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MISSION REPORT

ON

THE COMMERCIAL COURT IN MALI

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Report of Mission 23 February - 7 March, 1992, the Director of IDLI, Mr. Michael Hager, having designated Mr. Alexandre Cordahi, Program Legal Counsel, as consultant.

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PREFACE

(a) **Background** - USAID/Mali, through its Policy Reform for Economic Development Program (688-0245)/046, is providing the Government of the Republic of Mali (GRM) with multi-year project and program assistance designed to increase private sector participation in the economy. The purpose of this consultancy is to provide information and analysis that will enable USAID/Mali and the GRM to assess the adequacy of the commercial courts to fulfil the role for which they are designed.

(b) **Terms of Reference** - Alexandre Cordahi, IDLI Program Legal Counsel, has been assigned by Mr. L. Michael Hager, IDLI Director, to carry out this legal consultancy. His terms of reference are set out in Annex 1.

Following a week's preliminary work, the consultant visited Mali from February 23 to March 7, 1992. He drafted his report in the following week.

(c) **Acknowledgements** : The consultant wishes to thank all those who assisted him during his assignment. A list of the persons and institutions appears in Annex 2. Alexandre Cordahi's special thanks go to Mrs. Mariam Diakité, whose assistance in arranging meetings with the main judicial institutions in Mali, was invaluable; to Mrs. Byess, Mrs. Breslar and Mr. Diakit for their useful advice and opinions, to Mrs. Marie Hélène Canale (IDLI) and Mrs. Martine Keita (USAID/Bamako) who have skillfully combined speed (with the texts) and patience (with the author);

(d) **Memorandum** : submitted together with a provisional report on March 6 in Bamako.

My review of the state of the commercial courts system in Mali indicates that AID has the opportunity to work with the GRM to improve the effectiveness of the legal system, which will result in an improved climate for the private sector to develop. This can be done through a combination of project and program assistance, as detailed herein. Without such assistance, the economic liberalization program may be severely affected. Indeed, the absence of a properly functioning legal system in the context of this liberalization

program could have a negative effect upon the efforts of the GRM and the donors.
At present, the new, poorly equipped commercial courts are being called upon to enforce an ill-defined legal framework producing an uncertain result. This uncertainty dissuades economic activity by potential national or international traders, investors, creditors and debtors seeking predictability and efficiency from the legal system. The commercial court which was established in Mali as a juridiction d'exception will be considered as specialized only when ***commercial procedures*** *exist.*

I. PROGRAM
Based on the deficiencies (A). which are highlighted by the report, the essence of the 40 recommendations of the report can be reduced to 5 major program objectives (conditionalities), (B).

A. DEFICIENCIES :
(described in the first part of the report :)
- conflicts of jurisdictions between civil and commercial courts which lead to delays in rendering decisions
- judges, professionals as well as assessors, lack knowledge of basic business law as well as procedural knowledge, techniques and skills.
(described in the second part of the report :)
- the existing framework do not provide creditors with effective means to enforce performance of credit contracts.

B. RECOMMENDATIONS FOR PROGRAM OBJECTIVES : ("CONDITIONALITY")
(described in the first part of the report :)
1. Quick clarification of jurisdiction of commercial and civil courts. April 1992
2. Adoption of an action plan for conceiving effective commercial procedures and enforceable claims through a ***renovated code de procédure civile et commercial****..This will entail the immediate set-up (or revival) of a commission of the Ministry of Justice for such a purpose. April/May 1992.*
3. Upgrade judges (professionals as well as assessors). January 1993
(described in second part of the report)
4. Promotion of model contracts and legal tools for effective enforcement of creditor/debtor rights with limited resources. By end of 1992.
5. Adoption of Arbitration Act and Ratification of International Conventions. By end of 1992.

(Note : These recommendations are only the most important and summarized ones. Details are given in the report).

Such conditions if met will stregthen the capabilities of commercial courts to resolve the bulk of private disputes, thus helping to develop the private sector, the portfolio of the banking system and the flow of credit. The value of financial statements depends not only on economic or financial criteria but also and mainly on predictability and efficiency of the legal instruments and institutions. We may however consider that a tentative study with conservative assumptions would show that more than $ 100,000,000 can be brought into "light", into the structured legal circuits by a more effective justice system. Indeed, more than 20% of the total credit of the financial institutions to the economy can be considered as "contentieux". This represents at the end of 1991 about $ 70,000,000 not taken into consideration the private sector internal debt between non financial institutions and the various damages claimed. How can the privatization program proceed without a basic legal framework ?

II. PROJECT

A. Description

The following project will contribute remedy these deficiencies. It would have four (4) components :

1) The training component : training of the judiciary and quasi-judiciary

2) The legislative component : contribution to the preparation of legislation related to commercial procedures in contact with the commission pluridisciplinaire of the Ministère de la Justice du Mali. A legal follow-up by a lawyer at USAID/Mali is recommended.

3) The court framework component : strengthening and refinement of the commercial courts and their functions (Registre du Commerce, bankrupcy...)

4) The equipment component : Infrastructure as well as legal journal ...

These four components would focus on ways to provide for the effective enforcement of creditors/debtors rights.

B. TRAINING ACTION PLAN

A proposed training action plan will be presented with the final report in April 1992. It will focus on training judges, avocats, huissiers de justice, etc... in the area of business law.

The major elements of this project will be :

a) participation of Malian lawyers at the new regular "Enterprise

and Investment Lawyers Course" in Rome (see annex 2) which corresponds very precisely to the present needs of the commercial court in Mali.
b) Workshops for all judges assessors. The Chambre de Commerce et d'Industrie might be willing to be associated with this workshop in Bamako.
c) Initial colloquium establishing guiding principles for the drafting of commercial procedures legislation with an emphasis on :
- legal planning;
- avoiding conflict of jurisdiction;
- arbitration;
- "dispositions particulières au tribunal de commerce";
- model contracts linked with articles of the law.

The Ministry of Justice has expressed its great interest for such an approach.

I was extremely honored to meet Ambassador Herbert D. Gelber and I would like to thank you and your team for the help you have provided during these two weeks.

I hope that this analysis will contribute to identifying means to promote the rule of law, enforcement of contracts and the private sector in Mali.

INTRODUCTION

1. **Method** - This report is not intended as an abstract analysis of the enactments governing the Tribunaux de Commerce in Mali but serves rather to see whether the institution of these courts may lead to an economic law-oriented state by fulfilling the conditions for a commercial judicial system necessary to private sector development. For this reason we have adopted various juridical approaches such as comparative (see table on typology, Annex 4 and attached manual) and functional (definition, plan) approaches. The remarks and recommendations take into careful account the complex relationship between the judiciary and social environment. The enquiries made on site by the consultant and by USAID were thus an essential tool in achieving our purpose. The move towards regional integration has also been taken into account.

2. **The Institutional Context:** Rules in a society moving over to a pluralistic system.

The Institution of the commercial court came about in exceptional circumstances which prompts the question: Can constitutional and political events change, eliminate or strengthen such an innovation within the judiciary? The question should be asked right from the start since Mali is now going through a period of transition where the outcome is as manifold as the issues are Parliament-related.

A. The Constitutional Framework

Basic Act No. 1 of the Comité de Transition pour le Salut du Peuple (March 31st, 1991) describes the institutional situation in the following terms : "*... the Malian people's struggle for a society based on ideals of freedom, democracy and social justice led, on March 26th, 1991, to the suspension of the Constitution of June 2nd, 1974 and to the dissolution of the institutions established by it...*".

Since then, the Conseil de Réconciliation Nationale "*..provides for the regular functioning of administrative and judicial institutions*".

Where new enactments are introduced under article 57 "*the laws currently in force in Mali are still applicable, save for the intervention of new texts, provided that such laws are not in conflict with the present Basic Act*". While awaiting the general election and the "*establishment of institutions provided for by the new Constitution to be adopted by referendum, the present Basic Act shall be enforced as constitution of the State*" (art. 64).

Since a new constitution was adopted by referendum on January 12, 1992, Malians have been called to the polls firstly for municipal elections and then on February 23rd, and on March 8th, for the two phases of the general election and, finally, in April for the presidential elections. **The leaders of the most important parties do not challenge the judicial organization adopted by the previous regime, which, inter alia, provided for the establishment of commercial courts.** The magistrature, having helped to spearhead political changes in Mali, claims stronger title than the other institutions. According to the interpretation of the Ministry of Justice, the institutions thus "established" will render the Basic Act inoperative. The Constitution of the Third Republic of Mali certainly takes into account all the competences of the different powers. " ***The Judiciary*** *is independent of the legislative and the executive ; it is exercised by the Supreme Court and the other Courts and Tribunals* " (art. 81). The President of the Republic, as guarantor of this separation of powers, is assisted by the **Conseil Supérieur de la Magistrature**, which supervises the career judges, expresses its opinion on all questions relating to the independence of the Magistrature and acts as a disciplinary council for the judges. The Constitution, which distinguishes between "ordinary" and "organic" Acts, establishes that the Conseil Supérieur de la Magistrature exists by virtue of an organic law. The same rule applies to the Supreme Court. The Act provides for the main principles of judicial organization, the creation of jurisdictions, and the status of professional legal and judiciary officers (Article 70). Finally, the following Articles are directly related to the present investigation:

Article 73: "*Matters other than those dealt with under any Act are governed under enforcement regulations. Laws covering such matters enacted before the entry into force of the present Constitution may be amended by decree subject to the approval of the Supreme Court. Laws enacted after the entry into force of the present Constitution may be amended by decree only if the Constitutional Court has declared that they fall within the category of enforcement regulations within the meaning of the previous sub-paragraph....*" and in matters of the Constitutional Court is thus vested with the power to **control the constitutionality of laws** and to pronounce the concurrence of jurisdictions between the judiciary and the institutions of the State. (Art. 85 and following). The right of property and freedom of enterprise are guaranteed (Art. 13 and 14).

Hence, Act. No. 88 - 38/AN-RM to institute the commercial courts, approved by the General Assembly on February 8th, 1992 and promulgated by Général Moussa Traoré, on April 5th, 1988, is constitutionally binding and politically unchallenged. We shall examine

in detail decree No. 147 PGRM of May 30th, 1988, which established the eligibility of, and election criteria for, members of the commercial court (see below para. 54 and following). The institution of the constitutional court and the administrative court justifies enquiry into the constituionality and legality of the law (Act) or simply regulatory sources of commercial law.

It should also be noted that in accordance with the principle of the **continuity** of laws as enshrined in the Constitution and in Article 231 of the Code of Civil, Commercial and Social Procedure, (texts enacted before Independence which have not expressly been repealed) are still in force. Thus it is that many outdated articles of laws on commercial, legal or judicial matters, are the main source of Malian private or procedural law.

B. The quest for pluralism

By means of the enactments here described the Malian State affirms its unity with society as well as its continuity and its "monopoly over the law". Yet, for all that, the establishment of a commercial court represents one of the first recent experiences of judicial "pluralizing" in Africa. Since gaining independence, African States have **unified** their domestic jurisdictions. A number of reasons, identical with those now invoked to favour the creation of new jurisdictions, were at that time cited merely to suppress them. It was necessary to unify the law in order to "guarantee certainty in transactions and to reassure investors". This need for standardization, streamlining and stabilization of the law coincided with the concern expressed by leaders of the poor countries for budgetary austerity and over the shortage of personnel. "*Balkanized before their independence and threatened by the tribal pattern of their own society, the new States could not afford to encourage, in any way, the existence of two distinct categories of citizens. A reform was therefore necessary envisaging a single order of jurisdiction, with no distinction between citizens subject to the law*". (K. Mbaye p. 37 ff) In 1992, however, a pluralist climate by now prevails, whether politically (with about forty parties), economically (14 firms privatized), professionally (discussions regarding the division of the Malian Chamber of Commerce and Industry into two distinct bodies defending the interests of tradesmen and industrialists, (establishment of a "Chambre Consulaire des Métiers d'Artisans") or even ethnically (Tuareg claims for autonomy). We are witnessing a difficult passage from, on one side, the single party - the State monopoly, with the judicial, civil and military power in the hands of the Head of State and on the other a situation of exacerbated and open antagonisms. Investigation confirms the present tension affecting the judicial world as well. Yet does not this tension -

between unity and pluralism - represent the essence of democracy and of a constitutional state once it finds expression in the very institutions and through procedures made to measure ?

3. Definition of the commercial court, and plan of this Report

The primary function of a commercial court is to state the law in order to settle disputes between business operators.

This functional definition captures all the elements of the commercial court and dictates the scope and structure of this report:

The first part deals with the conditions governing the establishment and functioning of the Commercial Court. Thus:

> **Among actions needing to be taken, the first part highlights those related to the judiciary code together with the amendments to or clarifications of civil and commercial procedure. This means defining how to resolve conflicts regarding the jurisdiction and specialized nature of this court.**

The second part deals with those who come within the jurisdiction of this court and with the law as applied by the court.

> **The point is made that the scope of commercial courts may be considerably extended by actions to be undertaken towards business operators, whether formal or informal, and by diversifying the sources of commercial law.**

The problem of an "economic magistrature" goes beyond the idea of a jurisdiction needing to be created or modified in some way. Several institutions may intervene, whether in the preliminary or in the consultative or in the decision-making phases of settling disputes.

Mention will also be made of the institutions (e.g. conciliation arbitration, administrative courts, etc.) that are relevant to the present inquiry. But the legal aspects, too (commercial law, banking law, international law, etc.) must be considered as an integral part of any attempt to improve the judicial system for the settlement of commercial disputes.

The creation of a specialized court represents for Mali an innovation that might even lead to a certain amount of malfunctioning. The present

analysis and the suggestions emerging from it seek to ensure that these commercial courts shall become a first-class instrument in the development of the private sector.

PART ONE

THE INSTITUTION AND FUNCTIONING OF THE COMMERCIAL COURT

The institution of a commercial court - three years after the relevant Act was passed - is characterized by difficulties relating to:

- conditions attendant upon the devising of such a court (Ch. I); and
- shortcomings and malfunctioning (Ch. II).

CHAPTER I

INSTITUTION OF THE COMMERCIAL COURT: THE LAW AND THE PRESENT SITUATION IN MALI

Action "needing to be taken to remedy the conceptual problems attendant upon the devising of a novel jurisdiction such as the commercial court (or even an administrative court) as a means of furthering the following goals:

- Financing the legislative approach (Section 1)
- Providing judicial data (Section 2).

SECTION I

LEGISLATIVE TECHNIQUE

§1. Problems of Form.

4. The establishment of the commercial courts, under Act N°. 88-38 of April 5, 1988, is merely one element in a complex judicial reorganisation instituted in the Republic of Mali in that year. (Several draft enactments on this organization of the judiciary (e.g. regarding the possibility of instituting legal advisers) are still under discussion). Despite the well-known African penchant for codes, the usual attention paid to form in the classification of laws has been disregarded in this case. Problems of form, disparate laws and decrees, and deficiencies and flaws now call for a tidying-up and reorganization. Indeed, economic development and the introduction of commercial law have been dwarfing the provisions of a Napoleonic-style commercial code. But the organization of justice requires clear-cut, easily communicated, well-arranged and rational classification. A great deal of correspondence has been necessary between the Ministry of Finance and Commerce and the Ministry of Justice in order to elucidate such relevant points as the composition of the *Tribunal de Commerce, the term of the presiding judge, the oath taken by "juges consulaires" (tradesmen sitting as judges in commercial courts) or the representation of the prosecuting magistrate* , and so on.

5. Under Art. 2 of this Act, "the jurisdicion of Commercial Courts

extends to any claim relating to exchanges and transactions between tradesmen under Art. 3 of the Commercial Code". The printer undoubtedly intended "undertakings" (engagements) rather than "exchanges" (changements) but this is not the most important point. Beyond problems of form, a problem of cohesion and pragmatism of the many reforms already introduced or planned is apparent. It is the very content of these reforms which is now at stake.

The recommendation is made here to the effect that the necessary tidying-up and reorganization be carried out in the form of a renovated Code de Procedure Civil et Commercial (CPCCS) and the comprehensive approach of a revised code for the judiciary as such. A code of this kind would bring together all matters having to do with the judiciary, jurisdiction, civil and commercial procedure, distraints and methods of execution (see Annex for the Belgian model). Each of these topics will be taken up in the report.

§2. Organizational problems.

6. The gap between the laws passed in the last few years and the state of trade and commercial suits in Mali calls for an analysis of the organization and of the ways by which the rules of commercial law are devised and find their way on to the statute book. Commercial law, both substantive and procedural, would gain if greater attention were paid to the facts of business life in Mali, and cases associated therewith. The overwhelming and exclusive influence of the Civil law tradition is not mitigated by case-law, which is certainly to be found in Civil law countries. Commercial law does not consist only in a body of abstract rules. Preliminary revision work on the commercial code, or even on the 1988 judicial reform, has not relied sufficiently on the collection, description and analysis of cases. The case method should be introduced and encouraged, and the dualism Civil law tradition / Common law tradition should be replaced with a synthesizing approach more appropriate to the situation in Mali and the region as a whole. The commercial court can only be conceived as originating from and depending upon the same realities as that which it is expected to regulate. In the normal way it should be organised in terms of integrating the following elements:

- identification of problems (courts' workoad, slowness, cost), and the recognition of the fact that the **need** exists;

- consideration of **constraints** (budget, conflicts of jurisdiction);

- determination of the **aims** to be pursued (technical expertise,

rapidity, the trust of the person coming, or being taken, to the court); and

- identification of the **targets** to be achieved (output, training, efficiency of the measures of execution).

The next stage consists in building up a system using all **technical mechanisms and elements** available to the law (chamber of commerce or commercial court; professional judges/coopted tradespeople, and so on). These elements will be examined in detail, together with a description of the method for developing legal rules. Yet this approach does not seem to have been considered by the authorities responsible for "monitoring the codification of the reforms" or even in their terms of reference. The burden of this report is that precilsely such an approach should be followed.

7. A perusal of the basic documents relating to economic and financial policy in Mali calls for the following remarks:

-a/ The institution of commercial courts is part of an economic and financial policy drafted in close co-operation with the World Bank, IMF and several other donors. One of the main objectives is the "easing of restrictions in the legal framework". The need to render the commercial courts operational is generally considered in conjunction with the revision of the Commercial Code, whereas the Code of Procedure is never mentioned.

-b/ The Franco-Malian convention for judicial cooperation does not seem to play such a relevant role. A French judge indeed is always present there, but his action is limited by a lack of coordination and of funds. The office may be abolished, despite the importance of the reforms. The exclusive nature of this bilateral cooperation has brought little benefit. The most conclusive evidence in this regard is to be seen in the conditions attaching it to the institution of the commercial courts. While such co-operation is now being re-appraised, it is to be wondered whether the reappraisal will make way for a more <u>inductive</u> approach.

-c/ Whereas economic measures are set down in all possible technical detail, there is no study, recommendation or suggestion in support of legal or judicial reforms. As USAID has rightly pointed out: "<u>The form and substance of such institutions should respond to local need and practice</u>...". The World Bank has initiated a study of the legal business climate in Mali.

The reform of the Code de Procédure Civil et Commercial demands that an ad hoc commission of the Ministry of Justice be set up immediately. This commission should follow the inductive approach here recommended.

This new method of organization - this pragmativc approach - can help the Malian authorities to overcome the difficulties inherent in reconciling the diverging interests now freely and firmly upheld by traders, industrialists, judges, legal advisers, the Ministry of Finance, lawyers, notaries, craftsmen, tax consultants and the rest - all present round the table where commercial standards are being classified.

SECTION II

JUDICIAL DATA

§1. The lack of judicial statistics

8. Judicial or legal reforms are unlikely to bring about any change if the tools are not provided for the **analysis** of complaints actually lodged, the methods for settling disputes, or the manner in which a judgement is enforced (or bypassed). Judicial statistics are virtually inexistent. In addition to providing raw materials for the analysis, statistics of this kind would facilitate:

- **monitoring** the efficiency of courts and of the individual judges in a given jurisdiction; and

- **reliance** on objective data when deciding on the establishment of new commercial courts in other places (e.g. Sikasso, Segou).

In early 1986 the need for an efficient administration of justice was recognized, and additional technical departments were nevertheless created within the Ministry of Justice. These were the National Directorate of Criminal Matters, the National Directorate of Judicial Services and the National Directorate of Civil Affairs and Seal, this last-mentioned comprising two divisions, namely, the division of civil legislation for procedure and public and social law, and the division of international law, commercial law and the law on nationality and the Seal. There is also an Inspectorate of Judicial Services, charged with monitoring the working of the respective courts and with conducting field inspections to solve local problems regarding staff and operational facilities (which is why, in this report, there will be no listing of material needs, which are indeed real enough and which we can only confirm).

Accordingly, essential that courts keep monthly records of pending and settled cases and send these to the respective presiding judges and to the central Government.

9. It is thanks to a retired judge who, on his own initiative, maintained the practice of drawing up general statistics that the mission came to know the following data on cases tried by the commercial court of the Bamako Court of Appeal. The clerk of the Bamako Court of First Instance was able, using the register, to reconstruct, the number of cases

filed and decisions handed down. These are shown in the following table.

Cases handled by the Courts

	1988		1989		1990		1991	
	f	d	f	d	f	d	f	d
Chamber of Commerce Court of Appeal (a)	576	333	450	383	721	578	569	464
Court of First Instance Bamako (b)			1122	297	1141	255	2029	258

(f) : Filed
(d) : Decided
(a) : 1988/1989/1990 : Bamako, Ségou, Sikasso, Kayes, Mopti, Tombouctou, Koulikoro, Gao
1991 : Bamako and Koulikoro (only)
(b) : Civil and commercial suits

The above figures show that the number of suits brought to the Bamako Court of First Instance nearly doubled between 1990 and 1991. The Court of Appeal also reported a rise, even though with a slight time lag due to the time taken for filing appeals. The 1991 figures relate to the Bamako and Koulicoro areas, while the figures referring to the previous years also include those for the areas of Bamako, Ségou, Sikasso, Kayes, Mopty, Tombouctou, and Koulicoro. It will also be noted that the 1991 increase in the number of cases is not matched by a similar rise in the number of judgements delivered; and a disquieting backlog has thus developed. Although they are not reliable, such figures nevertheless highlight a **growing delay**. As the number of judges appointed to a court is always the same, one can only expect the handling of cases to be a lengthy business. According to the judges concerned, a considerable

proportion of the cases brought to the Court of First Instance are commercial cases. This can be easily verified by examining a day of activity at the Court of First Instance (Annex 3).

Is it desirable and feasible to increase in the number of judges? An attempt will be made to answer this question later in the report (see para. 36). Certainly, a specialized commercial jurisdiction is justified and seems to offer a solution to the overload problem.

In reading these data it is difficult to single out among the cases filed and settled those which are delayed, the appeals and those disputes where settlement is "certified by an enforceable record" (As required by Art. 3 CPCCS, 1961). But according to all those interviewed, the judge quite often guides the parties towards conciliation; a matter we shall dwell upon later.

It is too early to draw up a balance sheet of the activity of the commercial courts, which have been operating only since November 1991 in Bamako and since December 1991 in Mopty (and not operating at all in Kayes from want of premises). The two courts have handled about forty cases, most of them concerning the collection of outstanding debts and some relating to the termination of lease contracts. The judges presiding over these commercial courts believe that "their activity will grow when all traders become aware of the existence of such an institution specialized in commercial matters".

10. Measures taken pursuant to the Structural Adjustment Plan do not envisage any link between the rehabilitation of the banking sector and the **much needed modernization of civil and commercial procedures**. There are data to show, however, that one of the major problems as far as commercial life in Mali is concerned, is to be seen in methods of execution. The total amount of loans granted by financial institutions to the Malian economy, according to BCEAO estimates, came to about CFAF 100 billion by the end of 1991. A conservative estimate, 20% of bank portfolios, i.e. CFAF 20 billion, is accounted for by doubtful or contested loans. Improving the system of collecting outstanding debts and of developing rapid, accurate, streamlined, modern commercial procedures would have immediately positive financial and economic effects. Greater confidence in justice and in its ability to settle disputes would make for a strengthening of the legal, formal economic sector to the tune of 100 million dollars and more. Besides bank debts, debts between non-financial individuals and corporations would also enter into the reckoning.

