



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

Under the USAID/Madagascar Legal, Regulatory and  
Judicial Reform Activity  
USAID contract No. 623-C-00-98-00029-00

**MADAGASCAR PARTICIPATION & POVERTY (P&P) PROJECT  
LEGAL, REGULATORY, JUDICIAL REFORM ACTIVITY**

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**July 1, 2000 – September 30, 2000**

**Quarterly Performance Monitoring Report  
(Ninth Quarter)**

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**MADAGASCAR PARTICIPATION & POVERTY (P&P) PROJECT  
LEGAL, REGULATORY, JUDICIAL REFORM ACTIVITY**

**Commercial Law Reform and  
Alternative Dispute Resolution Components  
Contract No. 623-C-00-98-00029-00**

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**Submitted November 14, 2000**

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# **I. CONTRACTOR'S REPORT**

## **A. NARRATIVE**

### **1. Background and Expected Results**

Please refer to the Second Annual Report, Section I, which provides descriptions of the background of this contract and USAID/Madagascar's Strategic Objectives (SOs), and the Special Program Objective (SPO) *Improved Environment for Private Initiative*, under which the ARD/Checchi contract falls. This report also details the Mission's two Intermediate Results (IRs), five Sub-Intermediate Results (Sub-IRs), and the relationship of the contract to those results.

### **2. Ninth Quarter Activities**

#### **a. Contract Modification**

ARD/Checchi and USAID/Madagascar completed negotiations on and signed a significant contract modification in July 2000. This modification:

- (1) Simplified the CLIN structure, substituting five Labor CLINs for 14 labor in the original contract;
- (2) Reallocated Levels of Effort within the Labor CLINs;
- (3) Added four Other Direct Cost (ODC) CLINs to cover offshore arbitration training, other offshore training, a grant to a national arbitration and mediation center, and the creation of a word-searchable CD-ROM compilation of Malagasy laws;
- (4) Added funding to cover the additional ODC CLINs;
- (5) Authorized the CTO to adjust costs within CLINs by up to 15%;
- (6) Broadened the definition of business laws; and
- (7) Made a number of technical adjustments.

#### **b. Secured Transaction (Sûretés) Law Reform**

During August and September 2000, international expert Martin Boodman analyzed the draft Secured Transaction (Sûretés) Law, prepared in the previous quarter by ARD/Checchi/ JURECO consultant Professor Ratiaray Ramarolanto. In mid-September Mr. Boodman provided the CRDA with detailed a commentary on the draft law, together with extensive recommendations for revisions to make the draft conform to international best practices. The ultimate goal of the adoption of a secured transactions law is to encourage commercial activity in Madagascar by facilitating access to credit through a clear and flexible legal regime for secured transactions. Mr. Boodman's report contains comments and recommendations of a general nature and those based upon a detailed analysis of each provision of the draft law.

The primary recommendation of a general nature is for the adoption of conceptual, terminological and functional uniformity as to security mechanisms in Madagascar. This entails recognition that personal security devices such as suretyship should not form part of the regime

for secured transactions that generally creates preferential real rights, i.e. rights enforceable against property by preference over non-secured creditors. By contrast, personal security mechanisms add another person as a debtor or guarantor without imposing preferred or privileged rights against the debtor's and guarantor's property. Within the draft provisions governing real security, Mr. Boodman recommended that the term "hypothec" (in French "hypothèque") be used to designate all security mechanisms other than the right of retention, reservation of ownership, leasing ("crédit-bail") and legal security ("privilèges"). There is an unnecessary multiplicity of security devices described in the draft law related to property used in or arising from a commercial or professional activity. The "hypothec" operates in the same manner for possessory and non-possessory security mechanisms for which, if necessary, there may be sub-groups with specialized rules as to their scope of application, formalities for creation and recourses. To avoid unnecessary repetition, he also recommended that the rules be consolidated through the use of general rules applicable to several or all types of security mechanisms.

Modern regimes for secured transactions in North America expressly permit and regulate security upon future property that is particularly useful in relation to inventory and accounts receivable financing. Mr. Boodman recommended that the Draft Secured Transactions Law of Madagascar be clarified as to its treatment of security on future property. He also recommended reorganizing the rules related to real security so as to begin with the basic concept of the property of a debtor being the common pledge of its creditors and then to regulate privileges and real security. The recommendations based upon a detailed analysis of each provision of the draft are too numerous to be summarized here. These recommendations were made in order to ensure internal consistency in the rules and clarity in their expression.

