

CLIPPER BOOK MIRANDA			 Miranda & Associados Sociedade de Advogados, SP, RL
MEDIA	INTERNATIONAL ENERGY LAW REVIEW		
Nº PAG.	317 - 319	DATA	

Regional Developments

THE CONGO

¹ Congo; Foreign investment;
 Oil and gas industry

New Congolese Hydrocarbons Code: Eppur si muove ...

The President of the Republic of Congo has just recently promulgated the long-awaited new Hydrocarbons Code, a first draft of which was prepared and submitted to the Congolese Parliament by the government back in 2015. This statute will be enacted as Law No.28/2016 of 12 October 2016.

The preparation of a new regime was the result of the realisation that the 1994 Hydrocarbons Code and its numerous ancillary statutes were no longer aligned with the current requirements of the industry and the market, either from a technical and operational standpoint, or in legal, economic, environmental and social terms, and this recommended a comprehensive revamping of the existing legal framework—which included consultation with industry players. Broader in scope than its 1994 predecessor, the Hydrocarbons Code (whose draft was the subject of some amendments as part of the parliamentary approval process) is to govern legal, fiscal, customs and foreign exchange matters, and to apply to all companies engaged in the local oil and gas industry.

Generally aimed at rendering the Congolese legal scenario more consistent with the best industry practices, the regional context, and the current environmental and technological standards, whilst simultaneously trying to address the economic and social challenges faced by the country, the Hydrocarbons Code has some noteworthy features. Here are those which may be deemed the most significant ones:

- *Société Nationale des Pétroles du Congo* (SNPC, the Congolese NOC) will be the exclusive concessionaire of petroleum mineral titles—in the form of exploration permits or production permits, granted by the Council of Ministers upon proposal of the Minister of Hydrocarbons—meaning that international oil companies and Congolese petroleum companies will have to associate themselves with SNPC to conduct petroleum operations;
- petroleum contracts will have to be either a production-sharing contract (PSC) or a services agreement, whose models are to be approved by the Council of Ministers;
- as a condition for their effectiveness, petroleum contracts negotiated and signed with a contracting group of companies must be submitted to the approval of both chambers of Parliament;
- whilst for the exploration phase the operator is authorised to merely register a branch in the country, it will be required to incorporate a local company for the production phase;
- any provisions in the petroleum contracts found to be in contravention with the Hydrocarbons Code are to be deemed null and void;
- unless otherwise authorised by the Minister of Hydrocarbons, a minimum participating interest of 15 per cent in the contracting group of companies (which can rise up to 25 per cent in certain cases) is reserved for Congolese petroleum companies. In the

CLIPPER BOOK MIRANDA				 Miranda & Associados Sociedade de Advogados, SP, RL
MEDIA	INTERNATIONAL ENERGY LAW REVIEW			
Nº PAG.	317 - 319	DATA	dezembro 2016	

- case of production permits, the aforementioned minimum participating interest is, unless such right is waived, to be "carried";
- in terms of fiscal and para-fiscal charges, the Hydrocarbons Code provides that, in respect of the PSCs to be entered into thereunder, a 15 per cent royalty shall apply on oil net production and a 5 per cent royalty shall apply on gas net production (the former may, in the case of production in waters deeper than 500m, be reduced to 12 per cent). As for the maximum cap for cost oil, it will be 50 per cent of net production, although in specific situations (e.g. deep-water projects or recourse to very expensive technology) said cap may be raised up to 70 per cent. Also worth mentioning is that the state's minimum share in the profit oil for each calendar year will be 35 per cent. As to the income tax rate, it may be set in the petroleum contract within the limits defined in the general tax code;
 - each member of the contracting group of companies is to provide a corporate guarantee by the ultimate parent company, or a first demand bank guarantee, in favour of the state, covering the minimum work obligations for exploration, which is to be provided in accordance with and within such deadlines as are to be defined by the Council of Ministers;
 - with certain operational exceptions being allowed in accordance with industry best practices, and unless otherwise permitted by prior special authorisation of the Minister of Hydrocarbons, flaring of associated gas shall be prohibited; and
 - a provision for abandonment must be made pursuant to an abandonment plan, with the abandonment funds so collected being deposited in an escrow account with the *Caisse des Dépôts et Consignations*.

One issue that the entry into force of the new legal regime will most likely bring about is how it will impact existing contracts. The general principle in this regard is that the agreements already in place are to remain in force as they stand irrespective of the adoption of a new framework, a principle which is typically complemented by specific contractual provisions on stability and supervening circumstances. The concern here is that there are "public policy" provisions in the Hydrocarbons Code which will be applicable as from its entry into force. Although a grace period of two years is afforded for the existing arrangements to be made compliant with the new regime, the interpretation and enforcement of the new standards could easily be the subject of controversy, an exercise which is rendered more challenging by the fact that some of the provisions of the Hydrocarbons Code are not exactly straightforward.

Will the Congolese authorities maintain the flexible approach we witnessed in recent years, and which allowed the creation of the legal and operational conditions required for the successful implementation of an international petroleum development project in a cross-border unitised area, and will they be willing to accommodate specific project needs under the new regime? The answer to this question will be known soon enough, but there are reasons for some degree of optimism.

Directly connected with the enactment of the new Hydrocarbons Code is the (re)launching of the 2016 licensing round. A total of 13 blocks (eight offshore blocks in the deepwater and ultra-deepwater, and five onshore blocks in the Cuvette Basin) were put on offer, and according to well-informed sources about 30 companies—including international majors, looking at investing in the Republic of Congo for the first time—have formally expressed their interest in participating. The time the Parliamentary approval and Presidential promulgation process took caused the timetable of the licensing

CLIPPER BOOK MIRANDA				 Miranda & Associados Sociedade de Advogados, SP, RL
MEDIA	INTERNATIONAL ENERGY LAW REVIEW			
Nº PAG.	317 - 319	DATA	dezembro 2016	

Regional Developments 319

round to be revised. The tender documents (including the promulgated Hydrocarbons Code and a model PSC) were made available on 15 October, and the deadline for the submission of offers is 31 January 2017. And the launching of another licensing round, for pre-salt and post-salt plays in shallow waters, has just recently been announced for 2017/2018 by the Congolese Minister of Hydrocarbons.

Despite some recent inactivity—to which the presidential campaign, the elections themselves and the aftermath of the electoral process are not entirely alien—the Congolese oil industry seems to be gaining momentum.

Ana Pinelas Pinto

Ana.Pinto@mirandalawfirm.com

Hugo Moreira

Hugo.Moreira@mirandalawfirm.com