

Brief observations on the concept of “Amodiation” in mining

The doctrine of amodiation presents major concerns for Governments and investors. It is a mechanism frequently used in numerous Civil Law based African countries, most notably in the Democratic Republic of the Congo, the Republic of Niger, the Central African Republic or the Republic

of Guinea.

Flexible by nature, it allows a mining title holder to retain its title while transferring the mining rights and obligations deriving from it to a third party in exchange for a remuneration.

Q1: WHAT IS AN “AMODIATION”?

AI : Often presented as a sale of movables by anticipation, compared to a lease [location] – with which it only entertains a remote parenthood –, or a quasi-usufruct – of which it does not present all the characteristics –, the amodiation is actually an original concept originating from the Middle-Ages. Initially used in agriculture, it corresponds to the situation where the holder of an exploitation right transfers it, in all or part, to a third party, generally with the obligations pertaining to it and in exchange for a payment.

In mining, an amodiation therefore characterizes the contract whereby the holder [amodiant] of an exploitation mining title transfers to a third party [amodiataire], in all or part, the right to exploit a mine and the obligations [e.g. legal, fiscal, environmental, community] arising from it over the mining perimeter in exchange for the payment of a royalty.

That is to say that an amodiation is distinct from the transfer of the mining title since the amodiant does not transfer its mining title; it only transfers the rights and obligations deriving from it. However, these rights are considerable since they confer on the amodiataire the right to extract mineral substances, become the owner of these substances and market them.

In practice, several transactions or acts can, intentionally or not, create an amodiation: amodiation agreement; joint venture agreement; shareholders agreement, shares sale and purchase agreements; MoU, etc. While differences exist between these notions, an equivalent to the amodiation can be found in the farm-out mechanism.

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Q2: IS AMODIATION A RISKY MECHANISM?

A2 : Amodiation immediately puts States at risk: the transfer of mining rights and obligations from the amodiant to the amodiataire results in the title holder [amodiant] – to whom the State had initially granted mining rights – being replaced by a third party [amodiataire] whose technical and financial capacities may not yet have been tested at the time the amodiation occurs, or to whom the State does not intend to grant exploitation rights over its resources for multiple reasons, notably reputational.

But it also presents, when irregular, an important risk for the amodiant and the amodiataire themselves.

As a result of the State exercising its sovereignty over its natural resources, amodiations must generally be prior authorized and any irregular amodiation – or de facto amodiation –, which would be put in place without such authorization being obtained could be the subject of vigorous sanctions: on the one hand, de facto amodiations could be deemed null and void or unenforceable against the State; and, on the other hand, the mining title held by the amodiant could be withdrawn.

Both the amodiant and the amodiataire would therefore bear the risks associated with an irregular amodiation.

While the amodiation is an interesting and flexible mechanism, it can be risky for all the stakeholders.

Q3 : WHAT ARE THE CONSEQUENCES OF AN AMODIATION IN TERMS OF LIABILITY FOR THE AMODIANT AND THE AMODIATAIRE?

A3 : The answer to this question varies depending on legislative provisions in each jurisdiction. Certain jurisdictions provide for total or partial joint and several legal liability between amodiant and amodiataire in order to neutralize potentially adverse effects for the State of contractual clauses limiting or exempting liability. When no such joint and several liability is provided by the applicable legislation, the focus will be on whether the approval by the State of an amodiation contract results in validating these limitation or exemption of liability clauses and rendering them enforceable or not.

Q4 : DOES AMODIATION RAISE OTHER QUESTIONS LIKELY TO HARM STATES INTERESTS?

A4 : Amodiations raise several legal issues but one of the most salient issues, maintains a close relationship with company law.

Mining legislation often provides for the right of the State to be granted a minority, free of charge and non-dilutable participation in the share capital of the company holding an exploitation mining title.

Such a participation has four objectives: first, it allows the State to obtain shareholders' information; second, it enables the State to engage in the company's administration [with or without voting right] or management bodies; third, it entitles the State to a share of dividends when a distribution becomes possible; and finally it allows the State to record a capital gain of a potentially considerable amount in the

event this participation can be assigned according to the applicable mining legislation.

However, when an amodiation is set up, revenues are no longer generated by the holder of the exploitation mining title but by the amodiataire to whom the title holder has transferred its exploitation rights and obligations. That is to say that operating income is received by the amodiataire while the amodiant only receives a contractually agreed royalty. Dividends received, or capital gains realized, by the State as shareholder of the amodiant will therefore be much lower than if it had become a shareholder of the amodiataire.

States should therefore review and, when required, amend their legislation to guard against adverse effects arising from such situations. When possible, they may also use contractual renegotiation to try and rebalance their contracts.

Q5 : CAN AMODIATIONS BE AFFECTED BY THE COVID-19 CRISIS?

A5 : The health crisis certainly has an impact on existing and future amodiations.

It is likely that impending amodiations, may have been or will be postponed on the prospective amodiataire's request, as consequence of their inability to perform their obligation to exploit natural resources due to the international nature of the crisis, [demobilization / remobilization of international subcontractors' teams; shortage in supply coming from abroad; redundancy plans or termination of contract affecting international consultants; local confinement and curfew; variation of currencies and commodity prices; etc.]

Concerning existing amodiations, certain effects of

the health crisis are likely to constitute a force majeure event. However, characterizing force majeure is very factual. States must therefore, on the one hand, analyze their contracts and conventions to assess if such event can legally characterize a force majeure event. This assessment will depend on whether the force majeure clause is "enumerative", i.e. it stipulates a set of events deemed to characterize as force majeure per se, irrespective of the definition of force majeure, [irresistibility, foreseeability, exteriority] or "indicative" i.e events listed in the force majeure clause are examples of force majeure events only and should, in any case, meet the definition of the force majeure.

Once force majeure is characterized, it will be necessary to analyze whether the force majeure benefits the amodiant, the amodiataire or both. For example, in certain jurisdictions which provide for joint and several liability between amodiant and amodiataire and the State could request the amodiant to perform an obligation which has become unlikely to be performed by the amodiataire, and vice versa. The question as to whether who, between the amodiant and the amodiataire, can benefit from the force majeure therefore becomes crucial for the State. A thorough analysis of the obligational content of the agreements and of the legal obligations borne by the amodiant and/or the amodiataire therefore becomes necessary. Lastly, it should be specified that, in any case, obligations to pay an amount of money never benefits the excuse of force majeure.

Numerous questions remain to resolve concerning the amodiation, but this crisis, deleterious as it is, should to our opinion encourage States to:

- objectively analyze the relevance, scope and efficiency of their mining legislation regarding amodiation;

- evaluate whether the negotiation, approval and control procedures applicable to amodiations,

whether legal or contractual, are efficient and applicable in practice; and

- audit their conventions – and notably the force majeure, adaptation and renegotiation, hardship and settlement of disputes clauses in order to objectively assess the consequences of the occurrence of exceptional events on these amodiations.



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