



**USAID** | **MOROCCO**  
FROM THE AMERICAN PEOPLE



Improving the Business  
Climate in Morocco

*Legal Reform and Improved Commercial Court System*

**JUDICIAL TRAINING, BANKRUPTCY  
REFORM AND MODERNIZATION OF THE  
COMMERCIAL REGISTRY:**

**FINAL REPORT**

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# **Improving the Business Climate in Morocco**

## **Amélioration du Climat des Affaires au Maroc**

### **IBCM Report**

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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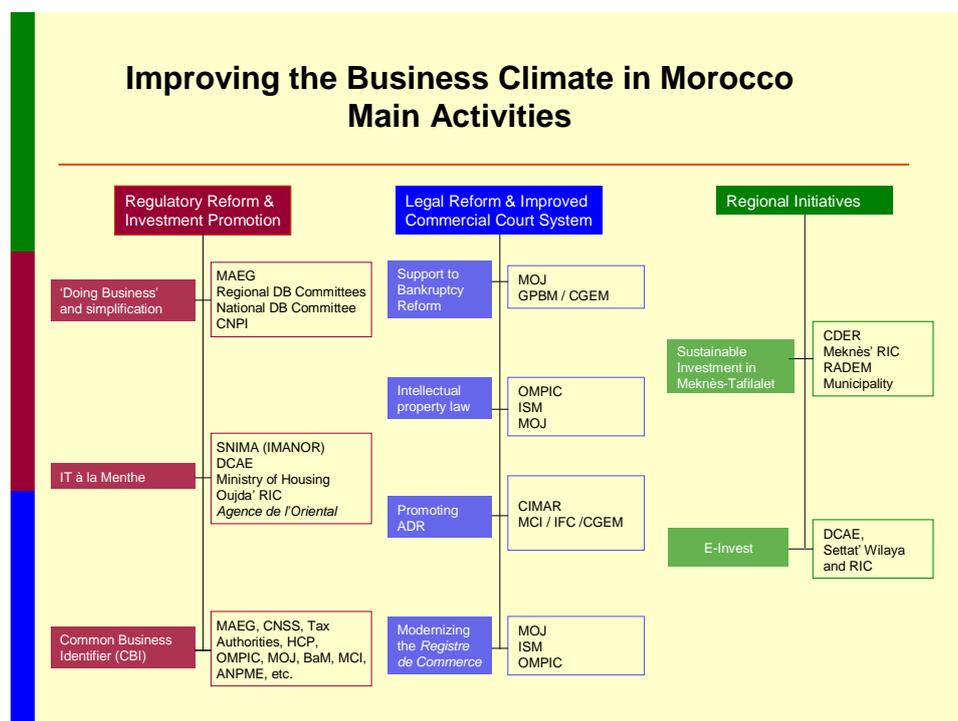
## LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
CBI	Common Business Identifier
CCIS	International Chamber of Commerce and Services ( <i>Chambre de Commerce Internationale et des Services</i> )
CGEM	General Alliance of Businesses in Morocco ( <i>Confédération Générale des Entreprises du Maroc</i> )
CIMAR	Rabat International Center for Mediation and Arbitration ( <i>Centre International de Médiation et d'Arbitrage de Rabat</i> )
CLE	Continuing Legal Education
CNPI	Committee for National Investment Procedures ( <i>Comité National des Procédures liées à l'Investissement</i> )
CNSS	Social Security Agency ( <i>Caisse Nationale de Sécurité Sociale</i> )
CRI	Regional Investment Center ( <i>Centre Régional d'Investissement</i> )
DAI	Development Alternatives Inc.
DCAE	Directorate of Cooperation and Economic Affairs ( <i>Direction de la Coopération des Affaires Economiques</i> )
GPBM	Professional Group of Moroccan Banks ( <i>Groupement Professionnel des Banques du Maroc</i> )
GTZ	German International Cooperation Agency ( <i>Agence allemande de Coopération</i> )
IBCM	Improving the Business Climate in Morocco
ICC	International Chamber of Commerce and Industry
IFC	International Finance Corporation
INEJ	National Judicial Training Institute ( <i>Institut National d'Etudes Judiciaires</i> )
INPI	National Institute of Intellectual Property ( <i>Institut National de la Propriété Intellectuelle</i> )
ISM	Higher Judiciary Institute ( <i>Institut Supérieur de la Magistrature</i> )
IT	Information Technology
MAEG	Ministry of Economic and General Affairs ( <i>Ministère des Affaires Economiques et Générales</i> )
MICNT	Ministry of Industry, Commerce and New Technology ( <i>Ministère de l'Industrie, du Commerce et des Nouvelles Technologies</i> )
MOJ	Ministry of Justice
NGO	Non Governmental Organization
OMPIC	Moroccan Industrial Property Office ( <i>Office Marocain de la Propriété Industrielle et Commerciale</i> )
POGAR	Programme on Governance in the Arab Region
RC	Commercial Registry ( <i>Registre de Commerce</i> )
SME	Small and Medium Enterprises
UNDP	United Nation Development Program
USAID	United States Agency for International Development
USPTO	United States Patent and Trade Office

## GENERAL INTRODUCTION

“Improving the Business Climate in Morocco” is a USAID program (referred to as IBCM or “the Program”) which ran from October 2005 and September 2009. Originally designed to help Morocco comply with certain provisions of the recently signed free trade agreement with the United States, the Program responded to requests from Moroccan partner Ministries to broaden and shift its focus. The ultimate goal was “to make it easier to do business in Morocco”. The Program worked towards this goal by carrying out a series of activities under two broad headings: (I) Regulatory Reform and Investment Promotion, and (II) Legal reform and improved commercial dispute resolution. Figure 1 provides a general overview of the Program’s main activities and partners<sup>1</sup>.

**Figure 1: IBCM Main Activities**



IBCM was funded at a level of US\$9.25 million, with resources going directly towards technical assistance, i.e. consultancies, trainings, events, and study tours related to program objectives and deliverables. The Program was implemented by Development Alternatives, Inc., and its subcontractor, DPK Consulting, offered expertise in commercial law. IBCM long-term staff worked closely with counterparts in key government and private sector organizations to build capacity and advance reform efforts. For the Legal reform and improved commercial dispute resolution component, the key partner was the Ministry of Justice (MOJ). Other partners included the *Institut Supérieur de la Magistrature* (ISM), the *Office Marocaine de la Propriété Industrielle* (OMPIC), the *Confédération Générale des Entreprises du Maroc* (CGEM), and a pilot ADR service provider, the Rabat International Center Arbitration and Mediation (CIMAR).

<sup>1</sup> Figure 1 shows IBCM's main activities and partners during the final year of implementation (2008-9); it is worth noting that the specific configuration of these activities and partners changed slightly from year to year.

Key activities implemented under the Legal reform component included the following:

- training, tools, and outreach events designed to increase understanding of and improve the application of the new intellectual property law
- support to legal reform efforts (specifically, for the bankruptcy law and the new law governing arbitration and mediation)
- promotion of alternative dispute resolution (ADR) in Morocco, including training for mediators and arbitrators and support to ADR service centers
- training of judges and clerks in a number of commercial law areas, accompanied by an effort to institutionalize continuing legal education for commercial court judges and staff, and
- exploring options for the modernization of the commercial registry (*Registre de Commerce*).

This report aims to provide useful recommendations to the Ministry of Justice, and will focus specifically on three activities relevant to the Program's collaboration with the Ministry: judicial training, bankruptcy reform and modernization of the commercial registry.

## **Training**

Training was an activity that cut across all disciplines, often providing the "entry point" through which the Program could engage with the Ministry and other partners on substantive issues.

In its first year (2005-2006), the Program delivered training in technical areas as requested by local partners (Ministry of Justice and Presidents of the commercial courts). Beginning in January 2007, there was a shift in approach. Rather than organizing training sessions, it was argued, the Program should strengthen Moroccan institutional capacity to offer commercial law training on a sustained basis. Around the same time, the Program received a specific request from the Moroccan intellectual property office to assist with outreach and training in order to improve judges' and lawyers' understanding of the office's role, the new law, and the relationship between Moroccan law and international agreements on intellectual property. The Program also became involved in promoting alternative dispute resolution, and in this area there was a clear need for training of mediators.

From 2007-2009, the Program moved beyond the organization of training courses in response to ad hoc requests by topic, and towards a long-term capacity building approach which partnered national and international experts with local Moroccan practitioners (whether commercial court judges, or private mediators) to develop and deliver tailored courses for a local audience. These courses were at first co-taught by expert consultants with newly trained trainers. Over time, the local judges and mediators were able to assume greater responsibility for the development of course materials and delivery of training. This work was carried out in partnership with ISM, with OMPIC, and in the case of ADR, with CIMAR.

The success of this approach and lessons learned may provide useful guidance for the Moroccan Ministry of Justice and ISM, as these two institutions seek to fill a large training gap which exists in the commercial courts. Section I provides an analysis and recommendations on this topic.

## **Bankruptcy**

USAID has long supported the Government of Morocco's efforts to strengthen its bankruptcy system, including extensive programming through the USAID-funded Project for the Modernization of Commercial Laws and Commercial Courts (2002-2005), which conducted detailed assessments of the commercial law framework and organized a conference on bankruptcy reform in 2005. The IBCM Program has included technical assistance and training activities aimed at strengthening the bankruptcy system and supporting the Government of Morocco's efforts to design and implement an effective bankruptcy reform process. This report provides an overview of the IBCM activities related to bankruptcy and outlines specific recommendations for the Ministry of Justice going forward.

## **Modernization of the Commercial Registry**

IBCM was originally mandated to work on the modernization of Morocco's registry for moveable collateral, with the goal of making it easier for banks to lend to small businesses. Early diagnostic work and discussion with stakeholders produced two main conclusions: (1) Upgrading of Morocco's moveable collateral registry should be undertaken as part of a larger effort to modernize the entire commercial registry system; and (2) in order for a modernization of the moveable collateral registry system to yield the expected benefits (increased lending by banks to small business) it would need to be accompanied by reform of the legal framework for both secured transactions and bankruptcy. USAID has committed, in its 2010-15 strategy, to support the modernization of the commercial registry. This report presents the results of a set of legal and technical pre-feasibility studies, and outlines the major decisions which will be faced by the Ministry of Justice as this process moves forward.

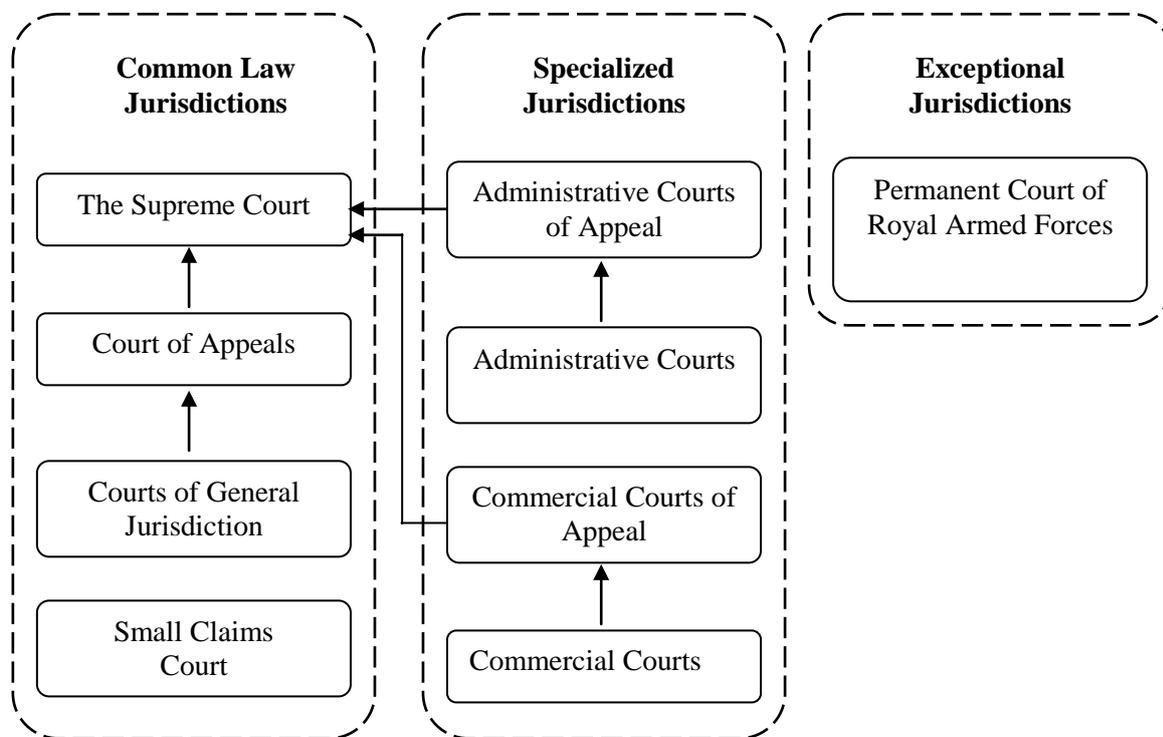
The report is organized as follows: Part I provides an overview of the Moroccan judicial system, with a focus on the functioning of the Commercial Courts. Following this overview there is a detailed presentation of IBCM's training activities, including the results of a survey administered to commercial court judges and clerks on their training needs and experience with USAID-supported training. Part II presents the Program's work in supporting the bankruptcy reform process, with a detailed record of discussions held during a conference organized in May 2009, including how those discussions have moved stakeholders closer towards consensus on three key issues designated as reform priorities. Part III shares the findings from analytical work conducted by the Program, and identifies a number of issues and decisions that should be addressed if the Ministry of Justice is interested in moving forward with the modernization of the commercial registry.

