COMMERCIAL LAWS OF EGYPT
October 2012
AN ASSESSMENT BY THE EBRD

Office of the General Counsel
COMMERCIAL LAWS OF EGYPT
AN ASSESSMENT BY THE EBRD

October 2012

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal system</td>
<td>2</td>
</tr>
<tr>
<td>Commercial legislation</td>
<td>4</td>
</tr>
<tr>
<td>Infrastructure and Energy</td>
<td>7</td>
</tr>
<tr>
<td>Concessions and PPPs</td>
<td>7</td>
</tr>
<tr>
<td>Energy</td>
<td>15</td>
</tr>
<tr>
<td>Electricity</td>
<td>15</td>
</tr>
<tr>
<td>Gas sector</td>
<td>18</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>20</td>
</tr>
<tr>
<td>Public procurement</td>
<td>25</td>
</tr>
<tr>
<td>Private Sector Support</td>
<td>33</td>
</tr>
<tr>
<td>Corporate governance</td>
<td>33</td>
</tr>
<tr>
<td>Insolvency</td>
<td>42</td>
</tr>
<tr>
<td>Judicial capacity</td>
<td>46</td>
</tr>
<tr>
<td>Secured transactions</td>
<td>49</td>
</tr>
</tbody>
</table>

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

The Egyptian legal system is a civil law system based on codified laws with the written constitution being the highest governing norm. Prior to the popular uprising in 2011, the governing norm had been the 1971 Constitution. At the time of writing, deliberations are ongoing with respect to drafting a new constitution for Egypt.

Under the 1971 Constitution, the parliamentary system is bicameral, consisting of a lower house, the People’s Assembly (Magles el-Sha’b), and a partially elected upper house (Magles el-Shura).

The country prides itself on a legal system that dates back to the early 19th century. The 1948 Egyptian Civil Code has widely influenced the codification of subsequent legislations in the Arab region. The judiciary is recognised as an independent body under the constitution. It is vested with the power to oversee both the legislative and executive branches. The legal system recognises a division between public and private law, the consequence of which is a dual system that is divided into civil courts, with general jurisdiction over civil and commercial matters (unless a specific law provides otherwise), and an administrative court system that decides over administrative disputes, including those related to administrative contracts, and administrative decisions that are issued by government entities or officials.

Courts of general jurisdiction are responsible for the settlement of civil, criminal, commercial and personal status matters. Jurisdiction further depends on the value and nature of the dispute or the territorial location of the court. On the other hand, administrative courts are concerned with the settlement of administrative or public law matters in which the government acts in its administrative capacity.

The ordinary court system comprises three levels of litigation, the first of which is the Courts of First Instance. The jurisdiction of these courts depends on the value of the disputed claim. Claims with a value that exceeds a specific Egyptian pound threshold are referred to District Courts.

The second tier of litigation is the Courts of Appeal. Courts of Appeal are located in major Egyptian cities and have jurisdiction to review decisions rendered by the Courts of First Instance. An appealed claim may be reviewed both on the merits (questions of fact) and with regards to the application of the law (questions of law). A judgment that has been awarded by a Court of Appeals may only be challenged before the Court of Cassation on points of law, such as a lack of, or inconsistency in, reasoning.

The highest level of litigation in the ordinary court system is the Court of Cassation. There is only one Court of Cassation and it is situated in Cairo. The Court of Cassation was established early in the 20th century with the competence to review claims that challenge the application of law, and to provide interpretations to legal texts. Its jurisdiction includes hearing cases that are brought either by adversaries, or referred to it through the Egyptian General Prosecution office. The Court of Cassation also hears challenges to the actions of judges and is, by way of exception, entitled to review the case on the merits in this event. Court of Cassation decisions are final, binding, and not subject to any further appeals. The Court issues an annual collection of its rulings in addition to approved judicial principles.

Administrative courts are collectively known as the State Council (Magles el-Dawla). The State Council is regulated under law No. 47 of 1972 and has the jurisdiction to hear disputes to which the government is a party, where the government has acted in its capacity as an administrative authority. The jurisdiction of the State Council therefore excludes commercial contracts where the government does not act in its administrative capacity.

The State Council comprises three levels of administrative courts. At the lower level are the Administrative Judiciary Courts. The second level of courts comprises the Administrative Courts which are competent to hear lawsuits involving employment matters for government officials. The highest appellate court for administrative disputes is the Supreme Administrative Court. An opinions and legislation department is located within the State Council to advise government ministries and authorities on public law matters such as tenders, administrative contracts, and official decrees. Although opinions issued by the advisory department are generally advisory and incapable of binding the government, these opinions still carry considerable weight. It is worth noting that State Council consultation is mandatory with respect to government contracts with a value above EGP 5,000. In addition to the advisory departments, each governmental authority has an in-house member of the State Council who has an advisory role in relation to administrative law matters within the authority.

Administrative law is generally not codified, which places significant emphasis on the role of precedents in the administrative judiciary. This is in contrast to the ordinary litigation system where judges are not bound by precedents. Nevertheless, even outside of the administrative law framework, past court judgments (especially Court of Cassation decisions) still carry some significance and may influence a judge in rendering his award.

The Supreme Constitutional Court is the highest judicial power in Egypt. It is at the top of both the administrative and ordinary civil court systems and it settles competence disputes which arise between the administrative and ordinary court systems. It
determines issues of constitutionality of laws and regulations, interprets enacted laws, and answers questions which arise from inconsistencies in the implementation of the law. The Supreme Constitutional Court also settles jurisdictional disputes between judicial bodies, or authorities which enjoy judicial competence by virtue of a special law.

As an alternative to traditional court litigation, arbitration has established itself as a common route for settling commercial disputes in Egypt. The Egyptian Arbitration Law No. 27 of 1994 mainly draws on the UNCITRAL Model Law, and it applies to both domestic and international disputes. Parties to a contract are free to agree on the governing law and jurisdiction, and their agreement will be upheld by courts to the extent that it does not violate public policy. Egyptian courts are therefore likely to reject jurisdiction to review a dispute that has been settled by arbitration on the merits, as long as the parties to the contract have agreed to a valid arbitration clause. Egypt is also a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Foreign judicial awards are therefore enforceable in Egypt with a few standard exceptions.
Commercial legislation

Since the late 1980s Egypt’s commercial legal system has witnessed major reforms, the most prominent of these being the enactment of the Code of Commerce in 1999. Along with the 1948 Civil Code, the Code of Commerce represents the principal source of commercial legislation in the country. In a number of sectors relevant to investments, the legal framework has been reformed in the last few years, but there remain important challenges.

In 2011-12 the EBRD conducted an assessment of Egypt’s commercial laws, with a focus on key areas relevant to “Infrastructure and energy” (concessions/PPPs, energy regulation, telecommunications and public procurement) and to “Private sector development” (corporate governance, insolvency, judicial capacity and secured transactions). In a number of these areas, the Bank’s assessment combines two approaches in order to evaluate the state of legal reform in the provided key sectors. The tools assess both the quality of the laws formally adopted (extensiveness) and the actual level of implementation of these laws as well as the framework they underpin (effectiveness). Combining the results of these analytical tools shows not only how advanced the system is compared with international benchmarks, but it also shows how effective the legal system is in a given field in practice, and points to the areas where further reform may be required.

The EBRD assessment of Egyptian commercial law shows that while in some areas legislation is well developed in comparison to internationally recognised standards, practice often lags behind. In several areas, it seems that both existing laws and practice could benefit from significant reform. For example, over the past decade, the authorities have shown an increasing interest in pursuing partnerships with the private sector to fund infrastructure projects. A public-private partnership (PPP) programme was started in 2006 and a new PPP Law enacted in 2010, establishing a sound regime for private participation in large infrastructure projects. Under the new law, appropriate securities may be granted to the private party, and the system also provides for the right to step in by the government, lender or a third-party to undertake performance in the event of default. Nevertheless, the existence of an incoherent and out-dated set of legislation governing old concession schemes and tendering processes causes some confusion. For instance, it is not entirely clear whether in practice such old existing legislation will conflict with the application of the newly enacted PPP Law. Moreover, because the new law was only recently adopted, its effects in practice remain to be tested.

Both the electricity and gas sectors are largely state-dominated. While the telecommunications sector looks promising, a lack of clear separation of policy and regulatory functions undermines the potential development prospects of the market.

Our assessment further reveals that the current tendering rules which govern public procurement are inflexible and lack the required transparency in the tendering processes. There are no provisions to deal with abnormally low bids which sometimes force public entities to deal with incompetent contractors. In addition, there seems to be a lack of policy in relation to regular training for public officers and technical specialists in public entities on best practice in procurement methods.

Corporate governance provisions can be found under the Companies Law of 1981, the Capital Markets Law of 1992 and the Egyptian Stock Exchange Listing Rules. A corporate governance code, the application of which is purely voluntary for companies, was enacted in 2005 and is under continuous modification to bring it in line with international standards. Its effectiveness would be greatly increased if its application were required for listed companies under the “comply-or-explain” approach. Areas where legal reform would also be welcomed are minority shareholders’ rights, concentration of ownership and director liability.

The enforcement of judgments poses a general obstacle to the development of commercial markets and investments in Egypt. Enforcement procedures are characterised as slow, complicated and inefficient. With certainty and predictability being the most significant attributes of a well-functioning economy, inefficient enforcement of contracts results in decreased trust in the system as a whole. To overcome these problems, specialised economic circuits were introduced into the court system in 2008 to handle certain disputes of a commercial nature. However, the lack of judicial training on commercial law matters remains a key challenge to effective contract enforcement. Consequently, arbitration is widely used for the settlement of commercial disputes in Egypt.

In the area of secured lending, Egypt still lacks a single comprehensive law to govern secured transactions. The result is a variety of complexities and associated costs with respect to the creation, registration and enforcement of secured interests. In particular, legislation governing real estate ownership is highly complex which causes the establishment of title to property to be a confusing and lengthy process. A non-possessor pledge over movables is not available for individual borrowers. Although the rules governing pledges over securities and shares are more flexible, only banks are allowed to benefit from eased enforcement procedures with respect to that specific type of security. Small and medium-sized enterprise (SME) development will require a
significant change to the legal regime for secured transactions, which at present still limits the type of collateral that borrowers can offer. Housing finance would also require important changes in the land registration system, as well as on enforcement, which can only be achieved through a heavily supervised, lengthy and costly court procedure.

Moreover, the overall investment climate cannot be conducive without a modern insolvency regime, which promotes both fair reorganisation of viable businesses and swift liquidation of failed ones. The current insolvency regime in Egypt does not offer this.
TABLE 1 - Snapshot of Egypt's commercial laws

<table>
<thead>
<tr>
<th>FOCUS AREA</th>
<th>HIGHLIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concessions and PPPs</td>
<td>Assessment results revealed that the law on the books in Egypt is in “high compliance” with internationally recognised standards (UNCITRAL Principles), mainly because of modern legislation which was adopted in 2010 to uniformly govern all large PPP projects. In measuring the effectiveness of the law in practice, Egypt was found to be in “medium compliance” with international best practices. This is mainly attributable to a lack of clarity with respect to PPP policies, and unclear thresholds regarding the application in practice of old concessions and public utility legislation to concessions and PPP projects.</td>
</tr>
<tr>
<td>Energy sector</td>
<td>The assessment placed Egypt in the “high risk category” when measured against international energy regulation principles from the standpoint of investors. This is largely due to the energy sector being mainly state-dominated, despite the formal unbundling of the vertically integrated electricity utility. A draft Electricity Law pending in parliament, if approved, is expected to introduce gradual competition to the market. In the gas sector, no attempts have been made to open up the market to competition and no regulator exists. The lack of certainty on the policy and regulatory sides, in addition to low energy pricing structures that are not reflective of costs, are major hurdles to the development of sustainable energy in the country.</td>
</tr>
<tr>
<td>Telecoms</td>
<td>The EBRD’s assessment of the overall legal and regulatory risks regarding the country’s communications sector shows that Egypt is in the “high risk category” from the standpoint of investors. Despite attempts to introduce reforms and modernise the economy by emphasising important sectors, such as infrastructure and communications, the fixed market in Egypt remains dominated by one state-owned infrastructure licence holder. There are imbalances in mobile spectrum allocations that have contributed to the restricted development of fully competitive conditions in the mobile market, and major concerns remain with respect to regulator independence and the authorisation and licensing regime. Nevertheless, there seems to be good investment potential with strong demand for fixed and mobile broadband services in particular.</td>
</tr>
<tr>
<td>Public procurement</td>
<td>The Egyptian public procurement framework was found to be in “low to medium compliance” with internationally recognised standards. Overall, the legislative framework is outdated, and the public procurement process overregulated and bureaucratic. Open tenders are the default procurement method, which is a positive feature. However, the extensive use of direct contracting negates efforts to achieve competition in public tenders and works against efficient public spending. Enhancing the institutional framework for regulating the public procurement sector would require making it more attractive to investors and increasing transparency with respect to the review and remedies processes.</td>
</tr>
<tr>
<td>Corporate governance</td>
<td>Egyptian legislation was found to be in “medium compliance” with internationally recognised corporate governance principles. A voluntary corporate governance code was adopted in 2005. Its effectiveness would be greatly improved if its application were required for listed companies on a “comply-or-explain” basis. Legal reform would be welcomed in the areas of minority shareholders’ rights, concentration of ownership and director liability. In addition there are concerns regarding non-financial disclosure and transparency, especially with respect to conflict of interest situations and related-party transactions. Difficulties in enforcement and problems with the institutional environment point to low corporate governance effectiveness in practice.</td>
</tr>
<tr>
<td>Insolvency</td>
<td>Cumbersome court procedures render the liquidation of unviable businesses a lengthy and complex process. An assessment of the law on the books showed no real means for effective reorganisation of viable businesses owing to the inability of the existing compromise procedures to bind secured creditors.</td>
</tr>
<tr>
<td>Judicial capacity</td>
<td>The assessment of the court systems in Egypt revealed low efficiency and a lack of resources, in addition to lengthy procedures. Furthermore, a complex and costly enforcement system compounds the situation. Although there have been initiatives for the training of judges and court personnel on commercial law matters, these have not been applied on a wide enough scale yet. Independence of the judiciary is a matter that is under scrutiny in Egypt at the moment.</td>
</tr>
<tr>
<td>Secured transactions</td>
<td>At present the legal regime for secured transactions in Egypt is too limited in terms of the type of collateral that borrowers can offer. The EBRD’s assessment of the secured lending framework highlighted challenges in relation to the registration and enforcement of collateral. Reform is particularly needed with respect to the land registration system where it appears that most real estate property is not duly registered. In addition, the current regime for the grant of security over movable assets has been found to be significantly restrictive. A key drawback of the overall framework is that the enforcement of security can only be achieved through a heavily supervised, lengthy and costly court procedure.</td>
</tr>
</tbody>
</table>

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

Detailed results of these assessments are presented below starting with infrastructure and energy and going into private sector development topics.\(^1\)

The completed assessment tools can be found at [www.ebrd.com/law](http://www.ebrd.com/law).

## Infrastructure and Energy

### Concessions and PPPs

**In a nutshell...**

Assessment results revealed that the law on the books in Egypt are in “high compliance” with internationally recognised standards (UNCITRAL Principles), mainly because of modern legislation which was adopted in 2010 to uniformly govern all large PPP projects.

In measuring the effectiveness of the law in practice, Egypt was found to be in “medium compliance” with international best practices. This is mainly attributable to a lack of clarity with respect to PPP policies, and unclear thresholds regarding the application in practice of old concessions and public utility legislation to concessions and PPP projects.

**Overview**

Egypt has a tradition of concessions, starting with the famous concession of the Suez Canal in 1854 and developed through the country's concession legislation of 1947 (Law No. 129 of 1947; revised in 1958) which still exists today, but contains severe restrictions that make it unworkable, such as a maximum profit of 10 per cent of the capital. This is the reason why, in the late 1990s, when Egypt decided to reassess the possibility of private sector provision of public services – which had been prohibited for nearly half a century – it was necessary to enact sector-specific laws. By derogation to the 1947 concession law, such laws have been enacted for electricity, airports, specialised ports, and the railway and roads sectors, allowing more flexibility in the drafting of related concession agreements. These exceptions have allowed for the construction of three power plants, as well as a number of airports, ports and road projects, although such projects have faced controversial policy issues.

In light of a growing interest by the government in pursuing partnership projects with the private sector for infrastructure projects, the traditional concessions model was abandoned in recent years in favour of a public-private partnership (PPP) policy. A PPP programme was started in Egypt in 2006. This programme called for the enactment of a comprehensive piece of legislation to govern and regulate different PPP schemes. Egypt was thus the first of the EBRD’s southern and eastern Mediterranean (SEMED) countries to adopt PPP-specific legislation (Law No. 67 of 2010) which, without repealing the former concessions law, has provided for a wide scope of PPP contracts to be implemented including the delegation of public services according to the Public Finance Initiative (PFI) model.

The EBRD has carried out an assessment aimed at evaluating the current PPP legal framework in Egypt and its effectiveness in practice. Given that the 2010 PPP Law is expected to be the relevant legislation to govern significant infrastructure projects in the future, the EBRD’s assessment has focused particularly on that piece of legislation. As such, the Egyptian legal framework for concessions and PPP has been ranked as “highly compliant” with internationally recognised standards in the assessment. It is also the most compliant of the four SEMED countries when compared with international best practice.

The following sections discuss the findings of the assessment in more detail.
Quality of the legislative framework in Egypt ("law on the books")

On the books, Egypt’s PPP legal framework was found to be in “high compliance” with internationally accepted standards (76.4 per cent). The assessment measured the quality of PPP legislation in Egypt and scores were given according to compliance with international benchmarks.\(^4\) (see Chart 1 below)

The 2010 PPP Law allows for a wide range of project schemes including, build–operate-transfer (BOT), build–own–operate–transfer (BOOT) and build–own–operate (BOO). The framework fares exceptionally well with respect to the availability of reliable security instruments to contractually secure the assets and cash flow of the private party\(^5\) 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. Furthermore, the assessment shows another positive aspect which is the available possibility of obtaining remedies for breach through arbitration.

A good PPP legal framework mandates the application of a fair and transparent tender selection process, with limited exceptions allowing direct negotiations, and competitive rules for unsolicited proposals and the possibility to challenge illegal awards. Egypt fares relatively weakly in this regard. For instance, the law does not provide for the possibility of unsolicited proposals. A PPP framework should allow private firms to propose projects to government entities, and provide a framework for these proposals to be developed into PPP projects. However, it is crucial that the rules and processes in place by which these unsolicited projects will be considered and adopted are clearly defined.

On the other hand, the assessment shows that Egypt fares well with respect to flexibility of the content of the provisions of project agreement\(^6\). This allows for a proper allocation of risk without unnecessary, unrealistic or non-bankable interferences from the contracting authority. The framework requires the governing law to be Egyptian Law, which is standard for this type of contract and should not be an issue for investors.

### Chart 1 – Quality of the PPP legislative framework in Egypt

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Egypt</td>
<td>International Standard</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>80</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>60</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>20</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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)

As illustrated in Chart 1 above, while the legislative provisions covering settlement of disputes in PPP arrangements, as well as security and support issues are regulated fairly extensively, areas such as the definitions and scope of the law, the selection of the private party and the project agreement could benefit from further improvement in order to meet the requirements of a modern legal framework facilitating private sector participation.
PPP legal framework

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

In line with international standards and best practice, Egypt has a single act dealing specifically with PPPs which is Law No. 67 of 2010 promulgating the law regulating Partnership with the Private Sector in Infrastructure Projects, Services and Public Utilities (the “PPP Law”). The PPP Law constitutes a comprehensive act which allows for a reasonably workable legal framework for PPPs. However, the same cannot be said for the granting of concessions in general, which can still be undertaken under old legislation.

