COMMERCIAL LAWS OF MOROCCO
May 2013

AN ASSESSMENT BY THE EBRD

Office of the General Counsel
## COMMERCIAL LAWS OF MOROCCO
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<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal system</td>
<td>2</td>
</tr>
<tr>
<td>Commercial legislation</td>
<td>3</td>
</tr>
<tr>
<td>Infrastructure and Energy</td>
<td>5</td>
</tr>
<tr>
<td>Concessions and PPPs</td>
<td>5</td>
</tr>
<tr>
<td>Energy</td>
<td>13</td>
</tr>
<tr>
<td>Electricity</td>
<td>14</td>
</tr>
<tr>
<td>Gas sector</td>
<td>16</td>
</tr>
<tr>
<td>Renewable Energy</td>
<td>16</td>
</tr>
<tr>
<td>Energy Efficiency</td>
<td>17</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>19</td>
</tr>
<tr>
<td>Public procurement</td>
<td>24</td>
</tr>
<tr>
<td>Private Sector Development</td>
<td>31</td>
</tr>
<tr>
<td>Corporate governance</td>
<td>31</td>
</tr>
<tr>
<td>Insolvency</td>
<td>33</td>
</tr>
<tr>
<td>Judicial capacity</td>
<td>36</td>
</tr>
<tr>
<td>Secured transactions</td>
<td>41</td>
</tr>
</tbody>
</table>

### Basis of Assessment:
This document draws on legal assessment work conducted by the Bank (see [www.ebrd.com/law](http://www.ebrd.com/law)) in 2011-12. The selection of topics reflects the areas where the EBRD has developed relevant expertise through its Legal Transition Programme. It does not purport to cover all legal topics affecting commercial activities. The assessment is reflective of the situation at the time of its preparation and does not constitute legal advice. For further information please contact ltt@ebrd.com.

This assessment was funded by SEMED Multi-Donor Account which is supported by Australia, Finland, France, Germany, Italy, Netherlands, Norway, Sweden, and UK.
Legal system

Morocco is a constitutional monarchy with an elected parliament and a mixed legal system of civil law mainly based on French law with some influence from Islamic law. Legislative acts are subject to judicial review by the Supreme Court. The principal sources of commercial legislation in Morocco can be found in the Code of Obligations and Contracts of 1913 and Law No. 15-95 establishing the Commercial Code.

Before the recently adopted Constitution, the King of Morocco held vast executive powers, including the power to dissolve parliament. A referendum was held in early July 2011 approving a new Constitution which included reforms, the most important of which being that the Amazigh language is now an official language of the State along with Arabic; the King now has the obligation to appoint a Prime Minister from the party that wins the most seats in parliamentary elections; and the Prime Minister is the head of government and president of the Council of Government with the power to dissolve parliament.

The Constitutional branch of the Supreme Court has the power to determine the constitutionality of legislation, excluding royal legislation (Dahîrs). In addition, the Constitutional chamber is authorized to review the legality of election procedures.

The Council of Government is in charge of preparing the general policy of the State, while the King retains complete control of the armed forces, foreign policy and the judiciary, as well as the power to choose and dismiss the Prime Minister, and control over matters pertaining to religion.

Legislative power in Morocco is vested in both the government and the two chambers of parliament, the Assembly of Representatives (Majlis Al-Nuwab) and the Assembly of Councillors (Majlis Al Mustahsareen). The King can also issue royal decrees which have the force of law. The most recent parliamentary elections took place in November 2011.

The Moroccan Government’s General Secretary (Secretariat General du Gouvernement - SGG) issues legal opinions upon request from the Prime minister or governmental authorities, however, whether such opinions are binding, or if they are undertaken in accordance with SGG’s mandate seems to be a matter of debate.
Commercial legislation

The principal sources of commercial legislation in Morocco can be found in the Dahir of Obligations and Contracts dated 1913 and amended thereafter, in addition to the Code of Commerce dated 1996. For historical reasons, Moroccan law is largely based on French law and tradition. Even today, French case law can have authoritative value in Morocco in specific areas of the law.

The establishment of special commercial courts in 1997 has reportedly led to some improvement in the handling of commercial disputes. Nevertheless, the lack of training for judges on general commercial matters remains one of the key challenges to effective commercial dispute resolution in the country. In general, litigation procedures are time consuming and resource intensive, and there is no legal requirement with respect to case publishing. A new Arbitration Law was passed in July 2007 which allows for international arbitration; mediation exists but is not often resorted to.

The 2006 law on the delegated management of public services constitutes the platform through which public entities and local authorities are allowed to conclude partnerships with the private sector for the performance of a public service, and the construction and operation of infrastructure and public works. The legal framework would benefit from the adoption of a new specific Public-Private Partnership (“PPP”) law and from putting into operation the PPP unit which was recently established by the Ministry of Economy and Finance.

EBRD’s assessment of commercial laws and practice in Morocco, as well country visits conducted by the Bank has revealed a need for developing a number of initiatives, in particular:

- encouraging the diversification of the financing of the agricultural sector via well tested tools such as warehouse receipts law;
- promoting the development of a wider range of financial products via the development of a secured transactions law which would permit a more flexible security package, the revision of the mortgage law to address the problems of enforcement; and exploring other legal tools, such as factoring;
- strengthening the private sector via better corporate governance framework (including of banks and listed companies)
TABLE 1 - Snapshot of Morocco’s commercial laws

<table>
<thead>
<tr>
<th>FOCUS AREA</th>
<th>HIGHLIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concessions and PPPs</td>
<td>Both the law on the books and PPP practice in Morocco were found to be in “medium compliance” with internationally recognised standards. Specific PPP legislation is lacking and the scope of the current legislation governing concessions is restrictive as it does not apply to PPP procurement by central government departments nor to concessions procured by companies, even if they are fully state-owned. Concessions and PPPs are mainly governed by the law on the delegated management of public services or infrastructure by municipalities or public enterprises. However, this law is not applicable to central governmental authorities, as the Civil Code and Administrative law regulate the granting of concessions/PPPs by these entities. A PPP unit was only recently established and it is thus too early to assess its effect on the overall PPP framework.</td>
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<tr>
<td>Energy</td>
<td>The assessment placed Morocco in the “medium risk category” for investors when measured against EU Directives and international energy regulation principles. This is mainly attributable to the lack of a unified policy framework; the lack of an independent regulatory authority; limited consumer choice; limited third party access; and non-compensatory tariffs. In addition, there is no independent regulator. Morocco’s electricity market is based on a “single buyer” system, where a state-dominated entity is responsible for buying all power generated by the country’s privately-owned generating companies. Domestic gas production is almost negligible and is all located in the south. Since there is no gas market, there is no regulatory framework.</td>
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<tr>
<td>Telecoms</td>
<td>The EBRD’s assessment of the overall legal and regulatory risks in association with the country’s telecommunications sector shows that Morocco is a “medium risk category” for investors. Liberalisation of the telecommunication sector started in 1997. Interestingly, the assessment shows that regulation in practice has superseded applicable legislation as the sector regulator has introduced amendments to the regulatory framework, which in many cases reflect best practice concepts. Nevertheless, there appears to be no consistent regime on rights of way to access the public domain. In addition, there is no general authorisation regime, and the regulator remains in control of the number of licences granted. With the exception of interconnection prices, there is no clear requirement that prices of other wholesale services include a return on capital as a component of costs. Amendments are being proposed to the current telecommunications law. In addition, there is an initiative to reduce the maximum timeframe for decision-making on rights of way and to introduce standard fees for the use of the public domain. It is worth noting that Morocco has the highest percentage of internet users in the region.</td>
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<tr>
<td>Public procurement</td>
<td>The assessment revealed that, although stable and based on the principles of fair competition and non-discrimination, public procurement legislation allows for preferential treatment of domestic bidders, which has a negative effect on competition standards. A positive feature of the public procurement process in practice is that contracting entities have adopted standard tender procurement forms, templates, and contract documentation, which is bound to encourage the efficiency, certainty, and economy of the process. Nevertheless, the law does not currently prescribe specific deadlines for the completion of the procurement procedures, which negatively impacts the speed, certainty and efficiency of the overall process. In EBRD’s 2012 assessment of the quality of the public procurement legal framework (law on the books) Morocco scored medium compliance as compared to other countries in the EBRD region.</td>
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<td>Corporate governance</td>
<td>Corporate structure in Morocco is generally characterised by the concentration of ownership and majority owner control over director nomination and election processes for board members. The legal and regulatory framework does not contain a comprehensive definition of directors’ duties of loyalty and care. Although conforming to the Corporate Governance Code is only voluntary, the Code does provide a definition for the fiduciary duties of board directors that is in line with best practice.</td>
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<td>Insolvency</td>
<td>The Moroccan insolvency system is substantially inspired by the French insolvency regime, which is amongst the most debtor-friendly regimes in the world. It contains provisions for prevention of financial difficulties in advance of insolvency or cessation of payments (a cash flow-based insolvency test) and for either rehabilitation or liquidation during insolvency. Creditors do not have an important role in insolvency proceedings. The system relies instead on strong judicial control. One of the key practical issues in Morocco is the lack of professional skills and experience of insolvency office holders and judges who handle insolvency cases.</td>
</tr>
<tr>
<td>Judicial Capacity</td>
<td>Courts in Morocco suffer from a deficit in material and human resources. Many judges lack sufficient judicial training and opportunities to specialise. The process of allocating cases to judges is not sufficiently transparent nor is it efficient, and court decisions lack predictability. Recent reforms have led to the creation of specialised courts, and there is a trend towards an increased use of alternative dispute resolution, including mediation. However, both litigation and enforcement procedures remain lengthy and uncertain.</td>
</tr>
<tr>
<td>Secured transactions</td>
<td>The framework for collateral and liens remains complex in Morocco. This is mainly attributable to a difficulty in determining priority in ranking classes and liens. Banks usually resort to pledges and mortgages. In addition, banks typically apply debt discounting, factoring and assignment of claims techniques. One of the key challenges that are cited in the overall framework for secured lending in Morocco is the inefficiency of the judicial system which hinders effective enforcement and recovery.</td>
</tr>
</tbody>
</table>

Source: EBRD legal assessments 2011-12 (for further details please see the focus analysis in the following sections).
The EBRD has developed and regularly updates a series of assessments of legal transition in its countries of operations, with a focus on selected areas relevant to investment activities. These relate to investment in infrastructure and energy (concessions and PPPs, energy regulation and energy efficiency, public procurement, and telecommunications) as well as to private-sector support (corporate governance, insolvency, judicial capacity and secured transactions).

Detailed results of these assessments are presented below starting with infrastructure and energy and going into private sector development topics.

The completed assessment tools can be found at www.ebrd.com/law.

Infrastructure and Energy

Concessions and PPPs

In a nutshell...

Both the law on the books and PPP practice in Morocco were found to be in “medium compliance” with internationally recognised standards. Specific PPP legislation is lacking and the scope of the current legislation governing concessions is restrictive as it does not apply to PPP procurement by central government departments nor to concessions procured by companies, even if they are fully state-owned. Concessions and PPPs are mainly governed by the law on the delegated management of public services or infrastructure by municipalities or public enterprises. However, this law is not applicable to central governmental authorities, as the Civil Code and Administrative law regulate the granting of concessions/PPPs by these entities. A PPP unit was only recently established and it is thus too early to assess its effect on the overall PPP framework.

Overview

Morocco’s longstanding tradition of PPP projects was revived in the 1990s with the first North African Jorf Lasfar build-operate-transfer (BOT) power plant project which achieved successful financial closing in 1997. Around that same time, management of the distribution of drinking water, electricity, and sewage in the Greater Casablanca area was delegated to a private company. This was followed by similar delegations in Rabat and Tangier-Tetouan along with a number of other concession projects such as the El Guerdane irrigation project.

A limitation in the scope of the applicable law has contributed to the ranking of PPP legislation in Morocco as being in “medium compliance” with internationally recognised standards. This score is below average in comparison to both the EBRD countries of operations and the Southern Eastern Mediterranean (“SEMED”) region. Although the 2006 Moroccan law allows for the carrying out of different forms of PPPs, our assessment reveals that the legal framework for concessions and PPP in Morocco would benefit from a number of improvements. In addition, both international and local practitioners in the field of PPP development share that view, some even encourage the adoption of a new PPP-specific law.

A PPP unit was created within the Ministry of Economy and Finance in September 2011 and is already in operation. It is in touch with a number of international institutions such as the European Investment Bank (EIB) and the International Finance Corporation (IFC). The PPP unit is expected to play a significant role in the development of PPP pilot projects within the country, but it is still too early to determine its actual effect in practice. We were informed that the unit has started work on a new PPP law which is expected to cover all types of PPP including government and public company concessions.

Quality of the legislative framework in Morocco (“law on the books”)

In EBRD’s 2012 Concessions Sector Assessment, Morocco’s PPP legislative framework on the books was found to be in ‘medium compliance’ with international standards (54.8%). The assessment measured the quality of PPP legislation and scores were given according to compliance with internationally recognised benchmarks. (See Chart 1 below).

Concessions and PPPs are regulated under Dahir No. 1-06-15 which was enacted in 14 February 2006 to ratify Law No. 54-05, regulating ‘contracts for the
delegation of the management of public services or infrastructure concluded by municipal authorities or public enterprises. The law is based on the State’s past experiences, however, its scope is significantly restrictive and does not apply concessions by companies even if they are fully owned by the state and, as such, are no longer considered to be public enterprises.

Furthermore, the current legal framework does not address PPP procurement by central government departments, and there is no clear legal basis for the regulation of projects other than concessions. Neither is there a clear basis for the implementation of wider categories of PPPs.

