

Final Report:

**ON THE PROPOSED AMENDMENTS TO
THE EGYPTIAN COMMERCIAL CODE OF 1883**

PART I : THE BANKRUPTCY PROVISIONS

**PART II : THE NEGOTIABLE INSTRUMENT, OR CHECK,
AND THE TECHNOLOGY TRANSFER PROVISIONS**

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PREFACE

This report is based upon a study conducted by the Development Economic Policy Reform Analysis ("DEPRA") Project, which is administered by Nathan Associates Inc. under contract to the United States Agency for International Development, Office of Economic Analysis & Policy, Cairo, Egypt ("USAID/Egypt") (Contract No. 263-C-00-00001-00), in response to a request from the Egyptian Minister of Economy to look into the existing and proposed revisions to laws and regulations pertaining to bankruptcy in Egypt.

The DEPRA Project is intended to encourage and support macroeconomic reform in Egypt through the provision of technical assistance and services to the Ministries of Economy and of Trade and Supply, with substantive focus on the areas of international trade/investment liberalization, deregulation of the economy, and financial sector strengthening.

This Report is based on a two-week visit to Cairo by the consultant, Mr. James C. Regan, Attorney at Law and Consulting Attorney, in March 1998, which was intended as an exploratory, "reconnaissance" trip. During this visit he discussed Egypt's existing and proposed, revised commercial law, specifically, its bankruptcy law, with 30 knowledgeable professionals (see attached Addendum). The consultant also studied (1) an English translation of The Commercial Code of 1883 and (2) a rough translation of the proposed new bankruptcy law (Articles 550 to 772, only, of the proposed, revised Code).

The information obtained from the professionals was often contradictory, and sometimes was apparently contradictory to specific provisions in the proposed new bankruptcy law. Drawing on the foregoing sources, as well as the consultant's knowledge of bankruptcy principles and bankruptcy systems in the laws of other countries, the consultant offers Part I of this Report on the subject of bankruptcy in Egypt, which should be understood in its context: It is not intended to be a definitive, comprehensive examination of the subject, but a point of departure for further analysis and discussion.

During his investigation the consultant discovered that the two parts of the proposed, revised Commercial Code discussed in Part II of this report—those regarding negotiable instruments and technology transfer—were controversial, and that the controversy was deflecting attention from the bankruptcy provisions. Limited information was obtained concerning these provisions. The consultant was not provided an English translation of them. Nevertheless, drawing on the comments of the professionals consulted (see attached Addendum), as well as the consultant's practical knowledge of negotiable instruments law and technology licensing, the consultant offers his opinions on these matters in Part II, which should be understood as more of a working draft than a final report.

The author is solely responsible for the opinions expressed in this report, and the conclusions and recommendations do not necessarily reflect opinions or policies of either the Government of Egypt or the U.S. Agency for International Development.

EXECUTIVE SUMMARY

The proposed new bankruptcy law should be revised.

The bankruptcy law should be made to conform, generally, with the modern approaches to bankruptcy in current international practice.

Such revisions should be thorough, and done with the intent of moving the Egyptian bankruptcy system away from its existing and traditional practices.

The three most significant revisions should be: (1) providing the debtor a discharge, (2) providing for more simplified reorganizations of bankrupt companies, and (3) establishing special courts and expedited procedures for bankruptcy cases.

Sections 597 and 696 should be re-written to state that a bankrupt debtor ordinarily shall receive a general discharge of indebtedness at the conclusion of his bankruptcy case.

This discharge should be granted in the ordinary course. It should apply to his indebtedness generally, but not to debt secured by liens, debt incurred by fraud, or certain debts to banks. It should be denied or limited only where one or more creditors, or the syndic or administrator, is able to prove that the debtor committed a fraud or other intentional wrong, or an act of gross negligence; or if the debtor fails to cooperate in the administration of his bankruptcy.

The disabilities imposed on the debtor as a result of bankruptcy also should be removed so he suffers no official disabilities as long as he receives the discharge provided for as per the above.

The "judicial reconciliation" and "preventive settlement" provisions found in sections 662 through 683 and 725 to 767, respectively, should be re-written to provide a simple and comprehensive reorganization procedure, akin to Chapter 11 of the United States Bankruptcy Code.

The reorganization procedure should be available to large and small enterprises, and publicly-traded companies in particular.

Investment bankers should be allowed to be hired by the debtors, creditors committees, syndics or a, for the purpose of finding strategic investors or floating the companies through the capital markets.

Specialized courts should be established to oversee all aspects of bankruptcy liquidations and reorganizations.

At the same time, unique, expedited procedures should be specified for such cases. Except for contested matters where a specific legal issue needs to be adjudicated, such as the bankrupt's entitlement to a discharge in the face of allegations of fraud, these procedure should depart freely from the procedures normally used in commercial and civil cases.

Under these procedures creditors and other interested parties should be required to act within short time-frames, or lose the benefit of their claims and/or their right to protest certain actions. The debtor, the syndics or administrators similarly should be required to act within short time periods.

While some of the recommendations concerning reorganization and procedure referred to above have been incorporated into specific provisions found in the proposed new law the new law is not comprehensive and thorough in these respects.

The proposed negotiable instrument law should be enacted, but with companion legislation improving a creditor's ability to obtain and enforce judgments on simple debts.

The technology transfer provisions, at least those which declare Egyptian law to be the governing law for technology licenses and which give the licensee a right to re-transfer the technology irrespective of the licensor's wishes, should not become law.

PART I: THE BANKRUPTCY PROVISIONS

1.1 INTRODUCTION

The consultant visited Cairo from March 18 to April 2, 1998. At the time the Government of Egypt had under consideration a comprehensive revision of The Commercial Code of 1883 (the “Code”).

The Code applies generally to commercial transactions and the persons who habitually engage in them, i.e., “merchants.”

The Code contains provisions which require a merchant to register at the Commercial Registry, to register details concerning his marriage, and to keep certain books (Articles 1 through 18); rules for the organization of merchant companies, the granting of mortgages to secure commercial debts, and for the conduct of business by certain types of traders and agents (Articles 19 through 104); rules of negotiability and enforceability for checks, notes, bills, and other negotiable instruments (Articles 105 to 194); and provisions which govern the *bankruptcies* of merchants (i.e., those situations which result when a merchant ceases making payment on his debts) (Articles 195 to 419, *i.e., more than half of the Code*).

The Code follows the model of French law. A specific statutory enactment is required in order for a commercial activity to operate within the law. A number of special rules apply to merchants. This is because their activities affect the public interest in a broad and important way: They ensure that a broad variety of useful goods and services are available to the public at large.

While the law applicable to merchants and commerce is found in the Code, other laws of general application are found elsewhere. Matters of corporate governance, contracts, and mortgages of real or movable property are found in the Company Law and the Civil Code, respectively.

As a result of the political situation in Egypt at various times from 1883 through to the present, the Code has been revised hardly at all and stands as a relic of the commercial law and practices extant in the second half of the last century.

The proposed revisions constitute a comprehensive re-writing and updating of the Code. These revisions were prepared by a blue ribbon committee working over a period of 15 years under the direction of Mohsen Shafiq, for more than forty years Egypt’s most prominent and respected expert on commercial law.

The consultant’s visit came at a time when the proposed revisions were near, but not quite ready to obtain, final approval from Parliament. Something close to a consensus had developed to the effect that the revisions as a whole were a good thing: A reliable modernization of a statutory scheme due to be updated.

However, controversy had been provoked by three parts of the proposed, revised Code. One, is a

negotiable instrument, or check, provision which varies significantly from existing law and practice. Two, is a rule which would restrict the transfer, or licensing, of rights in technology. Three, is the bankruptcy section, which contemplates a fairly thorough re-write of the bankruptcy provisions in the existing Code -- Articles 195 to 419 of the Code, governing bankruptcy, are recast as Articles 550 through 772 of the new, proposed, revised Code.

