



**European Bank**  
for Reconstruction and Development

# **Commercial laws of Morocco**

An assessment by the EBRD

March 2015

# COMMERCIAL LAWS OF MOROCCO

## AN ASSESSMENT BY THE EBRD

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**Basis of Assessment:** This document draws on legal assessment work conducted by the Bank (see [www.ebrd.com/law](http://www.ebrd.com/law)) and was last updated during the preparation of the 2015 EBRD Strategy for Morocco, reflecting the situation at that time. The assessment is also grounded on the experience of the Office of the General Counsel in working on legal reform and EBRD investment activities in Morocco and does not constitute legal advice. For further information please contact [ltt@ebrd.com](mailto:ltt@ebrd.com).

## Overall assessment

Both the law relevant to PPPs and concessions 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.

The recent EBRD energy 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

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 Interestingly, the assessment shows that regulation in practice has superseded applicable legislation as the sector regulator has introduced amendments to the regulatory framework, which in many cases reflect best practice concepts. Amendments are being proposed to the current telecommunications law. The Public Procurement 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. Corporate structures in Morocco are 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.

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. 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

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

## Legal system

### Constitutional and political system

In response to wide-scale protests in Casablanca, Rabat, Tangier and other cities [in early 2011], King Mohammed formed a commission of constitutional lawyers and academics to prepare reforms aimed at strengthening democratic rights and freedoms. The commission had limited consultations with political parties, many of whom endorsed its main aims and expressed satisfaction that it contained sufficient guarantees of democracy. The commission’s recommendations were announced on 17 June 2011 in a public address.

Key changes to the Constitution announced by King Mohammed include:

- The new Constitution introduced a stronger separation of powers and somewhat reduces the political authority of the King.
- Under the new Constitution, the Government will be formed based on the results of parliamentary elections, would be

accountable only to parliament and would be the sole body empowered to enact laws.

- The Prime Minister – elevated to Head of Government and the executive branch – will be chosen from amongst the leaders of the party with the most votes in the election, rather than by direct selection by the King. The Prime Minister will have the power to propose and dismiss cabinet ministers, will have appointment powers for ‘civilian positions’ and will have the power to dissolve the lower House of Parliament.
- The Prime Minister chairs the Governing Council, while the King chairs the Council of Ministers. The former has some decision-making powers, but in many important cases – as for matters of strategy, arbitration and general policy (including macroeconomic and fiscal policy) – it has only a deliberative character and refers issues to the latter for decisions.
- The King will retain direct responsibility for religious affairs, security issues and ‘strategic policy choices’. He is also the supreme arbiter among political forces.
- The Parliament gains additional powers of assessing government policy, ratifying legislation, enacting laws and holding the Government to account.

The new Constitution enshrines the concept of ‘judicial independence’, making it a crime to interfere with legal rulings.

- The new Constitution makes it clear that Morocco is an Islamic state, but one which guarantees religious freedom and freedom of conscience.
- The new Constitution recognises Amazigh, the language spoken by the Berber minority, as an official language, despite objections by conservatives who felt this would dilute Morocco’s Arab identity.
- The new Constitution enshrines fundamental human rights as they are universally recognised and provides for the supremacy of international covenants (those ratified by Morocco) over national legislation, including gender equality.

## Freedom of information

There is no law on access to information in Morocco. The Arab spring has increased the demand by Moroccan media and transparency activists for legal reforms on transparency. Morocco has become the first Arab country to introduce a constitutional provision securing the right to access information in 2001. However, in order to strengthen the legal

framework for transparency, a law securing access to information held by the government is needed.

## Judicial system

### The structure of the court system

The Moroccan court system comprises ordinary and specialised courts.

The ordinary courts are divided into three levels:

The Courts of Appeal (Cours d’appel) which hear appeals against decisions from the Court of First Instance. The Supreme Court (Cour de cassation), which is the highest court, ruling only on the legal issues at stake in the case and not on the facts. There are also specialist courts such as Administrative Courts, Commercial Courts, Administrative Courts of Appeal and Commercial Courts of Appeal.

### Independence of the judiciary, equal protection under the law and fair criminal procedure

The Constitution provides for an independent judiciary and guarantees conditions for a fair trial, though there have been concerns raised regarding the independence of the courts in practice, allegations of corruption in the judiciary and political influence in legal proceedings (amongst others, Transparency International, National Integrity System Morocco 2009). The King heads the Supreme Judicial Council, which has authority to hire, dismiss and promote judges. Under the new Constitution, it becomes a crime to interfere with legal rulings. The current law does not prohibit arbitrary arrest or detention which the police have used often.

### Judicial Capacity

The Constitution states that the judicial branch is independent from the legislative and executive branches, and that the King guarantees that independence. Magistrates are appointed by Dahir (the King’s decree) upon proposal by the High Council of the Magistracy. Organisation of the judiciary is regulated under Law No. 1-74-388 that was passed in 15 July 1974.

The Moroccan court system is comprised of first degree courts and second degree courts. Jurisdiction of the first degree courts comprises Courts of First Instance, which are competent to adjudicate matters of civil, personal status, and commercial matters; Trade/Commercial Courts (eight courts and three appellate level courts), which are competent to rule on cases involving merchants and commercial disputes; and Communal and District Courts, which are competent to adjudicate all personal estate actions brought against individuals who reside under their jurisdiction. First degree courts are generally

limited in jurisdiction according to the value of the claim.

Jurisdiction of the second degree courts includes Courts of Appeal, the Supreme Court, and Administrative Courts (seven courts and two appellate level courts). The Supreme Court is competent to adjudicate appeals of cassation, appeals requesting the cancellation of Prime Ministerial decisions, and lawsuits relating to bias that are filed against magistrates, or for disqualification of judges in any court other than the Supreme Court itself.

Administrative courts are competent to make initial rulings on claims for cancellation of acts filed against administrative bodies, disputes related to administrative contracts and claims for compensation against prejudice caused by public entities' acts or activities, as well as deciding on the consistency of administrative decisions with legal provisions. In addition, a Special Court of Justice looks at 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 by government members during the discharge of their duties. Members of government may be indicted by the two houses of parliament and referred to the High Court of Justice for trial.

An Audit Court (Court of Accounts) is responsible for supervising budget implementation. It ensures the sound conduct of receipt and expenditure operations and evaluates the management of agencies placed under its control by law. The Audit Court provides assistance to parliament and the government in its fields of competence as well as taking action against violations of the rules which govern such operations.

Other bodies with a jurisdiction to review include the Constitutional Council, which reviews laws and the rules of procedures of each house of parliament before their promulgation. The Constitutional Council also decides on the validity of the election of the members of parliament and referendum operations. Decisions of the Constitutional Council are binding on all public authorities, administrative and judicial bodies.

The administrative authority of the judiciary is vested in the Supreme Council of the Judiciary. The Council is composed of the Minister of Justice, the First President of the Supreme Court, the District Attorney of the King to the Supreme Court, and the President of the Civil Chamber of the Supreme Court. The Appeals Courts, Regional Courts, and Sadad Courts each elect two members to the Supreme Council.

In addition to the courts in the main judicial structure, there are a number of courts with specialised jurisdiction. Special commercial courts

were established in 1997 and they operate at the level of the courts of first instance.

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.

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 the 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.<sup>1</sup>

In October 2011, the Moroccan parliament passed a law on the protection of trial witnesses, experts, prosecutors, judges, as well as whistle-blowers who report corruption. This was the result of efforts by the ABA Rule of Law Initiative (ABA ROLI) in collaboration with Morocco's Anti-Corruption Commission, l'Instance Centrale de Prévention de la Corruption (ICPC). ABA ROLI provided research assistance for this legislation, providing analogous legal codes from other countries in the region, and drafting and amending the initial text to produce the final law.