Enacting a PPP-specific law, could explicitly allow for a variety of PPP models, as well as strengthen the legal basis for the procurement of projects at the local, regional, and national levels. This is bound to increase investors’ trust in the legal basis upon which their PPP investments will be based.10

Chart 1 – Quality of the PPP legislative framework in Morocco

As illustrated in Chart 1 above, while the definitions and scope of the applicable law are relatively clear, the rules for the selection of the private party are in need for enhancing. For instance, although generally the concessionaire should be selected via a competitive tendering process, this obligation is not applicable to the State or state-owned companies as the law is not applicable to those entities. Furthermore, there is no real regulation for security and support issues. The concessions law allows pledges in relation to assets held by public enterprises but not by local communities.

Furthermore, the law does not explicitly provide for the public authority’s ability to give support to the contracting authority or guarantee its proper implementation of the PPP agreement. Most importantly, the law neither provides the necessary flexibility for the parties to arrange for financing under the project agreement, nor does it allow the lenders to “step-in” and take over the implementation of the agreement in the event of default of the private party, nor is there a mechanism to allow the lenders to substitute the private party in the event of any such breach.

PPP legal framework

As indicated in Chart 1 above, the core area "PPP Legal Framework" concentrates on the existence of specific PPP law or a comprehensive set of laws.
regulating concessions and other forms of PPPs, and allowing a workable PPP legal framework.

In Morocco concessions and PPPs are mainly governed by Dahir No. 1-06-15 dated 14 February 2006, ratifying Law No. 54-05 on the delegated management of public services or infrastructure by municipalities or public enterprises. However, this law is not applicable to central governmental authorities, as the Civil Code and Administrative law regulate the granting of concessions/PPPs by these entities.

In addition, specific laws regulate different sectors. For instance, there are specific laws for ports, highways, railways and airports, water and electricity. Nevertheless, the country currently lacks a single act which specifically incorporates the legal framework for PPPs.

The concessions law is intended to regulate the delegation of management of public services and infrastructures but to date the relevant implementing regulations have not been enacted for centrally procured PPP projects. In the absence of specific legal regulation, bidding procedures are designed on a project by project basis and are set out in the tender document. This provides bidders with information as to how the procurement will be run but does not provide certainty that similar procedures will apply to all major project procurements.

The understanding is that PPPs that require availability payments from the public sector and that do not fall under the ambit of the concessions law will be procured under Procurement Decree No. 2-06-388. The Procurement Decree is designed to govern general public procurement and not PPPs, and thus the tender processes outlined therein are inappropriate for complex procurements of long term PPP contracts.

The law allows the setting up of the institutional form of PPPs (“IPPP”)s as it provides that the project company which must be established can be public or private but does not state any specific rules for the selection of the private partner for the awarding of the concession.

One of the drawbacks of the PPP legal framework in Morocco is that it explicitly requires that the main assets of a concession be mandatorily returned to the granting authority at the end of the concession which excludes Build-Operate-Own models form available projects.

Private Finance Initiatives (PFIs) are not excluded by legislation as the delegated management may be in relation to the completion of operations with regards to a public facility participating to the delivery of a public service without the delegation of the public service itself which is typical to PFIs.

Definitions and scope of the law

The assessment shows that the definitions and scope of the law are relatively clear, although some improvement in this respect is still attainable.

The delegation of management is defined in the law as a contract by which the public authority: the “grantor”, delegates - for a limited period of time -the management of a public service which is under its responsibility to a public or private legal entity: the “délégataire” (concessionaire). The concessionaire is granted the right to collect remuneration from the users and/or to make profit out of this management.

The law makes a distinction between a PPP agreement (such as a concession) and a license in as far as it specifies that the granting of a right for delegated management does not waive the concessionaire’s obligation to obtain the legally required authorisations.

However, ensuring the certainty of the boundaries and scope of application of the PPP legal framework, including a clearer definition of “PPP”, “concerned sectors”, “competent authorities”, and “eligible private party” will limit the risk of challengesto the validity of PPP contracts.

Selection of the private party

In the assessment, the core area “Selection of the Private Party” (as indicated in Chart 1 above) questioned the mandatory application of a fair and transparent tender selection process, with limited exceptions, allowing direct negotiations. Equally important is the accessibility of the rules and procedures governing the selection of the Private Party, awarding and further implementation of a PPP project. Sound PPP legislation should foresee a process that guarantees competitive selection, equal treatment of potential investors, opportunity to challenge the rules and decisions of contracting authorities and competitive rules for unsolicited proposals.

In principle, the law requires the contracting authority to select the private party/concessionaire through a competitive tender process which ensures the equality of candidates, objectivity of the selection criteria, and the transparency of the process and impartiality of decisions. Article 6 of the concessions law provides for some exceptions in specifically defined cases. However, the obligation to use competitive bidding is not applicable to the State for any delegated management of public service.

Nevertheless, in practice the State reportedly applies competitive processes for most of its awarded contracts. This seems to be based on a recommendation from the department of public enterprises within the Ministry of Finance which requires a competitive process for all delegated management service contracts signed by the State.
The law necessitates that the selection process is

priorily publicised.

However, a negative feature of the law is that it does

not require a contracting authority which rejects an

applicant at the time of pre-selection, or disqualifies

a bidder, to make public the reasons for its decision,

or inform the rejected bidder of its reasons for

rejection.

Furthermore, the law does not provide that all

proposals be ranked solely on the basis of

predefined evaluation criteria that are set forth in

pre-selection documents. Nor does the law provide

that the contracting authority or any other public

authority maintain records of key information

pertaining to the selection and award proceedings.

The law does however require the publication of a

notice of award for the project which identifies the

private party and includes a summary of the

essential terms of the project agreement. An extract

of the Project Agreement must be published in a

specified official gazette and must include the name

of the contractors, the scope, duration, content and

provisions concerning end users.

The law does not contain provisions regulating final

negotiations (i.e. post contract award) so that

transparency, equal treatment and competition are

ensured. Another drawback is that the law does not

provide the contracting entity with the authority to

terminate negotiations with an invited bidder and

start negotiations with the second ranked candidate

if it becomes apparent that the bid will not result in

an agreement. Nevertheless, the law does not

prohibit the contracting entity from making such a

decision.

Furthermore, the ability of bidders to seek remedies

against administrative action could be improved.

Other then general recourse to the country's court

system, the law does not provide for an

administrative mechanism through which bidders

who claim to have suffered losses or injury may seek

review of the contracting authority’s actions or failure

to act.

A positive feature however is that the law seems to

provide for an adequate framework for the

contracting authority to manage unsolicited

proposals and private initiatives.²

Project agreement

The core area "Project Agreement" in Chart 1 reflects

the degree of flexibility with respect to the content of

the provisions of Project Agreements, which should

allow a proper allocation of risks without

unnecessary, unrealistic, non-bankable, or

compulsory requirements, or unnecessary

interferences from the Contracting Authority.

Freedom to negotiate concession agreements is

important because it allows the factoring in of a

greater variety of circumstances while allocating risks

between the parties and thus elaborating a more

creative and financially efficient approach to risk

allocation. Moroccan law offers some flexibility in this

regard. A model PPP agreement may be drafted by

central government, however, the model agreement

sets out a list of mandatory provisions and conditions

for approval.

In a PPP framework that is conducive to investment,

the law would generally provide that the duration of

the project agreement should be dependent on the

length of time taken for the amortisation of the

private party's investment and an appropriate return

on capital. A positive aspect of the Moroccan

framework is that the duration of the project

agreement must take into account the nature of the

services performed and the projected investment. In

addition, the duration of the agreement should not

exceed the normal duration of depreciation if the

works are to be financed by the concessionaire.

Some grounds for termination are listed in the law

which cover the usual cases of PPP termination in a

non exhaustive manner.

Although the law does not explicitly provide for the

compensation of the private party for losses incurred

as a result of public authority acts, or in the event of

early termination, such is not prohibited by the law

and it is subject to the general rules of compensation

under administrative law.

A positive feature is that the law leaves it to the

project agreement to fix the financial aspects and

tariff structure of the delegation of services including

the adjustment or revision methods taking into

account the required financial balance, productivity

gains, and savings resulting from the improvement of

the management. However, the law does not provide

clear guidance on all aspects of interaction between

the bodies that have the power to award PPPs and the

bodies that regulate tariffs and service standards.

Security and support issues

On average, about 20% to 30% of a PPP project is

financed by the private party itself. The other 70% to

80% is usually borrowed from lenders under a

security arrangement according to which the private

party gives to the lenders security over its rights

under the project agreement. However, in order for

this security to be effective, the state should also

provide an assurance in case the enforcement of the

security becomes necessary.

In line with this, the core area “Security and Support

Issues” concentrates on the availability of reliable

security instruments to contractually secure the

assets and cash-flow of the private party in favour of

lenders, including "step in" rights and the possibility

of government financial support to, or guarantee of,

the contracting authority’s proper fulfilment of its
obligations. Further, good international practice requires that the parties be able to arrange for financing the project with reasonable flexibility.

The Moroccan concessions law allows pledges in relation to assets held by public enterprises but not by local community. Lenders can receive a full range of securities in line with those which are commonly seen on the international market.

The law allows the public authority to provide financial and/or economic support for the implementation of PPPs. However, it does not regulate cases where the public authority is allowed to provide support or guarantee the contracting authority’s proper implementation of the PPP.

Other noticeable drawbacks include the fact that the law does not allow the parties to arrange the financing with reasonable flexibility under the project agreement, neither does it provide for the lenders’ right to step in in the event of default by the private party, nor does it allow the lenders to substitute the private party with a qualified new party without initiating a new tender process.

Settlement of disputes and applicable laws

PPP legislation should ensure the possibility to protect the rights and interests of both parties under an effective system of dispute resolution, including the possibility for international arbitration and enforcement of arbitral awards. This principle is especially important for creating a more secure, predictable and attractive climate for investors.

Accordingly, this area of the assessment evaluates the possibility of obtaining a proper remedy for breach under the applicable law, through international arbitration and enforcement of arbitral awards.

The use of arbitration as a means of dispute resolution in PPP projects is explicitly allowed under Law No. 54-05. Nevertheless, international arbitration is not unquestionably accepted and investors therefore consider it wise to provide for a clause allowing international arbitration, as the law permits a contracting authority to enter into a project agreement that is subject to international arbitration.

Some existing concession agreements refer both to international arbitration where the investment itself is concerned and to a local administrative forum for day to day operational disputes.

Morocco has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards in 1967 as well as the Washington Convention on the Settlement of Investment Disputes (ICSID) in 1966. In addition, it has ratified several international treaties for the protection of foreign investments.

Furthermore, the law does not prohibit the contracting authority from entering into side agreements that are governed by foreign laws, such as a direct agreement with the lenders.

Review of effectiveness of the PPP framework in practice

Similar to the legal framework on the books being in medium compliance with international standards, an assessment of the effectiveness of the PPP framework in practice shows that the country is in “medium effectiveness” when compared to international best practice (52%). Chart 2 below illustrates the effectiveness of PPP legislation in practice.
Chart 2 above reflects the quality of PPP practice in Morocco. In this respect, a key problem that was identified during the assessment is the lack of a general PPP policy. There is no national, municipal, or regional long term programme for PPP promotion and awareness in the country, nor are there sustainable training and educational programmes for public servants in that field. On the institutional front, a PPP unit was recently established but it is still too early to assess its actual role in the development of PPP in practice. So far, only minor problems have arisen with respect to the enforcement of awarded PPP projects.

The results of the effectiveness assessment are further explained below.

**Policy framework**

A modern PPP law should be based on a clear policy for private sector participation. In addition to a sound legislative framework, clear government policy and strategy for private sector participation is important for signaling the commitment of the government to develop a stable and attractive investment environment and to reflect its efforts in improving the legal environment. Such strategy should generally be developed on the level of a government-approved document. Accordingly, sound international practice entails the existence of a clearly defined national policy framework for PPPs, infrastructure, and public services.

Although the government in Morocco seems keen on developing PPPs in different sectors and is adopting institutional reforms to facilitate that process, a clear and specific PPP policy is still lacking.

Government direction in this regard can be deduced from Morocco’s general economic policies as evidenced by a trend toward the delegation of public services such as the distribution of water and electricity, as well as sanitation in Casablanca. This trend was also obvious in the initiation of the Jorf Lasfar BOT project, and was confirmed in the government’s statements in 2007 as part of the policy to liberalise the Moroccan economy.

PPP policy is also part of the privatisation process and is evidenced by the State’s desire to withdraw from productive services. In addition to water and energy, PPP has been encouraged at the government’s initiative in numerous sectors including housing, telecommunications, urban transport (Salétraways), and agriculture (Guerdane irrigation project). An announced National Development Plan stated that the government can significantly benefit
from a well designed PPP initiative to help close Morocco’s substantial infrastructure gaps.

The enactment of a specific PPP law would further contribute to the development of PPPs in Morocco. Local practitioners and international institutions that are active in the region confirm that a PPP specific law is currently under consideration.

At the time being there seems to be no administrative guidance or printed information edited by the government concerning the legal framework for PPP projects in the country. However, the newly established PPP Unit is expected to take-over this role.

Furthermore, there is no national, municipal, or regional long term programme for PPP promotion and awareness in the country.

Although, from time to time, some general training sessions are made available through public seminars and international conferences, there are no clear and sustainable PPP training programmes that are dedicated to public servants on a national level. PPP courses are not part of university curricula and there are no specialist departments or faculties that specifically teach PPP in universities.

Furthermore, concessions and PPPs are still sensitive political and social topics. Recent delegation of management contracts in water, electricity and sewage services have been a source of public criticism based on a concept of rejection for private sector management of public services which is perceived as being much more expensive. Nevertheless several international institutions still express their confidence in the success of the PPP model in Morocco.

Institutional framework

This core area evaluates the existence of a PPP institutional framework, as well as how well the relevant institutions perform in practice and whether the different entities coordinate and interact, both with each other and with other market participants, in an efficient manner. Successful implementation of a PPP institutional framework requires the clear identification of the body authorised to negotiate project agreements, as well as implement and monitor the performance under the agreement, including the clear division of powers between central and local authorities.