The check and technology transfer provisions are controversial for specific reasons. These issues are discussed briefly in Part II of the consultant's report.

The bankruptcy provisions are controversial in a broader sense. Commercial bankruptcy as it is practiced in Egypt plays a peculiar role in the system of justice -- and the economy. The bankruptcy system is understood and controlled by a small, select group of specialists. The proposed revisions would change the existing practice significantly. Only a few people, however, can understand how these changes will affect the bankrupts, the creditors, the specialists, or the economy as a whole.

As a result of these controversies, the proposed revised Code did not pass in the last session of the Parliament, although passage in the next (October, 1998) session remains a possibility.

The consultant had the opportunity to review the proposed, new bankruptcy law (Articles 550 through 772 of the proposed, revised Code) prior to his visit. During his visit he met and consulted with more than thirty leading lawyers, economists, bankers, accountants, and bankruptcy specialists. (These consultations are listed on the attached Addendum.)

Coming out of these consultations, and by comparing the bankruptcy provisions of the proposed, revised law (Articles 550 through 772) with the bankruptcy provisions in the existing Code (Articles 195 to 419) and with the more modern bankruptcy laws in effect in other countries (United States, France, United Kingdom, Singapore) the consultant offers the following background comments, findings, conclusions and recommendations in respect of the proposed, new bankruptcy law.

1.2 BACKGROUND: Bankruptcy - The Basic Concepts

1.2.1 Bankruptcy's Adverse Effects

The debtor-creditor relationship is basic to commerce. Merchant sellers and buyers habitually provide their goods and services in the expectation of being paid after delivery. The provider in turn will have debts he owes, some of which undoubtedly were incurred in the expectation of being paid by his customers.

For every debt owed there is an equal credit, or receivable, on the books of the creditor entitled to be paid.

Where a merchant debtor is unable to meet his obligations he disappoints his creditors, who as a result of the debtor's insolvency may be unable to meet their obligations.

Obviously, the effect of an insolvency on a community of merchants, and on the economy at large, can be devastating. Theoretically at least, large numbers of businesses can be forced to close, credit can cease to be available, and products and services can disappear from the marketplace.

Accordingly, merchants are expected to manage their affairs competently and honestly: To not become unable to pay their debts; and, certainly, to not incur debt on false pretenses or without intending to pay.

1.2.2 Two Approaches to the Risk of Business Failure

Severe strictures traditionally are imposed on insolvent merchants. The term "bankrupt" is itself a pejorative for a merchant who has become insolvent. At the moment that a merchant's insolvency becomes evident he is "handcuffed" or frozen out of the operation of his business, as if all his assets suddenly had been seized. As a further punishment bankrupt merchants are stricken from the commercial register. This denies them the right to do business under the law. They also are subjected to other disabilities, such as the inability to borrow or to hold certain offices.

But there is another side to the matter. Merchants must be able to take risks. Undertakings which present the greatest risks also may provide the greatest potential rewards, not to the entrepreneur alone but also to the economy of which he is a part.

Further, some enterprises must fail, perhaps because the circumstances which made them successful change, perhaps because success is taken by a competitor, perhaps because management exercised poor business judgment.

Further, a merchant, having had a failure, may have learned from the experience and be better equipped to succeed at another time.

Given these considerations, it is counterproductive to punish a bankrupt merchant so severely that merchants generally will be unwilling to take risks, or be barred from future business activities as a consequence of failure.

Failure must be expected and allowed for, especially in dynamic modern economies.

1.2.3 Asset Reallocation and the Reorganization of Troubled But Viable Businesses

Considerations of efficiency also apply to bankruptcy. Capital and labor need to be employed to higher and better uses. Enterprises lacking viability should be liquidated so that their assets may be redeployed to other, more useful activities. Other enterprises may be economically viable yet so saddled with debt they cannot function efficiently. In the latter case the reorganization of the firm, rather than its liquidation, makes the most sense.

Reorganization in this sense entails the continuation of the enterprise as a going-concern, the elimination of its inefficient operations and divisions, the sale of some of its assets, and the

recapitalization of its profitable operations -- freeing the latter from the burden of excessive debt.

In any case, when enterprises need to be liquidated or reorganized delay is inappropriate. The continuation of an enterprise lacking viability or needing reorganization results in further waste. Clearly, there is an advantage to be had in redeploying operating assets with a minimum of transaction costs and down-time, preserving going-concern value wherever possible. That way valuable capital and labor are moved inexpensively and quickly to other purposes.

1.2.4 Investigation; Allocation of Losses

Also fundamental to bankruptcy is the fact that a loss has occurred. That loss needs to be quantified and borne by some responsible party or parties.

The amount of the loss needs to be determined, and also its cause -- otherwise, one would never know whether the debtor had simply hidden his properties or stolen from his creditors. Determining the amount and cause calls for an investigation thorough enough to locate and value all the bankrupt's properties.

Whatever its amount, the loss must be suffered by someone, or shared in some equitable manner among several of the interested parties, ordinarily the debtor's creditors. But the creditors will not all be similarly situated. Some will be owed for unpaid wages, taxes, or deposits; others will have security for their claims; still others will be only unsecured merchant sellers.

Sharing the loss among the creditors means that creditors' claims also must be investigated. The amount of each claim must be determined, as well as its legitimacy and type.

Clearly, there is a tension between the desire to redeploy assets with a minimum of transaction costs and down-time and the need to investigate thoroughly enough to determine the extent and value of the debtor's assets, the cause of his insolvency, and the nature, amount and bona fides of each of his creditor's claims.

1.2.5 Striking A Balance: Six Principles of Bankruptcy Law

Bankruptcy law struggles with the tensions discussed above by trying to regulate the rights and obligations of the parties effected when a merchant has insufficient assets to pay his creditors in full.

By its nature, bankruptcy is complex.

To balance the interests of the various parties (including that of the economy in general) the law resorts to six basic, and not necessarily consistent, common principles:

1. Collective execution -- The concept that a bankruptcy entitles the debtor's creditors, as a group, to seize his assets all at once;

2. Creditor equality -- The concept that creditors share equally in the amounts distributed, and, thus, bear equally the burden of the losses;
3. "Civil death" -- The concept that a bankruptcy is the equivalent of the bankrupt's death, in a civil or commercial sense, so that he no longer may act with respect to his property which now constitutes an "estate";
4. Efficient liquidation -- The sale of the debtor's assets, placing his inventory, equipment and other properties back into the marketplace in return for cash or other near-cash assets capable of being distributed among creditors;
5. Mitigation/partial satisfaction -- The distribution of the debtor's liquidated assets among his creditors so that the creditors' losses are mitigated and each creditor's debt is partially satisfied;
6. Expiation/rehabilitation -- The concept that the debtor must be punished for having failed to honor his obligations and as a recompense to creditors for their losses, but that he nevertheless may be rehabilitated under certain circumstances or after a certain time.

Subordinate to these are other principles which follow from, or modify them. For one thing it follows that there must be an administration of the bankrupt's estate, and that that administration must be undertaken by some duly authorized liquidator or manager. It also follows that the liquidator or manager will have expenses, will need to be compensated, and will take time to do what he has to do: the debtor's assets must be located, valued and sold, his past actions investigated, and the claims of his creditors verified.

A corollary concept is that the greater the amount of time spent administering the bankruptcy and the greater the expenses of administration the less that will be available for distribution among the creditors.

It also follows that strict creditor equality cannot be observed. Some creditors will be of a favored class, destined to receive all or almost all of what is owed them (creditors holding liens, government creditors, laborers having claims, etc.) while others will receive only what, if anything, is left after the preferred creditors and expenses of administration have been paid.

