a ground for termination of the subsoil use right the abandonment of rights by the licensee. However, the law does not provide for a clear procedure for abandonment. In practice, the Geology Agency requires the licensee to fulfil its obligations under the licence and licence agreement, which are subject to fulfilment by the abandonment date. Termination of subsoil use rights due to the licensee's abandonment does not terminate the obligation of the licensee to conduct reclamation of land.

15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

The licensee has the right to reduce the licensed area. Reduction of the area is carried out upon the licensee's request and receipt by the Geology Agency of an information report on the results of work performed on the reduced area after land reclamation.

15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

The subsoil use rights may be terminated by the decision of the Geology Agency in the following cases:

- failure to notify the Geology Agency about a change of participants of the licensee if it is a legal entity, if such change involves the payment of a bonus;
- the licensee's waiver of the subsoil use right;
- expiration of the licence;
- performance of activities without the technical project being approved by all necessary expert opinions;
- failure to eliminate in time the reasons that led to the suspension of the subsoil use rights; and
- discovery of the fact that false information was provided regarding the ultimate beneficiaries of the company or the financial capabilities of the subsoil user while obtaining a licence.

If deposits of national significance were distributed through a competitive bidding, there are additional grounds for termination of subsoil use rights:

- non-payment or late payment of the fee for the subsoil use right and penalties provided for by the terms of a competitive bidding; and
- failure to meet the deadline, after a single extension, for submission of the technical project with positive expert opinions.

The decision of the Geology Agency on termination of subsoil use rights shall be sent to the subsoil user within 10 working days. The decision on termination can be appealed to a court in accordance with the procedure provided by law.

Concession agreements and production sharing agreements may provide for other grounds for termination of subsoil use rights.

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Formed in 2002, Kalikova & Associates (K&A) is one of the leading law firms in the Kyrgyz Republic, specialising in business law services.

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K&A received acclaim from leading ratings publications such as *Chambers Global*, *Chambers Asia Pacific*, *Who's Who Legal* and *Best Lawyers*. K&A strives to facilitate the development of business, commerce and industry by rendering legal services that meet high standards of professional and ethical conduct.