A new PPP unit was created in Morocco within the Ministry of Economy and Finance in order to promote and assist in the development of PPP projects. However, the unit is not yet in operation and it is thus not yet possible to assess its effect.

There are no specific departments established in any ministries or at sectoral levels, other than the PPP unit, neither is a specific "one stop shop" for PPP authorisations and formalities or a "one stop shop" the services of which are available to sponsors and investors in PPP.

In addition, the law does not provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies that regulate tariffs and service standards.

The division of power between the numerous stakeholders involved on the public side is by no means simple.

For example, a communal charter (Dahir No. 1-02-297 of 3 October 2002) allows municipalities to contract PPPs if they are approved by the supervisory authority, which is the Ministry of Interior. The decision-making process for infrastructure projects involves different central government departments. The process can also be initiated at the municipal level. Projects are likely to involve a wide range of stakeholders, including decision-making committees across ministries for centrally procured projects. In addition, there are concerns as to whether municipalities have sufficient legal powers to award contracts.

Legal reforms to remove ambiguities in the powers of municipalities with respect to procuring projects is expected to enhance investor confidence and the ability of local authorities to develop projects in line with the specific needs of the concerned region.

PPP law enforcement

This core area examines the effective statistical implementation of PPP projects and whether such projects have been awarded and implemented in compliance with the law.

PPPs in the public transportation (buses) and waste collection sectors have been awarded following a competitive selection procedure that is in accordance with the concessions law.

In addition, an energy sector BOT project, and a port concession have been awarded under different laws. The fact that the concessions law does not apply to centralised PPP projects allows the awarding of PPPs outside the designated legal framework.

With respect to implementation few difficulties arose at the time of the periodical review of the contract terms for the delegations of services in the water and electricity sectors.

All in all, about 50 PPP projects are said to have been awarded in Morocco, or are currently in operation. These are mostly in the public transportation, waste, water and electricity distribution, energy sector (power plant, wind firms), and ports.

Of the most significant of those are the Jorf Lasfar power plant (1360 MW) and the Tarfaya wind farm (300 MW); both being BOT projects that were awarded by a central contracting authority.
No PPP projects have ever been awarded in the non-merchant sector (such as hospitals, schools, prisons...etc.)
Energy

In a nutshell...

The assessment placed Morocco in the “medium risk category” for investors when measured against EU Directives and international energy regulation principles. This is mainly attributable to the lack of a unified policy framework; the lack of an independent regulatory authority; limited consumer choice; limited third party access; and non-compensatory tariffs. In addition, there is no independent regulator. Morocco's electricity market is based on a “single buyer” system, where a state-dominated entity is responsible for buying all power generated by the country’s privately-owned generating companies. Domestic gas production is almost negligible and is all located in the south. Since there is no gas market, there is no regulatory framework.

Overview

Morocco has a population of 32.3 million and a GDP of US$ 163.5 billion. In 2011, the total primary energy consumption in Morocco was 16.9 million toe, of which petroleum products made up 62%, coal constituted 22.1%, natural gas made up 4.7% and renewable energy (“RE”) contributed 4.2% (3.1% hydropower and 1.1% wind power). The Ministry of Energy, Mines, Water and Environment (known by its French acronym as “MEMEE”) projects that, based on demographic trends and increases in the standard of living, the demand for primary energy will triple between 2010 and 2030, reaching 43 million toe in 2030. Energy costs in 2011 were 89.9 billion DH, with imported petroleum products accounting for 81.4 billion DH.

Morocco has virtually no conventional energy resources and depends almost entirely on imported fuel to generate electricity. Due to demand outpacing domestic generation, an additional 4,607 GWh of electricity was imported in 2011, primarily from Spain and Algeria. Annual demand increased an average of 7.5% in the first half of the last decade, and jumped to 8.4% in 2011. MEMEE projects that demand for electricity over the period 2010 to 2030 will quadruple, from 26,500 GWh in 2010 to 96,000 GWh in 2030. Rural electrification of the country reached 97.5% in 2011, a dramatic increase from 20% in 1995.

Institutional Framework

There is no single law that lays out the functions of different bodies within the GoM or that describes the market framework. Instead, many different decrees and laws have been issued over the past two decades that have shaped the current structure of Morocco’s electricity sector. MEMEE’s Electricity Directorate is primarily responsible for developing policy in the electricity sector but consults with ONEE and, with respect to RE and energy efficiency (“EE”), also seeks the in-put of the Moroccan Agency for Solar Energy (“MASEN”) and the National Agency for the Development of Renewable Energy and Energy Efficiency (l’Agence Nationale pour le Développement des Energies Renouvelables et de l’Efficacité Energétique) (“ADEREE”). Large investments and tariff changes have to be approved by an inter-ministerial council chaired by the Minister of Finance.

MEMEE adopted a National Energy Strategy in March 2009 (“2009 Energy Strategy”), which was updated in August 2011 with a New Energy Strategy (“2011 Energy Strategy”). The 2009 Energy Strategy, supported by a study performed by McKinsey & Company for the period 2010-2030, laid out a number of measures to meet growing electricity demand. They included:

- Diversification of fuels and technologies in generation
- Development of RE resources
- Making EE a national priority
- Exploitation of national fossil resources
- Integrating the national grid in the regional electricity networks.
- These strategies were to be implemented through short, medium and long-term Action Plans. In the short-term (2009-2012) the 2009 Energy Strategy aimed to achieve a balance between demand and supply by increasing generating capacity at existing plants and implementing energy efficiency measures. In the medium-term (2013-2019), the plan called for diversifying Morocco’s energy mix based on robust and economic technologies (new coal plants, increase in RE plants and developing a natural gas system).
- The successes of the measures taken following publication of the 2009 Energy Strategy were reviewed in the 2011 Energy Strategy, which reiterated and updated the objectives of the 2009 Energy. One of the updates of the 2011 Energy Strategy was to add a new Green New Energy Deal to be implemented from 2012 through 2020. (The implementation of the individual Action Plans is discussed below in the relevant sections dealing with RE, EE, natural gas and regional interconnections.)
- There is currently no independent regulator and MEMEE assumes the role of regulator through its Electricity Directorate; however,
MEMEE is currently reviewing the recommendations of Euro Consult, a European consulting firm, regarding the creation of such an entity and has publicly discussed the possibility of creating an electricity sector regulator in 2014. The recommendations are not yet available as they are still being reviewed by MEMEE.

Electricity

Market framework
Morocco’s electricity market is based on a “single buyer” system, with ONEE being responsible for buying all power generated by the country’s privately-owned generating companies. ONEE is also the largest power generator in the country and the major distribution entity; these functions are performed by different divisions within the vertically-integrated company, not by affiliated or legally separate companies.

The only exception to the “single buyer” system has been the EnergiPro program which allows for direct contracting between producers of RES power and industrial customers connected to the medium, high and very high voltage network; however, ONEE is the only entity that can buy electricity generated from coal or natural gas.

The Transmission Grid
ONEE holds a monopoly on transmission and is responsible for construction, operation and maintenance of the electric transmission system, as well as for long-term load forecasting and planning development of the network to meet expected demand. In practice, however, ONEE’s expansion ability is limited by financial constraints.

Regional Interconnections
Morocco is connected to Spain through a 1200 MW undersea cable, which was increased to 1400 MW in 1998. A third interconnection, currently under development, will increase the capacity of the interconnections between Morocco and Spain to 2100 MW. Morocco is one of a group of regionally interconnected networks and a member of the MEDRING project which aims to create a Pan-Arab electricity interconnection with Europe. The MEDRING project would connect Morocco, Tunisia, Libya, Egypt, Syria and Jordan, once the connection between Libya and Tunisia is operational. In addition to increasing Morocco’s security of supply, as envisioned in MEMEE’s National Energy Strategy, integration of Morocco’s electricity network with that of Europe also provides Morocco with potential markets for its solar and wind power resources.
Chart 3 – Electricity Sector in Morocco

Note: The spider diagram presents the sector results for Morocco in accordance with the benchmarks and indicators identified in an assessment model. The extremity of each axis represents an optimum score of 1.0 that is full compliance with international best practices. The fuller the “web”, the closer the overall regulatory and market framework approximates international best practices. The results for Morocco are represented by the blue area in the centre of the web.

Source: EBRD 2012 Energy Sector Assessment
Distribution

ONEE is responsible for distributing electricity to 55% of the population in Morocco. The remaining 45% are served through distribution companies which are privately operated under concessions or by public entities operating under the authority of the Ministry of Interior. The private concessions were granted by the municipalities of Casablanca, Rabat, Tangier and Tétouan. In Casablanca, the electric distribution system is operated by Lydec SA, in Rabat it is managed by Redal SA, a 100% owned subsidiary of Veolia Water AMI (“Veolia”), and in Tangier and Tétouan the concessions are held by Amendis SA, which is 51% owned by Veolia. The public entities (known as régies autonomes de distribution) manage the electric (and sometimes the water) distribution systems in the cities of Meknes, Marrakech, Fes, El Jadida, Safi, Larache, Agadir, Oujda, Béni Mellal, Settat, Taza and Kénitra. The distribution companies that are under private concessions make grid investments in accordance with the terms of their concession agreements.

Operational Environment

ONEE has not been unbundled and performs the functions of transmission, distribution and production as a single vertically integrated company. There is no transmission system operator or distribution system operator. A draft law that has been under consideration for some time would liberalize the market and unbundle ONEE.

Network Access

ONEE has published an access tariff for RES projects developed under the EnergiPro program but there is no Grid Code or Market Rules that governs access to the network;

Gas sector

Market Framework

There is no gas distribution system as yet but MEMEE is working on a new gas law which will create a gas market by allowing new entrants to sell directly to consumers and providing for third party access to the national gas transportation system. The law will include tariff principles and a establishment of an independent regulator is also under consideration for later this decade.

Renewable Energy

Legal framework and institutions

The cost of importing fuel and electricity has been a key driver in Morocco’s push to develop renewable energy and promote energy efficiency. In 2009, electricity from RES made up 33% of the total production (29% was hydropower and 4% was wind power). The
National Energy Strategy aims to increase the percentage of power from RES to 42% by 2020. In order to stimulate investment in RES, the GoM passed a framework law to promote the use of RES and other laws to create institutions to implement the strategy for renewable energy and energy efficiency.

The Renewable Energy Sources Law ("RES Law") was enacted in 2009. It authorizes private developers to enter into contracts with individual consumers or groups of consumers connected to the medium, high and very high voltage systems to supply them with electricity from RES. The law lays out an authorization procedure for RES development on a Build-Own-Operate-Transfer ("BOOT") but leaves to secondary legislation the implementation of the financial incentives for construction of RES projects. Thus far, no such financial incentives have been promulgated.

Under the RES Law, RES projects of 2 MW or greater are required to go through a two-step authorization procedure—a provisional authorization for construction and a final authorization for operation. The transmission system operator ("ONEE") is required to provide its technical opinion at both stages. The operating permit may not exceed 25 years, after which the ownership of the project reverts to the GoM at no cost and the GoM may require that the developer dismantle the plant and restore the site to its natural state, at the developer’s cost. Wind and solar projects of 2 MW or more can only be located in zones specified in the law. RES projects of 20 kW or less require no prior authorization and can be located anywhere, while RES projects greater than 20 kW but less than 2 MW are subject to a prior notice procedure. Renewable energy may be exported and if there is insufficient capacity on interconnections, developers may construct their own direct lines to connect to neighbouring transmission systems. Exports are subject to an export fee.

This RES framework is separate and different from the EnergiPro program introduced in 2006 by ONEE to induce development of renewable energy from wind by large industrial consumers, although it was also applicable to other RES. The program was capped at 1,000 MW, which cap has been reached. Under the EnergiPro program, ONEE purchases surplus power at a premium over ONEE’s peak tariff. It is the only tariff similar to a feed-in tariff in Morocco.

Several institutions were created in 2009 to implement the GoM’s RES strategy. ADEREE was mandated to develop demonstration projects and create wind and solar atlases. MASEN, a public-private agency, was created to promote solar power development. A third institution, the Research Institute on Renewable Energy (known by its French acronym as “IRESEN”), performs research and technical studies. In 2010, the GoM created the SIE, an investment agency which can take a minority share in new RES projects and is intended to eliminate the need and double glazing, and increased use of solar water heating. ADEREE, the implementing agency for EE, has already taken a number of steps. For example, ADEREE developed a solar water heating project called PROMASOL, which has already reduced the demand for electricity to heat water by increasing the number of solar water heaters from 35,000 m² in 2002 to 300,000 m² in 2010.

In the industrial sector, the strategy calls for, among other things, increased use of energy audits, variable speed and frequency, and energy efficient lighting, while in the transport sector, the strategy seeks improvements in urban transportation planning, public transportation and implementation of vehicle fuel efficiency standards. An Action Plan to implement the EE strategies is under development and pilot projects, technical
standards, and studies are being undertaken in each of these sectors. A new international tender was recently issued by the GoM for development of a new detailed EE strategy and implementation plan. The study is expected to last for 12 months starting January 2013. The Law on Energy Efficiency (“EE Law”) requires implementation of a number of measures to reduce energy consumption. They include:

- energy performance standards and labeling of appliances and equipment sold in Morocco
- EE standards in construction (dealing with insulation, building orientation, lighting, etc)
- rationalizing energy usage in the delivery of public services in municipalities,
- fuel efficiency standards for motor vehicles
- “energy impact” assessments of new urban projects which will consume energy above a certain threshold prior to authorizing construction of such projects (and where environmental impact assessment are required, to be conducted in conjunction with such assessment)
- Mandatory energy audits for energy consumers above a certain threshold along with mandatory mitigation measures recommended by such audits
- Accreditation and regulation of auditors
- Monitoring of implementation of EE
- Penalties for failure to comply with EE obligations
Telecommunications

In a nutshell...
The EBRD’s assessment of the overall legal and regulatory risks in association with the country’s telecommunications sector shows that Morocco is a “medium risk category” for investors. Liberalisation of the telecommunications sector started in 1997. Interestingly, the assessment shows that regulation in practice has superseded applicable legislation as the sector regulator has introduced amendments to the regulatory framework, which in many cases reflect best practice concepts. Nevertheless, there appears to be no consistent regime on rights of way to access the public domain. In addition, there is no general authorisation regime, and the regulator remains in control of the number of licences granted. With the exception of interconnection prices, there is no clear requirement that prices of other wholesale services include a return on capital as a component of costs.