Likewise, the issues of punishment and rehabilitation of the debtor are not simple. In some situations a debtor might be quickly forgiven and rehabilitated. In other situations the debtor may have been outright fraudulent and rehabilitation might never be possible.

1.2.6 Traditional and Modern Systems Compared

Traditional bankruptcy systems evolved from traditional concepts of justice. Justice requires that debts be paid. The debtor who fails to do so has done a wrong for which he ordinarily should be punished. Further, unpaid debts remain outstanding obligations. Only by eventually paying (his inability to do business notwithstanding) is he traditionally allowed rehabilitation.

Making sure that the debtor is punished, that his affairs are thoroughly investigated, that all assets are found and creditors' claims verified, and that the loss is spread among creditors as equitably as possible, are the paramount principles which follow from the traditional concepts of justice generally applicable to civil and commercial matters.

Modern systems are more inclined to encourage entrepreneurial conduct. The transfer of part of the risk of business failure from debtor to creditor is consistent with this goal. Also consistent with it is the efficient liquidation of the debtor and the redeployment of his assets at minimal transaction cost.

The modern reasoning is simple. If commercial activity is to be encouraged debt invariably will be incurred without complete assurance that it can be repaid. If a debtor cannot pay his debts, losses are unavoidable. The capital and talent invested in the failed enterprise are sunk costs, which are simply unrecoverable. What matters after an insolvency is truncating the loss, spreading it so that it may be most easily borne, and redeploying the capital and talent to something else.

1.2.7 The Key Issues: Discharge, Reorganization, and Rapidity of Adjudication and Administration

Between the traditional and the modern systems the key issues seem to be three:

One, whether the debtor should receive a discharge, or forgiveness of debt;

Two, whether debt-burdened enterprises should be allowed to reorganize in bankruptcy, i.e., reduce their indebtedness, even against the wishes of their creditors, and restructure their operations while continuing to do business; and,

Three, whether bankruptcies should be adjudicated and administered in a summary fashion with the assets sold and distributions made to creditors without undue delay and with minimal attention given to thoroughness of investigation and the rigors of due process.

On all of these issues the modern answer is in the affirmative. Traditional systems, on the other hand, do not readily allow the debtor a discharge, do not permit reorganizations without unanimous creditor consent, and, generally, emphasize the need to investigate thoroughly over the desire to mitigate losses and re-deploy assets.

These three issues are also interconnected.

Where the discharge is readily available to the debtor, he has little reason to fear the legal consequences of a bankruptcy. Accordingly, he will not be motivated to delay his adjudication as a bankrupt or protract the administration of his bankruptcy estate.

The rapid or summary adjudication and the speedy administration that can be accomplished with the debtor's cooperation, are by-products of the discharge the debtor receives.

Similarly, the consequence of allowing a discharge of debt against the creditors' will invites the concept of a reorganization where debt is reduced but the enterprise continues in business, even under the same management and ownership.

1.3 CURRENT BANKRUPTCY PRACTICE UNDER THE COMMERCIAL CODE OF 1883.

1.3.1 The Present System is Traditional and Inefficient.

The system in effect under the Code is traditional and not modern. It is similar to the French system which was replaced in 1954, and to English and other European laws in effect in the last century and to some extent today.

At the same time, it is not very effective even as a traditional system. It is characterized by excessive delay. It does a poor job minimizing losses and spreading them equitably among creditors. It is misused for purposes other than the efficient liquidation of insolvent enterprises.

As now practiced in Egypt under the Code commercial bankruptcy punishes debtors. Once it is proven that the debtor has ceased making payments to creditors he is adjudicated as a bankrupt -- irrespective of the cause of such cessation of payments. Thereupon, the debtor is "handcuffed." He loses the right to manage his business or possess his properties. He suffers a "civil death," is stricken from the commercial register, and, thus, is barred from doing business again (until rehabilitation occurs, if ever). He also is barred from holding certain offices.

Needless to say, he is not discharged of his debts. This means that he continues to owe his creditors the amounts he has been unable to pay and which are still owed them after his liquidation is completed and distributions have been made to creditors -- and he may not be rehabilitated until he does so.

At the same time the rewards of the system go, most notably, to the specialists who administer the bankruptcies. They do so by spending an inordinate amount of time investigating the debtor, verifying creditors' claims, and liquidating assets. For their efforts the specialists receive a healthy compensation from the assets of the bankrupt's estate.

Except for the psychic reward of seeing the debtor punished -- and except for the tactical benefit received by creditors who employ the threat of bankruptcy to obtain full payment (discussed below) -- creditors receive little from the present system. After the specialists have fully administered the estates only a small sum is usually distributed among creditors. Worse, much time passes before distributions are made. Creditors lose further on account of the delay.

In any case, the system does not encourage entrepreneurship. The sanction for becoming bankrupt is severe. An honest merchant very likely would hesitate to incur debt for any new or untried venture which could lead to his own bankruptcy.

It also does not allow for the rapid and efficient redeployment of assets. Instead of transferring material and human talent smoothly and inexpensively from defunct and less viable economic uses to better ones, the system encourages a protracted “freeze,” or period in which the assets of a bankrupt enterprise are effectively withheld from normal economic activity.

1.3.2 The Present System Has Built-in Delays.

1.3.2.1 The Debtor Has Incentives to Delay.

This freeze is most notable in the period before a bankruptcy administration starts. In order to avoid the strictures imposed for becoming bankrupt the troubled debtor will take pains to hide his insolvency: continuing his business as if nothing were wrong and lying to his creditors about not being able to make his payments.

When the foregoing tactic has run its course he also will oppose the attempt to adjudicate him as bankrupt.

Before a bankruptcy administration can start there must be an adjudication. That can come only after a trial, on evidence, following standard procedures. To resist an adjudication the debtor generally can and will use all rights of due process afforded by the standard rules of civil procedure, including rights of appeal.

1.3.2.2 The Standard Rules of Procedure Encourage Delay.

Although it is not strictly a bankruptcy problem, the standard procedures now employed in Egyptian civil practice are not generally effective to enforce ordinary debts or conclude litigated matters in a timely and efficient manner. An expert system is used to assist the finder of fact. Cases cannot move forward until the experts give their opinions. Often this is a problem.

There are other problems. Multiple appeals, even from interlocutory decisions, with matters stayed pending appeal, are possible.

While these problems cause delay and dislocations in ordinary cases, in bankruptcy cases the inefficiency is compounded. Bankruptcies raise unique quasi-judicial and economic issues that the courts are not accustomed to deal with and for which the judges have little aptitude or training. There are too many steps in the procedure and each step is too legalistic for the process of marshaling and distributing assets.

The courts also are often inundated with a mixture of bankruptcy and other demanding cases all at once.

The result is both too much delay and that too much deference is given to the wishes of the syndics and professional administrators.

While the debtor opposes and delays his adjudication he may negotiate and settle with his most

insistent creditors. Frequently, those creditors are paid, although perhaps not in full, thereby ending the bankruptcy process before it even starts, i.e., before an adjudication of bankruptcy.

In the cases where there is an adjudication, and the bankruptcy administration begins, the debtor may still settle with his creditors, causing the bankruptcy to be discharged. In that case he still will perceive an advantage in having the process delayed.

Delay frustrates and pressures creditors, who increasingly see that it is more to their advantage to take something in settlement in the short run rather than receive nothing or much less later after the process of administration has consumed most of the estate.

Delay is, thus, the debtor's ally in this process -- a process in which he has few allies and from which he has much to fear.

1.3.2.3 Syndics and Administrators Have Incentives to Delay.

In any case, where an adjudication occurs and an administration runs its course delay continues to characterize the process. The bankruptcy specialists, or syndics, who make administration of bankruptcy estates their profession are subject to two incentives to protract the procedure.