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<sup>1</sup> *Id*

### Education and Judicial Training

The Institut Supérieur de la Magistrature (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.<sup>2</sup> Both INEJ and ISM have collaborated in the past, and ISM continues to collaborate, with international and bilateral organisations for the provision of training, seminars and conferences on the rule of law, anti-money laundering and economic crimes. 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.

### Enforcement and Alternative Dispute Resolution

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 the publishing of court decisions.

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.

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<sup>2</sup> For more information on the nature of the criticisms that were directed to INEJ please see: <http://siteresources.worldbank.org/INTLAWJUSTI/NST/Resources/MoroccoSA.pdf> - Page 26

## Commercial legislation

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](http://www.ebrd.com/law).

## Infrastructure and Energy

### Electronic Communications

The Consolidated Law 24 of 1996 on Post and Telecommunications is the primary law affecting the electronic communications sector in Morocco. In Morocco, the law sets the general provisions and principles applicable while decrees provide for the detailed implementation of the law. Broadly speaking, the Moroccan legislative framework for the 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.

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 used in the EU framework.

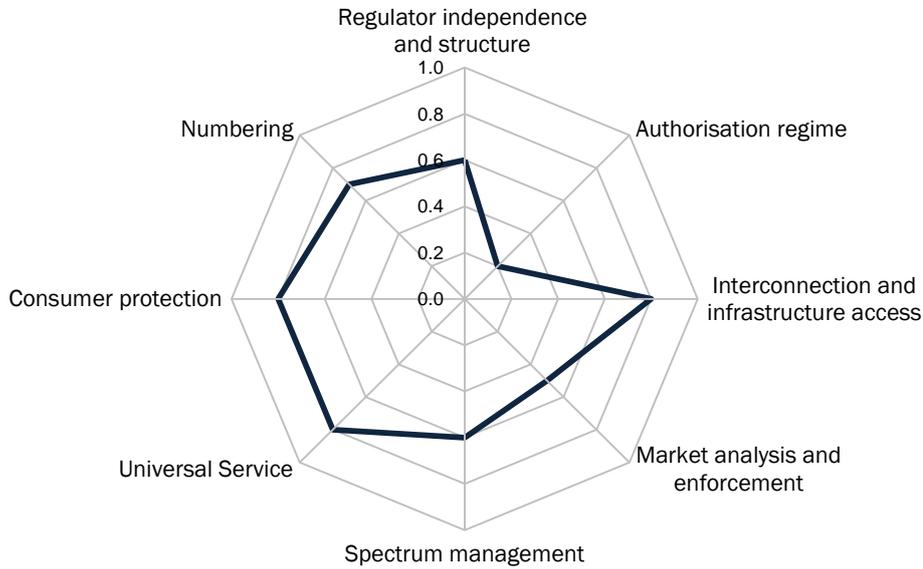
Morocco retains an individual licensing regime, unlike the EU style general authorisation and notification framework. ANRT's authority to set tariffs is understood to differ depending on whether the service is wholesale or retail, interconnection related, subject to margin or price squeeze, instead of the general authority best practice to set tariffs for services of operators with significant market power. Levels of fines appear to be meaningful to large operators; however, ANRT lacks the authority to impose graduated penalties. ANRT must apply to

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 can be appealed to the Tribunal de Rabat and ANRT decisions cannot be suspended during appeal.

In early 2014 ANRT is understood to have presented a draft amendment bill for Law 24 of 1996 which would enhance its power in regulating the sector. It is understood that the new powers would enable the ANRT to impose penalties of up to 2% of revenue before tax on operators where there is a breach of regulation, as well as enforcing stricter consumer protection requirements, infrastructure sharing, roaming and fibre based roll-out regulations.

When finalised, the planned amendments to Law 24 or 1996 should draw Morocco's framework closer to that of best international practice, and make the overall environment more conducive to investment for competitive operators. Notwithstanding these very positive changes, some rules and practices remain to be improved in terms of consistency with international best practise; rules which will better allow the entry, increase and sustainability of competitive provision of service, particularly in the area of broadband. Among the improvements that could be made are: transition from individual licensing to a general authorisation framework; a more detailed market analysis framework and guidance in the law; a requirement that operators are to provide reference offers for infrastructure access; and, enhanced procedures in law to obtain rights of way, as well as enhancements to the independence of executive appointments and dismissals; and, elimination of the requirement for ministerial approval of regulatory decrees.

Chart 1 – Comparison of the legal framework for telecommunications in Morocco with international practice

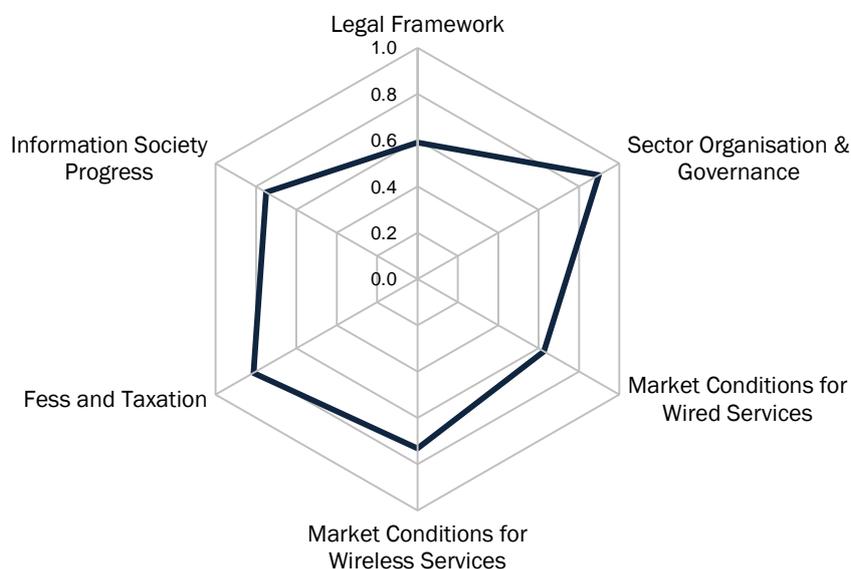


**Key:** Extremities of the chart = International best practice

**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.

Chart 2: Comparison of the overall legal/regulatory risk 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.

## Energy

### 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.

### 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”). 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 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.

### 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.

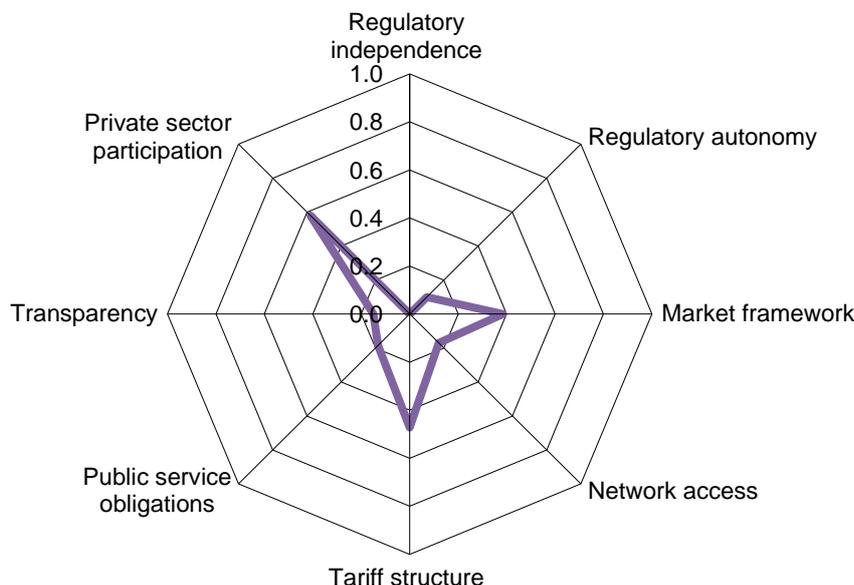
### Operational Environment

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.