Amendments are being proposed to the current telecommunications law. In addition, there is an initiative to reduce the maximum timeframe for decision-making on rights of way and to introduce standard fees for the use of the public domain. It is worth noting that Morocco has the highest percentage of internet users in the region.

Legislative framework

The Moroccan legislative framework for the electronic communications sector has a number of best practice features, including the interconnection regime, infrastructure access, market analysis, universal service and role of telecommunications operators in national security and emergency situations.

Consolidated Law of 1996 on Post and Telecommunications is the primary law impacting the telecommunications sector. It is supplemented with numerous decrees and other laws that address important aspects of the legislative and regulatory framework, which must be read in conjunction with the law so that it is best understood.

Regulation of the sector has developed in practice more than the legislation in place would suggest, as the general authorities and functions provided to the sector regulator (Agence Nationale de Réglementation des Télécommunications - ANRT) in the 1996 Law have been used as a foundation to support separate decrees. For example, although market analysis is not specified in the law, the provisions of secondary legislation adopt many best practice concepts, as applied in the EU framework.

However there is still only limited guidance on the conduct of market analysis, the designation of operators with significant market power and the imposition of market remedies. ANRT is understood to have prepared comprehensive amendments to Law 24/96 which are expected to align key aspects of the legal framework with best practice. These amendments reportedly focus primarily on market analysis, rights of way, infrastructure access, dispute settlement, tariffs, national roaming, consumer protection and penalties.

Morocco retains an individual licensing regime, unlike the European Union (EU) style general authorisation and notification framework. ANRT’s authority to set tariffs differs depending on whether the service is wholesale or retail, interconnection related, subject to margin or price squeeze, instead of the general authority usual under best practice to set tariffs for services of operators with significant market power.

ANRT’s authority with respect to tariffs is derived from several different laws and decrees, including the telecommunications law, which authorizes ANRT to “propose” the method of determining network tariffs and services; and the 2000 Law on Free Prices and Competition, which applies to all sectors and affirms the principle of free pricing. The 2000 law also created the Competition Council (Conseil de la Concurrence), which has a consultative role in setting tariffs.

Levels of fines appear to be meaningful to large operators; however ANRT lacks the power to impose graduated penalties. ANRT must apply to the court (Tribunal de Rabat) in order to impose a fine. ANRT may not impose fines directly, except for non-disclosure of information. All ANRT decisions are appealable to the Tribunal de Rabat and ANRT decisions cannot be suspended during appeal.

The operators’ licence conditions address personal data protection to meet many best practice requirements for consumer protection in the sector, such as those defined in the 2009 EU regulatory framework.

ANRT is responsible for developing and managing the National Numbering Plan, which is published on its website. After receiving a numbering request from an operator, ARNT assesses the request and if determined to be justified, ANRT assigns a block/range of numbers to the operator and informs the other national telecommunications operators. There is no specific requirement for adequate numbers and numbering ranges for all services. For broadband services such as VoIP, ANRT assigns non-geographic numbers.

For telecommunications equipment, Morocco retains a country-based equipment approval system instead
of type approval regime prevalent in best practice. A relevant decree and specifications in operators’ licences contain guidance for compliance with national security and public emergency requirements.

Chart 4 – Comparison of the legal framework for telecommunications in Morocco with international practice

Key: Extremities of the chart = International best practice
Note: The diagram shows the quality of the legal framework as benchmarked against international standards (European Union). The extremity of each axis represents an ideal score of 100 per cent, that is, full compliance with international standards. The fuller the “web”, the closer the overall telecommunications legal framework of the country approximates these standards.
Source: EBRD 2012 Electronic Communications Comparative Assessment.

Market framework

The telecommunication sector has been liberalised since 1997. After an unsuccessful attempt to attract new entrants to the fixed telephony market in 2002, the process was re-launched in 2006 and two new fixed licences were awarded. The three fixed players are now:

- The incumbent operator, Maroc Télécom (53% Vivendi Group, 34% Moroccan State and 13% listed on the Casablanca bourse);
- Méditel (Orange: 40% - Caisse de Dépôt et de Gestion: 30% - Finance Com: 30%);
- Wana (ONA Group and Zain).

Previous restrictions on wholesale transit traffic were removed and competitive operators are now permitted to provide any kind of voice service (national/international voice calls) and data transmission services. Maroc Telecom maintains 65% market share of basic fixed telephony subscribers. There are 3.56m fixed lines. This gives a penetration rate of 11/100 population, which is around the average for the 4SEMED countries assessed. Mobile subscriptions stand at 36.5m, which represents a penetration rate of 114/100 population.

Fixed broadband penetration has reached 1.8/100 population, with 99% provided by Maroc Telecom. Two alternative licensed operators cover the remaining 1%. This low level of fixed broadband penetration has resulted from most growth coming from mobile broadband subscriptions, which have risen to 2.3m since the launch of 3G services in 2006 (a current penetration rate of 8.1/100 population).

The incumbent operator, Maroc Telecom, began operating a mobile network in 1994 and currently has a 47% market share. The second GSM licence was granted in 1999 to Méditel, which has 33%
market share. A third GSM licence was granted to Wana in 2009, which already has 20% market share. All three operators were awarded 3G licences in 2006, each of them paying around EUR 30m plus EUR 6.5m as a contribution to spectrum re-farming. This mobile licensing timetable resulted in the unusual situation where Wana received a 3G licence before receiving a GSM licence. Wana launched its 3G service in 2008, building on its existing fixed line and internet services.

**Sector organisation and governance**

The Ministry of Industry Trade and New Technologies (MITNT) is responsible for policy and legislative development for a range of sectors and the sector regulator (ANRT) is responsible for implementation of policy and law relating to electronic communications. ANRT also prepares amendments to the regulatory framework on its own initiative, or on behalf of the Ministry.

ANRT was established in 1998 as a public body with financial autonomy. It carries out the allocation of radio spectrum and authorisation of frequencies for telecommunications services. There is a separate regulatory agency for broadcasting, the “Haute Autorité de la communication Audiovisuelle” (HACA).

ANRT retains the responsibility for competition issues linked to electronic communications, where it has ruled on about a dozen cases. Each time ANRT rules on a competition case, it informs the Competition Council. Decree 1025 further authorises ANRT to set prices for all interconnection services (origination, transit and termination) even if for services provided by operators that do not have significant market power.

ANRT is governed by a board, the Conseil d’Administration, that is chaired by the Prime Minister and includes several ministers or secretaries of State, five designated telecom experts and the Director of ANRT (with a consultative role). The board meets at least twice a year, to set ANRT general policy and discuss budget issues. The board has delegated regulatory tasks to specific committees. A management committee that includes representatives of the ANRT board sector representatives deals with interconnection disputes. So far ANRT is understood to have dealt with around 20 interconnection issues. Its decisions can be challenged in court but no ANRT decisions appear to have yet been challenged.

All ANRT decisions are appealable to the Tribunal de Rabat. If an operator appeals, the ANRT decision is suspended during the appeal process. However, ANRT may request court approval for payment by the operator of a deposit equal to a maximum of the fine imposed, pending the outcome of the appeal. A draft amendment to Article 30 of the telecommunications law, if adopted, would allow ANRT to impose fines not exceeding 2% (and up to 5% for second fine) without application to the Tribunal de Rabat and provide that ANRT decisions are not suspended during appeal process.

A Director, who is appointed and dismissed by the King of Morocco, heads ANRT. The Prime Minister proposes the directors, and it is expected that a new law will be adopted with clear criteria and conditions for director appointment and dismissal. The ANRT Director makes regulatory decisions on non-strategic issues based on recommendations of ANRT staff.

ANRT has published a “General Guidance Note” on the development of the telecommunications sector for the period 2010-2013. From this guidance note the main goals for this period are stated to be to:

- Support the development of network infrastructure, including for very high speed broadband, to facilitate the development of the Moroccan economy and to help reducing the digital divide.
- Enhance competition on prices to increase affordability of telecom services.
- Use regulation as a tool to develop competition in several segments of the market.

To reach these goals, the stated ANRT actions are:

- To implement new regulatory tools or clarify existing ones to strengthen competition for example to provide more details regarding the obligation to share infrastructures and to unbundle the local loop.
- To enhance transparency, simplify number portability procedures, and strengthen price controls on wholesale services.
- To allow for the development of new infrastructures for the internet, both for fixed and mobile networks. This implies the possibility to award new licences both for fixed (NGA) and mobile (4G) networks and also to improve licensing regime of other operators like VSAT operators.
- To set a national action plan for very high-speed access, which identifies the needs in terms of infrastructures, business models and financing.
- To revise the existing regulatory framework and other regulations (like town planning, use of public domain).
- To put in place a graduated system of penalties (including financial penalties) that ANRT could use for enforcement of regulatory decisions.

Morocco has been a member of the World Trade Organisation since 1995, and is therefore committed to market liberalisation. It also has a free trade agreement with the United States, and another free trade agreement is being finalised with the European Union. ANRT is a member of AREGNET (group of
regulators of MENA countries) and of EMERG (group of regulators of the Mediterranean region, including regulators from South Europe and North Africa).

Regulatory conditions for wired networks

There is no general authorisation regime, and ANRT remains in control of the number of licences granted. Market entrants currently have to wait until ANRT issues a request for proposals. Licences for fixed services are technology neutral so, where operators possess such licences, they are free to use whatever technology they want to rollout their fixed network. For example, while Maroc Télécom has its access network mainly based on copper, Méditel and Wana’s networks are based on fixed wireless access.

To stimulate the fixed broadband market, local loop unbundling and wholesale broadband access obligations are imposed by ANRT on the incumbent operator Maroc Télécom. Monthly price for shared access to a copper loop is around €2 and for full access around €5. Despite this low price, local loop unbundling and wholesale broadband access are not a success so far. This could potentially be explained by the complexity of the procedures used by the incumbent, the relatively high penetration of 3G mobile services and the absence of market interest in IPTV (with satellite TV being the main service used by consumers in Morocco).

The prices of wholesale services for operators with significant market power are subject to an audit by ANRT to check cost-orientation. Although interconnection prices should be based on cost plus a return on capital, there is no clear requirement that prices of other wholesale services include a return on capital as a component of costs. Voice call termination services are regulated through a multiple-year price cap.

Carrier selection and carrier pre-selection are available but these have no impact on the retail market. Fixed number portability was introduced in 2007.

There appears to be no consistent regime on rights of way to access the public domain. Operators have to contact both regional and local authorities to pursue public rights of way. Decision-making by these authorities can take about two months. There is an initiative to harmonise the procedure, reduce the maximum timeframe for decision-making on rights of way and to introduce standard fees for the use of the public domain. For private property, agreements are made under contract law. Building managers cannot oppose the deployment of telecommunications infrastructure. Duct sharing has not yet been enforced but is expected to be clarified with the proposed amendments to the telecommunications law.

Information society safeguards

Provision of internet-based services does not require any prior authorisation, just a declaration to ANRT.

The legal framework for electronic contracts and electronic signatures has been adopted in November 2007. Electronic signatures are therefore recognised and there is one provider that has received an official approval from ANRT to provide secured electronic certificates and related services; Poste Maroc (Barid Al Maghrib).

Morocco has adopted a law concerning the protection of personal data in 2009. This sets up a specific Commission, “la Commission nationale de contrôle de la protection des données à caractère personnel”, in charge of the control and enforcement of this law, including fines or imprisonment for infringement. This Commission was officially launched in 2010.

Domain name registration is liberalised and currently the “.ma” domain names are commercialised by 21 different registrars. By the end of 2011, a total of 42,187 “.ma” domain names were issued, with new registrations running at around 1,000 per month.

Morocco has not adopted the Council of Europe convention on cybercrime but has signed the Arab convention against cybercrime in December 2010. At a national level, there is no specific law concerning this issue but there are some provisions in different laws on related issues. The legal framework is in the process to be strengthened.

Summary and outlook

The mobile market grew strongly in 2011, up by 14%. Users that took out voice plus data packages are currently growing at around 10% every 3 months. Fixed broadband lines grew less strongly and there are signs of market saturation, with users preferring mobile broadband.

Morocco has the highest percentage of internet users in the region, and this number is still growing. It is estimated that 25% of households have internet access, even though only 13% of households have a fixed connection, with only around 2% having fixed broadband capability. Most access is carried out through wireless broadband.

Further investment in the fixed network will be critical to the government’s national development plans, and measures to achieve more effective competition are necessary to attracting such investment. The issue of new licences for fixed services will be necessary in order to develop networks that can offer higher speed broadband. No date has yet been established for the introduction of these new licences.

Key amendments to the primary law are understood to be under consideration, which should improve the regulatory framework, including for market analysis,
better conditions for rights of way, more effective infrastructure sharing and mobile national roaming. In 2009, the Moroccan government has issued a medium term national strategy for information society and digital economy (“Maroc numérique 2013”). The government allocated a budget of around EUR450m over the period of the plan to:

- enhance the availability and use of information technology (IT) for citizens. The government proposes to generalise IT use and equipment for education, to get each socio-professional category using broadband and buying IT equipment, and to support the development of national digital internet content;
- develop a more user-oriented Moroccan administration through an ambitious e-government programme;
- enhance productivity of small and medium enterprises (SMEs) through the use of IT. To do so, it is proposed to support IT investments for sectors with high GDP potential;
- develop a local IT sector by supporting the creation and growth of local IT players, the creation of regional techno-parks, boosting Moroccan IT offshoring;
- setting up public-private investment funds, creating innovative and high-added value projects in fields like mobile services, e-banking, digital copyrights management.