If accepted, the recommendations made by Mr. Boodman will advance the commercial interests of Madagascar in several respects. First, the general recommendations provide a framework for meeting international standards in relation to secured transactions law. While all aspects of a modernized secured transactions regime may not be appropriate for Madagascar, it is necessary for law reformers to be aware of North American approaches to this area of law to make an informed choice as to reform. Second, consolidation and simplification of the rules will make them more understandable to domestic and foreign users and should provide easier access to credit and related commercial activities. Third, both the general and specific recommendations may provide an example of legislative methodology that can be used in other domains. Finally, a clear and workable regime for secured transactions can be an indicator that a country is serious and committed to modernization of its financial and economic institutions.

### **c. Creation of a Word-Searchable CD-ROM Compilation of Malagasy Laws**

In August 2000, international legal information systems expert Pierre Babinsky began his assignment to create a word-searchable CD-ROM compilation of Malagasy laws. Mr. Babinsky received a copy of the non-searchable CD-ROM compilation prepared by USAID/Madagascar and analyzed the technical requirements for converting it into a word-searchable database that can be used both on a CD-ROM and on the Ministry of Justice's web site. After reviewing the existing database, he investigated a wide range of search engines and concluded that Adobe Acrobat, to be used in conjunction with Acrobat Reader, offered the best mix of capabilities, ease

of use, maintenance and updating, and cost benefit. USAID and the Ministry of Justice approved this decision. Following this decision, Mr. Babinsky converted the documents contained in the USAID compilation to Acrobat format (PDF). While the Project Manager was in Madagascar (see d, below), Mr. Babinsky also provided him with technical guidance on including additional laws (i.e., laws not contained in the USAID compilation), the production and distribution of the master version of the word-searchable CD-ROM, and the promotion of the use and sale of the CD-ROM.

Mr. Babinsky will continue and complete his assignment during the Tenth Quarter.

**d. Project Manager Visit**

Project Manager Thomas R. Reynders visited Madagascar from September 15 through October 4. During his visit, Mr. Reynders conducted the following activities:

- (1) Met with USAID, the leadership of the CRDA, the *Cellule technique*, and JURECO to discuss activities projected in the work-plan and additional possible contract activities;
- (2) Met with ENMG and ENAM leadership to define dates, curricula and trainers for planned and possible additional training activities;
- (3) Assisted CAMM Secretary General in designing and presenting a training session on arbitration to legal interns in Antananarivo under bar association auspices.
- (4) Provided support and technical assistance to the Secretary General of the CAMM in the preparation of the CAMM's grant application (see 2.a.(3), above);
- (5) Assisted the International Legal Information Expert in defining additional law texts to be included in the CD-ROM, investigated the possible inclusion of the database on the Ministry of Justice's web site, began negotiations on the production and distribution of the CD-ROM, and began the planning of promotional and training events related to the release of the CD-ROM for sale and distribution;
- (6) Resolved remaining issues related to and complete the Final Work Plan; and
- (7) Concluded with USAID that ARD/Checchi would not seek a contract modification for a no-cost extension with additional activities and milestones beyond those presently required by the contract; instead, ARD/Checchi will provide additional technical assistance on laws falling under the general rubric of contract law under Ministry of Justice auspices.

**e. ADR Training and National Arbitration/Mediation Centre**

(1) ADR Training

Mr. Raphaël Jakoba, Secretary General of the CAMM and an ARD/Checchi consultant, provided two one day training sessions on arbitration principles to 104 legal interns (*stagiaires*) in Antananarivo on September 28 and 29, 2000. This training will be repeated in Fianarantsoa in October 2000.

(2) CAMM Administration

Mr. Jakoba completed the CAMM grant application to ARD/Checchi, working with technical assistance from the Project Manager and the ARD/Checchi grants management expert

**f. Milestone Completion**

The following table shows those milestone activities under the Final Work Plan that were commenced and/or completed during the Ninth Quarter (July 1-September 30, 2000):

**Business Law Reform**

- 1.3.02 Second Annual Report
- 1.3.03 Final Work Plan for Business Law Reform Component
- 1.3.04 Commentary and Technical Assistance on Secured Transactions Law
- 1.3.05 Creation of a Word-Searchable CD-ROM Compilation of Malagasy Laws (to be completed in Tenth Quarter)