Chart 3: Comparison of the overall legal/regulatory risk for energy 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. 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 energy legal framework of the country approximates these standards.

**Source:** EBRD 2010 Energy Sector Assessment.

## Gas

### 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 establishment of an independent regulator is also under consideration for later this decade.

### Tariffs

ONEE may propose changes to the level of its tariffs, but the decision on whether to accept or reject such changes is made by an inter-ministerial committee composed of MEMEE, the Ministry of Economic and General Affairs (“MEGA”), the Ministry of Interior and the Ministry of Finance. The inter-ministerial committee is supervised by MEGA.

## Energy efficiency/renewable energy

### Renewable energy

Morocco has limited conventional energy resources and depends almost entirely on imported fuel to generate electricity, as well as, due to demand outpacing domestic generation, on import of electricity (primarily from Spain and Algeria). The country has abundant renewable energy resources, with wind being particularly attractive in the short to medium term. Against rising energy demand, the development of renewable energy (RE) has become a major policy objective with the adoption of the first National Energy Strategy in 2009. With the adoption of the new National Energy Strategy in 2011 (the “Strategy”), the target for production of electricity from renewable energy sources (RES) has been set at 20% by 2020.

The government has set ambitious goals for the RES sector and there is a clear need for an efficient mechanism to achieve those. The legal framework is well advanced but there is a considerable gap in introducing enabling implementation mechanisms. RES support schemes such as priority access to the grid and mandatory purchase of electricity from the

RES are not part of the regulatory framework. Importantly, financial support mechanisms need to be in place, including feed-in tariffs and tax support mechanisms to promote wide-scale project deployment.

### Energy efficiency

Morocco's energy efficiency strategy calls for a 12% reduction of energy consumption by 2020 and a 15% reduction by 2030. In its 2011 Energy Strategy, the GoM laid out a number of steps to be taken in the residential, industrial and transport sectors to reduce energy demand in the short-term. In the residential sector, the strategy calls for an Energy Efficiency Building Code, energy efficient lighting, the use of insulation material and double glazing, and increased use of solar water heating. ADEREE, the implementing agency for EE, has already taken a number of steps.

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.

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. The Law on Energy Efficiency ("EE Law") requires implementation of a number of measures to reduce energy consumption. They include:

- energy performance standards and labelling 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 assessments are

required, to be conducted in conjunction with such assessments)

- 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

## PPPs / Concessions

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, the 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. The unit has apparently 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<sup>1</sup>. (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' confidence in the legal basis upon which their PPP investments will be based.

As illustrated (see Chart 1), while the definitions and scope of the applicable law is relatively clear, the rules for the selection of the private party are in need of enhancement. 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.

### PPP legal framework

As indicated (see Chart 1), the core area "PPP Legal Framework" concentrates on the existence of a specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPPs, and allowing for 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/PPP 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 infrastructure but to date the relevant implementing regulations have not been enacted for centrally procured PPP projects. In the absence of specific legal regulations, 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 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 the main assets of a concession to 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 in 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.

### 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. The law necessitates that the selection process is publicised prior to the event. 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 than 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.

### 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.

### 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.

### 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.

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. 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.

### 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 signalling 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.

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. Although, from time to time, some general training sessions are made available through public seminars and international conferences<sup>2</sup>, 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.

### 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.

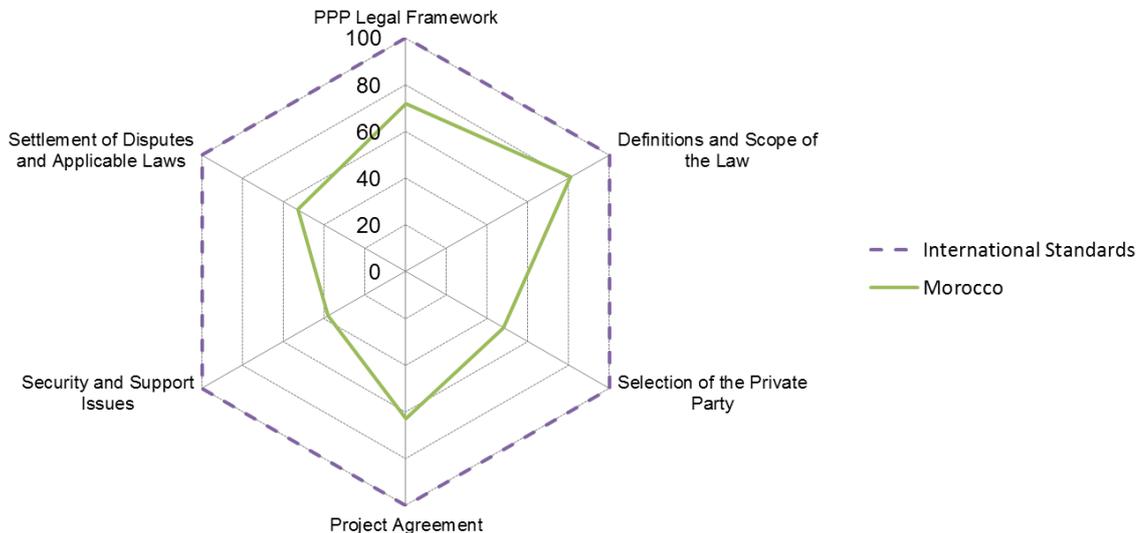
**PPP law enforcement**

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.

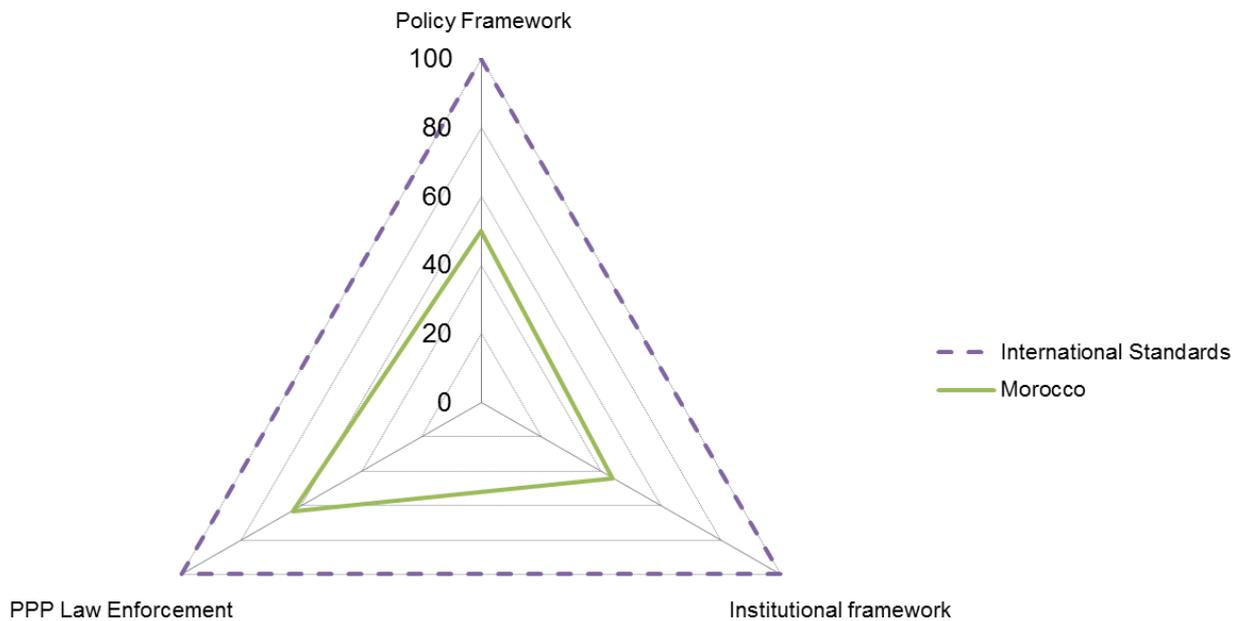
Chart 4 – Quality of the PPP legislative framework in Morocco



**Note:** The extremity of each axis represents an ideal score in line with international standards such as the UNCITRAL Legislative Guide for Privately Financed Infrastructure projects. The fuller the "web", the more closely concessions laws of the country approximate these standards.