As these plans unfold and the regulatory framework develops best practices to create more competitive conditions, the electronic communications market will show high potential.

Chart 5 – Comparison of the overall legal/regulatory risk for telecommunications in Morocco with international practice

Morocco’s overall legal/regulatory risk scored 69 (100 is the lowest). Morocco has thus been found to be in medium risk category.18

For detailed information on the EBRD 2012 Electronic Communications Comparative Assessment please visit this link: www.ebrd.com/downloads/legal/.../comparative-assessment-2012.pdf
Public procurement

**In a nutshell...**
Moroccan public procurement legislation was found to be in “medium compliance” with internationally recognised standards. Morocco barely met the conditions for medium compliance with respect to the general quality of its local public procurement practice.

The assessment revealed that, although stable and based on the principles of fair competition and non-discrimination, public procurement legislation allows for preferential treatment of domestic bidders, which has a negative effect on competition standards. A positive feature of the public procurement process in practice is that contracting entities have adopted standard tender procurement forms, templates, and contract documentation, which is bound to encourage the efficiency, certainty, and economy of the process. Nevertheless, the law does not currently prescribe specific deadlines for the completion of the procurement procedures, which negatively impacts the speed, certainty and efficiency of the overall process.

In EBRD’s 2012 assessment of the quality of the public procurement legal framework (law on the books) Morocco scored medium compliance as compared to other countries in the EBRD region.

**Overview**

The economy and integrity indicators scoring low compliance is attributable in large part to the fact that Moroccan legislation does not implement sufficient instruments to enable public procurement to be accomplished within a reasonable timeframe. In addition, there is a disconnection in the promotion of integrity between the procurement function and transparency in delivering government policy and achieving value for money.

The assessment also highlighted several regulatory gaps in adopting integrity safeguards, and an appropriate institutional and enforcement framework. This is explained by the fact that there is no single independent regulatory institution with powers to develop policy and monitor the compliance of contracting entities, and no independent review and remedies mechanism in place.

The law does not contain provisions requiring the contract terms and conditions to be fair, balanced, and reflective of best practice. Furthermore, transparency is impinged, as although all contract notices are published online, procurement records are not made public.
Note: the diagram draws a comparison between public procurement law on the books and local public procurement practice. It presents the scores for the regulatory gaps identified in the review of public procurement legislation, and the performance gaps identified in the survey of local procurement practice for each Core Principles benchmark indicator. The regulatory gap is marked in light blue, while the performance gap is marked in dark blue. The implementation gap (the percentage difference between the higher scoring regulatory gap and the lower scoring performance gap) highlights issues regarding the implementation of public procurement legislation in practice. The wider the percentage performance gap, the greater the issues regarding the implementation of public procurement legislation.

Source: EBRD 2012 Public Procurement Assessment

Chart 6 presents the regulatory and performance gaps identified in the assessment of public procurement laws and practice against the Core Principles benchmark indicators. The assessment revealed some inconsistencies and opportunities for improvement between the legislative framework and local procurement practice. In some cases the law in practice achieved higher scores than the law on the books. The resultant implementation gaps between legislation and practice concerning accountability (13%), competition (32%), proportionality (14%), uniformity (6%), stability (17%), and enforceability (14%) suggests that more robust and additional safeguards and efficiency instruments are required in practice.

Highlights from the EBRD’s 2012 Public Procurement Assessment are detailed below.

**Legislative framework**

Public procurement is regulated in Morocco by virtue of Decree N° 2-06-388 dated 5 February 2007, comprising the primary public procurement legislation (PPL), and secondary legislation including Prime Minister 19 and Minister Decrees 20. Moroccan PPL is based on the principles of fair competition and non-discrimination. However, it allows for the favourable treatment of domestic tenderers comprising a price preference of up to 15% to Moroccan tenderers. Although the PPL attempts to regulate all three phases of the public procurement process: pre-tendering, tendering, and post-tendering, our review highlighted that the post-tendering phase is not regulated as robustly as the pre-tendering and tendering phases of the public procurement process. In addition, the PPL does not contain a provision requiring the contract terms and
conditions to be fair and balanced or to reflect best practice. Nevertheless, the PPL is reportedly stable and local stakeholders are provided with sufficient time to learn the skills necessary to prepare tenders and compete for public contracts.

On average Moroccan PPL scored 69% ("medium compliance") compared with other EBRD countries of operation regarding the quality of its public procurement legal framework.

Chart 7 - Quality of public procurement legal framework in Morocco

Note: The chart shows the score for the extensiveness of the national public procurement laws. The scores have been calculated on the basis of a questionnaire on legislation that is developed from the EBRD Core Principles for an Efficient Public Procurement Framework. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator. The bigger the "web" the higher the quality of legislation.

Source: EBRD 2012 Public Procurement Assessment

Chart 7 presents the scores for the quality of the public procurement legal framework for each Core Principles indicator. In the review the PPL scored "high compliance" in the competition (85%), proportionality (80%), and stability (87%) indicators; medium compliance in the accountability (62%), transparency (60%), efficiency (67%), uniformity (62%), enforceability (60%) and flexibility (70%) indicators; and low compliance in the economy (52%) indicator, and very low compliance in the integrity (47%) indicator. The assessment revealed that the low and very low scores were because Moroccan PPL does not provide mandatory standard tender documentation and public contracts templates. In addition the framework only provides for limited measures to eliminate undue influence during the undertaking of a public procurement procedure.

Institutional framework on the books

There is no single independent regulatory institution with general regulatory powers to develop procurement policy and monitor the compliance of contracting entities. Neither is there an independent and dedicated remedies body to handle complaints
related to public procurement. However, several institutions make attempts to harmonise rules and monitor public procurement compliance. These include:

- **Public Bids Commission ("commission des marchés")**

The Public Bids Commission (PBC) is regulated by Decree n° 2-78-840 dated 30 December 1975. The Prime Minister appoints the PBC Chairman. The remaining ten members are representatives from relevant Ministries. The core function of the PBC is to monitor enforcement and suggest amendments to the PPL. In addition, the PBC is responsible for giving opinions on awards, execution and settlement of public contracts, and claims related to public bids and contracts.

- **National Audit Body ("Cour des Comptes")**

The National Audit Body (NAB) is the central authority responsible for reviewing the accounts of each public entity. It reports to the King. In addition, the NAB monitors PPL compliance as part of its general audit review.²¹

- **Ministry of Interior**

The Ministry of the Interior (MoI) is responsible for reviewing and monitoring the public procurement process in municipalities. The MoI is headed by the Prime Minister, and it reports to the Government.

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**Chart 8 - Quality of public procurement legal and institutional framework in Morocco**

**Morocco**

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uniformity</td>
<td>70%</td>
</tr>
<tr>
<td>Regulatory Gap in Uniformity Indicators</td>
<td>32.50%</td>
</tr>
<tr>
<td>Stability</td>
<td>30%</td>
</tr>
<tr>
<td>Regulatory Gap in Stability Indicators</td>
<td>67.50%</td>
</tr>
<tr>
<td>Flexibility</td>
<td>65%</td>
</tr>
<tr>
<td>Regulatory Gap in Flexibility Indicators</td>
<td>35%</td>
</tr>
<tr>
<td>Enforceability</td>
<td>92.50%</td>
</tr>
<tr>
<td>Regulatory Gap in Enforceability Indicators</td>
<td>6%</td>
</tr>
</tbody>
</table>

Note: The chart shows the assessment scores for four key institutional factors of the public procurement system: uniformity, stability, flexibility in application, and enforcement indicators. Total scores are presented as a percentage, with 100 per cent (quarter of the pie chart) representing the maximum score for each benchmarked area. A regulatory gap (a difference between the scores for quality of law “on the books” and the assessment benchmark which illustrates a scope for improvement in each assessed area) is marked in light blue, light orange, light red and light grey respectively.

Source: EBRD 2011 Public Procurement Assessment

Chart 8 presents the assessment results for quality of the Moroccan public procurement regulatory and institutional framework, benchmarked against EBRD Core Principles for institutional and enforcement measures: uniformity, stability, flexibility and enforceability of the legal framework.

In the assessment the Moroccan PPL scored high compliance (87.5%) for the stability indicator, and medium compliance for the uniformity (62.5%), flexibility (70%), and enforceability (60%) indicators. Consequently, the survey revealed several regulatory gaps in the uniformity (37.5%),
flexibility (30%), and enforceability (40%) indicators. These regulatory gaps suggest the PPL is not comprehensive, the law is not easy to enforce, and the legal framework is not flexible enough to accommodate the market.

**Legal framework as implemented in practice**

Local public procurement practitioners reported that Moroccan PPL is clear. However, some aspects of the PPL are considered incomplete, subject to interpretation and in some cases require explanation. Although most contracting entities provide training to their public procurement officers regarding their roles, rights, and obligations in the public procurement process, the majority have not established internal procurement rules to close any regulatory gaps. For municipalities, training is provided by the MoI. The survey highlighted that pay levels for procurement officers are below levels set for other private sector technical specialists. Furthermore, there are no procurement manuals, instructions or codes of ethics available to procurement staff to consult. On average Morocco just met the conditions for medium compliance (61%) for the general quality of its local public procurement practice.

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**Chart 9 - Quality of local procurement practice in Morocco**

The chart shows the score for the quality (effectiveness) of local public procurement practice in Morocco. The scores have been calculated on the basis of questionnaires on practice, developed from the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage, with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

The survey revealed that local procurement practice scored very low to high compliance with the Core Principles benchmark. In the survey the economy (79%), and flexibility (76%) indicators scored high compliance, medium compliance in the transparency (63%), efficiency (71%), proportionality (66%), and stability (70%) indicators, low compliance in the integrity (59%), competition (53%) and uniformity indicators, and very low compliance in the accountability (49%) and enforceability (46%) indicators. The high levels of compliance are because of the mandatory legal
provisions for the preparation of a procurement plan before commencement of the procurement process, and that contracting entities have in place procedures for planning the procurement of recurrent contracts. The regulatory gap in the competition indicator is because domestic preferences are allowed. The very low level of compliance achieved in the enforceability indicator is because some aspects of PPL are incomplete and subject to interpretation, and in the accountability indicator because in practice the PPL does not balance public and business dimensions.

Institutional framework in practice

The assessment is designed to also capture how the institutional framework is evaluated by local contracting entities and practitioners. Both NAB and PBC monitor compliance with Moroccan PPL. Although the PBC makes endeavours to harmonise rules and monitor public procurement compliance, it is not an independent regulatory institution. A high compliance score for flexibility (76%), and a medium score for stability (70%) suggests that in practice public procurement is progressing towards compliance with the PPL. However, a low score was achieved for uniformity (56%), and a very low score for enforceability (47%). The resultant performance gaps indicate that the institutional framework lacks a robust regulatory mechanism that is capable of assessing the compliance of contracting entities and employing corrective measures when necessary. The data also suggests that the legal framework is in practice considered to be too bureaucratic and lacking in flexibility, and as such is incapable of accommodating the changing market.

Eligibility rules

Eligibility rules provided by law are reported to be respected and followed in practice. Submitting false declarations is grounds for exclusion from the procurement process. In practice, a bidder who fails to comply with the published eligibility rules is excluded from the public procurement process. However, contracting entities do not establish additional prequalification criteria except for high value contracts for which the financial situation of tenderers is paramount. Moreover, prequalification is not mandatory and contracting entities do not prepare lists of prequalified contractors. In addition, there are no rules in implementation to avoid conflicts of interest.

Efficiency of the procurement process regulatory framework in practice

Contracting entities reported that it takes on average 45 days to complete the process to procure a goods and services contract in the value of €250,000, and a works contract in the value of €500,000. In practice, tenderers seem to be allowed sufficient time to prepare and submit tenders, with the evaluation of tenders completed within the original tender validity period.

The monitoring and management of contracts seems to be well developed, with public contracts generally completed within the budget and on schedule. However, manual or computerised procurement and contract monitoring systems are not available and internal rules on contract cancellation and compensation have not been established. Nevertheless, when a public contract is cancelled, the contracting entity is required to specify a reason for cancellation.

The survey highlighted that public procurement planning procedures are implemented, with public procurement plans prepared for each budget year. Contracting entities are obliged to complete the plan before commencing the procurement process, and as a result the coordination of technical, financial and procurement planning is achieved. However, although an assessment of risks regarding the procurement is not mandatory, evaluations and audits of public contracts are undertaken. In practice, contracting entities have not introduced internal monitoring procedures or established auditing arrangements, although there are procedures to monitor the delivery of goods and services and contract payments. Consequently, changes in public procurement policies and procedures are not monitored. However as they are mandatory, contracting entities have adopted standard procurement forms and templates. In practice, public contracts administration is deemed fair and equitable.

Priorities for reform

The analysis of the assessment data has informed the development of policy recommendations. These include:

- The use of information technology and specifically the internet can be enhanced for the purpose of managing public procurement activities.
- The public procurement law is in need for upgrading so that it reflects the current standards in public procurement.
- Specific procurement rules for concessions, public law institutions and municipalities need to be developed and implemented.
- There is a need for the creation of dedicated national regulatory agencies and an independent review and remedies mechanism.
- A robust system needs to be developed for monitoring the compliance of procurement entities throughout the three phases of the public procurement process.
Up to-date procurement policies and procedures need to be developed and implemented, in addition to codes of ethics and guidance manuals for procurement staff.

