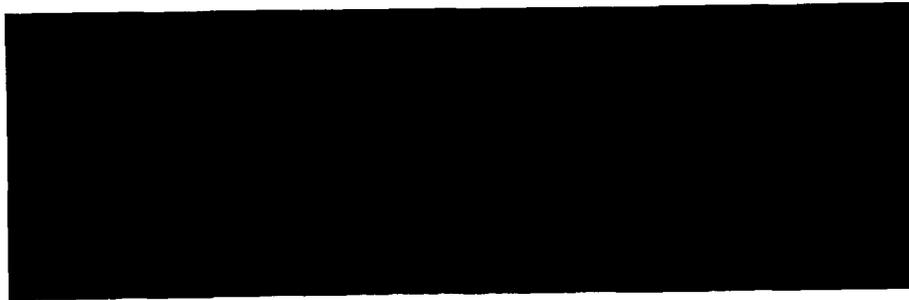


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100789



**Business Law Reform and
Alternative Dispute Resolution
Development**

Under the USAID/Madagascar Legal, Regulatory and
Judicial Reform Activity



Contrat USAID No 623-C-00-98-00029-00

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PD-ARR-254

**Madagascar Participation & Poverty (P&P) Project
Legal, Regulatory, Judicial Reform Activity**

Results-Achieved Report - 1998

Contract USAID No 623-C-00-98-00029-00
ARD, Inc and Checchi and Company Consulting, Inc

I. Points of Reference

Madagascar has its own unique legal system, based largely upon French legal antecedents. Thus, in our review and commentary on legislation and decrees drafted under the framework of the Malagasy Business Law Reform Commission (CRDA) and the Cellule technique, we have not tried to recreate the practices in France or in the United States. Rather, we attempted throughout our review of the Malagasy laws to make recommendations based on the following criteria:

A. Simplicity

An essential hallmark of an open economy, receptive to foreign investment, is the simplicity of its laws—simplicity in the sense of simple to read and understand, not overly technical, and not requiring advanced learning in the local culture. Such openness reduces the need for recourse to local professionals for a general understanding of the local legal culture. For example, in the United States many laws are simply drafted and are user-friendly laws so that consumers and the companies that must comply with those laws can understand their impact, and adapt accordingly. The same is true of foreign investment: the simpler the laws, the easier it is for a foreign investor to understand the potential risk and advantages of their investment decisions. Therefore, many of our suggestions for the laws reviewed are aimed at simplifying the text of the laws, removing unnecessary or redundant phrases, and generally making the text of the new laws more user friendly, easier to understand and easier for the local judges to apply and interpret. This should result in less uncertainty about the legal rules that apply, and therefore may remove a barrier to incoming investment.

B. Transparency

In a number of areas, we considered the importance for investors - especially foreign investors - of transparency in business practices. This is very important, for example, with respect to the procedures for the creation and public notice of liens on real and chattel property, so that banks and investors may be fully informed of all liens, rights, and other risks that may be attached to taking certain property. Only with full and complete public notice of such liens and a quick and simple way for such liens to be created and removed, will investors of all kinds feel secure in taking such property as collateral. Without this transparency, the availability of in-country financing and the creation of wealth that can result from leveraging existing assets are limited.

C Best practices

In general, we take as our benchmark the best practices that have emerged in various disciplines, and on which there is near universal acceptance. This was the case in our comments on the Corporation Law, where we were often influenced by the emerging consensus on best corporate governance practices. In such cases our comments rely on the wealth of corporate governance literature as well as on specific reports, such as the April 1998 “Report to the OECD by the Business Sector Advisory Group on Corporate Governance” and national reports such as the Cadbury report in England, the Bosch report in Australia, or the Viénot report in France. This was also the case for our comments on the Arbitration law, where we were influenced by the growing acceptance of the UNCITRAL Model Law on commercial arbitration as the international standard. Over 20 countries have adopted the UNCITRAL law as their national arbitration law over the last ten years, and the Model Law often played a significant role in national debates over arbitration law in countries, such as England, that have modified their arbitration laws to conform to modern practice.