One incentive comes from the requirements of the law itself that the syndic investigate the debtor and his assets and obligations thoroughly, finding all his properties and ascertaining the nature and amount of his creditors' claims. This investigatory and verification process is also subject to the standard rules of civil procedure, including rights of appeal. Thus, creditors and others claiming interests in assets (mortgage holders, purchasers of goods from the debtor, etc.) must have an opportunity to contest such matters as they wish. If the syndic fails to find certain assets, or fails to distribute certain properties or dividends to the creditors or other claimants entitled to them, without the matter having been ruled on in court, the syndic may be liable to the creditor or claimant for the loss.

While the foregoing provides a powerful incentive to delay the procedure, the syndic is also subject to another incentive to delay, and that is his own self-interest. The longer the process takes, the more thorough his investigation is, and the more time he spends in litigating issues of asset entitlement, the more the syndic can take as his fee.

The delays built into the bankruptcy system of the Code violate the principles of efficient liquidation and mitigation/partial satisfaction. Much time is allowed to pass in which assets, both material and human, are locked up in dead or dying enterprises. Rather than having such assets rapidly redeployed to other, more viable uses, the inefficient use of the assets over a substantial period of time is guaranteed. Further, the cost of the redeployment process is increased far beyond that which is necessary -- creating an extra cost for which there is no demonstrable economic benefit.

At the same time the creditors receive far less than optimal partial satisfactions of their claims, frustrating the concept that bankruptcy should mitigate their losses.

1.3.3 The System is Misused as a Debt-collection Device.

As discussed above, the standard system of civil procedure is not efficient. Foreclosures and executions are also difficult. Thus, ordinary legal process, and post-judgment, enforcement procedures are usually not effective to enforce collection of simple debts in an economical or timely way. As also discussed above the threat of a bankruptcy adjudication motivates debtors to avoid its consequences. Creditors know that there is an incentive for a debtor to settle with his creditors under the threat of a bankruptcy adjudication. The foregoing leads to the second significant deficiency in the present system: Bankruptcy under the Code is used primarily to collect specific debts.

Typically, in the early stages of a business failure a debtor is confronted by one or more aggressive creditors who insist on being paid. These creditors know that if they wait for payment their claims will likely be trapped in the insolvency process and never be satisfied in a timely or satisfactory way. They also know that if they act insistently they can be paid in full, or nearly so, in preference to the debtor's other creditors.

The tactic employed by these aggressive creditors is to file a petition in bankruptcy against the debtor, forcing the debtor to defend against his adjudication as a bankrupt.

Usually, this results in the debtor paying the petitioning creditor—but not his other creditors—and avoiding a bankruptcy adjudication while becoming all the more insolvent!

This misuse of bankruptcy violates the principles of collective execution and creditor equality. Instead of the insolvent's assets being subjected to a collective seizure for the benefit of all, and the creditors sharing equally in the value salvaged from the assets, the aggressive creditor sees all or almost all of his debt paid, leaving that much less to be shared with others.

This abuse is avoided in modern bankruptcy systems by making bankruptcy more palatable to the debtor so he does not excessively fear its legal consequences and to some extent welcomes a bankruptcy adjudication as a source of relief from his creditors' pressures.

1.3.4 The Avoidance of Transfers During the "Suspect Period" is Not Effective In the Present System.

Both modern and traditional systems abate the advantage seized by the overly aggressive creditor (and also by those creditors who the debtor voluntarily wishes to favor) by declaring certain debt payments made during a "suspect period" of several months before his bankruptcy "avoidable," enabling the bankruptcy administrator to recover them for the benefit of the estate.

The Code has such suspect period rules. [See Code §§ 227-233]. In present practice under the Code, however, these rules do not effectively prevent aggressive creditors from using the filing of a bankruptcy petition, or the threat of doing so, from compelling payment of their particular debt. This is primarily because the bankruptcy administrator cannot act to recover the preferential

payment unless there is an adjudication, and neither the debtor nor his other creditors (who expect the result to be only delay and the exhaustion of the estate's assets through the process of administration) desire an adjudication.

Clearly, in several of its aspects the practice in effect under the Code has a negative impact on the economy as a whole. The current practice, thus, is economically and legally inefficient. It retards investment and growth in a macro-economic sense. At the same time it gives little comfort that justice is served in individual cases.

1.4 THE PROPOSED, REVISED BANKRUPTCY LAW (SECTIONS 550 THROUGH 772 OF THE PROPOSED, REVISED COMMERCIAL CODE): ANALYSIS, FINDINGS, CONCLUSIONS AND RECOMMENDATIONS.

1.4.1 The Proposed New Bankruptcy Law: Gestation and General Approach.

As mentioned, the Code was perceived as overdue for revision.

The current proposed revisions were developed after many years of study by a blue-ribbon committee of lawyers and accountants, led by Mohsen Shafiq. For almost half a century Mr. Shafiq was the most renowned commercial lawyer in Egypt. He also is the author of "Egyptian Commercial Law," the most authoritative treatise on the subject.

The proposed revisions, thus, have not only the weight of a prestigious authorship in their favor, but they come from a thorough understanding of the Egyptian legal culture and its practical problems.

As also outlined above, the deficiency most characteristic of the present system is excessive delay. This delay is in part attributed to the employment of standard procedural rules, including rights of appeal, in both the adjudication and administration phases of bankruptcy proceedings.

The revised law deals directly with the problem of delay by setting strict time periods in which the courts, the syndics, and the creditors must take certain actions. (See Pro. Rev. L. §§ 564(3)(4), 565(2), 651, 655, 657, 694, 748). The revisions also modify the standard rules of civil procedure when applied to bankruptcy cases. Notably, rights of appeal are frequently eliminated. (See Pro. Rev. L. §§ 567, 580, 656; But see § 565(3)).

The revised law also changes the character of the syndic, or principal, bankruptcy administrator, from that of an advocate for the creditors to that of a neutral party. A new administrator, a supervisor, is also appointed who acts as an intermediary between the syndic and the judge. (Pro. Rev. L. §§ 578(1), 582, 584).

The revised law also calls upon the courts to look more closely at the cause for the debtor's cessation of payments. (Pro. Rev. L. § 558). This requirement is explained as part of an attempt to deal with bankruptcy as an illness. It is a step toward reducing the sanctions imposed on the debtor in cases where the insolvency is found to be not his fault.

However, except for possible imprisonment, similar disabilities, obligations and penalties generally fall upon the debtor as a result of his bankruptcy adjudication as in the present system. (Compare Code §§ 216, 239-243, 396-407, and 408-419 with P. Rev. L. §§ 586-604, 676).

The reforms in the proposed, revised law should be generally effective in improving the practice which now exists. However, the proposed revisions do not go as far as they should. They do not fully reform the procedural mechanisms by creating special bankruptcy procedures and courts. (See Pro. Rev. L. §§ 559, 560, 565). More importantly, they preserve a traditional bankruptcy system rather than take the opportunity to create a modern one.

Generally, the proposed, revised law deals too much with the symptoms and not enough with the causes of the present system's short-comings.

The approach of setting strict time limits may be described as procrustean, i.e., it merely attempts to force time-consuming activities into limited periods of time. Forcing hasty judgment frequently results only in injustice. (See Pro. Rev. L. §§ 655(3), 748(3) (judge is to determine disputed debts within 30 days)).

Further, as pointed out above, debtors obtain some advantage from delaying the proceedings. Accelerated procedures simply may be too hard on the debtors, unless there are fundamental changes elsewhere in the statute giving the debtor relief.