§2 - Bypassing the Courts

11. From an analysis of judicial statistics it will also be seen that in cases of economic disputes, the forum for the settlement of litigation either ceases altogether (to the detriment of the insured, for example) or shifts from judicial instances to the public authorities; and even to people taking the law into their own hands (see para. 55 ff). Company reorganization-related problems have never been "solved" by the judicial apparatus. As far as we know, no judicial decision has been delivered in this respect. And, according to Malian jurists "*had there been such a decision, no company in Mali, after paying off all its debts, as provided for by the Commercial Code, would be able to redress its financial situation*". There is a real danger of commercial justice becoming marginalized. Faced with an economic and financial crisis, a deterioration in the terms of trade and growing uncertainty, the Government is trying to exert a de facto predominance. Its plan to sell off public companies and to privatize the economy is not accompanied by the creation of judicial arm or by the implementation of measures for the private sector effectively to step in following this disengagement by the State. The legislator cannot foresee all possible social and economic situations in Mali, which is now experiencing rapid changes and is subject to several internal and external pressures. Legislation, Government action and adjustment programs have only limited scope for adaptation to circumstances.

12. This is where **the role of the judge** comes into its own. In a crisis situation, with firms going out of business, with wages remaining unpaid, and with looting going on, uncoordinated Government measures risk creating a wide gulf between the law and the realities of economic and social conflicts; and it is here that a case-law approach can bridge the gap between short-term economic expediency and the long-term rule of law.

For all these reasons the powers of the commercial court to deal effectively with litigation in economic matters should be strengthened, for the principles presiding over conception and the conditions accompanying its institution do not seem, by themselves, to have guaranteed its complete efficacy. Improve the court's operational performance, and the desired strengthening will follow.

CHAPTER II

FUNCTIONING : WHERE IMPROVEMENTS ARE CALLED FOR

Action tc be taken to remedy the present deficiencies is geared to:

- making up for the drawbacks of specialized jurisdiction (Section I).
- strengthening the advantages of the mixed composition (Section II).
- specializing the Commercial Court (Section III).

SECTION I

MAKING UP FOR THE DRAWBACKS OF SPECIALIZED JURISDICTION

§ 1. Comparative remarks

13. According to the information gathered, and in the absence of published travaux préparatoires or parliamentary debates, it is due to lobbying by the business community that the Act provides for the **total autonomy** of commercial courts vis-à-vis the trial courts. The Ministry of Justice has taken its stand on the mixed composition formula, by placing a professional judge alongside the lay judges (juges consulaires). It also demanded the means for implementing such a policy; and continues to do so.

The system chosen is evidence of the will to underline the judge's specialization in commercial contentious proceedings and to associate with the court the social and professional sectors concerned, namely business and industry.

The annexed chart reveals that a system so conceived is met with only in **Belgium**, Burundi and the French oversea departments, with their joint composition commercial courts. However, nowhere else is their autonomy carried to greated lengths than in Mali today. This bold innovation might cause surprise. Another system could have been opted for, such as that of Commercial Divisions within courts of general jurisdiction in the Bas-Rhin, Haut-Rhin and Moselle départements. This is based on the German formula. A "bill to provide for the establishment, organization and operation of commercial courts"; currently being examined in the Ivory Coast, follows the example of such divisions, which are not distinct from the courts of general jurisdiction and are composed of a professional judge assisted by lay assiciate judges. These divisions are vested with a commercial jurisdiction to deal with litigation between traders, claims having to do with bills of exchange and cheques, and with business concerns and registered trademarks. The "Kammer für Handlessachen" in Germany's provincial courts (Landsgerichte) are not the object of frequent criticism, as are the commercial courts in France. The creation of an independent and autonomous jurisdiction has been advised against in Burkina Faso, for fear that the reliability of commercial justice might not gain thereby.

14. Luckily, Mali did not adopt the often criticized French system, with its limited-jurisdiction commercial courts consisting exclusively of commercial operators. Even in France, the German system was recommended within the framework of a reform in 1975; and a plan for a joint composition formula, though under a different form, seems to be envisaged now (see Guyon p. 32). Obviously, commercial courts are placed in Mali, as anywhere else, under the authority of the Ministry of justice, but the special, exceptional nature may nevertheless give rise to conflicts of jurisdiction (see 22 ff.). **However, the closely similar example of Belgium's Commercial Court is fairly encouraging,** since that country's Minister of Justice even envisaged extending commercial court jurisdiction to the entire area of business law and endowing commercial courts with a fully fledged prosecutor's department. "Apart from general tasks of giving advice and actions, this department would be in charge of preliminary investigations. The bringing together of the magistrature's independence and the representative character of a government department would remove from such a department some of the constraints applying to the ordinary judiciary, and might endow it with prerogatives at both pre-trial and trial stage". It may be asked whether such a system can be effectively transposed to Mali and adopted there, so as to perform the function if was devised for - i.e. promoting the development of the private sector. It is the author's conviction that if insufficient allowance is made for the recommendations of this chapter, then the benefits of such a transposition may prove illusory and costly.

§2. Social and Historical background.

15. Commercial courts date back to "consul" jurisdictions (consolati) in Italian cities in the Middle Age (whence the expression "tribunaux consulaires", though Mali has its own long-standing tradition of commerce and its practitioners. It was indeed at a time when "consul" judges were in operation in the Italian Cities, that the Kingdom of Mali flourished. "*The height of the gold trade was reached during the reign of Mansa Moussa, between 1305 and 1339. In that period, two thirds of the world's gold reserves came from the Sudan. To meet the demand, Wangara tribes went out searching for gold into the Akan territory (the present Ghana and Ivory Coast). Trade across the Sahara was absolutely safe, as it was so crucial for the economy of the Empire. Any misconduct with foreigners was immediately and severely punished*". (Benoist, Le Mali, l'Harmattan 1989, p. 41).

16. Islamic Courts? To this brief historical overview could be added the following remarks, which are important for the current shaping of

the judicial organization in Mali. Islam developed within the world of trade and has long been "*the peculiar religion of this great mercantile system spreading throughout the black countries as the bloodstream flows throughout the body, with centres and interchange points necessary both for religious and business activity*..." (Benoist, op. cit. p. 42). In Mali, Muslim law was applied in the courts, in the higher administration and within cultured urban circles in the XIII and XV centuries, and with strict rules in the Peuhl theocratic states. Today, it is increasingly being applied and some African countries believe it is better suited to their traditions than European law, although the former tends to adapt to certain African customs. Between 1973 and 1989, the kingdom of Saudi Arabia granted aid to African countries "*largely exceeding 17.4 billion dollars, of which 10.14 billion as a donation*." (L'essor, 6 November, 1991). The second bridge over the Niger river, opened in March 1992, as well as several mosques (see para. 74), were financed by Saudi Arabia. Work started in Kayes in 1981 to provide premises for other special courts, such as the Islamic courts, presumably a pre-requisite for Saudi support. Ironically, according to Mali officials, the SONETRA bankrupt public company has left a building designed for the Islamic court (though it has yet to be completed), to the commercial and administrative courts, which are formally established, whereas the special character of the Islamic courts has not been "legalized" to date.

17. The foregoing comparative and historical analysis shows that several legal systems hold the autonomous commercial jurisdiction in disfavour and tend, rather, to recognize and apply a unified jurisdiction. That being so, an ad-hoc monitoring institution is needed, within the Ministry of Justice, to address the problems met with during the initial stages of the Commercial Court's existence - problems that are certainly encountered in Mali.

§3. Problems connected with the effective date of the new Act.

18. The Principle. Before examining the problems relating to jurisdiction rules, one should note that the legislator made no special provision prescribing the exact date when the new law shall come into force. Indeed, art. 13 states that : "a trial court may exert jurisdiction over business matters until a commercial court is established...". The provision is ambiguous and the citizen no longer knows which court he must turn to. Even lawyers and judges, because the subject is so new, tend to confuse problems relating to the time aspect of the applicability of the Act and to other situations connected with conflicts of jurisdiction. Are the commercial courts, for example, "established" in Mali, at Bamako, Kayes and Mopty, or just at Bamako?

If this question has to be asked, then, in principle the Act is immediately applicable to any suit already brought or yet to be brought. Without a formal exception being invoked, the ordinary courts can have a case removed from them and brought before a commercial court. This however would not apply where the ordinary court has already handed down a first - or final - instance decision on the merits or affecting the merits of a case that has been regularly brought before it. Art. 2 of the French Civil Code is still part of the Malian legal system, as the Malian Constitution and Art. 231 par. 2 of the CPCCS provide for the principle of legislative continuity (as pointed out in the introduction (see para. 2 above).

19. Practice. This interpretation (the only one possible) has several practical drawbacks. The commercial court of Bamako seems to be fully "established" (unlike the Kayes court, which has no physical premises and the Mopty court, whose president is currently in hospital) but it could hardly handle all the commercial proceedings pending before the Bamako Court of First Instance. The silence of this law (with the exception of art. 13, par. 4 , which does not apply specifically to conflicts as regards time) as regards proceedings instituted before the commercial courts were established could be interpreted as an oversight. The omission, however, and the ambiguity are intended, since they express one of the peculiar features of law and legal reforms in Africa, lying in "the flexible, non-imperative nature of rules and in the implementation of a law inculcating a model of conduct rather than one prescribing sanctions for offences" (Rouland p. 386). Some legal scholars dismiss this as "ghost law" or "ineffective law"; yet others use the expression "progressive law". Often, new laws and institutions enjoying official status under the constitution and under statutory law are difficult to apply fully and immediately - it is more convenient not to worry about problems relating to applicability in time; and this is in any case the current attitude of the Ministry of Justice. This is especially so since any new Act may represent a condition precedent to a facility; and it is in the interests of the parties present to be satisfied that the condition is met. However, such attitude is not free from dangers; and it can deprive such a new Act of all authority.

20. Techniques are available, however, for <u>the progressivce implementation of a new legislative and institutional policy</u>. **Legal planning** envisaging a coherent and controlled development of statute law, the adoption of **transitional** and **accompanying measures, together with measures for insuring the information** of the public and **applied training**. In the case in point, the legislation, by the same Article 13, vested the judge of the appellate court with wide powers, which have so far never been exercized: " *whenever a commercial court*

cannot operate for any reason, ***the Court of Appeal once the matter has been brought before it , at the request of the Attorney General, appoints the trial court competent for handling business cases.*** *When the commercial court is able to resume its functions, the Court of Appeal, seized for this matter under the same conditions, takes this into account and fixes the date starting from which actions shall be brought before the commercial court again".* The process is flexible, coherent and suitable for the Malian context.

21. *It is therefore to be recommended that the "Court of Appeal, thus called upon at the request of the Attorney General", should appoint the courts competent to exercise jurisdiction over business matters in Kayes, Mopty and Bamako, in order to settle as soon as possible problems regarding the timing of applicability* The legislation and the Ministries concerned should adopt a stricter procedure regarding the dates on which laws are supposed to come into force. The above - mentioned techniques make it possible to couple strictness with caution - a technical caution. This may result in a less idealized law but one which is certainly more effective and less frequently disregarded.

§4. Possible increase of jurisdiction-linked cases.

22. An example

Affaire : D.T.- SA c. Monsieur O. L. S. (Injonction de payer)
"La société "D.T.-S.A" est créancière du Monsieur O. L. S. de la somme de neuf millions huit cent soixante cinq mille trois cent dix huit francs CFA (9.865.318 cfa) représentant le reliquat du prix d'un véhicule camion T. DA 110 qu'elle lui a vendu à crédit le ....

Elle a saisi le Tribunal Civil de première instance de Bamako d'une requête aux fins d'injonction de payer la susdite somme augmentée des intérêts de droit et des frais afférents.

In limine litis, le Conseil du Monsieur O. L. S. a soulevé l'**incompétence du Tribunal** de 1ère instance de Bamako, résultant de la loi d'organisation juridique du 5 avril 1988, créant à Bamako un Tribunal de Commerce devenu fonctionnel.

Qu'en conséquence il y a lieu de se déclarer incompétent, le litige ressortissant de la compétence du Tribunal de Commerce.

L'autre partie a rétorqué que la procédure d'injonction de payer est non seulement une procédure civile, mais qu'en plus Monsieur O. L. S. n'a pas la qualité de commerçant.

L'affaire est mise en délibéré pour l'audience du ...."

23. The creation of a special jurisdiction thus gives rise to yet another problem for several litigants, namely; the determination of jurisdiction. A case formerly brought before the "Tribunal d'instance" (court of primary jurisdiction) can today be brought before the Commercial Court, the Administrative Court or, one day, perhaps, the Islamic Court. This is not the place to explain the complexity of the rules of jurisdiction, or the scope of the powers vested in the respective courts.

Once it has been determined before which kind of jurisdiction the case can be brought, the applicant will have to determine, among all jurisdictions of that kind, the one that is territorially competent for his purpose.

24. And how can he do so at all clearly in Mali today, when Article 2 of the 1988 Act is imperfect (see para. 5 above) and refers one to Article 3 of a commercial code (at the second reading stage to commercial transactions (actes de commerce) between people, and to "everything relating to receiverships, judgements and the liquidation of property"? How could the Malian jurist have avoided the radical judgement of Georges Ripert and René Roblot when they say that "*our conception of the commercial transaction is not sufficient, and unfortunately the question is dominated by that of the competence of the Commercial Courts; and this question, too, will have to be reconsidered*" (Traité, p.8). And how could our Malian jurist have done any better, avoid archaisms, draw support from scholarly opinion regarding real needs, finalities, objectives, opinions and solutions (see para. 6 above). Praise is due for the re-reading efforts and the reports of the expert working group established in Bamako to renew (already!) the 1986 Commercial Code. To be sure, the 1986 Commercial Code took into consideration the changes in French commercial law. Nevertheless, the numerous and important French technical reforms of the 1980s have not yet been adopted in Mali. Some are to be inserted in the new Code (e.g. regarding single-person companies limited by guarantee), while others of greater importance are not even taken into consideration; and there is no statute defining the scope of privatizations (Act No. 88-34 is the only one that authorizes the opening up of the capital of state-owned companies to other operators, and of joint-ventures - i.e. companies with public and private capital and of those to be privatized). It seems that the new Commercial Code will give a different meaning to the notion of a commercial act. It is not the intention in this brief survey to judge between the subjective conception of commercial law as concerning

only those qualifying as commercial operators and the objective conception which considers legal acts necessary to commercial activities. But this digression about the Commercial Code was necessary because it defines the scope of the competence of the Commercial Court. Here more than ever, the Malian jurist needs to strengthen his understanding of the theories of l'accessoire and of mixed actions.

§5. Conclusions and recommendations.

25. The discussion on the rules governing competence is a waste of effort; and remedies need to be found here. The commercial jurisdiction concept can be defended on the grounds that it offers more expeditious procedures and that access to the court is facilitated. It would be a mistake to suppose that the simple institution of a tribunal d'exception would automatically guarantee specialization in one field or another. From this point on, therefore, the discussion will concern functional and procedural specialization, since the autonomy of the commercial court is not in question. The creation of a commercial jurisdiction has provided the necessary basis for the renewal of judicial power in a society where economic liberalization is in process. But the effort made from the institutional standpoint has not really affected the course of commercial justice. Thus, if the reform is to succeed, it needs a lot of improvements in order to achieve its original purpose, namely that of "settling disputes between commercial operators who have to state their respective claims in good faith without being bogged down by the subtleties of statutory laws or decrees" (Edict of November 1563, which created the territorial jurisdiction of professional and lay judges in Paris and determined their competence). These solutions for conflicts of competence will ensure that the reform is not so unreasonable and is not in contrast with the opinion of many private judiciary law experts who, ever since Jeremy Bentham, have called for the abolition of special courts.

The proposal is accordingly made here that the reform of Mali's Code de Procédure Civile et Commerciale shall have among its purposes to nullify any manoeuvres designed to slow down the course of justice. A special procedure is needed to solve conflicts of jurisdiction immediately. Pleas in bar of trial, or of lis pendens or, again joinder pleas will have to be dealt with with this in mind. That is why article 13 of the Act to institute the Commercial Court should encourage reliance on this procedure and empower the Court of Appeal to decide in conflicts of jurisdiction. Juridical acculturation is easier when the legal system comes from a country whose language is the same as that spoken in the adopting country (even if the system is not the best one!), which is why this report suggests the following approach, adopted in France for judicial settlements and liquidation cases:

a/ **Expeditious clarification** of all conflicts of jurisdiction: when the court before which a case is brought finds that the case is beyond its jurisdiction, the presiding judge has to inform the President of the Court of Appeal who will then indicate the competent jurisdiction (in so many days', weeks', months' time).

The decisions of the presiding judge and the President of the Court

of Appeal are notified immediately to the parties by the clerk of the court and may not be appealed. The decision of the President of the Court of Appeal is an order for the parties and for the judge to whom the case is sent back.

b/ Where the competence of a court is challenged, but that it finds that it is competent, the court must **decide on the merits** immediately.

c/ Where there is a conflict of jurisdictions, then the court that finds it has no competence can nevertheless take **conservatives measures** as a form of guarantee (taking inventory of a debtor's property and thereafter affixing seals) to protect the creditors' rights. .

These three approaches could effectively settle conflicts of jurisdiction.

The authorities in Mali, of course, will not be able, in the space of four months, to prepare or discuss or adopt, in a new Parliament, a revised Code of Civil and Commercial Procedures - which is not to say that it would not be advisable for the relevant commission to begin work at once.

SECTION II

STRENGTHENING THE ADVANTAGES OFFERED BY THE MIXED COMPOSITION OF THE COMMERCIAL COURT

§1. The Mixed System: Career judges together with business people as lay judges

26. Comparative Evaluation. The system adopted in Mali is also met with in Belgium, Germany, Norway, and in France's Alsace-Lorraine and her overseas departments. France is the only country where the Commercial Courts are composed exclusively of commercial operators. The superiority of this system lies in the fact that:

- the presence of a professional judge is a guarantee of rectitude and, in theory, of impartiality in judgement;

- commercial operators, familiar with business, have a sense of practicality and of technicality, a specialization that career judges cannot have; and

- commercial justice tends towards reconciliation and accordingly will suggest that the legal proceedings be discontinued and that the parties agree to this procedure, or to some form of compounding, which in turn will facilitate the resurgence of commercial relations.

27. The cultural dimension associated with the status of the professional judge and of the commercial judge. The two are called to sit together. As all the French-speaking countries in Africa and in Madagascar, Mali was already familiar with the mixed system in the labour courts. There are lessons to be learnt in the practice of having lay judges sit in customary matters in Mali. Some of them are likely to lack motivation as they are not remunerated. And there is the professional judge who rightly complains about his salary being a "corruption trap", to a greater extent than his commercial lay counterpart. The latter, on the contrary, feels that his is a merely decorative function. His role must therefore be accorded greater esteem. In the mixed legal system, the presiding judge does not have to be a professional, as is currently the case in Mali. It is interesting to make a comparison with what was said 60 years ago about the Roume doctrine and its attempts to write on African issues: "... *by limiting oaths on fetishes or on the Koran, by disregarding the supernatural factors linked with the person of the judge, by depriving the chiefs of their position as judge and by calling in lay judges to sit in court, i.e. no longer the initiates, the inspired of the Africa of old,*

haven't we emptied custom of its meaning? "(in Roulard p. 355). This quotation shows that, in a similar court system, the problems associated with the mixed legal system in Mali can be solved by statutory or procedural means which make allowances for the cultural factor. To avoid the problems of a professional judge appointed to a court in the provinces and surrounded by locally influential people, it is recommended that the revised Judiciary Code follow the example of the Belgian Code and provide for such matters as the acceptance of judges, residence, and the exercise of judicial functions (as regards rank, precedence and the servicing of hearings) - since Malian society is far from being informal.

It would be wrong to think that the intrusion of the commercial operator on Mali jurisdiction constitutes a danger. His presence there assumes that the professional judge comes from an independent and hierarchical body, and that he is detached from the milieu where he exercises his functions. Many observers of the judicial world in Mali believe that there is no difference here between him and the commercial operator. Some judges, whether experienced or at the beginning of their career, have expressd the same opinion with both bitterness and dignity. Great hopes are therefore in this new mixed legal system which may be a real asset for the private sector. Traders and industrialists care very much about unfairly judged disputes that they come across in the cases they hear, about unfair competition or discrimination against French traders who have been living in Bamako for many years and are still waiting for the enforcement of a judgement. "*Judges of all shapes and sizes, dressed in black or red, with or without ermine, all have in common this modern idea that equity is the only justice*" (Jean Denis Bredin in Etudes offerte à B. Goldman, Litec 1987 p.20). And this is the general feeling that the mission perceived - a feeling that can renew a legal system which has been constrained foo long by its dependence on authority.

28. Organisation of commercial operators in Mali.

The commercial court system is based on the existence of a society of tradesmen and industrialists. This is not the place to talk about this society and its customs, but it is necessary to identify and analyse the problems encountered in the operation of the sytem in Mali.

Several authors reject the identification of law and the State and insist on the autonomy of a commercial law which should not be lumped together with government Law. In their commercial dealings, the parties would progressively come to create a spontaneous law system made up of professional usage, of contract terms progressively elevated to the rank of customary institutions and arbitral awards exmlicitating and developing this customary law. A commercial judge would more easily refer to these

sources to settle disputes. More will be said about this particular character of commercial law in the second part of this report. The jurist Santi Romano says that "Law is not only the rule stated but also who states it". Given some form of social organization, there will be a juridical system. Yet the question needs to be asked as to whether Malian tradespeople and industrialists are sufficiently homogeneous to enable the solidarities of professional and vocational groups to make themselves felt.

§2. The Chamber of Commerce and Industry.

29. The CCI. During the "Etats Généraux du Commerce et de l'Industrie" which were held in Bamako in November 1991, a matter previously brought up in the last National Conference was raised. namely, the division of the Mali Chamber of Commerce and Industry into two distinct bodies, defending respectively the interests of traders and of industrialists. This difference of interests and claims creates a doubt as to whether the business community can be the right framework for justice. The common interests which drove private persons to associate in the CCI compete with a rival institution, the FNEM. Some purpose will be served, therefore, if we were to analyse the **election procedures** and discern the conditions governing eligibility, since it is by being elected that tradesmen and industrialists are temporarily vested with judicial power over commercial disputes. Is it not important that the judges be chosen among those people who are trusted by the potential parties in a case? Once elected, the commercial lay judge, like the career judge, should fear the penalties that can be imposed by a disciplinary measure for any failure of his. The **disciplinary system** is particularly important as the business community in Mali is relatively small and is characterized, beyond the differences of interest expressed at the "Etats Généraux", by many convergences of interest, relationships and various kinds of solidarity.

30. How representative are commercial lay judges? Commercial judges are elected by a constituency which is a subject of controversy, namely the Mali Chamber of Commerce and Industry. The survey of private entrepreneurs in Bamako conducted by Messrs. Byess and Diakite, from USAID Bamako, brings out the degree of distrust by industrialists and many traders of an organization which is supposed to represent them. The commercial courts are linked historically, by their composition and by their vocation, to the CCI. The rules for the election of the members, the statutes and the functions themselves of CCI preclude its being very representative, independent or efficient. This is why there is a reform under way with as its main purpose a wider independence vis-à-vis the public authorities, and an extension of representativeness by granting the right to vote to categories so far

excluded. In the March 1992 draft Statute, the categories are: Trade, Industry, Banks, Transport and the Professions. But it seems that in not setting the obligation of "quotas" for each category, there has not been any serious discussion as to the correctness or otherwise of allocating to the respective categories a "quot" for membership corresponding to the economic "clout" that each of them has. If there had been any such discussion, and if quotas have been adopted, then the temptation to separate industrialists form tradespeople would have been removed.

31. The Crafts. The CCI's hope of having a very broad representativeness has already been defeated by the creation of the Chambers of Crafts. In the past, artisans, although numerous in Mali, had no autonomous representation through lay judges. It is nevertheless difficult in this country to distinguish between the artisan and the petty trader or small-time industrialist. Often the person concerned is both artisan and trader at one and the same time. This is why, **while the administrative regulation can keep its "originality", the craftsmen's private statute can be gradually absorbed into that of the trader**. This reality does not seem to have been taken into account by those presently advocating plurality among the trades, crafts, etc. In other countries, artisans tend to align their private statutes with those of the tradesmen. In France, artisans have achieved the "commercial property benefit" and they are entitled to compensation if they have been denied a renewal of their lease and they are regularly enrolled in the artisans' association. Since the procedural reforms introduced by the Act of 25th January, 1986, artisans can have the court oblige them to put their affairs in order or be wound up (redressement/liquidation judiciaire), in which case they will be deemed to be tradesmen, and be able to come within the jurisdiction of the commercial court.

The 1988 Act does not provide that the commercial courts must have "everything concerning bankruptcy, judiciary rules and the liquidation of property" brought before them. But the planned updating of the Commercial Code will need to examine many of these questions in greater detail. In its introduction to the draft Artisans' Code, the Ministry of Tourism and Artisan Crafts says that "it is necessary to revise some of the Codes in order to prevent confusion in dealing with artisans' problems". The interdepartmenal talks and the examination of the draft do not seem to involve the Ministry of Justice to any degree.