The scope of the new PPP Law is defined in the first article of the law. The article specifically states that PPP contracts will not be subject to the provisions of Law No. 129 of 1947 concerning Concessions of Public Utilities and Law No. 61 of 1958 concerning Concessions relating to the Investment of Natural Resources and Public Utilities, as well as Public Tenders Law No. 89 of 1998 organising tenders and bids, nor to any specific laws related to the granting of concessions for public utilities.

The PPP Law only applies to projects procured on a PPP basis with a minimum investment value of EGP 100 million (slightly above €12 million). There are no legal restrictions on the sectors that are eligible for PPP. Public-private partnership projects can be concluded for commercial sectors, such as energy, transport, water, and oil and gas; as well as for non-commercial activities, in the form of government services such as schools, hospitals and housing.

If any of the criteria which are necessary for subjecting a project to the PPP Law are not met, the relevant sector-specific law applies. For example, the electricity sector is operated through semi-private companies that are owned by the government. These private companies do not fall under the definition of “administrative authority” as per the law. Hence, they cannot offer a project under the PPP Law and they are expected to apply sector-specific laws instead. It is worth noting that Egyptian law takes a “substance over form” approach. This means that the law applies to all contracts that fall under the definition of a PPP agreement, irrespective of the title that may be given to such agreement.

Among the advantages of the newly enacted law is that it allows the use of security interests against the private party’s assets in favour of lenders. Further, the law provides both the administrative authority and lenders with the right to “step-in” and take over project management in the event of default by the private party, whether directly or through a third party. The law also allows for the possibility of government to provide financial support and to guarantee the contracting authority’s fulfilment of its obligations and the standard mechanism for resolving disputes is arbitration.

The law allows the PPP agreement to be amended during the lifetime of the project in order to accommodate unforeseen circumstances, such as a change in law. In the event that an unforeseen circumstance is adverse to the private party and cannot be mitigated, the administrative authority is under an obligation to compensate the private party as a remedial measure. The law also introduces a petition committee to settle complaints that are submitted by investors during the tendering phase and throughout the life of the project. However, the petition committee is mainly comprised of the Minister of Finance and other public officials with only one independent expert, which could raise issues as to the committee’s neutrality.

Definitions and scope of the law

The assessment shows that some improvement is attainable by ensuring a clearer definition of the boundaries and scope of application of the PPP legal framework, including a clearer definition of “PPP”, “concerned sectors”, “competent authorities”, and “eligible private party”. A clearer scope and definition will limit the risk of challenges to the validity of PPP contracts.

Selection of the private party

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

Tendering and awarding procedures are provided in detail under the Egyptian PPP Law, including the pre-selection of bidders, the procedure for requesting proposals and a competitive dialogue on a two-stage basis. In the event that the contracting entity rejects an application at the time of pre-selection or disqualifies a bidder, the entity is required to inform the rejected bidder of that decision while explaining the reasons for rejection. The downside however is that there is no requirement that the contracting entity makes public the reasons for rejection. This has the potential of undermining the transparency of the selection process.
In terms of the equal treatment of investors, “private sector” is defined under the law to include both Egyptian and foreign entities without discrimination. A PPP can be awarded to public entities or to entities jointly owned by private and public entities such as IPPPs,” as long as the government’s share in any such entity or joint venture does not exceed 20 per cent.

One of the drawbacks of the law is that it 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. Moreover, the law does not provide for an adequate framework for the contracting authority to manage unsolicited proposals or private initiatives which are not submitted in response to a request or solicitation by a contracting entity. Accepting unsolicited proposals allows the government to benefit from the knowledge and experience of the private sector given that the public sector often has limited experience in identifying and developing PPPs. Good international practice is therefore inclined towards allowing unsolicited proposals in order to ensure transparency and the equal treatment of bidders, as well as to prevent a distortion of competition as long as unsolicited proposals are duly and properly regulated in order to strike a balance between incentivising the private sector to develop projects and ensuring sufficient transparency and competition to achieve value for money for the government.

Another negative feature is a restriction on the ability to challenge certain administrative awards. Bidders who claim to have suffered a loss or damages can seek review of the contracting entity’s actions or failure to act only in the event of cancellation of a tender. Even in that event, a bidder who challenges a cancellation of a tender may not claim compensation against the decision. As an exception, the Executive Regulations of the Law allow bidders whose technical bids were qualified to claim compensation that may not – in any event – exceed 10 per cent of the bidder’s actual expenses with a cap of EGP 500,000 (around €62,500). This cap on the compensation amount is likely to prove impractical on implementation. In addition, it adds to the restrictive nature of the possibility to challenge tender awards, with the potential effect of deferring investors.

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. The new PPP Law in Egypt offers reasonable flexibility in this regard.

However, a cited drawback is that the law does not provide that the duration of the project agreement be made dependent on the amortisation rate of the private party's investment, or that it be tied to a consideration of an appropriate return on capital, which goes against requirements of bankability and financial efficiency. Instead, the PPP Law merely states that the term of a PPP contract shall not be less than five years and shall not exceed 30 years from the date of completion of the construction and equipping works or the date of completion of the rehabilitation works. Nevertheless, on recommendation from the Supreme Committee for PPP Affairs, the government may agree to conclude a PPP contract for more than 30 years, if such is determined to be required by reason of a material public interest.

Security and support issues

On average, about 20 to 30 per cent of a PPP project is financed by the private party itself. The other 70 or 80 per cent 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.

Furthermore, good international practice requires that the parties be able to arrange financing the project with reasonable flexibility. A key promising feature of the Egyptian PPP Law is that it permits for all of these possibilities.

First, the law allows direct agreement between the administrative authority, the project company and its lenders, which is bound to ensure greater flexibility in negotiations.

In addition, the direct agreement may include a provision whereby the Ministry of Finance guarantees the administrative authority’s payment of its financial obligations under the contract and may contain a provision providing for the right of lenders to step-in and assume the role of the project company in
executing the provisions of the PPP contract, or appoint a new investor (subject to the approval of the competent authority), in the event that the project company defaults in performing its material obligations, or in meeting the quality levels established by law – or by virtue of the PPP contract – in a manner that entitles the competent authority to terminate the PPP contract. This is bound to create an encouraging climate for investors.

Other positive aspects include that the PPP Law allows a private party to assign its property, the project agreement, or the proceeds and receivables arising therefrom, by way of security for financing purposes. The project company may also charge its entire business under the rules of the Fonds de Commerce Law of 1940, and may further undertake a pledge of its shares under the provisions of the Commercial Code. However, the company would be required to obtain the administrative authority’s written consent prior to any such action.

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. Egypt has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards as well as the Washington Convention on the Settlement of Investment Disputes (ICSID).

Upon obtaining the approval of the Supreme Committee for PPP Affairs, it may be agreed to resolve disputes arising out of the PPP contract through arbitration, or any other non-judicial means of dispute resolution according to what was stipulated in the PPP contract. The Supreme Authority can give this approval either at the time of conclusion of the contract or at the time of the dispute.

The Law provides that the PPP contract shall be subject to Egyptian Law and that any agreement to the contrary will be deemed null and void, which is quite common worldwide and should not undermine the otherwise attractive climate that the PPP Law aims to set for investors. It is worth noting that this provision does not affect the possibility for side agreements, other than the PPP contract, to be governed by foreign law.

Review of effectiveness of the PPP framework in practice

An assessment of the effectiveness of the PPP framework in practice in Egypt shows that the country is in “medium compliance” with international best practice (64 per cent). This is mainly attributable to a lack of clear PPP policy framework, including a clear division of roles between the relevant PPP authorities, in addition to weak enforcement in practice in recent years despite a very active PPP Unit. Chart 2 below illustrates the effectiveness of PPP legislation in practice.
In contrast to the results reflecting the quality of the PPP legislative framework in Chart 1, where PPP rules on the books appear to be in close proximity to internationally recognised standards, Chart 2 shows a lower level with respect to PPP practice in Egypt.

A key problem that has been reported is that although the PPP Law has been drafted in a way that would suggest that it is applicable to all PPP contracts, it does not completely abolish existing laws which regulate government concessions and it is therefore not entirely clear whether administrative entities may still grant concessions, BOT and BOO schemes based on old legislation.

The results of the effectiveness assessment are further explained below.

**Institutional framework**

This core area evaluates the existence of a PPP institutional framework, along with 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.

A special unit, the PPP Central Unit, was established by the Ministry of Finance in 2006, to be the main entity responsible for the initiation and implementation of PPP projects in Egypt. The Unit conducted the drafting of the PPP law and the initiation of PPP projects in parallel. The New Cairo Wastewater Treatment Plant was the first PPP project awarded in Egypt by the Egyptian Ministry of Housing, Utilities & Urban Development in June 2009, before the PPP law was even enacted.

The 2010 PPP Law made official the establishment of the central PPP unit. It provides that the Minister of Finance stipulates the structure of the unit, while the Executive Regulations of the Law determine the administrative and financial framework for the operation thereof. This includes the Unit’s relationship to other public organisations, its operational system and employee remuneration. The Unit is mainly comprised of public servants. Most of the officials who currently serve on the PPP Central Unit originally worked in the private sector.

Although on the books the PPP Unit is designed in a way to suggest it only has an advisory role, in practice the Unit is increasingly involved in the negotiation and execution levels of PPP bids and contracts.

The law provides that PPP “satellite units” are to be established, whenever necessary, within the different administrative authorities. It states that a decree shall be issued by the relevant “competent authority” regarding the structure of the satellite units, their...
competencies and operational systems. However, to date no such decree has been issued.

In addition to the PPP Central Unit, the law provides that a Supreme Committee for Public Private Partnership Affairs shall be formed and chaired by the Prime Minister (the “PPP Supreme Committee”). The PPP Supreme Committee’s membership is comprised of the Ministers of Finance, Investment, Economic Development, Legal Affairs, Housing and Utilities and Transportation, as well as the Head of the PPP Central Unit.

The PPP Supreme Committee is responsible for the following:

- the setting of an integrated national policy for PPPs, and identifying the framework, objectives, mechanisms and targeted scope of projects
- endorsing the application of the PPP structure on administrative authority projects
- monitoring the allocation of financial resources to ensure the fulfillment of financial obligations resulting from the implementation of PPP contracts
- issuing the rules and general criteria for PPPs, and endorsing standard PPP contracts for use in different sectors
- endorsing the recommendation of the competent authorities within administrative authorities in relation to the selection of the contracting party and approving the conclusion of the contract
- conducting studies and proposing means to provide and develop the market tools necessary to provide appropriate financial structures for PPP projects.

In terms of how the PPP Central Unit interacts with other public authorities, according to the PPP Law the former is to provide technical, financial and legal expertise to the PPP Supreme Committee as well as to the PPP satellite units. It is responsible for laying out and following up on procedures for the tendering and conclusion of PPP contracts, as well as their execution. In addition, the Unit is responsible for preparing and publishing studies, information and statistics in relation to PPP projects, both locally and internationally, and for the selection of advisers for the tendering and contracting of PPP projects.

The PPP Unit is also responsible, inter alia, for endorsing the application of the PPP structure on projects of administrative authorities, as well as endorsing the recommendations of the competent authority in relation to the selection of the contracting party.

Administrative authorities require the approval of the PPP Central Unit prior to the publication of any advertisements or documents related to the tendered projects; including expressions of interest, prequalification invitations, information memoranda and invitations to bid. Moreover, the convening of committees to determine criteria and qualifications, or to receive and evaluate bids is not valid unless a representative of the PPP Central Unit is present.

The PPP Central Unit is also in charge of maintaining an electronic record for all PPP project documentation. It is competent to receive, investigate and provide advice concerning complaints of investors participating in PPP projects in preparation for submitting such complaints to the Supreme Committee for PPP Affairs. The law does not however require that such a record is made accessible to the public.

The consent of the PPP Unit is necessary for the development and granting of PPP projects in Egypt. However in any event, PPP projects will not be tendered except with the final approval of the Supreme Committee for PPP Affairs. The PPP Unit still plays a significant role as the Law mandates that the Supreme Committee’s Approval is based on the request of the competent authority in light of the studies prepared under the supervision of the PPP Central Unit. Such studies are required to determine the feasibility of PPP projects, guarantee the quality of its production and services, as well as the quality of the utility’s assets and their maintenance.

Regardless of this intricate distribution of tasks between the different PPP authorities, in practice most of this framework has not been tested yet. Successful implementation of a PPP institutional framework requires the clear identification in the law of the body authorised to negotiate project agreements, implement and monitor the performance under the agreement, including the clear division of powers between central and local authorities.

Furthermore, good international practice mandates that the division of power between different public authorities that are involved in the PPP granting process is simple and coordinated. In Egypt, the law does not explicitly provide for a clear division of powers. Further, it would seem that the coordination of these different tasks among the different PPP entities might prove difficult in practice, result in confusion or an unnecessary prolongation of the process.

**Policy framework**

A modern PPP law should be based on a clear policy for private sector participation. Like 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.
In addition, sound international practice entails the existence of a clearly defined national policy framework for PPPs, infrastructure and public services. In Egypt, the law provides that the Supreme Committee for PPP Affairs is responsible for laying out an integrated national policy for PPPs. In addition, the Committee is in charge of identifying the framework, objectives, mechanisms and targeted scope of PPP projects. However, to date there has not been a clear declaration of policy in this regard. Further, the assessment shows the lack of a policy framework on a national or municipal level or any form of long-term programme for PPP promotion, awareness or training of public servants.

In addition, because under the previous regime Egypt has had experience of non-transparent privatisation processes that have typically been infested with corruption, there is an inherited negative perception and lack of trust in the private sector, potentially including cooperation projects between the private and public sectors.

Moreover, following the revolution, conflicting signals are being given in relation to the development of PPPs in the country and there is some uncertainty as to the future of PPP in Egypt. Nevertheless, for the time being and following a year of being on hold, the PPP development policy is apparently still in place.

**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.

In Egypt, several projects have been implemented based on sector-specific laws in recent years, however, because the PPP Law is relatively recent, only one project has been awarded subject to its provisions (Alexandria Hospital) and the financial closing has not yet been reached for that project. As a result, enforcement of the PPP Law has not been sufficiently tested in practice.

Several other tenders are currently open or under preparation, but it is expected that these will remain on hold until the political situation stabilises and a clearer policy is in place with respect to PPP projects in Egypt.
Energy

In a nutshell...

The assessment placed Egypt in the “high risk category” when measured against international energy regulation principles from the standpoint of investors. This is largely due to the energy sector remaining mainly state-dominated, despite the formal unbundling of the vertically integrated electricity utility. A draft Electricity Law pending in the parliament is expected to introduce gradual competition to the market if approved. In the gas sector, no attempts have been made to open up the market to competition and no regulator exists. The lack of certainty on the policy and regulatory sides, in addition to low energy pricing structures that are not reflective of costs, are major hurdles to the development of sustainable energy in the country.

Electricity

Policy and legal framework

The Ministry of Electricity and Energy (MoEE) and the Ministry of Petroleum (MoP) are the two state entities in charge of the energy sector in Egypt. MoEE is the policy-making body for the electricity sector, while MoP is responsible for oil and gas. The Supreme Energy Council (SEC) established in 1979 is the highest policy-making authority for the energy sector. MoEE and MoP are represented on SEC together with other Ministries. Decisions on electricity and gas pricing are currently made by the SEC.

The key legislative texts that currently regulate the electricity sector in Egypt are Law No. 100 of 1996, which authorised the then vertically integrated electricity monopoly Egyptian Electricity Authority (EEA), to buy power from independent power producers under build-operate-transfer (BOOT) arrangements; and Law No. 164 of 2000, converting EEA into the Egyptian Electricity Holding Company (EEHC). The latter law, together with the subsequent Administrative Decree No. 32 of 2000, created subsidiary generation and distribution companies and one transmission company – the Egyptian Electricity Transmission Company (EETC) – all under the EEHC umbrella. The new structure formally came into effect on 1 July 2001.

Market framework

Presently, EEHC has 16 subsidiary companies including nine distribution companies, six generation companies (one hydro and five thermal) and the transmission company EETC. All entities are 100 per cent state-owned. The new structure formally allows private equity participation in EEHC’s subsidiary companies up to a maximum of 49 per cent. Nonetheless, the companies today continue to be fully owned by the state through EEHC. Despite the formal sector unbundling, EEHC continues to coordinate the plans and investments of its subsidiaries and manages their finances including the arrangement of loans.

Egypt currently operates a “single buyer” model among the state-owned subsidiaries of EEHC and with the state-owned New and Renewable Energy Authority (NREA). EETC is the single buyer and purchases electricity from the generation companies and in its turn sells electricity to the distribution companies and to transmission connected customers. EETC is also responsible for exports and imports with neighbouring countries.

The power purchase agreement (PPA) for the BOOT plants provide for sales of energy and capacity exclusively to EEHC with the units fully dispatchable by EEHC. Energy payments were designed to pass through all fuel costs and variable operating costs, with a ceiling on heat rate. Capacity payments were designed to cover capital and fixed operating costs.

The accounts of EEHC subsidiary companies are not published but reportedly the companies do maintain accounts. Transfer prices between the distribution companies and EETC and between the generation companies and EETC are adjusted by EEHC so that the companies each retain a reasonable level of revenue to cover their own costs of operation while, at the same time, maintaining a uniform national electricity tariff to end-consumers. The transfer prices between the companies are not published.

Regulatory framework

The Electric Utility and Consumer Protection Regulatory Agency (Egyptera or the “Agency”) was formally created by virtue of Presidential Decree No. 339 of 2000, in addition to a Ministerial Decree in that same year which appointed Egyptera’s first Managing Director. At the time Decree No. 339 was seen as temporary legislation and a new law – that would consolidate and rationalise a number of previous laws and decrees – was to have been prepared and enacted.

Egyptera has legal status but is attached to MoEE. Egyptera Board members are recommended by the Minister of Electricity and Energy and approved through a Prime Ministerial decree. Egyptera’s principal authority arises from its power to issue licences for the construction, management, operation and maintenance of electricity generation, transmission, distribution and sale. Decree No. 339 does not specifically empower the Agency to impose penalties but the draft licences include sanctions for non-compliance including the imposition of fines and the withdrawal of licences. The Agency’s Board is
concerned with a range of issues including approving decisions in relation to disputes between parties within the “electricity utility” (EEHC) and between the “electricity utility” and consumers.

A key weakness of the regulator is that it is not independent of policy-makers or of influence from EEHC. The electricity companies’ cooperation with Egyptera is assured because Egyptera is currently dominated by EEHC and is chaired by the Minister of Electricity and Energy. At present, this lack of independence from the Ministry and EEHC compensates for Egyptera’s lack of statutory powers and without this relationship it is likely that Egyptera would be largely ineffective. However, in the future Egyptera needs to become independent in order to limit potential political influence and to give the private sector confidence that regulatory decisions will be taken in a balanced manner. More importantly, EEHC and its affiliates should have no representation on the Board since this is clearly incompatible with entry of new competing firms to the market.

Another major weakness in the current regulatory framework is that Egyptera is not given the responsibility for setting and approving tariffs. Electricity tariffs are currently de facto approved by Cabinet. The single most important function of any economic regulator is to approve prices that satisfy the legitimate interests of private investors and operators while preventing exploitation of consumers by those investors and operators.

**Renewable energy**

In order to promote renewable energy, the Egyptian government set up the New and Renewable Energy Authority (NREA) through the introduction of Law No. 102 of 1986. This law is concerned with the promotion of renewable energy other than hydropower. Hydropower, developed in Egypt since the early 1960s, makes up the largest share of renewable energy sources. With five existing hydropower stations and an installed capacity of 2,894 MW, it currently represents around 10 per cent of total generation capacity but the share is declining. The hydropower plants are owned and operated by the Hydropower Project Executive Authority (HPPEA). Both NREA and HPPEA fall under the jurisdiction of MoEE.