Dealing with bankruptcy as an illness is a "modern" approach in a psycho-social and jurisprudential sense, but not in an economic or practical sense. The issue is not whether bankruptcy is an "illness," a "crime," or some other fault or delict, but rather how can its adverse effects on the interested parties -- and the economy -- be minimized and spread.

The proposed revisions aim too much toward correcting specific problems in the present practice and not enough toward giving the bankruptcy system a more fundamental reorientation and modernization. The revisions simply fall short when measured against international and modern standards

1.4.2 Specific Findings.

1.4.2.1 Under the Revised Law the Debtor is Still Sanctioned Heavily and Denied a Discharge.

Severe punishment will still be imposed upon the debtor under the proposed, revised bankruptcy law. (See Pro. Rev. L. §§ 587-590, 676). The debtor will be stricken from the commercial register, denied the right to do business, denied the right to hold certain offices (See Pro. Rev. L. at § 588; But see § 597 (which states that the debtor is permitted to "practice a new trade" in apparent contradiction to section 588 which expressly restricts him from most trades until rehabilitation)), not given a discharge from debts he cannot pay (Pro. Rev. L. § 696), and not allowed "rehabilitation" until he repays the debt (Pro. Rev. L. §§ 713, 714) or three years has passed since the "termination of the bankruptcy." (Pro. Rev. L. §§ 712, 714).

1.4.2.2 Under the Revised Law Chapter 11 Type Reorganizations are Still Impracticable, if not Impossible.

The proposed, revised law does not have all the provisions necessary for a debt-burdened company to reorganize as a going-concern. Such provisions would include (1) a stay of creditor actions against the debtor while he continues to operate his business under bankruptcy court protection, including provisions enabling the debtor to continue operating as a “debtor-in-possession” for an extended period, if necessary; (2) provisions which enable debtors-in-possession to escape burdensome contracts, sell assets free and clear of liens, and employ investment bankers and advisors; and (3) provisions which would enable the debtor to compel his creditors, even against the wishes of a substantial number of them, to accept less than full payment of their debts, with the remainder of the debt being discharged.

1.4.2.3 Under the Revised Law There are Still Incentives for Delay.

The courts responsible for bankruptcy cases will continue to be the commercial sections of the ordinary courts. The rules applicable to bankruptcy procedure will continue to be the ordinary rules of civil procedure with some modifications to eliminate appeal rights and accelerate the process.

Further, the administrators, or "syndics," and their support staffs which have found employment in the present system will continue to be the critical persons responsible for administering bankruptcies. Provisions in the proposed, revised law which put the court in a supervisory role over the syndics, and which interpose a “supervisor” between the court and the syndic will prevent some abuses but may also increase costs and delays by involving more people in the process and may not deter the habitual practice of "thorough" administration.

1.4.3 General Conclusions.

1.4.3.1 Entrepreneurial Initiative Will Be Discouraged; Participation in the Informal, “Underground” Economy Will Be Encouraged.

Because debtors are denied a discharge in a liquidation, and reorganizations are impractical, entrepreneurs will avoid risks. Further, after bankruptcy a merchant will take recourse in the underground economy.

1.4.3.2 Reorganizations Will Not Occur.

As the “preventive settlement” provisions are complicated and not comprehensive, true bankruptcy reorganizations are unlikely to occur.

1.4.3.3 Liquidations Will Still Be Time Consuming and Expensive.

As debtors and administrators will still have an incentive to delay, and the procedural system will

still allow for it, too much time probably will still be spent administering estates and the compensation and expenses of the administration likely will continue to consume most of what the creditors might otherwise receive.

1.4.3.4 Bankruptcy Will Continue Being Used to Compel Debt Payments to Particular Creditors.

As bankruptcy still threatens debtors with punishment and other legal reforms have not been installed to make ordinary legal process and post-judgment, enforcement procedures effective in collecting debts creditors will still perceive that the threat of a bankruptcy adjudication gives them a powerful weapon to enforce payment of their debts. Worse, the accelerated procedures provided for under the new law may make bankruptcy adjudications more difficult for the debtor to defend against. Accordingly, it is likely that aggressive creditors will continue to use the threat of bankruptcy adjudications to compel insolvent and near-insolvent debtors to pay the creditor in preference to others.

1.4.4 Specific Recommendations.

1.4.4.1 The Law Should Grant the Debtor a Discharge of Indebtedness.

Sections 586 to 594 and 696 should be amended to provide a clear discharge of indebtedness to most bankrupt debtors and to specify clearly what disabilities and obligations will adhere to the debtor after his bankruptcy. To prevent abuse of the discharge by large borrowers, and to ensure that it is available for smaller businesses, there should be a restriction against the discharge for debtors owing large amounts of bank debt.

The discharge should be granted in the ordinary course, and should be denied or limited only to the extent one or more creditors, or the syndic or administrator, is able to prove that the debtor committed a fraud, an intentional wrong, or an act of gross negligence with respect to the creditor, or if the debtor fails to cooperate in the administration of his bankruptcy.

The disabilities of the debtor as a result of his bankruptcy now found in sections 588 and 676 should also be revised so that the debtor suffers no official disabilities so long as he receives the discharge provided for as per the above.

The granting of the discharge and removal of disabilities except in egregious cases may be controversial to the Egyptian legal culture. Some think it may be abused. Although that may be the case, it is a necessary step toward modernization. It is needed to destigmatize bankruptcy and create a more sophisticated understanding of commercial risk in a modern, entrepreneurial economy.

1.4.4.2 The Law Should Include Comprehensive and Simplified Reorganization Provisions.

Generally, the “preventive settlement” (sections 725-776) and, to some extent, “judicial

reconciliation” (sections 662-682) of the proposed, revised law are an attempt to modernize the bankruptcy law by introducing reorganization concepts found in modern, international practice. Most notable are sections 665 and 754(1) which permit settlements where the debtor has the consent of one-half in number and two-thirds in amount of his creditors.

However, an effective insolvency reorganization mechanism requires that there be a possibility of forcing even a group of dissenting creditors to accept reasonable plans of arrangement.

For reorganizations to be practical the legal regime must encourage negotiated workouts between the debtor and his creditors. This is done by giving each side such leverage as it needs to prevent the other from exercising too much control over the process.

The provision which enables the debtor to compel even a substantial portion of his creditors to accept less than full payment of their debts, with the remainder discharged, is especially important. Such a “cram down” provision gives the debtor leverage to prevent one large creditor from taking control of the reorganization, enabling the debtor to negotiate a reasonable plan of arrangement.

Sections 754 and 665 should be revised to provide that the court can compel creditors to accept a plan of arrangement, even one which is not agreeable to one-half in number and two-thirds in amount of creditors. Here the statute should borrow from United States bankruptcy law the concept that as long as the creditors receive at least as much as they would in a liquidation of the debtor (which amount is to be estimated by the court based on the value of the available assets and the expenses of liquidation) and the proposal is fair and does not discriminate, the court may approve such a plan over the creditors’ opposition.

Further, the “judicial reconciliation” and “preventive settlement” provisions found in sections 662 to 682 and 725 to 767, respectively, and especially those in sections 665, 725, 726, 730, 731, 740, 741 and 754, should be revised, generally, to provide a more comprehensive reorganization procedure, akin to Chapter 11 of the United States Bankruptcy Code.

In all its particulars the statute should strive to strike a balance between the leverage provided the debtor and his creditors.

Noteworthy are section 740 which allows the debtor to operate his business with court protection under certain circumstances, and section 741 which stays certain creditor actions pending the conclusion of a preventive settlement. These provisions are necessary to keep the debtor’s business afloat while he negotiates with his creditors. As drafted these provisions are not sufficient to ensure that the debtor can continue to operate as long as may be necessary to work out an arrangement.

