# Mining licence revocations: How to manage the risks

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## A brief guide to protecting mining investments, from contract structuring through to dispute resolution

### Why are mining licences revoked?

There are a number of reasons why host country governments cancel or otherwise intervene in mining licences. Some are more defensible than others, although all are contestable in most cases.

Common reasons for licence revocation include:

- **Failure to comply with the terms of the licence**

  Failure (or perceived failure) to comply with licence conditions is usually a ground for revocation of a licence or refusal to extend it for a new term.

  Termination is typically not automatic but requires a notice from the competent authority or other public body to remedy the breach within a specific period, failing which the licence may be revoked without further compensation.

  Mineral claims, mining leases and permits are frequently cancelled where licence holders make unsatisfactory progress towards bringing the project into production.

  For example, licence holders may be accused of failing to complete required work programmes or assessments, achieve agreed exploration and development milestones, or make payments in lieu of completing this work. Covid-19 restrictions, particularly their impact on labour, supplies and access to equipment, have exacerbated this problem for investors.

  Other grounds for intervention include failure to submit assessment reports or make licence fee or royalty payments.

- **Breaches of local legislation**

  Breaches of local laws, such as labour, environmental, tax, trade or anti-corruption laws are common reasons for governments to revoke licences.

  As with breaches of licence conditions, legal infringements tend to nullify the licensee's right to compensation.

- **Strategic minerals**

  Some governments reserve the right to revoke licences for the exploitation of minerals identified as being of strategic or special importance to the domestic economy.

  Such legislation usually provides for the licensee to be awarded fair compensation for the loss of the licence.

- **Local economic empowerment**

  Mining licences held by international companies may be revoked and awarded to local companies, artisanal miners or individuals under economic empowerment legislation that seeks to repatriate national resource wealth.

  Generally, provided there are no accompanying allegations of misconduct against the licensee, compensation should be payable to the licence holder.

- **New investors**

  The arrival of new investors offering more attractive terms to develop mining concessions may tempt a host government to revoke the licences of incumbent licensees, sometimes under spurious pretexts (such as alleged irregularities in the award of the licences), and make them available to new market entrants.

  Over the past decade, there has been a trend in Africa in particular for mining licences to be revoked and handed to Chinese-backed companies.

- **Price volatility**

  The number of revocations tends to increase when mineral/metal prices rise, as host governments opportunistically seek to repatriate resources that have increased in value since licences were initially awarded.

  Equally, collapsing prices can impact mining companies' payments to governments, prompting interventions.

## How can companies mitigate the risk of licence revocation?

### Internationalise your mine development agreement

- **Structure the investment to benefit from protections**

  If structured appropriately at the outset, an investment by a foreign investor in a host state may benefit from protections found in bilateral or multilateral investment treaties (BITs/MITs).

  Protection can be achieved by making the investment from or through a state that has a BIT/MIT with the host state.

  BITs and MITs are governed by public international law and provide companies with additional protections independent of any protections afforded by domestic laws and contractual relationships.

  Protections can also be found in certain free trade agreements. For example, the African Continental Free Trade Agreement (AfCFTA) came into effect on 1 January 2021 to provide a platform for intra-African investment between 27 African Union member states, both at state level and for private investors.

  Such treaties often contain investor-state dispute settlement (ISDS) provisions, meaning a company that has had its mining licence revoked can bring proceedings against the host state if the revocation was in breach of the state's treaty obligations.

  The existence of such protections may sometimes be enough to discourage host countries from initiating proceedings against international investors.

- **Consider stabilisation and material adverse change clauses**

  Stabilisation clauses and material adverse change clauses in mine development agreements with the host government are means for foreign investors to mitigate or manage political risks associated with their project.

  The World Bank and other multilateral development organisations favour the deployment of clauses that allow an investor to sue a state if the tax regime or other terms on which they invested change, as a way of increasing investment in developing economies.

  Again, the existence of such clauses can help prevent proceedings being commenced in the first place.

  However, it is becoming increasingly evident to host nations that such clauses bind their governments and prevent them from amending local labour, environmental and tax laws, so the use of such clauses needs to be handled sensitively.