The Secretary General to the Government is himself a judge. But, in a climate of rapid reform, it is extremely difficult for anyone to keep a check on all the technical details. One such detail has been examined here. A detail of this kind may, however, prove to be important when the aim is to see the artisan develop and break out of the informal sector by gaining access to bank credit. This explains the intention to provide

the artisans' associations with corporate status such as that of the joint-stock or limited liability companies.

32. How independent is the CCI ? The main problem now for Mali's CCI is its identity, as is illustrated in the debate on Article 1 of the draft. There are two types of "compagnies consulaires" in the world today. There is the model found in the English-speaking countries, where the CCIs are a sort of voluntary association which does not enjoy public institution status and cannot manage large equipment, facilities or factories and where financial resources are limited to their members holdings. In Mali, there is a Rotary club where notaries, bankers and private entrepreneurs are active. An association of industrialists has also been created with the intention of becoming a "chamber of industry" on the "continental" model (as yet the association is nothing of the kind).

The continental-style CCI's have "public institution" (**établissement public**) status, therefore - de jure, private law and public law together. The Mali CCI is intended as being authorized to create and manage warehouses, permanent exhibitions, commercial museums, service stations. "Accordingly, the CCI will manage the Faladié, Dakar, Abidjour, Bamako Airport warehouses" (Art. 12, draft Statute). For the same reason, the CCI will be subject to the same regular controls as the établissements publics. The framers of these draft statutes thus have the difficult task of setting their course, on the one hand avoiding the accusation of being subservient to the executive and, on the other, the forfeiture of all real government-related administrative functions. The purpose of this report, however, is to emphasize the impact the draft may have on those coming before the court.

33. Election of Judges. The Commercial Court members, other than the presiding judges who are career persons, are elected by a constituency formed by

1. "The members of the Mali CCI who are entered in the Register of Commerce coming within the jurisdiction of the Commercial Court; and

2. former members of the Commercial Court and those that are still in office". (Decree No. 147, Art. 1)".

This electoral body is modelled on the French constituency system. But in France the CCIs have a broad representativeness and in their electoral registers there are some candidates who are neither industrialists nor tradesmen.

In Belgium, commercial judges are appointed by the King on the proposal of the Ministers of Justice and of Financial Affairs. "Candidacies may be proposed either by the candidates themselves, or by professional or interprofessional organizations representing commercial or industrial interests" (Art. 203, Code Judiciaire Belge). The Mali 1988 Act completely unifies the rules concerning the composition of the electoral body for election to the commercial courts and of the CCI members. This simplification justifies the importance to be accorded to the CCI, and to the procedure for organizing elections to it. The bill at present under consideration in another French-speaking country of Western Africa provides that "regular lay judges and their alternates are chosen from the lists presented following the elections by the Chambers of Commerce and Industry or by the Chambers of Artisan Crafts or by the most representative unions of members of the commercial, financial and industrial callings ". The author is in favour of such an extension.

The 1988 Decree leaves several uncertainties to be clarified, and a fair amount of tidying up is needed. The reform of the CCPCS in the spirit of the Constitution will need to give statutory force to rules previously found in enforcement regulations. We take the view that the election of a judge should be a matter for statute law, for this is fundamental to the organization and composition of the commercial courts. It seems that in the legal systems of most foreign countries, and those in the drafting stage in Western Africa, the disciplinary system for the lay commercial judges is established by statute within the context of the law governing the commercial court and the new and more precise rules on elegibility will also determine cases of incompatibility.

§3. The paralysis caused by absenteeism

34. Lost in the Decree that determines the procedures for the election and the elegibility of commercial court members, Article 16 provides that "judgements shall be taken by at least three judges, and the presiding judge and a titular judge must take part in the trial, otherwise the judgement shall be void". This provision gives grounds for being apprehensive over possible delays in commercial justice, because:

a) commercial judges, if they come at all, tend to be late;

b) the presiding judge of the commercial court may be unavailable for various reasons (sickness, training, etc.)

This explains why, in practice, there may be hearings where no career judge is present and a titular judge acts as President! There is something to be gained by embodying in the relative enactments the initiative and

realism evinced by what happens.

In Belgium, if the President of the Commercial Court is unable to fulfil his specific duties, he is replaced by the senior judge. In the same way, the lay judge is replaced by an alternate from his commercial sector. In case of unforseen absence, the President of the Commercial Court, or "a lawyer 30 years of age or, if younger, who is a registered member of the order of attorneys, shall replace the lay judge who is indisposed".
Impediments and replacements are a specific characteristic also of the Commercial Courts in France's overseas departments. "If at a hearing there is no quorum of judges, the President of the mixed court in public session draws by lot from the names in a list drawn up by the First President" (Art. L. 921-9).
The foregoing points are, in the opinion of the author, essential modifications to be taken up in the travaux préparatoires for the revised CPCC.

§4. The Sole Judge and the President of the Commercial Court.

35. **The Sole Judge.** The new Code of Civil Procedure, as in France, may submit some disputes to a sole judge, usually the President of the Commercial Court, who would act as "juge rapporteur" of "sole judge". This practice, developed in Belgium and, in France, in Mulhouse, Strasbourg and Sarreguemines, is justified on the grounds of the technicality of certain matters brought before the court which entail exclusively legal or technical considerations (declinatory pleas, challenges of jurisdiction, pleas in bar, technical investigations, experts hearings, etc.). In other, simpler cases three judges may not be required. The revised CPCC seeks to strike a balance between recourse to the reporting judge whether for these cases or for those which, by reason of their commercial or complex nature, require the intervention of a professional judge and commercial judges.
In the new French Code of Civil Procedure (Art. 862-869) the institution of the reporting judge for commercial disputes draws inspiration from previous practices, which varied according to the courts. At Lyons, the main purpose in having a reporting judge was the reconciliation of the parties. In Paris, reference to a judge's report was made part of the procedure for the parties to consult the reporting judge was made part for the procedure, where the designated judge was required to prepare the case for judgement. Accordingly, it is practice that has provided a starting point for the legislator where he defines the prerogatives of the reporting judge. Similarly, practices in coordinating at the Bamako commercial court - and this is an excellent development - such as the special hearings arranged for every Wednesday and Saturday. The conditions governing the appointment of the reporting judge should be embodied in the revised CPC, in the interests of avoiding yet a further

drag on procedure or the systematic institution of the sole judge. The consultant is also in favour of the extension to the Mali investigating judge of the functions assigned to the French investigating judge in the Courts of First Instance. He must thus be able to decide on dilatory pleas, pleas of voidance, on the grounds of lack of the form required by law, to grant a payment in advance to creditors and to adopt temporary measures. An important element in the role of the commercial judge in Bamako is that appeal to the "magistratures présidentielles" by "action on cessation" or "summary jurisdiction" is more and more frequent. The framers of the revised CPC can usefully refer to the article 584 of the Belgian Judiciary Code, which allows the presidents of commercial courts to order temporary measures for urgent matters within their jurisdiction. The temporary nature of measures is not so much a condition of the summary judge's jurisdiction as a limiting effect of his decision, which does not necessarily bind the judge who will be taking the final decision. The adoption of summary procedure would notably widen his scope for intervention by the judge in chambers. This necessary flexibility and specialization must not be pursued to the detriment of the due process of law. Careful monitoring of the activity of the commercial courts will indicate the likely developments in the complex relationship now delineating itself between the career judge and the lay commercial judge. The contribution of both to this evolution is to show the special commission what is at stake, cite actual experience and make suggestions.

36. The President of the Commercial Court. The increasing importance of this judge in commercial disputes demands that not only his powers with regard to summary procedures and rulings, but also the regulations for his election and the exercising of his jurisdictional functions be specified in greater detail. The Act states that the President is a member of the magistrature (Art. 7). Considering the cultural and technical aspects of the Commercial Court, one is entitled to ask what is the minimum age for election as President of a commercial court, what level of education is required; and how many years' jurisdictional experience. Again, what are the incompatibilities - plurality of offices; relationships by blood or marriage ? What of cases of indisposition and the rules governing his replacement ? What are the impediments and the replacements? Absences; leave? Salaries and expenses? Does the draft Statute of the magistrature take into account all these questions? It is to be hoped that it does, when one considers the particular function of the President of the Commercial Court. It is as necessary to ensure his autonomy as his competence, together with his intregrity and his ability to understand the world of commerce. The Act and the enforcement decrees have little to say about commercial judges. It is therefore recommended that more precise and comprehensive rules, procedures,

and guarantees than at present be adopted : The Belgian mode offers useful pointers here.

§5. The prosecuting magistrate and distressed enterprises.

37. **(a)** According to the opinion expressed by the Ministry of Justice on May 29th, 1990 to the Ministry of Finance and Commerce regarding the representation of the Public Prosecutor's Department: "Commercial activities are essentially private, and this concept is the basis of the mixed-composition court. The Government intervenes in such courts, acting through its judges, only to preside over the court as a technically qualified person who interprets and states the law to protect the key elements on which commerce proceeds, namely the security and the rapidity of transactions. The Department of the Public Prosecutor is therefore not directly involved. If public action (ex officio) is needed, the President of the Commercial Court informs the Attorney General and the public action pertains to public law, i.e. the magistrate's court or the Assizes Court. Today, this interpretation is incredible (it prevailed in France till 1985). But, since the Act of January 25, 1985, the procedure has been for the Attorney General to act as Public Prosecutor before the court of first instance which is competent over the commercial courts (Art. L 412-5). His powers for the control of publicly instituted procedures are many. It is not correct to say that commercial activities involve only private law issues (see para. 5 ff).

(b) In Belgium since the 1967 reform, **there is a Public Prosecutor's Office attached to the commercial courts** : the Crown Attorney is appointed to act in that capacity. In German law, there is no duty or entitlement assigned to the Public Prosecutor to intervene in commercial or financial disputes. But Germany has a very highly developed bankruptcy and composition procedure, and a bankruptcy court which appoints and controls the trustees. This unusual "self-management system controlled by the Government gives considerable powers to creditors". (Jäger, Lehrbuch des Deutschen Konkursrechts, 8th Ed.).

(c) One of the most difficult matters that pertain to the commercial courts concerns distressed companies. The recession has tried to ascertain the present situation with Book II of the draft Commercial Code. There seems to be a controversy between the local consultant and the supervisory mission of the World Bank.
The consultant is in favour of a precautionary system which empowers the judge to intervene in the management of distressed companies merely upon the Public Prosecutor or at the instance of any other interested person, and of having the cessation of payments formally verified. The mission, for its part, recommends that the situation be

analysed in the light of the 1984 French reform. The French system has a tripartite structure of precautionary measures, publicly instituted proceding and extra-judicial intervenors. One reason why this reform has been criticized is that it should have allowed "The court to intervene before payments ceased, i.e. when its action is more effective than after legal action to obtain redress has been instituted". (Y. Guyon, Droit des Affaires, p.29).

(d) Legislators have several ways of dealing with distressed companies; among them:

(1) private procedure: here creditors play an essential part;

(2) administrative procedure: liquidation placed in the hands of a para-administrative body of the Ministry of Economy (Switzerland, Greece); and

(3) judicial procedure: the matter is assigned to the courts

Publicly instituted procedures combine these three ways in different degrees. In Mali bankruptcy control policy is an essential adjunct to economic reform. This is why the first way (German style) can be disregarded. In case of application for redress, the courts do not necessarily enforce legal rules, because they also decide in the light of what is opportune in a given instance. Now, a Government cannot ignore this; which is why the Government of Mali exercises an exclusive right here. Does one have to consider this right as being enshrined in statute law (as in Switzerland and Greece) or as pertaining to judge-made law? In principle, preference is for those courts whose independence is a guarantee for both creditors and debtors; but no final opinion is possible without a deeper analysis of the matter. Prompt and discreet intervention is often necessary, however, to relieve the situation of a firm which, failing such intervention, would be forced into suspending payments. The joint formula of Governments and judicial authorities acting together would make it possible somehow to protect at the same time the firm, the creditors and the interests of the employees.

(e) The Belgian commercial court corresponds to the Mali court, and equally prefers precautionary measures; and a fully-fledged commercial enquiry facility exists within such a court. The problem from the entrepeneurs' point of view is the nature of the convocation before the President of the commercial court, which in Belgium is an aid measure and not a legal procedure that leads to a firm being brought to judgement. In Mali, the system proposed in the revised Commercial Code looks more like a precautionary measure than a special urgency measure of summary jurisdiction. <u>It is therefore recommended that</u>

prevention and alerting be determined on the basis of precise indices of difficulty and be organized as rapidly and discretely as possible, aiming at:

- an improvement in information, by the publication of accounts;

- according more power to the statutory auditors;

- the adoption of a new accounting plan (as contemplated in the revised Commercial Code); and

- establishing the minimum capital a company must have (the minimum amount fixed by the 1986 Commercial Code is excessive). In any case, proposals for reduction here must be carefully studied, given that being undercapitalized is what makes firms vulnerable. A reduction in the required capital must be accompanied by promotional measures or facilities designed to secure an increase in the capital, such as tax incentives, the possibility of reinvestiment of dividends in new shares instead of having them paid out in cash, and more information on transferable securities.

In conclusion, the recommendation made here is that the Public Prosecutor's Department play its appointed role in publicly instituted procedures, working in close cooperation with the commercial courts, since the Department is the link with public authorities. Once its prerogatives are recognized, the law will subsume current practice.

SECTION III

SPECIALIZING THE COMMERCIAL COURT

§1. Training and recruitment

38. An instrument for changing mentalities. The preponderance of economics, the contract taking precedence over the law, the development of a private sector with which the law is inadequately acquainted - these are but some of the factors that disorientate the judiciary qua institution as well as the judges that make up that institution. The bringing into being of a commercial court has, in such a context, given rise to a misunderstanding that were best cleared. Career judges look askance at the Commercial Court, and are the first to point to the illiteracy of the lay judges, their ignorance of the law and their incompetence as a component of the judiciary. The former tend to ignore and look down on the world of private enterprise, and the latter tend to ignore and look down on the judiciary. One thing that must be done immediately (otherwise the gulf will become yet wider between the expectations the commercial court engenders and the disappointment that may ensue), namely to define its specific place and providing it with the means of sustaining it. And it is training that represents the high road to achieving this purpose.

39. Recruitment. There can be no recruitment to, or running of, a judiciary, without professional training. For budgetary reasons, the Mali Government, during the last few years, has limited staff recruitment. But Article 2 of Decree No. 79-9/CMLN dated 19.1.1979 expressly excludes from its scope training courses and courts. "In spite of this exclusion, and of the fact that even the central departments which are coming within the scope of the above-mentioned decree have never had the needed staff, the Government has expressly limited the recruitment of judges. When every year an important number of elderly judges seek retirement, the Government authorizes every other year the recruitment of a paltry six or seven aspirant judges who have yet to undergo two years' specific training before their substantive appointment as judge" (1992 Ministry of Justice Report on the judiciary).
Mali has 215 judges and seven judges on the waiting list, for an estimated population of nine million. Only 150 judges have actual jurisdictional functions. Another 45 work in different Government administrations (see in table in annex). Considering that the minimum ratio required in a developing country is one judge per 50,000 of population, then Mali's ratio of one per 60,000 is not sufficient. The

Ministry of Justice reckons that there is a real "shortfall of 121 judges, and the consequences are well known at every level". The shortfall, moreover, is amplified by an imbalance of functions, and the Court of Appeal suffers in consequence. The concentration of judges in Bamako is explained by the number of cases tried in the capital and also by the number of judges in Government departments.
While the judges' performance can indeed be improved, the increase in the number of cases can only be counterbalanced by recruiting more judges. The lack of motivation and the resignations have an adverse effect on staff numbers. "The other cause of dissatisfaction and of judge's leaving his profession is also the humiliation suffered by Mali justice during the last years of the former regime. Recruitment - and nobody denies the need for it - does not solve our problem, which has to do with the provision of commercial court judges, which is why it is necessary to create possibilities for career judges in the commercial courts (cf. the Belgian model).

40. Initial training. There are two ways to qualify as an aspirant judge. A first examination at the national level is open to all applicants having a diploma of the Ecole Nationale d'Administration (law section) or a national diploma or an overseas equivalent (e.g. master in law). A second examination is open to applicants having a high school teaching diploma in law and five years' experience as civil servant. The initial training in question is provided by the National Judiciary Training Institute established by the 1986 Act. Business law is only a small part of the training. Lessons and seminars are not always in the hands of competent laymen. At the end of this training, which is mainly theoretical, the candidates take oath before the Court of Appeal and are then sent for another period of ten months' training in the courts. At the end of this training they are appointed judges.

41. Ongoing training. Some is provided in France at the International Section of the Ecole Nationale de la Magistrature (ENM), as well as in Bamako. In Mali this is possible thanks to some assistance from the Cooperation Française of the Ministry of Foreign Affairs and the Fondation Friederich Ebert. The ENM offers three types of training: ab initio, intermediate and advanced. The consultant was not aware of any specialized level of training of Mali judges in commercial or criminal law as referred to business activities.
In France, too, judges' training suffers from a closed attitude towards the private sector, to the litigation that may arise there, to its specific competences and to the professional people that make it up. "*For a realistic training policy, it is necessary* ", André Potoski maintains, *"to facilitate and encourage the secondment of judges and allow them to*

work for some time in private companies otherwise where will you find people with the know-how and experience to handle financial law?" (Etudes p. 459). Many would welcome the day when the barriers between lawyers and judges disappear *"to endow judicial activity with consistency and therefore greater weight"*. In 1991, two training missions were organized, the first on the drawing up of judgements, and the second on special procedures. A seminar was also organized on land law and development. The seminars and workshops held with support from the Friederich Ebert Foundation related mainly to civil and criminal law matters. The seminars scheduled for 1992 seem to be more oriented towards commercial law. As Mohammed Ali Bathily says "*there is a shortage of persons trained - and available - in such fields as tax, customs and commercial litigation...*" (La Justice en Afrique, p. 128). Joint training programs among the various professional specializations could be organized by the CCI, along the lines of what is done in France.

42. Other persons intervening in the judicial process. We find the same lack of training in commercial and economic subjects among lawyers. In 1985 there were about fifteen judges only, whereas today there are 150, and they are mainly young. A reform is under consideration here. This should provide for a national-level examination organized by the Bar Association and open to applicants coming from the Ecole Nationale d'Administration (ENA law stream) or to those who have an equivalent qualification, leading to the CAPA (Certificat d'aptitude à la profession d'avocat). Maître Tapo considers it is necessary to establish a training center for barristers. There are many problems relating to "*codes of conduct today, and that explains the behavior of certain barristers*" (L'Essor, March 4th 1992). A commercial court will work properly or otherwise depending on the professionalism of its clerk and his office staff. Their function is particularly important, since it is they who keep the Register of Commerce (see para. 58). And then there are the ushers. Without them it is not possible to carry out notifications, serve writs or, last but not least, enforce judgements. It is therefore necessary to train them for this new specialization inherent in the commercial courts and their procedures.

§2. Judicial Techniques

43. Procedure. It has been repeatedly emphasized here that the commercial court procedures should have special rules incorporated in the revised Code of Civil Procedure, and it is these that make for the specialization of the commercial court and offer litigants a simple, prompt and inexpensive procedure. At the moment, the commercial

procedure is regulated by the Code of Civil Procedure (art. 12) and certain provisions of the Commercial Code. But the main features of the litigation procedure before a commercial court in Mali are not satisfactorily developed in current law. In areas where there are no commercial courts, the first instance court is competent. In that case the court of first instance follows the procedural rules applied by the commercial courts. What is needed therefore is a reform that will provide for the applicable procedure in the light of the commercial object of litigation, and not simply for the court that is expected to rule in the matter.

44. Representation and cost. Art. 11 of the Mali Act does not as such provide that "parties shall conduct their own defense" (as is provided explicitly in the French revised Code of Civil Procedure (Art. 853 para. 1). Greater clarity would simplify access to the commercial courts and would encourage reconciliation without the need for intermediaries. The same Art. 11 specifies that the person who appears before a Court on behalf of either of the parties must produce an act of specific agency. In the new Code of Civil Procedure it will be desirable to specify the extent of the powers of proxy in an article to which simple cross reference can be made. The cost is therefore not only a problem of depositing of the sum due. It would be unreasonable merely to abolish the 7% deposit at the beginning of proceedings: given the situation in Mali the courts will be unable to recover this amount later from the litigant. It is suggested that an estimate be made of the consequences on the budget of a reduction to 4% of the deposit due at the beginning of proceedings. The balance should be made over once judgement has been pronounced. The basis should be the amount set in the judgement and not what the creditor claimed (the author has no information regarding any catio judicatum salvi problem where foreigners are concerned). The merging of the professions of barristers and legal counsels in commercial cases should hopefully lead, in any event, to ample enabling powers in commercial matters. The provisions concerning the commercial court procedure need to be dealt with in a specific division of Act No. 88-44.

45. Initiation of proceedings. Innovative solutions are needed to problems concerning the writ of summons in commercial procedure, the term to appear, and election of domicile. In France, for example, in commercial cases, a joint petition may be filed with the court (Artt. 859-860, Nouv. Pr. Civ.). Some simplified models of petition would facilitate access for the parties to this new commercial jurisdiction.

46. Application to the court. The practise of some parties before the Commercial Court in Bamako makes it desirable that the legislator should abolish the faculty of submitting the case only on the day of the hearing, since this does not leave the court time to familiarize itself with the petition. A one week's notice should be accompanied by a sanction. As something has already been said here regarding the possible mission of an investigating judge, the following analysis will be confined to the formalities attaching to the preliminary investigation in commercial matters and the characteristics of the oral proceedings.

47. Colloquy between judge and litigants. In commercial cases, it is desirable that the judge reporting on an enquiry be empowered, provided the parties do not object, to conduct the hearing alone, receive the pleadings and report to the court and the time judges enter upon the formal hearing. A provision in this sense would take over Art. 869 of the revised Code of Civil Procedure, experience having shown that this course of action does much to improve the courts' performance and, in doing so, to render commercial justice more expeditious and more efficacious (Solus, 1991, No. 505). A hearing-cum-dialogue of this kind very often provides the judge with an opportunity of suggesting that the parties compound or come to an out-of-court arrangement; and this is quite well suited to the situation of the judiciary in Mali.

48. Increased powers of the judge. The new Code of Civil Procedure could attach greater importance to the judge's task by vesting in him powers to order the furnishing of evidence. The revised enactments in France give the judge "ex officio power, supported by evidence procedures, for summoning persons, hearing witnesses, ordering discovery, appointing experts, production of documents in commercial law, and the disallowance of expert appraisement in the event that this is not delivered on time". These different questions, will be taken up by the commission on the reform of the Code of Civil Procedure (cf. Les rôles respectifs du juge et du technicien dans l'administration de la preuve en droit privé, PUF, 1976).

PART TWO

ACCESS TO THE COMMERCIAL COURTS IN COMMERCIAL MATTERS

The scope of commercial courts may be considerably extended by promoting:
- jurisdiction (Chapter 1)
- commercial law (Chapter 2)

CHAPTER I

FACILITATING JURISDICTION

Action to be undertaken in order to better the position of persons coming before the commercial court can be subdivided into two categories:

- channelling economic controversies (section I)
- favoring access to the status of commercial operator (section II)

SECTION I

ECONOMIES AND DISPUTES

§ 1 - What kind of commercial operator?

49. The Formal sector. By "persons coming before the court" in this context are meant the commercial operators. If one disregards any distinction between individuals and bodies corporate, commercial operations consist in: distribution, manufacturing or industrial, service, including transport and secondary activities. Corporate bodies in the private sector are obviously subject to the rules of private law, but it is important to remind ourselves that even corporate bodies in the public sector may, in varying degrees, resort to the rules of commercial law. The private sector provides employment for 9% of the active population, while only 20.7% out of the 12,536 workers make up the industrial labour force, the mixed sector accounts for about 26% contributed 50% to the gross domestic product by Malian industrial and service companies in 1989 as compared with 50% for agriculture. The latest industrial census, published in July 1991 by the Ministry of Finance, lists 186 enterprises within the "modern industrial sector", mostly grouped in the Bamako district, followed by the Sikasso (13%), Ségou (11%) and Koulicoro (8%) areas. Kaye and Mopti, which have commercial courts, are still poorly industrialized. Concentration has taken place in the following sectors: food, beverages, tobacco, textiles, clothing and leather, accounting for about 60% of jobs. In spite of the partially divergent interests between manufacturers and the commercial operators "most industries were set up by Malian traders..." (Sahel Club 1989).