The debtor’s entitlement to operate while reorganizing should be expressly stated in sections 687, 740 and 741. These provisions must include a stay of execution or enforcement to protect the debtor in the continued possession and use of his necessary operating assets. To prevent continuing losses by hopelessly insolvent and mismanaged enterprises the debtor’s right to

continue in operation should be conditioned on the requirement that after the start of his bankruptcy case he operate on a net, operating profit basis. That is, that the revenue from his ongoing operations must at least match his expenses, exclusive of interest, and of principal payments on his prior debts.

The rights of lien creditors found in sections 613 to 622 should be modified to make clear that lien holders' rights to foreclose can be deferred pending a reorganization in which the debtor may use the lien property. Creditors with mortgages should have the value of their collateral protected while the debtor operates and reorganizes.

Other reorganization provisions should be spelled out in sections 725 to 767 and elsewhere in the law.

Reorganizing debtors should have the power to sell assets free and clear of liens. The liens would attach instead to the proceeds of sale. This provision would enable reorganizing companies to more easily find buyers for unwanted assets and eliminate unprofitable operations which should be closed.

The reorganization procedure should be available to large and small enterprises. Publicly-traded companies should be able to use the reorganization procedure to protect their investors.

Reorganizing debtors, as well as creditors committees, syndics or administrators, should be allowed to hire investment bankers for the purpose of finding strategic investors or floating the companies through the capital markets. In such cases the bankers and intermediaries should be entitled to fees and to equity in the reorganized company.

Keeping in mind the importance of providing adequate leverage for each side, section 730 should be revised so that "plans of arrangement" may be proposed by lenders as well as the debtor.

The power to sell assets and have access to the capital markets should be spelled out in section 735.

An effective reorganization mechanism along the above lines, should be beneficial in several ways. It would assist companies in temporarily troubled industries, like tourism. It would help small enterprises operate in the formal sector. It could be used to list new stocks and privatize government owned companies.

Once appropriate provisions are in the bankruptcy law, separate laws or regulations could require government holding companies to spin-off enterprises experiencing continuing losses by commencing procedures for their reorganization and privatization.

1.4.4.3 Specialized Bankruptcy Courts and Rules Should Be Established.

Specialized courts should be established to oversee all aspects of bankruptcy adjudications, liquidations and reorganizations.

The regular courts are not especially capable or efficient in the handling of bankruptcy matters. Putting such matters in the hands of specialized courts and judges will lead to the development of expertise on the bench especially suited to recognize and deal effectively with the liquidation and reorganization issues which commonly arise in such cases. Such judges then can be proactive. They, rather than the syndics, can take control of the cases and manage them toward optimal results.

Similarly, unique procedures should be specified for bankruptcy cases. Except for contested matters where a specific legal issue needs to be adjudicated, such as the bankrupt's entitlement to a discharge in the face of a creditor's allegation of fraud, the bankruptcy procedure should depart freely from the procedure normally used for commercial and civil cases generally.

Generally, two sets of procedures would be appropriate: one, for adjudication of the bankruptcy (where the debtor can contest cessation of payments) and appointment of the syndic; and, two, for the administration of the estate -- where there is usually great delay as the syndic searches for assets and creditors. In the latter period especially creditors should be required to act within short time-frames, or lose the benefit of their claims and/or their right to protest the discharge of the debtor.

1.4.4.4 The Proposed New Bankruptcy Law May Be Adopted, But With A Plan to Substantially Revise and Modernize It After Enactment; The Bankruptcy Law Also Should be Enacted as a Separate Statute.

Changing the law in line with the matters discussed above calls for a fundamental revision in approach. Yet, the proposed revised law unquestionably improves the existing system.

Accordingly, the proposed law might be adopted in substantially its present form, or with less-than-comprehensive revisions, but with the understanding that further bankruptcy legislation should follow. This would be consistent with the legislative history of bankruptcy in the United States, where major reforms oftentimes were soon followed by further legislation.

Bankruptcy establishes a unique quasi-judicial system for redistributing assets and rights. Including it within the general Commercial Code is not necessarily appropriate. Segregating the bankruptcy provisions into a separate law which could be presented to Parliament would make more sense.

1.5 CONCLUSION

The proposed bankruptcy law revisions do not significantly modernize the legal structure. Most notably, the revisions fail to provide for a readily available discharge of indebtedness for individual bankrupts, or to make the bankruptcy practice as expeditious as it should be by creating special courts and streamlined procedures for handling the various aspects of bankruptcy cases.

The proposed new law also falls short of one in which true bankruptcy reorganizations can be effectively accomplished. The law should be revised to make the discharge available, to establish special courts and procedures, and to establish a comprehensive reorganization procedure similar to that found in Chapter 11 of the United States Bankruptcy Code.

PART II: THE NEGOTIABLE INSTRUMENT, OR CHECK, PROVISIONS AND THE TECHNOLOGY TRANSFER PROVISIONS

2.1 INTRODUCTION

During the consultant's visit to Cairo in March - April, 1998, he learned that controversy had been aroused by certain proposed changes in the law governing negotiable instruments and a new law applicable to transfers of technology. These proposed laws are part of a comprehensive revision of The Commercial Code of 1883 (the "Code") under consideration in the Egyptian Parliament.

The Code governs merchants and commercial transactions, generally. It includes provisions which apply specifically to checks and other negotiable instruments, and to specific transactions, including contracts connected with industry or trade. (See Code, Art. 2).

By far the largest part of the Code, and the proposed, revised Code, are the bankruptcy provisions. Despite their importance the bankruptcy provisions were understood by, and were of interest to, only a limited audience. In contrast, the negotiable instruments provisions were of concern to a broad segment of the population. As explained below, this concern is easy to understand: The new negotiable instruments law would make a distinct change in the existing practice of tendering post-dated checks as security for the payment of debts.

The proposed transfer of technology law, as also explained below, is also controversial, but to a more limited audience and for a different, but, perhaps, more important, reason.

The reasons for interest in these provisions were the broad effect that a change in the negotiable instrument law would have on daily commercial life, and the effect novel technology transfer rules could have on the future development of the Egyptian economy.

The consultant was not provided with a translation of the negotiable instrument or technology transfer provisions. Nevertheless, during his consultations with several leading lawyers, economists and other professionals he was given an understanding of the applicable issues. (These consultations are listed on the attached Addendum.)

Based on these consultations, and his experience with negotiable instruments and technology licenses, the consultant offers the following comments and recommendations in respect of the proposed, new negotiable instrument and technology transfer laws.

2.2 THE NEGOTIABLE INSTRUMENT, OR CHECK, PROVISIONS.

As discussed in Part I, existing civil and commercial court procedures are not effective to enforce payment of simple obligations. Claims for the payment of debts can be delayed in court for excessive periods, and foreclosures and executions likewise may be delayed, sometimes indefinitely.

This defect has been remedied, in a practical, but less than satisfactory, sense, by reliance on the criminal law, i.e., on the criminal sanctions applicable to persons who pass bad checks.

In practice, when a person extending credit wants assurance of payment, he will demand that his debtor give him a check, even if post-dated, and even if the creditor knows that funds are not available to cover the check.

Similarly, a person wanting to obtain credit, intending to pay the debt when it is due, will willingly tender a post-dated or other check, not covered by adequate funds, to the person from whom he wants credit.

Tendering such an instrument obviously exposes the one presenting it to great risk, as the practice bears all the earmarks of fraud -- but that is its purpose: Exposing the debtor to such risk that he is nearly certain to pay the debt if he possibly can.

If and when such a check is presented and dishonored, the maker of the check is subject to imprisonment on criminal charges. Further, the authorities can and regularly do enforce the criminal sanction for tendering a bad check, so that the debtor who cannot cover his check faces likely imprisonment.