For a more detailed assessment of public procurement processes in Moroccan legislation and practice, please visit this link: http://semed.ppl.ebrd.com/materials/eng_cp_morocco.pdf
Private Sector Development

Corporate governance

In a nutshell...

Corporate structure in Morocco is generally characterised by the concentration of ownership and majority owner control over director nomination and election processes for board members. The legal and regulatory framework does not contain a comprehensive definition of directors’ duties of loyalty and care. Although conforming to the Corporate Governance Code is only voluntary, the Code does provide a definition for the fiduciary duties of board directors that is in line with best practice.

Background

Morocco’s legal framework for companies is based on French civil law with minor influence from the German, Ottoman, and Shari’a legal systems. Corporate laws include the Commercial Code, the Investment Charter (Law No. 18-95), Law No. 5-96 on Partnerships, Limited Partnerships, Limited Partnership by Shares, Limited Liability Companies and Joint Ventures, and Law No. 17-95 on Public Limited Companies.

In 2007, the National Corporate Governance Commission (CNGE) was created and is jointly led by the Ministry of Economic and General Affairs, in addition to the private Confédération des Grandes Entreprises Morocaines. In addition, there is a Moroccan Association of Enterprises (Confédération Générale des Entreprises du Maroc) which launched a charter on corporate social responsibility and aims at increasing board member awareness of their duties towards the company and its shareholders.

CNGE developed the Moroccan Code of Corporate Governance in 2008. Separate annexes were issued in 2009 and 2010 which deal with corporate governance issues specific to SMEs, family owned enterprises, state owned enterprises and banks respectively. The Moroccan Institute of Directors was launched in 2010 in a private public partnership involving companies and institutions, in order to help enhance the skills of board members and senior managers.

Although the Corporate Governance Code is voluntary, 57 percent of companies are reported to have, at least in part, applied recommendations made by the Code by 2010.

Publicly listed companies and banks are under a legal requirement to fully and publicly disclose their annual audited financial statements in a Journal of Finance. However, that Journal is not very easily accessible to the public.

According to a 2010 Report on the Observance of Standards and Codes (ROSC), the Moroccan authorities have a strong record of consulting and engaging with the private sector in developing new or amending existing laws in the area of corporate governance. In addition, both the public and private sectors in the country seem to have demonstrated a commitment to partnership in order to improve corporate governance in Morocco.

Corporate structure in Morocco is generally characterised by the concentration of ownership and majority owner control over director nomination and election processes for board members. The legal and regulatory framework does not contain a comprehensive definition of directors’ duties of loyalty and care. Although conforming to the Corporate Governance Code is only voluntary, the Code does provide a definition for the fiduciary duties of board directors that is in line with best practice. Further, the findings of the 2010 ROSC on Morocco show that most company directors appear to act on an informed basis, in good faith and with due diligence and care.

All companies are required to submit annual financial statements in accordance with the Moroccan Accounting Standards. Listed companies are in addition required to produce semi-annual statements. Holding companies, groups and publicly traded companies are required to provide consolidated accounts either in accordance with the Moroccan Accounting Standards or the International Financial Reporting Standards (IFRS), while banks must prepare their financial standards in accordance with IFRS. Annual financial statements must be audited by two external auditors. In addition, the law requires companies to disclose relevant non-financial information as per OECD Principles, with respect to corporate governance structures such as board composition, executive remuneration, and committee structures, as well as risk management, internal controls and auditing. Companies are further required to submit to shareholders qualitative descriptions and analyses as to the company’s activities and performance. However, non-financial disclosure remains generally underdeveloped.

The legal framework allows companies to choose between one-tiered and two-tiered board structures. For one-tiered boards, the law requires that more than half of the board consists of non-executive
board members. In practice, 89 percent of the board is constituted of non-executive directors. Further, the election process is defined but the law is silent on board nomination processes. In practice, minority shareholders are not known to actively participate in general assemblies, and thus they rarely get a chance to nominate or elect board directors.

With the support of the Moroccan Institute of Certified Public Accountants (representing the accounting and audit professions), the National Accounting Council (Conseil National de la Comtabilite/ CNC) is responsible for developing and approving the Moroccan Accounting Standards and their interpretation.

Shareholders are able to access corporate records easily for a reasonable fee, whether at the company’s headquarters, or at the Commercial Registry. However, information is not regularly updated and is not maintained through an efficient electronic system.

Furthermore, Morocco is one of only two African countries to have adopted an official exam that has to be administered for an internal auditor to be certified. The exam is administered by the international Institute of Internal Auditors.

Minority shareholders are protected by law from potential abusive conduct by controlling shareholders. Moreover, any shareholder may file a direct or derivative lawsuit against the company’s directors and managers for compensation. Director duties are broadly defined and scattered in different law texts.

In general, the Moroccan government seems to have taken strong measures against insider dealing and market manipulation. The legal framework further provides protection against related party transactions conducted by board members, managers and shareholders owning directly or indirectly 5 percent or more of capital, or of voting rights, which have to be approved by the board and then by the general assembly. Companies are required to fully disclose related-party transactions in their financial statements.

Nevertheless, Morocco fares poorly in comparison to other MENA and OECD countries in terms of director liability and ease of shareholder suits that are related to related party transactions.25

It is of note that the 2012 World Bank Doing Business Report has ranked Morocco at 97 in investor protection with respect to 183 economies. This number represents a 57 points jump from the country’s rank in the 2011 report which was 153. This seems to be mainly due to Morocco’s strengthening of investor protections by allowing minority shareholders to obtain any non-confidential corporate documents during trial, and requiring greater disclosure in the company’s annual reports. The score is based on information that was collected through a survey of corporate and securities lawyers, based on securities regulations, company laws and court rules of evidence, which measured the extent of disclosure, extent of director liability and ease of shareholder suit.26
Insolvency

In a nutshell...

The Moroccan insolvency system is substantially inspired by the French insolvency regime, which is amongst the most debtor-friendly regimes in the world. It contains provisions for prevention of financial difficulties in advance of insolvency or cessation of payments (a cash flow-based insolvency test) and for either rehabilitation or liquidation during insolvency. Creditors do not have an important role in insolvency proceedings. The system relies instead on strong judicial control. One of the key practical issues in Morocco is the lack of professional skills and experience of insolvency office holders and judges who handle insolvency cases.

Introduction and overview

Insolvency regulation was significantly reformed in 1996 with the introduction of a new Commercial Code (the Dahir of 1 August 1996). No significant reforms appear to have been introduced since this date. Insolvency proceedings are regulated by Book V (Businesses Difficulties) of the Commercial Code. Book V is applicable to traders, artisans and any commercial company. Book V of the Commercial Code encompasses a system for ‘prevention’ of financial difficulties, which draws upon the old French law procedure of amicable settlement (règlement amiable). There is an initial ‘internal prevention procedure’, where the head of the business is informed by the auditors or management of any serious financial difficulties faced by the business. If internal efforts to address the situation fail, the court then intervenes through an external court-led prevention procedure known as ‘amicable settlement’. This procedure is only available for debtors that are not yet insolvent and may lead to a stay or moratorium on judicial proceedings against the debtor.

For debtors that are insolvent, Book V offers two alternative routes: judicial rehabilitation proceedings aimed at preserving the business by means of a continuation plan and/or a sale or transfer where there is a real prospect of rescuing the business and settling its liabilities and, for businesses that are irredeemably compromised, liquidation proceedings leading to the sale of the debtor’s business and assets. The Dahir no. 1-97-65 on 12 February 1997 created commercial courts with jurisdiction over all commercial matters including insolvency and gave the commercial court located in the debtor’s place of business jurisdiction in the event of insolvency.

Legislative Framework

The Moroccan regime provides a comprehensive legislative framework for businesses in financial difficulty: (1) a system of ‘prevention’ of financial difficulties for those businesses that are not yet insolvent; and (2) judicial insolvency proceedings aimed at rehabilitation of the business or its liquidation for debtors that are already insolvent. The effectiveness of such framework is, nevertheless, reportedly undermined by the lack of experience and training of judges and other professionals involved in insolvency procedures and other institutional and regulatory weaknesses.

Prevention of difficulties

Inspired by French law, the Moroccan law envisages two types of prevention: internal (debtor led) and external (court led):

Internal prevention (the alert procedure):

The law provides that the business is obliged to work towards the internal prevention of its financial difficulties and recovery aimed at the continuation of the business. The internal prevention procedure is initiated by the business’ auditors or partners, who are required to notify the manager of the business within eight days of any circumstances which could be detrimental its continuation. If no steps are taken to remedy the situation within 15 days of the notification, a general assembly must be convened to take a decision on how to redress the situation based on an auditor’s report and where no plan is identified or the business is still at risk, the auditor or the manager of the company must notify the President of the Commercial Court. This may result in the opening of the amicable settlement procedure.

External prevention (amicable settlement procedure):

The President of the Commercial Court has important investigatory powers to determine whether the amicable settlement procedure should be opened. These include the power, in certain circumstances, to summon the debtor’s manager and to request any additional information from various sources (auditors, managers, public entities or staff representatives) regarding the debtor’s financial condition. The President of the Commercial Court can also request an expert to produce a report on the economic, social and financial condition of the debtor.

Amicable settlement is reserved for any commercial company, trader or artisan experiencing financial difficulties but not yet cash flow insolvent. When amicable settlement is opened, the debtor is placed
under the supervision of the Court, which appoints an external mediator (conciliateur) for a limited period of three months (extendable by a maximum of one month) to assist the debtor in reaching an agreement with its creditors. The mediator may request a stay or moratorium on all judicial proceedings against the debtor relating to any debts incurred before the opening of the procedure, including a stay on all pending proceedings where this will facilitate an agreement with creditors. Whilst the stay is limited in time to the duration of the mediator’s appointment, it constitutes a powerful tool for the debtor in negotiations with its creditors. An amicable agreement can be reached with all creditors or the debtor’s ‘main creditors’ - the law does not define a value threshold. Once approved by the President of the Court, all judicial proceedings relating to debts covered by the agreement are suspended for the duration of the amicable settlement agreement. Where an agreement is reached only with the debtor’s ‘main creditors’, the President has a vaguely defined power to impose a rescheduling of debts on non-consenting creditors within the limits foreseen by the law. There appears to be no time limit or other guidelines for the rescheduling; this power has potentially quite severe implications for dissenting creditors. As regards the debtor, there is no requirement or option for confidentiality in the amicable settlement procedure. Lack of confidentiality may undermine in certain cases the prospect of rescuing the business prior to insolvency, particularly where all of the debtor’s creditors and any suppliers or clients are alerted to the business’ financial difficulties.

Insolvency Procedures

The manager of the debtor is required to request the opening of insolvency proceedings within 15 days of the date on which the debtor became cash-flow insolvent. Before any insolvency proceedings may be initiated, the Court must be supplied with written evidence of the debtor’s state of cessation of payments (last financial statements, list and evaluation of the debtor’s assets, detailed list of creditors and the amounts owed to such creditors). Insolvency proceedings can be initiated by the debtor, a creditor or by the Court (ex officio).

Judicial Rehabilitation Proceedings

The judicial rehabilitation procedure is an insolvency proceeding that is only available for debtors that are in a state of cessation of payments i.e. cash flow insolvent, but whose financial situation is not irreparably compromised. If there is no prospect for rehabilitation, the Court will open judicial liquidation proceedings.

An insolvency judge (juge commissaire) and an insolvency office holder (syndic) are appointed by the Court. During the rehabilitation procedure, the debtor and its management remain ‘in possession’ and the debtor continues its business activity. The insolvency office holder is able to elect to continue certain contracts by the debtor following entry into the procedure, which is a useful tool for preservation of the debtor’s business. A contract is automatically terminated where the insolvency office holder fails to respond to a demand from a contractual counterparty for more than one month.

The rehabilitation procedure can result in the reorganisation of the debtor’s business, sale or transfer of the business, or liquidation. Once the procedure is opened, third parties can submit offers to the insolvency office holder for purchase of the business – a transfer may only be agreed where its purpose is to maintain the business activity and preserve all or part of any jobs attached to such activity.

The insolvency office holder is required to prepare a report on the situation of the company within four months from the opening of judicial rehabilitation proceedings, with assistance of the company manager and any appointed experts. The four months’ time frame is capable of being extended up to a maximum of another four months by the Court upon the request of the insolvency office holder. In his report, the insolvency office holder will either recommend a rehabilitation plan for the debtor, the sale of the debtor’s business to a third party or liquidation of the debtor’s business. The Court then is required to reach a decision on the fate of the debtor based on the office holder’s report and after having heard the company’s manager, the creditors’ representatives (‘controlleres’) and employee representatives. Unlike in other more creditor-friendly insolvency systems, there is no direct vote by the creditors on the options available to the debtor during the rehabilitation procedure. The procedure is entirely Court driven.

Judicial Liquidation Proceedings

The judgment opening the liquidation procedure renders all debts immediately due and payable and creditors have two months (four months if they live outside Morocco) to submit their claims. Any claims not submitted within the statutory prescribed period remain unpaid, other than where the creditor is able to prove that it was not its fault, in which case it is entitled to participate in subsequent distributions.

Liquidation proceedings may be brought to an end prematurely prior to a distribution in liquidation where the debtor no longer has any debts, the insolvency office holder has sufficient funds to pay all creditors in full or where the debtor does not have enough assets to meet the costs of the liquidation procedure. It is not clear in this latter case how insolvent companies are wound-up.

Liquidation gives rise to the possibility that certain transactions entered into by the debtor with third parties within the ‘suspect period’ prior to its
insolvency may be unwound by the Court. The ‘suspect period’ is not, however, not clearly defined by the Commercial Code, which states that it commences upon the date of cessation of payments, as determined by the Court, and ends upon the opening of the liquidation procedure. For third parties, the open-ended ability of the Court to set the date of cessation of payments introduces a level of uncertainty into transactions concluded with the debtor. Furthermore, the law provides a very wide definition of the types of transactions that may be unwound by the Court. These include any act, payment, guarantee or security entered into by the debtor after the date of the cessation of payments. Nevertheless any guarantee or security constituted before or at the same time of the creation of the debt cannot be avoided by the Court. The suspect period is lengthened to apply to all gratuitous acts entered into by the debtor in the six months prior to the date of cessation of payments. Lack of certainty concerning the suspect period can have a negative impact on the provision of credit and, in times of economic difficulties, the prospect of achieving a financial restructuring.