## **OVERVIEW OF THE MOROCCAN JUDICIAL SYSTEM AND THE COMMERCIAL COURTS**

Dahir No. 1-74-338 of 15 July 1974 sets out the structure of the regular courts (*Juridictions de droit commun*). First Instance Courts (*Tribunaux de première instance*) of which there are currently 66, hear all civil, criminal, real estate and labor disputes unless jurisdiction is assigned to another court. Courts of Appeal (*Cours d'appel*) of which there are 21, hear appeals from the First Instance Courts. The Supreme Court, which has six Chambers and is presided by its First President, hears appeals from the Courts of Appeal. Judges and prosecutors have the status of *magistrat*. In addition to the regular courts, Morocco has several specialized jurisdictions, including

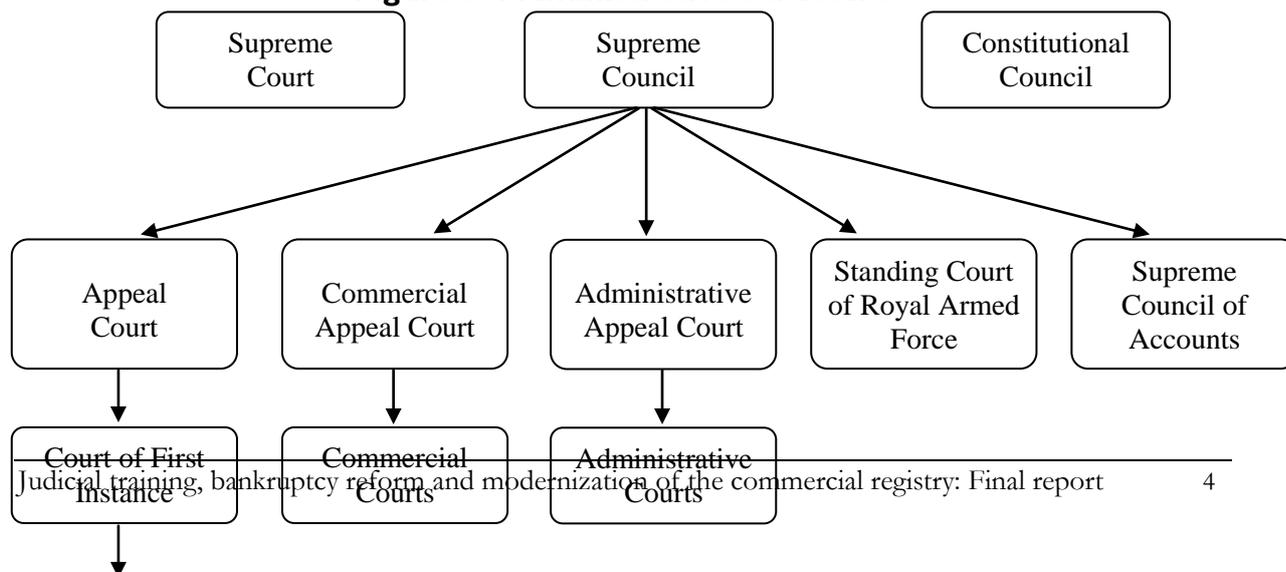
administrative courts established in 1993 and the Commercial Courts, established in 1997 and operational since 1998. Appeals from both the regular courts of appeals and specialized courts of appeal are made to the Supreme Court of Morocco. Since the IBCM Program has worked primarily on business or commercial law topics and with the Commercial Courts, these courts are examined below in more detail.

**Figure 2: The Moroccan Judiciary**



While the judicial branch is independent from the legislative and executive branches pursuant to the Moroccan Constitution, judges and prosecutors (*magistrats*) are civil servants appointed, promoted and disciplined by the Supreme Judicial Council (*Conseil Supérieur de la Magistrature*), which is presided by the King and the Minister of Justice (as vice-president) and includes judges and prosecutors from the judicial system. (Arts. 86-87 of the Moroccan Constitution). Judicial supervision, inspection and oversight of administrative matters connected with the courts, including budgetary issues, are conducted by the Ministry of Justice, which is part of the executive branch. The Supreme Court, like the Constitutional Council, is outside the direct supervision of the Supreme Judicial Council. As set out below, the day-to-day administration of each individual court and of specific cases is generally supervised by court presidents.

**Figure 3: Administrative Structure**



## **The Commercial Code, the Commercial Courts and Commercial Courts of Appeal**

In the mid-1990s the Government of Morocco embarked on a reform of the commercial law framework, which dated back to the early Protectorate period. The Commercial Code was amended and recodified in 1996 (Dahir no. 1-96-83 of 1 August 1996, promulgating Law no.15-95 forming the Commercial Code). Book I of the Code covers the status of merchant (*commerçant*), Book II contains the rules relating to the *fonds de commerce*, Book III contains the rules relating to commercial paper (*les effets de commerce*), Book IV commercial contracts (*les contrats commerciaux*), and Book V covers bankruptcy procedures (*les difficultés de l'entreprise*). A number of key business law areas are governed by the Code of Obligations and Contracts (*Dahir des Obligations et des Contrats*), or by separate laws which are not part of the Commercial Code, including for example company law and creditor rights (secured transactions, mortgages).

Following the reform of the Commercial Code, the Government of Morocco instituted a new specialized commercial jurisdiction, the Commercial Courts (*Tribunaux de commerce*) and the Commercial Appeal Courts (*Cours d'appel de commerce*), governed by Law No. 53-95 of 6 January 1997, promulgated by Dahir No. 1-97-65 of 12 February 1997. These new courts have been operating since 1998; the Commercial Courts are located in Casablanca, Rabat, Fez, Tangier, Meknes, Oujda, Marrakech and Agadir; the Commercial Appeal Courts are located in Casablanca, Fez and Marrakech.

While the new Commercial Code was strongly influenced by modern French commercial law (for example the bankruptcy provisions of Book V of the Moroccan Code were closely modeled on the French bankruptcy laws of 1984 and 1985), it is important to note that Morocco opted to staff the new Commercial Courts with professional judges. In France, the commercial courts are so-called *juridictions consulaires* staffed by lay judges, who are local businesspeople elected by chambers of commerce to serve for limited periods of time. This distinction is significant, since French lay judges sitting on the commercial courts have extensive business experience and technical skills and French commercial law, such as bankruptcy procedures, were intended to be implemented and supervised by businesspeople rather than jurists.

### **Jurisdiction of the Commercial Courts**

The Commercial Courts have jurisdiction over disputes relating to commercial acts where the amount in controversy is 20,000 MAD or more. The definition of a commercial act includes (i) a commercial transaction entered into by an individual conducting commercial activities, such as buying, selling or trading goods and services; (ii) a transaction related to commercial documents (such as checks); (iii) relations among partners in a registered business, such as employees, directors, shareholders; or (iv) the operations of legally registered business entities. The forum for “mixed actions” is determined by the status of the defendant. For example, a mixed action involving a merchant and non-merchant would be heard in the Commercial Court if the defendant is a merchant, or the First Instance Court if the defendant is a non-

merchant. The First Instance Courts receive all matters that are not subsumed under the jurisdictions of other courts, regardless of the amount in controversy. The First Instance Courts therefore hear all commercial cases that do not meet the jurisdictional requirements of the Commercial Courts. Unlike the Commercial Courts, parties in these courts are not required to be represented by counsel. Businesses which are located outside of the metropolitan areas where Commercial Courts are based must register with the Courts of First Instance, so Commercial Registries are kept in both the Courts of First Instance and the Commercial Courts.

### **Overview of the Management Structure of the Court System**

Each Commercial Court is led by its President, who holds important management as well as jurisdictional responsibilities; each court also has one or more vice presidents. The State is represented by a King's Prosecutor (*Procureur du Roi*) and one or more prosecutors (*substituts*) (who are also *magistrats*). Each court also has a clerk's office (*greffe*) headed by a head clerk (*greffier-en-chef*) and staffed by clerks (*greffiers*). A judge from each court is assigned to supervise enforcement proceedings.

As noted above, judges and prosecutors are appointed by the Supreme Judicial Council; no special qualifications, experience or business skills are required for appointment to the Commercial Courts. Thus for example a junior judge with exclusively penal experience can be reappointed to a Commercial Court.<sup>2</sup>

### **A Note on Judicial and Legal Reform in Morocco**

Strengthening the judicial system and improving the legal framework are both priorities of the Government of Morocco. Legal and judicial reform and strengthening the rule of law (*état de droit*) have been cited as priorities by King Mohammed VI in numerous speeches, including his first royal address (*discours du Trône*) on July 30, 1999. This will have been translated into numerous initiatives. Much work has been done to identify areas where legal, regulatory and institutional reforms were needed, where additional training was warranted and where international resources might be useful and significant resources have been allocated to designing and implementing judicial and legal reforms.

Indeed, a frank and open debate has been taking place over the last decade or more, with private sector associations, academics, journalists, jurists, government officials, judges, other stakeholders and bilateral and multilateral donor agencies and experts contributing to the debate. Examples of this input on judicial reform include the "*Livre Blanc*" published by the CGEM<sup>3</sup>, Moroccan academic publications,<sup>4</sup> Moroccan press articles,<sup>5</sup> justice sector assessments conducted by bilateral donors, multilateral development banks and international organizations.<sup>6</sup> Some of the priority areas that have been identified

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<sup>2</sup> Some commentators have suggested that the appointment process is not sufficiently based on objective standards, See e.g., Nabila Fathi & Imane Azmi, *La réforme de la justice aura-t-elle lieu ?*, Challenge Hebdo, 25 April 2009.

<sup>3</sup> Confédération Générale des Entreprises du Maroc, *Livre Blanc, Pour renforcer et consolider le dynamisme de l'économie marocaine* (2007).

<sup>4</sup> E.g. Mohamed Haraqat, *L'évaluation du système juridique et judiciaire au Maroc* (Publications de la Revue Marocain d'Audit et de Développement) (2004).

<sup>5</sup> E.g. Naoufal Belghazi, *Les tribunaux de commerce débordés*, *L'économiste*, 6 May 2004, Mohamed Ali Mrabi, *Justice : réforme de justesse*, *L'économiste magazine*, February 2009.

<sup>6</sup> E.g. Ambassade de France au Maroc—Mission économique de Rabat, *Fiche de synthèse: Justice et règlement des litiges commerciaux au Maroc* (2006) ; The World Bank, *Legal Vice-Presidency, Morocco: Legal and Judicial Sector*

include the need to increase the speed of judicial adjudication, improve the quality of judicial decisions in commercial disputes, improve the results of bankruptcy proceedings and provide better access to information on businesses.

The USAID IBCM Program has worked collaboratively for years with the Ministry of Justice, the Commercial Courts and other Moroccan stakeholder, and is accordingly familiar with the key justice sector reform priorities that have been identified. Perhaps more importantly, the IBCM program's experts have had the opportunity and the privilege of working closely with numerous judges, clerks, lawyers, businesspeople and others in Morocco over the years and are accordingly familiar with the needs and perspectives of the stakeholders "on the ground".

## **PART I: TRAINING**

### **Training of Commercial Court Judges in Morocco and the IBCM Program**

#### **The Institutions Involved in Training of Judges**

In 2002 the National Judicial Training School (*Institut national d'études judiciaires*, or INEJ) was reorganized as the Superior Judicial Institute (*Institut supérieur de la magistrature*, or ISM), a semi-autonomous training institute reporting to the State (Ministry of Justice) (*sous la tutelle de l'Etat*).<sup>7</sup> The ISM is responsible for initial training for newly recruited trainees (*attachés de justice*) and continuing training for *magistrats* and clerks, training of other legal professionals as requested by such professions, collaboration with international donors and other national training schools, as well as research and publication. The ISM is governed by Board of Directors (*Conseil d'administration*) and managed by its Director General. The Board of Directors is presided by the Minister of Justice, and has as members representatives of the Supreme Court, the courts, the bar, universities and ISM staff and trainees. The ISM was recently given more control over its budget, thereby reinforcing its autonomy.

While the ISM is by law the sole provider of initial training for new judges and prosecutors, both the Ministry of Justice and the courts are also involved in developing and delivering continuing training for judges, prosecutors and clerks; likewise a number of bilateral and multilateral donors and programs are also involved in continuing training programs in collaboration with the ISM.

#### **Initial Training of Magistrats**

In order to become a judge or prosecutor (*magistrat*), candidates must first graduate from university with at least a four year degree in law (*license*)<sup>8</sup> and must then gain admission to and graduate from the National Higher Judicial Institute (*Institut Supérieur de la Magistrature* or "ISM") two year training program. Admission to the ISM is by competitive exam and the process is highly selective. The first year of initial training for new recruits (*attachés de justice*) at the ISM is theoretical and is the same for all attendees, regardless of their future appointments to general or specialized jurisdiction courts or prosecutor's offices; during the second year trainees are required to complete internships in the courts to provide them with practical training and experience. The ISM's primary mission is to deliver this initial training. In recent years the ISM has trained approximately 150 new *magistrates* annually, though 2009 reform initiatives and budgets call for drastically increased entering classes as high as 300 or more.

#### **Continuing Training / Legal Education ("CLE") for Magistrats**

*Magistrats* are not required by law to undergo any type of continuing training, but a number continuing training courses are offered by different Moroccan institutions and directly or indirectly with support from bilateral and multilateral donors and programs. The main providers of training include the ISM, the Ministry of Justice (MOJ), the courts themselves (usually in collaboration with the ISM and/or the MOJ, and bilateral and

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<sup>7</sup> Law No. 09-01 relating the *Institut Supérieur de la Magistrature*, promulgated by Dahir No. 1-02-240 of 3 October 2002.

<sup>8</sup> We understand that the educational requirement may be increased, with at least a Masters degree (additional one year graduate degree) being required in the future.

multilateral programs such as USAID's IBCM, the French National Judicial Training School (*Ecole Nationale de la Magistrature*).

### **The ISM CLE Programs for Magistrats.**

While CLE is not its primary mission, the ISM provides a number of training sessions for judges. These are two day trainings on specific topics; trainers are generally retired or sitting judges, and occasionally other legal professionals. Typically the ISM organizes 30-35 training sessions per year; in 2005 the ISM reached 643 *magistrats* (out of a total of approximately 3000) through these courses; in 2006, the ISM trained 449 in 35 sessions; in 2007 the ISM reported organizing 36 CLE sessions and reaching over 1,000 *magistrats*. These totals does not include the ISM trainings which are organized in collaboration with international donors, which for example in 2005 reached 162 *magistrats* and in 2006, 31 *magistrats*, nor does it include programs offered by the ISM to judges from other countries.<sup>9</sup> CLE seminars are held either at the ISM's facilities in Rabat, in various judicial facilities or within the courts.

The specific topics for these CLE seminars are determined in collaboration with the Ministry of Justice and the courts, based on the needs of judges and prosecutors; the MOJ generally also selects the *magistrats* attending the CLE seminars in consultation with court presidents.