The situation is even more extreme than one would suppose. The practice of creditors demanding and debtors delivering such checks has become so common that it is a standard practice.

Further, as it is well understood that funds are not available at the time such checks are delivered, the practice has become one in which checks are routinely drawn on non-existent accounts. This practice is facilitated by the purchase of blank check forms at stationery stores. The debtor simply fills in the blank, placing the name of a bank and an account number in the appropriate spaces, and signs it as if he had such account at the named bank, even though he does not.

Thus, it is clear to the creditor and his debtor at the outset of the transaction that the check tendered will never be honored. What is expected of the debtor, though, is that he will find the money to redeem the check on or before the due date. He also understands from the outset that he likely will go to jail if he fails to do so.

This practice has the virtues of simplicity and effectiveness. By this uncomplicated method creditors are able to lend with reasonably good assurances of being repaid, and debtors are able to borrow irrespective of poor credit histories or weak balance sheets.

Clearly, however, this is not a good or modern practice. The criminal law should not be used to enforce payment of simple debts.

Further, this "check tendering" practice obviously has been devised to compensate for the procedural deficiencies in the civil and commercial law, where the collection of debts should properly be addressed.

The proposed, revised Commercial Code would remedy the problem by removing the criminal sanction which has made the practice of check tendering effective as a commercial device.

Instead, the proposed new law would treat checks given as security as simple obligations, the same as promissory notes.

Interestingly, this would be consistent with an Egyptian *Cours de Cassation* decision which already has declared that checks given as security are not subject to the criminal sanctions which apply when checks are tendered in payment for goods, services, or pre-existing debts.

The new law also would make checks immediately due on presentment, even if post-dated.

Treating checks given as security the same as promissory notes means that the check would be *prima facie* evidence of the existence, amount and validity of the debt. If the check were dishonored, it would be up to the holder to enforce payment in the civil or commercial courts, obtaining judgment against the maker of the check and enforcing the same against the maker's property.

Enacting these provisions likely would cause serious dislocation in commercial practices. Many lenders who now lend based only on the tendering of post-dated checks would probably refuse to grant credit.

Nevertheless, the proposed changes are an important step forward. Only by enacting such a reform can the Egyptian legal system wean itself from its misplaced reliance on the criminal law to deal with a matter which is essentially civil and commercial in nature: The granting of credit.

However, in addition to enacting the negotiable instruments provisions in the proposed, revised Commercial Code, reforms need to be made in the procedures for obtaining and enforcing civil judgments on simple debts.

The problem arises in the first place from the inadequacy of more fundamental legal procedures. The remedy presented by the proposed, revised Commercial Code does not go far enough to solve that underlying problem.

Where a check or a note has been tendered as a debt, the instrument is *prima facie* evidence of the debt. The holder should not have a problem enforcing the debt evidenced by the instrument. The procedure applicable to such cases is referred to as "summary judgment."

When the holder of an instrument seeks summary judgment he should need to prove only that the instrument was signed and delivered. In the absence of any material factual dispute the holder should obtain judgment summarily, without trial.

Accordingly, to make sure that the existing practice in Egypt with respect to the tendering of checks is reformed, not only should the negotiable instruments provisions in the proposed, revised

Commercial Code be enacted, but an effective summary judgment procedure should be put in place for the enforcement of checks and notes by the civil and commercial courts.

2.3 THE TECHNOLOGY TRANSFER PROVISIONS.

“Technology transfer” refers to the granting, or assigning, by its owner to another, of a right to use know-how, processes, concepts, patents, trademarks, copyrights, or other intellectual property, or technology.

Oftentimes, but not always, the subject matter is computer software.

Usually owners of commercially valuable technology are careful to prevent its unauthorized use. Further, technology owners usually grant rights of use cautiously, taking care that their technology does not escape their control, is not misused, or cheapened, and that profits are captured for the owner’s benefit.

If technology is used without authorization, such use constitutes a misappropriation, or infringement. The owner can sue for damages, and may be able to obtain an injunction. His measure of damages should include the profits wrongfully obtained by the unauthorized user and/or profits lost due to the user’s interference with the owner’s access to the marketplace. An injunction would bar the unauthorized user from making any further use of the technology, under penalty of contempt.

Granting or assigning rights to use technology is usually accomplished by “licensing.” A “license” in law is an authorization or permission, which by its nature may be subject to detailed conditions and may be revocable.

Technology license agreements are usually carefully negotiated and drafted. An effective licensing agreement should make clear the rights and interests of each party: Those of the licensor, or owner of the technology, and those of the licensee, or recipient of permission to use it.

Licensing agreements usually provide that the licensee’s right to use the technology terminates if he defaults in making payments, or in meeting certain minimum obligations, or in maintaining certain standards required by the licensor. The consequence for the licensee, or user, in such cases is that he becomes an unauthorized user, and must cease using the technology -- even if it has become essential to his business.

Licensing agreements also often specify how disputes between the licensor and licensee are to be resolved. Arbitration is frequently specified with it further stated that the arbitration will be conducted in a certain place and in a certain language. Such agreements also usually specify what law governs the rights and interests of the parties (e.g.: “This Agreement shall be governed by the laws of the State of New York.”)

As is well known, in recent years technology based businesses, and the profits which can be earned from the exploitation of technology have grown considerably.

Egypt is and is expected to continue for the foreseeable future as a net importer of technology. Accordingly, the Egyptian economy can expect to profit substantially from the continuous and increasing licensing of foreign-owned technology for domestic use and exploitation. Conversely, the economy will suffer if such licensing activity is curtailed.

Although Egypt's existing commercial law, the Commercial Code of 1883, deals with commercial transactions and merchants, generally (see Introduction to Part I of this Report) it has no provisions which apply specifically to transfers of technology.

The proposed, revised Code, however, attempts to apply specific legislation to the technology area. The moving force behind the new legislation is a desire to protect the weaker party (i.e., usually the Egyptian licensee) from overreaching by the stronger party (i.e., usually the foreign licensor) in contracts for the transfer of technology (i.e., licenses).

The proposed, revised Code would require that Egyptian law be the governing law in contracts transferring rights in technology. The new law also would require that a licensee be free to re-license the technology to others irrespective of the terms of the licensing agreement under which he obtained access to the technology.

The re-licensing right could be important to the licensee, because it would give him greater assurance of being able to recoup his investment in the technology.

Despite their intent, these proposals are only a misguided attempt to protect domestic licensees.

Now and in the foreseeable future, technology of commercial value should be available for licensing into Egypt by foreign owners. These foreign owners will be seeking the protections discussed above. They will carefully choose their potential licensees, and will carefully negotiate the terms of any licensing agreements they enter.

Foreign licensors need to be assured that their agreements will be enforceable as negotiated.

Similarly, domestic licensees need to be able to conclude licensing agreements. Otherwise, the licensee would never have access to the technology. Thus, competent Egyptian firms who wish to compete for the rights to foreign-owned technology want there to be no extraneous impediment to their negotiations with the owners of the technology.

The proposed technology transfer provisions in the revised Commercial Code would be such an impediment.

Foreign owners of technology would simply decline to enter into licensing arrangements with Egyptian licensees out of fear that their technology would be re-transferred to others, over whom they had no control, and that it would become subject to Egyptian law.

These provisions, thus, would create a barrier to the commercial exploitation of foreign technology in Egypt. The same barrier would exist to a lesser extent with respect to the exploitation of domestic technology. Egyptian owners of proprietary technology also will hesitate to enter into licenses with Egyptian licensees knowing that under their own law the licensee can re-license the technology to others.

The technology transfer provisions should be removed from the proposed new law. In any case, such proposed technology transfer provisions should not be enacted without undergoing substantial revision first.