NREA has a broad mandate, which includes development and operation of renewable energy plants as well as policy promotion and technological research. As of the end of 2009, 522 MW of wind power had been developed by NREA. The output from NREA’s state-owned wind and other power plants is sold to EETC. In June 2011 NREA commissioned a 20 MW fuel saver concentrated solar power (CSP) as part of a 120 MW CCGT plant. Nonetheless, the lack of cost-reflecting tariffs, insufficient sector incentives and an inadequate regulatory framework remain key obstacles to the development of renewable energy in Egypt. The proposed Electricity Law draft is designed to provide for specific incentives for the generation of electricity from renewable energy sources.

**Proposed legal and market framework**

A draft Electricity Law (EL) has been before parliament for approval since 2008 and is designed to gradually open the market to competition in stages in accordance with policies issued by MoEE and approved by the Cabinet. The draft Law does not, however, specify the dates or the size of the market that will be opened at each stage – this is left to the Minister and the Cabinet to determine.

The draft EL provides for obligations to market participants to maintain separate accounts to be incorporated into their licences, and aims at ensuring the political and commercial independence of EETC. At the same time, it states that the General Assembly of EETC should be presided over by the Minister (of electricity) and have up to 14 members appointed by virtue of a prime ministerial decree based on the recommendation of the Minister. This potentially undermines the transmission company’s independence from policy-makers.

Unbiased third-party access to EETC’s network is provided for in the new draft EL but at present there is no obligation for EETC or the distribution companies to provide network access. However, there are some discussions concerning third-party access on a negotiated basis to allow renewable energy producers to sell electricity to large industrial users.

The draft Electricity Law does not vest Egyptera with more independence than the present regulatory regime. Under the proposed EL Egyptera would continue to report to the MoEE and the chairman of its Board should be the Minister of Electricity with seven other members of the Board that would be nominated by the Minister. Since Egyptera will not be fully independent of the Ministry, the draft Law does not de facto give it full authority to set electricity tariffs.

In summary, the draft EL encompasses many of the requirements of the EU energy acquis with regard to competition in the electricity sector but there are remaining gaps such as the need for clear separation between policy-making and regulation.

**Conclusion**

Egypt partially unbundled the vertically integrated electricity utility and established a regulatory agency 12 years ago, and has had intentions to introduce competition in the electricity sector since that time. However, the current framework for electricity is based on a holding company structure with all of the unbundled entities both under the ownership and controlled by the holding company. Limited
competition based on the BOOT model was introduced in 1996 and led to three BOOT power plants, which were tendered, the last of which was completed in 2003. Apart from a few other projects put on hold following the political upheaval in early 2011 no effective competition has yet been introduced in the electricity sector. This is reflected in the spider diagram below (Chart 3).

Chart 3 – Energy sector framework in Egypt

Note: The spider diagram presents the sector results for Egypt in accordance with the benchmarks and indicators identified in the EBRD assessment model. The extremity of each axis represents an optimum score of 1.0 that is full compliance with international best practices (including e.g. EU Directives). The fuller the “web”, the closer the overall regulatory and market framework approximates international best practices. The results for Egypt are represented by the blue area in the centre of the web.
Source: EBRD 2011 Energy Sector Assessment
Gas sector

Policy and legal framework

Egypt has substantial oil and gas reserves. Natural gas is produced as both associated gas from oilfields and from non-associated gas fields.

The Ministry of Petroleum (MoP) is responsible for policy making in the gas sector and is also the owner of three state-owned holding companies with responsibilities relating to natural gas production and distribution. The first of these entities is the Egyptian General Petroleum Company (EGPC), which plays an important role in the regulation of the industry and has the sole right to import and export crude oil and other petroleum products. EGPC has a stake in all joint ventures as well as investment companies operating in the sector and owns the oil transportation network. In relation to natural gas, it is responsible for associated gas from oilfields but not non-associated gas. The second entity is the Egyptian Natural Gas Holding Company (EGAS), which participates in upstream natural gas joint ventures (non-associated gas) and export schemes and serves as the single buyer and seller of all gas in the domestic market. EGAS is itself a subsidiary of EGPC. The third company is the Ganoub El-Wadi Holding Company (Ganope), which is responsible for handling and assessing all petroleum activities in the southern area of Egypt including associated gas from oilfields. Chart 4 below shows the institutional structure for natural gas in Egypt. Gas transmission is owned by a subsidiary of EGAS, the natural Gas Company of Egypt (GASCO). Gas distribution is handled by 12 local distribution companies (LDCs).

Chart 4 - Natural gas market structure in Egypt

Notes:
SEGAS: Spanish Egyptian Gas Company; an LNG complex in Damietta, Egypt
ELNG: the Egyptian Liquefied Natural Gas Company
EGAS: the Egyptian Natural Gas Holding Company
EGPC: the Egyptian General Petroleum Corporation
GASCO: the Egyptian Natural Gas Company
LDCs: Local Distribution Companies

Market framework

There are currently no plans to introduce a more liberal market arrangement in the gas sector in Egypt. While the gas sector is largely unbundled in legal and accounting terms, the gaps in the gas market framework in Egypt are considerable in comparison with EU energy acquis. In particular, there is no provision for third-party access, there is no supply competition as EGAS has a complete monopoly and there is no independent regulator. The gas distribution networks are largely privately operated, but are not buyers and sellers of gas and, instead, act only as distributors on behalf of the national gas company.

The majority of the LDCs (10) are privately owned or with at least 50 per cent private ownership. Besides residential and commercial demand, LDCs can also supply very large consumers such as power generators, cement factories and steel factories. Each LDC owns and operates the distribution systems in one of the designated concession areas. The largest LDCs in Egypt are:

NATGAS which provides gas to 53 per cent of all domestic customers and 47 per cent of all gas distributed by volume and is privately owned by the Egyptian Kuwait Holding Company.
Towngas which is majority owned by GASCO and operating in the densely populated concession areas of Cairo, Alexandria and Giza.

There are 12 local distribution company zones (LDC) which were established in 1997 to develop distribution networks through private participation.
City Gas which is owned and managed by the TAQA Group, a subsidiary of the Egyptian private equity company Citadel Capital.

In effect, there is no “market” for natural gas in Egypt. EGAS has a complete monopoly over the sale of gas to users within Egypt. EGAS sources gas for the domestic market either through its own share of the PSAs or by purchasing gas from its own joint venture partners or from EGPC or EGPC’s joint venture partners. It then sells gas directly to residential, commercial and industrial customers and power plants using the GASCO transmission network and, where necessary, LDC networks. The revenues are collected by LDCs if the customers are connected to the distribution network but are passed through to EGAS. LDCs therefore obtain no revenue from the supply activity. Instead, the LDCs receive a “commission” from EGAS which is subject to a cap. The “commission” is, effectively, a distribution use-of-system charge except that there is no access to the network except by EGAS. LDCs are regulated through concession agreements issued by EGAS. The concession agreements are not publicly available and it is not clear exactly what power EGAS has to, for example, enforce consumer service standards or quality of supply.

Accordingly 40 per cent of the estimated capital cost of connecting consumers to the distribution grids is subsidised by the public sector and the rest is funded by the consumer. The LDC connection fee is initially covered by the LDCs. It is then repaid through annual instalments over a four-year period by EGAS. There is no obligation on the LDCs to provide access to third-parties and no such access has been provided.

There are cross-subsidies between users and in particular the residential sector is heavily subsidised. Efforts have been made since 2004 to gradually increase fuel and natural gas prices to cost-reflective levels through a number of prime ministerial decrees. However, in February 2009 price increases were stopped due to the economic crisis and have remained at a constant level.

Gas prices to end-users are set by the Supreme Energy Council. Complex natural gas tariffs introduced in Egypt in January 2012 can be split into:

Direct charges supplied directly to end-users and payable for gas consumed by the end-user. These are payable to the gas distribution or transmission company. The tariffs vary across different user categories.

Indirect charges supplied to EEHC to supply end-users with electricity and payable by EEHC (or its subsidiary generation companies). EEHC faces different gas prices according to the share of electricity sold to different types of users and for each unit of electricity sold EEHC is charged the corresponding gas price for the required units required to supply electricity to those users.

The precise details of this arrangement are, for example, the assumed volume of gas required to generate electricity to supply the different customer types, the assumed power sector losses assumed between the power plant and the user and the treatment of gas supplied to the BOOT plants are unclear. It is likely that the charges are applied ex post.

**Conclusion**

In the gas sector, no attempts have been made to introduce competition and no regulator exists. The gas distribution networks are largely privately operated, but they are not buyers and sellers of gas and, instead, act only as distributors on behalf of the national gas company. Because there is no regulator and no market, the sector results for Egypt gas sector in accordance with best practices benchmarks are virtually invisible and thus difficult to represent.

**Energy efficiency**

There are a number of barriers to energy efficiency in Egypt, among which the most significant are the lack of incentives and the low energy prices and energy pricing structures that do not reflect costs. There is a low awareness of the financial benefits of energy efficiency improvements despite the high energy intensity in many sectors. More specific barriers to energy efficiency in the residential sector include, *inter alia*:

- the lack of coordinated national energy efficiency strategy
- the lack of strong enforcement mechanisms for energy efficiency standards for new residential buildings
- communal ownership of multi-storey residential buildings, which makes retrofitting existing older buildings unfeasible
- unclear property titles and unreformed landlord/tenancy laws, which lead to the unavailability of financing
- poor housing design and planning resulting in a large number of substandard housing in use.
Telecommunications

In a nutshell...

The EBRD’s assessment of the overall legal and regulatory risks regarding the country’s communications sector shows that Egypt is the “high risk category” from the standpoint of investors. Despite attempts to introduce reforms and modernise the economy by emphasising important sectors, such as infrastructure and communications, the fixed market in Egypt remains dominated by one state-owned infrastructure licence holder. There are imbalances in mobile spectrum allocations that have contributed to the restricted development of fully competitive conditions in the mobile market and major concerns remain with respect to regulator independence and the authorisation and licensing regime. Nevertheless, there seems to be good investment potential with strong demand for fixed and mobile broadband services in particular.

Legislative framework

The EBRD’s 2011 assessment of the electronic communications sector in Egypt shows that some important components of the Egyptian Telecommunications Law No. 10 of 2003 reflect best practice, including market analysis procedures, universal service, numbering administration, equipment approval, national security and emergencies. However, there is no clear separation of policy and regulatory functions, as for example the Minister of Information Communications Technology is also the chairman of the regulator, the National Telecom Regulatory Authority (NTRA) and Telecom Egypt (the incumbent service provider). Among the other inconsistencies with best practice, NTRA is “subordinate to the Ministry concerned”, NTRA’s board includes representation from the armed forces and national security entities and there are no apparent restrictions on dismissal of NTRA executive and board members. Further, regulations of the NTRA governing internal issues must be issued by decree of the Minister, though this does not apply to other NTRA regulations. There is no obligation by the Ministry or NTRA to conduct their functions transparently using consultations.

Unlike the EU general authorisation and notification regime, Egyptian law sets out an individual licensing regime with more detailed and complex procedures, with exceptions for some services, such as “Class C” internet service providers (those without networks of their own). The law requires that all operators provide interconnection and access. The NTRA has the authority to indirectly set the tariffs of operators. However, while interconnection charges must be based on cost plus a reasonable return on capital, there is no similar requirement for prices of other services, and the retail minus methodology used for interconnection is not cost-based. However, operators have challenged in court NTRA’s authority to set interconnection rates (2011).

The Telecommunications Law and Competition Law No. 3 of 2005 combine to provide a legal framework for market analysis that largely conforms to best practice. NTRA is developing a draft regulation on market analysis that is expected to fill the gaps needed to align with best practice by defining criteria and procedures for defining relevant markets, market analysis, designation of SMP operators and imposition of remedies. The law also authorises NTRA to resolve interconnection disputes, and a separate ministerial degree includes procedures for the resolution of other disputes. The law authorises NTRA to take all necessary actions and sets out a penalty regime of fines and prison terms for violation of licenses, the law and other “crimes”. The penalties imposed are evidently among the highest imposed by Egyptian laws, but are still not sufficiently meaningful to deter large operators. NTRA must go to court to impose fines, unless there are violations of the licence, in which case NTRA can impose fines set out directly in the license without application to a court. Operators can appeal NTRA decisions and fines to the administrative court, which can use an expedited process to determine whether or not to suspend the decision. If not suspended by the court, the NTRA decision is binding until the court makes its decision. But in the interim, any fine is deducted from a performance bond paid by the operator, making NTRA decisions effectively binding when adopted with respect to fines. The court’s decision can be appealed to a higher final court, and legal inconsistencies can be further appealed to the Supreme Court.

Spectrum management is broadly in line with best practice. NTRA develops the Frequency Spectrum Plan to ensure optimal use, then presents the Plan to the Frequency Regulation Committee (a committee of NTRA board established by resolution of the Minister), though the legislation does not specify the role of the committee. There is potential for delay due to the involvement of the Ministry of Defence and National Security. The deadline for responses to requests for spectrum exceeds the six-week period used in the EU framework. The Universal Service regime contains no requirement that the regulator calculates the net cost of providing universal service and decides whether this constitutes a net burden to universal service operators.
Although the law provides for operators to obtain rights of way, and that charges be “fair”, there appear to be no mechanisms or procedures to determine charges for rights of way if two parties cannot agree, no requirement for transparency and non-discrimination in decisions regarding rights of way and no assurance that decisions regarding requests for rights of way are made without delay. The provisions for consumer protection, compliance with national security and public emergency requirements and numbering are generally aligned with best practice. NTRA is responsible for Egypt’s numbering scheme and monitoring its implementation. The law provides that NTRA may develop and approve a National Numbering Plan and supervise its execution.

The EBRD’s comparative assessment of the legal framework of Egypt’s communication sector shows that while the legislative framework fairs well with respect to consumer protection and coverage, reform is still needed in the areas of spectrum management and enforcement. Infrastructure access is low. Major concerns lie with respect to regulator independence and the authorisation and licensing regime. See Chart 5 below.

Chart 5 – Comparison of the legal framework for telecommunications in Egypt 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 (WTO and EU framework). 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.

**Sector organisation and governance**

Telecom Egypt, the main fixed-line provider is still 80 per cent owned by the state. Its infrastructure is extensively used by the mobile and internet companies. Only in Cairo’s exclusive residential compound areas has there been alternative infrastructure investment. The mobile sector has three competing network operators, one of which is 45 per cent owned by Telecom Egypt.

The regulatory agency (The National Telecommunications Regulatory Authority - NTRA) was established in 2001 and covers telecommunications, internet and broadcasting services. NTRA is managed by a board of directors (19 members) headed by the Minister of Information Communications and Technology. There are only two members from NTRA, the other members are from other entities, which would tend to suggest a large external influence is exerted on the management of the regulator. A decision on whether to carry out a public consultation before any key NTRA decisions relies on its own interpretation of whether the decision will significantly affect the market. Sometimes these consultations are published,
sometimes private meetings are held. The NTRA has a defined role with timescales for dispute resolution, but in practice parties’ appeal to the administrative courts, which has resulted in NTRA decisions being overturned. NTRA signed a cooperation protocol with the Competition Agency in 2011, confirming that all ex ante regulation in the telecommunications sector is carried out by NTRA, while ex post regulation is an area of cooperation between NTRA and the Competition Agency.

A National Broadband Strategy has recently been published by the Ministry of ICT, with much of the drafting being done by the NTRA together with external consultants. This document underwent public consultation in early 2012. The overall national strategy envisages attracting companies and external investment and creation of jobs. This would include public-private partnerships, led by the private sector. Cairo has a “Smart Village” technology park that has targeted inward investment, and more of these “technology clusters” are included in the plan. There is provision for a Centre for Technology and Entrepreneurship with the objective of job creation, especially in the outsourcing market in areas of high-technology. The government is creating a Technology Development Fund to support this.

Egypt is a member of the World Trade Organization (WTO) so it is committed to market liberalisation. It is also a signatory to other regional and bilateral agreements including membership of the Arab regulators network – AREGNET, Arab spectrum management group – ASMG, Euro-Mediterranean regulators group – EMERG.

Regulatory conditions for wired networks

In general the licensing regime is service-specific and operators have to go through set procedures to obtain a new licence or modify a licence for any new service. Although the procedures are published, there is no set menu of services and the sector regulator NTRA can refuse on the grounds of lack of experience of the requester or no solid business case. The result of this licensing process (since the fixed sector was liberalised in 2005) has been to issue only one national fixed infrastructure licence – to Telecom Egypt. Among the apparent disincentives for potential investors are the uncertainties involved in securing rights of way from local government authorities; the very cheap price of the incumbent’s basic service (circa €1.50 per month); lack of fixed number portability; an apparently subsidised broadband service from the incumbent; and the lack of regulated wholesale infrastructure access.

In 2009, in order to increase the availability of broadband and to allow for new services to enter in the market, NTRA announced an invitation for interested companies to bid for two licenses to install and operate access telecommunications networks in defined residential areas known as closed compounds. These licenses allowed for the introduction of new innovative services, including triple play, through fostering investment in fibre access networks. It is expected that the licenses would attract an expected investment of around €0.75 billion over five years. The two operators who were granted licences were required to pay 8 per cent of their yearly revenues to the state.

Alternative operators are not satisfied about the interconnection arrangements set by Telecom Egypt. They complain about high charges, the lack of a service level agreement and the preferential treatment given to Telecom Egypt’s own subsidiary companies.

The only alternative call services available to consumers is via pre-paid scratch cards. There is no carrier selection/pre-selection or wholesale line rental services available from Telecom Egypt. In the broadband market, Telecom Egypt does not provide fixed services directly. Most are provided to consumers via unbundled lines to TE Data, its 100 per cent owned subsidiary internet service provider. The retail price of Telecom Egypt’s broadband offering is effectively subsidised by the state. TE Data’s share in the internet market is 63 per cent of the residential subscriptions and 52 per cent of business subscriptions. The majority of the remainder are provided exclusively by the separate licence holders in the residential closed compound areas of Cairo.

Regulatory conditions for services requiring frequency spectrum

The mobile market is still dominated by Mobinil and Vodafone (both with around 44 per cent market share) although Etisalat has now grown past 10 per cent since its launch in 2007 after paying a record (for Africa) price of €2.0 billion for its licence in a public auction. Egypt became one of the first countries in Africa to launch third generation (3G) mobile services in 2007, following the award of the country’s third mobile licence. There is good growth in mobile broadband services, with Mobinil (Orascom and France Telecom), Vodafone Egypt (Vodafone: 55 per cent, Telecom Egypt: 45 per cent) and Etisalat – gaining new revenue streams in an environment of falling average voice revenues. The number of mobile data subscriptions has risen to 2.3 million (2.9 per 100 population). In a move that could inject further competition into the sector, in January 2011 Telecom Egypt was reported to be considering acquiring a licence as a mobile virtual network operator (MVNO). Mobile number portability was introduced in 2007 and has been one of the accelerating factors for greater competition in the market. There are no firm plans for further spectrum liberalisation, such as re-farming, spectrum trading or for digital broadcasting switchover.
Information society safeguards

The market for internet services is competitive, although licences are required even for simple internet service provision without infrastructure. There is a legally valid basis for electronic documents and signatures (since 2004) and domain name registration has already been liberalised. There is now a more liberalised approach to freedom of expression in electronic media, but there is not yet any legal protection of personal data and Egypt is not yet a signatory of any international cyber-crime conventions.