It is important to note that in a typical year, only a few of the seminars relate to commercial or business law topics, since the ISM serves the entire judicial community and not just Commercial Court judges. Thus for example, in 2004 four of the 40 CLE seminars offered by the ISM were on topics relating commercial law or other business cases heard by the Commercial Courts (the topics were "Role of Stakeholders in Bankruptcy Procedures", "Summary Proceedings in Commercial Actions", "Possession of Unregistered Real Estate", and "Repression Side of the Commercial Code." In 2005, five of the 35 CLE seminars were on similar topics (the topics were "Evidence in unregistered real estate cases", "Valuation of net receipts", "Sale of a *fond de commerce*", "Collection actions", and "Cases of non-payment". In 2006 (January-October only), out of 28 CLE courses, three were on commercial or business law topics (the topics were "Notification in certain types of commercial procedures", "Banking Law: Deeds and liability" and "Commercial Arbitration." In 2007, out of a total of 36 CLE courses, four were on commercial or business law topics (the topics were "Penal protection of intellectual property", "Registration of a firm,", "New methods of proof in commercial cases" and "The role of the Prosecutor in financial crimes heard in the Commercial Courts".

### **CLE Offered by the Ministry of Justice / Ministry of Justice / the Courts**

As indicated above, the Ministry of Justice and the court also design and implement continuing training for judges and prosecutors. MOJ officials have indicated that these trainings reach a large number of *magistrats*.

### **CLE Organized in Cooperation with Bilateral Donors and Multilateral Aid Agencies**

In addition to the initial and continuing training offered and funded by the Government of Morocco and the judiciary, a number of judicial training programs and events are

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<sup>9</sup> 2005-2006 Annual Report of the *Institut Supérieur de la Magistrature* (2007).

organized and/or funded in cooperation with foreign donors, multilateral development banks, international organizations and NGOs. Besides the USAID IBCM Program, examples of these programs include the American Bar Association Rule of Law Initiative (ABA-ROLI) distance learning CLE courses for judges, collaboration between the French National Judicial Training School (*Ecole Nationale de la Magistrature*) and the ISM for both initial training and CLE, CLE programs organized with the European Union on topics relating to criminal law, anti-terrorism and other topics, courses on international human rights organized with the International Committee of the Red Cross, and a large number of other programs in Morocco and abroad. The MOJ and the ISM ensure coordination among these donors, and as noted above, the ISM also offers CLE for judges from other countries.

### The USAID IBCM Program

Building on the work and experience of the earlier USAID Project for the Modernization of Commercial Law and the Judiciary, the IBCM Program has from its inception included continuing training initiatives as a key part of the Legal & Judicial Reform Component. This inclusion of training reflects USAID and key Moroccan stakeholders' determination that there was a need for more training of Commercial Court judges and clerks, that the delivery of such training could be improved, and that this is an area in which foreign expertise and experience can be helpful.

Below is a summary of all the trainings organized by the Legal & Judicial Reform Component of the IBCM Program, organized in chronological order:

**Table I: IBCM-Supported Legal & Judicial Reform Trainings**

Training subject	Dates	Duration (days)	Profession	No. of Trainees	Location	Partners
Accounting for Bankruptcy Cases	6/ 2/2006	2	Judges	48	Casablanca	Commercial Courts, MOJ, ISM
Accounting for Bankruptcy	6/10/2006	1	Judges	48	Casablanca	Commercial Courts, MOJ, ISM
Banking Law	4/7/ 2006	1	Judges	42	Rabat	Commercial Courts, MOJ, ISM
Banking Law	4/14/ 2006	1	Judges	42	Rabat	ISM
Bankruptcy Law	6/9/2006	1	Judges	48	Casablanca	Club de la Justice
Enterprise finance	4/8/2006	1	Judges	42	Rabat	ISM
Enterprise finance	4/15/2006	1	Judges	42	Rabat	ISM
The role of banks in bankruptcy proceedings: Analysis for Settlement, Reorganization Plans, Liquidation	6/17/2006	1	Judges	48	Casablanca	Commercial Courts, MOJ, ISM
The role of banks in bankruptcy proceedings: Action and responsibility	6/16/2006	1	Judges	48	Casablanca	Commercial Courts, MOJ, ISM
1 <sup>st</sup> session on Trademarks	5/17/2007	2	Judges	25	Ifrane (for judges in Fez, Meknes, Oujda, and Tangiers)	OMPIC, ISM, Minister of Justice
1 <sup>st</sup> session on Trademarks	5/22/2007	2	Judges	20	Marrakech (for	OMPIC,

Training subject	Dates	Duration (days)	Profession	No. of Trainees	Location	Partners
					judges in Marrakech and Agadir)	ISM, Minister of Justice
Trademarks	5/24/2007	2	Judges	25	Casablanca	OMPIC, ISM, Minister of Justice
1 <sup>st</sup> session: Commercial mediation	6/2007		Mediators, other professionals	40	Rabat	SFCG, CIMAR
2 <sup>nd</sup> session: Commercial mediation	5/12/2007	4	Mediators, other professionals	20	Rabat	SFCG, CIMAR
Private/Commercial mediation	18/12/2008	1	Mediators, other professionals	22	Casablanca	Public-Private Commission
2 <sup>nd</sup> session: Commercial mediation )	1/23/2008	4	Mediators, other professionals	19	Rabat	SFCG, CIMAR
2 <sup>nd</sup> session on trademarks	2/5/2008	3	Judges	30	Casablanca	OMPIC, ISM, Minister of Justice
Commercial mediation	3/3/2009	4	Mediators, other professionals	75	Tangiers, Meknes and Casablanca	CIMAR, CCI
A seminar on “Introducing commercial arbitration in Morocco”	3/14/2008	1	Mediators, other professionals	100	Rabat	CIMAR, CCI
Commercial mediation	5/15/2009	2	Mediators, other professionals	25	Rabat	CIMAR, CCI
Conference on bankruptcy	5/20/2009	1	Judges, bankers, businesspeople, other professionals	100	Rabat	Ministry of Justice
Commercial Registry	5/27/2009	4	Clerks	50	Agadir	OMPIC, Minister of Justice
Commercial mediation	6/3/2008	3	Mediators, other professionals	75	Rabat	CIMAR, CIMAT, IMAM
2 <sup>nd</sup> session on trademarks	6/6/2008	2	Judges	30	Rabat (for judges in Fez, Meknes, Oujda and Tangiers)	OMPIC, ISM, Minister of Justice
2 <sup>nd</sup> session on trademarks	6/27/2008	2	Judges	25	Agadir (for judges in Agadir and Marrakech)	OMPIC, ISM, Minister of Justice
Mediators training of trainers, module 1 : Communication and public speaking	4/16 2009	3	Mediators	8	Rabat	CIMAR
Training of trainers, module 1: Communication and public speaking	4/23/2009	3	Judges, <i>greffiers</i>	9	Rabat	Minister of Justice, IBCM

Training subject	Dates	Duration (days)	Profession	No. of Trainees	Location	Partners
Mediators training of trainers, module 2 : Teaching methods and techniques	4/24/2009	2	Mediators	8	Rabat	CIMAR
Mediators training of trainers, module 3 : Training design	5/8/2009	2	Mediators	8	Rabat	CIMAR
Mediators training of trainers, module 4 : Training techniques	6/5/2009	2	Mediators	8	Rabat	CIMAR
Commercial mediation for tax law	6/17/2009	2	Mediators	35	Rabat	CIMAR
Seminar on patents	6/26/2009	1	Judges, lawyers, business people, other professionals	100	Casablanca	OMPIC, Minister of Justice
Training on patent law in the Commercial Court	6/26/2009	2	Judges	30	Tit Mellil	OMPIC, Minister of Justice
Training of trainers module 1: Communication and public speaking	7/2/2009	3	Judges	8	Rabat	CIMAR

In 2005 the IBCM Program disseminated a judicial training survey among Commercial Court presidents to identify the most common types of cases and areas of law for which sitting judges need additional training, in each region of Morocco. This survey identified specific areas of commercial law of interest, such as intellectual property, secured transactions, bankruptcy, real property and international treaties.

During its first year (2005-2006), the Program designed and implemented ongoing training seminars in commercial and financial law and basic accounting skills for Commercial Court judges. The seminars were organized in collaboration with the Ministry of Justice, the ISM and Presidents of the Commercial Courts. The trainers were a law professor, a banker and consultant and a bankruptcy trustee and court appointed expert.

Five distinct modules, or approximately 300 hours, of training were delivered to judges based in the Rabat, Tangier and Casablanca Commercial Courts. Each module was attended by approximately 40 judges and prosecutors and lasted between 1 and 2 days; the trainings were held at ISM or other judicial facilities. The modules included the following specific topics:

**Banking Law (*Droit bancaire*).** This course provided an overview of basic banking law and financial concepts, including lines of credit, banking risks, accounting procedures, guaranties and bonds.

**Banking Law--Business Finance (*Financement des entreprises*).** This course focused on issues relating to default on business loans (e.g. calculating the interest rate to apply for damages).

**Bankruptcy Law / *Entreprises en difficultés*.** An introductory course on Book V of the Commercial Code and bankruptcy practice.

**Bankruptcy Law—The Role of Banks in Bankruptcy Proceedings / *Le rôle des banques dans les procédures collectives*.** This course focused on the legal and business questions relating whether to proceed with liquidation or reorganization and the positions taken by creditors (typically banks).

**Bankruptcy—Accounting Principles / *Comptabilité pour les procédures collectives*.** Designed to introduce judges and clerks to basic accounting concepts and how to read the balance sheets introduced as evidence during bankruptcy procedures.

The Bankruptcy-Accounting Principles course was also offered as two five-week on-the-job training courses at the Rabat and Tangier Commercial Courts for both judges and court clerks.

### **Training of ISM Trainers**

In April-May 2007 Mr. Anthony Fisser, a leading international expert on judicial training and former head of the State of Connecticut Center for Judicial Education undertook a consultancy for the IBCM project to develop and deliver a training of trainers (TOT) workshop with ISM trainers, and to conduct an informal assessment of the ISM, its curriculum and organizational structure/capabilities to identify potential improvements and opportunities for collaboration with IBCM.

In May 2007, Mr. Fisser conducted a two-day workshop on training with eight Commercial Court judges and four Commercial Court clerks. The judges and clerks had either already served as part-time trainers at the ISM or had been identified by the ISM staff as potential trainers in the area of commercial law or commercial court administration. The workshop focused on planning for training programs, training objectives (e.g. skills, knowledge and behaviors that will result from training), training methodologies, support materials, delivering content, how adults learn and training evaluation.

In June, Mr. Fisser delivered a report which included recommendations relating to increased collaboration on training activities with the Commercial Courts and the ISM as well as the MOJ. It recommended possible ways of strengthening Moroccan institutional capacity to offer commercial law and business skills training for Commercial Court judges and clerks (e.g. improved long-term strategic planning, increasing the amount of training offered), ways of increasing the quality of training through training of trainers and adoption of improved training methodologies. The Fisser report recommended specific training topics for Commercial Court judges and expanding IBCM collaboration with the the ISM. Mr. Fisser also highlighted that international best practices in the area of judicial training generally suggest that judges and judicial personnel should be given as much say in the design and implementation of their own training as possible. Mr. Fisser's consultancy, and his discussions with ISM training director Mr. Ayoubi, planted the seed for what would later become the "Four judges" train the trainers model (see below).

### **Trademark Law Training (2007-2008)**

Beginning in January 2007, the Program and USAID sought to find ways to design programs which would not only deliver quality training but would at the same time strengthen Moroccan judicial institutional capacity to offer commercial law and business skills training and ensure that USAID funded training programs would have a long-term impact and effect.

At around the same time, the Program received a specific request from the Moroccan Intellectual Property Office (OMPIC) to assist with outreach and training in order to improve the application and understanding of Morocco's new intellectual property law (Law No. 17-97 relating to industrial property, as modified and completed by Law No. 31-05), OMPIC's role in implementing the law, and the relationship between Moroccan law and international agreements on intellectual property.

In collaboration with OMPIC, the Commercial Courts, the ISM and the MOJ, IBCM worked with these partners to develop and publish a 120-page Trademark Guide for judges, lawyers, intellectual property experts, academics and businesspeople, as well as an extensive training program on trademark law for Commercial Court judges.

As part of this work on trademark law, IBCM designed and implemented a new approach to judicial training, which incorporates training-of-trainers (TOT) principles and adult education methodologies. The Program contracted with a senior commercial law expert and retired Supreme Court judge, who served as principal author for the Trademark Guide and then worked closely with a group of four judges to develop a practical training program on trademark law using the Trademark Guide. These same four judges and the senior expert then served as trainers in the five training programs for judges from all eight Commercial Court jurisdictions held in Ifrane, Casablanca, Rabat and Agadir. In addition to using the Trademark Guide, the two-day intensive training workshops included a sophisticated case study and role play. The training materials have also been adapted to the needs of student-judges undergoing initial training at the ISM and included in the 2008 training program at the ISM.

The Program also found that pairing technical assistance in specific areas of business law with associated training programs was especially effective. For example, in the area of commercial mediation, research conducted by the IBCM Program on issues relating to regulation and self-regulation of mediators contributed to IBCM training programs in mediation skills; in the area of intellectual property, the work on developing a guide on trademark law was directly applicable to the development of judicial training materials and case studies. In addition to this economy of scale the staff found that where the Program demonstrated technical expertise, requests for training support from partners followed, and the process of designing, obtaining approvals and implementing training programs was streamlined.

### **ADR Training (2007-2009)**

Between 2007 and 2009, IBCM supported the development and delivery of a number of different types of training courses on mediation and arbitration. The target group, objectives, length and depth of the courses varied:

Practical skills training was offered to mediators. These courses were given first by specialized international trainers, but over time the international trainers were joined by local mediators who co-facilitated portions of the training.

Training of trainers (including public speech and the design and delivery of courses on mediation) was organized for a group of local mediators. Practice sessions were organized where the new trainers co-facilitated training events with international experts.

Introductory courses – most focused on mediation but there was one course on arbitration – were organized by the Program in collaboration with CIMAR. These training events were

combined with “awareness raising” presentations, and offered legal and business professionals a chance to learn more about alternative dispute resolution and how they might use these mechanisms to resolve commercial disputes. These events served two purposes: they informed new potential users of ADR services, and they gave CIMAR’s mediator/trainers a chance to hone their presentation skills (sort of a mini-training before they ventured out and offered full-fledged practical training to potential mediators).