50. The Informal sector. According to DNSI 1989 estimates, this sector accounts for 63% of economic activities and, according to the ILO definition, "includes small independent businesses, with or without

employed workers, having low organizational and technological standards, whose main purpose is to create jobs and sources of income for the people concerned insofar as such businesses are conducted without official approval and elude the control of administrative supervisory bodies in charge of enforcing the regulations on taxes and minimum wages as well as similar enactments concerning fiscal matters and working conditions, they are underground activities". For the jurist, enrollment in the commercial court register would simplfy the search for a definition encompassing the unstructured or informal sector (though identifying illegal informal activities would remain as difficult). Several investigations are making for a better understanding of this sector , which, or course, involves, "commercial operators".The informal sector is thought to account for 50% of urban jobs and to generate higher incomes than the entire farming sector. It includes people providing services connected with cars, transportation, laundries, etc. - people engaging in the kinds of business which do not figure in any economic statistics, such as door-to-door selling, retailing of traditional craftwork and manufactured objects, smuggling, and so on.

§ 2 - Violence and informal justice in economic matters

51. The presence of certain institutional elements makes for a peaceful settlement of disputes, whereas their absence leads to resort to violence. During the social and political turmoil in January and March 1991, several production and distribution units (51% or, in value terms, roughly USD 40 million) were destroyed. Such phaenomena fall within the scope of our subject matter as they may well be considered as violent ways of settling political and economic controversies. The presence of a third party and the effectiveness of public institutions such as the commercial courts would curb violence based, in this case, as in any vindictive system, upon a mistaken notion of debt. Looting and pillaging cannot be justified. Some manufacturers and traders have been suspected of thriving by fraud or corruption, thanks to the previous regime. This view is not necessarily correct, and concerns the public rather than the private sector. Thanks to gold trafficking between Bamako and Brussels, some people, including the former President, allegedly diverted USD two billion (see Le Monde, 3 April 1992). The climate aroused by such suspicions can easily be imagined.

52. Only within a State endowed with an effective economic justice, can violent confrontations be turned into litigation settled by a court of justice applying the law.
The UN subcommittee on human rights in Geneva is examining a draft resolution relating to public officials' earnings from fraudulent activities to the detriment of the public interest.

The extent of unemployment and of the informal sector bears some of the blame for such violence. Another interesting approach, though certainly beyond the purpose of the present report, would be to look into the informal justice in this sector. Conciliation plays an essential role, but it is also possible that in the urban environment, taking the law into one's own hands avoids the costs and complex procedures of commercial justice. It is for these reasons that we advocate an effective "promotion" of potential ligtigants. Such measures, insofar as they represent the essential pre-requisites for the rule of law in the economic sector, are a direct contribution to the security of the private sector no less.

53. The tragedy of Yanfolila is a criminal case falling within the jurisdiction of the Assize Court. Yet, the outbreak of violence in this case, involving 31 defendants indicted for "murders, sacrificial killings by fire, involvement in uprisings, occupation and destruction of public buildings and private property, destruction of public property, incitement, riotous assembly with access by password, violent disarming of police agents, plundering, gang robbery ..." was touched off by a mission of customs officers code-named "Consommer Malien". A Customs officer inconveniently injured a smuggler during an action involving a seizure of cigarettes, soap and Guinean Magic cubes. The chairmen and deputy chairman of the Yanfolila tradesmen are thought to have played a crucial role in triggering off the escalation of violence. The incidents described occurred at Molobala, a real "smuggling corridor where contraband in order to survive is the main business for the people" (L'Essor).

§ 3 - The capacity of the administrative courts

54. The nature of an administrative court is such as to extend the judge's powers, and strenghten the rule of law in the process. Administrative litigation may also involve companies. The latter, in fact, may challenge a decision of the Minister of the Economy and Finance, by the General Directorate of Taxation or by the Customs Service. Such litigation, therefore, does not concern only the civil service. However, it is not advisable to create a fundamental gap between formal rules and their real effectiveness, between establishment of an institution and failure of its implementation. This is why the Ministry of Justice should focus on the practice of appeals and on the court decisions they have occasioned.

55. Operational conditions.

Judgements are delivered at only irregular intervals. An average of about four or five judgements per year shows that the judicial review of administrative decisions in Mali, has performed poorly. Some 90% of claimants live in Bamako, most of them civil servants. Such a system for

litigation dates back to 1965, and the appeals seldom concern the economic sector. The various obstacles described by the present report in relation to commercial courts also affect administrative courts, though their content differs. The specificity of the rules to be applied and the lack of real specialization on the part of judges are some of the causes of the shortcomings of proceedings in litigation where administrative matters are concerned. Without faster, streamlined and coherent administrative litigation procedures, administrative courts now represent an unaffordable luxury for Mali; as things stand at present. Administrative law should therefore be given encouragement. Cases of ultra vires appeals and appeals for full litigation matters should be envisaged, specified and made public even to the illiterate.

In this connection the following guidelines should be of help:

(a) review of the administrative sources of business law : the administrative court should review and, if necessary, rule against the Government as Guarantor of administrative decisions ensuring freedom of trade, for instance:
- possible annulment of decrees subjecting business dealings to discriminatory creditors;
- citing the responsibility of the public powers in cases of breach of equal treatment between competitors;
- consumption law: unlawful clauses;

(b) review of the public administration as a trading partner : will the administrative court have competence only to handle cases concerning public contracts? If so, as in France, problems of concurring jurisdiction between commercial and administrative courts should in other cases be solved. There are several examples of subrogation or guarantee actions involving commercial operators and potentially bringing them before an administrative court; and

(c) review of administrative activity in commercial law matters :

its initial stage. A similar way of viewing matters shapes the role of the claims department, set up in 1966 within the Government Secretariat, which was supposed to act as an information or pre-trial centre. The plaintiff often prefers to deal with an authoritative mediator rather than with a judge who does not adequately fit his function. This is why, as is the case with commercial courts, it would be advisable to back up the examination of positive law with exhaustive research, which, in the case of administrative law, should be of a social and political nature. In these few remarks, a limited number of avenues of research can be suggested.

57. A mediator of the Republic. We especially recommend the creation of a Mediator of the Republic. Mr. Ousmane Kamara, a former judge and First President of the Supreme Court, who inaugurated this function in Senegal, as provided for by that country's Act 91-14, of 11 February 1991. Thanks to Mme. Maimouna Kane (General Secretary of the Supreme Court of Senegal and a Member of the IDLI Board), we have been able to read the first report of this mediator for 1991 (see Annexe). This report is evidence of the advantage that such an institution would represent for Mali, especially within the economic sector, over such matters as arrears of rent owed by the State to private persons, "as extremely complex and dangerous situations may derive from the current conditions on which land and estate transactions are handled by the public powers", as well as from "resort to legislation for the payment of damages caused by riots" and "banking sector malfunctioning". The mediator's decisions are not enforceable; and the mediator himself can intervene even when a plea has already been filed before a court, but his task, consisting in ensuring a dialogue between the public administration and the citizen, between his public service and his users, seems to be suited to Mali here and now, in order to prevent controversies and settle litigation because it offers the possibility of trying cases into equity. **The mediator could contribute to a better management of public affairs and of a peaceble society, which is essential for economic development.** In a society where the personalization of power is so strong, this "ombudsman", to be really effective, could be appointed by the Head of State (as is the case in Tanzania, Zambia and Nigeria). But if, in the future, no Parliament of Mali were to acquire the same prestige as the Head of the Executive, then no mediator could be associated with Parliament, as in western democracies. He could represent a sort of safety-valve by channelling the complaints of citizens who claim to be victims of the administration.

The Yanfolila incidents are precisely a criminal expression of an informal marginal smuggling sector against the Customs system. Incentives to enroll in the Central Commercial Register, to maintain regular book-keeping and to publish balance sheets should be matched by the interested party's real chances of filing a plea and by the

defendant's possibility of filing an administrative or judicial appeal. In Africa, there are few judicial actions on fiscal or Customs matters brought by trading companies or by taxpayers, who are reluctant to have recourse to a judge who is still considered in Mali as "just another civil servant" (Mr. Ouattara, in La Justice, p.150). This situation is compounded by fears of possible retaliation by the government department. Commercial courts, at least, no longer labour under this criticism and this is a remarkable achievement for the private sector.

SECTION II

FACILITATING ACCESS TO THE STATUS OF COMMERCIAL OPERATOR

§ 1 - The Commercial Register

58. Legal incentives. Just as the Chambers of Trade and Industry and the commercial courts (where it is a basic element), the commercial register finds its origin in the corporate organization of traders. In Mali, articles 11 to 55 of the Code relate to the Commercial Register. The next nine articles (56 to 64) concern the list of professions. The Register is fundamental to the development of the private sector because, quite apart from its administrative functions, certain legal effects may be connected to it. Any policy aiming at bringing the informal sector into the mainstream of commercial activities should see in the Register a special means for encouraging registration by informing the people concerned of its effects. Now, the ordinary citizen trader seems to be unaware of one of the main advantages of registration (which is also a pre-requisite for the status of trader), namely the competence of the commercial court. In the absence of registration, it is often difficult to uphold the commercial nature of any document by applying the theory of appurtenance, in order to claim such a competence.

59. Fiscal incentives. Developing the peculiar character of commercial procedure and jurisdiction, as recommended in Part I, will be a practical incentive to abandon the informal sector and enjoy the benefits of joining the formal sector. At present, it is exactly the opposite that happens takes place: a number of traders and manufacturers complain of the publicity involved in the formal sector - in being a licensed operatior. Thus, the private sector, covering only one tenth of the working population, accounts for more than a half of direct tax revenues of the State. This is a handicap, namely a fiscal one, against informal traders. It could be countered that business companies draw all kinds of benefits from corporate status as a result of their registration. However, failure to register could be penalized by way of taxation, in other words by promoting access to the status of trader through a fiscal approach. A study carried out in 1989 by D.E.G. Louis Berger International at the request of the Bamako USAID highlighted "the discrepancy between the small number of formal (in the legal sense) "commerçants" currently registered with the commercial court and the number of "commerçants" who are known to the internal revenue service and who are not experts."

The author's research confirms that the discrepancy persists today (in spite of the abrogation of Ordinance 58 and its enforcement decrees).

60. Streamlining: a unified numbering system. As pointed out earlier, current analyses, mainly carried out by economists, stress the need to streamline procedures. We completely agree, and suggest, together with Mr. Ibrahima Makanguilé, fiscal consultant at Bamako, that the system for identifying and numbering enterprises should be unified. Under the present system, companies are registered with the several government departments under different numbers. Apart from streamlining, such a system is likely to have other advantages such as rapid identification of the kind of company and of its place of registration as well as easier cross checking during fiscal inspections. But the French system is no cure-all remedy. As this unified number is chosen by INSE and not by the registrar, it is often assigned after delays, and the administration continues to use other numbers together with the SIREN number to identify firms (APE number of activity and SIRET number). This is why in France a 1984 decree extending the role of the registrar receiving applications for registration, provides for the creation of a co-ordination board whose task is to examine the difficulties standing in the way of enforcement and to submit the necessary reforms to the Minister. It is suggested that the ad hoc Committee in charge of developing commercial courts should also determine ways of simplifying declarations and speeding up burocratic procedures.

61. The contribution of **notaries** in Mali is especially significant. They have the equipment often lacking in the courts (photocopiers!). They advocate that their active role in handling procedures could be legally recognized, as in Canada today. With the assistance of a notary at Bamako a company may be assigned a number in 24 hours. Without a notary, the process will take a month. On top of this, there is a lack of forms and, above all, the fact that traders ignore the very existence of a commercial court located elsewhere and in charge of keeping the Commercial Register! Before boosting the role of notaries, it would be advisable to assess the impact of doing so on the costs of access to justice.

62. Commercial publicity. Any process of streamlining is limited by the very raison d'être of an institution or a procedure. Can the Commercial Register today perform its task of centralizing commercial publicity in Mali? Commercial publicity has an essential role in a market economy. All regulations in other countries ensure a strict control, especially when a company wants to go public. In any case, in Belgium a notary takes part all stages of the setting up of a company, and public issues are submitted to the supervision of the bank commission. The author checked at Bamako how the Commercial Register is kept; and

computer support would obviously be extremely helpful, but it does not seem to be urgently needed, considering the number of companies to be surveyed now. The registrar and his assistants deserve to be praised for working in such unsatisfactory conditions. A Register of entries is well kept, listing in chronological order the date and number of each declaration together with some items of general information. It is the Analytical and Alphabetical Registers that could be improved. In principle, anybody having business relations with a company in Mali may ask for a summary of registration to make sure that no proceedings have been started by the public authorities. In practice, things are different.

63. Even more effective than the Commercial Register is the "everybody knows everything" refrain very common in Malian society. Such social rather than legal transparency has some drawbacks, as noted earlier, in the "echevinage" system. Hasty publicity at the least instance of litigation, by exposing the troubles of a defendant to the public, could well undermine a firm's financial situation. The problem is insoluble - how to ensure enough publicity through the Commercial Register kept by the commercial court yet at the same time avoiding unnecessary publicity which would only arouse the concerns of those who, for example, have business relations with the debtor.

64. Information and the Chamber of Commerce and Industry (CCI). The search for such a balance leads the author to disagree with the conclusions of the diagnostic study of the Commercial code, in relation to the Commercial Register. The study suggests that some of the functions performed by the registrar should be delegated to the Chamber of Commerce, since it is the Commercial Register that is involved. It is worth remembering that the Register is and must be kept "under the supervision of the President of the court or a judge expressly appointed to this task" (Art. 13, Commercial Code). It is nevertheless necessary that the Chamber of Commerce and Industry undertake a through going information and training campaign to promote the Commercial Register to be kept by the commercial court. Without overrating the possible effects of the informal sector being integrated into the formal sector, it is the author's firm conviction that a better understanding of the effects of enrolment in the Register, together with a streamlining of the numbering system, and the training of registrars as well as of traders, would have an immediate and positive influence on the business sector.

§ 2 - The law of family relations

65. In order to be entered in the register of the Commercial Court, married women must produce evidence of the husband's consent, as required by Art. 4 of the Commercial Code. This article, in fact, places married women who are under a "non-exclusive system of community property" under the obligation of obtaining the prior consent of their husbands. Little wonder that this obstacle is removed by the Commercial Code reform started within the framework of PAS-AID. That marital authorization is to be abolished is definitely as one of the changes to be introduced. Accordingly, this is no place to sum up the arguments for or against abolition, since this is part of a wider debate on traditional rights and modern society. "Desirably, the question should no longer be put in terms of either a regression to the past or as the ushering in of a future exclusively shaped on European standards and decided by others" (to quote Le Roy). Several associations of Malian women have already demanded the abolition of the marital consent requirement. Obviously, whatever the legislative and regulation provisions, texts will not be matched by practice. However, as Le Roy points out, it is regrettable that "in many cases the Code proved to be an instrument of legal underdevelopment, as it either widened economic gaps or ruled out of the legal sector individuals who are neither French-speaking nor educated, thus endangering the objectives of development and national integration" (see Rouland p.361).

66. The issue is evidently linked to private-law family relations such as those deriving from marriage (dowry, polygamy, name, etc.). Did we not, in 1986, witness the acculturation of the official law by traditional law or, more likely, the persistence of an outdated French law? Whatever the answer, local courts sometimes direct the official law towards more traditional solutions. It is thus not necessary to fossilize custom, which is ever-evolving and rather uncertain, into some would-be authentic legislative policies. The new Zairian family law (1986) obliges wives to be assisted by their husbands for the performance of any legal act. Article 38 of the Code of Marriage and Guardianship in Mali (1962) should logically be abolished where it provides that "a woman may not engage in business transactions without the authorization of her husband". What is in question here is precisely the redefinition of the powers of spouses and their matrimonial regime.

67. Mention has previously been made of the growing importance of religion. However, it should be made clear that an essential characteristic of the muslim marriage is that it does not entail any married person's property system as between the spouses and that married women enjoy independent legal personality and are entitled to acquire

and alienate property, and institute judicial proceedings, without marital authorization. The only restriction to this liberal attitude is - in the Malekite rite - the interdiction to manage more than one third of the couple's assets without the husband's consent. Such legal autonomy of property, is often an illusion. This is why we recommend that USAID should not take part in the creation of discriminatory systems. Egyptian law, thanks to the remarkable work of the legal scholar Sanhouri, is an example of civil law in a predominantly Islamic society. Mali does not need to base its legal system upon the Sudan model, despite the historical affinity.

§3. Corporations.

Book 2 of the Commercial Code deals with corporations. According to article 316, these can be defined as "trading companies" on the grounds of their form and regardless their object. This means that such a company will enjoy the status of "trader" or "commercial operator". The current reform will update the present code and introduce necessary changes. The present texts could be integrated and adjusted to social and economic structures by establishing other kinds of companies able to meet the Malian reality in relation to the ownership of capital.

69. A single trader often holds the entire capital of a company. A situation of this kind involving an individual, a natural person, as the sole partner, may be recognized by creating the one-person company. Thus,

(a) one person company could offer, in comparison with partnerships, the advantage of a more serious accounting and business management;

(b) it also allows traders to limit their responsibility to the assets they want to allocate to their enterprise (if the bank agrees); and

(c) it is in harmony with Malian business culture, as it enables the single "partner" to organize, in a flexible way, the management of his property including its alientation, which can be effected by a simple share transfer which may some times qualify for tax reliefs as well.

70. Co-operatives and mutual societies. These may also suit Malian social and economic realities; and this is why they are advocated in the revision notes of the Commercial Code. Consideration of the special needs of the craftwork sector highlighted the advantage deriving from bringing together craftsmen in co-operatives. Such an approach should lead the legislative authority to devise laws governing both craftsmen and

retail traders. Actually, shops run collectively by independent traders in France and elsewhere allow to group together within one and the same premises both traders and craftsmen wishing to manage their company under common name and rules, while retaining the ownership of their capital. The experience of the Groupement d'Intérêt Economique (GIE) justifies forming other kinds of companies or developing the nature of the existing ones. Some GIEs have been established without even being registered! They undertake new activities having no connection with those of their members. According to Maître Touré "the law gets sidetracked and the courts are ever more inclined to sanction this in cases of litigation between members" (v. Baara info n. 001 1991 p.12).

71. Legal situations. Promoting those who may have recourse to the law - or may come under its sanctions - therefore does not concern only bodies corporate or individuals themselves but also their situations under the law. Our purpose here is not to describe the best possible kind of one-man, co-operative or mutual society for Mali but rather to confirm that the above-mentioned approach (see supra para.6) allows one to discern with greater precision the legal organization best suited to the object of that company, etc. "Making reference to a simple definition of the company, to an idea, to a merely abstract notion is not enough; whereas what is called for is a serious and detailed study of that company's actual conditions. Otherwise, the organization could miss its real target." (PAILLUSSEAU n.18). Thus, by identifying possible or existing litigation in Mali on competition issues, it should be possible to determine the type of company etc., that one is dealing with (cf. PAILLUSSEAU, L'organisation juridique des collectifs d'indépendants, libre-service, Actualité 389, DELBEQUE, Les magasins collectifs de commerçants indépendants, journ.not. 1973, 161).

72. Acts 87-51 AN.RM and 89-73 AN.RM set forth the positive law of public companies and joint-venture type bodies. Among the changes to be introduced in the new Commercial Code that concern the commercial courts, is the provision regarding the mandatory enrolment in the Commercial Register for state-owned companies and public enterprises having "an industrial and commercial nature" (EPICs). The National Department for Economic Affairs thus perfectly agrees with the evolution of law, whereby the status of trader for companies whose main and habitual function lies in the conduct of business is recognized. The conclusion from all this is that public companies come within the jurisdiction of the commercial courts, just as if they were private traders; and representatives of public industrial and trading firms can vote and be elected to the CCI and can be elected judges in the commercial courts.
It is to be recommended that certain comments be incorporated in the texts in order to explain the intentions of the legislator. Any open policy of this kind should not lead to the state exerting influence via these legal

provisions or those regarding eligibility to office in the courts. It cannot be denied, however, that some national-level enterprises in Mali - just as anywhere else - enjoy excessive private law privileges (expropriation procedure, public contract system, etc.).

CHAPTER II

PROMOTING LEGAL RESOURCES IN THE COMMERCIAL FIELD

Action to promote the law as applied by the judge ("juris dictio") would go some way to filling the serious gaps in the following fields :
- the law on Credit (section I)
- specificity of economic law (section II)

SECTION I

THE LAW ON CREDIT

§1. Means of execution

73. It is well established that disputes mainly concern credit recovery. Courts as well as banks have to cope with situations whose nature is not exclusively financial. The procedures and the rules governing unpaid bills, guarantees and measures of execution are by now obsolete. The present policy of restructuring the bank sector will not suffice to favour access to bank credit. Indeed, an effective general law of bank guarantees and a reform of the civil and commercial procedure are essential if credit practice is to be reorganised, and must of necessity accompany the establishment of commercial courts.

74. Case. The above statement can be further explained by examining the court experience of a trader at Bamako. Mr. D. owes Mr. K. the sum of CFAF 12,000,000. Mr. K. obtains an order to levy a distraint through several banks. An attachment order is issued but the commercial court claims it is incompetent, and refers the parties to other courts, the reason being that execution problems cannot be brought before limited jurisdiction courts. The President of the Commercial Court, in support of his decision, cites French court decisions on this matter. We recommend that the President of the Commercial Court should acknowledge he is empowered to authorize, withdraw or maintain in being distraints arising out of commercial loans. He is certainly in the best position to assess the reasonableness and soundness of a request of distraint when the guarantee concerns a commercial credit. If the commercial court, following the mainstream French court decisions, has declared its incompetence in a decision concerning a validation, it should not, however, invoke these same reasons to exclude its competence to order distraints on commercial matters. Consequently, we recommend that the Malian legislator should follow the new French Code of Civil Procedure, specifically artt. 872 and 873, setting out the powers of the president of commercial courts as a judge of summary commercial proceedings. What, then, happens to the creditor tossed about between first instance courts and commercial courts?

75. Any distraint, including the cases where the distrainor holds an enforceable instrument, today has to be submitted to the prior authorization of the president of the court of first instance. This practice seems to be based on a set of scattered, uncertain and obsolete articles.

Thus article 203, regulating the distraint of remunerations and salaries, refers back, in paragraph 2, to article 191, which concerns the execution of distraints. Article 192 obliges even those holding a documented credit claim to obtain a judicial authorization before distraining. Trial courts have given a generic construction to this article. But the CPCCS did not in any way regulate distraints under the general law of the country. This silence of the law in a field representing the source of the main controversies in Mali, is alarming. Credit and the safeguards it needs cannot be developed where the laws and the judicial situation is wanting in this way. We recommend that the legislator should take steps as soon as possible to make good the lacuna here.

76. The Mali Development Bank (BDM). For all these reasons and as part of the Structural Adjustment Plan, Act N°90-01 has been introduced, allowing the Mali Development Bank to grant preferential credits. The arrangement has been decried by several legal experts and by the banking sector, which obviously does not benefit from it, since these credits are alleged to "distort competition". Indeed, credits subsequent to those granted by the BDM before 27 February 1988 enjoy general lien on chattels and on immovable property. Again, the MDB is entitled to draw up lists of credit instruments containing the execution provision. This exceptional provision grants a privilege ranking third after the Treasury and the National Security Institute. Apart from the criticism aroused by the imbalance thus created, to the detriment even of good credits in that these become pre-empted by bad ones, it is questionable whether, as things stand, an exception of this kind favouring the MDB will suffice to bring about the recovery of the banking system. **A possible solution could lie, for instance, in a temporary extension of these arrangements to the other banks; but it is more advisable in the author's view, to make good immediately the deficiencies of the CPCCS and of the practice of the first instance courts.**

§2. Criminal law in the commercial sector

77. Criminal law may also be an accompanying and strengthening element for commercial courts, since transaction security would be achieved through the deterrant effect of preventive measures as far as bad checks are concerned. If that is so, then cheques could be then presumed good, and the actions brought before the commercial court would no longer have their origin in problems falling within the competence of the Public Prosecutor's office. The Public Prosecutor does not normally punish the issuing of bad checks, even though he has legal grounds for doing so. Yet, it is in the interest of business transparency that transactions shall be carried out through the use of checks. As suggested above, the promotion of such terms of payment is a way to

achieve the integration of the informal sector into the formal sector and to combat against fraud or unfair competition from the informal economy. Finally, the Finance Ministry should be especially interested in being equipped with all possible means for a better assessment of the tax base.

78. Even better than repression in this field, prevention of disputes may also constitute a first line of defense for the commercial court itself. There is no reason, in fact, to prosecute bad cheques issued without malice and encashable within a given time limit.

There are several expedients that could be adopted to cover eventualities here, such as:
- the central file of unpaid bills of persons debarred by any bank, to be kept by the BCEAO;
- the banks to cover bad cheques involving small amounts only;
- withdrawal of a person's check-book;
- regional standardization; and
- the implementation of a computerized system for data collection.

All these measures would be effective and are urgently-needed. Yet the question needs to be asked as to how can they possibly be contemplated, formulated or implemented, when it is well-known that the BCEAO in Bamako, despite its newfound scope for action, does not have a single legal expert on its staff. What, too, is needed is a throughgoing policy of recruiting lawyers that will make a success of commercial law.