Summary and outlook

Despite attempts to introduce economic reforms and modernise its economy by emphasising important sectors, such as infrastructure and communications, the fixed market has only one national infrastructure licence holder (state-owned Telecom Egypt). There are also imbalances in mobile spectrum allocations that have contributed to the restricted development of fully competitive conditions in the mobile market.

Egypt is one of the few large markets in Africa, and is one of the fastest growing. There is good investment potential, especially if the government’s recently developed supporting policy framework is quickly turned into a credible implementation plan, backed up by improving the primary legislation and enforcing more pro-competitive regulatory reforms. Significant new investment in infrastructure is required to meet the expected strong demand for fixed and mobile broadband services. The National Broadband Strategy announced in late 2011 contains a 10-year broadband investment plan, connecting an additional four million households, at a cost of about €4.0 billion. The NTRA is currently considering funding options. On top of this infrastructure expansion, the National Broadband Strategy envisages advanced facilities to 16 million school and 2 million university students, a community-led programme of IT clubs, telecentres, Internet cafes (2,000 more of these in rural areas), plus internet access and ICT training. Also, the government will provide support to new businesses, and ensure that some 3,500 post offices are an effective channel for new e-government services. This National Broadband Plan is at the policy stage, it still requires a detailed implementation plan to be prepared. The initiative should also be supported by better regulatory conditions, including the introduction of a general authorisation scheme to replace the restrictive licensing regime plus the introduction of the normally expected competitive safeguards. These market improvements include the need for fixed number portability, guaranteed access to rights of way, regulated wholesale infrastructure access, wholesale broadband access and the removal of the distorting cross subsidies enjoyed by Telecom Egypt in basic and broadband fixed services.

The Egyptian regulator will also have to ensure that adequate additional spectrum is made available to investors to meet significant growth in mobile and wireless broadband services. The announcement in April 2012 of the government’s stated intention to take a stake in mobile phone operators and major communications companies is a worrying development. The state already has a 45 per cent stake in Vodafone Egypt through its ownership of 80 per cent of Telecom Egypt. The state also holds 34 per cent of Etisalat through the National Post Authority. The regulator has recently given approval for France Telecom to take control of its Egyptian mobile phone joint venture, Mobinil in a deal worth around €1.5 billion. Orascom will retain a 5 per cent holding, but with a voting interest of around 28 per cent to ease Egyptian worries about foreign ownership. An assessment of the overall legal and regulatory risks in relation to the country’s communications sector shows that Egypt is in the high risk category. See Chart 6 below.
Chart 6 – Comparison of the overall legal/regulatory risk for telecommunications in Egypt with international practice

**Egypt: Overall legal/ regulatory risk**

Key: Extremities of the chart = International best practice
Note: The diagram shows the combined quality of the legal and regulatory frameworks when benchmarked against international standards and best practice. 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 regulatory framework of the country approximates these standards.

Source: EBRD 2012 Electronic Communications Comparative Assessment.

Egypt’s overall legal/regulatory risk scored 46 (100 is the lowest risk). Egypt has thus been found to be in high risk category.11
Public procurement

In a nutshell...
The Egyptian public procurement framework was found to be in “low to medium compliance” with internationally recognised standards. Overall, the legislative framework is outdated, and the public procurement process overregulated and bureaucratic. Open tenders are the default procurement method, which is a positive feature. However, the extensive use of direct contracting negates efforts to achieve competition in public tenders and works against efficient public spending. Enhancing the institutional framework for regulating the public procurement sector would require making it more attractive to investors and increasing transparency with respect to the review and remedies processes.

Overview

Public procurement in Egypt is regulated under the Tender Law No. 89 adopted in 1998 (the PPL) and its executive regulations (secondary legislation), issued pursuant to the decision of the Minister of Finance No. 1368 of 1998. Since 2008 the PPL has been subject to two amendments which had little impact on public procurement regulation. The most recent amendment, a decree of the Prime Minister No. 33 of 2010 introduced electronic means for tender notification and established a government website where contracting entities are required to publish contract notices in addition to traditional means of publication (a public tender board or a newspaper).

The EBRD 2012 assessment of public procurement regulatory frameworks shows that Egyptian PPL is based on sound principles that are aimed at promoting competition, equal opportunity, accountability, and uniformity of public procurement practice. It provides for an acceptable institutional framework, although there are opportunities for improvement with the current review and remedies mechanism.

Nevertheless, Egypt scored an overall “low to medium compliance”, with a compliance rate of 62 per cent against the EBRD Core Principles benchmark. This is below average results in the EBRD region of operations. Laws adopted in 2010 did not modernise the system, and frequently these laws are neither implemented nor enforced. The Egyptian public procurement institutional framework lacks modern administration qualities. Put differently, it is complex, bureaucratic and unfriendly to private sector suppliers. In addition there is no effective public procurement review procedure, and no independent regulatory authority or remedies body.

The law incorporates standards which no longer facilitate efficiency and economy of public contracts. It is positive that open tenders are the default procurement method, but the extensive use of direct contracting jeopardises any efforts on competition in public tenders. In addition there are no modern procurement procedures suitable for different contract types. Furthermore, the PPL does not provide for electronic communication and procedures, nor does it ensure the transparency of procurement decisions. Overall, the public procurement process seems to be overregulated and procurement policies are underdeveloped. Policy objectives are unclear, with the legal framework and practice lacking compliance with current international standards.

Unsatisfactory transparency safeguards - The high level of monitoring in the Egyptian system results in good accountability of procurement decisions. However, the Egyptian case clearly demonstrates that monitoring has to be aligned with transparency measures, otherwise the process will be costly but with no better overall integrity without strict monitoring on behalf of the central government. Integrity safeguards are unimpressive in general. However, these are better with regard to “law on the books” rather than “law in practice”. In addition, the assessment identifies a substantial regulatory gap in the integrity measures, and the results of the practice review demonstrate evident implementation problems.

Insufficient efficiency instruments - Egyptian PPL aims to achieve fair competition in public tenders. In the assessment, competition tools were assessed as satisfactory, scoring 76 per cent of the benchmark. However the survey of local practice demonstrated that the actual application of the competition principle is inadequate, and there are low levels of competition in public tenders. This is evidenced in the limited number of bids per tender, as well as in the large number of cancelled tenders. This low level of implementation is linked to underdeveloped transparency measures. The assessment highlighted that contracting entities apply minimal standards established by the PPL, with no evidence of developing internal procurement policies to increase transparency of the procedures. Limited information about procurement opportunities has resulted in a low level of competition in procedures. In terms of process economy, the contracting entities were found to apply in practice higher standards than required by law (in the practice review economy indicators scored better than in the legislation review by 10 per cent to minimal regulatory standards of the Egyptian law). Contracting entities are very much cost conscious and the lowest price is more frequently selected than best value for money evaluation.
criteria. Unfortunately, in terms of ensuring efficiency of public procurements little has been advanced to date. For example, contracting entities apply standards required by law which were found to be of medium compliance with the assessment benchmark.

What is evident across all SEMED countries is that the high level of central control does not result in higher compliance, and it does not significantly increase the score for accountability of contracting entities. The Egyptian PPL focuses on monitoring contracting entities but does not provide sufficient protection to private sector suppliers and contractors. Requests for reconsiderations are hardly ever used, indicating a low degree of effectiveness in practice. No independent remedies system is provided, and as a result a high regulatory and performance gap has been identified in the enforceability indicators. Legal protection for suppliers and contractors is low, and implementation of existing standards is uneven. This has resulted in low compliance of contracting entities and low performance of these indicators in practice.

**Regulatory and implementation problems** - The 2012 assessment results suggest that legislation presently in force in Egypt does not provide a basis for modern public procurement practice. Chart 7 below presents analysis of the assessment results for quality of Egyptian laws and local procurement practice.

Chart 7 - Egypt’s regulatory and performance gaps in public procurement

![Chart of regulatory and performance gaps](chart7.png)

Note: the diagram draws a comparison between public procurement law on the books (blue), and local public procurement practice (green).

Source: EBRD 2011 Public Procurement Assessment

As is evident from Chart 7 above, the assessment revealed scope for improvement and some inconsistencies between the legislative framework and local practice. First, the framework lacks several regulatory features recommended by international legal instruments. Second, in the survey of local procurement practice contracting entities evaluated in the assessment scored between 58 and 69 per cent for the quality of their procurement practice. This suggests significant procurement capacity problems. In addition, despite stability of the legal framework, implementation problems were reported in the assessment. These relate to the lack of secondary legislation, availability of up-to-date guidelines for tender preparation and conducting tender procedures. Moreover, implementation problems also centred around procedures for public contract performance monitoring and auditing arrangements, which are not mandatory by law, but seldom voluntarily established by contracting entities.

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

In the assessment, the PPL on average scored “medium compliance” against the EBRD Core Principles benchmark. The scores are built on questionnaires that have been developed on the basis of the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local legal advisers.

The current Egyptian public procurement legislative framework was found to be outdated and not in line with harmonised international standards or modern procurement best practice. Based on the assessment results, the PPL does not incorporate several regulatory features recommended by current procurement standards, and is not instrumental to ensuring efficiency of public spending or facilitating market economy development. National public procurement policies prescribe reasonable rules for determining the scope and terms of the public procurement and the tendering processes. However, notification of procurement opportunities, submission of tenders and the tender evaluation process require updating.

The PPL is not comprehensive. Currently it regulates central and local government procurement, but does not cover procurements by state-owned or state controlled companies in the utilities sector. In addition, Egyptian law does not specifically regulate concession contracts. Concession contracts are usually awarded through a public procurement procedure under the PPL. However, there are exceptions for oil and gas concession contracts which are procured and awarded according to project specific laws. Since 2010 procurements for public private partnership projects (PPP) are separately regulated by PPP Law No. 67 of 2010.

Although the PPL regulates the three phases of the public procurement process: pre-tendering, tendering, and post-tendering; it does not cover the post-tendering phase as robustly as the pre-tendering and tendering phases. For example, the PPL incorporates only minimal standards with regard to monitoring, contract management, payments, and completion dates in the post-tendering phase. In the case of underperformance or late completion by a contractor, the public entity can impose contractual penalties, seek damages, terminate the contract, or perform the contract at the expense of the contractor. However, Egyptian PPL does not include provisions for monitoring the compliance of a contractor with the technical specification from the original tender.

The law in principle seems to provide a decentralised public procurement function. Contracting entities are monitored and managed in their procurement decisions by the central government agencies. Monitoring is undertaken operationally, and not governed by procedures. Central government agencies appoint their representatives on tender evaluation committees, influencing the procurement decisions of the contracting entities. Regardless of this closely-knit relationship between central government and contracting entities, there is no official aggregation mechanism embedded in the Egyptian public procurement planning and a central purchasing body has not been established.

The government decision to introduce an online tender publication is a step towards updating the current public procurement regulatory framework. If effectively implemented, this reform will lead to significant improvements in the national procurement system.

The assessment shows that the lack of transparency and integrity of the public procurement processes in addition to an ineffective monitoring and review mechanism are a source of risk to the public procurement regulatory system. Further, the law does not provide for a code of ethics for public procurement officials. Although, procurement officers are subject to rules under the civil servants law, Egyptian PPL contains no whistle-blower statutes. The assessment also identified significant regulatory gaps (31 – 41 per cent) in all key evaluation categories. These results reveal that both laws and institutional and enforcement capacity need to be strengthened and modernised to comply with current international transparency and efficiency standards for public procurement.

Furthermore, the law does not protect the ‘rights’ of private sector suppliers. Tenderers cannot effectively challenge public procurement decisions of the contracting entity, as there is no public access to procurement information and the review mechanism is neither independent nor impartial. In general, the public sector is likely to prevail in any public procurement review decision.

Tendering procedures used by Egyptian contracting entities also require updating. The minimum deadline for tender submission (10 days) is too short considering that current methods of communication require modernising, and electronic tender submission is currently not available. The current procedures increase bureaucracy, with no alignment between the formality of the procurement procedure, and the value and scope of the tendered contract. In Egypt, regardless of the contract value the same procedure is applied. Moreover, there is no legal requirement to consider the whole life cycle cost, or any other social or environmental aspects of the procurement. Egyptian PPL merely requires that the contract be awarded to the lowest bid of the contractor/supplier who passed the technical evaluation.
Chart 8 - Quality of public procurement legal framework in Egypt

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

As illustrated in Chart 8, Egyptian PPL is based on the principles of fair competition and non-discrimination. However the PPL does allow for domestic preferences (a price preference of up to 15 per cent for Egyptian tenderers or tenderers offering domestic goods and services). In the assessment, Egyptian PPL scored above 70 per cent compliance rate (medium compliance) in the indicators for accountability, integrity and transparency of the legal framework. Currently Egyptian PPL does not provide mandatory standard tender documentation or public contracts templates. However, guidelines are issued by the central government which increased compliance and uniformity of application of the laws (72 per cent compliance rate with the benchmark).

In addition, the law is also stable and local stakeholders are provided with sufficient time to learn the skills necessary to prepare tenders and compete for public contracts. However, significantly lower standards were observed in the incorporation of efficiency instruments in the PPL. Moreover, the indicators for economy and proportionality of the legal framework scored below average. The assessment also highlighted that the PPL was formal, inflexible and bureaucratic. Although benefiting from good accountability procedures, the PPL does not provide sufficient enforcement instruments for private sector suppliers.

Institutional framework on the books

The assessment highlighted that in Egypt there is no single independent authority with regulatory powers responsible for developing policies and monitoring the compliance of contracting entities. In addition there is also no independent and dedicated remedies body to handle complaints related to public procurement.

The Egyptian public procurement institutional framework is complex and a number of authorities (government departments) are involved in delivering public procurement functions. For instance, the Ministry of Finance (MoF) is responsible for policy making, issuing decrees and determining policies in relation to public procurement. It is the ultimate authority responsible for national procurement planning and ensuring that government achieves value for money. On the other hand, the Public Services Authority (PSA), which reports to the MoF, is a central government agency responsible for several aspects of Egyptian public procurement.

These include:
- planning, regulating and monitoring of public contracts
- reporting on technical, financial and regulatory governmental expenditures and
ISSUING GUIDELINES TO CONTRACTING ENTITIES IN RESPONSE TO QUESTIONS FROM PUBLIC ENTITIES

Guidelines issued by the PSA play a significant role in harmonising the procurement practice of different public entities.\(^\text{17}\)

Further there is the Public Contracting Office (PCO), which is a department within the MoF. Although the PCO does not possess any regulatory powers, the office is responsible for handling complaints from suppliers. Procedurally, the PCO does not make a decision on a complaint. Rather, the PCO reviews complaints and provides recommendations on how to respond to the complaint. The final decision with respect to each complaint is taken by the supervising Competent Authority (CA). The CA is an administrative authority and is placed above contracting entities in the government hierarchy. Given that the decision-making process regarding complaints is fully administrative and not independent, each contracting entity reports to the relevant CA with regard to complaints.

Finally, there is the Central Auditing Authority (CAA) which is the central independent authority that is responsible for reviewing the accounts of each public entity. The CAA takes its instructions directly from the President’s Office. While the scope of the CAA is not primarily to monitor PPL compliance, the authority undertakes this function as part of its general audit review.\(^\text{18}\)

---

**Chart 9 - Quality of public procurement legal and institutional framework in Egypt**

<table>
<thead>
<tr>
<th>Uniformity</th>
<th>Regulatory Gap in Uniformity Indicators</th>
<th>Stability</th>
<th>Regulatory Gap in Stability Indicators</th>
<th>Flexibility</th>
<th>Regulatory Gap in Flexibility Indicators</th>
<th>Enforceability</th>
<th>Regulatory Gap in Enforceability Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td>72.5%</td>
<td>35%</td>
<td>65%</td>
<td>27.5%</td>
<td>62.5%</td>
<td>37.5%</td>
<td>37.5%</td>
<td>37.5%</td>
</tr>
</tbody>
</table>

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

**Source:** EBRD 2011 Public Procurement Assessment

In the assessment, a public procurement institutional framework in Egypt is “on the books” scored from low to medium compliance with respective international standards.

Chart 9 presents the assessment results for quality of the Egyptian public procurement regulatory and institutional framework, benchmarked against EBRD Core Principles for institutional and enforcement measures: uniformity, stability, flexibility and enforceability of the legal framework. The assessment highlighted that the Egyptian institutional framework is uniform and predictable. The assessment also revealed that the institutional
framework is hierarchical, inflexible, and not business-friendly which is attributable to the fact that it is based on old governing principles. The present legal and institutional framework requires updating. The framework does not guarantee transparency and integrity of public procurement, despite robust central government control. The wide application of direct contracting between contracting entities suggests that there is no clear vision whether the public sector should outsource its public services or directly deliver these services.

**Legal framework as implemented in practice**

Local practitioners interviewed in Egypt do not consider the national public procurement legal framework to be clear, comprehensive, and conducive to a competitive procurement environment. However, under the current framework only limited attempts have been made by contracting entities to supplement the existing PPL with internal procurement policies and regulations. The assessment revealed that the existing PPL is inflexible and creates difficulties in its application in practice. Despite the consequences, economic factors are less important and the lowest priced tender is always accepted. Although there are official guidelines on procurement good practice and the correct application of procurement rules, in practice up-to-date guidelines are generally not published and not available to contracting entities and suppliers. Local respondents participating in the assessment suggested that the guidelines should be published on the MoF website, and additionally on paper in the attachments to the Tender Law. However, the assessment was inconclusive as to the reason why recent guidelines are not available. The latest review decisions and guidelines available on the MoF website are dated from 2008. Practitioners also reported that there is no policy in relation to providing regular professional training for public procurement officers and technical specialists working for contracting entities.

Review of the legal framework in practice show that the Egyptian PPL is closely followed. Indicators for accountability of the procurement process scored 83 per cent (high compliance) in the survey of local practice, confirming that very strict administrative measures are applied by central government. Practitioners apply the law with precision, but in a bureaucratic manner. Supplier selection instruments such as prequalification may be applied to the procurement process based on internal policies and rules, if not in contradiction to the PPL requirements.

Weaknesses in the framework, as reported by the contracting entities, include that the PPL is outdated and in an urgent need of updating in order to comply with current international best practice focused on economic efficiency. In the survey of local procurement practice low marks for competition, integrity and transparency indicators reveal significant implementation problems and demonstrate an overall lack of transparency and efficiency of procurement processes. As there is no legal requirement for the public entities to consider the whole life cycle costing of the goods or services procured, or seeking value for money, no appraisal is undertaken on any other aspect of the procured goods or services. In practice, contracts are awarded to the lowest bid. Furthermore, extensive use of direct contracting and widely applied domestic preferences has resulted in low marks for competition in local procurement practice. With an ineffective review and remedies system, no actual legal protection against discretionary decisions is enjoyed by private sector suppliers.

In addition, electronic means of communication are not used in practice, and communication between the bidders and the contracting entity usually takes place by registered mail. This results in a very slow selection process. In addition, procurement records are not available to the public, and bidders cannot request procurement de-briefings for any reason.

Pay levels for public procurement officials are not addressed in the PPL. Consequently, and as a result pay levels are in practice considered to be much lower than those of relevant private sector specialists. In addition, public procurement officers and technical specialists working for contracting entities are not, in general, provided with regular training. Lacking mandatory national regulation contracting entities are unlikely to adopt internal code of ethics or whistle-blower statutes.