A series of other training sessions were offered, financed by IFC and organized as part of the memorandum of understanding signed between IFC and USAID/Morocco. One of these trainings offered participants an international certification (delivered by the ADR Centre of Italy). These trainings targeted mostly Casablanca-based professionals.

Exercises and content included in these trainings ranged from defining mediation, to facilitation techniques, to role plays and case studies. The first international trainers brought their own material, with case studies from California or Lebanon. In later trainings, IBCM worked with Moroccan mediators to develop pedagogical case studies based on real-life disputes that had recently taken place, in business fields such as insurance, construction, and real estate development.

Trainings did not focus on judges since mediation in Morocco is not court-connected but rather contractual, or private (as referenced in the new law on arbitration and mediation). The trajectory of the training events and the emphasis on local capacity-building, however, followed the same path as the trademark and patent law trainings. The use of peer groups and real-life cases, the selection of a small group of practitioners to become trainers, the organization of mini-training opportunities and the progression to fully locally delivered training, were all elements that these activities had in common. A formal “guide” was not developed for ADR, as it was for the intellectual property topics, however CIMAR was left with a variety of mediation training materials developed as part of the training of trainers exercise.

### **Patent Guide and Patent Law Training 2008-2009**

IBCM’s work with the patent guide, patent law trainings, and conference was based primarily on the earlier success of the trademark guide and trainings. Elements of the approach were also drawn from IBCM’s experience in developing training and information dissemination campaigns for mediation and arbitration.

Like the trademark guide, the patent guide was developed by Moroccan expert consultants, in collaboration with an editorial committee from OMPIC and a representative of the French intellectual property agency (*Institut National de la Propriété Intellectuelle* - INPI). Given the density and complexity of the topic, the conception, drafting, and editing of this document took more than a year. As the guide neared completion, IBCM shifted its attention to the design of the training module for commercial court judges and the information session, or conference, that was organized to launch the guide.

As requested by the Ministry of Justice, IBCM worked with the same four judges that had undergone training to become trainers on trademark law. These judges are now considered resource persons in their court, and are regularly consulted by their colleagues. Whenever possible, court presidents are likely to assign intellectual property cases to these judges.

A launch event was organized, entitled “Patents as a Tool for Economic Development.” The aim was to make business professionals aware of the new guide, and of the work being conducted with commercial court judges. Fifty-three lawyers, government officials, and senior business executives attended the conference. Topics covered included (i) patents in Morocco, (ii) the legal rights associated with patents, (iii) the importance of patents for small and medium enterprises (SMEs) and investors, (iv) the role and use of patents in Morocco and abroad. Like the trademark guide, the patent guide is available online, in French and Arabic ([www.brevetsaumaroc.com](http://www.brevetsaumaroc.com))

Following the conference, the Program and OMPIC organized a judicial training session with judges from commercial courts from all around Morocco. The training was co-facilitated by two international experts, one Moroccan expert, and the four judges. Twenty-five commercial court judges and five OMPIC representatives attended.

OMPIC and other partners have commented on the success of the intellectual property training program. IBCM views this model as a viable one for the Ministry of Justice and ISM to adopt in other topical areas, given the limited resources that can be devoted to continuing legal education in commercial law.

### **Judge & Clerk Survey (2008)**

In 2008 IBCM conducted surveys of Commercial Court judges and clerks in order to: (1) to evaluate the results and impact of past training activities, reflecting upon a change in strategy and methodology and (2) to orient the development and delivery of future training activities, in such a way that USAID contributes to institutionalizing continuing legal education in commercial law in Morocco.

The specific objectives of the survey were to:

- understand the impact of past training activities
- provide baseline data regarding judges’ and clerks’ knowledge, skills and training needs orient the development of new training courses and training interventions for judges during the remainder of the IBCM project period define future training topics and modalities for training judges and court staff in Morocco during any USAID follow on activities

### *Methodology*

The purpose of the study summarized in this report was to assess the effectiveness of the IBCM Program’s work in judicial training with the Commercial Courts and to provide recommendations for the structure and content of future USAID support. The information gained from interviews and surveys was therefore analyzed with a view to informing future USAID-funded initiatives and MOJ priorities.

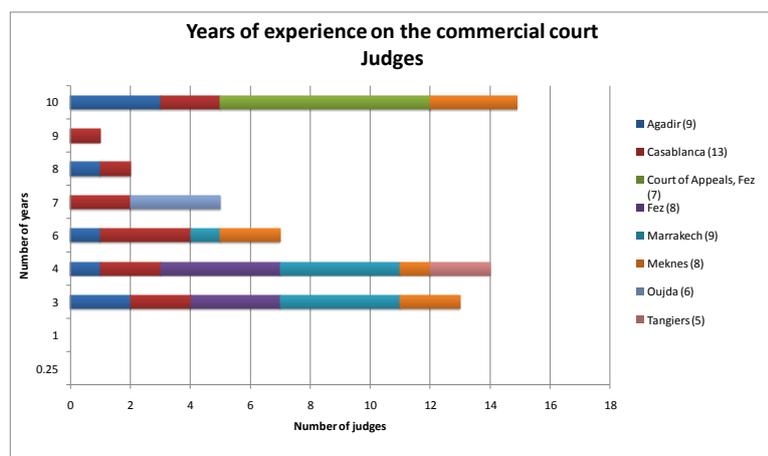
The data analyzed here comes from interviews and surveys conducted with court personnel. Interviews were conducted at the Commercial Courts of Agadir, Rabat, Tangier, and Casablanca (and included interviews with the court president, judges, and *greffiers* in each of those courts), and in the Court of First Instance in Inezgane, where the Team interviewed the court president, and judge and *greffier* assigned to the *Registre de Commerce*. In addition to meeting with court personnel, the team also met with the MOJ, ISM, lawyers and Bar Association representatives, and other donors and groups in a position to provide information on training activities and on current and future needs of commercial courts.

Questionnaires were also developed to obtain more extensive feedback about trainings and training mechanisms and to identify priority areas for future trainings. These were distributed to court personnel—with separate versions developed for judges, court presidents, and *greffiers*—in the eight commercial courts in Morocco (a total of 122 judges and 16 prosecutors) and three commercial courts of appeal throughout the country (a total of 33 judges and 6 prosecutors). A total of 64 Commercial Court judges and 144 Commercial Court *greffiers* responded, representing all of the commercial courts in Morocco with the exception of Rabat. The Fez Court of Appeals was the only Commercial Court of Appeals that responded.

## Judge Profiles

### *Experience / Seniority*

**Figure 4: Years of experience on the Commercial Court: Judges**



Judges responding to the survey were appointed to the commercial court an average of 6 years ago, with the largest number of judges—17 out of 65—having served on the commercial court for 10 years. This suggests that the pool of respondents contains many of the more experienced judges in the commercial courts, since these specialized courts

have only been operational since 1998. The 7 judges at the Fez Court of Appeals all reported having been on the court for 10 years, while the 8 in the Fez commercial court were all among the newest, having served for four years or less. Judges in both the Casablanca and Agadir commercial courts were well distributed among the range.

### *Education*

24 of the 65 judges who responded to the survey, reported having a graduate university degree beyond the *license*, such as a masters degree 48% of those with a graduate university degree received degrees in business or commercial law, while 23% had a graduate degree in civil law. There was a mixed review of the applicability of university education and more generally of judicial training for judicial responsibilities, with 18 judges responding that they were very relevant and 24 responding that they were not. Of the 18 respondents who felt they were relevant, 7 found university courses to be relevant, 7 found ISM trainings to be applicable, and 12 found trainings offered by the ISM, MOJ and/or USAID to be highly relevant.

## Caseload & Types of Cases

The Moroccan judicial system as a whole hears a large number of cases every year; in 2007 a total of 2.57 million cases were filed, and 3.25 million cases were ongoing.<sup>10</sup> This total includes all types of civil, criminal, administrative cases and expedited procedures such as those described above for the Commercial Courts. In 2007 the total number of *magistrats* was approximately 3,100. By very rough estimation, using the number of cases pending, each *magistrat* in Morocco works on and/or decides

<sup>10</sup> Source : Ministry of Justice 2008.

over 1,000 cases annually, double international averages.<sup>11</sup> These figures are only estimates since the degree of involvement of a judge or prosecutor varies enormously and many cases are decided in panels.

In 2007 a total of 119,695 new “cases” (including expedited procedures) were filed in the Commercial Courts and 125, 226 judgments or decisions were rendered; of the new cases, the Casablanca Commercial Court heard over 63.4% of the cases; Rabat 11.9%, Agadir 5.3%, Fez 5.1%, Marrakech 4.6%, Tangier 4.5%, Meknes 5.5% and Oujda 1.63%.<sup>12</sup> That same year, there were 122 judges (*magistrats du siège*) and 16 prosecuting judges (*magistrats du parquet*) in the Commercial Courts. A very rough estimate suggests that Commercial Court judges also deal with a large number of cases—each working on or deciding approximately 800 cases annually on average. As set out in the paragraph below, however, it is important to note that not all “cases” are equal: some expedited procedures are decided without hearings by the Court President, while other procedures such as bankruptcy proceedings can be extremely complex and time consuming.

Unless otherwise specified in the law, the Commercial Courts follow the Code of Civil Procedure, which provides for civil law style procedure, similar to French civil procedure in many respects. Like in most civil law countries, there is no single, concentrated “trial,” nor is there a jury, as in Common Law countries like the US; instead, cases proceed in a linear fashion and primarily in writing, with a series of meetings and hearings to introduce evidence, hear procedural motions and issue rulings spread out over months. A judge is assigned the role of managing the case (*le juge rapporteur*); when the case file is complete, a decision is rendered, usually by a three judge panel.<sup>13</sup> Besides such “regular” litigation (*procédures de fond*), the Commercial Courts also hear bankruptcy cases (*traitement des entreprises en difficulté* or *procédures collectives*) which follow separate procedures. Court Presidents may rule on expedited motions for injunctions or conservatory measures (*référé*), separately from any underlying litigation, and on certain requests for immediate payment (*injonction de payer*). Each of these different types of cases is counted as a separate “case” (*affaire*) for statistical purposes by the Ministry of Justice.

Table 2 sets out the relative percentage which these constitute of the total number of cases.

**Table 2: Case Categories**

Subject	% of total cases
Urgent Orders/Injunctions without a hearing ( <i>Ordonnances sur requête</i> )	43
Regular litigation ( <i>Procédures de fond</i> )	21
Orders/Injunctions with Hearing ( <i>Référés</i> )	12
Motions for Payment ( <i>Injonctions de payer</i> )	10.5
Bankruptcy procedures ( <i>Difficultés d'entreprises</i> )	0.5
Other	8

(Source: Ministry of Justice 2007)

<sup>11</sup> Mohamed Ali Mrabi, Justice : Réforme de justesse, L'Economiste Magazine

<sup>12</sup> Ministry of Justice statistics provided to the IBCM Program in 2009.

<sup>13</sup> Code of Civil Procedure, Dahir No. 1-74-447 of 28 September 1974, approving the Code of Civil Procedure, as modified by Law No. 08-05 of 30 November 2007. See John Henry Merryman, *The Civil Law Tradition* (1985) pp. 111-123 for a general overview of civil procedure in Civil Law countries.

As noted above, it is important to note that the time and resources needed for a complex case that is fully litigated, or for a large bankruptcy case, will be much higher than the time needed for a motion decided by the Court President in a single hearing.

The survey results confirm these numbers: according to the survey, on average judges hear approximately 45 cases per month, although there is significant variation among regions. Judges in Casablanca carry a significantly higher load, averaging between 50 and 90 cases a month. In contrast, judges in Marrakech are more likely to see an average of 20 cases a month. Note that court presidents hear a far larger number of “cases”, since they hear a large number of expedited procedures.

These statistics and survey results also highlight the importance of the Casablanca Commercial Court, located in the economic and financial capital of the Kingdom, which dwarfs the other commercial courts in terms of volume of cases heard, staffing and infrastructure.

#### *Subject Matter of Cases Heard by Commercial Court Judges*

Commercial court judges hear disputes involving a wide variety of business law. Cases regarding banking and financial transactions are heard by all responding judges, and cases relating to *fond de commerce* and contracts likewise constitute the majority of subject matter of disputes.

Judges in the Fez Commercial Court of Appeals, the Fez Commercial Court, and the Marrakech Commercial Court report having a higher number of intellectual property cases on average than judges in Agadir, Meknes, Oujda and Tangiers. 60% or more respondents in each court had dealt with trademark cases. 5 out of 13 responding judges on the Casablanca Commercial Court stated that they heard intellectual property cases. There were no responses to the survey from judges on the Casablanca Commercial Court of Appeals, which hears trademark disputes on appeal from OMPIC (*opposition*).

Judges from the Casablanca Commercial Court also mentioned hearing import/export cases, which are also heard in Agadir and Marrakech.

Bankruptcy cases are heard by only between 1 and 4 responding judges in each court, which is consistent with the fact that relative to regular litigation, the number of bankruptcy cases filed in the Commercial Courts is lower (though bankruptcy procedures can be quite time consuming) and that these cases are increasingly being heard by judges specializing in bankruptcy cases. None of the judges in Casablanca responded to this question, although anecdotal evidence suggests that the Casablanca Commercial Court hears more bankruptcy cases than other Commercial Courts and that the Casablanca court has developed extensive expertise in this area.

Among responding courts, tourism and agriculture are the most frequently cited sectors in which bankruptcy proceedings are heard, although cases are also heard in mining and other industries.

**Table 3: Cases heard, by subject and court**<sup>14</sup>

	Agadir (9)	Casablanca (13)	Court of Appeals, Fez (7)	Fez (8)	Marrakech (9)	Meknes (8)	Oujda (6)	Tangiers (5)	Total (65)
Finance/banking	9	13	7	8	9	8	6	5	65
Fond de Commerce	5	6	5	8	6	4	6	4	44
Contracts	4	5	2	7	7	8	5	4	42
Intellectual Property	1	5	7	8	8	2	2	1	34
Bankruptcy	2	0	3	4	4	3	1	2	19
Import/export	1	3	0	1	4	0	0	0	9
Property	1	0	0	0	0	0	0	0	1
Other	3	1	1	1	0	2	0	1	9

*Continuing legal education (CLE)***Background in specific substantive areas**

34 judges, or 77% of responding judges, reported receiving specialized training in commercial or business law prior to their assignment to their Commercial Court, including a combination of university courses, ISM and MOJ trainings, and other trainings. On average these trainings took place six years ago and 20 judges had participated in training in general commercial law, nine in bankruptcy law, and others in intellectual property law, competition law, financial/banking law, and computer/IT skills.