2.4 CONCLUSION

The proposed negotiable instrument law should be enacted, but with companion legislation improving a creditor's ability to obtain and enforce judgments on simple debts.

The technology transfer provisions, at least those which declare Egyptian law to be the governing law for technology licenses and which give the licensee a right to re-transfer the technology irrespective of the licensor's wishes, should not become law.

الملخص التنفيذي

ينبغي إجراء مراجعة لقانون الإفلاس الجديد . ويجب أن يتم إعداد قانون الإفلاس بحيث يتطابق، بشكل عام، مع المناهج الحديثة للإفلاس فى الممارسات الدولية الراهنة .

وينبغي أن تكون المراجعة متعمقة، وان تتم بقصد تحريك نظام الإفلاس المصرى بعيدا عن الممارسات التقليدية الحالية .

ويجب أن تنصب عمليات المراجعة على الثلاث نقاط الأكثر أهمية وهى:

- ١- إعطاء المدين إبراء من الدين
- ٢- تقديم عمليات إعادة تنظيم مبسطة للشركات المفلسة
- ٣- إنشاء محاكم خاصة، وإجراءات سريعة لحالات الإفلاس

وينبغي إعادة صياغة القسمين ٦٩٦،٥٩٧ بحيث يتم ذكر أن المدين المفلس يجب أن يحصل على إبراء عام من المديونية عند الانتهاء من قضية الإفلاس الخاصة به .

ويجب منح هذا الإبراء فى المحكمة العادية . كما ينبغي أن تنطبق على مديونيته بصفة عامة، ولكن ليس على الدين المشفوع برهن عقارى، والدين الناجم عن الغش، أو ديون معينة للبنوك . وينبغي حجب هذا الأمر أو تقييده فقط حيثما يكون واحد أو أكثر من الدائنين، أو وكيل الدائنين، أو مدير الديون، قادرا على إثبات أن المدين قد اقترف الغش أو قام بخطأ مقصود ، أو إهمال جسيم، أو إذا فشل المدين فى التعاون فى عملية إدارة حالة الإفلاس الخاصة به .

أن صور عدم الأهلية التى تفرض على المدين كنتيجة لتعرضه للإفلاس ينبغي إزالتها أيضا، بحيث لايعانى من عدم أهلية رسمية طالما حصل على الإبراء، فيما يتعلق بالأمور المذكورة عليه .

أن أحكام التوفيق القضائى، والتسوية الوقائية، الموجودة فى الأقسام من ٦٦٢ حتى ٦٨٣، ومن ٧٢٥ حتى ٧٦٧ على الترتيب، ينبغي إعادة صياغتها لتقديم إجراءات بسيطة وشاملة فى نفس الوقت لعمليات إعادة التنظيم، تماثل الفصل الحادى عشر من قانون الإفلاس بالولايات المتحدة .

ويجب أن تكون إجراءات إعادة التنظيم متاحة أمام المشروعات الكبيرة والصغيرة، وشركات التجارة العامة على وجه الخصوص .

وينبغي السماح باستعانة المدنيين برجال الاستثمار المصرفي، ولجان الدائنين، ووكلائهم، ومديري الديون، من أجل إيجاد مستثمرين رئيسيين أو تعويم الشركات من خلال أسواق المال .

ويجب إنشاء محاكم متخصصة للإشراف على جميع جوانب التصفية وإعادة التنظيم الناجمة عن الإفلاس .

وفي نفس الوقت، ينبغي تحديد إجراءات متفردة وسريعة لمثل هذه الحالات . وفيما عدا أمور النزاع حيثما تحتاج قضية إلى إصدار حكم، مثل إعطاء المفلس براءة في مواجهة الادعاء بوجود غش، فيجب فصل هذه الإجراءات عن تلك التي تستخدم عادة في القضايا التجارية والمدنية .

وفي ظل هذه الإجراءات، يجب مطالبة الدائنين وأصحاب المصلحة بالتصرف في أطر زمنية قصيرة، وإلا فقدوا منفعة مطالباتهم و/أو حقهم في الاعتراض على أفعال معنية . كما ينبغي مطالبة المدين، ووكلاء الدائنين أو مديري الديون بالتصرف خلال فترة زمنية قصيرة .

وعلى حين نجد أن بعض التوصيات المتعلقة بإعادة التنظيم والإجراءات المشار إليها عاليه، قد تم تضمينها في فقرات محددة في القانون الجديد المقترح، فمن الملاحظ أن هذا القانون ليس شاملا، وغير متعمق في مثل هذه الأمور .

أن الأداة القانونية المقترح التفاوض بشأنها، يجب تقنينها، وان تكون مصحوبة بتشريع يحسن من قدرة الدائن على الحصول على الأحكام وتنفيذها في حالة الديون البسيطة .

أن شروط نقل التكنولوجيا، على الأقل تلك التي تحدد القانون المصري كقانون حاكم لتراخيص نقل التكنولوجيا، والتي تعطي الشخص المرخص له الحق في إعادة نقل التكنولوجيا دون أن يأخذ في الاعتبار رغبات مانح الترخيص، لا يجب أن تصبح قانونا .

ADDENDUM

**TO CONSULTANT'S REPORT ON THE PROPOSED AMENDMENTS TO
THE COMMERCIAL CODE OF 1883**

CONSULTATIONS IN CAIRO, MARCH 18 TO APRIL 2, 1998.

March 19, 1998	10:00 a.m.	Dr. Ziad Bahaa El-Din Attorney, Special Assistant to the Minister of Economy
	1:00 p.m.	Dr. Ali El Shalakany Dr. Mona Zulficar Dr. Mohamed S. Amr Dr. Hani Sariel-Din Attorneys with The Shalakany Firm
	3:00 p.m.	Bridget McKinney Attorney, Fox & Gibbons
March 22, 1998	3:00 p.m.	Dr. Yosif Boutrous-Gali Minister of Economy
	4:15 p.m.	Ahmed Abou Ali Attorney, Hassouna & Abou Ali
March 23, 1998	1:50 p.m.	Dr. Mohamed Kamel Attorney, The Kamel Firm
	4:15 p.m.	Tareq Ryad Legal Advisor to the Speaker
	8:00 p.m.	Dr. Nabil Ahmed Helmy Attorney and Law Professor
March 29, 1998	10:00 a.m.	Delfine Caramalli Attorney, The Kamel Firm
	1:00 p.m.	Dr. Fathy Naguib Deputy Minister of Justice Mohammed IbrahimKhalil Georgette Sobhy Khalliny Members of the Drafting Committee

	4:25 p.m.	Yassir Hashim Attorney, Hashim Firm
March 30, 1998	1:00 p.m.	Dr. Mohammed Hassouna Attorney, Hassouna & Abou Ali
	3:00 p.m.	Ashraf Nadoury Attorney and retired Judge
March 31, 1998	9:00 a.m.	Samir Hamza Attorney, Baker & McKenzie
	10:00 a.m.	Moustaffa Gamgoun Accountant, Bankruptcy Specialist Office of Ahmed Shawky
	11:55 a.m.	Aladdin Sabra Investment Banker, Hermes
	1:45 p.m.	Mohammed Ozalp Banker, MIBank
	3:15 p.m.	Shams Nour Albert Szal Attorneys
	5:25 p.m.	Ali El Tahry Investment Banker, Hermes
	6:45 p.m.	Judge Kamel Georgi Appeals Court Judge
April 1, 1998	9:30 a.m.	Dr. Yosif Boutrous-Gali Minister of Economy
	12:15 p.m.	Mohammed Mahmoud Delfine Caramalli Nermien Al-Ali Attorneys, The Kamel Firm
	1:30 p.m.	Chuck Vokral Accountant, Arthur Andersen
	3:30 p.m.	Mohammed Abdel Aziz, Judge