Priority of claims:
The system of determining the priority of debts is complex and is contained mainly in Book IV of the Commercial Code and Book II of the Code of Obligations and Contracts. Under Moroccan law, there are no specific rules on priority of claims in insolvency. Article 365 provides that secured creditors (créancier nanti) with a pledge rank ahead of all other creditors (including State creditors such as the treasury and social security fund). However, they are subject to the priority of judicial expenses, any costs of maintaining the pledged property and wages and salaries for the six month period prior to the insolvency.

Rules on distribution to creditors are contained in Chapter III in Book V of the Commercial Code contains rules for distributions to creditors in liquidation. Distribution of the proceeds of the debtor’s estate is only permitted following payment of liquidation fees and expenses.
Judicial capacity

In a nutshell...

Courts in Morocco suffer from a deficit in material and human resources. Many judges lack sufficient judicial training and opportunities to specialise. The process of allocating cases to judges is not sufficiently transparent nor is it efficient, and court decisions lack predictability. Recent reforms have led to the creation of specialised courts, and there is a trend towards an increased use of alternative dispute resolution, including mediation. However, both litigation and enforcement procedures remain lengthy and uncertain.

Background

The judicial system in Morocco is based on a combination of Islamic law and European civil law.

First degree courts are generally limited in jurisdiction according to the value of the claim. The jurisdiction of the first degree comprises Courts of First Instance, which are competent to adjudicate matters of civil, personal status, and commercial matters; Commercial Courts, which are competent to rule on cases involving merchants and commercial disputes; and District Courts, which are competent to adjudicate all personal estate actions brought against individuals who reside under their jurisdiction.

The jurisdiction of the second degree includes Courts of Appeal, the Supreme Court, and Administrative Courts.

The Supreme Court is at the peak of the judicial system. Judges in the Supreme Court are appointed by the Supreme Council of the Judiciary, headed by the King. The Supreme Court is competent to adjudicate appeals of cassation, appeals requesting the cancellation of executive decisions, and lawsuits against magistrates for disqualification, or in relation to conflict of interests or biasness by a judge in any court other than the Supreme Court itself.

The Constitutional branch of the Supreme Court has the power to determine the constitutionality of legislation, excluding royal legislation (Dahirs).

Administrative courts are competent to hear claims for the cancellation of the acts or decisions of administrative bodies, disputes related to administrative contracts and claims for compensation against prejudice caused by the acts of public entities, as well as deciding on the consistency of administrative decisions with applicable legislation.

A Special Court of Justice hears cases of corruption and embezzlement in which magistrates or Government employees are involved. Furthermore, a High Court is authorised to adjudicate offences or crimes committed while performing their duties.

An Audit Court (Court of Accounts) is responsible for supervising budget implementation and evaluating the management of agencies under its control by mandate of the law.

The Supreme Council of the Judiciary headed by the Minister of Justice oversees administrative matters with respect to the judiciary.

In addition to the courts in the main judicial structure, there are a number of courts with specialised jurisdiction. These include the Social Courts, which function as labour courts, and the Criminal Appeals Court, which hears cases related to the security of the state (whether internal or external), and from which there is no appeal. Special commercial courts were established in 1997 and they operate at the level of the courts of first instance.

In October 2011, the Moroccan parliament passed a law on the protection of trial witnesses, experts, prosecutors, judges, as well as whistleblowers who report corruption.

Legislative and procedural framework

In a legal system that contributes to an environment conducive to economic development, the judiciary should operate in an optimum legislative and procedural framework. Legislation, regulations and court rules should facilitate the practical administration of justice.

Court procedures are generally regulated under the Civil and Commercial Procedures Law.

The assessment highlighted some drawbacks with respect to the procedural regulations for court proceedings. Procedural rules need to be better harmonised with substantive laws. A good example of an area where this is relevant is the insolvency law.

In addition, different types of courts have different internal rules. This results in a lack of coherence within the system and contributes to rendering it unpredictable.

In order to reduce lengthy procedural steps, certain types of less important/administrative matters would better be dealt with if channelled to bodies other than the courts.

The assessment also highlighted a need to simplify and clarify the procedural rules governing general litigation as some are hard to understand and thus left to be subject to different interpretations, which again shakes the confidence in the predictability of the system.
In an ideal situation both the legislature and the courts would consider how legal issues could be channelled to the most appropriate forum for resolution. In particular, the court system could benefit from a greater use of alternative dispute resolution mechanisms, such as mediation, the use of which is currently marginal.

Quality of judicial decisions
Judicial decisions should be clear, relevant and well reasoned. Court judgments should engender public confidence in the administration of justice and courts should set and enforce policies on the quality of decisions. The quality of court decisions have been reported to be in need of enhancing in Morocco. In many instances court decisions are poorly drafted, unclear, and they lack reference to case law, which carries considerable weight in the Moroccan judicial system albeit it being a civil law system.\(^{30}\)

The courts would benefit from setting and enforcing policies to ensure the quality of decisions, including a policy to ensure the systematic reference to case law, which would in turn allow the tracking of court precedents, reinforce the rules and enhance predictability.

Speed of justice
Justice should be rendered within a reasonable timeframe, which takes into account subject matter and complexity. The time between filing and hearing, and between hearing and judgment, should be practical. Benchmark clearance rates should be set for key categories of proceedings, which should be monitored by courts or ministries.

The speed of justice is an important area for reform in Morocco. Litigation proceedings are generally lengthy. An average time ranging between two weeks and two months is necessary for filing a claim. The average time between filing and trial exceeds a year and a half.

Furthermore, the excessive reliance on referring disputes to ‘experts’ results in unnecessary extensions in the average duration between trial and judgement.

Courts would thus benefit from a more effective case management system, where benchmarks for clearance rates are established and well monitored. This should be coupled with enhanced training for judges on fundamentals so that they would have less need for expert advice.

Furthermore, channeling uncontested matters and small claims to be resolved through truncated/ non-judicial procedures could help in mitigating the problem by allowing for the speedy resolve of simple matters, which do not require judicial attention.

Impartiality and transparency
The independence of the judiciary must be guaranteed so that the operation of courts remains free from government influence. The judiciary must be impartial and must function as a cohesive institution. In an optimal environment, decisions will be based on fact and law, without favour to any party.

Courts should also establish codes of conduct on impartiality for judges and court staff, and monitor compliance. Allegations of bias and corruption should be investigated, and new cases allocated objectively and transparently.

The Moroccan Constitution provides for the independence of the judiciary from the legislative and executive branches. It also states that the King guarantees the independence of the judiciary. Magistrates are appointed by way of a decree from the King (\textit{Dhahir}) upon proposal by the High Council of the Magistracy. Organisation of the judiciary is regulated under Law No. 1-74-388 passed in 15 July 1974.\(^{31}\)

Although judicial independence is supposed to be guaranteed by the Constitution, a Rule of Law Assessment that was prepared by the USAID in September 2010 stated that the judiciary lacks sufficient capacity to fully perform its functions and does not in fact enjoy independence from other branches of government. The report further cites the subjection of the current judicial system to political influence which leaves judges vulnerable to political retribution. This is further complicated by the King’s role as the head of High Judicial Council which is in charge of the appointment, promotion, sanctioning and dismissal of judges.\(^{32}\)

Decisions relating to judge nomination would be better handled by a body that is independent from the executive authority. These decisions should be transparent, and based on objective and pre-set criteria. The appointment of court chairmen and presidents could be better made through elections by magistrates who serve in the same jurisdiction.

The assessment also identified a need for a more transparent and effective disciplinary system for judicial misconduct. Both judges and court staff should be subject to a compulsory code of conduct. Once a code of conduct is put in place, it must be efficiently monitored and enforced. There should also be more active investigation of alleged bias or cases of irregular payments within the court system.

Finally, with respect to case assignment, a system of random allocation within a pool of adequately trained and experienced judges should be encouraged to ensure that the process is transparent.

Judicial education
Judges in a well functioning, well-trusted system should receive comprehensive initial training. In
addition, proper ongoing training should also be strongly encouraged, mandatory in appropriate cases, and a factor in judicial promotion. Training curricula should be shaped by higher courts or independent supervisory bodies. They should cover all relevant substantive areas and vocational subjects such as decision-writing and ethics. Court management staff should receive managerial and financial training. Better training would assist in granting courts greater rule-making powers to improve trial procedures especially where the governing legal texts are not sufficiently clear.

In Morocco initial judicial training should take into consideration the specialisation of judges in different fields of law. Judges are disconnected from reality being either too theoretical and/or too generalist. Initial judicial training should focus on a specific field of law. On-going judicial training is also necessary as judges are not always kept up to date regarding new legislation. On-going training is provided by the “Institut national des Etudes Judiciaires” (INEJ) and some international institutions such as the USAID. However, these initiatives remain insufficient.

Furthermore, judicial education should have a greater focus on practical commercial knowledge and financial literacy. Judges have poor commercial knowledge and financial literacy. They systematically rely on experts without being able to understand the experts’ reports.

In particular, judicial education should have a greater focus on certain substantive commercial law areas such as competition law, consumer protection, personal data protection, public procurement, and corporations’ law.

In addition, court management and staff should have more training in managerial, financial and administrative skills.

Law No. 09-01 of 3 October 2002 on the Institut Supérieur de la Magistrature (ISM) provides guidelines for the appointment process for judges in Morocco. Under the 2002 Law, judges are appointed following their graduation from ISM. Article 21 of the Law provides that candidates are selected on the basis of an open competition and subject to jurisdictional needs. However, there are no clear details as to how the selection process is actually conducted. It is of note that the ISM operates under the auspices of the Ministry of Justice (MOJ), which is said to play a dominant role in the appointment process, and the Minister is appointed by the King.

ISM is the national judicial training and studies institute in Morocco. The primary role of ISM’s predecessor, the National Institute for Judicial Studies (Institut National d’Etudes Judiciaires – INEJ), was to provide initial training for judges before they start practicing. Trainees, called judicial attaches, attend a two-year mandatory training and pre-selection of candidates is made on the basis of university performance. However, the performance of INEJ was subjected to severe criticisms which led to its restructuring into the current entity, ISM.

Both INEJ and ISM have collaborated in the past, and ISM continues to collaborate, with international and bilateral organisations for the provision of trainings, seminars and conferences on the rule of law, anti-money laundering and economic crimes. The most prominent organisations in this respect are the U.S. Department of State, the American Bar Association, USAID and the EU. EU collaboration with ISM seems to be focused on the combating of money-laundering, whereas the ABA and the USAID are more focused on general rule of law and alternative dispute resolution.

The World Bank also conducted studies in collaboration with the Moroccan government early in the decade. These covered the commercial courts, the commercial registries, INEJ, and a review of legislation. On-going training is provided by the “Institut national des Etudes Judiciaires” (INEJ) and some international institutions such as the USAID. However, these initiatives remain insufficient.

Furthermore, the World Bank’s Development Policy Loan programme for Morocco in FY12 includes a Judicial Performance Enhancement project for specific governance and service delivery reforms in the justice sector.

Nevertheless, the professional training available at present is still optional and insufficient. Among other things judicial training should specifically target practical commercial knowledge and financial literacy of judges, and encourage specialisation in areas such as banking, capital markets, corporate, and international trade law.

It is also important that continuous training for magistrates is made compulsory and that it involves all magistrates regardless of their level of experience. It is also crucial that training is extended to different regions in the country.

**Enforcement**

In an effective economic system, court decisions must be implemented and enforced within a reasonable timeframe and in an efficient manner. Courts must promptly notify parties of decisions, and effective enforcement mechanisms must be in place. Implementation of decisions should be monitored. High incidence of non-compliance in particular areas
should be investigated and remedied by government action.

The court system in Morocco has been generally considered inefficient, time consuming and resource intensive. Further, rulings are cloaked with uncertainty and the judicial system generally lacks transparency since there is no legal regulation with respect to case publishing.36

Although, the establishment of commercial courts in 1997 is said to have significantly improved the treatment of commercial and credit related lawsuits in the judicial system, judges still lack training on commercial law, credit, and banking related matters including insolvency. Alternative dispute resolution is therefore widely considered as the only viable option. A new Arbitration law was passed in July 2007 which allows for international arbitration. Furthermore, Mediation exists but is not often resorted to. A new professional order of court mediators has been created with assistance from the USAID and is expected to attempt to settle a number of judicial cases out of court.

Globally, Morocco stands at number 89 in the ranking of 183 economies on the ease of enforcing contracts.37

To increase the efficiency of the enforcement of judgments, certain reforms should be made. Of foremost importance is limiting the ability of the executive power to hinder the enforcement process. The involvement of police officers and bailiffs in the enforcement process should be strictly monitored and supervised to avoid any chances of corruption, which could lead to more delays in enforcement.

The establishment of a reliable database of commercial registration for companies, containing up-to-date information, would greatly facilitate swift enforcement against commercial entities. This is also true with respect to enhancing credit bureau databases with comprehensive and reliable information.

**Predictability/access to decisions**

An efficient judiciary should ensure maximum predictability in its processes and judgments, and produce a coherent body of case law. There should be a court policy to promote certainty, and procedures for court oversight of jurisprudence.

There needs to be greater predictability / certainty in court decisions in Morocco. Courts decisions and processes are usually contradictory in all areas except for some areas such as payment injunctions or labour law. There should be a court policy to promote and monitor predictability of court decisions and processes. Public access to judicial decisions needs to be improved as the public currently has no access to judicial decisions. Systematic publication of case law is required.