About 71% of commercial court judges reported receiving some sort of specialized training, Continuing Legal Education (CLE) which related to types of cases heard by the Commercial Courts since their appointment to their Commercial Court. On average these trainings were recent—about 3 years ago—and reflect the increasing importance of USAID-funded training in the overall landscape of CLE for Commercial Court judges in Morocco. For judges getting training after their appointment, 50% received training from the ISM, 41% from USAID, and 25% from the MOJ. Banking law was a major area for training (34%), as were commercial law and bankruptcy remained important subjects as well (28% each).

**Sources of Commercial Court training**

The survey confirms that the MOJ, the ISM, and USAID are the main providers of continuing training for Commercial Court judges in Morocco; of course much training are offered jointly by some combination of these institutions. Survey respondents also cited other sources of training, including the faculties of law or sharia at specific universities, other professional or technical institutions and/or trainings funded by other bilateral or multilateral donors.

*USAID IBCM Support for Continuing Training of Commercial Court Judges in Morocco*

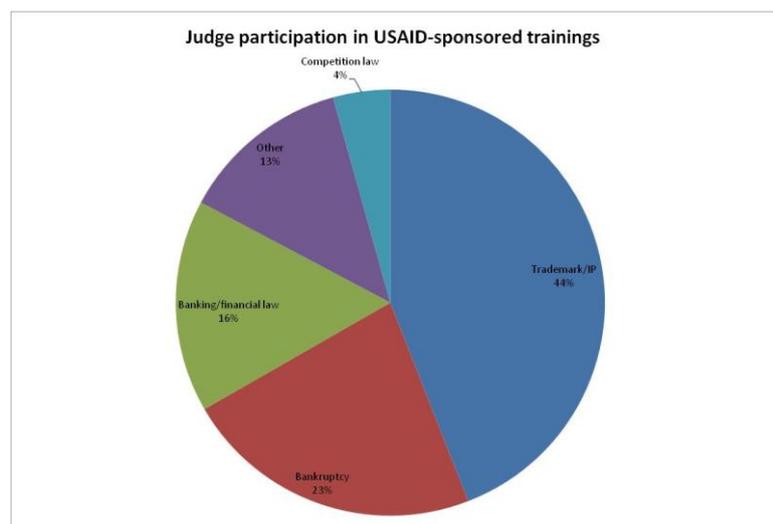
As described above, the USAID funded IBCM Program has implemented a large number of judicial training programs with the MOJ, the ISM, the Commercial Courts and other Moroccan institutions such as OMPIC. One of the primary goals of the Judge and Clerk Survey was to evaluate this training and its impact. Working hand in hand with ISM and MOJ, over the last several years USAID has become an important partner in the design and delivery of Commercial Court training programs. As noted above, USAID has supported commercial court trainings in Morocco since 2002, originally through the

<sup>14</sup> The numbers in parentheses indicate the number of respondents from each court.

“Project for the Modernization of Commercial Law and the Judiciary” project and through IBCM since 2005. Indeed, 95% of responding judges reported that they had participated in courses offered by the USAID-funded IBCM project. These trainings took place an average of 2 years ago and focused on intellectual property (primarily trademark), banking law, and bankruptcy.

### *Evaluation of Trainings*

**Figure 5: Judge participation in USAID-sponsored Trainings.**



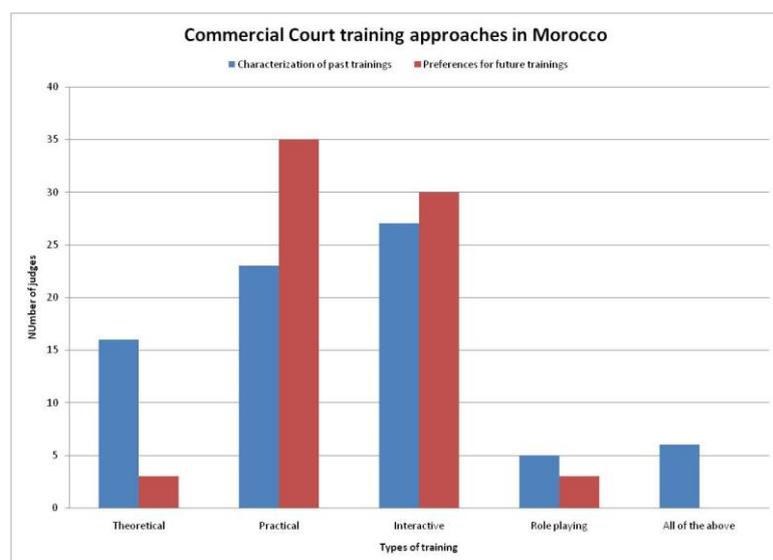
95% of the judges who received trainings felt that these were useful and 100% stated that they apply the skills they learned in their day-to-day work either frequently or occasionally. 70% of respondents reported that following their CLE training they were assigned to cases that pertained to the subject of their training.

As shown in Figure 5, the most frequently cited area of training was trademark, followed by bankruptcy.

Significantly, 74% of responding judges have been assigned cases which involved trademarks. 83% of responding judges know about the Trademark Guide produced by IBCM. These judges were enthusiastic about the guide and looking forward to the release of additional guides, such as the one for patents that came out in June 2009.

### Training Methodology

**Figure 6: Commercial Court training approaches in Morocco**



Respondents heavily favor participatory and interactive approaches over lectures and prefer practical to theoretical material presented through actual case-based examples. In terms of the IBCM trainings for judges, 35% characterized them as interactive, 30% as practical, and 21% as theoretical. 6% of responding judges stated that these trainings included role-playing and 8% stated all of the above.

In terms of what judges would like to see from trainings, 49% preferred that they be practical, 42% preferred that they be interactive, and only 4% that they be theoretical.

Role playing was not a highly favored approach, with only 5%, or 3 judges, preferring this methodology. This is somewhat contradictory, since role plays are often used in interactive judicial training programs.

96% of responding judges also supported the suggestion that classroom training be followed by on-site training as they believed that this would improve their ability to use their new skills.

### Training of Trainers

As described above, in early 2007 the IBCM Program supported an introductory course in adult education techniques for trainers at the ISM. That same year, the Program applied this methodology to train commercial court judges in trademark law. In this ‘four judges’ model, as the approach became known, a senior expert works closely with a small number of judges to develop practical training programs and serve as trainers for other judges. This approach focuses on developing long term relationships between trainers and trainees, on-going coaching, and a gradual increase in responsibility for trainings over time as the new trainers gain skills and competencies. The trainings focus on improving technical knowledge and skills as well as devoting a great deal of time to improving public speaking and communication skills of the new trainers.

The majority of interviewees—60%—expressed keen interest in serving as instructors for future CLE classes and 88% of these—a total of 29 individuals—expressed interest in participating in train-the-trainer classes offered by USAID. Viewed regionally, all of the responding judges in Tangiers would be interested in participating along with 75% of judges in Meknes.<sup>15</sup> The inherent sustainability of the ‘TOT’ approach was viewed very positively during interviews, particularly with regards to creating internal expertise.

The TOT methodology was also of interest to the MOJ, who commented favorably on IBCM’s revised approach in terms of increasing the length of courses, focusing on practical exercises, preparing the Trademark guide, and possible expansion of the same methodology into other areas of commercial court jurisdiction.

While not current practice, most Commercial Court presidents endorsed the idea that, upon returning to court, those who attended trainings convene a meeting to present what they had learned to their colleagues. In the survey, 95% of judges expressed willingness to do this and 81% of respondents stated that they make training materials available to the rest of their court. As per the Four Judges training model described above, judges who attend specialized trainings may also act as in-house experts for their court and a resource for judges from other Commercial Courts.

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<sup>15</sup> Note that 32 judges did not respond to this question.

**Table 4: Subjects for trainings**

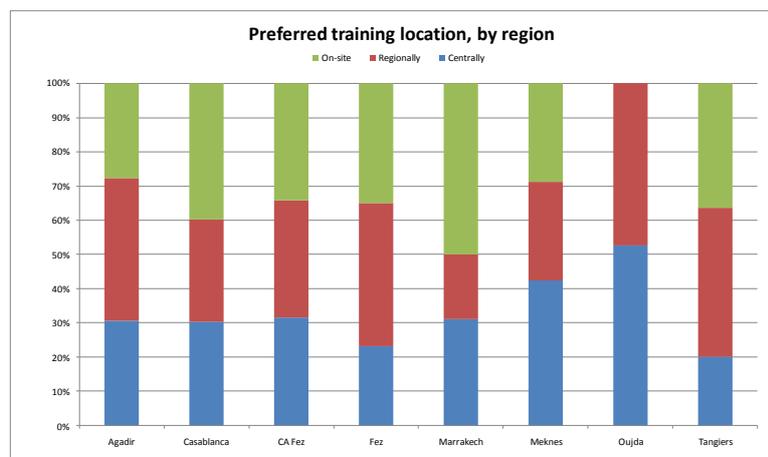
Potential areas for additional training	# of judges interested
Bankruptcy law	21
Banking law	21
Intellectual Property	12
Commercial law	11
ITC	9
Accounting	6
International business	5
Maritime law	4
Language	2
Fiscal law	2
Competition law	1
Others	4

Commercial Court judges expressed interest in trainings in a number of areas. As expected, bankruptcy and banking law emerged as leading categories, with 21 judges requesting training in both of these areas. Commercial law followed, with 11 judges expressing interest, while 9 judges each expressed interest in trainings in intellectual property and ITC. Additional areas of training were also mentioned, as noted in Table 4.

### Length of CLE Sessions

In interviews, some judges reported that trainings were too long, while others found them too short. In the survey, however, the majority of judges stated that they would like to see longer trainings—only 18% of responding judges felt that the trainings were of sufficient length to cover the material.

### Training venue

**Figure 7: Preferred training location, by region**

In interviews, judges outside of Rabat and Casablanca expressed a preference for on-site trainings. However, the survey results showed a different perspective, with judges outside of Casablanca and Marrakech actually more interested in trainings located centrally or regionally. This may reflect some recognition that regionally or centrally located trainings have

additional benefits through interaction between judges from different courts.

### Training evaluations

It is common practice for participants to fill out an evaluation form upon completion of trainings and all judges responded that they had done so. About half of respondents felt that the form covered the types of feedback they wanted to give completely and about half felt only partially. A few judges responded that the form did not allow them to give the kind of feedback they felt was important. Follow-up inquiries from trainers once the trainees have returned to work are very uncommon, with only about 18% responding that they had been contacted following the training. Meanwhile, 83% of judges would be willing to complete a follow-up form several months after a training, to report on its practical utility.

## Other Suggestions from Interviewees Relating to CLE In General

While judges felt that their trainings had been beneficial, they also provided suggestions for improvements. The following areas were discussed during interviews with court personnel about donor-funded trainings in general. During in-person discussions interviewees tended to mingle together their experience with many donor-funded trainings over the years, indicating that many of these were somewhat inconsistent with local laws and procedures. However, responses to survey questions revealed that many trainings being discussed had taken place more than six years ago – prior to the IBCM program.

### Relevance

During face-to-face interviews, court personnel stressed the importance that trainings have specific application within Moroccan courts and that trainers have extensive knowledge of Morocco's court system and laws. Some judges found that donor-funded programs have not always tailored their trainings to Moroccan laws and practices, but these comments are not relevant to USAID-funded trainings, which has traditionally used Moroccan experts in trainings. In fact, all survey respondents felt that trainings were partially or completely tailored to local laws and practices, with 60% stating that they were completely tailored.

### Consistency

In interviews, court personnel reported that some courses contain competing advice and approaches, and focus on issues perceived as significant by the donor, but that are not necessarily of interest to the Moroccan judiciary. However, in survey responses 98% of reporting judges reported that the subject matter of the trainings was relevant to their work.

### Other Issues

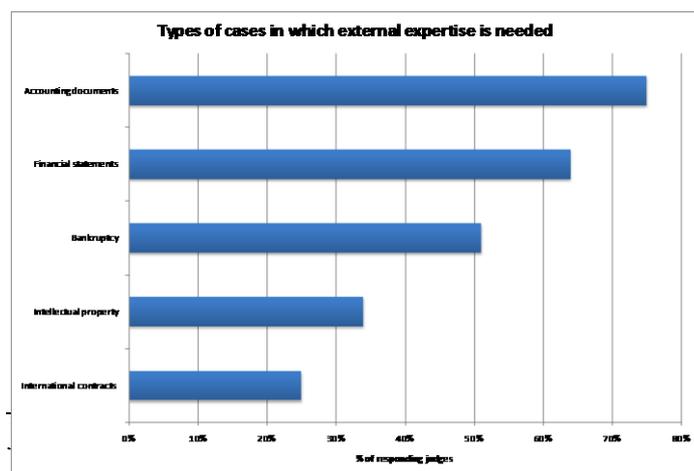
#### *Language issues*

The official language of the Moroccan courts is Arabic, but French often is used by mid and large size businesses in Morocco and many business contracts are drafted in French.. In such cases, key documents need to be translated into Arabic, with varying degrees of accuracy. This adds a level of complexity to Commercial Court proceedings.

About 60% of responding judges reported encountering documentation in other languages that presents difficulties or engenders delays. English was cited by 27 judges, French was mentioned by 12 judges, and 21 judges reported that documentation in yet another language was problematic. Many judges—about 85% of respondents—refer documents to translation but for most of them this is only an occasional occurrence, as is any difficulty in interpreting technical business terms in documents under review. Still, there was near universal support for a multilingual glossary of technical terms.