SECTION II

SPECIFICITY OF THE LAW GOVERNING THE ECONOMIC SECTOR

§1. Alternative procedures for the settlement of disputes.

79. Arbitration. It is essential in reforming economic and business law in Mali that consideration be given to arbitration. The fact that the practice of international commercial arbitration is not very common in Mali or in Western Africa has meant that Malian courts have had little opportunity to build up any case law in the matter of arbitration. Yet this is not surprising when national law limits the judge's powers and chooses solutions precluding international arbitration. The SATOM/COMELEC case is worth publicizing and brought to the attention of both jurist and legislator (see Annex 8). The case did not in fact arouse the same interest as the TALAH/MASSIH/OMAIS case

(Clunet, 1991 n.4). The latter had tangible repercussions, since the Ivory Coast lodged its ratification instrument of the New York Convention on 1 February 1991. A preparatory committee in the Ivory Coast has drafted a preliminary bill introducing arbitration procedures, whose main provisions are based directly on French law. It is strongly to be recommended that similar steps should be taken in order to endow Mali with the regulation that it currently lacks.

80. Likewise, the network of international conventions to which Mali is signatory should be extended. This in fact, is provided for by Act N°91, to enact the Investment Code; and the Republic of Mali, on 3 January 1978, ratified the Convention of 18 March 1965, establishing the CIRDI. However, it is common knowledge that the 1965 Convention is of limited scope. To the foreign investor, resort to arbitration is particularly desirable where government contracts are concerned. The institutional arbitration offered by CIRDI and the AMGI Convention admittedly constitute a protective framework. But the Washington Convention does not place investment agreements within international law. The type of arbitration that it contemplates is just one procedure for international settlement. Art. 42-1 does not determine the law governing an investment agreement grounded in the law of the country in which the investment is made. The situation in Mali today is unlikely to attract private investment. While the modernization of national law here is being pursued, the investment agreement should be given the chance to move beyond the limits of the national law. As P. Juillard clearly points out, "bilateral instruments make up the warp and woof of conventional networks of safeguards for international investments". Such instruments contain a so-called consolidation clause, which has the merit of "grounding investment agreements in international law". The contracting parties, therefore, choose the forum and the law at the moment when they are making their contract; whether it be a sharing, transfer, license or management agreement. Such agreements share one of the characteristics of international business law, namely its reluctance to resort to traditional national courts. The establishment of commercial courts, the training of judges in business matters, the possibility of obtaining an award and its exequatur by eluding the immunities of jurisdiction and, much more difficult, of execution, are the prerequisites of the certainty of the law international that private investments need.

81. This can be illustrated by the SATOM/COMELEC case (the building of a mosque). Malian law is not suited to tackling situations were several firms group together for a given purpose and were a foreign (i.e : non-Malian element) would have meant that the arbitration clause would not have been declared void (on the ground that, since the two companies concerned whether malian nationality and were bound by contracts entered into in Mali and expected to be executed there, and thus could

not submit their disputes to foreign arbitrators). The Malian court thus concludes that "the arbitration agreement is void as it departs from the principles of judicial organization, which is itself a principle of public order, and therefore the award subsequent to such an agreement must be overturned in conformity with the provisions of article 1028 of the former French Code of Civil Procedure".

82. Judges look suspiciously on arbitration. "*The procedure experts do not like to change their habits and do not welcome innovations, be they imposed or proposed, from the top down or from the outside. Is it really so outrageous to add that such attitudes conceal a certain amount of ignorance?*" (in Etudes, p.187). As an accompanying measure to the adoption of a Malian law providing for arbitration procedures, we believe it is necessary to introduce specific training for professional judges. The ordinary judiciary and arbitration must be brought closer to each other. As things stand in Mali, these are not two mutually opposed methods of settling disputes. In this country and especially in the business sector, relations are pluralist and community-based, and people are bound by common ties at different levels (community, family, religion, economic considerations). The severance of relations may be much more upsetting than could be imagined in a more individualistic society. The parties thus try to settle their disputes in terms of composition, mediation, conciliation and arbitration. Such an attitude is already present in the trial practice, as we witnessed at Bamako. Training seems to be the best way to remedy such a mistaken perception on the part of the Malian judge, according to which arbitration has its roots in a rejection of the State, of its laws and of its courts. Arbitration simply represents a preference for justice administered in a different way - in a way better suited to the commercial context. Having endured the State monopoly in this field for too long, tradespeople , through the creation of a commercial court, sought to counterbalance the "governmentalization" of justice. Domestic Arbitration organized within a corporative context, such as the arbitration likely to be introduced by the revised CCI, may also meet such a need. We do not recommend the development of judicial arbitration.

83. A regional scale? The idea is currently being canvassed to establish a regional arbitration centre. This does not exclude the development of domestic arbitration and conciliation. International and regional arbitration sometimes suffer from a judicial-style approach ushering in endless procedural debates which end up in a reproduction of the ordinary courts. The training of professional judges referred to earlier is necessary not only to bring about a change in mental attitudes but also because arbitrators do not hold the imperium. If the award has the authority of res judicata, it is not thereby enforceable. Arbitrators cannot order provisional or restraining measures such as distraints. It is

this difference that makes arbitration tributary to the ordinary courts. The business sector should therefore recognize both systems and the fact that they are complementary one to the other, if it wants to enjoy a more liberalist approach from the judges and from the legislator. The problems arising in enforcement will have to be identified even at the drafting stage. One goal will be to ensure that the person seeking, or being brought to, justice is not continually tossed about between arbitration fora and courthouses, as one sees happening elsewhere. The legislative technique used in setting up commercial courts in Mali left no room to envisage and organize the problems connected with conflicts of competence. At the same time, the means should be provided to curb at the source rising costs, time-consuming procedures and the extremely intricate complications likely to derive from the introduction of arbitration without reflection on its legal or judicial implications. A guiding principle presides over the preparations here, namely that the rules and procedures need to be conceived in regional terms. From the strictly practical standpoints, this means that the model to be followed is a common system which is conducive to the purpose - the French system, though with the fundamental concern to adjust it to the local and regional realities. This is why it is recommended that an examination first be made of the Togolese law (L.89-31, 28 November 1989: J.O.R.T. 1 January 1990) and of the bills currently in the preparatory stage in the Ivory Coast and in Cameroun.

84. Article 19 of the draft CCI regulations in Mali envisages that the Paris CCI "can be requested, if the parties agree, to appoint arbitrators in order to settle business and industrial controversies opposing the Republic of Mali or Malian individuals or bodies corporate and foreign nationals whether individuals or bodies corporate". Malian arbitration should not be identified in any way with the State, especially as it could be accompanied by a forum for conciliation (see the annexe on CCI conciliation and arbitration settlement). "The spirit of conciliation imbues the African notion of justice in human relationships. Such a spirit of wisdom confers on conciliation a higher rank than any other legal technique as a means of settling or preventing controversies" (E. Michelet, University of Dakar). In its article 3, the CPCCS has made ample provision for this: and this provision has been attended with considerable success but all too often and despite the enforceability of awards is actually dependent on the good will of the parties. The judge's imperium (let alone the conciliator's) is even more restricted in the case of conciliation. The resort to conciliation and arbitration thus presupposes that all concerned in settling disputes, including the process servers and the parties themselves, are acquainted with these mecchanisms.

85. Quasi-judicial settlement proceedings. The beginnings of privatization in Western Africa, including Mali, raise a problem concerning the need to monitor the fledgling stock market in the area. Though respecting the principle of the non-interference of courts in the financial activity of companies, it has been recommended that commercial courts should start to exercise judicial control over the establishment and evolution of joint-stock companies. If commercial courts are not empowered to exercise such control, it will be advisable to create an institution which could contribute to achieving a greater transparency in business practices and to prevent an inrease in irregularities. Whatever the reforms in this sector, a more dominant role for BCEAO in the area or the creation of new institutions, it is to be recommended that at all costs there should be no marginalization of the commercial court as a strictly watertight entity. Obviously, it is not a question of developing a Stock-Exchange supervisory board such as the French COB but, it should be recalled that in France such an institution has given way to a close co-operation with the judicial sector.

§2. Diversification of the sources of commercial law

86. Foreign law and the rules of law. Malian private international law could also strengthen the principle of the will of the parties, which is amply invoked in international business agreements. Although articles 3, 11, 14 and 15 of the civil Napoleonic code are still the essential sources of the Malian private international law, court decisions have almost systematically applied the Malian law, without referring to the foreign law appealed to in the rules for the settlement of disputes.
With the noteworthy exception of some distinguished lawyers, most lawyers and judges are unaware of this rule and confuse it with the rules of jurisdiction. This explains the recommendation made in this Report for training in private international law and for an updating of the provisions of the private international law. As provided for by art.1496 of the New French Code of Civil Procedure (NCPC FFr.) and by art.1051 of the Dutch Code of Civil Procedure, it is to be recommend that the Malian law recognize that reference to "the rules of law" and not merely to the "applicable law" shall be a means of allowing the parties and arbitrators to have the disputes governed by appeal to different sources and by suitable combinations of principles and provisions (see infra para. 88).

87. The business climate and the context of the private sector suffer from the monopoly of a single traditional formal source of law, namely statute law. The monopoly can be explained by the predominance of the statute in the civil law, but also by the notion, shared by states and international organizations, that society can be reformed by decree. The emerging democracy in Mali is embuing society with a sort of assumption, which

was already widespread, that "the efficacy of a rule does not depend upon the authority of the rulemaker, but rather on the conviction of the subject" (Michel Albert, Jean Boissonat, "Crise, Krach, Boom", Le Seuil, 1988, p.209). This way of seeing things presupposes that people share the constraints they impose on themselves and that authority should be ready to understand, communicate and explain the enactments that it introduces, so that these will not remain a dead letter or used contra legem. In the business sector, there is no great number of rules deriving from laws enacted by the public powers.

88. Other sources. Malian judges, economic experts, public officials and jurists should thus strengthen, recognize and appeal to such other sources of the law, for these are the very foundations of relationships within a market economy, namely the general principles of law, the customs of international trade, the contract, the case law and the non-binding rules that have a "varying prescriptive intensity" (J. Carbonier, Flexible droit). The Chamber of Commerce and Industry and the National Department for Economic Affairs, together with jurists, experts and the private circles concerned, could promote model contracts in the most frequent business dealings, and conventions (e.g., on the responsibility of those operating in transport terminal stations in international trade), and could put forward recommendations suited to a legal system in its initial stages.

A better knowledge of court decisions would contribute to the certainty of the law in terms of information for appellants and defendants and of control over the quality of decisions. Consulting the Courts of Appeal and the commercial courts would prevent judges from feeling they have had their authority taken away from them, as they now do. Cautiously, Malian judges too often choose to stay "within the traditional limits of the XIXth century judicial function, rather than reach the level of the other branches, in order to control the mammoth legislature and the leviathan administration" (M. Cappelletti "Nécessité et légitimité de la justice constitutionnelle", Aix-en-Provence 1982, p. 467). "The Recommendation formula may have its part to play in providing a stimulus or advice in areas where it would be premature to intervene through binding acts " (Les instruments du rapprochement des législations dans la CEE, IEE 1976, p.149).

The interest being taken in the economic and legal integration in the region also accounts for the adoption of "guidelines" making it possible to harmonize legislations and constituting a realistic solution to the alternative between scattered codifications and the risk of hurting the national pride, which is always strong in the region. Non-binding rules may be devised without excessive formalism. They could thus be modified or abolished and they could have a temporary character and be

suitable for situations whose terms are rapidly changing. Stability does not necessarily mean perpetuity of obsolete rules or practices. "The possibility of being revised is the essence of the law in the economic sector" (Farjat, Droit Economique, PUF, 1982).

89. Negotiation. The profound changes currently taking place in Mali should not consist only in the devising of new combinations of texts. Indeed, implementing the new rules of the game and new ways of thinking is the only way to "impart dynamism to the commercial courts". In order to move beyond the private context of the informal sector and beyond the public monopoly, considerable savoir-faire is needed, such as that shaping the system coming into being today in a somewhat confused way, which (to use the expression of E. Le Roy) consists in "the negotiated order". Negotiation is a major communication and rule-making technique. Just as this Report has stressed the relevance of procedures in relation to business matters, so it recommends that training be provided in negotiation, consultancy and conciliation in legal matters. Private lobbying is already going on, and some general aims are being negotiated between private partners and public officials, and privatization is proceeding apace. Within such a context, the Malian industrial and business sector is ever losing cohesion. The State is staging its own dismantling. In this situation, in which it is besieged by the new expression of private interests - economic groups, unions - the State is naturally inclined to strengthen its means of intervening. Parliamentary activity may make it possible in the future to channel the claims of professional organizations by shaping their structure. All such novel means leave a much wider room for the will of the parties. Training in such legal practices as negotiation, consultancy or conciliation enables the arbitrator, to find a solution to the problems generated by the confrontation of such wills. It is the State's task to encourage the promotion of the citizen. Business law, through the instruments identified here, is the link whereby the economy and democracy can develop together.

CONCLUSION

90. The Report leads to a simple conclusion. Although it is technically in existence, the commercial court is still, in operational terms, in the realm of the future. There can be no denying, of course, that a law has been enacted, and that decisions have been taken on the strength of its provisions; But it is even more the resolve of all the actors in the economic life of the country that makes the institution a reality. If this is true, then the measures suggested in this Report will be better suited to carrying out the implications of that resolve - in other words, if a specialized commercial jurisdiction, with all the advantages that this offers, is to be brought into being. The conviction underlying the Report is that commercial judges with a thoroughgoing training in business law and assisted by lay judges (magistrats consulaires) can amply demonstrate that the commercial court is a strengthening element for the private sector and for the formal operations that take place within it.

The commercial judge in Mali has the difficult task of mediating between the legislator and the private sector, by the fact that he has often to apply obsolete rules in a heavily top-down, i.e. state-controlled, environment and one in which indigenous processes for the settlement of disputes are there for the using, where written law is of little consequence yet where conciliation has an important part to play.

Only a fragment of the economic life of Mali comes before the commercial judge. That being so, there are those who would have the "ordinary" justice there in the midst of economic and social processes, and there are others who argues that it should be kept apart. In either case, there is the risk that justice will be considered as just another government department and that the courts will be lumped together simply with the courts that have "expertise in economic efficiency". The question therefore has to be asked, as to how to obviate this risk and, at the same time, how to avoid setting up a government of judges.

91. The dilemma, then, is that the Malian authorities, and the donors, faced as they are with the difficulties engendered by the many reforms that are needed , seem to waver between two possible formulas - what one may call the Welfare State approach and what one may call the neo-Liberalist approach; and this is yet another element making the existence of the commercial courts precarious. At one and the same time, one is thus faced with a multiplicity of apron-strings, with its effective predominance of the state in the exercise of the legislative and the judicial function that should be geared to developing the private sector and to the settlement of economic disputes, a marginalization of justice

and, withal, the bringing into being of a commercial jurisdiction. This state of affairs is not confined to Mali, and it may account for the emergence of a parallel control by the administrative courts. It is commonplace to see a certain public law "interference" in commercial law; and it remains to be determined how one can escape from the dilemna here described.

92. **The new pattern of co-operation.** The Development Aid Committee (DAC) is anxious to see progressively shifted elsewhere the centres of decision making, hitherto in the public sector (Rapport Annuel, 1991). In the present Report, an attempt has been made to translate such a shift into legal terms, for the areas for decision making are there to hand and need to be strengthened in the hands of both the judge and the parties to commercial transactions. The commercial court is a first step in this direction. The court could be strengthened through commercial techniques of a procedural or contractual nature. Private groups are already taking part in the economic and political process in Mali; and, according to the analyses and recommendations of DAC, such a process could also curb corruption and help to extend people's participation in the economic process. A major problem is thus one of power sharing in the organization, under law, of business relations in the private sector. Without going so far as to adopt the American-style hearing (My God, these fellows are always suing one another - Sir Gordon White, in Fortune, November 7, 1988, p. 74), Mali can only benefit from lightening the conceptual ballast of legal theory and relying instead on contractual pragmatism and on custom without, however, jettisoning the Roman-German framework. IIt is not a question of passing from one legal system to another but rather, to quote Paillusseau (p. 14), of taking a lead from worthwhile formulas in American law or from the methods used in lawyer training and legal practice.

93. **Terms of reference.** It is therefore to be recommended that the terms of reference for those engaged in legal training, the technical consultants, and those providing legal advice in the matter of reform, might specify competences in manner more closely geared to transactional realities and the regional integration that is likely to take place. Purely bilateral legal approaches, i.e., those simply transposing a system to Mali, must be avoided, since they are lacking in creativity and any pragmatic approach. Yet, on the other hand, autonomous legal development is rarely possible. The incorporation of laws and practices coming from outside a country has characterized most societies since ancient times. The main problem is first one of acquiring the means of assessing how a law, and institution, a type of court could actually and effectively operate in Mali, and of then introducing the necessary adjustments. Such an approach is what the present Report has been about. Yet it is the men and women involved that make law, an

institution or a court come alive and function; and that is why training will be an essential pre-requisite for an efficient performance of justice in Mali.

INDEX OF MEASURES NEEDING TO BE TAKEN/RECOMMENDATIONS

[The numbers refer to the paragraphs in the text]

I. General recommendations

1. Appoint. within the Ministry of Justice, a committee (17) to:

2. initiate the travaux pre'paratories for the reform of the Code of Civil Procedure, in the light of the **revised Judiciary Code** (5, 43 f);

The Judiciary Code prescribes rules for:
(i) dealing with conflicts of jurisdiction (25);
(ii) distraints of property and measures of execution (10, 73 f);

3. identify, follow up and settle problems arising in the establishment of new courts (commercial courts, administrative courts) (18 f);

4. introduce and enforce the principal Acts and Decrees having implications for the commercial court, e.g. Commercial Code; Statute of the Magistrature; Accountancy law (24).

5. Secure the availability and analysis of statistics on the laws and on judicial practice (8, 60, 71), e.g. by:

6 having the respective courts maintain monthly returns of cases (cases filed, cases finished) for forwarding to the presiding judge and to the central Government; and monitor the performance of the judges (8).

7. Organize regular consultation of the courts of appeal and the commercial courts, and publicize annotated rulings of the Supreme Court and of the courts of appeal (12, 88).

8. Look to the quality of the organization, approach and output of statutory and regulatory enactments in the field of economic law and judicial practice, inter alia, the practice of the commercial courts (4, 5, 6):

9. organize among donors the coordination of the content of training and technical assistance with judicial strategy and planning in collaboration with the National Directorate of Economic Activities, the consultants of the World Bank and other development partners in Mali (6, 7, 92).

10. Ensure that greater attention is paid to comparative law in the terms of reference for training or assistance to the judiciary (92, 93).

11. Organize the gradual implementation of novel legal and judicial policies (20).

12. Update private international law (86).

13. Promote the adoption of model contracts in the usual commercial fields (88).

14. Convene a preparatory drafting committee for a Bill to provide for arbitral procedures (79).

15. Increase the number of international conventions to which Mali is signatory (80).

16. Participate in projects for regional integration and in harmonizing - unifying, even - new laws at the regional level (83).

17. Prepare a study on the desirability or otherwise of instituting a Mediator of the Republic (57).

18. Define cases for ultra vires appeals and in matters in disputes concerning government servants (54 f).

19. Undertake a re-reading of the Criminsl Code in the light of these aspects on criminal law in commercial matters (77 f) :

(i) prevention of misuse of community property and illicit use of intellectual property;

(ii) enforcement of bankruptcy laws;

(iii) removal from the criminal law of certain provisions governing the issuance of checks with sufficient funds, while ensuring effective sanctions in such cases; and

(iv) specification, in detail, of prohibited commercial practices.

20. Ensure greater provision for the study of subjects connected with commercial law in the basic training of both lawyers and judges (40).

21. Provide training, information and ongoing concertation for lawyers and judges in commercial law matters (41), and for commercial operators and lay judges under the CCI (64, 87).

22. Appraise recruitment needs where judges are concerned (9, 39).

23 Organize legal services of banks and firms and the recruitment and training of their legal staff, as long the lines of BCEAO (78).

II. Recommendations specific to the commercial court

24. Organize enforcement in the light of the entry into force of the new Act (18, 19, 21).

25. Ensure rapid solution of conflicts of jurisdiction (25).

26. Specify how the mixed (career judge/lay judge) system works (2, 13, 25). This could be done by, inter alia, raising Decree No. 147 to the status of an Act of Parliament and supplementing it as regards:

27. broadening the representativeness of lay judges (33);

28. introducing a disciplinary system for lay judges (29, 33);

29. making provision for the exercise of the public prosecutor's function (37);

30. determining incompatibilities (33); and

31. bringing certain cases before a sole judge and broadening the scope for the action of the summary process judge (34, 35).

32. Specify the conditions governing the appointment of the presiding judge of the commercial court and those governing the exercise of his functions and his relations with the lay judges (36).

33. Create possibilities for the judges of the courts of first instance to transfer to the commercial courts, and vice versa (34, 39).

34. Promote specialization in commercial court technique and in the distinct provisions governing such courts (45 f).

35. Encourage commercial operators to be entered in the Commercial Register (5, 58, 59).

36. Clarify the relationships between EPICs and the commercial courts (72).

37. Secure the adoption of a single, unified system of identification for

commercial firms (60).

38. Establish subject-matter and alphabetical registers and procedures for firms' activities (62).

39. Evaluate the impact of a reduction of the deposit at the start of proceedings to 4 per cent (44).

40. Redefine relationships under family private law, inter alia with the abolition of the mandatory husband's consent requirement (66).

41. Institute new forms of company (e.g. single-person companies) (69, 70).

42. Take over the private law aspects of the artisans' statute into the commercial operators' statute, inter alia as regards their standing vis-à-vis the commercial court (31).

43. Develop procedures for quasi-judicial settlements, and for the commercial courts (85).

Most of these regulations concern the Ministry of Justice and imply that its role will increase together with that of the lawyers working in the various ministries, in particular the Ministries of Economic Affairs and of Finance.

The measures in question can (and some of them must) be put in hand organized as early as possible.

Extrait de

Le nouveau Juge
Amadou Ousmane
Les Nouvelles Editions Africaines
Dakar, 1985

"- Un juge, commença Binta, c'est un homme qui est chargé de rendre la justice : par exemple en cas de conflit entre deux personnes, il détermine qui a raison, et qui a tort... et il essaie de les mettre d'accord.

- C'est aussi celui qui envoie les gens en prison, crut devoir préciser Falmata, commère réputée pour ses formules à l'emporte-pièce.

- Alors, il ne fera pas ce métier ! trancha Inna Bagaya sur un ton farouchement résolu qui coupa l'enthousiasme de ses interlocutrices. Celles-ci s'en exusèrent et se mirent en devoir d'atténuer ses craintes.

- Mais voyons, grande soeur, ton fils, notre fils, vient d'être nommé juge et nous devons toutes être fières de lui, car c'est une grande distinction pour un homme que d'avoir à juger les autres hommes".

ANNEXE 1

Les termes de référence

BACKGROUND

"USAID/Mali, through its Policy Reform for Economic Development Program (688-0245/046), is providing the GRM with multi-year project and program assistance designed to increase private sector participation in the economy. In FY 1991, which was the first year of PRED acticity, policy reform focused on eliminating Mali's export taxes. For the current fiscal year the Mission, in collaboration with GRM officials and Mali's business leaders and jurists, has targeted the nascent commercial court system as the focus for USAID policy reform initiatives. It is our collective view that the existence of a credible and responsive commercial court system would provide a formal, specialized, and legally recognized means for commercial litigation and redress. Such an institution would increase confidence within Mali's growing business and banking communities, help stimulate domestic and foreign private sector investment, and ultimately achieve Mali's goals of economic growth and social well-being. These courts would also promote the "rule of law" and transparency in business and financial operations, and contribute substantially to Mali's democratization efforts.

Enabling legislation for establishing Mali's first commercial courts in Bamako, Kayes and Mopti was passed in 1988. However, due to budgetary, logistical and staffing constraints, the courts did not become operational until mid-November 1991. Despite only two months of operations, it is essential for the proposed reform agenda to understand the structure and function of commercial courts, their sphere of influence within the judicial system and the Malian business community, and their effectiveness in terms of resolving commercial disputes".

THE STATEMENT OF WORK

The purpose of this consultancy is to provide information and analysis that will enable USAID/Mali and the GRM to assess the adequacy of the commercial courts to fulfill the role for which they are designed, i.e., to provide for expeditious and impartial resolution of commercial disputes at reasonable cost.

Specifically, this will entail the review and analysis of

(a) the current status of Malian legislation and documents with respect to the establishment, operations, jurisdiction and procedures of the commercial courts;

(b) the actual functioning of Malian commercial courts and their effectiveness in resolving disputes; and

(c) any perceived needs among Malian jurists and private sector operators for modification or expansion of the current commercial court mandate.