**Source:** EBRD 2012 PPP Legislative Framework Assessment (LFA)

Chart 5 – How the PPP law is implemented in practice in Morocco



**Note:** The extremity of each axis represents an ideal score, that is, a fully effective legal framework for PPPs.

**Source:** EBRD 2012 PPP Legal Indicator Survey (LIS).

## Public procurement

### 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 assessment for the quality of the Moroccan local procurement framework (law in practice) as compared to countries in the SEMED region, highlighted that with the exception of flexibility and

economy where a high performance was achieved, local procurement practice scored low compliance to medium compliance against the applied benchmark.

Although local procurement practitioners reported that the legislation is clear, and to a certain extent comprehensive, they also reported that aspects of the legislation are considered by contracting entities to be incomplete and subject to interpretation. Contracting entities have not established sufficient internal procurement rules to close regulatory gaps in practice. The law provides for mandatory standard tender documentation and public contract templates, however, there are no public procurement manuals or instructions available.

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.

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.

### 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's decisions 3 and Ministerial Decrees<sup>4</sup>. 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, a 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 4 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 the 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.

#### 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<sup>5</sup>.

#### 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.

Chart 8 presents the assessment results for the quality of the Moroccan public procurement regulatory and institutional framework, benchmarked against the 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 react to 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.

Chart 3 presents the scores for the quality of local public procurement practice. The survey revealed that local procurement practice scores ranged from 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 reacting to the changing market.

### Eligibility rules

Eligibility rules provided by law are reported to be respected and followed in practice. Submitting false declarations are 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.

### 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.

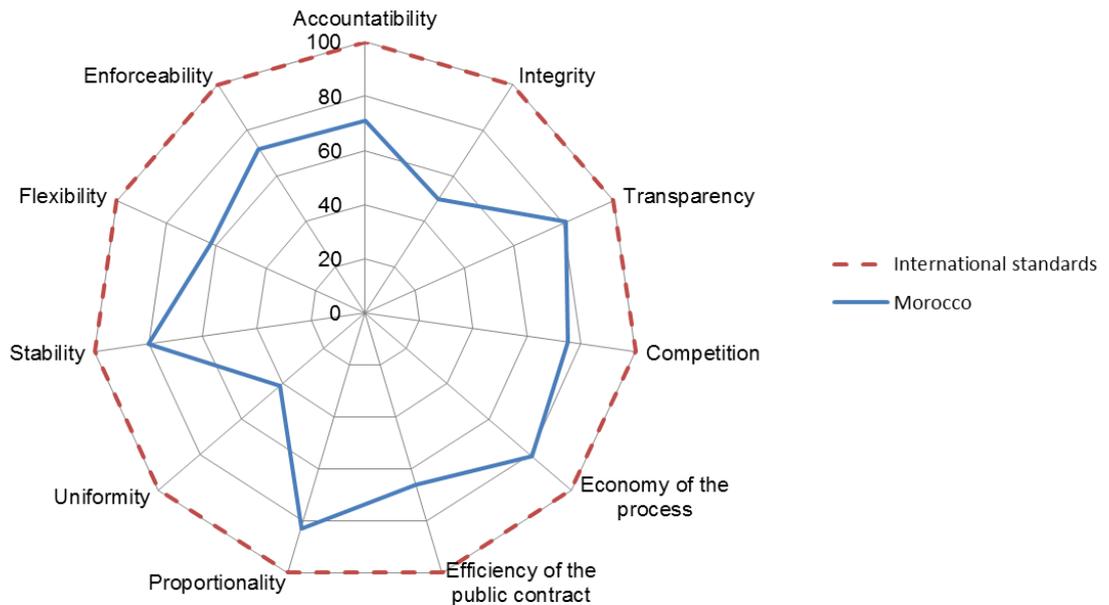
- The public procurement law is in need for upgrading so that it reflects the current standards in public procurement.
- Specific procurement rules for concessions, public law institutions and municipalities need to be developed and implemented.
- There is a need for the creation of dedicated national 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](http://semed.ppl.ebrd.com/materials/eng_cp_morocco.pdf)

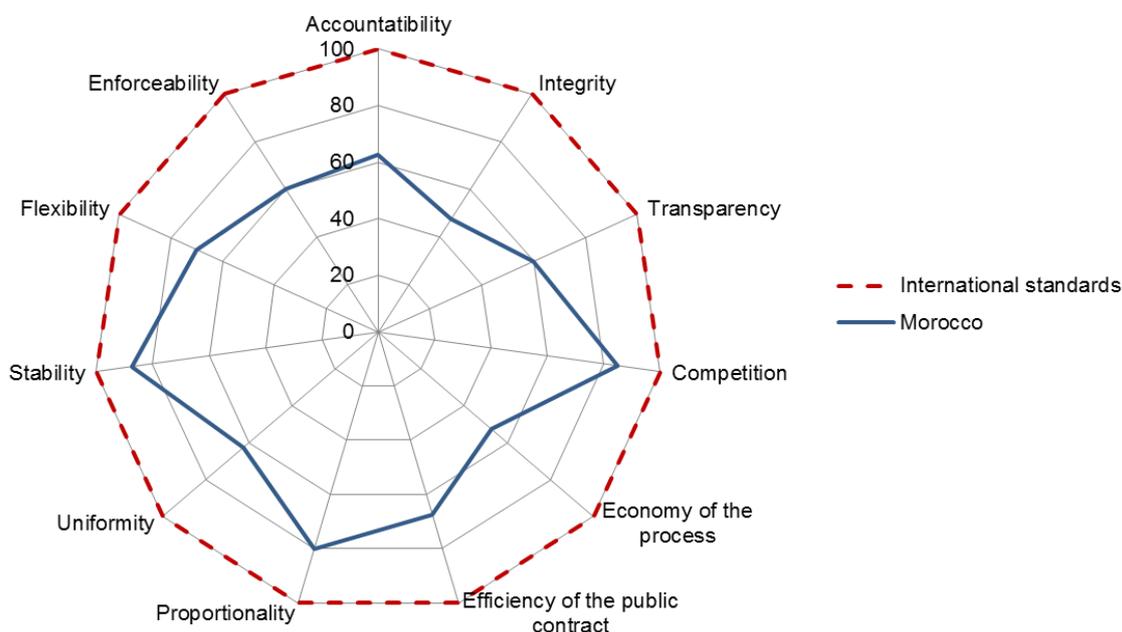
Chart 6 – Morocco’s quality of public procurement legislation



**Note:** The chart shows the score for the effectiveness 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 2011 Public Procurement Assessment

Chart 7 - Quality of public procurement practice 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 2011 Public Procurement Assessment

## Private Sector Support

### Access to finance

#### Background

The Moroccan legal framework allows for the creation of a wide range of security interests over a broad range of assets. The system recognises 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 the 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 governed by special regimes established by the laws specifically governing those types of assets<sup>6</sup>).