#### *Use of experts*

**Figure 8: Types of cases in which external expertise is needed**



Commercial Court judges can request expert written testimony on technical matters relating to litigation, for example from an engineer or an architect relating to a construction case. Such experts must be certified and registered with the court but they are independent professionals and not court employees. The expert's report

becomes evidence. 94% of the judges responding to the survey stated that they frequently or occasionally call on external experts in this way. While the use of expert reports relating to non-legal technical areas is often necessary and provided for by Moroccan law, there are “grey areas” involving questions of law where the use of a court appointed expert may not be appropriate. An example of such an area would be the use of an expert to determine the validity of a trademark registration or the patentability of an invention. Where judges have not received any education or training (for example in an area where laws have recently been extensively revised or have historically not been applied) there is a tendency to use experts as a crutch.

There are other cases where the use of an expert may be warranted, but where a Commercial Court judge should be able to critically evaluate and weigh the evidence. An example of this would be the interpretation of complex financial reports in business and financial disputes and bankruptcy cases.

Indeed, the survey reflects that there is a great deal of demand for trainings in reading and interpreting accounting documents and financial statements, as well as in other technical areas, as shown in Figure 8, both to minimize reliance on court appointed experts but also to ensure that judges can make the best use of the expertise provided. In the words of one judge who received technical training, “... I no longer need to refer matters [relating to trademarks] to external experts...and can provide advice and guidance to other judges on my court.”

#### *Court President Survey*

Seven presidents of commercial courts were surveyed. On average, respondents had served as court president for 4 years and all had served in commercial courts prior to their appointment as president. All received training, most frequently from the MOJ, prior to their appointment as a commercial court judge and on average this training was about 10 years ago.

All the court presidents surveyed reporting using criteria to differentiate case types prior to assigning them to specific judges and 75% of them assert that the assignment of certain types of cases (such as bankruptcy) is conditional on a series of criteria that commercial court judges must first meet, including specialized training. 100% of court presidents stated that they developed these criteria themselves or used criteria developed by a prior president. In deciding to use a *greffier* in the role of *syndic*, court presidents rely primarily on the specialized experience of the individual.

Court presidents reflected that they would very much like to see basic training courses in place for both judges and *greffiers*, as well as additional trainings in specific areas such as the *Registre du Commerce* and the role of the *syndic*.

#### *Conclusion and Recommendations Regarding Training of Commercial Court Judges*

### **There is Demand for More Continuing Training on Commercial Law and Business Skills**

More specialized commercial law and business skill training is needed at **all levels**: (i) during the initial ISM two year training for new judges, (ii) prior to appointment to the Commercial Courts (whether directly from the ISM initial training or upon transfer from another court) and (iii) in the ongoing (CLE) training programs for judges.

As set out in this Report and revealed in the survey, the CLE currently offered to Commercial Court judges by the ISM, the MOJ, the courts and donor programs such as USAID has been limited and there is clear demand for more continuing training. Indeed the survey indicated that 97% of the responding judges would like to see a required CLE program, an extraordinarily high percentage which reflects enthusiasm and high demand for ongoing training.

Court presidents would like to see a requirement established for completion of substantive commercial law and business skills training prior to assignment to a specialized jurisdiction like the Commercial Courts, or to specific types of cases and procedures.

### **Continuing Training for Commercial Court Judges Should be Specialized**

At the beginning of a patent training held in 2009, a Commercial Court judge remarked “how can I decide whether an invention in dispute is really patentable (for example, whether it meets the requirement of novelty)?” Their answer, “of course I request an expert in the technical area to do a report (expertise) to tell me whether or not it is patentable.” However, the judge was mistaken; the law requires that judges make this determination themselves, and sets out how to do so, but with no training on this relatively new and technically quite difficult area and extremely limited experience, the judge simply did not know how to handle a case involving patents.

This example illustrates that while Commercial Court judges are well versed in civil law and procedure and general commercial law, through no fault of theirs, they often do not have the expertise required of them because a number of specialized areas such as industrial property or bankruptcy are often not included (or insufficiently covered) in their university studies, in their initial two year training at the ISM, or in the limited continuing training offered.

In many countries these highly technical cases are assigned to courts where judges have specialized legal, technical and/or business expertise. For example, in the US, federal bankruptcy judges hear only bankruptcy cases and are thus are specialists. In Morocco, the lawyers representing the parties in these kinds of cases often do have extensive expertise due to their own ability to specialize, in contrast with the judges who are hearing the case. This issue is exacerbated in areas such as Moroccan bankruptcy law that were adapted from French law, since in France business people and not professional judges serve as Commercial Court judges. Simply put, specialized training, education and experience is required by judges sitting on specialized courts.

The Judges Survey and the IBCM Program’s work with Commercial Court judges and with the business and banking communities also suggests that Commercial Court judges are interested in and often need more training in and knowledge of non-legal fields, such as accounting (e.g. to help judges understand underlying contract disputes or determine if a company is insolvent), banking (e.g. to understand how to calculate penalties on a loan), business contracts (e.g. to be able to interpret clauses in complex mergers or business acquisition deals).

With more specialized legal and non-legal skills training, Commercial Court judges can better decisions, handle cases more promptly, and rely less on court-appointed experts.

## Training of Trainers & Training Methodology

A key way of improving the quality of continuing training is to increase the training of the trainers who themselves give training courses to judges. As noted, to-date continuing training is generally given on a volunteer basis by active and retired judges, and to a lesser extent by academics and other legal and other professionals. While some of these trainers are natural teachers or experienced lecturers and recognized experts in their fields, many could benefit from training in both in specific legal or technical areas and more training-specific areas such as planning, setting training objectives (e.g. skills, knowledge and behaviors that will result from training), training methodologies (e.g. moving away from lecturing to using interactive techniques), preparing support materials that are effective and encourage interaction and input from judges, delivering content, how adults learn and training evaluation.

The survey clearly reveals that judges heavily favor **participatory approaches** over **traditional lectures** given by the trainer. Likewise respondents indicated that they preferred **practical, case-based materials** over **theoretical presentations**. Continuing legal education experts in Moroccan and abroad have long endorsed such approaches for training judges—who are after all experienced legal professionals and not students—so these preferences should come at no surprise. However, not all trainers selected to offer continuing training are familiar with such training approaches.

The training-of-trainers approach, which was used by the IBCM Program (see the description of the “Four Judges” approach above) adds the tangible benefits of creating a deeper level of expertise in the *magistrats* trained as instructors who are also sitting judges and serve as resources for their commercial courts, while also building a local pool of potential instructors available to the ISM for future training needs.

As noted above, the Survey feedback indicates that judges also appreciate learning about how the business and financial worlds really work; the best trainers for these types of courses may be accountants, lawyers, or other non-judges. Several courses offered by IBCM in accounting, banking and bankruptcy were professionals from outside the courts. IBCM recommends that ISM and MOJ look at establishing a mechanism to incorporate these types of trainers in their rosters. For example, one experience conducted by IBCM that was especially well-received was the placement of a trainer in accounting and financial statement analysis inside the Casablanca commercial court, following a training given on the topic. The expert was available for afternoon consultations on real cases for a three month basis.

## Technical Guides / Other Resources

The development of quality guides and training materials is extremely effective in improving the implementation of specific areas of the law. As the interviews and survey made clear, the Trademark Guide was extremely well received. It was followed by a Patent Guide (which was released in 2009 after the questionnaires were finalized) which has also proved to be a well received product meeting an important need. Both guides have been used and will continue to be used in judicial training, as well as serving as resources to judges, lawyers, businesspeople and other stakeholders. The surveys also identified the need for a multi-language technical glossary as well as preparation of internal procedures guiding the interpretation and application of procedural law or substantive business-related laws.

### **Involving Judges More**

Judges and Court Presidents should have a great deal of input to add to the design and implementation of, and feedback on, trainings, to ensure that future efforts meet the large need and continue to develop and improve as national and regional needs change. The Survey indicated that across the board judges are interested and willing to participate in this process and their feedback should be sought in formal and informal ways.

The survey also suggests that it would make sense for Commercial Court Presidents to develop training plans for their judges, using this information to feed in to the survey ISM sends around each year asking about training needs. This would address also concerns about transparency that were raised in the selection of judges to participate in trainings, and should allow also for judges more advance time to plan for their participation in training sessions.

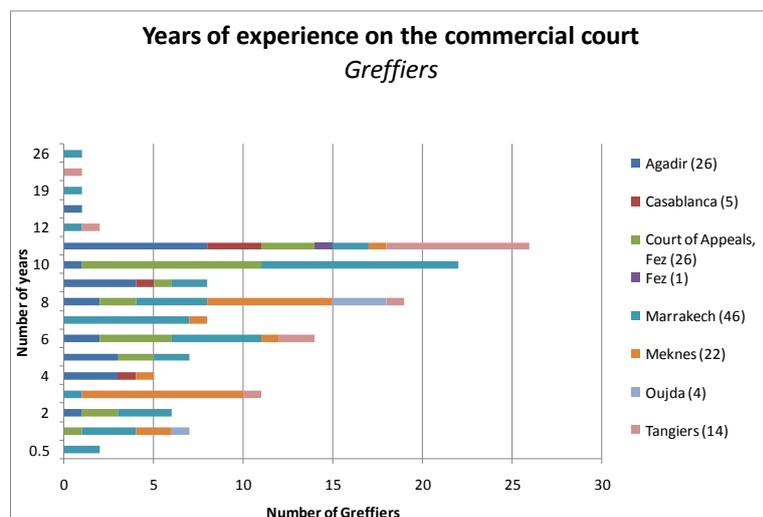
### **Final Recommendations**

As in every country of the world, judicial training resources in Morocco are limited. Judges are busy with high caseloads, Morocco is undertaking major legal reforms in a number of areas of the law, many of which reforms are being led by the Ministry of Justice, and the ISM has been requested to dramatically increase the number of new entrants (*attachés de justice*) it trains. The Commercial Courts make up only a small fraction of the Moroccan judicial system and so there are numerous other initial and continuing training needs. Foreign donors too have limited resources and short timeframes. Clearly, all of the general recommendations set out above cannot be implemented immediately, and the institutional responsibilities for judicial training will require more planning and more resources.

Until then, it may be worth **prioritizing one or a limited number of topics** each year, to support the development of high-quality (1) training materials, (2) training courses, (3) training of trainers, and (4) adaptation by ISM into the curriculum for the attachés de justice. For example, specific areas of bankruptcy law and practice might be selected as a priority area for continuing training for Commercial Court judges, and resources could be focused on developing training materials, courses and selecting and training of trainers in this area

This approach was successfully taken by the IBCM Program and its Moroccan partners in the specific fields of trademark and patent law. It is fair to say that today regarding trademark and patent law, there is now a sufficient number of trained and experienced experts to ensure that future continuing training courses for judges can be offered in these topics with minimal additional investment.

Other donors wishing to strengthen the judicial system in Morocco should be encouraged to follow this approach as well, and perhaps ISM could look at using its distance training platform as a way to make training materials and training more accessible on a regular basis for all judges, once modules have been developed.

*Greffiers***Greffier profile****Seniority****Figure 9: Years of experience on the Commercial Court: Greffiers**

On average, *greffiers* surveyed have served on the commercial court for eight years, with many serving for 11 years. 15% of respondents reported that they had responsibility for registering cases in the commercial registry, with an average of nine *greffiers* assigned to this task per court.

60% of responding *greffiers* had served in another type of

court before coming to their current position—62% in a Court of First Instance, 35% in the Fez Court of Appeals, and a small percentage in other kinds of courts.

**Education and training**

Nearly all *greffiers* have completed secondary school and 64% have completed university. There is no one path to becoming a *greffier* however. About one quarter of *greffiers* studied literature, about 40% studied private law, and most of the others studied public law, sharia law, or business administration/ accounting.

**Job Functions**

*Greffiers*, or court clerks, are government civil servants (*fonctionnaires*).<sup>16</sup> There is a manager of *greffiers* (the *chef des greffiers*), but court presidents also provide general oversight. *Greffiers* may be reassigned by either the *chef* or the president, and in some courts assignments are based on caseload rather than individual expertise.

The clerk office (*greffe*) for each Commercial Court serves several key functions; the key categories of job functions for clerks (*greffiers*) include: procedural, administrative, managerial, and technical. The procedural category relates to the functions defined in the Code of Civil Procedure, for example the preparation of the official court record for each case, the *proces-verbal* (*PV*). These functions are generally considered the most important. On the administrative side, *greffiers* register cases, receive necessary fees, file documents, schedule hearings, provide for notifications and service of process, and manage the execution of judgments by the *huissiers*. There is a manager of *greffiers* (the *chef des greffiers*), but court presidents also provide oversight. They may be reassigned by either the *chef des greffiers* or the president, and in some courts, reassignments are frequent and appear to take place in response to fluctuating caseloads rather than individual knowledge and

<sup>16</sup> In Morocco, the *greffiers* are considered to be civil service employees (whereas in France, they are not, but rather function under ministerial order). This difference has had fundamental impact on implementing some French laws in Morocco.

expertise on the part of the *greffier*. *Greffiers* are also responsible for maintaining the commercial registry (*registre de commerce*), a function described in more detail in Part III.

Job assignments vary widely, and in many cases official job descriptions do not exist. One exception to that rule is the commercial court in Agadir, which has developed job descriptions for *greffiers* assigned to the *Registre de Commerce*.

### **Initial and Continuing Training of Clerks**

By law the ISM is also responsible for the initial training of court clerks and by law has a Director of Clerk Training; however, we understand that the programs don't reach all new clerks, who often receive on-the-job training within the courts instead. The first initial training of clerk recruits took place in 2005 at the ISM and reached 160 recruits. That same year, the ISM offered continuing training to over 1,000 clerks; in 2006, the continuing training programs reached 1,200 clerks. Foreign donors, including IBCM, the American Bar Association and the French clerk training school also provide continuing training seminars for clerks in collaboration with the ISM. In 2009 IBCM conducted limited trainings of *greffiers* on the operations of the *Registre de Commerce*.

About 40% of survey respondents reported receiving training prior to their assignment, primarily from the MOJ and ISM, although other sources were cited, including the school of *greffiers* in France. For most, trainings were about eight years ago and focused on the role of the *greffier*, computing, or the commercial court.

As was the case for judges, USAID emerged as a source for training, though far less than for judges, with 14% of *greffiers* reporting having participated in USAID trainings, primarily on bankruptcy, accounting skills and the commercial registry.

### **Evaluation of trainings**

#### ***Relevance and consistency***

Over 90% of responding *greffiers* found IBCM-sponsored trainings to be relevant to their work and completely or partially tailored to the laws and local practices of Moroccan courts.