Questions that need to be answered are :

1. What were the main concerns and the process that lead to the establishment of Malian commercial courts ? How were they formally established ? Has French law or that of other relevant jurisdictions (e.g. other Francophone countries, the U.S. or International Chamber of Commerce) influenced the present practices, procedures or overall functioning of Mali's commercial courts ? Is the current legislation adequate and sufficiently "enabling" for Mali's commercial courts to function effectively ?

2. What is the structure and function of commercial courts within the judicial system ? Is there a clear demarcation of jurisdiction between commercial and civil courts ? Does the civil court still play a role in commercial matters ? If so, what are the judicial and procedural differences ?

3. What is the extent of commercial litigation ? What is the role of arbitration ? How many cases are heard during a given period, i.e., a week, month, judicial session, etc.? What kinds of cases make their way to the courts ? Do many types of commercial conflict not go to the courts because there are more informal or amicable ways to resolve them ? When would a businessman most likely seek redress in the court system ? What types of businesses or banks are likely to litigate ? What are the costs of litigation ? How much time does it normally take to resolve a dispute ?

4. How are commercial courts staffed ? What kinds of training and expertise do judges and other members of the court have ? Are staffing and training sufficient to make the courts functional ? Are there different levels of dispute resolution, such as "large claim" and "small claim" courts ? If not, should there be ? If so, do they require different levels of expertise ?

5. Have commercial courts contributed to improving the overall business climate in Mali ? Are they fair ? Are they effective and efficient ? Can we determine if economic activity increased (even partly) because of commercial courts ? Is this at all measurable ? What would doing business be like without these courts ?"

ANNEXE 2

Liste des personnes

LISTE DES PERSONNES

MALI :

Justice : Ministère et juridictions

M. Mody Diall
M. le Ministre de la Justice

Dr. Diarra Boubacar Gaoussou
Directeur de Cabinet

Mme Sidibé Cissé
Directrice

M. Abdoulaye Traoré
Conseiller Technique

M. Arnoux
Magistrat
Conseiller technique

M. Moussa Doumbia
Premier Président de la Cour d'Appel

M. Mamadou Koné
Conseiller à la Cour d'Appel

M. Hamidou Younoussa Maiga
Président
Tribunal de 1ère instance

M. Modibo Coulibali
Président du Tribunal de Commerce
Bamako

M. Soulaymane Coulibali
Président du Tribunal de Commerce
Kayes

M. Mohamed Ali Bathily
Magistrat
Ambassadeur

Secrétariat du Gouvernement

Mme Néné Eddedine Traoré
Secrétaire Général adjoint du Gouvernement
Mali

Chambre du Commerce et de l'Industrie :

M. Daba Traoré
Secrétaire Général
Bamako

Mme Fatou Seck Diallo
Conseiller Juridique
Bamako

M. Amadou Niangado
Chef du Service de la Promotion Commerciale

Tidiané Kane-Diallo
Chargé des Relations Extérieures

Professions libérales et juristes :

Maître Abdoul Wahab Berthé
Avocat

M. Hamadi Diallo
Président de l'ordre des Conseils Juridiques

M. Gaoussou Fofana
Directeur des Affaires Juridiques
Banque Malienne de Crédit et de Dépôt

M. Ibrahima Makanguile
Conseil fiscal

Maître Kadidia Sangaré
Avocate

Maître Ahmadou Touré
Notaire

M. Abderrezak
Professeur, Avocat
Algérie

M. Pierre Cellard
Ministère de la Justice
France

Mme Henriette Chaubon
Ministère de la Justice
France

M. Olivier De Baynast
Ministère de la Justice
France

M. Jean-François Dupuy
Banque Mondiale

M. Xavier Ghelber
Avocat au barreau de Paris
Jeantet & Associés

Mme. Yvonne Muller
Avocate
France

M. Jean-Luc Vallens
Conseiller à la Cour d'Appel de Colmar
France

Mme. Francine Vanderstricht
avocate
Bruxelles

Plusieurs rencontres ont été par ailleurs organisées par l'USAID Bamako avec des juges assesseurs, des industriels et des commerçants.

ANNEXE 3

Loi portant institution des Trib. de commerce

Mme Sissoko
Présidence de la République

République du Mali

Secrétariat Général du Gouvernement

UN PEUPLE-UN BUT-UNE FOI

Loi n° 88-38 /AN-RM

PORTANT INSTITUTION DES TRIBUNAUX DE COMMERCE

L'ASSEMBLEE NATIONALE A DELIBERE ET ADOPTE EN SA SEANCE DU 8 Février 1988
LE PRESIDENT DE LA REPUBLIQUE PROMULGUE LA LOI DONT LA TENEUR SUIT :

ARTICLE 1 : Il est institué en République du Mali des Tribunaux de commerce placés sous l'autorité du Ministre chargé de la Justice.

ARTICLE 2 : Les Tribunaux de commerce connaissent :

- des contestations relatives aux changements et transactions entre commerçants au sens de l'article 3 du code de commerce.
- des contestations relatives aux actes de commerce (entre toutes les personnes)
- de tout ce qui concerne les faillites, les règlements judiciaires et les liquidations de biens.

Toutefois les parties peuvent, au moment où elles contractent, convenir de soumettre à des arbitres les contestations ci-dessus énumérées lorsqu'elles viennent à se produire.

ARTICLE 3 : Lorsque les billets à ordre ne portent que des signatures d'individus non négociants et n'ont pas pour occasion des opérations de commerce, trafic, change, banque ou courtage, le tribunal de commerce est tenu de renvoyer au tribunal civil, s'il en est requis par le défenseur.

ARTICLE 4 : Lorsque les billets à ordre portent en même temps des signatures d'individus négociants et d'individus non négociants, le tribunal de commerce en connaît.

ARTICLE 5 : Ne sont pas de la compétence des tribunaux de commerce les actions intentées contre un propriétaire, un exploitant agricole ou éleveur pour vente de produits provenant de son cru, les actions intentées

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contre un commerçant pour paiement de denrées et marchandises achetées pour son usage personnel. Néanmoins, les billets souscrits par un commerçant sont censés faits pour son commerce.

ARTICLE 6 : Les tribunaux de commerce jugent en dernier ressort.

Toutes les demandes dans lesquelles les parties justiciables de ces tribunaux et usant de leurs droits ont déclaré vouloir être jugées définitivement et sans appel.

Toutes les demandes dont le principal n'excède pas la valeur de 1.000.000 F CFA. Les demandes reconventionnelles ou en compensation lors même que réunies à la demande principale elles excèdent 1.000.000. F CFA. Mais si l'une des demandes principales ou reconventionnelles s'élève au-dessus des limites ci-dessus indiquées, le tribunal ne statue sur toutes qu'en premier ressort.

Néanmoins, il est statué en dernier ressort sur les demandes en dommages-intérêts lorsqu'elles sont fondées exclusivement sur la demande principale elle-même.

ARTICLE 7 : le tribunal de commerce est composé d'un Président et de juges titulaires et suppléants.

Chaque chambre d'un tribunal de commerce est composée d'un président de deux juges et deux juges suppléants. Le président appartient au corps de la Magistrature. Les juges titulaires et suppléants sont des commerçants. Un décret fixera les règles relatives à l'élection et à l'élégibilité de ces derniers. Plusieurs secrétaires greffiers sont nommés près de chaque tribunal de commerce.

ARTICLE 8 : les juges consulaires sont élus pour une période de 3 ans, avant d'entrer en fonction, ils prêtent serment à l'audience de la Cour d'Appel. Ces formalités sont remplies sur les conclusions du Ministère public et sans frais.

La formule du serment est la suivante : "je jure et promets en mon âme et conscience de bien et fidèlement remplir mes fonctions, de garder réligieusement les secrets des déclarations, et de me conduire en tout comme un digne et loyal magistrat".

ARTICLE 9 : l'honorariat peut être conféré par arrêté du Ministre de la Justice aux anciens membres des tribunaux de commerce ayant exercé leurs fonctions pendant au moins 9 ans.

Cet arrêté est pris après avis du tribunal de commerce statuant en assemblée générale.

L'honorariat peut être retiré suivant la même procédure.

ARTICLE 10 : les fonctions de juge consulaire ne sont pas rétribuées.

ARTICLE 11 : Nul, à l'exception des avocats régulièrement inscrits au tableau de l'ordre ne peut plaider pour une partie devant les tribunaux de commerce si la partie présente à l'audience ne l'autorise ou s'il n'est muni d'un pouvoir spécial.

ARTICLE 12 : La procédure suivie devant les tribunaux de commerce est celle prévue par le code de procédure civile, commerciale et sociale.

ARTICLE 13 : le tribunal d'instance est compétent pour statuer en matière commerciale tant qu'un tribunal de commerce n'est pas mis en place.

Lorsqu'un tribunal de commerce ne peut fonctionner pour quelque cause que ce soit, la Cour d'appel saisie sur requête du procureur général désigne le tribunal d'instance compétent pour connaître des affaires commerciales.

Lorsque le tribunal de commerce est de nouveau en mesure de fonctionner la cour d'appel saisie dans les mêmes conditions constate cet état de fait et fixe la date à compter de laquelle les affaires devront être à nouveau portées devant le tribunal de commerce.

Le tribunal d'instance demeure cependant saisi des affaires qui lui ont été soumises en application de l'alinéa 2 du présent article.

KOULOUBA, le 5 AVRIL 1988
LE PRESIDENT DE LA REPUBLIQUE

GENERAL MOUSSA TRAORE

ANNEXE 4

Tableau de juridictions commerciales

Typologie de juridictions commerciales (du premier degré)

Tribunal de Commerce		Chambre Commerciale			Juge civil/commercial		
Commerçants	Echevinage	Juge unique		Collégialité	Juge unique		Collégialité
			avec jury	Echevinage		avec jury	
- France	- Belgique - D.O.M. - Burundi	- Angleterre High Court of Justice (Commercial Court) - Zimbabwe	- Angleterre (si fraude)	- Allemagne - Autriche - Als.-Lorr. - Norvège	- Italie (section comm. depuis 1888) - USA (equitable claims) en pratique la majorité des litiges commerc. complexes - Grèce - Egypte (summary (-180 US$) - Japon/Corée (-14.000 US$) - Tchad - Niger - Netherlands 1990	US (legal claims)	- Egyte (3) (1ère instance + 2 180 US$) - Gabon - Bénin -Rwanda (1989)

IDLI 1992

ANNEXE 5

Les juridictions et leur composition

MAGISTRATS

MAGISTRATS DANS LES DIFFERENTES JURIDICTIONS	NBRE	MAGISTRATS EN DETACHEMENT	NBRE
Cour suprême	16	GTSA	2
Cours d'appel de Bamako	13		
Cour d'appel de Kayes	7	Ministère de la Justice	6
Cour d'appel de Mopti	6	Dir. Nle. des Affaires judiciaires	8
Tribunaux de 1ère Instance		Institut de Formation judiciaire	3
Bamako	21	Dir. Nle. de l'Adm. Pénitentiaire	2
Kayes	6		
Segou	5	Secrét. Général du Gouvernement	2
Sissako	6		
Mopti	7	Min. chargé du contrôle G. de l'Etat	1
Tombouctou	6	Contentieux du Gouvernement	3
Gao	3		
Koulikoro	5	Ministère des TP	1
Tribunaux de Commerce		Ministère des Finances	3
Kayes	1		
Mopti	1	Ministère des Affaires Etrangères	4
Bamako	1	Ministère de l'Education Nationale	1
Sections détachées du Tribunal de Bamako			
Commune I	3	Ministère de la Communication	1
Commune II	3	Ministère des Sports et culture	2
Commune IV	3	Ministère de l'Adm. Territoriale	1
Commune V	3	Ministère de la Défense	1
Commune VI	3		
Justices de Paix à compétence étendue			
Kayes	6		
Koulikoro	6	Gouvernerat du district	1
Sikasso	6	INPS	1
Segou	6		
Mopti	7		
Tombouctou	4		
Gao	4	Banque Malienne de Crédits et Dépôts (BMCD)	1
	154		45

Magistrats en position d'attente	7
Magistrats retraités 91/92	6
Magistrats départs volontaires	10

ANNEXE 6

Rôle d'audience du Trib. de 1ère instance

COUR D'APPEL DE BAMAKO
Tribunal de Première
Instance de Bamako

République du mali
Un Peuple, Un But, une Foi

ROLE D'AUDIENCE D'UNE JOURNEE DU MOIS DE ...

N° ord	Noms et Prénoms des parties	Nature Aff.	Conseils
	a) Affaires en délibéré		
1)	BMCD C/ Aboubakar MACALOU	Promologation	Soumaoro c/Diallo
2)	Sté PARIDO c/Sadi DABO & Fils	Val. Saisie Arrêt	Sèye c/
3)	BMCD c/ Mamzdou DIAKITE	Homologation	Soumaoro c/
4)	Sté Kagnassy & Fils c/Sékou WXWAGUE	Expulsion lieux	Ch S c/ Traoré
5)	Cheick N'Diaye c/ Yaya SANGARE	Opp.jugt n°224/91	c/ Amadou Krambé
6)	Alassane SOW c/ Ibrahim BERTHE	Réparation Prej.	Ouane c/
7)	Oumar Labass SIDIBE c/ DIAMA TOYOTA	Contredit Injonc.	Kadidia c/ Ma DIA
8)	Lamine KEITA c/ Michel SAADE	Val. saisie Cons.	Mountaga c/ DIARRA
9)	Makane KANE c/ Zakaria TRAORE	Val. saisie Cons.	Dongar c/ Daffé
10)	M'Baye DIARISSO c/ agence M. D'Assu.	Appel en garantie	A.B. CISSE c/ Dongar
11)	Mahamadou DRAME c/ A G F	Appel en garantie	S. MAIGA c/ Dongar
12)	Mohamed c/ KANE c/ Intendance Milit.	Appel en garantie	O. BOCOUM c/A Tapo
13)	FATOUMATA DIAWARA c/ Mamadou DIANE	Recherche Paternit.	K. Sangaré c/ Yattara
14)	Demba DIA c/ Aéroflot	Val. saisie Arrêt	Sèye c/ LAT
15)	Boulaye TRAORE c/	Recti. Prénom	
16)	Afric Diffusion c/ MAEC, CMP	Val. saisie Arrêt	GAKOU c/Sèye
17)	Djime TOURE c/ Abdoulaye KOUROUMA	Récl. de sommes	c/A. TAPO
18)	El H. Adama TRAORE c/ BDM-SA	Reddition comptes	Danté, c/ Barry
19)	Modibo KEITA c/ Thierry BARRE, SEEMEN	Annulation vente	Danté c/ TAPO, Toureh
20)	Abdoul W.MOUL. c/M Amadou MOULEKAFOU	Dissolution société	Demba c/ Gakou
21)	BDM-SA c/ SEMA	Liquidation d'astreinte	Faguimba c/
22)	Bank of Africa c/ Tamba SIMPARA	Récl. de sommes	Toureh c/ I. TRAORE
	b) Affaires anciennes		
23)	DAMBELE Awa KOULIBALY c/ H.F.M.Diong	Validation vente	Dia, Sèye c/
24)	Bala Moussa CAMARA c/BMCD	Opp. Jugt. n°233/90	O. Bocaup c/CH S.T.
25)	Bakoré SYLLA c/ Almany NAFO	Reddition compte	Tall c/ A/W Berthe
26)	Kaba SACKO c/ Centre Djoliba	Réparation préjud.	Drissa c/ Demba
27)	Abdoulaye SOW c/ BDM-SA	Reddition compte	Demba c/ A.W. Berthé
28)	SNTP c/ Commune III	M. Statuer aimable	F. Sylla c/ C.G.T.
29)	SA TOTAL TEXACO c/ U Negoce	Val. Saisie cons.	Toureh c/ F. Sylla
30)	Pétrostock c/ SIEPP	Expulsion lieux	C. Gvt c/ M. Bocoum
31)	BALIMA c/ Sté Melchemie Holland	Homologation	Barry c/ Ouane
32)	Bandiougou DIARISSO c/ Magatte SEYE	Récl. de dommages	K. Tapo c. Moussa M

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33)	Niamé KEITA c/ Frère Mamaye et Makan	Revendication d'Imm.	Ma, gara c/ Gakou
34)	Bank of Africa c/ Bouba DJIRE	Val Saisie Arrêt	Barry c/ Antonin
35)	Hotel Tenesse c/ Michel FOURRIER	Val. Saisie Cons.	K. tapo c/ Drissa
36)	Ayants droits f. Mamadou DIAKITE et trois autres c/ CNAR	Appel en garantie	Toureh c/
37)	Sté Mobil OIL c/ Sté TRANS AIR MALI	Val. saisie Cons.	Mamady c/ I. Keita
38)	Diougoudou DIAWARA c/ Gaoussou H.	Restitution TF	Sall c/ LAT
39)	Mamadou CISSOKO c/ Souleymane DIAWARA	Opp. Jugt n°1790	Gakou c/ tall
40)	BMCD c/ Mamadou N'DAOU; Korotoumou S.	Réalisation gage	Kamité c/ Dama
41)	Mamadou GAMBY c/ Commune III	M. Statuer aimable	F. Sylla c/
42)	Cheick BA c/ Namory KEITA	Récl. de sommes	Kelly c/
43)	Kader KIDA c/ Hamala YANOGA	Résolution convent.	Yattara c/
44)	Mamadou S. TOURE c/ KONATE Kandia c.	Récl. de sommes	Diallo c/
45	Sté Pétroles BP c/ Salif KARAGNARA	Homologation Proto	
46)	Noumouké CAMARA c/ Bakary SAMAKE	Homologation	
47)	Mamadou TOUNKARA c/ Karamoko SIBY	Expulsion des lieux	Drissa c/ Amadou
48)	Coop Conso Djélibougou c/ Issaga F.	Récl. de sommes	C/ Amadou
49)	Djigué SA C/SOMMAGES	Récl. de sommes	Kouma c/
50)	Mamadou YATTASSAYE c/ EDELMAN MALI	Récl. de sommes	Magatte c/
51)	Ami SIDIBE C/ Cheick M. NIAMBELE	Recherche patern.	
52)	Mohamed SYLLA c/ BIAO-MALI	Reddition compte	Etienne c/
53)	Bana CISSE c/ Modibo DEMBELE	Récl. de sommes	Hamadi c/
54)	Mamadou YATTASSAYE c/ EDELMAN MALI	Reddition compte	
55)	Gaoussou SANGAREP/ Coop des bouchers et Chevillards - Bamako c/Balla KEITA et 5 autres	Récl. sommes	

Bamako, le 1992

LE PRESIDENT DU TRIBUNAL

ANNEXE 7

Loi relative à la B.D.M.

Présidence de la République
Secrétariat Général
du Gouvernement

République du Mali
Un Peuple - un but - une foi

LOI N° 90 - 01/AN-RM
AFFECTANT D'UN PRIVILEGE DES CREANCES DE LA BANQUE
DE DEVELOPPEMENT DU MALI

L'Assemblée Nationale a délibéré et adopté en sa séance du 13 janvier 1990;
Le Président de la République promulgue la Loi dont la teneur suit :

ARTICLE 1ER : Les créances consécutives aux prêts accordés par la Banque de Développement du Mali antérieurement au 27 février 1988 sont affectées d'un privilège général mobilier et d'une hypothèque sur les immeubles.
Ce privilège s'exerce immédiatement après les privilèges du Trésor et de l'Institut National de Prévoyance Sociale.
Il s'exerce pendant une période de trois (3) ans à compter de la date de publication de la présente Loi.
Dans la même période les formalités prescrites par les Articles 204 et 205 du Code de Procédure, Commerciale et Sociale ne sont pas applicables.

ARTICLE 2 : Tous les actes et formalités nécessaires au recouvrement des créances exigibles consécutives aux prêts accordés par la Banque de Développement du Mali s'exerce comme en matière d'impôts directs, contributions, taxes et produits assimilés.
A cet effet la Banque de Développement du Mali - SA est habilitée à établir des états de créances revêtues de la mention exécutoire.

ARTICLE 3 : La Banque de Développement du Mali - SA pour le recouvrement des créances de la Banque de Développement du Mali désigne les mandataires de son choix.

ARTICLE 4 : Tous les actes, pièces et formalités ayant pour objet le recouvrement des créances exigibles de la Banque de Développement du Mali sont enregistrés gratis et exempts de tous autres droits et taxes, à l'exclusion des émoluments dus au Conservateur tels que prévus au Code Général des Impôts.
L'enregistrement se fera au début au cas où la mutation profite à une autre personne.
non exonérée par une disposition du Code Général des Impôts, ou toute autre disposition législative.

ARTICLE 5 : Sont et demeurent abrogées les dispositions de la loi n°
27 Février 1988.

KOULOUBA, le 12 FEVRIER 1990
LE PRESIDENT DE LA REPUBLIQUE
GENERAL MOUSSA TRAORE

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ANNEXE 8

Arrêt SATOM/COMELEC
Cour d'Appel 25/10/1990

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N° 481 /ARRET

DU 25/10/1990

S. A. T. O. M.
C/
C.O.M.E.L.E.C.

ANNULATION D'UNE CLAUSE COMPROMISSOIRE ET RECLAMATION DE SOMMES

COUR D'APPEL DU MALI

CHAMBRE CIVILE

La Cour d'Appel du Mali, séant à Bamako au Palais de Justice de ladite ville, en son audience publique ordinaire du Vingt Cinq Octobre Mil Neuf Cent Quatre Vingt Dix, tenue en matière civile à laquelle siégeaient Messieurs :

Moussa DOUMBIA/ Premier Président de la Cour d'Appel — PRESIDENT

Mme DIALLO K. KAYENTAO) Conseillers à la
Mamadou KONE) Cour d'Appel — MEMBRES

En présence de Mamadou T. DEMBELE, Substitut Général près la Cour d'Appel du Mali ;

Avec l'assistance de Mme GUITTEYE Madina TALL, Greffier à la Cour d'Appel du Mali ;

A RENDU L'ARRET SUIVANT DANS LA CAUSE ENTRE :

LA S.A.T.O.M. (Société Anonyme des Travaux Outre - Mer) ayant son siège social à Gentilly 5 Avenue Gallieni, 95250- France- représentée par son Agence Sociale à Bamako ; non comparante à l'audience mais représentée par ses Conseils Me Mamadou YATTASSAYE, Avocat à la Cour, Me Boubacar SIDIBE, Conseil Juridique et Me VILLARD, Avocat au Barreau Français -

APPELANTE — D'UNE PART

ET LA C.OM.E.L.E.C. (Compagnie Malienne d'Electricité et d'Equipement) ayant son siège social à Bamako,
INTIMEE non comparante à l'audience mais représentée par Me Cheickna H. SIBY et Georges A. DONGAR, tous Avocats à la Cour ;

D'AUTRE PART

DANS UNE INSTANCE EN ANNULATION D'UNE CLAUSE COMPROMISSOIRE ET EN RECLAMATION DE SOMMES.

Sans que les présentes qualités puissent

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nuire ni préjudicier en rien aux droits et intérêts respectifs des parties en cause, mais bien au contraire sous les plus expresses réserves de fait et de droit ;

POINT DE FAIT : Par acte au greffe en date du 26/11/87 Me Mamadou YATTASSAYE, Avocat à la Cour, agissant au nom et pour le compte de la SATOM a déclaré interjeter appal du jugement N° 229 rendu le 26/11/87 par le Tribunal Civil de Bamako dont le dispositif est ainsi conçu "Dit que SATOM et COMELEC sont deux sociétés maliennes pour être immatriculées au Régistre du Commerce malien ; Que le contrat SATOM-COMELEC pour être exécuté au profit de l'Etat Malien sur le territoire malien par deux sociétés maliennes n'a aucun caractère international ; déclare en conséquence la clause compromissoire nulle; Annule la sentence arbitrale pour avoir violé la loi malienne applicable aux parties ; Déclare que la sentence n'a pas acquis l'autorité de la chose jugée en ce qu'elle n'a pas définitivement jugé l'action de COMELEC relative à la demande reconventionnelle. Se déclare donc compétent- Reçoit l'action COMELEC-
Condamne la SATOM à lui payer au principal :

- 248.679.695 Frcs Maliens soit 124.384.847 Frcs CFA représentant le reliquat du montant de la valeur des travaux d'électricité réalisés par COMELEC.

- 10.871.550 Frcs CFA à titre de remboursement de la valeur du matériel approprié par SATOM ;

- Les intérêts de droit desdites sommes à compter du 7 Décembre 1976.

- 50.000.000 Frcs à titre de dommages-intérêts toutes causes confondues.

- Ordonne l'exécution provisoire.
- Condamne la SATOM aux dépens.