  For example, while the Model Mining Development Agreement (MMDA) developed by the International Bar Association (IBA) contains a tax stabilisation clause, it acknowledges that such a provision is controversial, particularly as it may be difficult to distinguish between the stabilisation of tax regimes and the stabilisation of other regimes, such as those that protect the environment and promote social development.

### Future-proof your contracts

- **Anticipate future demands**

  In addition to using stabilisation clauses and material adverse change clauses, investors can include other measures that cover potential changes of circumstances in their contracts.

  For example, licence and royalty arrangements can be structured in ways that ensure host countries receive an equitable share of any increase in the value of mine production.

  Joint venture agreements, particularly those with earn-in and farm-in options, with local and state-owned companies can also reduce the likelihood of disputes with the host government, although there is always the risk of disputes arising between JV partners.

  What will work best in any given case will partly rely on the details of the proposed investment and on analysis of previous disputes that have arisen in comparable situations in the host jurisdiction.

- **Consider dispute and arbitration clauses**

  Simply including an arbitration clause in a contract will not automatically prevent parties ending up in messy disputes, contested simultaneously in domestic and international courts.

  Where there is a suite of agreements containing different arbitration clauses, this leaves the parties open to arguments about which arbitration clause governs which dispute and the possibility of multiple proceedings.

  Parties can also choose to ignore arbitration clauses and commence proceedings in domestic courts.

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While not wholly avoidable, the risk of becoming embroiled in paralysing disagreements can be minimised by fully thinking through how potential dispute proceedings will work and carefully drafting the contract to anticipate all eventualities.

Investors should think about the seat of arbitration specified in the contract. While using an established arbitration centre has many obvious benefits, choosing a regional seat close to the host country may help instil trust in the process and help with enforcement.

### Establish local links

The likelihood of losing your licence partly depends on:

- Who your partners are;
- The size of your company; and/or
- How influential you are in the host nation – for example, if you have wider interests in the country that are important to the national government.

While large, influential mining companies are not immune from the risk of revocation, the threat of losing a licence tends to be more acute when a mining company is small and/or is not a major local employer or contributor to the host nation's economy.

Establishing relationships with influential local operators is therefore helpful in mitigating the risk of disputes with host country entities.

### Get your ESG in order

Since 2015, there has been a steady increase in disputes over environmental and social issues connected with mining projects.

Mining companies should therefore ensure they have a robust environmental, social and corporate governance programme in place and a solid social licence to operate.

## What options are available to companies whose licences have been cancelled?

### Negotiate

Negotiation tends to be the most effective, fastest and least costly method of resolving mining disputes.

How successful negotiations concerning mining licence revocations are will largely depend on:

- The strength of investor-state relationships;
- How motivated host governments are to reach a business solution; and
- The quality of the mine development agreement or other relevant contracts.

It is usually in the interests of parties to negotiate at least a temporary solution to any disagreement, before considering next steps.

### Consider mediation

If negotiation does not produce an acceptable solution, it is advisable to move to mediation or other kinds of alternative dispute resolution (ADR) before taking more drastic action.

Mediation often helps parties identify common ground that negotiation failed to uncover. Mediation will explore parties' interests, rather than their perceived rights, and help clarify areas where those interests coincide and how they can be accommodated through future actions.

Mediation and ADR approaches can also help parties assess the relative merits of their cases and establish key facts. Parties should avoid litigation or arbitration unless they are sure they have a strong case with firm evidence to support their position.

### Formal proceedings

Mining companies should review their licence to identify whether they have to comply with a formal appeal process before they can bring legal proceedings.

It is also important for parties to identify whether they have a right to arbitrate, either via an express right to arbitration in the licence agreement, or through an investment treaty if the investor agreement structured the investment through a state that has an investment treaty with the host state.

Failing a right to arbitrate, you will be compelled to litigate the dispute in a domestic court of the host state.

### Come with clean hands

Under the "clean hands" principle, foreign investors are prevented from presenting claims that are tainted by illegality.

Investors therefore need to be able to prove that their investment was made lawfully, for example through a public tender process.

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