#### ***Approach***

About 30% of *greffiers* responding to questions about past experience with USAID-funded trainings found them either theoretical or practical, while about 40% found them to include elements of both. No *greffiers* expressed a preference for purely theoretical trainings, however all respondents were interested either in practical trainings or those that combined elements of both.

#### ***Length***

Only 5% of responding *greffiers* felt that the trainings were of sufficient length to cover the material presented. A preference for longer trainings was primarily seen in Agadir, Marrakech, and Tangiers.

#### ***Training evaluation***

60% of responding *greffiers* had been assigned to cases for which trainings were directly relevant. However, 88% use their trainings occasionally or frequently in their day-to-day work and all *greffiers* found their trainings useful.

### *Desired trainings*

*Greffiers* overwhelmingly express interest in trainings on the role of the *greffier* and general computing skills. This highlights the fact that the role of the *greffier* encompasses a wide range of distinct activities for which *greffiers* may feel unprepared. In terms of technical areas, commercial court, commercial registry, and bankruptcy stand out as areas of interest. Other categories that were identified by more than one *greffier* include cash box services (*caisse*), accounting, and business assets. About 60% of responding *greffiers* stated that they have been assigned cases for which they received no formal training.

While many *greffier* functions are governed generally by statute, these functions have not been documented into standard internal procedures. *Greffiers* noted that there is a need to harmonize the way registrations are processed (new cases and updates to existing cases), both internally and externally with other courts.

### **Other issues**

#### ***Computer literacy***

Nearly all *greffiers* reported that their courts use computers, primarily to access legal documents. Other categories of use included: follow-up; legal research; and to speed up various processes. (out of 136 responding *greffiers* said that they did not use computers to support their work, while 112 said that they used them frequently. Nearly 60% of responding *greffiers* stated that they used computers outside of work.

There was not a high response rate among *greffiers* to questions regarding specific trainings on the use of computers to assist them in their work. However, among those who did respond, training in the use of computers to support case management emerged as an area of interest. Training in the use of computers for research or legal research was lower, as these are not primary areas of *greffier* responsibility.

#### ***Language***

As noted in the section on judge training, documents in French are common in the Commercial Court, thus, nearly all of the responding *greffiers* stated that they encounter a variety of languages in the documents they work with daily. Only about 20% of respondents stated that these language differences cause problems or delays, but among these, nearly all *greffiers* found that documentation in French caused problems or delays and one third stated that English caused similar problems in their work. 60% of respondents refer documents to translation frequently or occasionally. About half of responding *greffiers* have encountered difficulties arising from differences of opinion over the interpretation of certain words or phrases, or difficulties in interpreting technical business terms in the documents under review. 90% of responding *greffiers* would like to see a multi-language glossary of legal terms.

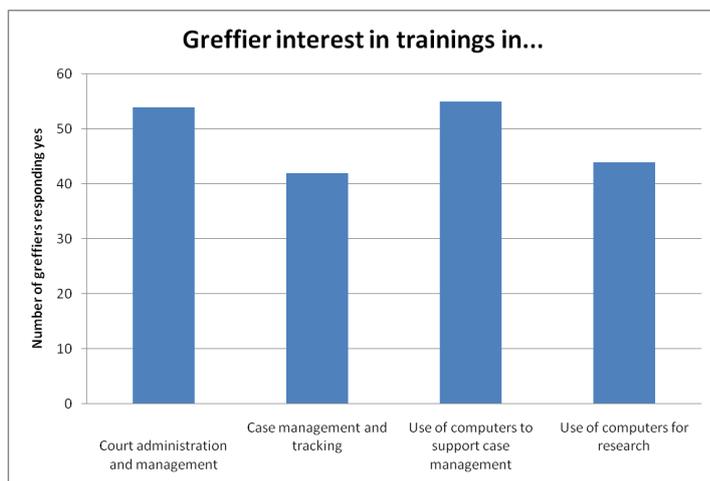
#### ***Consistency of court procedures***

Overall court management is the responsibility of the court President, who assigns cases to judges and distributes responsibilities with *greffiers*, often with assistance from the *chef des greffiers* who oversees the day-to-day activities of *greffiers*. The commercial courts in Tangiers and Casablanca prepare monthly statistical reports on the work of the courts as

part of their management duties, but most of the individuals interviewed stated that they had not had any specific training in court or case management.

Between courts, access to court decisions and information remains a problem. At the current time, decisions rendered by the Appeals Court are supposed to be accessible by the lower courts, but in fact, this is not always the case and much of the information that has been made available is significantly out-of-date.

**Figure 10: Greffier training interests**



It was very interesting to find that a small majority of *greffiers*, 68 out of the 118 who answered the question, responded that there are standard operating procedures in their courts. Furthermore, 47 of these respondents stated that, to their knowledge, other commercial courts use identical internal practices. Interestingly, answers varied significantly even within courts. For example, in Agadir, 11 respondents said no such

regulations existed, while 10 respondents stated that they did. Similarly, answers varied in Meknes, Tangiers, and the Court of Appeals in Fez, with about half of respondents in each location answering yes and half answering no. In Marrakech the majority answered yes, but 18% still responded no. This suggests that if such written regulations exist, they are not disseminated in a coherent or universal way.<sup>17</sup> *Greffiers* interviewed noted that there is a need to harmonize the way registrations are processed (new cases and updates to existing cases), both internally and externally with other courts. However, survey results were split, with the courts of Meknes and Tangiers indicating that all commercial courts already use identical processes, while the CAs in Fez and Marrakech believed their processes were unique to their court. All interviewees noted that standard procedures would be useful to clarify and guide the work of the *greffiers* and 69% of survey respondents indicated that preparation of standard procedures guiding interpretation and application of commercial laws would be useful to their work.

### ***Greffier* training Recommendations**

The surveys of Commercial Court *greffiers* revealed some important gaps in the Commercial Court system that ultimately impact the ability of the *greffier* to perform their duties in the most effective manner. Thus, in addition to trainings these recommendations include areas for further study.

### **Standardization of job descriptions and procedures**

The job description of the *greffier* is extremely broad and in most Commercial Courts not well defined (job descriptions do not exist). Furthermore, the lack of standardization of

<sup>17</sup> The differing perspectives may result from interpretation of what the written guidelines are. For example, the *greffier* assigned to the RC function in the municipal court in Inezgane indicated that he followed the procedures contained in the commercial code. On the other hand, the TC in Casablanca had analyzed the code requirements, and produced written procedures to guide both manual and computerized registration processes. This explains the high percentage of respondents from Casablanca who confirmed that internal procedures did exist.

procedures within and across courts (and division among *greffiers* in terms of these differences) presents additional challenges.

Near term reforms for the *Registre de Commerce* should include harmonization of Commercial Court processes of case management (registration, filing, information provided, etc.). Over the longer-term, the goal of harmonizing both laws and procedures should remain as a critical objective for the GOM-MOJ. Benefits to be accrued include facilitating training (through consolidated and standard course materials); consistency of internal operations (uniformity in case processing procedures and systems); consistency in interpreting and applying laws; greater transparency and accountability (clear standards exist and are applied to all); and enhanced public confidence.

### **Training institutionalized in ongoing training programs**

As with Commercial Court judges, *greffiers* expressed a desire for more standardized and extensive training. *Greffiers* would like trainings to be substantive, practical, and in general, longer, allowing increased integration of new information.

### **Training subjects**

In addition to training in the basic tasks expected of *greffiers*, there is demand for skills building in the area of use of computers to speed case management and other duties. The majority of *greffiers* are computer literate—with many using computers outside of work—so trainings could be focused on the use of specific programs to facilitate *greffier* responsibilities.

## **PART II: BANKRUPTCY**

### **Introduction**

#### **An Effective Bankruptcy System is Important to Sustained Economic Growth.**

Bankruptcy law is not just about how to deal with failing businesses. An effective corporate bankruptcy system is a vital component of the legal and institutional framework which supports the growth of credit markets and entrepreneurship in market economies. How?

**Allows the Development of Healthy Credit System.** An effective bankruptcy system establishes rules that allocate the risk of failure in a predictable manner, thereby fostering the availability of credit. For example, the mere *existence* of an effective bankruptcy system that allows a creditor to initiate liquidation or reorganization procedures provides a source of discipline in the debtor-creditor relationship and enhances the willingness of the creditors to lend in the first place.<sup>18</sup> A healthy credit market is important for sustained economic growth; banks and non-bank lenders (for example equipment leasing) play a vital intermediary role. The availability of credit is in the best interests of all entrepreneurs and of small businesses in particular.

**Supports the Collective Best Interests of Creditors.** If creditors act solely in their own interests by trying to collect their claims as soon as a debtor encounters financial difficulties, the collective best interests of the creditors are not served.<sup>19</sup> If the debtor company is still viable creditors' claims will be most effectively maximized by preserving the going concern value of the enterprise (reorganization). If the debtor company cannot be saved and liquidation is inevitable, a premature dismemberment often leads to lower returns for all creditors. In both cases, an effective bankruptcy system ensures that the burden of an insolvent borrower is shared equitably among creditors.

**An Effective Bankruptcy System Favors the Orderly Exit of Inefficient Firms.** Just as entry free of unnecessary government imposed barriers, is important to competition and to economic growth, the orderly exit of inefficient firms is also important to economic growth.

#### **What does it mean to have an “Effective Bankruptcy System”?**

An effective system includes well thought-out laws and regulations on bankruptcy and secured lending that reflect the local legal, economic, social and cultural context and effective institutions such as courts and collateral registries to implement these laws. Although not formally part of bankruptcy law per se, secured transactions law (governing the use of collateral) is part of the framework creditor rights law which facilitates the use of credit.

The bankruptcy system must apply the law in a **predictable and equitable** manner as to all stakeholders (e.g. debtors, secured and unsecured creditors, employees, shareholders, management).

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<sup>18</sup> Sean Hagan, Global Development: Insolvency Reform and Economic Policy, 17 Connecticut Journal of International Law 63 (2001), p. 64.

<sup>19</sup> Kenneth Dam, The Law Growth-Nexus (2006), p. 197.

Bankruptcy procedures should be **prompt** and should yield **efficient** results. There are wide variations around the world in the debt recovery rate—World Bank estimates that in some countries the procedures consume up to 95% of the debt while in others only 5%.

### **Bankruptcy Reform in Morocco**

Both the public and private sectors in Morocco have long recognized the importance of developing an effective bankruptcy system. As noted above, the Government of Morocco amended and recodified the Commercial Code in 1996 (Dahir no. 1-96-83 of 1 August 1996, promulgating Law no.15-95 forming the Commercial Code) and in Book V of the Code instituted a completely new bankruptcy system which incorporated modern prevention (or pre-bankruptcy) and reorganization (*redressement*) procedures inspired by French law as well as liquidation.

The new Commercial Courts and Commercial Courts of Appeal which were established in 1997 were given jurisdiction over all bankruptcy cases. As noted in the Introduction above, these specialized courts are staffed by professional career judges, in contrast with the approach taken in France, where the commercial courts are staffed by lay judges, who are local businesspeople elected by chambers of commerce to serve for limited periods of time. This distinction is significant, since French lay judges sitting on the commercial courts have extensive business experience and technical skills, and French bankruptcy procedures (which served as a model for the Moroccan law), were intended to be implemented and supervised by businesspeople rather than jurists.

Implementing a new bankruptcy system is a lengthy, resource-intensive and challenging process for a judicial system and the professionals involved, due to the complexity of the legal, financial and business issues involved and the huge economic, political and social stakes. The process of implementing Book V of the Commercial Code has been a challenge in Morocco, and the Ministry of Justice, other public sector representatives, the judiciary, bankruptcy professionals, lawyers, the business sector, the banking industry, academics, the press, other stakeholders, bilateral donors and have worked hard over the last five years or so to identify the areas where the bankruptcy system can be improved and have begun designing the needed legal, regulatory and institutional reforms. Some gaps in the law (*vide juridique*) for example have already been resolved by Commercial Court judges and appellate judges through decisions (jurisprudence)<sup>20</sup> or through improvements in case management and court policies (*pratique judiciaire*). Other issues have been the object of studies and assessments by Moroccan legal and banking experts<sup>21</sup>, assessments by bilateral cooperation projects<sup>22</sup> and multilateral development banks<sup>23</sup>, or have been raised in press articles<sup>24</sup> and other public fora.

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<sup>20</sup> E.g. case law on the definition of insolvency (*cessation de paiements*).

<sup>21</sup> E.g. Dix ans d'application du système des difficultés des entreprises : Quel bilan ?, Numéro spécial de la Revue marocaine de droit, d'économie et de gestion, No. 53 (2008).

<sup>22</sup> E.g. The USAID-funded Project for the Modernization of Commercial Laws and Commercial Courts (2002-2005), which conducted an assessment of the commercial law framework in Morocco and organized a conference on bankruptcy reform in 2005 which was entitled "Bilan de 8 ans d'application de la nouvelle législation des procédures collectives au Maroc."

<sup>23</sup> E.g. Banque Mondiale, Rapport sur l'observation des normes et codes (RONC) Maroc, Insolvabilité et droits des créanciers, Septembre 2006

<sup>24</sup> E.g. Adam Berrada, Droit des faillites, Une loi « détournée par les escrocs »?, L'économiste, 20 janvier 2009 ; Saad Benmansour & Fadel Agoumi, Redressement judiciaire : les banquiers s'inquiètent !, La vie éco, 29 juillet 2005.

Accordingly there is today in Morocco not only an ongoing discussion on the topic among legal and business experts, but there is a consensus on the need for reforms as well as on some of the specific legal and business issues which the reforms should address. The IBCM Program's work in the area of bankruptcy law reform has been based on both a thorough understanding of the research and publications that are available and perhaps more importantly, on extensive work and formal and informal interviews and discussions with Ministry officials, Commercial Court judges, bankers, business people, lawyers and other stakeholders.

### **IBCMs Support to Bankruptcy Reform**

USAID has long supported the Government of Morocco's efforts to strengthen its bankruptcy system, including extensive programming through the USAID-funded Project for the Modernization of Commercial Laws and Commercial Courts (2002-2005), which conducted detailed assessments of the commercial law framework and organized a conference on bankruptcy reform in 2005 which was entitled "*Bilan de 8 ans d'application de la nouvelle législation des procédures collectives au Maroc.*"

From the start, the USAID IBCM Program has included technical assistance and training activities aimed at strengthening the bankruptcy system and supporting the Government of Morocco's efforts to design and implement an effective bankruptcy reform process. This section provides an overview of the IBCM programs between 2005 and 2009 and outlines specific recommendations.