Court decisions are in many cases inconsistent, and thus unpredictable. A clarification of texts defining the procedures would ensure a greater predictability of decisions. So would the regular scanning and publication of court decisions so as to make them more accessible to the public.

Contributing to the low levels of predictability is the fact that lower court decisions are neither automatically nor promptly published. In order to ensure maximum predictability in its processes and judgments, courts should attempt to harmonise a coherent body of case law.

Finally, predictability also refers to the amount of time it takes for a dispute to be resolved. Thus it would be useful if indicative timelines were set for the determination of cases which vary according to the complexity of the subject, and the value of the claim.

**Resources**

To function effectively, the judicial system requires adequate material and human resources, including appropriate court premises and equipment, court leadership and management, and court staff.

The assessment identified that equipment, technology, and means of transport. Court premises were reported to be inadequate. Steps need to be implemented in order to facilitate the creation of a virtual database for computerised archives.

Courts in Morocco require greater material resource including premises, equipment and technology. The assessment has also highlighted a need for modern and well organised court databases, and online access to case files.

With respect to human resources, courts require well trained and specialised judges, as well as administrators, court clerks and bailiffs ("huissiers de justice").

In addition, courts would benefit from enhanced court management and administration. This includes the management of hearings, the distribution of cases between judges, and human resources management in order to avoid repetitive strikes among court administrators.

Laying out a computerised system to replace the current physical archiving system throughout the country, and establishing a network courts located indifferent regions together is likely to reduce case processing times and increase efficiency. Similarly, making available remote access to data which allow litigants to consult the content of court records and case files from a distance is likely to release the excessive pressure on court staff. Access should also be given to court clerks in order to enable them to efficiently process and manage data that is relevant to case files.
Greater human resources are also required. This includes judges, administrators and court clerks. Court registries are understaffed. Cases are often delayed or remain pending.

Another issue that was identified in the assessment is the lack of any system to effectively monitor the conduct of court employees. As a result, irregular payments to court clerks are not uncommon.

**Alternative Dispute Resolution**

Although, the establishment of commercial courts in 1997 is said to have significantly improved the treatment of commercial and credit related lawsuits in the judicial system, judges still lack training on commercial law, credit, and banking related matters including insolvency. Alternative dispute resolution is therefore widely considered as the only viable option. A new Arbitration law was passed in July 2007 which allows for international arbitration. Furthermore, Mediation exists but is not often resorted to. A new professional order of court mediators has been created with assistance from the USAID and is expected to attempt to settle a number of judicial cases out of court.
Secured transactions

In a nutshell...

The framework for collateral and liens remains complex in Morocco. This is mainly attributable to a difficulty in determining priority in ranking classes and liens. Banks usually resort to pledges and mortgages. In addition, banks typically apply debt discounting, factoring and assignment of claims techniques. One of the key challenges that are cited in the overall framework for secured lending in Morocco is the inefficiency of the judicial system which hinders effective enforcement and recovery.

Background

The Moroccan legal framework allows for the creation of a wide range of security interests over a broad range of assets. The system recognizes both possessory and non-possessory pledges over movable assets and rights as well as registered mortgage over real estate. However, the multiplicity of legal sources creates an interplay of the rules regulating secured transactions which makes the system overly complex and outdated. In addition, the centralised register of security interests and the deficient enforcement of secured parties’ rights adversely influence the access to finance in Morocco.

The principal sources of secured transactions legislation in Morocco can be found in the Law of Obligations and Contract (Dahir des Obligations et des Contrats of August 12, 1913 as amended and supplemented by Dahir of May 11, 1995), the Commercial Code (Dahir No. 1-74-447 formant code de commerce of August 1, 1996) and the Law on Registered Real Property 1915 (Dahir fixant la législation applicable aux immeubles immatriculés of June 2, 1915).

The creation and registration of non-possessory security over movable assets and rights

Possessory pledge over tangible assets is governed by the Law of Obligations and Contract. However, non-possessory security is governed by several pieces of legislation and the registration requirements differ depending on the type of the asset. A non-possessory security can be established over wide range of movable assets from pledge over goodwill (Fond de Commerce), tools, machinery, motor vehicles to shares. However, a uniform modern legal system of taking non-possessory security over any type of movable property and an efficient registration of such rights does not exist (e.g. under Commercial Code, different regimes exist for pledge of goodwill, non-possessory pledge over tools and equipment, and non-possessory pledge over shares. Motor vehicles, sea vessels and aircrafts are again governed by special regimes established by the laws specifically governing those types of assets).

Security interests are generally created by written agreements between the creditor and the debtor. Apart from the pledge over goodwill, a generic description of the charged assets is not available as a specific description of collateral is required and the security agreement must specify the secured amount or at least the maximum amount secured. Registration venues and systems relating to personal property depend on the type of the collateral provided.

In case of charge over fond de commerce, the enforcement procedures are prescribed by the Commercial Code, while for other collaterals the enforcement rules provided by the Code of Civil Procedure apply. However, regardless of the applicable regime, the out of court enforcement is not possible and the enforcement is perceived to be costly and time-consuming.

Pledge over goodwill (Fond de Commerce)

The pledge over goodwill (fond de commerce) is regulated in the Commercial Code. According to Article 107 paragraph 2 of the Code, in case of the absence of an explicit and precise description of the pledged elements of goodwill, the pledge automatically covers the trade name, the trade marks, the leasehold right, the customer list and the goodwill.

The Fond de commerce is created by a pledge agreement which under penalty of becoming void needs to be registered in the decentralised Commercial Registry (registre du commerce) of the place of business of the debtor within fifteen (15) days as of signing. The commercial registry is administrated by the Office of Industrial Property (OMPIC); an agency under the Ministry of Industry (Article 109 of the Commercial Code). After initial registration, the pledge is re-registered in registries for every branch of the company. The priority over collateral is gained in the moment of registration.

The displacement of the pledged assets without informing the creditor accelerates the secured debt. According to article 113 of the Commercial Code, in order to start enforcement a creditor needs to apply to the court which then sets a deadline for voluntary payment after which the actual enforcement may start. The entire process is court led as the court nominates a court’s clerk as a bailiff, fixes the starting prices for public auction and determines the main conditions of the sale and how it is to be
conducted. The process can be further delayed as filing of an appeal against the execution decision suspends the process.

Non-possessory pledge securing acquisition of tools and equipment

This type of pledge secures the payment of the purchase price or a loan received for the particular purpose of acquiring tools and equipment.

The pledge is created by a notarial deed or a written agreement between the creditor and the debtor and has to be referred to in the sale invoice or the loan document (depending on the nature of claim it secures). The assets have to be specifically described in the pledge agreement which also needs to mention their whereabouts.

Under penalty of being declared void, the pledge must be registered within twenty (20) days as from the signing of the pledge agreement in a decentralised Special Registry (registre spécial) held by the Clerk’s Office in the Court of the location of collateral (Article 357 of the Commercial Code). In addition, if the pledgor exercises an industrial or commercial activity and is, as such, registered in the trade register, the entry of the pledge must also be made in the Commercial Registry of the court where his company is registered (applying same rules of registration as for the fond de commerce pledge).

Once registered, the pledge gains priority over pledge over goodwill if the pledgee notifies the goodwill pledgeree within two (2) months as from the conclusion of the pledge agreement. The pledge secures the principal debt for five years since registration and the registration can be renewed only for another five year period.

Displacement of the pledged assets without informing the creditor accelerates the secured debt. The enforcement process involves obtaining a payment order and an authorisation of sale. The process is burdened with excessive notice requirements and gives debtors opportunities to delay the process by making objections and appealing rulings.

Non-possessory pledge over certain assets has to include the amount and the term of the loan, the agreed rate of interest, the nature, the quality, the quantity and the value of the collateral as well as the exact place where the collateral is stored.

Same as pledge over tools and equipment this type of pledge is also registered in a decentralised Special Registry (registre spécial) held by the Clerk’s Office in the Court of the location of collateral. The pledgor is allowed to sell the pledged assets or to use them (in case of perishable goods) in which case the pledge is extended to the proceeds of the sale.

In case no payment is made within ten (10) days, as of the due date, the pledgee may apply to the court, which after the expiry of the period of fifteen (15) days as from the receipt of the application, delivers an order fixing the day, place, and time of the public sale of the goods in question. Same as in the case of pledge over tools and equipment, the public auction is conducted in accordance with the Civil Procedure Code and suffers from the same deficiencies.

Pledge over securities

According to the article 538 of the Commercial Code pledge over any security (regardless of its form) can be used to secure any debt (even conditional and/or those of which the amount is not fixed when creating the pledge).

The pledge over shares of publicly traded companies is created by registration of the pledge agreement in a special public registry (the central security depository – Maroc Clear). Pledges of shares of non-publicly traded companies are not registered in any public registry, but rather in the books of the debtor or issuer.

Warehouse Receipts

Any deposit of goods in a warehouse, (established by the Dahir of July 6th, 1915) is recorded by dated and signed receipts which are recorded in a register book of issuing warehouse and delivered to the depositors (Article 341 of the Commercial Code). These receipts mention the names, occupation and domicile of the depositor as well as the nature of the deposited goods and in general, any relevant information likely to establish the identity and the value of deposited goods. A pledge certificate (warrant) is appended to every receipt.

This warrant contains the same information mentioned in the receipt and is a proof of creditor’s rights over stored goods. Upon the presentation of the protested warrant, the administration of the warehouse starts the sale of the goods through a public official who is in charge of the sale.

The Moroccan warehouse receipts are set up around a traditional warehousing system and as such lack specific features that would facilitate development of the modern agricultural warehousing supporting post-harvest finance (e.g. compensation fund, decentralised public registry of receipts and private (out-of-court) sale).

Security over immovable assets

There are two types of title over real estates in Morocco, one stemming out from sharia law and the other one based on registration. Non-registered property, so-called “Melk”, is regulated by sharia law. The document evidencing this type of property is called “Moulkia”. However, the holder of a “Moulkia” can register his property at any time in the Real Estate Office (Bureau de la conservation foncière et hypothécaire).
Conventional mortgage can be created by “a notarial deed or a private handwritten signed deed” ("titre foncier") and has to be registered in the register. The deed must specify the name, the number of the land title, the situation of the mortgaged property and the amount of the secured debt. According to the Law on Registered Real Property any property rights or encumbrances, which impact or affect the property registered in the Real Estate Office, have to be recorded in the registry.

The system of registration of mortgages is generally convoluted by delays stemming out of the possibility to oppose and postpone the registration and strict controls of the filed documentation implemented by the registrar. In addition, the register is not centralised and is not accessible online which can increase costs of transactions. The fact that not all of the property is registered (due to the said dual system of ownership) decreases the efficiency of the registration system even further.

Efficiency of mortgage enforcements is decreased by the lengthy judicial process, non-efficient involvement of experts and procedural abilities of the enforcement debtors to obstruct various stages of the process.

1 Some texts also refer to influence from Jewish traditions. See: http://www.nyulawglobal.org/globalex/Morocco.htm
2 Dahir des Obligations et des Contrats as amended in 11 May 1995. 3 Promulgated by royal Dahir No. 1-96-83 of 1 August 1996. 4 This is the Berber language. Berbers are the indigenous peoples of North Africa west of the Nile Valley.
fy=1
6 This power was preserved for the king prior to the July 2011 Constitution.
7 In that sense, the bicameral parliamentary system in Morocco is very similar to the legislative system adopted in Morocco. The bicameral system was created by an amendment to the Constitution in 1996.
8 A Moroccan King’s decree is called Dahir.
9 These include the UNCITRAL Legislative Guide for Privately Financed Infrastructure, European Union legislation applicable to concessions, and related European Union materials (the EU acquits).
10 See the the European Investment Bank (EIB)’s review of the Private Public Partnership Legal & Financial Frameworks in the Facility for Euro-Mediterranean Investment and Partnership (FEMIP) Region (the Study) - Volume 2 – Country Analysis- May 2011 ("EIB Report 2011")
11 A proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the contracting authority
12 Examples are seminars held by foreign countries and institutions such as the IFC and the EIB as part of their involvement in order to address capacity constraints and to provide assistance in the development of PPPs in the region.
13 See the EIB 2011 report
14id
15 Law no 13-09 (11 Feb. 2010) 
16 Created by Law No. 16-09 
17 Law no 47-09 
18 It is worth noting that the overall legal/regulatory risk as measured by the EBRD’s assessment ranked Morocco and Tunisia at medium risk, Morocco in high risk category, while Jordan scored the lowest risk (assessment score of 70) with Morocco the highest risk (score of 46). Please visit the link provided above for more information on the comparative results for SEMED.
19 For example Prime Minister Decision N° 3-70-07 dated on September 18, 2007 detailing furnishing contracts not submitted to PPL.
20 For example Decision of Ministry of Finance N° 1291-07 dated on 4th July 2007 establishing costs of obtaining copies of plans and technical documents for tender participation.
24 Id
26 http://www.doingbusiness.org/~/media/tpdkm/doing%20business/documents/profiles/country/MAR.pdf
27 Id
29 http://www.nyulawglobal.org/globalex/Morocco.htm
30 We have been informed that the French judicial system is so influential to the extent that French case law is sometimes relied on/cited in Moroccan court judgments.
33 For more information on the nature of the criticisms that were directed to INEJ please see: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MoroccoSA.pdf - Page 26
37 The World Bank Doing Business Report 2012, Morocco. This is in comparison to Tunisia ranking at number 76 and Egypt at 147 on the same indicator in the same year.
38 For motor vehicles see the Dahir of July 17th, 1936, governing the sale on credit of motor vehicles; for sea vessels see the Dahir of March 31st, 1919, forming the Maritime Code, and for aircrafts see the Decree n° 2-61 of July 10th, 1962, governing civil aviation.