Implementation risks lie in the fact that despite strong administrative supervision from the central government, in practice the procurement decision-making process is not fully aligned with general investment decision making. The annual procurement plan prepared by the PSA is generally considered as indicative and not mandatory to implement. Moreover, monitoring and contract management, procurement risk and auditing arrangements have not always been established and undertaken by contracting entities. It has also been reported that public contracts are not generally completed within the original contract price.
Chart 10 - Quality of local procurement practice in Egypt

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

Source: EBRD 2011 Public Procurement Assessment

Chart 10 presents the scores for the general quality of local public procurement practice. Egypt scored an average compliance rate of 72 per cent. In the assessment, local procurement practice scored medium compliance with the benchmark, except for competition and efficiency where a lower performance was observed. A high compliance was reported regarding the accountability of the contracting entities in the public procurement process (83 per cent), but unfortunately a 51 per cent performance gap was reported by practitioners regarding the enforceability of the PPL in the procurement processes conducted by contracting entities.

Institutional framework in practice

The assessment is designed to also capture how the institutional framework is evaluated by local contracting entities and practitioners. A low compliance rate (59 per cent) revealed that regardless of the supervision of central government, compliance with the PPL rules is, in practice, low. Frequently contracting entities are lacking procurement capacity and apply rules or guidelines which are no longer in force. In addition, there is no clarity as to which public procurement authorities are responsible for ensuring uniform standards, developing good practices and training procurement staff for public sector procurement.

A survey on local practice confirmed that the PPL covers only government procurement. Interviewed entities in the utilities sector apply their individual procurement policies and procedures, modelled on the PPL, but redesigned to fit their business needs. With no mandatory application by law, it is often the case that the PPL is followed by state-owned companies voluntarily. The assessment revealed that the internal procurement procedures of such entities are substantially the same as the PPL policies and procedures.

In addition, the Egyptian PPL is not explicit in relation to concession contracts, and this has created problems in the practice of contracting entities.

Application of eligibility rules. In practice Egyptian contracting entities apply mandatory general eligibility rules, and establish qualification criteria which include: technical expertise, supplier
experience and performance history. All requirements of the contracting entity are normally included in the tender documents. The assessment revealed that there are no rules on conflict of interest in competing for public tenders. This is because all affiliates of the contracting entity, as long as they remain in public ownership, are not required to tender as they can obtain public contracts through direct contracting.

In addition to general public procurement eligibility rules and individually specified qualification requirements, each public entity keeps a register of blacklisted and pre-qualified suppliers and contractors. However, these registers are not published online, and are not easily accessible to other contracting entities.

Efficiency of the procurement process regulatory framework in practice. The assessment highlighted that communication and submissions practice requires updating. Currently, Egyptian PPL does not allow for the employment of information and communication technology tools in public tenders, or promote e-commerce to support the public procurement process. Contracting entities reported a need to adopt new legislation that promotes electronic communication between public entities and tenderers, and enable the submission of tenders online.

Priorities for reform

The public procurement legal framework in Egypt would benefit from significant review with the incorporation of up-to-date procurement policies and procedures.

More improved transparency safeguards should be adopted and put into practice. This will improve the overall image of the public procurement system.

Local contracting entities report that their procurement practice is about 7-8 per cent compliant with European sustainability standards. Therefore, new legal instruments promoting sustainability in public contracts should be developed.

The introduction of simplified procedures for small value contracts will encourage the participation of local SMEs and therefore contribute to local economic development.

E-procurement tools should be introduced to lower procurement transaction costs for both contracting entities and local businesses.

Since national procurement laws do not recognise the value of environmental and social needs, public sector suppliers and contractors deliver public contracts with no concern for green solutions.
Private Sector Support

Corporate governance

In a nutshell...

Egyptian legislation was found to be in “medium compliance” with internationally recognised corporate governance principles. A voluntary corporate governance code was adopted in 2005. Its effectiveness would be greatly improved if its application were required for listed companies on a “comply-or-explain” basis.

Legal reform would be welcomed in the areas of minority shareholders’ rights, concentration of ownership, and director liability. In addition there are concerns regarding non-financial disclosure and transparency, especially with respect to conflict of interest situations and related-party transactions.

Difficulties in enforcement and problems with the institutional environment point to low corporate governance effectiveness in practice.

Overview

Egypt has been engaged in significant corporate governance reform activities over the past two decades. In 2003 the Egyptian Institute of Directors (EIoD) was established under the supervision of the Ministry of Trade. The Institute was acclaimed as the first of its kind in the region. It worked jointly with international organisations on spreading awareness of, as well as improving, corporate governance practices in Egypt. These efforts resulted in the drafting of the Egyptian Code of Corporate Governance (ECCG) in 2005. The ECCG was endorsed by the Ministry of Investment and the General Authority for Investment and Free Zones (GAFI). It largely draws on the OECD Principles of Corporate Governance. In 2006 the Ministry of Investment issued a Code of Corporate Governance for State Owned Companies, and the Egyptian Junior Businessmen Association issued a Corporate Governance Manual for Family Businesses.

A Code of Corporate Governance for Listed Companies was issued in February 2011 incorporating the ECCG and adding to it. In addition, the EIoD has been working on refining the ECCG to further streamline it with international corporate governance standards. However, compliance with the code is purely voluntary for companies and its effectiveness would be greatly increased if its application was required under a “comply-or-explain” approach (where companies will be required to disclose their degree of compliance with the code).

Companies in Egypt are required to operate under a compulsory one-tier management system. The law requires that listed companies have an audit committee with at least three qualified non-executive independent directors and boards are required to meet four times a year in line with minimum legal requirements.

Two regulatory bodies in Egypt are in charge of supervising the implementation of corporate governance laws: the Egyptian Financial Supervisory Authority (EFSA) and the General Authority for Investment and Free Zones (GAFI). EFSA is the governmental body in charge of overseeing the activities of non-banking financial markets. EFSA’s competencies include supervising capital markets, the derivative markets, insurance, mortgage finance, financial leasing, factoring and securitisation. On the other hand GAFI is the principal governmental body concerned with regulating and facilitating investment in Egypt. The Companies Department in GAFI supervises the implementation of the Companies Law. GAFI also represents a “one-stop-shop” for investment in general, including company formation and regulation. The Egyptian Stock Exchange (EGX) is in charge of enforcing the Listing Rules for listed companies in Egypt.

Economic Courts were established by virtue of Law No. 120 of 2008 and are competent to hear commercial disputes. The introduction of these special court circuits was expected to improve the speed and quality of litigation in relation to commercial disputes. However, market participants report that the effects of this reform measure remain to be seen in practice.

Alternatively, commercial arbitration is quite a viable option in Egypt, and it is regulated under Arbitration Law No.27 of 1994. In addition, the Capital Market Law provides that arbitration will be the sole method of resolving disputes between actors on the securities market.

A good corporate governance framework should be flexible enough to allow fast adaptation to market changes and sufficiently enforceable to ensure that rules are respected. An assessment by the EBRD of the corporate governance framework in Egypt shows that while Egyptian legislation is in “medium compliance” (66.6 per cent) with international standards, the country ranked “low compliance” (51.1 per cent) on the indicators measuring the effectiveness of the framework in practice.
Legislative framework

The main legislative texts governing the corporate governance framework in Egypt can be classified into two groups: the laws governing the incorporation of companies in Egypt are the Companies’ Law; the Investment Law; and the Public Business Sector Law; and the laws governing companies listed on the Egyptian Stock Exchange (EGX) which include the Capital Market Law and the Central Depository Law as complemented by the Listing Rules.

In addition, Egyptian companies are subject to the 2006 Egyptian Accounting Standards (EAS), which are based on international accounting standards including, the International Financial Reporting Standards (IFRS) and International Accounting Standards (IAS), with some slight divergences.

The results of EBRD’s 2011 assessment of the corporate governance framework in Egypt showed that national legislation is in “medium level of compliance” with relevant international standards (See Chart 11).

![Chart 11 – Quality of the Corporate Governance Legislative Framework in Egypt]

Note: the extremity of each axis represents an ideal score, that is, legislation fully in line with the OECD Principles of Corporate Governance; the fuller the ‘web’, the better the quality of the legislative framework.

Source: EBRD Corporate Governance Assessment 2012

While the quality of legislation on the books appears generally sound, the EBRD’s assessment highlighted a need for reform in a number of key areas. For instance, on observing the results displayed in Chart 11 it becomes apparent that Egyptian legislation provides a lower level of protection for shareholders’ rights and the equitable treatment of shareholders. This could be attributed to the fact that the law contains restrictions with respect to the rights of shareholders to access company information, and to vote in abstentia. Moreover, shareholders are not sufficiently involved in decisions concerning fundamental corporate changes and they do not have automatic pre-emptive rights. Other key problems which the assessment revealed are in relation to transparency and disclosure. In particular, the rules governing related party transactions are in need of fine-tuning. For instance, lack of a clear definition of “interest” and “interested party” results in indirect interest being difficult to detect and deal with. Companies are not required to disclose the degree of their compliance with corporate governance principles, nor are boards required to disclose forecasts of existing or potential risks which have the potential of affecting the shareholders’ investment.

The results of the assessment are further analysed in the following sections:
Ensuring the basis for an effective corporate governance framework

A good corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities. The framework should be developed with a view to its impact on overall economic performance, market integrity, and the incentives it creates for market participants and promotion of transparent and effective markets.

Our assessment reveals that the corporate governance reform process in Egypt could benefit from increased transparency and predictability. For instance, the level of dialogue between the government and the private sector over existing and recent corporate governance regulations seems low. Consequently, the legal and regulatory corporate governance requirements do not appear to be generally well understood by market participants. Although the EIoD provides training to directors on good corporate governance practice, such training is not conducted on a wide enough scale.

Another drawback is the unclear coordination of provisions under different laws, decrees, and regulations, which causes uncertainty. As an example, state-owned companies are subject to the Public Business Sector Law, which refers to the Companies Law with respect to corporate governance regulations. This is apart from provisions concerning the composition of the board (and government representation therein), and the grounds for the removal of board directors, which are subject to the Public Business Sector Law. Further, while the Capital Market Law contains a definition of ‘related parties’ it is not clear whether that definition applies to unlisted companies which lie outside the scope of that law.

The adoption of a uniform law, consolidating the many company law provisions that are scattered across a wide variety of legislative texts into one uniform code could significantly improve the efficiency of the overall framework and decrease the uncertainty on the scope of application of these different laws and regulations. In order to ensure the maximum benefit to the market, it is recommended that the ECCG is amended to apply a “comply or explain” approach where companies would be required to disclose the degree of their compliance with the code or explain why they have not implemented/fully complied with the corporate governance principles as provided in the ECCG.

Supervisory, regulatory, and enforcement entities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent, and fully explained. The establishment of specialised economic courts in 2008 has been widely recognised as a positive step forward with respect to resolving commercial disputes in the country. Nevertheless, these courts are relatively nascent and thus a significant percentage of corporate governance legislation has not been tested in court. Further, economic court rulings are not sufficiently made available to the public and weak and lengthy court enforcement continues to defer market participants from resorting to the courts in order to enforce their rights.

The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that public interest is served. In Egypt, the division of responsibilities among regulatory authorities seems to be established in a clear manner. However, assessment results show that there is no effective system of cooperation in place between the different regulatory bodies, and regulators are not generally required to provide explanations for decisions rendered.

In terms of transparency and independence of regulatory bodies, both EFSA and GAFI are accountable to the Ministry of Finance, and both are required to publish their budget and expenses on a regular basis. Law No.10 of 2009 establishing EFSA provides for the operational independence of the regulatory body from political and commercial pressure, as well as conflict of interest. However, in practice, there is no mechanism to ensure such independence. Furthermore, the law does not mandate a “Regulatory Impact Analysis”, ensuring that regulatory authorities fully understand in advance the effect, costs, and consequences of developing and passing new legislation before such is adopted.

Shareholder rights

A sound corporate governance framework should ensure that the essential rights of shareholders and key ownership functions are provided. These rights include, but are not limited to, access to information, voting and profit sharing. Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting. It is not only important these rights are clearly stated, but also that shareholders – both national and foreign - have easy access to their rights.

In Egypt, the law grants shareholders with rights such as the right of ownership registration, the right to convey or transfer shares, obtain relevant corporate information, participate and vote in general shareholder meetings, elect members of the board, and share in profits. In line with good international standards, the opportunity is provided for shareholders to ask questions to the board (subject to reasonable limitations) and to place items on the agenda at general meetings. Nevertheless,
shareholders’ access to information is slightly restricted. Corporate information is accessible to shareholders only prior to a general assembly meeting and subject to a fee. Furthermore, while shareholders are entitled to receive timely notice prior to a general shareholders meeting, the rules do not ensure that the information received is sufficient to duly inform shareholders on the topics that are to be discussed. The minimum notice period that is required before convening a shareholders meeting is 15 days, which might not be enough to ensure informed participation by all shareholders.

A corporate governance framework should also allow for the use of electronic communication and easily accessible and transparent voting in absentia procedures. Although shareholders in Egyptian companies are able to vote in person or in absentia, a proxy can only be made to a shareholder in the same company and there is no requirement to include a proxy template with the notice calling for a shareholders meeting. The rules governing the location of the meetings are flexible as general shareholder meetings can be held in the places specified in the articles of association (which could be defined to be outside of Egypt). Nevertheless, shareholders are not allowed to vote by post, and although available in theory, electronic voting is rarely ever used in practice.

The OECD Principles of Corporate Governance mandate that shareholders have the right to participate in, and to be sufficiently informed of, decisions concerning fundamental corporate changes such as amendments to the company’s statutes, or articles of incorporation; the authorisation of additional shares; and extraordinary transactions, including the transfer of all (or substantially all) of the company’s assets, that in effect result in the sale of the company. Most of these rights are provided under Egyptian law. However, against good practice, extraordinary transactions do not generally require shareholder approval, unless the transaction constitutes a merger or an acquisition, or the transaction is in relation to a fixed asset, in which case the approval of an extraordinary general meeting is required.

Another key disadvantage is that the Companies’ Law does not provide shareholders with automatic pre-emptive rights, allowing them to have the first right to subscribe for newly issued shares in proportion to their relevant shareholding.

In terms of sharing in management and ownership benefits, the shareholders’ meeting is responsible for the election and appointment of board members, while appointing an audit committee is the responsibility of the board. A positive feature is that the shareholders’ meeting has the exclusive power to approve related party transactions, the appointment of auditors, and remunerations of the auditor and board members. Further, shareholders representing 10 per cent of the company’s issued shares may request an extraordinary shareholders meeting, though the invitation must be made through the board of directors. If the board declines to call for an extraordinary meeting upon being requested to do so, then a complaint can be made to the regulator.32

The rights of shareholders also include the right to be informed of any changes in ownership structure that is likely to affect their investment. In Egypt a listed company must disclose ownership exceeding five per cent in its holding company, or any of its affiliates or subsidiaries. The Capital Market Law mandates that any transaction(s), the effect of which is that a shareholder’s ownership exceeds 10 per cent of the company’s capital, must be disclosed by the shareholder to the company. In turn, the company is obliged to notify every shareholder representing one per cent or more of capital of any such transaction(s). In addition, board members of listed companies must notify the company of any transaction the effect of which is to increase their ownership over five per cent of the company’s capital. Such disclosure must be made to the regulator and stock exchange, and must include details of any related parties to the shareholder/board member who has concluded the transaction(s). Shareholders reaching 25 per cent of the company’s capital or voting rights, must also disclose future investment plans and directions with respect to managing the company (if any).

External auditors should be accountable to the shareholders and owe a duty to the company to exercise due professional care in the conduct of the audit. The Companies Law makes it possible for any shareholder to submit a motion to dismiss the auditor after explaining the grounds for discharge - in writing - up to 10 days before a general assembly meeting.

Furthermore, shareholders should have the opportunity to obtain redress for violation of their rights. Effective methods should be in place to ensure redress at a reasonable cost and without excessive delay. With respect to listed companies, shareholders representing five per cent of share capital are entitled to submit a complaint to the regulator (EFSA) who has the power to suspend annual general meeting resolutions that are considered to unfairly favour a given group of shareholders, or cause harm to them, or unfairly bring about a benefit to the members of the board or others. In addition, the Companies Law grants any shareholder the right to bring an action before court in order to set aside a shareholder’s resolution with respect to a violation of the rules relating to the convening of the shareholders meeting, and shareholders who attend the annual general meeting and register their opposition in the minutes with respect to a certain topic are allowed to initiate a case in court with regard to that particular topic. Nevertheless, the effectiveness and timeliness of
redress have been highlighted as areas where reform is required.

The equitable treatment of shareholders

The principle of the equal treatment of shareholders of the same class is a key issue in corporate governance. Within any series of a class, all shares should carry the same rights. All investors should be able to obtain information about the rights attached to all series and classes of shares before they purchase.

Egyptian law recognises the principle of “one share one vote” for common shares. Preferred shares can enjoy priority in dividend distribution and in the event of liquidation. Shares within the same class are required to be treated equally. Further, information about the rights attached to each class of shares is publicly available at GAFI’s Companies Directorate.

All shareholders should be treated equally including foreign, domestic, and minority shareholders. In Egypt the rules governing the rights of minority shareholders could benefit from some fine-tuning. For instance while minority shareholders are able to pool their votes for the election of a certain board candidate, and cumulative voting is encouraged under the ECCG, the law does not provide for a mechanism for the implementation of cumulative voting in practice. Cumulative voting provides minority shareholders with a better chance to have a say in electing board members and thus allows them the opportunity to share in setting the direction of the company’s management.

A good framework should also ensure that minority shareholders are protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress. In Egyptian listed companies and companies that have made a public offering, minority shareholders holding not less than three per cent of the company’s shares can force a majority shareholder holding at least 90 per cent of the company’s capital to buy their shares at a price that is not less than that paid by the majority shareholder for the company’s shares within the preceding 12 months. Although this is a positive feature, 90 per cent of shareholding could be too high a threshold to overcome before minority shareholders are able to protect themselves against a potential freeze-out.

Among the other weaknesses highlighted by the assessment is that financial institutions and other intermediaries who hold shares in custody - and are able to vote on behalf of investors - are not required to disclose their voting policy, or other voting related information to shareholders. Sound corporate governance principles require that custodian and nominee votes are cast in a manner which has been agreed upon with the beneficial owner of the shares.

The role of stakeholders

The corporate governance framework should guarantee that the rights of stakeholders, including company employees and creditors, are both protected by the law and respected in practice. To a certain extent, Egyptian law provides protection for the rights of stakeholders and beneficiaries such as bondholders, creditors and workers.

Employees can share in management through representation on the board of directors, or through a special committee. The Companies Law further contains provisions which permit stock ownership plans and mandates that the company adopts an employee profit-sharing mechanism.

The Egyptian Labour Law No. 12 of 2003 contains provisions on employee safety at work, and Egypt enacted an Environmental Law in 1994 which contains provisions that encourage companies to apply methods that are less harmful to the environment.

Nevertheless, the protection of the rights of creditors could benefit from further development. Even though the Companies Law contains some provisions which provide for the protection of creditor rights, in practice creditors are bound to face difficulties in the enforcement of those rights. For instance, the Companies Law provides that creditors are entitled to request a court to nullify any resolution calling for the distribution of dividends if the effect of such a resolution is to affect the company’s ability to honour its financial obligations as they become due. Board directors who approve a distribution of dividends which has such a result can also become jointly and severally liable vis-à-vis the company’s creditors for a value that is up to the amount of the dividends which have been distributed in violation of this provision. However, in order to enforce such a right, recourse to lengthy court procedures is necessary, and in practice creditors and suppliers do not seem to possess effective and easily workable remedies for the violation of their rights.

One of the essential rights of stakeholders is to receive regular and reliable information for a sound assessment of the company’s management and profitability. A good corporate governance framework should ensure that investors, creditors, employees, the market and all other stakeholders can rely on the information received by the company and act accordingly. The integrity of the market requires information to be reliable, disclosed in a timely manner, regularly updated and easily accessible. Although corporate information is generally thought to be reliable, stakeholders are not granted special access to such information.