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.

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.

### 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 the 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 pledgee 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.

### 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 warehouses 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, a centralised 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 the 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.

## Capital Markets

A significant number of legislative and regulatory reforms have been undertaken in the capital markets area recently, with 12 draft laws in various stages of completion. Five draft laws have already been submitted to the Moroccan Parliament. Specifically, some of the primary institutions regulating the debt market are being reformed to increase their level of independence and supervisory powers, efforts to introduce Islamic finance products are underway, a draft law on covered bonds is being prepared and a draft law is underway to establish a regulated market (under the supervision of the Conseil Déontologique des Valeurs Mobilières (CDVM) and the Central Bank) for the trading of derivatives instruments.

The aim of the aforementioned drafts is to develop a local capital market in Morocco with the ultimate goal of establishing Casablanca as a finance center for North and West Africa. Once adopted, these laws would address many of the main impediments of the current legal and regulatory framework, and would allow for the expansion of the variety of the available fixed income and money markets products for which interest in the market exists (e.g. Sukuk, covered bonds).

Morocco is one of the Deauville Partnership countries and the EBRD has conducted, with other IFIs, a capital market assessment mission under that umbrella. Following the assessment, EBRD engaged with market participants and authorities on legal and regulatory technical cooperation on a derivatives legal framework that would also apply to over-the-counter derivatives transactions.

## Corporate governance

### Legislative framework

Morocco's legal framework for companies is based on French civil law along with certain influences from the German, Ottoman, and Sharia legal systems.

The corporate governance framework is mainly governed by the Commercial Code enacted by the law No. 15-95 of 1st August 1996 ("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<sup>3</sup>.

The law on Public Limited Companies was amended on different occasions the latest being Dahir N.1-08-18 of 23 May 2008 promulgating the law 20-054. The main features of these amendments were to reinforce shareholders' rights<sup>5</sup>, disclosures and the role of the board to serve the main objective of ensuring managerial oversight and provide guidance on strategic decisions.

Companies listed on the Casablanca Stock Exchange "Bourse de Casablanca" are also required to comply with the Law n° 1-93-212 on the Moroccan Securities Commission "Conseil Déontologique des Valeurs Mobilières CDVM" and the information required from legal entities seeking public offerings dated 21 September 1993, as amended, (the "Public Offering Law"). This law sets the control of the CDVM on public offerings (either an initial public offering of securities on the Stock Exchange or the issuance or sale of securities to the public) and private placements and regulates the disclosure of inside information and market manipulation.

Additionally, listed companies on the Casablanca Stock Exchange (CSE) should also comply with the law n° 1-93-211 (the "Stock Exchange Law") dated 21 September 1993, as amended. This law regulates more specifically the primary listing of securities on the MSE, their trading, and the settlement of transactions on such securities.

In accordance with the Stock Exchange Law, the CSE enacted general rules (règlement général) approved by the Ministry of Finance on 7 July 2008, as amended, (the "Stock Exchange General Rules") which provided for technical aspects of the functioning of the Stock Exchange.

Moreover, law n° 26-03 in relation to public offers on the stock exchange dated 21 April 2004, as amended from time to time (the "Law 26-03")

establishes the legal framework applicable to a public offer made over listed securities.

Moroccan laws allow for economic entities to be incorporated under many forms. The main forms of companies provided under the Moroccan law<sup>6</sup> are the Joint-Stock Company (Société anonyme), Limited Liability Company (Société à responsabilité limitée), and General Partnership (Société en nom collectif) and Limited Partnership (Société en commandite simple).

The most commonly used forms of commercial companies in Morocco are the Joint-Stock Company (JSC) that is a share company which must have at least 5 shareholders. There exist 3 types of joint-stock companies:

- JSC which have undergone a public offer (Société anonyme faisant appel public à l'épargne): These are companies whose shares are either listed on the stock exchange (or which use intermediaries to place their shares) or which have at least 100 shareholders, with a minimum share capital of 3,000,000 DH.
- Simplified JSC (Société anonyme simplifiée): such companies are to be created exclusively by two or more joint-stock companies (Sociétés anonymes) and each of such companies must have a share capital of at least [200,000 euros].
- Closed JSC (have not undergone a public offer): These are companies whose share capital must be at least 300,000 DH.

### Institutional framework

#### Moroccan Securities Commission ("Conseil Déontologique des Valeurs Mobilières" (CDVM))

The main financial market regulator in Morocco is the Moroccan Securities Commission ("Conseil Déontologique des Valeurs Mobilières" (CDVM))<sup>7</sup> that is a self-financed legal entity under the supervision (tutelle) of the Ministry of Economy and Finance, set-up in 1993.

The CDVM is in charge of ensuring the protection of savings invested in securities, ensuring the smooth functioning and transparency of the securities market and assisting the government in regulating the securities market.

The CDVM is empowered to (i) elaborate circulars, (ii) approve prospectuses addressed to investors in the context of public offerings to secure compliance with legal and regulatory requirements relating to products and investors' information, (iii) ensure that

<sup>3</sup> Official Gazette n. 4422 of 17 October 1996, page 661

<sup>4</sup> Official Gazette n.5640 of 19 juin 2008, page 384

<sup>6</sup> The commercial code; Law n° 17-95 regarding joint stock companies; Law n° 5-96 regarding other types of companies.

<sup>7</sup> <http://www.cdvm.gov.ma/en>

issuers meet their reporting requirements and (iv) control the securities market professionals, namely brokerage firms, the stock exchange, the account holders, the central depository and the management companies. The CDVM also conduct investigations and seek sanctions against parties that breached the rules regulating their activities or the functioning of the securities market.

#### The Casablanca Stock Exchange

The Casablanca Stock Exchange (CSE)<sup>8</sup> is a Joint Stock Company which share capital is owned by brokerage firms and managed with general rules approved by the Ministry of Finance. Its mission consists of ensuring the running, functioning and promotion of the Stock Exchange by monitoring and managing trading sessions, publishing market information, providing assistance to issuers in the listing of their securities and in the execution of their financial transactions and ensuring the successful completion of transactions between the various parties.

The Stock Exchange Company is also in charge of pronouncing the initial public offering of securities (debt and equity securities) and their withdrawal from listing and more generally ensuring that all the transactions carried out by brokers conform to the applicable legislation and regulation.

The Stock Exchange Company shall report to the CDVM any breach it may notice in the context of its mission. The Stock Exchange is subject to joint supervision by the CDVM and the Ministry of Finance.

#### Bank Al Maghrib

Banks' activities are regulated and supervised by Bank Al Maghreb (BAM)<sup>9</sup> that is self-funded and independent public entity that is under the control of the Ministry of Finance.

The legal framework in Morocco allows companies to choose between one-tier system and two-tier system board structures.

### Code of Corporate Governance

The Moroccan Code of Corporate Governance (hereafter CG code)<sup>10</sup> was first issued in 2008 by the National Corporate Governance Commission (Commission Nationale Gouvernance d'Entreprise or CNGE) – jointly created and led by the Ministry of Economic and General Affairs or MEGA) and

<sup>8</sup> <http://www.casablanca-bourse.com/bourseweb/index.aspx>

<sup>9</sup> <http://www.bkam.ma/>

<sup>10</sup>

[http://www.ecgi.org/codes/documents/morocco\\_code\\_march2008\\_en.pdf](http://www.ecgi.org/codes/documents/morocco_code_march2008_en.pdf)

“Confédération des Grandes Entreprises Marocaines” (CGEM)

The MCGC has three separate annexes targeting corporate governance issues specific to SME and family-owned enterprises, banks, and SOEs. In early 2010, a partnership between the public and private sectors also launched the Moroccan Institute of Directors (Institut Marocain des Administrateurs or IMA), which conducted its first training courses the same year.