Sur cet acte, l'affaire fut inscrite au rôle général du greffe de la Cour d'Appel sous le N° 289 de l'année 1988.

Par arrêt N° 33 en date du 25/01/1989, la Chambre Civile de la Cour d'Appel a annulé le jugement entrepris pour violation de la loi - s'est déclarée incompétente et a renvoyé les parties à se mieux pourvoir.

Me DONGAR, Avocat à la Cour, Conseil de la COMELEC a fait pourvoi contre ledit arrêt ;

Suivant arrêt N° 24 en date du 19/04/1990, la Chambre Civile de la Cour Suprême a cassé l'arrêt de la Cour d'Appel et renvoyé

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la cause et les parties devant la Cour d'Appel autrement constitué ;

Sur cet acte, l'affaire fut inscrite au Rôle Général du greffe de la Cour d'Appel sous le N° 440 de l'année 1990 ;

Appelée à l'audience du 19/04/1990, l'affaire fut renvoyée au 30/08/1990 pour dépôt de conclusions en réplique ; advenue cette date, l'affaire fut retenue et débattue puis mise en délibéré pour l'arrêt être rendu le 4/10/1990, date à laquelle le délibéré fut prorogé au 25/10/1990. Advenue cette nouvelle date, la Cour composée comme précédemment et vidant son délibéré a rendu l'arrêt dont la teneur suit :

LA COUR

VU les pièces du dossier ;
OUI les Conseils des parties en leurs demandes, fins et conclusions ; Le Ministère Public entendu ;
Après en avoir délibéré conformément à la loi ;

EN LA FORME : Considérant que par acte au greffe en date du 26/11/1987 la SATOM, représentée par Me Mamadou YATTASSAYE, Avocat à la Cour a relevé appel du jugement N° 223, contradictoirement rendu par le Tribunal de Première Instance de Bamako et dont le dispositif est ainsi conçu : "Dit que SATOM et COMELEC sont deux sociétés maliennes pour être immatriculées au Régistre du Commerce Malien ; Dit que le contrat SATOM-COMELEC, pour être exécuté au profit de l'Etat Malien, sur le territoire malien par deux sociétés maliennes n'a aucun caractère international ; Déclare en conséquence la clause compromissoire nulle ; Annule la sentence arbitrale pour avoir violé la loi malienne applicable aux deux parties. Déclare que ladite sentence n'a pas acquis l'autorité de la chose jugée en ce qu'elle n'a pas définitivement jugée de l'action de COMELEC relative à la demande reconventionnelle.
Se déclare donc incompétent. Reçoit l'action de COMELEC ; condamne la SATOM à lui payer :

AU PRINCIPAL :

- 248.697.695 FM soit 124.348.847,5F CFA représentant le reliquat du montant de la valeur des travaux d'électricité réalisée par COMELEC ;

- 10.871.550F CFA à titre de remboursement de la valeur du matériel restant et approprié par SATOM, les intérêts des droits desdites sommes à compter du 7 Décembre 1976 ;

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AU TITRE DE REPARATION :

- 50.000.000F CFA à titre de dommages-intérêts, toutes causes confondues ;

Dit qu'il y a réparations urgentes ;

Ordonne l'exécution provisoire en ce qui concerne les condamnations au principal nonobstant toutes voies de recours.

Condamne la SATOM aux dépens."

Considérant que l'appel, interjeté dans les formes et délais de la loi est recevable ;

AU FOND : Considérant que par requête en date du 8/12/1986, Me DONGAR Avocat à la Cour, agissant au nom et pour le compte de la COMELEC a saisi le Tribunal Civil de Bamako d'une requête en annulation de sentence arbitrale et de clause compromissoire d'une part et d'autre part en réclamation de sommes contre la SATOM ;

Considérant que par écriture conjointes de Me YATTASSAYE et Boubacar SIDIBE en date du 21/08/1990, completées par d'autres de Me YATTASSAYE, Boubacar SIDIBE et VILLARD, respectivement Avocat au barreau malien, Conseil Juridique et Avocat au barreau Français, la SATOM expose qu'en ce qui concerne la validité du contrat de sous-traitance, ce n'est pas elle qui fit appel à COMELEC mais que c'est cette société qui proposa ses services en présentant le 02/05/1975 un dévis d'un montant 114.019.593 FM correspondant à certains travaux d'léctricité à l'exclusion des fournitures et de la pose de nombreux appareils. Que SATOM ayant souligné que la construction de la mosquée bénéficiait de l'exonération des taxes et droits de douane, COMELEC modifia sa proposition et, par lettre du 12/05/1975, donna son accord pour recevoirune avance de démarrage de 20% en confirmant que son prix était fermé et non revisable. Que le 20/05/1975, le contrat de sous-traitance d'un montant de 61.964.063 FM fut signée par la SATOM et COMELEC, celle-ci était représentée par Mr. CHIERICI ;

Qu'à la demande de SATOM, Mr. SANTARA, Directeur Général de COMELEC dont il était l'animateur et dont il est aujourd'hui le seul gérant confirma par lettre du 5/06/1975 que Monsieur CHIERICI était autorisé à signer le marché ; Que dans l'absolu, il est certain que SATOM n'aurait pu contraindre COMELEC à exécuter le contrat qui n'était pas signé par sa gérance ; Que par contre, COMELEC si elle voulait se prévaloir de cette lacune devait le faire immédiatement et refuser l'engagement pris pour elle par quelqu'un sans qualité ; Or c'est

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le contraire qui se produisait puisque le premier geste de la gérance de COMELEC fut de nantir ce marché par contrat du 19/06/1975 en faveur de la B.I.A.O. qui en avisa la SATOM en lui rappelant que les sommes dues à COMELEC doivent être versées au compte de celle-ci dans son établissement ; Que cet élément qui n'avait pas jusqu'alors été versé aux débats est détermiant car le fait de disposer d'un contrat, de le déposer auprès d'un tiers en l'espèce une banque, de le nantir auprès de celle-ci pour obtenir une ouverture de crédit démontre de façon incontestable que COMELEC prenait à sa charge le contrat de sous-traitance signé par Monsieur CHIERICI ; Que mieux, SATOM avait promis à CHIERICI de verser à COMELEC une avance de démarrage et dès le début des travaux remplit son engagement et au-dela en remettant à COMELEC 30.382.030 FM représentant la moitié du prix convenu au contrat au titre d'avance de démarrage ; Que les deux gérants statutaires de COMELEC ont évidemment eu connaissance de ce paiement et l'ont accepté confirmant ainsi une nouvelle fois qu'ils entérinaient le contrat signé par Mr CHIERICI ; Qu'en outre jusqu'à la fin des travaux, COMELEC se comporta comme le titulaire du contrat de sous-traitance ainsi que le prouvent les nombreuses lettres adressées à SATOM par sa gérance et notamment les suivantes: lettre du 25/11/1975, lettre du 22/12/1975 et lettre du 02/01/1976 ; Que d'ores et déjà la preuve est faite que la première et la principale des conditions de l'article 1108 du Code Civil à savoir le consentement de la partie qui s'oblige est rapportée par les faits ci-dessus ; Que le comportement de COMELEC au moment de la liquidation des comptes du marché de sous-traitance (lettre du 31/05/1976 du gérant statutaire de COMELEC à SATOM, entretien entre les deux sociétés le 14/07/1976 à la demande de COMELEC) confirme que COMELEC s'était bien engagée au titre de l'article 1108 du Code Civil ; Qu'il n'est pas contestable que le contrat du 20/05/1975 soit le seul titre dont COMELEC peut se prévaloir contre la SATOM et ce, d'autant plus qu'il s'agit d'un acte de commerce pour lequel tous les modes de preuve sont admissibles ; Qu'elle demande en conséquence de constater que la Cour d'Appel est chargée de statuer uniquement sur la validité d u contrat de sous-traitance du 20/05/1975 et que, pour le surplus la Cour Suprême confirme ce qu'elle avait jugée le 26/03/1979 ; Qu'ainsi la Cour doit dire et juger que pendant l'exécution des travaux COMELEC s'est comportée comme le titulaire du contrat de sous-traitance.

Qu'en conséquence déduire que les conditions imposées par l'article 1108 du Code Civil étant réunies en l'espèce il y a lieu d'appliquer l'arrêt de la Cour Suprême du 26/03/1979 et de dire que les senten-

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ces arbitrales doivent être confirmées ; Que très subsidiairement et pour les cas où la Cour se contenterait de consacrer la validité du contrat de sous-traitance, dire et juger que COMELEC ne peut réclamer à SATOM une somme supérieure à celle qu'elle avait elle-même fixée le 31/05/1976 soit 31.347.643 FM.

Considérant que COMELEC en répliquant sous les plumes conjointes de Me SIBY et DONGAR, tous deux Avocats à la Cour, commence par rappeler l'obligation de répondre par notes en cours de déliberé qu'elle avait fait remarquer à la Cour lors des débats ; Que répondant ensuite à SATOM, elle expose que celle-ci feint de croire que COMELEC a intenté une action tendant à faire reformer un arrêt de la Cour Suprême du Mali ; Qu'elle a toujours dit que son action était basée sur l'article 1028 ancien du Code de Procédure Civile Français seul applicable au Mali lequel est ainsi conçu :

"art. 1028- Il ne sera besoin de se pourvoir par appel ni par requête civile dans les cas suivants :

1°- Si le jugement a été rendu sans compromis ou hors des termes du compromis ;

2°- S'il l'a été sur compromis nul ou expiré ;

3°- S'il n'a été rendu que par quelques arbitres non autorisés à juger en l'absence des autres ;

4°- S'il l'a été par un tiers sans avoir conféré avec les arbitres ;

5°- Enfin, s'il a été prononcé sur choses non demandées ; Dans tous les cas les parties se pourvoieront par opposition à l'ordonnance d'exécution devant le Tribunal qui l'aura rendue et demanderont la nullité de l'acte qualifié jugement arbitral.

Il ne pourra y avoir recours en cassation que contre les jugements des Tribunaux rendus soit par requête civile soit sur appel d'un jugement arbitral- Pro 1006,1007,1011,1012,1026 ; Que comme l'a constaté l'arbitre lui-même le contrat et la clause compromissoire étaient nuls comme contrevenant à l'article 1108 du Code Civil ; Que ce cas de nullité de la clause compromissoire ayant été soumis à l'arbitre et celui-ci ayant reconnu qu'elle était nulle, il se devait eu égard à la doctrine et à la jurisprudence prévalant en République du Mali se déclarer incompétent ; Que ne l'ayant pas fait COMELEC a parfaitement le droit de saisir les tribunaux de droit commun conformément à l'article 1028 du Code de Procédure Civile (... s'ils étaient à torts déclarés compétents en considérant comme

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valide une clause compromissoire qui ne le serait pas la partie lésée peut déférer leur décision au contrôle de la juridiction de droit commun statuant sur opposition à exéquatur en vertu de l'article 1028 du C.P.C.) ; Que disposant de la possibilité de présenter tous ses arguments à l'appui de la nullité de la clause compromissoire devant les arbitres et de conclure à leur compétence la partie qui soutient celle-ci peut encore reprendre ses moyens, fins et conclusions devant le Tribunal par voie de l'opposition à l'exéquatur de la sentence arbitrale-jurisprudence de procédure civile 2e App. Art 1003-1028 PC Commercial art 631 Annexe II ; Que la Cour de Lyon par arrêt du 10/4/1951 (D 1951,610 ; Gaz Pal 1951,2,262) décide que Juge de sa propre compétence sous réserve du contrôle de l'autorité judiciaire le Tribunal arbitral ne saurait statuer sans excès de pouvoir sur la validité de sa propre institution et que "Dès lors les arbitres devant lesquels est invoqué la nullité de la clause compromissoire doivent surseoir à leurs opérations jusqu'à la solution de cette question préjudicielle par le Tribunal compétent. "Que cette thèse est celle adoptée par la Cour de Cassation dans son arrêt confirmatif du 6/10/1953 (D 1954,25) ; Que c'était donc conformément aux règles de procédure que COMELEC a saisi les Tribunaux compétents ; Que sur l'exception de l'autorité de la chose jugée, la doctrine et la jurisprudence admettent que tout comme une décision judiciaire étrangère, une sentence arbitrale n'acquiert de force exécutoire que lorsqu'elle est rendue exécutoire au moyen de la procédure d'exéquatur par ordonnance du Président du Tribunal apposée au bas de la minute déposée au greffe ; Qu'à défaut d'exéquatur la sentence ne perd pas le caractère d'un simple écrit privé, mais n'acquiert pas l'autorité de la chose jugée elle ne peut pas lier les juges ni être opposée devant eux ; Qu'ensuite aux termes de l'article 1028 alinéa 2 du C.P.C. il n'est ni discuté, ni discutable que l'opposition à exéquatur de sentence arbitrale se forme par assignation devant le Tribunal Civil et qu'elle est recevable s'il est soutenu que le jugement querellé a été rendu sur compromis nul ; Qu'il a été jugé que cette opposition n'est soumise à aucun délai par la loi ; Qu'elle peut donc être formée pendant trente ans ; Que la partie qui a eu la possibilité de présenter à l'appui de la nullité de la clause compromissoire devant les arbitres et de conclure à leur incompétence, peut encore reprendre ses moyens, fins et conclusions devant le Tribunal par la voie de l'opposition à l'exéquatur de la sentence arbitrale ; Qu'il s'ensuit

que c'est vainement que SATOM exige l'autorité de la chose jugée de la sentence arbitrale, à l'égard de laquelle l'action introduite par COMELEC n'a rien de contraire ni à la loi ni à la procédure ; Qu'enfin elle rappelle que SATOM après avoir demandé l'annulation de l'expertise de SALL a sollicité la nomination d'un collège de trois experts dont un a été expressément désigné par elle (M Richard de Chicourt) ; Qu'en conséquence de tout ce qui précède elle sollicite de confirmer le jugement dont appel en toutes ses dispositions et condamner SATOM aux dépens dont distraction au profit des Avocats soussignés aux offres de droit.

Considérant qu'en réponse aux moyens exposés par COMELEC, la SATOM, par notes conjointes en cour de déliberé de Me YATTASSAYE, Boubacar SIDIBE et VILLARD, replique en commençant par relever les erreurs matériels et de faits que soutiendrait la note de COMELEC sur la sentence arbitrale, concernant la compétence de l'arbitre et la validité du contrat de sous-traitance, sur les décomptes réellement perçus sur le volet Electricité par SATOM après l'achèvement des travaux ; Que sur le plan juridique elle rappelle que COMELEC soutenait que seuls les Tribunaux d'Etat pouvaient apprécier la question préjudicielle de la validité du contrat ; Or c'est au moment où, comme elle le souhaitait, elle se trouve devant une juridiction d'Etat qu'elle esquive le débat et garde le silence reconnaissant ainsi qu'elle n'a rien à objecter à l'argumentation de la SATOM ; Que le silence de COMELEC s'explique, car ainsi que le démontre la pièce ci-jointe que SATOM a retrouvée dans ses archives, elle avait elle-même, par lettre du 28/08/1974 signée de ses deux gérants proposés ses services à SATOM ; Qu'elle comprend maintenant pourquoi Monsieur SANTARA avait affirmé à SATOM que Monsieur CHIERICI avait le pouvoir de signer le contrat car les trois associés de COMELEC souhaitaient l'obtenir ; Que pour être complet la SATOM ajoutera que l'article 1028 du C.P.C. sur lequel COMELEC déclare baser son action n'a strictement rien à voir avec le problème de la validité du contrat que la Cour est chargée d'apprécier ; Qu'au surplus ce texte est inapplicable puisqu'il ne concerne que l'opposition à une ordonnance d'exéquatur qui n'existe pas en l'espèce ; Qu'il est également inapplicable parce qu'on ne se trouve pas dans aucun des 5 cas qu'il énumère ; Que nul n'ignore en effet qu'il n'a pas eu de compromis mais une seule clause compromissoire et que la procédure arbitrale a été engagée sur une décision de la Cour Suprême ; Que dans ces conditions, la SATOM demande respectivement à la Cour de débouter COMELEC de son action et de faire droit à ses propres conclusions en déclarant valable le contrat de

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de sous-traitance.

ANALYSE ET DISCUSSION

Considérant qu'en saisissant le Tribunal de Première Instance de Bamako en annulation de la sentence arbitrale rendue par la Chambre de Commerce Internationale, la COMELEC n'a exercé qu'une voie de recours contre ladite sentence et cette instance ne saurait en aucun cas être confondue avec la première procédure ayant abouti à l'arrêt N° 16 du 26/03/1979 de la Cour Suprême ;

Que conséquemment l'examen de la présente procédure passe inéluctablement par celui de la recevabilité du recours ;

SUR LA RECEVABILITE DU RECOURS DE LA COMELEC

Considérant que le Mali n'a pas légiféré en matière d'arbitrage et qu'il échet de faire application de l'article 231 al. 2 du CPCCS ;

Considérant que la COMELEC fonde son recours sur l'article 1028 de l'ancien Code de Procédure Civile Français ;

Considérant qu'en fait, sous l'empire de ce code, cette voie de recours dite opposition à ordonnance d'exéquatur, s'entendait aussi bien aux sentences arbitrales internes qu'aux sentences de droit international privé (cf Jurisclasseur -Procédure- 812 à 1042 ; l'arbitrage-Droit interne, Droit International privé 5ème Edition J. Robert P. 328) ;

Considérant que ladite voie de recours, "malgré les termes employés par l'article 1028 d'opposition à ordonnance d'exécution n'a pas spécialement pour objet de faire rapporter l'ordonnance déjà rendue ou d'empêcher qu'elle soit mise à exécution ; en fait elle tend essentiellement à faire déclarer nulle la sentence arbitrale. Aussi doit-on décider que ce recours peut-être exercé avant que l'ordonnance d'exécution ait été rendue, comme elle peut l'être après qu'elle a été rendue, soit au moment où l'exécution est provisoire, soit même après que l'exécution a eu lieu et pour en détruire les effets" ; (Garsonnet et César-Bru, T VIII P 630 ; Paris 30/10/1936, S,1937,2,66 ; Aix 1er/03/1951,D,1952,11,9647 note Motulsky)

Considérant que les règlements des centres internationaux d'arbitrage privé ne peuvent faire obstacle à l'article 1028 surtout lorsque l'arbitre a statué sur sa propre compétence ; Que l'arrêt de principe en date du 22/02/1949 est sans équivoque" Disposant

.../...

de la possibilité de présenter tous ses arguments l'appui de la nullité de la clause compromissoire devant les arbitres et de conclure à leur compétence, la partie qui soutient celle-ci peut encore reprendre ses moyens, fins et conclusions devant le Tribunal par la voie de l'opposition à l'exéquatur de la sentence arbitrale".

Qu'à cet égard, la jurisprudence est allée jusqu'à créer une voie de recours dite appel en nullité contre les sentences rendues en dernier ressort et insusceptibles de réformation par le biais de l'article 1028 du C.P.C. (cf" les voies de recours contre les sentences arbitrales. Jean Viatte, in Gazette du Palais Mercredi 5, Jeudi 6 Mars 1975. P 3" On s'est demandé comment rémédier aux vices qui infectaient une sentence en dernier ressort insusceptible de réformation lorsque ceux-ci n'étaient pas au nombre de ceux bien limités qui permettaient l'opposition à l'ordonnance d'exéquatur. Les Tribunaux n'ont pas hésité. Ils ont estimé que la renonciation à l'appel n'était pas valable lorsque la sentence contenait des violations des règles d'ordre public ou une méconnaissance des droits de la défense. Ainsi est né l'appel en nullité"].

Considérant que l'opinion dominante est que nul ne peut se prévaloir avant la formalité d'exéquatur, de l'autorité de la chose jugée qui s'attache à une sentence arbitrale (Paris 1ère Ch.19 Mai 1961) ;

Considérant que dans les cas énumérés en l'article 1028, "la nullité de la sentence peut être demandée au Tribunal sans condition de délai au moyen d'une opposition à l'ordonnance d'exéquatur, la décision du Tribunal étant susceptible d'appel suivant le droit commun- (cf Jean VIATTE, déjà cité) ;

Considérant que la doctrine et la jurisprudence ont déterminé, de façon constante et ce jusqu'à l'avènement du nouveau C.P.C. (pour lequel la distinction n'avait plus d'importance) la nationalité d'une sentence d'après la loi qui a régi la procédure (cf. Batti fol, Traité de D.I.P. 3ème ed. N° 447 ; Niboyet, D.I.P. T VI Paris 28 Avril 1976, R arb. 1977, note Boitard, Paris 5 Juillet 1955).

Qu'ainsi, la sentence querellée, entreprise en application de la loi malienne, est étrangère par rapport aux juridictions du lieu où elle a été rendue et par conséquent le recours a été valablement formé devant les juridictions maliennes ;

Qu'en égard de ces différents éléments d'application de l'article 1028 de l'ancien C.P.C. Français, il convient de dire que c'est

.../...

à bon droit que le premier Juge a reçu le recours et de confirmer sa décision sur ce point.

Que dès lors, il échet d'aborder frontalement les moyens de la COMELEC qui invoque tant la nullité du contrat que celle de la clause compromissoire ;

Considérant que l'arbitre s'est déclaré compétent tout en appliquant la loi malienne, qu'il a ainsi estimé que l'arbitrage dans le cas de l'espèce est d'ordre international ;

Qu'à ce stade, il convient donc d'apprécier tour à tour la validité du contrat de sous-traitance et celle de la clause compromissoire en raison du caractère autonome de la clause par rapport au contrat dans lequel il est inséré, l'un n'affectant pas l'autre, cette indépendance résultant du fait que la clause compromissoire est soumise à des règles qui ne sont pas applicables au contrat principal ;

Que ce principe de séparabilité est consacré par la doctrine et la jurisprudence (cf. Pierre MAYER. D.I.P. P 227 N° 295 ; J. Robert, "l'arbitrage, Droit Interne, Droit International Privé, 5ème ed. P 364, Arrêt Gosset, 7 Mai 1963).

SUR LA VALIDITE DU CONTRAT DE SOUS-TRAITANCE

Considérant que les dispositions de l'article 1338 du Code Civil sont sans équivoque et qu'en fait, la forme habituelle de la confirmation tacite est l'exécution volontaire de l'acte annulable ;

Considérant qu'à cet égard, il importe peu que le contrat ait été signé par un agent dont qualité est contestée d'autant que la COMELEC a, en toute connaissance de cause exécuté les travaux ; Que ce constat est clairement étayé par les différentes correspondances échangées entre les deux sociétés, tantôt relatives à l'état d'avancement des travaux, tantôt au paiement des sommes dues. Que mieux la réclamation de la COMELEC est fonction des travaux par elle exécutés ; Que par conséquent le contrat de sous-traitance est parfaitement valable ;

SUR LA VALIDITE DE LA CLAUSE COMPROMISSOIRE ET DE LA SENTENCE ARBITRALE

Considérant que l'article 1028 de l'ancien C.P.C. Français dispose "Il ne sera besoin de se pourvoir par appel ni requête ci-

vile dans les cas suivants :

1°) Si le jugement a été rendu sans compromis ou hors du terme du compromis ;

2°) S'il l'a été sur compromis nul ou expiré ;

3°) S'il n'a été rendu que par quelques arbitres non autorisés à juger en l'absence des autres ;

4°) S'il l'a été par un tiers sans en avoir conféré avec les arbitres partagés ;

5°) Enfin s'il a été prononcé sur choses non demandées.

Considérant que le principe de base de l'examen de la validité de la clause compromissoire a été indiqué par Réné David : "La jurisprudence a temperé sa position en reconnaissant que la clause, frappée de nullité dans les rapports internes, était au contraire valable si elle était prévue dans un contrat interéssant le commerce international, sous la pression de groupements commerciaux, la validité de la clause compromissoire a été d'autre part reconnue en matière commerciale par la loi du 31/12/1925". (cf. "L'arbitrage dans le commerce international", P 128) ;

Qu'en fait, ce principe procède de deux arrêts, d'une part l'arrêt civ. 9 Janvier 1854 in D.P.54.I.69 qui a disposé que "le compromis est nul lorsqu'il a été soumis à des conditions par lesquelles les parties dérogent à des lois qui intéressent l'ordre public" et d'autre part par l'arrêt Limoges 12/10/1928, D.P. 1931 2.49 avec note de M. Baudouin in ancien C.P.C. Français P. 363 qui indique "La loi du 31/12/1925 qui autorise les commerçants à stipuler, au moment où ils contractent, qu'en cas de difficultés nées du contrat ils auront recours à des arbitres, ne confère pas aux interéssés, quand ils sont Français, le droit de soumettre leurs différends à des arbitres où à des Tribunaux étrangers". Que d'ailleurs la Chambre de commerce internationale ne trouve sa compétence que dans le double caractère commercial et international du différend (Carabier" L'arbitrage international Privé" P 27) ;

Considérant que la SATOM et la COMELEC sont toutes deux des sociétés relevant de la législation malienne au regard de l'article 29 de l'ordonnance N° 58/CMLN du 14/10/1976 portant règlementation de la profession de commerçant en République du Mali ;

Qu'en fait, elles sont immatriculées au régistre du commerce et exercent au Mali avec l'obligation d'y avoir siège social et y avaient siège social.