In these examples, the extensive research and study that have gone into creating a system of best practices or a Model Law were often useful in analyzing the legal issues in the draft Madagascar laws we reviewed. The collective wisdom accumulated over the years in such debate will redound to the benefit of Madagascar. This approach creates laws that have withstood the test of time, laws that will be familiar to actors in the international community, and will therefore imbue the new laws of Madagascar with credibility and acceptance. This is extremely important in fostering investor confidence.

II. Impact of Our Recommendations

Our recommendations aim at creating a system of laws for Madagascar that is fair and simple. To the extent our recommendations are accepted we believe that the impact will be felt in Madagascar on at least two levels.

First, the people of Madagascar will have a system of laws tailored to their particular culture and experience and that reflects modern thinking on structuring commercial laws such that the operation of the economy under those laws will generate the greatest wealth in the fairest way. The entire country and all economic actors will benefit from such reform. The economic growth and the stability that can result from the modernization of the country’s laws will indirectly benefit the rest of the international community.

Second, the international community will benefit directly from an in-country investment climate that is favorable to foreign investment. Modern laws that ensure fairness to minority investors, that reduce the risk of corruption and that ensure a “level playing field” for foreign and domestic investors alike can only encourage foreign investment in Madagascar. This could take the form, for example, of private infrastructure investment, where the legal foundations for project finance (guarantees, liens, receivables financing, etc.) must meet certain minimum criteria before foreign investment will be attracted. To the extent that the modernization of the laws of Madagascar

provides a safe and secure investment environment, foreign capital may be invested to the benefit of both Madagascar and foreign investors

A Arbitration Law

Perhaps the most significant results of our review and commentary efforts to date are reflected in the changes made to the Arbitration Law. The CRDA and the Cellule technique prepared a draft law before the project began. The draft was aimed largely at domestic arbitration. It did not take into account the best practices as stated in the UNCITRAL model, and the drafters were considering drawing upon the OHADA model to introduce international arbitration into the draft. We convinced the Cellule technique that the UNCITRAL model would afford Madagascar with a better and more universally acceptable system of arbitration, and we provided suggestions and commentary on the resulting draft as it evolved. The Arbitration Law was enacted in the last session of the legislature. This law puts in place a major facilitator to foreign investment, allowing potential investors to ensure that commercial disputes arising from trade and investment in Madagascar can receive fair adjudication in a jurisdiction of their choice.

B Company and Related Laws

The CRDA and the Cellule technique had already begun consideration of the Company Law and related laws and decrees when the project began. We provided commentary on the draft Company Law, three draft laws related to the Company Law (the Tradesman's Law, the Competition Law, and the Law on the Transparency of Companies), and two draft implementing decrees (the Decree on the Legal Notice for Real Property Mortgages and the Decree on the Commercial Registry). On the Company Law, our report contained observations on the Sole Shareholder Company, the Société en Commandite par Actions (SCA), the Multiplicity of Corporate Forms, Corporate Governance, and the Form of the Text, as well as commentary on specific articles. The Company Law is still under discussion within the CRDA. If our recommendations are accepted, the final draft legislation will provide for a simple and transparent system for creating and organizing business entities in Madagascar. Such a system, if it becomes law, will benefit all businesses, and should stimulate investment from both domestic and foreign sources.

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Note The effort to modernize the laws of Madagascar is a long-term project that involves not only the laws, but also the creation of a safe and modern investment climate. The reform of the commercial laws we have examined, and will continue to examine, is an important and indispensable part of the modernization process. This process also includes training, as adopted legislation—even the most modern—will not be effective if the judges, arbitrators and other actors in the business community do not understand the changes wrought in their laws, or increased security and efficiency that can result.