The CG code is structured in 4 chapters in a way to make it largely inspired by the OECD Principles in 2004. The Principles consists of four main chapters, dealing with (i) Shareholders; (ii) Public Disclosure and Transparency; (iii) Stakeholders; and (iv) Board of Directors.

The CG CODE provisions functions as a voluntary soft law established under the so-called “comply or explain” approach. However, companies, including listed companies, are not required to report their compliance.

### Summary

#### Structure and Functioning of the Board

There are many critical issues in this area. The Gender diversity assessment in companies' boards presents a serious issue of gender representation. The major drawback in this section is the lack of a legal requirement for board independence. This does not only hinder the independence of the board but also negatively affect the efficiency of committees created at the level of the board. Listed companies are not required to perform an annual evaluation.

- The law requires that company's boards have at least three and not more than 12 members for non-listed companies and 15 for listed companies<sup>11</sup>; the number of board members should ensure that they are able to perform their activities effectively, make rapid and rational decisions, and efficiently organize the formation and activities of the committees. Boards of the ten largest listed companies have between 4 and 15 members.
- Gender diversity – Only 4 companies from the list of 10 major listed companies have one female board member.
- For one-tier boards, the law requires that more than half of the board consist of non-executive board members. A non-executive member of the board of directors shall be the person who does not have any administrative duty other than being a board member. As a matter of fact, all of the ten

<sup>11</sup> Article 39 of the Law No. 17-95 on Public Limited Companies.

largest companies have a majority of non-executive directors on the board (see chart 3).

- There is no explicit requirement for Board independence in the law. The CG CODE only encourages an independent attitude of the board and its directors without setting up any requirement for independent board members with a clear definition and criteria for an independent board member.
- Corporate secretary – the law requires companies to appoint a board secretary charged with organizing board meetings under the authority of the chairman, draft the minutes and records of board meetings and ensure compliance with statutory and regulatory requirements. All listed companies appear to have board secretaries. However, the role of secretarial assistance is mainly administrative as it doesn't provide the board with professional advices (i.e. legal)
- There is no established practice of board evaluation. The law does not make it mandatory for companies to perform a board evaluation. The CG CODE only provides for a self-evaluation of the board to be conducted annually. Only four listed companies in our list publicly disclose that they carry out a self-evaluation including an evaluation of their non-executive directors.
- The Directors' duty of care and loyalty is not comprehensively defined in the legal and regulatory framework. Besides this concept is scattered across various laws and regulation, the scope of the Directors' duty of care and loyalty cannot be precisely ascertained. However, the CG CODE provides a comprehensive definition of this duty. Indeed, CG CODE reads *“the fiduciary responsibility vis a vis all shareholders and partners is built upon the duties of diligence and loyalty. The duty of diligence is applicable in particular to their personal involvement and their conviction that the principal management mechanisms facilitate the governing body's exercise of its monitoring and control mission. The duty of loyalty colours the observance of the other principals, relating in particular to independence of judgement, conflicts of interests, ethics, good faith and professionalism.”*<sup>12</sup>. It appears that the courts have developed a relatively clear, standards and interpretation of director duties. According to the respondents of the

CG CODE survey, minority investors have successfully brought cases in front of courts. However, law suits against directors still rare in practice.

- All listed companies disclose the number of board meetings per year. However, the number of meetings in these companies is quite limited. Most companies appear to meet between 1 and 3 times per year. This gives a very formalistic view of the board's meeting as a legal requirement rather than as an effective function enabling the board to fully carry out its activities.
- The laws and regulations vest the authority to determine the company's overall strategy and provide management oversight to the board<sup>13</sup>. The law expressly calls on non-executive board members in one-tiered board structures to supervise and oversee management. The CG CODE provides a detailed set of board's responsibilities such as to approve key company policies (e.g. on risk management and succession planning), key performance indicators, and major capital expenditures. However, neither the law nor the code entrust the board with the responsibility of the company's corporate governance practices, risk management and control framework, and disclosure policy.

When reading the annual reports of the ten largest listed companies and, as a result of desktop research on information disclosed by these companies online, it appears that the majority of boards appear to exercise supervision and guidance on management and approving the company's strategy and budget and major expenditures.

- The law does not require companies to establish board committees. It only suggests and allows companies to create these committees at the board level as they see it fit<sup>14</sup>. The CG CODE code also encourages companies to establish board committees, particularly audit committees, remuneration committees, nomination committees.

However, given the lack of independence requirement for board members, one can question the efficiency of these and their ability to enhance the objectivity and independence of the board's judgment, insulating it from potential influence of managers and controlling shareholders.

#### Transparency and Disclosure

<sup>13</sup> Article 69 of the Law No. 17-95 on Public Limited Companies.

<sup>14</sup> Article 76 of the Law No. 17-95 on Public Limited Companies.

<sup>12</sup> Code of Corporate Governance of Morocco, section 1 Responsibilities of the governing body, page 9.

There is no requirement in the law with regard to the rotation of the external auditor which can seriously affect the independence of the latter. Moreover, the provision of non-audit services is considered as a common practice and the law does not provide for an explicit prohibition.

- The law requires external auditor to be independent. However the law does not provide for any independence test that should be carried out by the audit committee. The CG code only provides that the audit committee, whose members are not necessarily independent, carry out a process to ensure a competitive and selection process. All ten largest listed companies declared their auditor to be independent (their auditors are international audit firms and they state that themselves).
- In accordance with the law, the right to appoint external auditor is reserved for the GSM<sup>15</sup>. All listed companies are required to appoint two external auditors who belong to different audit companies. Furthermore, pursuant to the law, all JSCs incorporated in Morocco are subject to external independent audit.
- There is no requirement in the law as regards to the rotation of the external auditor. The law does not require the legal audit partner to be rotated on a periodic basis.
- Provision of non-auditing services by the external auditor is not allowed by the law although this prohibition shed some ambiguities of interpretation. However audit firm believes that it is common.
- The law imposes a cooling-off period of five years where an external auditor cannot serve on the board or as a manager of a company within five years of completing the audit<sup>16</sup>.
- Group of companies, holdings and listed companies are required to provide consolidated accounts in either in accordance with the Moroccan Financial Standards (MAS) or IFRS<sup>17</sup>, while banks are

required to prepare their consolidated accounts in accordance with IFRS only. Although not required and companies (except banks) are allowed to choose, all ten largest listed companies prepare their financial statement in accordance with IFRS.

- Minutes of GSM – there is a specific requirement in the law to disclose the GSM minutes and records<sup>18</sup>. The law requires that shareholders obtain copies of these documents. Under Moroccan law, the minutes of GSM must be registered with the commercial registry.
- There is specific requirement in the law for shareholders to disclose their ownership structures in listed companies to the regulatory authority (CDVM) when crossing 5 percent of the company's capital share<sup>19</sup>. This information is made public by the CDVM within a short time. As a matter of fact, all ten largest listed companies disclose these information on their shareholders.
- Companies are not required to disclose AoA on their website. None of the companies in our list of ten largest listed companies disclose its AoA on its website. This information cannot be found on the CDVM or CSE websites.

#### Internal Control

The Moroccan legal framework does not provide any protection for whistle-blowers. Companies do not disclose online their code of ethics.