Furthermore, the framework lacks protection for whistle-blowers, for example, there is no mechanism which ensures that stakeholders, including employees and their representative bodies, are able to freely communicate concerns or complaints over
illegal or unethical practices to the board without compromise to their rights.

Disclosure and transparency

A corporate governance framework should ensure that timely and accurate disclosure is made with respect to all material issues regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

In addition disclosure should include, but not be limited to, material information on company objectives, majority shareholder ownership, and remuneration policies for members of the board and key executives, and information about board members, including their qualifications and selection process, other company directorships, and related party transactions.

In Egypt, while financial disclosure has reportedly developed over the years, non-financial disclosure continues to lag behind internationally recognised standards, notwithstanding specific recommendations in the ECCG.

Financial disclosure

Egyptian auditing and accounting criteria are largely consistent with international standards. All joint stock corporations in Egypt are required by law to prepare annual audited financial statements and listed companies must prepare financial reports on a quarterly basis.

Holding companies and companies with interests in other entities must prepare financial statements on a consolidated basis. All Egyptian companies are also required to prepare and disclose to shareholders and auditors are not required to submit reports on any amendments to the company charter or other constitutional documents of similar nature. Article 79 of the Executive Regulations of the Companies Law grants this right to parties that are a shareholder or manager to disclose any material information on company's interests. However, in practice, GAFI only authorises from the company's premises as long as the disclosure of such documents is not detrimental to the company's interests. However, in practice, GAFI only grants this right to parties that are authorised from the company by way of a power of attorney.

The Companies Law does not contain language which oblige a company to make publicly available any amendments to the company charter or other constitutional documents of similar nature. Article 79 of the Executive Regulations of the Companies Law only refers to an obligation to publish the initial articles of association. Nevertheless, in practice, GAFI requires that any amendments that are made to the articles of association are published in the Companies Gazette. This obligation is clearer with respect to listed companies and is dealt with under Article 18 of the Listing Rules.

Non-financial disclosure:

Companies are not required by law to disclose key issues relevant to employees and stakeholders that may materially affect the company's performance such as the management structure, employee relations, as well as the company's relations with creditors, suppliers, and local communities. Furthermore, companies are not required to disclose their corporate governance structures and policies, and are not under an obligation to publish the minutes of shareholder meetings. This is notwithstanding that the Executive Regulations of the Companies Law grant any interested party the right to obtain a copy of the minutes of a shareholders' meeting from the Companies Directorate at GAFI, and grants shareholders the right to inspect the company's records and any company documents at the company's premises. As long as the disclosure of such documents is not detrimental to the company's interests. However, in practice, GAFI only grants this right to parties that are authorised from the company by way of a power of attorney.

The Companies Law does not contain language which obliges a company to make publicly available any amendments to the company charter or other constitutional documents of similar nature. Article 79 of the Executive Regulations of the Companies Law only refers to an obligation to publish the initial articles of association. Nevertheless, in practice, GAFI requires that any amendments that are made to the articles of association are published in the Companies Gazette. This obligation is clearer with respect to listed companies and is dealt with under Article 18 of the Listing Rules.

Furthermore, against good international practice, auditors are not required to submit reports on existing or predictable market risk factors. Reform would therefore be welcomed in requiring companies to publicly disclose their ownership and governance.
structures, remuneration policies, and foreseeable risk factors online or in their annual reports.

Of note is that listed companies are required by law to make publicly available information on bankruptcy proceedings.

**Responsibilities of the board**

A sound corporate governance framework should ensure: that the board fulfils its role in providing strategic guidance to the company, effectively monitors management, and that the board is accountable to the company and the shareholders. Under Egyptian law, the board is accountable to shareholders and the company, as well as responsible for any misrepresentation of company information. In addition, the board is responsible for ensuring that there is no misuse of corporate assets. However, the framework does not specifically require directors to abide by a set of clear duties and the board’s role in monitoring and effectively managing conflict of interest situations and related party transactions are often not well enforced.

The law does not require that the boards of unlisted companies have independent directors, nor does it provide a definition for ‘independent director’ or ‘board independence’. In effect, many boards are composed of family members and other insiders. Moreover, the law does not provide circumstances under which directors and officers can be found liable for a breach of duties, nor does it clearly define those duties.

A positive feature is that the law prohibits a company from making loans to any of its directors. In addition, Article 100 of the Companies Law nullifies any transactions that are concluded with another company, the board members of which are in common with the company’s board members, or if at least one of them is. Further, transactions with a company in which the other company’s shareholders own a majority shareholding are also subject to nullification.

However, there are no limitations imposed by law as to the number of board directorships that a director can hold. Although rules do exist with respect to the equal treatment of shareholders and shareholders can start derivative suits and – in theory - have the right to hold the board accountable, in practice this right is rarely exercised due to an ineffective court system.

Directors are required to obtain special authorisation from the shareholders’ meeting in order to do business in the same sector as the company, or to be a party to any contract submitted to the board for approval. It is worth noting however, that most companies appear to grant general approvals on all board actions in their annual meetings, which goes against good practice.

Boards are not required to have separate committees for dealing with issues which have a potential for conflict of interests (such as remuneration, and nomination). Further, the line between board oversight and management is not sufficiently clear. Boards perform management duties, make decisions and oversee risk management. This is compounded by the fact that Egypt applies a one tier system, rather than having a two-tier system of management where a supervisory board oversees the board’s fulfilment of its duties.

On a more positive note, audit committees in listed companies are required to include at least three non-executive board members or independent board directors. Recent reform initiatives have also mandated that insurance companies and banks have audit committees, as well as provided some guidelines with respect to independent and qualified directors. The Central Bank of Egypt has also recently issued new guidance on financial reporting which brings these standards closer to full compliance with IFRS and IAS.

Finally, the strengthening of professional requirements for board members and auditors is bound to improve the general framework by ensuring that these bodies are able to better fulfill their corporate roles.

**Highlights of the corporate governance framework in practice**

A review of the corporate governance framework is incomplete without an assessment of the effectiveness of corporate governance legislation in practice. Charts 12 and 13 below illustrate the results of an assessment of compliance with corporate governance rules in practice, based on a case study dealing with related party transactions.
Chart 12 – How the corporate governance framework works in practice in Egypt

Note: the extremity of each axis represents an ideal score: the fuller the ‘web’, the more effective the corporate governance framework.
Source: EBRD Corporate Governance Assessment 2012

Chart 12 reflects disclosure, redress and the institutional environment in Egypt. Disclosure refers to a minority shareholder’s ability to obtain information about their company. Redress refers to the remedies available to minority shareholders whose rights have been breached. Institutional environment refers to the capacity of a country’s legal framework to effectively implement and enforce corporate governance legislation. Costs refers to the estimated expenses a minority shareholder must pay to take legal action.

A general reform priority for Egypt is to improve effective implementation and enforcement of its existing legislation. The effectiveness (how the law works in practice) of corporate governance legislation was assessed by the EBRD in 2011-12, examining a case study dealing with related-party transactions. The case study investigated both the position of a minority shareholder seeking to access corporate information in order to understand if a related party transaction had been entered into by the company, and how to obtain compensation in cases where damage was suffered. Effectiveness of legislation was then measured according to four principal variables: complexity, speed, enforceability and institutional environment (See Chart 12 above). The survey revealed a variety of actions available to minority shareholders to obtain disclosure and redress but procedures were seen as complex. When considering enforceability, the procedure can be difficult and time-consuming.
When examining the institutional environment (as reflected in Chart 13), the survey identified difficulties in the availability and use of precedents with respect to corporate cases. Although the courts are deemed competent in general, knowledge and experience in corporate law cases seem to be in need of enhancement. On the other hand, the market regulator is generally regarded as efficient and redress through the regulator is preferred to that of the courts. In the current political situation it is difficult to tell whether courts or the regulator can be biased in favour of powerful defendants.

The axis entitled “Possibility for the defendant to delay the proceedings” reflects challenges related to enforcement in practice. Court procedures in Egypt are generally described as a slow and inefficient form of shareholder redress where it is easy for defendants to prolong litigation procedures. As a result, court litigation tends to be avoided as much as possible when settling corporate disputes. Instead, participants are typically advised to recourse to the regulator first.

Both the Companies Law and the Capital Market Law specify sanctions for certain breaches of corporate governance rules. In addition, the securities market regulator can intervene on behalf of shareholders in corporate disputes in certain circumstances. Nevertheless, it has been reported that a significant percentage of corporate governance law has not been tested in courts and that there is no sufficient case law to provide a predictable interpretation of corporate governance regulations in the country.

Insolvency

In a nutshell...
Cumbersome court procedures render the liquidation of unviable businesses a lengthy and complex process. An assessment of the law on the books showed no real means for effective reorganisation of viable businesses owing to a number of factors including to the inability of the existing compromise procedures to bind secured creditors.

Introduction and overview
This section contains an overview of bankruptcy proceedings in Egypt and related key issues. Bankruptcy proceedings are mainly regulated by Chapter V of the Code of Commerce No. 17 of 1999 (the Bankruptcy Law), with some additional bankruptcy related provisions contained in the Civil Code. Law No. 120 of 2008 establishing the Economic Courts granted these courts exclusive jurisdiction to hear bankruptcy claims. The initial review conducted by the EBRD has focused upon interpretation of existing Egyptian insolvency legislative texts and analysis of commentary from leading Egyptian legal practitioners on insolvency.

The Bankruptcy Law applies to traders, which by definition are any persons or entities that are required to hold commercial records. The Bankruptcy Law defines bankruptcy to be the situation whereby a trader stops paying his commercial debts and such default stems from financial distress. A trader must file for bankruptcy within 15 days from the date of “suspension of payments”. In addition, creditors with verified debts and the office of the general prosecution are able to file for bankruptcy, and a court may declare the bankruptcy of a trader of its own initiative.

The Bankruptcy Law applies to traders. However, the Bankruptcy Law also offers two potential settlement mechanisms, both attainable only through court. One is a pre-bankruptcy compromise procedure, which can be requested by a sufficiently solvent trader, who has not yet been declared bankrupt, and the other is a post-bankruptcy compromise procedure, which is available to a trader who has been declared bankrupt. Further details on both compromise procedures are set out below.

Once a bankruptcy judgment is entered, a general moratorium arises and creditors may not file individual claims against the bankruptcy estate to recover amounts owed to them by the debtor. Any proceedings commenced prior to the declaration of bankruptcy will be suspended. Secured creditors may enforce their security notwithstanding the moratorium. However, out-of-court realisation of assets is explicitly prohibited under Egyptian law. As a general rule enforcement of security must take place through a court supervised mandatory sale process.

Our review has highlighted a number of areas in the Egyptian bankruptcy regime, which may benefit from reform. The present framework does not offer an effective means for reorganisation of the debtor’s business and its survival as a going concern. The existing compromise procedures expressly provide for the ability of a debtor and creditors to agree an extension in repayment terms and/or to reduce the level of debt. However, the law does not restrict the creditors from agreeing to other settlement terms with the debtor.

In order to prevent any premature division of the bankrupt’s estate, creditor actions to enforce their rights or remedies against the debtor’s assets should be suspended once compromise proceedings have been commenced, until a final compromise is reached. Under the Bankruptcy Law, neither compromise procedure results in a moratorium on enforcement by secured creditors, nor is either of the two procedures binding on secured creditors in respect of their secured debts.

Secured creditors would have to relinquish their security in order to be able to vote in the compromise, which is highly unlikely to occur in practice. The compromise procedures are highly court-driven and widely publicised, factors which may further undermine the prospect of economic survival of a business. As a result of all of these issues, compromises in bankruptcy are rarely used in practice.

The existing bankruptcy law framework is designed to apply to the bankruptcy of a trader. Although the Bankruptcy Law contains a few provisions that deal with the bankruptcy of companies, these are by no means comprehensive. Many provisions are outdated and reflect times when business models were not as diverse. The drafting of the Bankruptcy Law centres on the model of the individual shop owner, with some ancillary provisions dealing with corporate entities.

Upon declaration of bankruptcy, debtors are penalised by loss of some political and commercial rights and may be imprisoned. The Bankruptcy Law also fines debtors whom the court determines to have “faked bankruptcy”. A bounced cheque in Egypt may result in a prison sentence and/or a fine.

Egyptian law applies the so-called “suspension of payments test”. If a definite date for the suspension of payments cannot be proved, the court sets a provisional date for the suspension of payments,
based upon available evidence. Determining the date for the suspension of payments is critical because this defines the suspect period during which the validity of some of the debtor’s transactions could be challenged under the Bankruptcy Law. The suspect period is defined as starting from the date of the debtor’s inability to meet his financial obligations (as evidenced by the suspension of payments) up until the date when bankruptcy is declared. By law, the date of suspension of payments may go back to a date occurring up to two years prior to the date of the bankruptcy judgment. If the court does not specify a suspension of payments date in its judgment, the bankruptcy judgment itself becomes the “provisional date”, thereby reducing significantly the ability of challenging any past actions by the debtor.

The following acts will be automatically invalid if undertaken during the suspect period:

- gifts and charity
- early resettlement of debts or payment of immature financial instruments
- resettlement of mature debts in a manner different to the debt agreement
- mortgages or security agreements that are created over the debtor’s assets to secure a debt that precedes the taking of security.

Formal proceedings

This section provides further information on the main formal proceedings available under the Bankruptcy Law.

Liquidation

A debtor’s filing for bankruptcy must include, inter alia, a comprehensive list comprising the names and addresses of all creditors as well as the value of their claims and any related security interests. A debtor who in bad faith fails to list all of his creditors in his filing for bankruptcy may be subject to a minimum period of six months’ imprisonment.

Once bankruptcy is filed, the court appoints a bankruptcy trustee and a bankruptcy judge. The trustee must then publicise the bankruptcy judgment and amend the date of suspension of payments in the commercial registry. A general notice is sent to all identified creditors asking the latter to submit their claims. Following this notice, the trustee compiles a list of creditors. Secured creditors are not entered into this group, except with respect to the unsecured portion of their debts. However, notice is sent to secured creditors so that they may commence enforcement procedures. As mentioned above as a general rule, enforcement of security must take place through a court supervised mandatory sale proceeding. However, the bankruptcy trustee may be able to restrict a secured creditor’s exercise of its enforcement rights in bankruptcy by selling the business as a going concern.

Once a bankruptcy judgment has been entered, the bankrupt is no longer entitled to manage his finances or the finances of others. The bankruptcy judgment accelerates all of the debtor’s financial debts and the debtor is no longer allowed to make any payments. The bankruptcy judge instructs the courts in the districts where the debtor has assets to seal those assets. Exceptions may be granted in respect of equipment that is necessary for the continuation of business (subject to the issue of an order of continuation). If an order of continuation of business is issued, the judge will appoint a person to carry on management of the business under the supervision of the bankruptcy trustee.

The Bankruptcy Law grants the court the right to place an individual debtor into custody or prevent him from leaving the country if this is requested by the bankruptcy judge, trustee, observer, or the general prosecution. A bankrupt person may not be absent from his residence without first informing the trustee, and may not change his address without the consent of the bankruptcy judge. An individual trader who has been declared bankrupt may not vote in elections, or be a member of any parliamentary or municipal councils, chambers of commerce, industrial chambers, or professional syndicates. A bankrupt individual may also not serve as manager or board member in any company or practice banking activities, commercial agency, brokerage, securities trade, export, import, or public auction sales. These restrictions will apply until the bankrupt person is rehabilitated in accordance with the provisions of commercial rehabilitation in the Code of Commerce.

Pre-bankruptcy compromise procedure

The pre-bankruptcy compromise procedure is intended to prevent a declaration of bankruptcy. It expressly provides for settlement by way of a reduction in the level of debt and/or the rescheduling of payment terms. A debtor may file for this procedure before court if its business is distressed to the extent it is feared that a state of suspension of payments might occur. A debtor who has actually suspended payment may also apply for the pre-bankruptcy compromise if it files a request within 15 days from the date of suspension of payments, even if it has simultaneously filed for bankruptcy.

A bankruptcy claim will be suspended until a decision is reached with respect to the pre-bankruptcy compromise. Once the compromise proceedings have commenced the debtor may not, without permission from the judge, enter into any other agreements, create mortgages or security interests of any type, or conclude any transactions involving the transfer or disposal of his property which are not necessary for day-to-day business. The debtor may otherwise continue managing his business under the supervision of the compromise trustee. The court will decline a pre-bankruptcy compromise request if the person filing the request has been convicted of a
bankruptcy offence such as fraud, bounced cheques, forgery, theft, embezzlement or breach of trust. Commencement of the pre-bankruptcy compromise procedure results in the suspension of all claims and enforcement measures against the debtor. Secured creditors do not participate in the pre-bankruptcy procedure in respect of the secured portion of their debts and are able to enforce their security. A compromise can be reached through the approval of a two-thirds majority of the creditors who have been called to attend the proceedings. Once rendered, a pre-bankruptcy compromise judgment is binding on all ordinary creditors, whether or not they have participated in the compromise procedure. This excludes secured creditors and those with special privileges unless they have chosen to participate in the procedure and in the case of secured creditors in respect of any secured portion of their debts, relinquished any security.

Post-bankruptcy compromise procedure
The post-bankruptcy compromise procedure is intended to allow the bankrupt debtor to exit the state of bankruptcy. Following a declaration of bankruptcy, the debtor may request the court to open this compromise procedure. Once such a request is made, the bankruptcy judge calls creditors whose claims have been accepted, whether finally or provisionally, to attend the compromise deliberations. As for the pre-bankruptcy compromise procedure, it explicitly provides for securing the agreement of creditors to a reduction and/or rescheduling of the debt. Secured creditors cannot participate with respect to their secured debt. A compromise can be reached through the approval of a two-thirds majority of the creditors who have been called to attend the proceedings. The post-bankruptcy compromise procedure is not available for a debtor who has been convicted of a charge of bankruptcy fraud. In the event the debtor is under investigation for such a claim, proceedings will be suspended until a judgment is entered. A final decision on the post-bankruptcy compromise procedure can be voided if the debtor is later convicted of bankruptcy fraud.

Participating creditors are allowed to object to the compromise for cause within 10 days from the date of signing of the compromise record by all relevant parties. However, the court may refuse to certify the compromise record even if no objections have been presented on grounds of public interest or in the interests of the creditors.

The compromise decision is binding on all creditors who are subject to its terms (for example, all creditors other than secured creditors in respect of the secured portions of their debts) even if they have not participated in the proceedings, or if they have participated and objected to the compromise terms.

Registration of the compromise decision in notary public offices results in the creation of a security interest over the debtor’s real estate property in favour of the creditors, who benefit from the compromise decision. Registration of the compromise decision on the commercial register(s) where the debtor’s business is listed similarly results in the creation of a mortgage over the debtor’s enterprise.

A state of “union of creditors” automatically occurs if the post-bankruptcy compromise procedure fails, is not used, or if the compromise decision is later annulled. Under this state of union, all creditors will be brought together to commence sale proceedings. Secured creditors are allowed to participate in the state of union and the union trustee may not continue running the business of the bankrupt debtor without receiving the support of two-thirds of creditors by value and the consent of the judge. The state of union of creditors ceases to exist once the final account is endorsed.

Commercial rehabilitation
With the exception of cases of bankruptcy fraud, the Commercial Code provides for the automatic rehabilitation of the debtor’s political and commercial rights on the date failing three years after the date of the end of the state of bankruptcy.43

In addition, the debtor may be rehabilitated at an earlier date subject to obtaining a court ruling of rehabilitation in certain circumstances, including the debtor fully implementing a compromise procedure with creditors, or being discharged from his payment obligations by all creditors.