**ADR**

- 2.3.02 Second Annual Report
- 2.3.03 Final Work Plan for ADR Component
- 2.3.04 Completion and Administration of USAID Grant to CAMM (grant application completed in October, 2000; administration ongoing)
- 2.3.05 Training for Legal Interns (Stagiaires) (in Antananarivo; training in Fianarantsoa to be completed in October 2000)

**3. Levels of Effort Provided per CLIN**

**a. Ninth Quarter**

CLIN #	Max Days	SOW/ Work Order	Description of Work Order	Consultant Name	# of Days
0001-1 U.S.-Legal Reform	435	24	International Advisor, Secured Transactions	Martin Boodman (IRIS)	10.00
		25	Legal Information Systems Specialist	Pierre Babinsky (Checchi)	20.00
		26	Grants Management Compliance Specialist	Jason Zeno (ARD)	1.5
		27	Law Development Advisor/Project Manager	Thomas Reynders (Checchi)	5.125
0001-2 Local Legal Reform	600	20	Local Law Development Advisor	Ratiaray Ramarolanto	9.00
0001-3 US ADR	290				
0001-4 Local ADR	200				

0001-5 Local Management	125				
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**b. Cumulative to Date (Quarters One through Nine)**

CLIN #	Maximum Days	Cumulative Days
0001-1: U.S. Legal Reform	435	406.37
0001-2: Local Legal Reform	600	339.75
0001-3: U.S. ADR	290	247.675
0001-4: Local ADR	200	97.25
0001-5: Local Management	125	12
<b>Totals</b>	<b>1650</b>	<b>1103.045</b>
<b>International Experts</b>	<b>725</b>	<b>654.045</b>
<b>Local Experts</b>	<b>925</b>	<b>449.00</b>

These totals include the figures in the previous table; some LOE figures are estimates according to the relevant scopes of work.

**4. Legislation Monitoring and Tracking Tables**

**a. Status, Critical Dates and Events of Legislation Reviewed by ARD/Checchi**

	Law/Regulation Name- English/French	Drafting /	CRDA /	Further	NA	Official
		Comment	Other	Comment	Adoption	Publication
1	Arbitration Law / <i>Loi sur l'arbitrage</i>	8/98	9/98		11/11/98	12/21/98
2	Company Law / <i>Loi sur les sociétés commerciales</i>	9/98		3/00 Ongoing		
3	Tradesman's Law / <i>Loi sur le statut du commerçant</i>	8/98	9/98		8/2/99	8/16/99
4	Competition Law / <i>Loi sur la concurrence</i>	8/98	9/98			
5	Transparency Law / <i>Loi sur la transparence des entreprises</i>	8/98	9/98		8/19/99	8/30/99
6	Legal Notice for Real Property Mortgages Law / <i>Loi sur l'hypothèque judiciaire provisoire</i>	8/98	9/98		8/19/99	8/30/99
7	Commercial Registry Decree / <i>Décret sur le registre du commerce et des sociétés</i>	8/98	9/98			1/3/00
8	Bankruptcy Law / <i>Loi sur les procédures collectives d'apurement des passifs</i>	4/99	Ongoing	2/00-4/00		
9	Labor Code / <i>Code du travail</i>	6/99	*	9/99-10/99 3/00		
10	Leasing Law / <i>Loi sur le crédit bail</i>	2/00-4/00				
11	Secured Transactions / <i>Loi sur les sûretés</i>	9/00				

\* CNE drafting effort suspended

**b. Business Law Reforms and ARD/Checchi/JURECO Contributions**

The following table describes the significance to the overall business law reform effort in Madagascar of the reformed laws and decrees on which we have provided commentary, along with an analysis of the extent to which the final versions or drafts of those laws and decrees utilized our recommendations. *The evolution of legal and regulatory reform is often difficult to quantify, with the final product frequently containing contributions of many persons who have written and spoken (both formally at meetings of Law Reform Commissions, and informally with drafters and policy-makers at various levels) about the subject undergoing reform. This table has been reviewed by both international and local specialists familiar with the reform process and reflects what they consider an accurate statement of the significant effort made by the ARD/Checchi/JURECO specialists.*