- Companies are not required in the law to establish an internal control function. Only banks are subject to this requirement. The internal control department in banks and companies should report to directly to the board or its audit committee which ensure for a reporting line independent from management. The CG code stipulates that “in its management report, the enterprise shall inform shareholders or partners of its internal control and risk management policy.
- In Banks, it is worth noting that the bank's internal auditors are required to audit the corporate governance and risk management structures. The CG code does not provide guidance on the role, scope, and independence of the internal audit function.

<sup>15</sup> Articles 163 and 164 of the Law No. 17-95 on Public Limited Companies.

<sup>16</sup> Articles 383 and 404 of the Law No. 17-95 on Public Limited Companies.

<sup>17</sup> IFRS are not translated into Arabic; instead, companies either use the original English version as published by the International Accounting Standards Board (IASB) or the official French version developed by the French Association of certified public accountants (*l'Ordre des Experts-*

*Comptables*). This ensures that the IFRS used by the accounting profession are up-to-date.

<sup>18</sup> Article 16 of the Law n°1-93-212(the "Stock Exchange Law") dated 21 September 1993

<sup>19</sup> Circular of the CDVM N.01/04, Articles 68 ter and 68 quater of the law n° 1-93-212 (the "Stock Exchange Law") dated 21 September 1993

- All ten largest listed companies disclosed having internal audits departments in place. However, we were not able to verify whether these companies provide the internal audit functions with sufficient resources.
- Institute of Internal Auditors is present in the Morocco. It advocates the IPPF (International Professional Practices Framework) and the IIA Global methodology. Morocco is only one of two countries on the African continent to have a presence of the Institute of Internal Auditors that has been formally designated to administer the official exam to become a certified internal auditor.
- The CG code recommends companies to adopt a Code of Ethics. Pursuant to the CG code “The enterprise must adopt an ethics charter prepared by the governing body, endorsed by the General Assembly, and disseminated to the public. The governing body will ensure that all its operations are consistent with the provisions of this charter.” The ten largest listed companies do not disclose their codes online.
- Companies including banks are required in the law to establish a compliance function to ensure that management complies with relevant laws and regulation and internal policies, procedures and process. Banks listed in the ten major listed companies have established compliance functions. Of further note is that a number of companies combine the compliance and internal audit functions.
- The Moroccan legal framework does not provide any protection of whistle-blowers for employees who report wrongdoing.
- Under the articles 58 and 95 and subsequent of the Law n° 17-95 on limited liability companies and the article 2 of the Decree n° 2-09-481, disclosure is made in the special report of the auditor and in the managing report.
- The law provides protection against Related Party Transactions RPT<sup>20</sup>. All transactions, other than those carried-out during the ordinary course of business, conducted by board members, managers, and shareholders owning directly or indirectly 5 percent of the share capital or voting rights are to be approved by the board and are then submitted to the general assembly for final approval.
- In accordance with the CG code “Shareholders or partners must have a guarantee that the enterprise is managed in

*the interest of all shareholders and partners. For the sake of readability, the most important regulated agreements will be the subject of separate resolutions. The enterprise is required to report transparently on the company’s transactions with shareholders and the key executives.”<sup>21</sup>*

Finally, companies are required to fully disclose related-party transactions in their financial statements, both according the MAS and IFRS.

#### Rights of Shareholders

Shareholders enjoy most of the rights enabling them to participate in the company’s decision making. However, there are few problematic issues relates to the minority shareholders protection. The GSM is not required to approve major transaction of any value. Cumulative voting is not foreseen in the law and regulation. Shareholders agreements are not required to be disclosed as per the law.

- The law allows shareholders to participate at the GSM in person or in absentia on the basis of a power or attorney. Postal and electronic voting is allowed under the law if specified in the articles of association. However, from reading annual reports of the ten major listed companies, this does not seem to be the practice in Morocco.
- The law does not require the board of directors to attend the GSM; only the management is required to do so. This is a serious impediment to the shareholders’ right to face the board and ask questions to further obtain clarifications at the GSM.
- The law entails a qualified two thirds majority of the capital attending the meeting on key issues via an extraordinary GSM<sup>22</sup> such as to modify the AoA, waive pre-emptive rights, change the company’s

<sup>21</sup> The CG code also defines RPTs as “the risk of conflicts of interest which might oppose individual preferences to the interest of the company prompted the lawgiver to lay down rules of procedure relating to the adoption of agreements concluded directly or indirectly between the company and its directors (or members of the Supervisory Board in a dual structure or managing partners in a limited company) or for agreements entered into between a company and its key executives (members of the Management Board in a dual structure or managers in a limited company) or one of the shareholders directly or indirectly holding over five percent of the capital or voting rights. Such agreements require special authorizations and a special report from the statutory auditors.”

<sup>22</sup> Article 110 of the Law No. 17-95 on Public Limited Companies

<sup>20</sup> Articles 95 and 58 of the Law No. 17-95 on Public Limited Companies.

objective, take-over, reorganization or share capital increase<sup>23</sup>,

- Shareholders owning at least 5 percent of the capital share may add items to the GSM agenda<sup>24</sup>.
- Notification with agenda of the GSM should be sent to the shareholders at least 15 calendar days before the meeting which can be considered as an insufficient time for shareholders. All ten largest listed companies published notifications which are made available on the platform of the CDVM<sup>25</sup>.
- Shareholders do not have a clear right to submit written or directly ask questions to the board which have in return to answer. Only the CG code recommends the board to attend the GSM and answer questions of shareholders. The CG code stipulates that *“Given that the General Meeting is where the governing body reports to shareholders and partners on the exercise of its responsibilities, the enterprise strongly recommends that the members of the governing body attend the General Meetings to answer questions from shareholders and partners, to the extent that responses do not prejudice shareholders or partners or the personnel of the enterprise.”*<sup>26</sup>
- Shareholders enjoy pre-emptive rights in all cases of capital increase, which can be waived by a qualified two thirds majority of the capital attending the extraordinary GSM<sup>27</sup>. These are fundamentals rights for shareholders. If they are not respected, the board incur a sanction amounting to 350k MAD (36k EUR) or one year of prison. No abuses of pre-emptive rights have been reported to us.
- The GSM is not required to approve major transactions of any value. This issue is not regulated by the Moroccan law. The GSM approval in an extraordinary session is only sought if such transaction leads to change the AoA. This is a severe drawback in shareholders’ right as it doesn’t protect them from any actions putting the company’s assets into threat.
- Insider trading is forbidden. Insider trading is defined as any act by which a person, as per his/her position, is in possession of privileged information that is used to generate directly or indirectly a profit by performing an operation<sup>28</sup>.
- Cumulative voting is not foreseen in the law and regulation. However shareholder agreement is a commonly used practice to allow minority shareholders to elect their board candidates.
- Companies are not required in the law to disclose Shareholders agreement. These agreements are enforceable, but there is no case law available that can be checked.
- Share register of listed companies is maintained by independent custodians to safeguard the shareholder’s right. These rights are protected when registered and held by custodians.
- In Morocco, the law forbids listed companies to restrict the transfer of shares. Non listed companies can restrict the free transfer of shares using various mechanisms such as stipulating these constraints in the company’s article of association or the shareholder agreements. The CG code provides that *“the enterprise must respect the rights of minority and nonresident shareholders and partners and facilitate the exercise of those rights, in particular in the freedom to sell or transfer their shares”*<sup>29</sup>
- Shareholders have the right to inspect: a) the company’s AoA; b) financial statements and statutory auditor reports; c) any report of an independent evaluation expert prepared in connection with a General meeting; d) minutes of each shareholder meeting e) a list of shareholders owning or controlling in a beneficial way 5% or more of the company’s issued shares; f) a list of shareholders who have not fully paid for their shares and the amounts due.
- The concept of derivative action exists under Moroccan law<sup>30</sup>. Any shareholder may file a direct or derivative suit against the company’s directors or management for compensation of any loss.. Any shareholders can also bring an action against the company’s directors or management for the violation of their right to acquire information

<sup>23</sup> Article 186 of the Law No. 17-95 on Public Limited Companies

<sup>24</sup> Article 117 of the Law No. 17-95 on Public Limited Companies

<sup>25</sup> <http://www.cdvm.gov.ma/>

<sup>26</sup> Code of Corporate Governance of Morocco, section 2 Right of shareholders and partners and equitable treatment, page 20.