Rehabilitation may be ordered where the debtor has paid all of his debts, and interest up to two years, if the debtor enters into settlement with his creditors and implements the settlement terms, or if he is discharged of all his debts and all of his creditors agree to the rehabilitation.

A debtor convicted of negligence with respect to the bankruptcy may not be rehabilitated, except after fulfilling the term of any applied penalty, or after being pardoned. In either case he must have settled all of his debts.

The debtor files a request for rehabilitation through the court, which then publishes this request. Creditors who have not been paid have the right to object to the rehabilitation within 30 days from the date of publication of the request. A hearing is then set to hear any objections. If the court declines rehabilitation, a new request may not be filed until one year has passed. If after issuance of the rehabilitation judgment the debtor is found guilty of a bankruptcy crime, the rehabilitation judgment will be considered void.
Bankruptcy of companies

Provisions which apply specifically to the bankruptcy of companies can be found in the Bankruptcy Law at Article 698 onwards. The rules are similar to those of general bankruptcy applying to traders with some minor variations. The legal representative of a company may only file for bankruptcy upon obtaining approval from the majority of shareholders/the general assembly. Partners/shareholders are not allowed to file for the bankruptcy of the company independently in their personal capacity, unless they are also creditors of the company. If a company is declared bankrupt, all jointly liable partners will also be declared bankrupt, including those who left the company after the cessation of payments up to a year following their departure.

A significant difference to trader bankruptcy described above is that the court may, upon a request by the company, or of its own accord, postpone hearing the bankruptcy claim for up to three months if it seems possible that the company may receive the required financial support or for reasons of the national economy. The court may also order measures to preserve the company’s assets.

Priority of claims

In general, the Civil Code regulates the priority of claims generally. The Code of Commerce does not provide specifically for priority in bankruptcy. The following claims are accorded priority status in order of importance:

- Judicial expenses and public treasury claims including taxes (incurred up to two years prior to bankruptcy).
- General privileges including wages and salaries.
- Rent and retail claims.
- Special Privileges, including liens for the price of sold property, and architect, contractor, and engineer liens.
Judicial capacity

In a nutshell...
The assessment of the court systems in Egypt revealed low efficiency and lack of resources, in addition to lengthy procedures. Further, a complex and costly enforcement system compounds the situation. Although there have been initiatives for the training of judges and court personnel on commercial law matters, such training has not been applied on a wide enough scale yet. Independence of the judiciary is a matter that is under scrutiny in Egypt at the moment.

Background

The Egyptian judiciary has a long and proud tradition, and is considered a regional leader in jurisprudence. Structurally, the court system reflects the strict division between public and private law in Egypt, and is itself divided into civil courts, with general jurisdiction over civil and commercial matters, and administrative courts (known collectively as the State Council). State Council courts decide disputes involving government entities acting in their administrative capacity. However, commercial agreements to which government bodies are party are heard by the civil courts. The civil stream of the court system has three levels; courts of first instance, which are located across the country; courts of appeal, which sit only in the larger cities; and the Court of Cassation in Cairo. At the apex of the civil and administrative streams sits the Supreme Constitutional Court, which is the highest judicial power in Egypt.

Economic circuits

In 2008, a system of specialised economic circuits was introduced into the hierarchy of the civil courts providing two levels of litigation, first instance and appeals. The objective was to refer commercial matters and certain cases of an economic nature to specialised court where the judges would enjoy focused expertise. The economic circuits review cases falling under a collection of laws, which regulate commercial and financial matters including inter alia banking, bankruptcy, competition and consumer protection, capital markets, mortgage financing, intellectual property, insurance, and telecommunications. These courts have exclusive jurisdiction to hear both civil and criminal cases arising out of the outlined commercial laws. Judges in the economic circuits are expected to develop skills in economic matters in general rather than specialise in one specific area of commercial law.

The law establishes a preparation office (the “office”) within each economic circuit. The role of the office is to examine case documents and ensure that they are comprehensive and ready for review by a judge. The office then prepares memoranda summarising the claims and defences submitted by both claimant and defendant in each case.

In addition, the office is required to exert its utmost efforts in seeking conciliation between claimants and defendants. In this respect, the operations of the office constitute a form of court-sponsored mediation. If the conciliation efforts are successful, the office must prepare a settlement report that is signed by both claimant and defendant. The report is then submitted to the competent court, along with an attachment of all case related documents. Although the procedure would constitute a commendable alternative dispute resolution mechanism, in practice it has been reported that this function of the preparation office has not been activated yet.

In the few years since their establishment in 2008, economic courts have been reported to improve the efficiency with which commercial matters are heard before courts, and they have gained a reasonably good reputation, in comparison to the ordinary courts. Nevertheless, the functioning of these and other courts in Egypt remains beset by challenges. At the forefront of these are lengthy litigation procedures, case backlogs, management inefficiency, lack of specialisation of judges, and ineffective enforcement mechanisms.

Speed of justice

Litigation proceedings are notoriously lengthy in Egypt. Although the average time between filing a lawsuit and commencing trial proceedings is usually a few months, it can take several years until a final and enforceable judgement is obtained. In recent years, the typical length of time for a matter to be dealt with in the economic circuits has decreased somewhat, however, frustration continues to be expressed with the speed of justice. Some delays can be attributed to the fact that there are separate procedural regimes for the different streams and courts, and a unified set of provisions for all courts could save time. In respects, the courts’ jurisdiction is simply too wide. Some claims, which are closer to being administrative matters, would be better dealt with by special administrative bodies rather than by courts. For instance lawsuits that are initiated to verify the authenticity of real estate sale contracts would be better handled by the notary offices. The same applies to signature verification cases in connection to real estate agreements.

A related problem is that government entities have limited ability to settle disputes. Further, out of fear
of administrative liability, government officials tend to prefer handling a claim that has been brought against the entity in court rather than settling the dispute amicably. This is sometimes the case even if a court settlement has the potential of subjecting the entity to a greater amount in damages than that which could have otherwise been paid in out-of-court settlement.

Furthermore, the Egyptian litigation system follows a traditional civil law model, under which judges do not enjoy significant rule-making powers that allow them to make decisions which have the potential effect of improving pre-trial and trial procedures. Although an abuse of judicial process such as bringing a claim for no good reason can constitute a ground for compensation, in practice, the lack of real mechanisms for the elimination of frivolous litigation at an early stage has been cited as a contributing cause to the court system being overloaded with cases. Judges would therefore benefit from having more discretion in dismissing frivolous claims. In an attempt to deal with this problem, court costs were raised in 2009. However, this has also had the effect of increasing the overall cost of litigation.

**Impartiality and transparency**

Another significant issue that remains is the independence of the judiciary. Whilst formally independent under the Egyptian constitution, concerns persist about the extent of executive interference in judicial decision-making.

There is no system in place to effectively monitor the actions of court employees. As a result, irregular payments to court clerks are not uncommon. This is also the case because despite efforts to maintain reasonable judicial and court personnel salaries, the government has not been able to accomplish this objective, specifically with regards to support personnel. Further, a more transparent process of allocating cases to judges is currently lacking.

**Education/lack of specialisation**

Despite the establishment of the economic circuits, concerns persist about judicial education and specialisation. The Judicial Authority Law states that for a qualified holder of a law degree to be appointed as judge in the primary courts (which is the first level of litigation in Egypt) they must have reached 30 years of age, and satisfied some other professional and/or academic calibre in legal or judicial practice. Candidates from the general prosecution office and other judicial bodies such as the State Council, the government disputes division and the administrative prosecution office are, upon graduation, appointed to these bodies through a process which involves personal interviews. The law provides for additional routes which individuals could, in theory, take in order to qualify as judge. These include private practice for at least nine years, including four years of representing clients before the Courts of Appeals. In addition, academics in recognised Egyptian law faculties may apply to become judges if they have served in their positions for a similar period. Nevertheless, although the law provides for these alternative methods, most candidates start their careers by spending a significant number of years working in the general prosecution office or one of the other judicial bodies.

The result is that they gain solid expertise in criminal and administrative law matters but often lack experience with respect to commercial law. The Cairo National Centre for Judicial Studies was one of the leading judicial training institutions to be established in the region. Nevertheless, effective systems for initial and ongoing judicial training and education still seem to be lacking and greater focus on practical commercial knowledge and financial literacy is required. In this respect, qualifying judicial exams could facilitate a more objective, transparent and effective judicial selection process. In addition, court employees and administrative staff require training in managerial, financial and administrative skills. For instance, courts in Egypt refer technical questions in a dispute to experts who are government employees appointed with the Ministry of Justice. Establishing a mechanism which ensures the appointment of qualified technical experts is another area which requires improvement. Experts who deal specifically with cases that are referred to the economic courts also require additional training in commercial matters such as insolvency and intellectual property.

**Enforcement**

Enforcement is another issue which requires serious consideration in Egypt. It is not uncommon to experience ambiguities in a court decision which lead to the hindering of quick enforcement. Further, complicated procedures and poor drafting sometimes lead to an even slower enforcement mechanism. In order to overcome any such ambiguities or to request clarification or rectification of any drafting errors, a new lawsuit has to be initiated. This is time consuming as it only adds to the length of an already long litigation process. Conducting training for judges could enhance the quality of judgments especially with respect to commercial law matters, and thus reduce the need for going through the lengthy procedures of rectifying/clarifying a court order. Further, it would be more effective if the correction of drafting errors and the clarification of ambiguous court orders is done through submitting a request to court rather than having to initiate separate proceedings. The court system would also benefit from setting and enforcing policies on the quality of decisions which would eliminate the need for requesting the clarification or rectification of court decisions.
A new system of enforcement was adopted in 2004 under which decisions are now referred to a single enforcement department that is located in each city’s Court of First Instance. Under the former enforcement system, each court had its own enforcement department. Although the old system had its shortcomings, the fact that each court had its own enforcement department and thus was only responsible for the enforcement of decisions that have been issued by its circuits, ensured a faster enforcement process. The current system seems to be causing further delays in the enforcement process since all cases from the city’s courts are sent to one enforcement department.

Moreover, once a judgment has been obtained, there are several ways for the party against whom the judgment is enforceable to stall the enforcement process, such as filing a contestation claim which has the potential of stopping execution for a number of months.

In general, court personnel who are vested with implementing and enforcing court decisions are in need of better training. More effective mechanisms seem to be required for the enforcement of court decisions against private parties. In addition, enforcement of court decisions against government entities is also time-consuming. In many instances the government does not have budget approval for monetary damages which further delays the process. Greater monitoring of court decision implementation is therefore required.

**Predictability/access to decisions**

In terms of predictability and public access to judicial decisions, Court of Cassation, State Council, and Supreme Constitutional Court judgments are published in the form of a selective collection of awards. Other than that, court cases and judgments are not published in periodicals or journals. Decisions are therefore not easily accessible to the public and obtaining the text of a judgment in paper form from court depends on the level of cooperation of the relevant court employee on any given day. An electronic database exists which contains legislations in the form of laws and decrees, in addition to a number of Court of Cassation, State Council, and Supreme Constitutional Court rulings. Nevertheless, the database is not entirely comprehensive and access is limited to paid registration.

The monitoring and collection of data regarding the clearance rate of cases seems to be taking place to a certain extent. The website for the Ministry of Justice contains a collection of relevant data. The published rate for cases that have been settled by the civil courts is 63 per cent for the year 2007-08. However, the basis on which such percentages have been calculated is not clear. Moreover, considering the common problem of lengthy proceedings which faces litigants before Egyptian courts suggests that the published rates may not be realistic. Moreover, the published rates relate to the overall performance of the different courts without any specification or classification on the basis of location or nature of dispute, and the website has no mention of the rates regarding cases settled by the economic courts.

**Resources**

Courts generally suffer from limited financial resources, which is evident in the quality of court premises and the lack of equipment. As a result of this under-budgeting, courts are sometimes forced to make periodic requests for supplementary funds from the Ministry of Justice. In addition, even though economic courts enjoy better equipped facilities in comparison to general jurisdiction courts, they still lack resources in terms of technological equipment.

**Arbitration**

In light of the ongoing challenges in the courts, arbitration has increasingly established itself as being the most common alternative dispute resolution method for commercial agreements in Egypt. The Egyptian Arbitration Law No. 27 of 1994 mainly draws on the UNCITRAL Model Law, and it applies to both domestic and international disputes. Parties to a contract are free to agree on the governing law and jurisdiction, and their agreement will be upheld by courts to the extent that it does not violate public policy. Egyptian courts are therefore likely to reject jurisdiction to review a dispute that has been settled by arbitration on the merits, as long as the parties to the contract have agreed to a valid arbitration clause. Further, Egypt is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Foreign judicial awards are therefore enforceable in Egypt with a few standard exceptions.

As mentioned above, special preparation offices situated within the economic courts are obligated to “exert their utmost efforts” in seeking conciliation between litigants. However, the function of the special offices as conciliators has not been tested in practice yet. The use of mediation and conciliation thus remains in need of further development.

**Costs**

Court fees may be substantial (generally calculated at an average of 7.5 per cent of the case value). In addition a 2.5 per cent enforcement fee is applied and an interest rate of 4 per cent may apply in the event that the party against whom the costs have been awarded fails to pay or object within the specified time period.
Secured transactions

In a nutshell...

At present the legal regime for secured transactions in Egypt is too limited in the type of collateral that borrowers can offer. The EBRD’s assessment of the secured lending framework highlighted challenges in relation to the registration and enforcement of collateral. Reform is particularly needed with respect to the land registration system where it appears that most real estate property is not duly registered. In addition, the current regime for the grant of security over movable assets has been found to be significantly restrictive. A key drawback of the overall framework is that the enforcement of security can only be achieved through a heavily supervised, lengthy and costly court procedure.

Overview

One of the key challenges which has been identified in assessing the legislative framework for secured lending in Egypt is the lack of a set of unified rules for taking and registering non-possessory collateral over movable property. For instance, the rules governing the grant of movable security in Egypt are currently scattered in provisions under the Civil Code, the Commercial Code, and the 1940 Law for the Sale and Mortgage of Commercial Enterprises (“the fonds de commerce law”). For real estate collateral, the Civil Code is the main governing legislative text. In addition, a Real Estate Finance Law which was issued in 2001 governs situations where the property in question is given as collateral for the financing of its purchase.

The problem seems to lie not only in the fact that many of these legislative texts are outdated when compared to modern secured transaction trends, but even in instances where a relatively modern piece of legislation has been adopted, such as in the case of the 2001 Real Estate Financing Law, the lack of implementing policy and institutional capacity to enforce the law renders the overall framework inefficient in practice. This is in addition to ambiguities in the text of the law which render application more difficult and so deters market participants from using this type of financing.

Despite a slight cultural shift in the last decade towards lending against future earnings rather than fixed assets, credit is still largely reliable on heavy collateralisation. Legal reform would especially be welcomed where it makes possible greater access to finance by small and medium-sized enterprises (SMEs) by allowing them to offer a wide variety of their movable assets (tangible and intangible) as collateral. The registration and enforcement of security constitute further challenges to the effectiveness of the credit system. For instance, while real estate notary offices are available throughout the country, the vast majority of real estate property is reportedly not registered. As a result, establishing land ownership is uncertain, and entails significant costs and time delays before a mortgage may be registered. Enforcement may only be achieved through a heavily supervised court procedure and any agreement that is deemed, in effect, to have purported to use out-of-court enforcement is considered void under Egyptian law.

An assessment by the EBRD evaluated the Egyptian legal framework for secured transactions against the following benchmarks: the EBRD Core Principles for a Secured Transactions Law (movables), the EBRD Core Principles for Mortgage Law, and the EBRD Guiding Principles for the Registration of Security Interests. The following section of the report examines the rules governing secured lending in Egypt in further detail.

Security over immovable property

Fundamentals

The main objective of a legal framework for security in immovable property (mortgages) is that it leads to a reduction in the risk of giving credit, and an increased availability of credit on improved terms. The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the mortgage from the use of his property. A general description of debts and obligations should be permitted in collateral agreements, so that all types of obligations and debts can be secured by stating a maximum amount rather than a specific amount between the parties.

An assessment of the legal framework governing the granting of security over real estate in Egypt shows some strengths and weaknesses in the system. To a certain extent, the legislative framework allows for some liberty in negotiating mortgage agreements. A mortgage can be created to secure a conditional, future, or potential debt, as long as the mortgage agreement specifies the amount of the secured debt or the maximum limit which the debt can reach.

Under Egyptian law, the mortgaged property must be clearly and specifically defined in terms of nature and location. The law provides that such specification must be contained either in the mortgage agreement or in a separate agreement. Unless otherwise agreed, a real estate mortgage includes any annexes to the property, including any rights of easement, fixations, improvements, or erections that are likely to increase the value of the property.
One of the pillars of a modern and efficient secured lending regime is that the rules that determine the relative rights among conflicting claims against property are made sufficiently clear. Egyptian law recognises the concept of first rank and second rank mortgages. The first creditor to register a mortgage over a real estate asset becomes a first rank creditor. The second creditor to register a mortgage becomes a second rank creditor. The Civil Code also allows creditors to subordinate their mortgage ranks to other creditors and contractual subordination is common practice in Egypt. Any transfer of a secured right, assignment, novation, or mortgage subordination will only be valid if annotated in the margin of the original mortgage registration.

In Egypt, a mortgagee may, at any time during the life of the mortgage, request a judge to issue an injunction to stop any act, or order measures that are necessary to stop any losses to the secured asset or the security interest. In the event that time is of the essence, the mortgagee may take any necessary provisional measures to protect its security and then settle the expenses from the security. However, whether this is attainable within a suitable timeframe and thus, how effective it is in practice are areas for further consideration.

The position against which the creditor most wants protection is the bankruptcy or insolvency of the debtor. The mortgage should continue to be effective and enforceable after the bankruptcy or insolvency of the debtor. Any reduction of rights or dilution of priority upon bankruptcy or insolvency will reduce the value of security. The validity of the mortgage should not be affected by insolvency (with the exception of fraudulent or preferential transactions or those carried out in the suspect period, but the same rules should apply as for other pre-insolvency transactions). However, Egypt prioritises public policy exceptions over creditors’ rights, including secured creditors. Public policy exceptions include statutory claims such as bankruptcy costs, employee wages, and rent.

Chart 14 below reflects the results of an assessment of the governing legal framework for the grant and enforcement of immovable security in Egypt against international best practices.

Note: The extremity of each axis represents an ideal score, that is, as measured against harmonised international standards (such as the EBRD Core Principles for a Mortgage Law), and best practice. The fuller the ‘web’, the more closely the laws and practice governing the grant of real estate mortgages in the country approximate these standards.

Source: EBRD 2012 Secured Transactions Assessment

**Creation and registration of mortgages**

In an efficient market for secured lending, the costs of taking, maintaining and enforcing a mortgage should be low. This is because a mortgage creditor will typically ensure that all costs connected with the mortgage are passed on to the debtor. High costs of the creation of the mortgage (including registration)
increase the cost of borrowing and thus diminish the efficiency of the secured credit market. In addition, enforcement costs will reduce the proceeds on realisation and will influence a mortgage lender’s assessment of the value of his security. Simple and fast procedures for creating and enforcing mortgages thus help in reducing the overall costs. The costs associated with the creation, registration and enforcement of mortgages in Egypt are significantly high. Together these three factors form the main challenges to a more efficient secured transactions regime in the country.

A robust mortgage law should also ensure an effective means of publicising the existence of the mortgage. Registration is therefore needed to ensure that a third party can be alerted to the existence of the mortgage. When taking a mortgage the creditor will want to discover whether any pre-existing mortgages have a prior claim. The creditor will also want to make sure that anyone subsequently claiming a right in the property is made aware of the creditor’s existing claim. Without a reliable system for publicity a creditor is unlikely to have sufficient certainty in his rights in the mortgaged property.