Law/Regulation Name- English/French	Purpose	Status	ARD/Checchi Activities
Arbitration Law / <i>Loi sur l'arbitrage</i>	Establishes legal framework for arbitration	Adopted and promulgated	Extensive commentary provided, notably on using key UNCITRAL model law principles for international arbitration, including: minimum intervention by judiciary; right of parties to select arbiters; mandatory nature of Arbitral Award. The ARD/Checchi/JURECO contributions had been discussed with proponents of the final version of the law.
Company Code/ <i>Loi sur les sociétés commerciales</i> (including General Partnership Law, Limited Partnership Law, Limited Liability Company Law and Corporations Law)	Defines the legal forms of business enterprises	CRDA completed drafting process, draft text under review by commentators	Extensive commentary provided, notably on forms of business enterprises, including the benefit of the one-person corporation. Also suggested removal of requirement that ALL incorporators be required to be residents of Madagascar, and insertion of more extensive Corporate Governance principles.  Suggested reference to separate proxy rules for larger enterprises in order to assure informed shareholder input.
Tradesman's Law / <i>Statut du commerçant</i>	Defines what a business is and who may engage in business	Adopted and promulgated	Commentary on inclusion of foreign businesses and technical aspects of draft. Articles 3.1 to 3.7 (dealing with accounting requirements that will clarify and help unify local standards) contributed by ARD/Checchi /JURECO team.
Competition Law / <i>Loi sur la concurrence</i>	Defines fair and unfair competition practices	CRDA action completed but blocked by Ministry of Commerce	Extensive commentary aimed at liberalizing and increasing specificity.
Transparency Law / <i>Loi sur la transparence des entreprises</i>	Specifies the kinds of information that a business make available to the public	Adopted and promulgated	Article 5.4 (on the ability of a sole proprietor to become a part of the registry—and therefore of organized business--) contributed by ARD/Checchi/JURECO team..
Decree on Legal Notice for Personal Property Mortgages / <i>Decret sur la Publicite du Credit Mobiliere</i>	Provides for public notice of liens on the personal property of business enterprises	Adopted and promulgated	Article 20 (dealing with creating a means of assuring that registrations are kept up-to-date and reviewable, thus making the registry more of a practical tool for the business community, rather than a formal procedure) contributed by ARD/Checchi/JURECO team.

<b>Law/Regulation Name-English/French</b>	<b>Purpose</b>	<b>Status</b>	<b>ARD/Checchi Activities</b>
Commercial Registry Decree / <i>Decret sur le registre du commerce et des sociétés</i>	Establishes commercial register for assuring public notice of on-going acts of business enterprises, including registration of security interests and Credit-Bail transactions.	In force after being published in Official Gazette	Suggestions regarding structure and organization that reinforce the principles suggested by the ARD/Checchi/JURECO team in the related laws and decrees (on Transparency and on Credit Mobiliere--see above): in Articles 5, 28, 58, 59 and 60 there are now provisions on sole proprietors on-going registration requirements, as well as several other requirements to keep the registry up-to-date).
Bankruptcy Law / <i>Loi sur les procédures collectives d'apurement des passifs</i>	Establishes legal framework for commercial enterprises to declare bankruptcy	Under review by CRDA	General guidance provided on theory and best international practices. ARD/Checchi now providing further technical assistance during the drafting process.
Labor Code / <i>Code du travail</i>	Provides comprehensive framework for labor/management relations	Being drafted by Conseil National d'Emploi	Extensive technical assistance provided on theory and best international practices. International Labor Law Expert n assisted in preparation of most recent draft. ARD/Checchi/JURECO Labor Mediation specialist contributed several key draft provisions to dispute-resolution portion of the draft that may, if adopted, strengthen the ability of labor mediators to resolve disputes.
Draft Law on Finance Leasing / <i>Projet de loi sur credit bail</i>	Improves Legal Framework for Finance Leasing	Under review by CRDA	General guidance provided on theory and best international practices. ARD/Checchi now providing further technical assistance during the drafting process.
Draft Law on Secured Transactions / <i>Projet de loi sur les sûretés</i>	Facilitates access to credit through a clear and flexible legal mechanism	Under review by CRDA	Recommendations provide framework for meeting international standards for secured transactions law; consolidation and simplification of the rules makes them more understandable to domestic and foreign users and should provide easier access to credit and related commercial activities.

**B. FINANCIAL**

Contract Value	\$ 1,452,136.00
Expenditures to Date	\$ 981,453.00
Expenditures in 9 <sup>th</sup> Quarter	\$ 37,903.00

## **II. CTO'S COMMENTS**

## **III. CO'S COMMENTS**