<sup>27</sup> Under the articles 189 and 192 of the Law No. 17-95 on Public Limited Companies

<sup>28</sup> Article 25 of the Law n° 1-93-212 (the Public Offering Law).

<sup>29</sup> Code of Corporate Governance of Morocco, section 2 Right of shareholders and partners and equitable treatment, page 19.

<sup>30</sup> Articles 352 and 353 of the Law No. 17-95 on Public Limited Companies

or non-compliance with disclosure and transparency requirements. The law provides for specific liability and sanctions in case of breach of the rules on failure to allow inspection of books and records that is up to 6 months imprisonment and/or MAD 6k to MAD 30k penalty<sup>31</sup>

#### Stakeholders and Institutions

Moroccan companies enjoy effective institutional and corporate environment. Nevertheless, Moroccan companies should explore the opportunity of further listing in foreign stock exchange which would significantly enhance the quality of their corporate governance compliance. Further efforts should be made to improve access to case law in Morocco.

- Listed companies in Morocco are characterized by concentrated ownership, where the controlling shareholder owns over 50% of the shares on average. The large groups have been controlled by families for some generations, often through pyramidal structures.
- It seems that case law is not aggregated and not easily accessible by lawyers in the country. However, the rulings of regulatory agencies are publicly available on the websites of CSE and CDVM.
- It seems that one company among the ten largest listed companies is double listed at the CSE and LSE (ITTISALAT AL-MAGHRIB). This is not a weakness per se, however, we think that double listing on another major exchange helps companies implementing higher standards of corporate governance which in turn contribute to spreading behavior and attitudes that enhance the legitimacy and functioning of the market economy.
- There are three listing tiers at the Casablanca Stock Exchange (Main market, Development Market, Growth Market). The First Tier is a segment for companies with significantly higher corporate governance standards. The list of 10 major listed companies belongs to the Main Market listing tier. Actually, only 41 companies meet the first Tier the Stock Exchange listing requirements with 17 companies in the Development Market and 14 companies in the Growth Market.
- As a matter of fact, the CDVM has the authority to monitor the capital market and enforce laws and regulation vis-a-vis companies and financial intermediaries. However, the power of licensing and suspending financial intermediaries belongs

to the Ministry of Finance not to the CDVM. The CDVM has the power to sanction market participants for wrongdoing and open investigation which is although rare but exists. Functionally, the CDVM is financially autonomous. The Chairman and CEO are appointed by the Sovereign and not the government.

- International audit and law firms have material presence in the country.
- In practice, the ten largest listed companies include CG reports in their Annual Reports. However some of the information included is just copied from their by-laws or company's documents such as organizational charts. This information is meaningless from a corporate governance perspective and presents a mere descriptive statement rather than an explanation.
- Law firms believe that the market regulator is effective in protecting integrity of local market with an improving disclosure of the cases that were investigated by the regulator (CDVM) and the consequences of fines imposed.
- A National Corporate Governance Commission (*Commission Nationale de Gouvernance d'Entreprise, CNGE*) was jointly created in 2007 by the Ministry of Economics and General Affairs and Confederation of Large Moroccan Companies (*Confederation des Grandes Entreprises Marocaines*). This institute is also supported by the State via the Ministry of Economics and General Affairs<sup>32</sup>.
- When looking at the indicators provided by different international organisation, many shortcomings appear. The Doing Business Index 2013, which ranks economies on their ease of doing business, positions Morocco at 71<sup>th</sup> place among 189 economies on the strength of investor protection index.<sup>33</sup> Transparency International's Corruption Perceptions Index (CPI)<sup>34</sup> ranks Morocco at 80<sup>th</sup> place among 177 countries.

<sup>32</sup> [www.institut-administrateurs.ma](http://www.institut-administrateurs.ma)

<sup>33</sup> While the indicator does not measure all aspects related to the protection of minority investors, a higher ranking does indicate that an economy's regulations offer stronger investor protections against self-dealing in the areas measured.

<sup>34</sup> The CPI measures the perceived levels of public sector corruption in 176 countries and territories around the world. It is capturing perceptions of the extent of corruption in the public sector, from the perspective of business people and country experts. The Corruption Perceptions Index scores countries on a scale from 0 (highly corrupt) to 100 (very clean).

<sup>31</sup> Article 406 of the Law n°17-95 on joint stock companies:

## Debt restructuring and bankruptcy

### 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<sup>7</sup>.

### 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 in 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, and public entities or staff representatives) regarding the debtor’s financial condition. 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 ('controlleurs') 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.

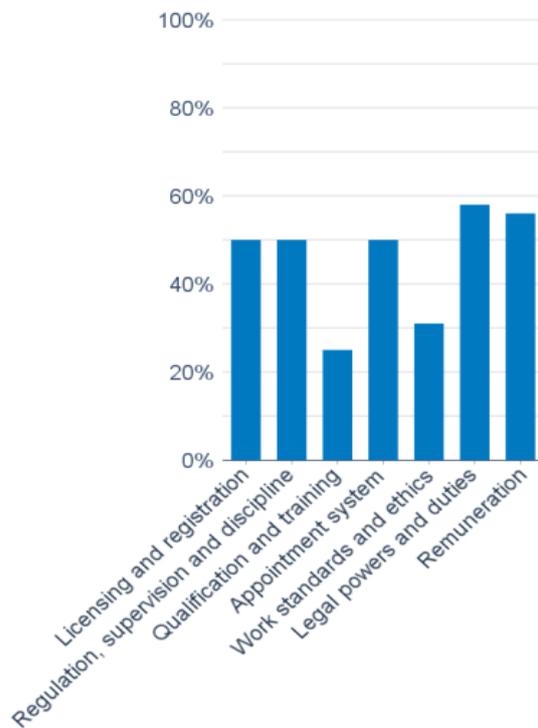
#### **Priority of claims:**

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.

Chart 8 – Assessment of Insolvency Office Holders in Morocco

## Morocco



**Note:** This bar chart indicates the results achieved for each of the assessment benchmarks. The score for each benchmark aggregates the results of the key indicators examined under the relevant benchmark. The result 100 per cent is intended to signal the existence of a comprehensive regulatory and/or professional framework.

**Source:** 2012-14 EBRD insolvency office holder assessment.

<sup>1</sup>These include the UNCITRAL Legislative Guide for Privately Financed Infrastructure, European Union legislation applicable to concessions, and related European Union materials (the EU acquits).

<sup>2</sup>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.

<sup>3</sup>For example Prime Minister Decision N° 3-70-07 dated on September 18, 2007 detailing furnishing contracts not submitted to PPL.

<sup>4</sup>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.

<sup>5</sup>Art 2, Law No. 62-99 of 2002.

<sup>6</sup>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 Commerce Code, and for aircrafts see the Decree n° 2-61 of July 10th, 1962, governing civil aviation.

<sup>7</sup>Id