In Egypt, a mortgage is not enforceable vis-à-vis a third party unless it is registered before the third party has established any rights over the property. In line with good international standards, the priority of a mortgage is calculated from the time of its registration, even if the secured debt is conditional, future or potential. However, the fact that the majority of real estate property is not formally registered in Egypt results in complicated, lengthy and expensive registry searches. This is because many times, before a creditor will be able to perfect their security, the property itself will have to be registered. In practice, this is usually overcome by the creditor’s request of a power of attorney from the debtor that allows the former to prefect the security by registering the property. An alternative route is to make the loan agreement conditional on successful registration. These techniques however still render the registration process even more burdensome, time-consuming, and expensive. It only shows that market participants are in practice attempting to bridge a gap that is caused by ineffective legislation. Further, it does not solve the problem of registry searches being overly complicated. The framework would therefore benefit from introducing a centralised electronic cadastre or land registration system that is searchable on line and accessible to the public.

Enforcement of real estate security If the secured debt is not paid the mortgage creditor should be able to have the mortgaged property realised and to have the proceeds applied towards satisfaction of his claim prior to other creditors. In addition, a creditor needs to be able to realise the property rapidly, as delays in realisation are likely to be a source of uncertainty and cost.

In Egypt, the enforcement and collection of debts upon defaulted loans is a major weakness in the system. In general, enforcement must be conducted through a court supervised procedure and is a very slow process. Part of the enforcement process involves commencing a court supervised mandatory sale through public auction, which is regulated in detail under the provisions of the Civil and Commercial Proceeding Code. The court appoints valuation experts who set the price and then if the asset cannot be sold for that price the whole procedure must commence from the beginning. Any agreement the effect of which is to directly grant the creditor the right to own the secured property in an event of default, or to have the right to sell the security outside of the formal procedures that are set out by the law, is considered null and void. This effectively bars any possibility for out-of-court enforcement.

Furthermore, creditors have almost no control over enforcement, and are - in effect - not protected against a mortgagor’s obstruction in enforcement. This is highlighted by the mortgagor’s ability to delay the proceedings by submitting (sometimes frivolous) objections at several stages of the enforcement process. The court’s response to these objections is usually to place the enforcement process on hold until the mortgagor’s claims are examined. If it is proven that the purpose of the mortgagor’s claims were merely to delay enforcement, the judge may impose a fine on the mortgagor. However, such a fine is so negligible in value that in fact mortgagors normally tend to make all types of claims they possibly can in order to delay the enforcement process.

Of note is that the enforcement process more or less remains the same whether the real estate property is commercial or residential.

Land development

A robust collateral law would ensure the automatic inclusion within the mortgaged property of subsequent constructions on and additions to the mortgaged property. In Egypt a real estate mortgage by default includes any annexes to the property, including any rights of easement, fixations, improvements, or erections that are likely to increase the value of the property.

The law should also ensure flexibility with respect to releasing some units (flats) in the developed building over which the mortgage is extended in order to sell
them free of mortgage while preserving the mortgage over the rest of the property. This is available under Egyptian law as long as the mortgagor enters into a release agreement with the mortgagor with respect to the properties which are to be released. The release agreement must then be registered in the notary public office (by way of an annotation in the record), while the rest of the mortgaged property will remain mortgaged in favour of the mortgagee.

Corporate finance

This category measures the regime in terms of allowing the flexible use of credit in corporate financing. As can be seen from Chart 14 above, the rules most prominent to corporate financing in Egypt permit for the subordination of loans as the Civil Code recognises the concepts of first rank and second rank mortgages. This broadens the types of credit arrangements that are available for corporations. Further, the contractual subordination of debt is possible and common in Egypt through inter-creditor agreements.

On the books, the registration of a transferred security claim is unnecessary as according to the Civil Law the assignment of a right comprises its warranties such as securities and privileges. However, in practice the transferee is advised to ensure that the security interest that was registered in the name of the transferor has in fact been transferred to their name in the designated registry (by way of an annotation in the registry).

Finally, although the mortgagor has the original right to receive and collect rent from the secured property, that is, the mortgagee does not have an automatic right to satisfy its claim directly from the rent; it is still possible that the mortgagor assigns its right in rent to the mortgagee so that the mortgagee will be able to collect. The rent assignment will however be a separate arrangement from the mortgage agreement.

Security over movable property

Fundamentals

Land has always been regarded as the most valuable and reliable form of collateral. However, most individuals and small and medium-sized enterprises (SMEs) do not own land or do not have sufficient land available to provide as security. They however tend to own movable property and this is the reason why secured lending over movable assets is important and should be encouraged. The most significant setback in the legislative framework for the grant of security over movable property in Egypt is the lack of a possibility to take non-possessory pledges over movable property, except in the form of a pledge of the enterprise (“fonds de commerce”). A legislative framework which does not provide the legal means by which a security right can be taken by a creditor over a person’s movable assets without requiring the pledgor to transfer possession of the assets to the pledgee or a third party significantly hinders the development of the SME lending market.

In Egypt a security over movables has to either be in the form of a possessory charge over the assets, where the lender or a custodian takes possession of the movables; or if the debtor is a commercial entity, then a charge over the whole enterprise. Even in a charge over the enterprise, a high degree of formality effectively hinders the granting of security.

A modern and effective secured lending regime will typically enable the availability of security over all types of assets, to secure all types of debts, and between all types of persons. The types of assets which can be granted in a charge over the enterprise in Egypt are restricted. According to the fonds de commerce law⁴⁹, collateral has to be specifically defined and cannot be described in general terms. A charge over the enterprise may only cover the trade name of the enterprise; leasing or similar rights relating to real property; ‘goodwill’ of the enterprise (for example, the right to acquire and contact clients); trademarks; licenses and permits related to the enterprise; and movables, including furniture, furnishings, and equipment related to the activities of the enterprise. Although this covers a fairly wide range of security types, it would have been better if the law had not limited the available forms of security in this manner and rather left the door open to the possible emergence of new types of security in the future.

Moreover, although the fonds de commerce law in effect allows for a pledge over a fluctuating pool of assets and a third party is able to determine whether property is encumbered, the law restricts the nature of the creditor who can benefit from that type of security. A pledge over the enterprise may only be granted in favour of licensed banks and international financial institutions. The law also effectively restricts the type of debtors who can benefit from a non-possessory charge over movable assets to commercial enterprises, which means that individuals are not able to benefit from this type of security.

Chart 15 below reflects the results of the EBRD’s assessment of the legal framework governing the grant of security in non-possessory movable assets in Egypt.
Chart 15 – Quality of the legal framework governing the grant of non-possessory security in movables in Egypt

Note: The extremity of each axis represents an ideal score, that is, as measured against harmonised international standards and best practice. The fuller the ‘web’, the more closely the laws and practice governing the grant of non-possessory security in movable property in the country approximate these standards.

Source: EBRD 2011 Secured Transactions Assessment

Creation and registration of security in movable assets

Where security is possessory the mere fact that the assets are held by the creditor is enough to alert third parties that the debtor has charged them. However, where security is non-possessory a publication (registration or notification) system is needed to ensure that third parties do not acquire charged assets without being made aware of the existence of the charge.

In Egypt the Code of Commerce mandates that a charge over the enterprise be registered in the chargor’s commercial register. Further, Egyptian law requires that the charge agreement includes an annex with all the assets that are subject to the charge and both the agreement along with the annexes are registered with the notary public office for banks. In addition, any real estate property that is charged under the agreement will have to be registered with the relevant real estate public notary.

Nevertheless, this data is not available online. It is critical that registration is effective in real time, and that searches reflect real, accurate and up-to-date information on security interests in movable property so that creditors can make informed financing decisions and protect their rights in the security.

Accordingly, the introduction of an electronic registry system that is indexed by the name of the borrower is bound to significantly improve data searches and save time and costs as well as provide a good basis for the evolution of the system to include any type of persons and all types of movable collateral.

Enforcement against movable security

Speedy and efficient enforcement procedures are especially important with respect to movable assets, the value of which is more likely to depreciate with time. Where a jurisdiction does not allow for out-of-court enforcement, it becomes essential that the judicial realisation process is prompt enough to permit quick recovery before any loss in the value of the property. Thus, a modern secured transactions law should at least allow for expedited judicial procedures for the enforcement of security against movable collateral.

In Egypt enforcement procedures are set out under the Civil and Commercial Proceedings Law. The creditor will have the right to initiate the enforcement process upon the occurrence of an event of default and upon providing notice to the debtor requesting the remedy of the default. There is an expedited court procedure which allows a creditor to start the realisation process more rapidly than when compared to a full court proceeding. However, once
the court order is rendered, the procedure to recover and sell the assets can still be a challenging process. Court supervised public sale proceedings apply in enforcement and the parties may not agree on any other enforcement process whether contractually or otherwise. Any attempt to enforce directly against collateral outside of court proceedings is void in Egypt. In addition, the enforcement process is considered expensive as a considerable court fee is imposed which is calculated as a percentage of the value of the claimed debt.

Of note is that banks seem to enjoy better protection and more effective enforcement mechanisms in contrast to ordinary, non-regulated creditors. For instance, in addition to the fact that only banks may benefit from taking a security over a commercial enterprise, banks are able to realise directly on a pledge of shares (by private sale), without having to resort to court supervised enforcement.

**Pledges of accounts receivable**

Achieving security over accounts receivable in Egypt is made effective by assigning the rights in the underlying claims. However, such an assignment has been used so rarely in Egypt that there is still some confusion over its operation. An assignment of receivables is structured so that the pledgor will be entitled to the proceeds as long as no event of default exists. Once an event of default occurs, the pledgee will be entitled to the proceeds. The obligor must be notified with the assignment of rights in relation to receivables and the notification must have an established date. The consent of the obligor is not required however. The assignment of receivables can be privately enforced through a sale of the receivables or by direct collection of payments upon the occurrence of an event of default. Of note is that under Egyptian law, a pledge over future assets is void, hence the pledge can only be established over the claims that already exist at the time of the creation of the pledge. Further, there is no mechanism which would allow a third party to establish whether accounts receivable have been used as collateral. The pledgee will however have to notify the obligor to cease paying the proceeds to the pledgor and start paying them to the pledgee. The involvement of the court is not required in relation to this type of security.

**Charges over bank accounts**

Under Egyptian law, a pledge over bank accounts may not – as the point is not clear beyond doubt - create an enforceable security interest because the law requires the possession of the pledged asset to be transferred to the lender or a trustee who would block the pledged assets. This may not be achieved for an account which is used by the borrower regularly. However, at least in theory, this can be achieved in the case of bank deposits. Nevertheless, it is becoming market practice for lenders to conclude a pledge of account agreement despite the legal risk.

**Pledges over shares and debt securities**

Pledges over shares and debt securities are regulated under the Commercial Code. The pledge includes the right to collect dividends for equity securities and the interest payable under debt securities in the absence of an agreement otherwise. All such periodic payments have to be set-off against the secured amount. As for the transferability of the pledged shares and debt securities, the pledgor may not dispose of them while they are pledged in favor of the pledgee. Creditors who have obtained a pledge of shares will not be deemed as shareholders in the company in which the shares have been pledged and corporate voting rights will always be vested in the owner of the shares (the pledgor).

As a general rule, the pledgee will have to enforce over the pledged shares/securities through a court supervised process. Nevertheless, the Egyptian Banking Law No. 88 of 2003 provides for facilitated procedures to enforce a pledge of shares and allows the bank to sell the shares on the Stock Exchange in the event of default.

**Charges over warehouse receipts**

There is no specific law for the regulation of warehouse receipts; rather such is regulated under the Commercial Code. Warehouses that issue negotiable warehouse receipts can only be established through obtaining a license from the relevant regulatory authority. Specific provisions exist for warehouses that are located in ports. The depositor of the goods has the right to sell or mortgage the stored goods by virtue of the warehouse receipt. The warehouse investor may also create a charge over the stored goods in favour of the depositor. A mortgage deed is annexed to the warehouse receipt to show any mortgages that have been created over the goods. Enforcement over mortgaged warehouse goods is subject to the same rules as a charge over the enterprise.

**Sale and lease-back/financial leasing**

Financial leasing is regulated in Egypt under the provisions of the Financial Leasing Law No. 95 of 1995. Only authorised financial leasing companies can undertake this form of financing. The Law mandates the registration of both financial leasing companies and financial leasing contracts that are either concluded or enforced in Egypt. Any amendments that are applied to these contracts must also be registered. A financial lessor may further register on the commercial registry and the exporters’ register.

The repossession process is relatively simple and quick for a creditor who has the license. Upon the termination of the financial lease agreement, the
lessee must vacate the leased property immediately and deliver it to the lessor (that is, the financial leasing company). In the event that the lessee refuses to hand over the leased property to the lessor upon the termination of the financial lease agreement, the latter may apply to a summary judge and request a court ordered hand-over which is, to a great extent, a straightforward process.

1 Special thanks to the law firm Sharkawy & Sarhan, who assisted the EBRD with the assessment of legislation on concessions and public private partnerships, corporate governance, judicial capacity, secured transactions and public procurement. The southern and eastern Mediterranean (SEMED) region currently includes Egypt, Jordan, Morocco and Tunisia.
2 Private Finance Initiative (PFI) is a scheme whereby a private party undertakes the financing and the construction of an infrastructure project that it then transfers to the contracting authority, which in turn provides the service or the product to end-consumers. These include the UNCITRAL Legislative Guide for Privately Financed Infrastructure.
3 Private party**: a private party or other entity in the form of a special purpose company to which a project agreement in general has been awarded. "Private sector" is defined under the Egyptian PPP law as "an Egyptian or foreign judicial person in which the Egyptian state owned shareholding is less than 20 per cent, and a consortium between two or more Egyptian or foreign judicial persons in which the state-owned shareholding is less than 20 per cent".
4 *Project agreement*: an agreement(s) between the contracting authority and the private party regulating their respective rights and obligations with respect to the PPP project.
5 *IPPP*: an institutional form of PPP which provides for cooperation between public authorities and a private party through a joint venture or mix (public- private shareholding) company, in which case all reference to the selection process refers to the selection of the private party.
6 However, the level in practice is still higher than that achieved in a comparative assessment by the three other SEMED countries.
7 GASCO is a fully owned subsidiary of EGAS and is not independent in management terms.
8 According to Decree 820/1996, concessions are issued to LDCs by EGPC but EGAS has taken over this function.
9 It is worth noting that the overall legal/regulatory risk as measured by the EBRD’s assessment ranked Morocco and Tunisia at medium risk, and Egypt in high risk category. Jordan scored the lowest risk (assessment score of 70) with Egypt the highest risk (score of 46). Please visit the link provided above for more information on the comparative results for SEMED.
10 Southern and eastern Mediterranean countries (including Egypt, Jordan, Morocco and Tunisia)
11 The term concessions, as adopted in the EBRD 2011 Legal Indicator Survey, is: "an agreement or license pursuant to which a governmental authority grants rights and agrees obligations to be undertaken in relation to the construction, refurbishment or provision of infrastructure or the exploration for and/or exploitation of natural resources (including any related treatment or transport facilities) to a private sector entity to utilise government assets in order to provide facilities or services to members of the public or otherwise".
12 For example, Law No. 155 of 1963 as amended by Law No. 172 of 2005 with regards to the concession agreement between the Egyptian General Petroleum Corporation and IPR Transoil Corporation in the Yidma/Alamein area.
13 Public-private partnerships in infrastructure, including energy, transport, municipal services, telecommunications and social services, can be defined as concessions or other contractual arrangements whereby the private sector operates, builds, manages and delivers a service for the general public typically in return for a payment. Successful PPPs combine the best the public and private sectors offer, while limiting the shortcomings of either the privatisation approach or the exclusive public sector delivery of services.
14 For example, (i) in the Criminal Code No. 58 to 1937 -- (that is, articles 103 - 111). A public official condemned in a case of bribery, can be sentenced up to 25 years life time imprisonment; and (ii) in the Civil Servants Code No. 48 to 1978 (article 78), such as the public official must carry out his job duties and orders from higher authorities thereof inconformity with the laws and regulations. Further, the public official must maintain his working hours and any other regulatory procedures specified in the law. The public official must perform his job with honesty and integrity.
15 Presidential Decree No. 2126 of1971
16 Art 11/3, Law No. 144 of1988
18 The Ministry of Investment was merged into the Ministry of Finance in 2010 and therefore no longer exists.
20 Article 7 of the Egyptian Stock Exchange Listing Rules
21 Securities arbitration awards may then be appealed before the court of appeals.
22 Including the OECD Corporate Governance Principles
23 The Companies’ Law No.15 of 1981 regulates joint stock companies, limited liability companies and partnerships limited by shares.
24 The Investment Law No. 8 of 1997 regulates tax free zones and offers income tax exemptions in specific industrial locations or economic sectors in order to stimulate investment.
25 The Public Business Sector Law No. 203 of 1991 governs the incorporation of public business sector companies.
27 The Central Depository Law No. 93 of 2000 aims at reducing risks associated with trading securities through maintaining all related registration, clearance and settlement procedures.
28 The Listing Rules were issued by EGY under Decree No. 30 of 2002.
29 Source: EBRD CG Assessment 2012. The chart reflects the results for listed companies.
Article 226 of the Companies Law Executive Regulations

See Article 41 and 44 of the Companies Law, and 196 and 197 of the Executive Regulations of the Companies Law.

At least such can be measured with respect to listed companies.

The law is silent with respect to the right of stakeholders to access corporate information.

The four key differences between EAS on the one hand, and IAS and IFRS on the other hand, have been provided in the World Bank’s 2009 Report on the Observance of Standards and Codes (ROSC); A Corporate Governance Country Assessment for the Arab Republic of Egypt. They are: (i) recognition of financial leases and the application of accounting treatments required under the relevant international standard; (ii) the re-evaluation of fixed assets, which is not allowed by Egyptian law; (iii) the accounting treatment for employee and director profit sharing, in that they are treated as dividends and not expenses; and (iv) general provisioning requirements for banks.

Even the ECGC does not contain a definition of independence.

This is with the exception of directors of credit corporations. Articles 96 of the Companies Law and 219 of the Executive Regulations thereof require that any loans that are made to directors of credit corporations are disclosed to shareholders for inspection at least five days before the convention of a general shareholders meeting.

Institutional environment refers to the capacity of the country’s legal framework to effectively implement and enforce corporate governance legislation. Statutory background relates to whether a comprehensive, clear and well-structured definition of related-party, self-interest, self-dealing or conflict of interest is provided. In particular whether this definition covers transactions in which the director or the dominant shareholder has an indirect interest. Institutional integrity refers to the level of corruption within the country, as determined by Transparency International’s Corruption Perception Index 2011. This index is measured on a scale from 1 to 10, with 1 being the most corrupt and 10 the least corrupt environment.

Article 598 of the Code of Commerce

Articles 38 and onwards of the Judicial Authority Law

Except for pledges of shares in favour of Egyptian banks.

According to the Commercial Code, the state of bankruptcy ends in one of the following ways:

Court ordered end of the state of bankruptcy upon the debtor’s request, after proving that the debtor has settled all of his debts with respect to all of the creditors;

A successful post-bankruptcy compromise procedure;

An arising of a state of ‘union of creditors’. A state of union of creditors automatically occurs if the post-bankruptcy compromise procedure fails, is not used, or if the compromise decision is later annulled; and,

Debtor’s settlement through relinquishing all or a portion of his assets for the repayment of the debts.

General Privileges are those over all of the debtor’s assets in general (whether movable or immovable).