.../...

Que par ailleurs le contrat de sous-traitance a été signé au Mali et devait être exécuté dans ce pays en ce sens que les parties contractantes honorent leurs prestations respectives en Territoire Malien ;

Qu'ainsi, il n'appert aucun élément d'extraneité pouvant caractériser un commerce international que vainement on chercherait cet élément dans le fait que l'entrepreneur principal (LA SATOM) est lié à un maître d'oeuvre étranger (L'Arabie Saoudite) ;

Qu'en effet, si la loi du 31/12/1975, en France, a crée un nouveau cadre juridique dans les rapports Maître d'oeuvre - sous-traitant, sous l'empire de l'ancienne législation (celle applicable au Mali) aucun lien de droit ne résultait de leur situation respective, le sous-traitant n'étant lié qu'à l'entrepreneur principal. De même aucune obligation ne pèse sur le maître vis-à-vis du sous-traitant". (cf. Leçons de droit civil Mazeaud, 5ème édition par Michel JUGLART. T III, 2ème volume, P 833 et 834). Dès lors le contrat entre la SATOM et l'Arabie Saoudite ne saurait influer sur le contrat de sous-traitance. Que par conséquent la clause compromissoire insérée dans le contrat de sous-traitance est nulle en raison du fait que deux sociétés de nationalité malienne, liées par un contrat conclu au Mali et devant y être exécuté ne pouvaient soumettre leur différend à des arbitres étrangers. Que par ailleurs l'acte de mission en date du 28/09/1979 (compromis) en vue de l'arbitrage est nul puisque dérogeant au principe de l'organisation judiciaire malienne ; Principe d'ordre public et partant la sentence arbitrale subséquente à ce compromis doit être annulée conformément aux dispositions de l'article 1028 de l'ancien code de procédure civile Français ;

Qu'ainsi le premier Juge, en procédant comme il l'a fait, n'encourt pas la censure de la Cour d'Appel.

SUR LES RECLAMATIONS DE LA COMELEC

Considérant que la COMELEC réclame, à titre de principal, la somme de 248.697.695F comme étant le reliquat de la valeur des travaux qu'elle a effectivement réalisés ; Qu'en outre elle demande des intérêts de droit de ladite somme à compter du 07/12/1976 et 10.871.550F pour son matériel aliéné par la SATOM ;

Qu'enfin au titre des réparations, la COMELEC demande 60 Millions F CFA de dommages-intérêts ;

Considérant qu'à l'occasion d'une opposition à l'ordonnance

d'exéquatur, le Tribunal Civil peut connaître d'une question de fond (Anger 27/03/1954, D. 1954, 406) ;

Considérant que le 28/01/1978 et ce dans le cadre de la première procédure, un collège d'experts, dont un désigné par la SATOM (Phillipe Richard de CHICOURT) a déposé son rapport ;

Qu'il appert de ce rapport que les experts ont évalué à 309.597.259 FM. Les travaux réellement effectués par la COMELEC tout en précisant que SATOM a acquitté 30.982.030FM ; . ;

Que par ailleurs, le rapport (page 12) souligne la retention par la SATOM du restant du matériel dont liste annexée au rapport, matériel évalué à 10.871.550F CFA ;

Considérant qu'une expertise antérieure diligentée par les mêmes parties dans une instance différente peut fournir au premier Juge des éléments de décision si ladite expertise a été soumise à la libre discussion des parties (cf. Expertise en matière civile et pénale, TONY Moussa P. 184 ; Gaz Pal. 10/02/76,1976,I.somm.32).

Considérant que la SATOM, par la plume de Me VILLARD, soutient qu'en cas de condamnation à paiement, il ne saurait être octroyé à la COMELEC plus que ce qui est arrêté dans le contrat ;

Qu'implicitement, la SATOM fait recours aux dispositions de l'article 1793 du C.C. relatives aux marchés à forfait. Que cependant ce moyen est inopérant puisque l'article 1793 ne s'applique point au contrat de sous-traitance et "par suite, le sous-traitant qui a traité à forfait avec l'entrepreneur général pour l'exécution de certains travaux a droit à des majorations pour les travaux supplémentaires qu'il a effectués si ces majorations sont justifiées" ; (Cass. ref 27/01/1937, Gaz Pal; 14 et 15/03/1937 in code civil Annoté P. 160 ; Civ. 15/02/1983 ; Civil 19/12/84, JCP. 85 IV 79), "peut être afin que le sous-traitant ne fasse pas les frais des rabais obtenus par l'entrepreneur principal" (cf. Phillipe Malaurie Laurent Aynès" Les contrats spéciaux " P. 324) ;

Considérant qu'au regard du rapport du collège d'experts, il échet de faire droit à la réclamation de la COMELEC, tant sur les montants dûs que sur les intérêts de droit, s'agissant d'une matière commerciale ;

Considérant que s'il est vrai que la COMELEC a subi un grave préjudice du fait de la SATOM, le montant des dommages-intérêts alloués par le premier Juge est exagéré ; Qu'il y a lieu d'infirmer le jugement entrepris sur ce point et statuant à nouveau, condamner

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la SATOM à payer à la COMELEC la somme de 10.000.000F CFA à titre de dommages-intérêts.

PAR CES MOTIFS

Statuant publiquement, contradictoirement en matière civile et en dernier ressort ;

EN LA FORME : Reçoit l'appel ;

AU FOND : Confirme le jugement entrepris en ce qu'il a reçu l'opposition à ordonnance d'exéquatur de la COMELEC ;

Condamné la SATOM à payer à la COMELEC la somme de 124.348.847,5F CFA représentant le reliquat de la valeur des travaux réalisés par COMELEC ; 10.871.550F CFA au titre du remboursement du matériel aliéné par SATOM ainsi que les intérêts de droit desdites sommes à compter du 07/12/1976 ;

L'infirme quant aux réparations et, statuant à nouveau, condamne SATOM à payer à COMELEC la somme de 10.000.000F CFA à titre de dommages-intérêts ;

Condamne SATOM aux dépens ;

Ainsi fait, jugé et prononcé publiquement par la Cour d'Appel du Mali les jour, mois et an que dessus.

ET ONT SIGNE LE PRESIDENT ET LE GREFFIER.

ANNEXE 9

Besoins estimés par le Ministère de la Justice

/)/) INISTERE DE LA JUSTICE

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION DU MATERIEL ET EQUIPEMENT

REPUBLIQUE DU MALI
Un Peuple - Un But - Une Foi

/// ABLEAU RECAPITULATIF DES BESOINS DU MINISTERE DE LA JUSTICE.-

DESIGNATION	MONTANT	OBSERVATIONS
Région de Kayes	211 480 000	
Région de Koulikoro	241 855 000	
Région de Sikasso	257 860 000	
Région de Ségou	171 860 000	
Région de Mopti	278 640 000	
Région de Tombouctou	114 295 000	
Région de Gao	170 000 000	
Région de Kidal	2 000 000	(Prison de Kidal)
Bamako District	256 285 000	
Total =	1 704 275 000	

Les travaux de construction et d'aménagement ne sont pas pris en compte et restent à évaluer par le service technique compétent.

Bamako, le

LE DIRECTEUR ADMINISTRATIF ET FINANCIER

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MINISTERE DE LA JUSTICE

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION DU MATERIEL ET DU PATRIMOINE

REPUBLIQUE DU MALI
Un Peuple - Un But - Une Foi

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT DE LA JURIDICTION DE KAYES

DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATION
Cour d'Appel :				
- Véhicule tout terrain	1	14.000.000	14.000.000	
Photocopieuse PC 25	1	1.800.000	1.800.000	
Machine à écrire	6	225.000	1.350.000	
- Coffre fort	1	850.000	850.000	
Bancs métalliques	20	25.000	500.000	
- Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
- Robes pour Greffier	3	175.000	525.000	
Encre pour photocopieuse	2	80.000	160.000	
- Robes Rouges pour C. d'As.	6	175.000	1.050.000	
			21.005.000	
Tribunal de 1ère Instance :				
Véhicule tout terrain	1	14.000.000	14.000.000	
- Photocopieuse	1	1.800.000	1.800.000	
Machine à écrire	5	225.000	1.125.000	
- Coffre fort	1	850.000	850.000	
Bancs métalliques	20	25.000	500.000	
- Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
- Robes pour Greffier	2	175.000	350.000	
Encre pour photocopieuse	2	80.000	160.000	
			19.555.000	
Justices de Paix :				
Vehicule tout terrain	6	14.000.000	84.000.000	
- Machine de tirage	6	1.300.000	7.800.000	
Machine à écrire	12	225.000	2.700.000	
- Coffre fort	6	850.000	5.100.000	

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[illegible]cule tout terrain	5	14 000 000	70 000 000
[illegible]ine de tirage	5	I 880 000	9 000 000
[illegible]ine à écrire	10	225 000	2 250 000
[illegible]ordinateur	5	4 500 000	22 500 000
[illegible]re fort	5	850 000	4 250 000
[illegible]métallique	50	25 000	I 250 000
[illegible]thèque	5	120 000	600 000
[illegible]our [illegible]ier	10	I75 000	875 000
[illegible]ique	10	II5 000	I-II5 000
			III 840 000
TRIBUNAL DE COMMERCE			
[illegible]ordinateur	1	4 500 000	4500 000
[illegible]-fort	1	850 000	850 000
[illegible]métallique	10	25 000	250 000
[illegible]seur	1	325 000	325 000
[illegible]thèque	1	120.000	120.000
[illegible] pour [illegible]ier	1	I75 000	I75 000
			6 229 000
TRIBUNAL ADMINISTRATIF			
[illegible]ordinateur	1	4 500 000	4 500 000
[illegible]-fort	1	850 000	850 000
[illegible]seur	1	325 000	325 000
[illegible]métallique	10	25 000	250 000
[illegible]thèque	1	I20 000	I20 000
[illegible] pour [illegible]ier	I	I75 000	I75.000
			6 220 000
TRIBUNAL DU TRAVAIL			
[illegible]ine à écrire	1	225 000	225 000
[illegible]-fort	1	850 000	850 000
[illegible]seur	1	325 000	325 000
[illegible]thèque	1	120 000	120 000
[illegible] pour [illegible]ier	1	I75 000	I75 000
			I 695 000
[illegible] rouges pour la cour d'assise	6	I75 000	I.050.000
TOTAL GÉNÉRAL			[illegible] 000
			24I 285 000

BAMAKO LE

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MINISTERE DE LA JUSTICE

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION DU MATERIEL ET EQUIPEMENT

REPUBLIQUE DU MALI
Un Peuple - Un But - Une Foi

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT
DE LA JURIDICTION DE KAYES

DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATION
Cour d'Appel :				
- Véhicule tout terrain	1	14.000.000	14.000.000	
Photocopieuse PC 25	1	1.800.000	1.800.000	
Machine à écrire	6	225.000	1.350.000	
- Coffre fort	1	850.000	850.000	
Bancs métalliques	20	25.000	500.000	
- Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
- Robes pour Greffier	3	175.000	525.000	
Encre pour photocopieuse	2	80.000	160.000	
- Robes Rouges pour C. d'As.	6	175.000	1.050.000	
			21.005.000	
Tribunal de 1ère Instance:				
Véhicule tout terrain	1	14.000.000	14.000.000	
- Photocopieuse	1	1.800.000	1.800.000	
Machine à écrire	5	225.000	1.125.000	
- Coffre fort	1	850.000	850.000	
Bancs métalliques	20	25.000	500.000	
- Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
- Robes pour Greffier	2	175.000	350.000	
Encre pour photocopieuse	2	80.000	160.000	
			19.555.000	
Justices de Paix :				
Vehicule tout terrain	6	14.000.000	84.000.000	
- Machine de tirage	6	1.300.000	7.800.000	
Machine à écrire	12	225.000	2.700.000	
- Coffre fort	6	850.000	5.100.000	

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- Bancs métalliques	60	25.000	1.500.000
- Ventilateur plafon	12	30.000	360.000
- Bibliothèque	6	120.000	720.000
- Robes	6	175.000	1.050.000
- Armoires métalliques	12	115.000	1.380.000
			104.610.000
<u>Tribunal de Commerce</u> :			
- Coffre fort	1	850.000	850.000
- Bancs métalliques	10	25.000	250.000
- Climatiseur	1	325.000	325.000
- Bibliothèque	1	120.000	120.000
- Robes	1	175.000	175.000
			1.720.000
<u>Tribunal Administratif</u> :			
- Coffre fort	1	850.000	850.000
- Bancs	10	25.000	250.000
- Climatiseur	1	325.000	325.000
- Bibliothèque	1	120.000	120.000
- Robes	2	175.000	350.000
			1.895.000
<u>Tribunal du Travail</u> :			
- Machine à écrire	1	225.000	225.000
- Coffre fort	1	850.000	850.000
Climatiseur	1	325.000	325.000
- Bibliothèque	1	120.000	120.000
Robe	1	175.000	175.000
			1.695.000
			150.480.000

Bamako, le

LE DIRECTEUR ADMINISTRATIF ET FINANCIER

<u>SOUMAILA SANOGO</u>.-

Inspecteur des Services Economiques

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DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION MATERIEL ET EQUIPEMENT

REPUBLIQUE DU MALI
UN PEUPLE - UN BUT - UNE FOI

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT
DE LA JURIDICTION DE KOULIKORO.-

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DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATIONS
TRIBUNAL DE 1ère INSTANCE				
Véhicule tout terrain	1	14 000 000	14 000 000	
Photocopieuse	1	1 800 000	1 800 000	
Machine à écrire	5	225 000	1 125 000	
Coffre fort	1	850 000	850 000	
Banc métallique	60	25 000	1 500 000	
Bibliothèque	6	120 000	720 000	
Ventilateur plafonnier	12	30 000	360 000	
Tables	2	175 000	350 000	
			20.705.000	
JUSTICES DE PAIX				
Véhicule tout terrain	6	14 000 000	84 000 000	
Machine à tirage	6	1 300 000	7 800 000	
Machine à écrire	12	225 000	2 700 000	
Bibliothèque	6	120 000	720 000	
Tables	6	175 000	1.050 000	
Armoire métallique	12	115 000	1 380 000	
		TOTAL =	110. 355.000	

BAMAKO, LE
LE DIRECTEUR ADMINISTRATIF ET FINANCIER

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REPUBLIQUE DU MALI

UN PEUPLE - UN BUT - UNE FOI

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION MATERIEL ET EQUIPEMENT

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT DE LA JURIDICTION DE SIKASSO

TRIBUNAL DE PREMIERE INSTANCE	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATIONS
Véhicule tout terrain	1	14 000 000	14 000 000	
Photocopieuse	1	1 800 000	1 800 000	
Machine à écrire	5	225 000	1 125 000	
Coffre fort	1	850 000	850 000	
Banc métallique	20	25 000	500 000	
Climatiseur	2	325 000	650 000	
Bibliothèque	1	120 000	120 000	
Robes	2	175 000	350 000	
Encre pour photocopieuse	2	80 000	160 000	
			19 555 000	
JUSTICES DE PAIX :				
Véhicule tout terrain	6	14 000 000	84 000 000	
Machine de tirage	6	1 300 000	7 800 000	
Machine à écrire	12	225 000	2 700 000	
Coffre fort	6	850 000	5 100 000	
Banc métallique	60	25 000	1 500 000	
Ventilateur plafonnier	12	30 000	360 000	
Bibliothèque	6	120 000	720 000	
Robes	6	175 000	1 050 000	
Armoires métalliques	12	115 000	1 380 000	
			104 640 000	
TRIBUNAL DU TRAVAIL :				
Machine à écrire	1	225 000	225 000	
Coffre fort	1	850 000	850 000	
Climatiseur	1	325 000	325 000	
Bibliothèque	1	120 000	120 000	
Robe	1	175 000	175 000	
			1 695 000	
TOTAL GENERAL.....			**125 860 000**	

BAMAKO, LE

LE DIRECTEUR ADMINISTRATIF ET FINANCIER

A.S.A.V.A.N.E/
MINISTERE DE LA JUSTICE

ACTION ADMINISTRATIVE ET FINANCIERE

DIVISION MATERIEL EQUIPEMENT

REPUBLIQUE DU MALI
UN PEUPLE - UN BUT - UNE FOI

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT DE LA JURIDICTIONS DE SEGOU.-

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DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATIONS
TRIBUNAL DE 1ère INSTANCE				
Véhicule tout errain	1	14 000 000	14 000 000	
Photocopieuse	1	1 800 000	1 800 000	
Machine à écrire	5	225 000	1 125 000	
Coffre fort	1	850 000	850 000	
Banc métallique	20	25 000	500 000	
Climatiseur	2	325 000	650 000	
Bibliothèque	1	120 000	120 000	
Robes	2	175 000	350 000	
Encre pour photocopieuse	2	80 000	160 000	
			19 555 000	
JUSTICES DE PAIX				
Véhicule tout terrain	6	14 000 000	84 000 000	
Machine de tirage	6	1 300 000	7 800 000	
Machine à écrire	12	225 000	2 700 000	
Coffre fort	6	850 000	5 100 000	
Banc métalliquo	60	25 000	1 500 000	
Ventilateur plafonnier	12	30 000	360 000	
Bibliothèque	6	120 000	720 000	
Robes	6	175 000	1.050.000	
Armoire métalliquo	12	115 000	1 380 000	
Total à	reporter	.....	104.500.000	

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		REPORT	104 610 000
TRIBUNAL DU TRAVAIL			
Machine à écrire	1	225 000	225 000
Coffre fort	1	850 000	850 000
Climatiseur	1	325 000	325 000
Bibliothèque	1	120 000	120 000
Coffre	1	175 000	175 000
	TOTAL	GENERAL.....	125 860 000

BAMAKO, LE

LE DIRECTEUR ADMINISTRATIF ET FINANCIER

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MINISTERE DE LA JUSTICE

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION MATERIEL ET EQUIPEMENT

REPUBLIQUE DU MALI

Un Peuple-Un But-Une Foi

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT
DE LA JURIDICTION DE - M O P T I -

D E S I G N A T I O N	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERV
COUR D'APPEL				
Véhicule tout terrain	1	14.000.000	14.000.000	
Photocopieuse	1	1.800.000	1.800.000	
Machine à écrire	6	225.000	1.350.000	
Coffre Fort	1	850.000	850.000	
Banc metallique	20	25.000	500.000	
Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
Robes pour greffier	3	175.000	525.000	
Encre pour photocopieuse	2	80.000	160.000	
Robes pour Cour d'Assises	6	175 000	1.050.000	
			21.005.000	
TRIBUNAL IERE INSTANCE				
Véhicule tout terrain	1	14.000.000	14.000.000	
Photocopieuse	1	1.800.000	1.800.000	
Machine à écrire	5	225.000	1.125.000	
Coffre fort	1	850.000	850.000	
Banc metallique	20	25.000	500.000	
Climatiseur	2	325.000	650.000	
Bibliothèque	1	120.000	120.000	
Robes pour greffier	2	175.000	350.000	
Encre peur photocopieuse	2	80.000	160.000	
			19.555.000	
JUSTICE DE PAIX				
Véhicule tout terrain	7	14.000.000	98.000.000	
Machine de tirage	7	1.300.000	9.100.000	
Machine à écrire	14	225.000	3.150.000	
Coffre fort	7	850.000	5.950.000	
Banc metallique	70	25.000	1.750.000	

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Ventilateur plafonnier	14	30.000	420.000
Bibliothèque	7	120.000	840.000
Robes pour greffier	7	175.000	1.225.000
Armoire metallique	14	115.000	1.610.000
			122.045.000
TRIBUNAL DE COMMERCE			
Coffre fort	1	850.000	850.000
Banc metallique	10	115.000	1.150.000
Climatiseur	1	325.000	325.000
Bibliothèque	1	120.000	120.000
Robe pour greffier	1	175.000	175.000
			2.620.000
TRIBUNAL ADMINISTRATIF			
Coffre fort	1	850.000	850.000
Banc metallique	10	25.000	250.000
Climatiseur	1	325.000	325.000
Bibliothèque	1	120.000	120.000
Robe pour greffier	1	175.000	175.000
			1.720.000
TRIBUNAL DU TRAVAIL			
Machine à écrire	1	225.000	225.000
Coffre fort	1	850.000	850.000
Climatiseur	1	325.000	325.000
Bibliothèque	1	120.000	120.000
Robe pour greffier	1	175.000	175.000
			1.695.000
Total général.....			168.640.000

Bamako, le

LE DIRECTEUR ADMINISTRATIF
ET FINANCIER

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Un Peuple - Un But - Une Foi

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION DU MATERIEL ET EQUIPEMENT

III- VALUATION DES BESOINS POUR LE FONCTIONNEMENT DE LA JURIDICTION DE TOMBOUCTOU.-

DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATIONS
- Tribunal Ière Inst.				
Véhicule tout terrain	1	14 000 000	14 000 000	
Photocopieuse	1	1 800 000	1 800 000	
Machine à écrire	5	225 000	1 125 000	
Coffre fort	1	850 000	850 000	
Banc métallique	20	25 000	500 000	
Climatiseur	2	325 000	650 000	
Bibliothèque	1	120 000	120 000	
Robe	2	175 000	350 000	
Encre pour photocopieuse	2	80 000	160 000	
			19 555 000	
- Justices de Paix :				
Véhicule tout terrain	4	14 000 000	56 000 000	
Machine à tirage	4	1 300 000	5 200 000	
Machine à écrire	8	225 000	1 800 000	
Coffre fort	4	850 000	3 400 000	
Banc métallique	40	25 000	1 000 000	
Ventilateur plafonn.	8	30 000	240 000	
Bibliothèque	4	120 000	480 000	
Robe	4	175 000	700 000	
Armoire métallique	8	115 000	920 000	
		Total =	69 740 000	
		Total Général	89 295 000	

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LE DIRECTEUR ADMINISTRATIF ET FINANCIER

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MINISTERE DE LA JUSTICE

DIRECTION ADMINISTRATIVE ET FINANCIERE

DIVISION MATERIEL ET EQUIPEMENT

REPUBLIQUE DU MALI

UN PEUPLE - UN BUT - UNE FOI

EVALUATION DES BESOINS POUR LE FONCTIONNEMENT DE LA JURIDICTION DE GAO.-

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DESIGNATION	QUANTITE	PRIX UNITAIRE	MONTANT	OBSERVATIONS
TRIBUNAL DE 1ère INSTANCE				
Véhicule tout terrain	1	14 000 000	14 000 000	
Photocopieuse	1	1 800 000	1 800 000	
Machine à écrire	5	225 000	1 125 000	
Coffre fort	1	850 000	850 000	
Sac métallique	20	25 000	500 000	
Climatiseur	2	325 000	650 000	
Bibliothèque	1	120 000	120 000	
Bureau	2	175 000	350 000	
Encre pour photocopieuse	2	80 000	160 000	
			19 555 000	
JUSTICES DE PAIX				
Véhicule tout terrain	4	14 000 000	56 000 000	
Machine de tirage	4	1 300 000	5 200 000	
Machine à écrire	8	225 000	1 800 000	
Coffre fort	4	850 000	3 400 000	
Sac métallique	40	25 000	1 000 000	
Ventilateur plafonnier	4	30 000	120 000	
Bibliothèque	4	120 000	480 000	
Bureau	4	175 000	700 000	
Armoire métallique	8	115 000	920 000	
	Total à	reporter.....	69 620 000	

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		REPORT	69 620 000
TRIBUNAL DU TRAVAIL			
Machine à écrire	1	225 000	225 000
offre fort	1	850 000	850 000
Climatiseur	1	325 000	325 000
ibliothèque	1	120 000	120 000
Robo	1	175 000	175 000
			1 695 000
	TOTAL	GENERAL.....	98 870 000

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LE DIRECTEUR ADMINISTRATIF ET FINANCIER

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ANNEXE 10

Bibliographie sommaire

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Note : Madame M. Diakité a collecté l'ensemble des lois relatives au système judiciaire au Mali. Nous n'avons pas jugé nécessaire de les reproduire en annexe. Plusieurs projets sont en cours de discussion au Mali ou dans la région. Nous en avons cité des extraits dans le rapport mais ils ne peuvent être à l'heure actuelle publiés.

Outre les annexes, plusieurs documents ou codes sont rattachés à ce rapport séparément. Les reproductions de l'encyclopédie de Monsieur Colman ont été réalisées avec son accord pour l'IDLI.