### **Judge & Clerk Training 2005-2006**

As set out in detail in Part I above, after identifying bankruptcy law, accounting and related banking and corporate finance law as areas where Commercial Court judges and (with respect to accounting) clerks were requesting continuing training, the IBCM Program, in collaboration with the Ministry of Justice and the ISM designed and implemented a series of training programs in these areas.

**Table 5: Bankruptcy Law, Banking Law and Accounting Skills Training offered to judges and clerks in 2005-2006 by the IBCM Program**

<b>Topic</b>	<b>Trainees</b>	<b>Jurisdiction</b>
Bankruptcy Law	Judges	Casablanca, Rabat, Tangier
Banking Law	Judges	Rabat
Banking / Corporate Finance	Judges	Rabat, Casablanca, Tangier
Bankruptcy Accounting	Judges	Casablanca
Bankruptcy Accounting (On-the-job training)	Judges & Clerks	Tangier, Rabat

### **Proposed Amendments to Book V of the Commercial Code (2007)**

In 2006 the IBCM Project hired a law professor at the Law Faculty of Mohammed V University Souissi in Rabat, Prof. Ahmed El Hajjami to undertake a study of the text of Book V of the Commercial Code and to prepare proposed amendments. After interviewing a number of Commercial Court judges, reviewing earlier studies and international bankruptcy standards and comparative legal analyses, Prof. El Hajjami prepared a report with detailed proposed amendments to Book V which was finalized and published in 2007. The review committee included representatives of the Ministry of Justice, of the CGEM, an advisor to the Supreme Court and a legal consultant.

The approach taken was to retain the basic procedures while proposing a number of technical amendments to address shortcomings in the application of the law.

The proposed amendments primarily address the **prevention** phase, with a number of proposed improvements to this initial phase. The proposed amendments also recommend a number of harmonizations of the text of Book V with other laws such as the Labor Code, and technical amendments relating to procedure and jurisdiction. No substantive amendments to the reorganization (*redressement*) or liquidation procedures were proposed.

The report recommends two significant amendments relating to bankruptcy proceedings. The first is that **two syndics, rather than one, be appointed**, one to represent the creditors and one to represent the debtor company (Art. 637). This amendment would alleviate the task of syndics, who are currently required to represent both the debtor company and the creditors—a very difficult task given the conflicting interests. Note that many commentators suggest increasing the role and power of the creditor representative, rather than creating a second “syndic”; but the underlying issue is the same.

The report also recommends **improvements to the notification to creditors** under Art. 686 that they must file their claims (*declaration des créances*), to ensure that all creditors are given adequate notice; likewise Prof. Hajjami proposes amendments to Art. 690, protecting creditors who were not given notice from losing their claim (*forclusion*).

The report with the proposed amendments was widely circulated and is available on the IBCM Program’s website; it is expected that a number of these amendments will be incorporated in the upcoming reform process.

### **2008 Interviews with Key Stakeholders in Bankruptcy Reform**

Since bankruptcy procedures impact a wide range of stakeholders, the IBCM Program sought to expand on the studies conducted in 2007 by conducting interviews with bankers, the bankers association (GPBM), Commercial Court judges and Ministry of Justice and Ministry of Commerce, Industry and New Technologies officials.

The interviews were structured around a number of open-ended questions relating to the following topics:

1. What are the primary goals of the bankruptcy system and how should they be ordered? (reimbursing creditors, protecting jobs, reorganizing debtor companies, eliminating inefficient firms)
2. What are the problems with the implementation of prevention procedures (including conciliation)?
3. What are the main areas for reform relating to the rights and participation of creditors?
4. What are the main areas for reform relating to the rights and participation of debtor companies?
5. What are the main areas for reform relating to the rights and participation of the other stakeholders in bankruptcy procedures (employees, managers, shareholders)?

6. What are the main areas for reform relating to the institutional / professional actors in bankruptcy, including the *syndics*, the Commercial Courts, the auditors, lawyers.
7. In practice, what are the key issues relating to reorganization (*redressement*) and liquidation;
8. Are there any other aspects of the law or its implementation that are significant?

The interviews allowed the IBCM team to get a much broader scope of perspectives on the bankruptcy reform process and to identify a number of areas for further study. The input from the interviews was incorporated into the Report published by the IBCM Program in late 2008.

### **Resource Binder & IBCM Web Site (2008)**

In the last five years or so considerable work has been done by international organizations, multilateral banks and bilateral donor agencies to develop a comprehensive set of standards for national bankruptcy regimes, as well improved assessment methodologies. The United Nations Commission on International Trade Law (UNCITRAL) published its “Legislative Guide on Insolvency Law” in 2005 and the World Bank, in coordination with UNCITRAL, revised its “Principles and Guidelines for Effective Insolvency and Creditor Rights Systems” in coordination with UNCITRAL that same year.<sup>25</sup> These detailed recommendations relate to the legal, institutional and regulatory frameworks, and are sufficiently broad to apply to both civil and common law jurisdictions. The European Bank for Reconstruction and Development (EBRD) has established standards relating to bankruptcy trustees (*syndics*).<sup>26</sup>

New assessment methodologies have also been developed, based in part on the standards. The World Bank / IFC’s bankruptcy assessment methodology is known as ROSC (Reports on the Observance of Standards and Codes). As noted above a ROSC was prepared for Morocco in 2006, the results of which were reviewed for this memorandum. As part of the Seldon Project implemented by Booz Allen Hamilton, USAID has also developed a sophisticated Commercial Law Assessment methodology, which includes bankruptcy legal, institutional and regulatory frameworks.<sup>27</sup>

The advantage of these international standards and methodologies is that they are generally policy neutral and not specific to common law or civil law systems. Certain international standards, such as the EBRD’s guidelines for the regulation of bankruptcy professionals, address issues which are especially important in the Moroccan context, namely the regulation of the *syndics*. The disadvantage of these international standards is that they tend to be general, and it is sometimes difficult to transfer the recommendations to specific legal, regulatory or institutional reforms.

In 2007 the IBCM Program put together many of these international resources and comparative materials in binders and provided copies of these binders to a number of

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<sup>25</sup> See Terence C. Halliday, Legitimacy, Technology and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead, 32 Brooklyn J. Int’l L. 1081 (2007).

<sup>26</sup> European Bank for Reconstruction and Development (EBRD), Law in Transition Online: Making Bankruptcy Work (2007).

<sup>27</sup> [www.bizlawreform.com](http://www.bizlawreform.com). Copies of completed Commercial Law Reform Assessments are available for a number of countries; however the actual methodology is not publicly available.

stakeholders in the bankruptcy reform process. These resources are also available on the IBCM website at [www.climatdesaffaires.com](http://www.climatdesaffaires.com).

### **Report on Bankruptcy Reform in Morocco (2008)**

This report, published by the Program in December 2008 and widely distributed to public stakeholders, the banking sector, business representatives, and academics and to other stakeholders, was intended to support the bankruptcy reform process which the Kingdom of Morocco has embarked on. It is addressed to all the stakeholders engaged in this important reform process, including ministry officials, legislators, judges, court staff, academics, businesspeople, bankers, and legal professionals and is intended to identify key issues in the reform process and discuss possible approaches.

It is important to note that this report does not set out proposed legislative amendments as was done in the 2007 Report mentioned above; nor does it recommend particular approaches. Rather it is intended to accompany the ongoing efforts of Moroccan experts working to improve the bankruptcy system by highlighting available international and comparative resources and noting some of the challenges encountered during the reform process in Morocco and in other countries.

Part I of the report outlines general considerations, strategies and resources relating to **the bankruptcy reform process itself**. Under the heading of “Recommendations / Next Steps” in each subsection of Part I, possible actions or next steps are set out. Part II discusses some of the **specific legal, regulatory and institutional reforms** which likely will need to be addressed.

The key points raised in the report are summarized below:

#### *Part I: The Bankruptcy Reform Process.*

A key priority is to ensure that the reform process is participative and transparent and that all private and public sector stakeholders are involved. For example: public hearings, informal forums and workshops can be held and written comments on draft legislation and regulations can be solicited. Rather than having independent groups and donors working separately on draft laws and regulations, the process should be collaborative and open.

Sufficient resources should be allocated to the reform process, and the challenges of bankruptcy reform should be taken into consideration: bankruptcy reforms are far more complex and controversial than most commercial law reforms.

A key early decision will be to agree on the scope of the reform: whether to amend and improve the existing system or to adopt an entirely new framework, or to add a third type of procedure which adopts different economic incentives. We note that as of mid-2009 the general consensus in Morocco appears to be that the reform will retain the same basic framework; it does not appear that there is interest or the resources available for a major change or for the introduction of entirely new procedures such as the “*sauvegarde*” procedure recently adopted in France.

Technical assistance from foreign donors can provide resources and advice, but the assessment, design, drafting and implementation of the reforms should be undertaken by national experts. The lessons learned of the 1996 reform, which looked exclusively to French law, should be carefully retained.

The reform process should address the **entire bankruptcy system**: this means the **regulations** and the implementing **institutions** as well as the text of the **law**. In 1996 the reform was largely limited to the law and the resulting absence of a regulatory framework and missing implementing institutions (such as supervisory body responsible for the quality of the work performed by *syndics*) has slowed the implementation of the bankruptcy system. Indeed, many existing shortcomings in the bankruptcy system can be addressed in *décrets d'application* and/or through training and regulation of bankruptcy professionals, judges and court staff, rather than through amendments to the law.

The **Commercial Courts are the primary implementing institution** for the bankruptcy system. Thus it is essential to identify ways of improving the institutional capacities of the commercial courts to process bankruptcy cases through improved internal case management and specialized training for judges. Strengthening the court system will also require obtaining the most extensive and up to date statistics available on bankruptcy cases in the Commercial Courts.

### *Part II: Specific Issues*

Perhaps the single most important and challenging issue for the reform of the Moroccan bankruptcy system is to find a more **equitable balance between the rights and obligations of creditors and those of debtor companies**. The economic, social and political stakes are enormous. Considerable work has been done by Moroccan experts in terms of proposing amendments and practical reforms to correct provisions that may inequitably favor debtor companies. International and comparative resources can also provide guidelines. Ultimately, however, how to balance these rights is **major policy decision** that requires debate and negotiation among all stakeholders

A priority will clearly be identifying regulatory and institutional reforms targeted at improving the selection, training and supervision of **syndics**.

Considerable research has already been undertaken by Moroccan experts to evaluate ways of improving the existing **prevention, redressement and liquidation** procedures. Reformers should build on this work, and on the international and comparative resources available, but further research and debate will likely be necessary.

It would be useful to identify economic **incentives** and legal mechanisms (including mediation) that encourage the parties to a bankruptcy case to negotiate and settle claims out of court.

### **2008 Judicial Training Survey Questions Relating to Bankruptcy**

In the survey on judge and clerk training conducted by the Program in 2008 (see above in Part I), 80% of responding judges found that there are elements of the Commercial Code that they found difficult to implement. This relates primarily to bankruptcy (although other areas mentioned include trademark and patent law, the law on commercial courts and other procedural and substantive areas of the law).

This survey result confirms the importance of the bankruptcy reform work supported by the IBCM Program, as well as the need for more training in this area.

## **May 20, 2009 Conference on Bankruptcy Law Reform**

In early 2009 the IBCM Program and the Department of Civil Affairs of the Ministry of Justice, led by its Director, Mr. Brahim Lisser, started discussions relating to collaborating on the organization of a national conference on bankruptcy reform.

The primary goal of the conference was to provide a forum for discussion among key stakeholders—commercial court judges, bankers, lawyers, bankruptcy professionals, business sector representatives—on the bankruptcy system and the needed reforms. Because the IBCM Program was able to identify international experts on bankruptcy to participate, the conference also provided an opportunity for international best practices to be presented.

The MOJ and the Program agreed that the conference would focus on a limited number of topics, rather than on bankruptcy law reform in general, to allow a more in-depth technical discussion. Three topics, which had been highlighted in the December 2008 IBCM Report on Bankruptcy Reform, were eventually selected: 1) Participation of creditors in the reorganization process, 2) the role of the bankruptcy trustee (*syndic*) and 3) The “prevention” or pre-bankruptcy phase. The entire preparation process involved extremely close collaboration between the Program and the Ministry of Justice.

The conference was held at the ISM’s new conference center in Rabat, on May 20, 2009 and was attended by over 100 judges, businessmen, bankers, lawyers, bankruptcy professionals and academics.

### *Opening Session*

The General Secretary of the Ministry of Justice, Mr. Mohammed Ledidi, and the Acting United States Ambassador, Deputy Chief of Mission Mr. Robert Jackson opened the day-long conference.

Mr. Ledidi highlighted the ongoing assessments and research which the Ministry of Justice and the Commercial Courts had undertaken in the area of bankruptcy procedures, reflecting the general consensus that this was an area where improvements were warranted. Mr. Ledidi also recognized the long-term collaboration between the Ministry of Justice and USAID.

Mr. Jackson’s opening presentation focused on the important role which an effective bankruptcy system plays in a modern, market-based economy, including fostering a healthy credit system and permitting the orderly exit of inefficient firms. Indeed, the existence of an effective bankruptcy system is one of the factors considered by foreign investors when evaluating direct investments in a country, and the World Bank has chosen “Closing a Business” as one of its “Doing Business” indicators. Mr. Jackson also emphasized the importance of establishing “early alert” mechanisms to allow the early detection of financial problems, to allow the business and its principal creditors to take steps to try to avoid a bankruptcy filing. Mr. Jackson also recognized the productive collaboration between USAID and the Ministry of Justice.

Following the opening session, the conference participants then addressed the three topics in separate sessions, with formal presentations by panel members followed by comments and questions from the audience.

*Panel 1: Creditor Participation in Reorganization Procedures*

This panel's goal was to analyze the level of creditor participation in corporate reorganization procedures in Morocco, both in theory and in practice, in order to address concrete problems in this process and to discuss potential judicial, regulatory and institutional reforms. The panel was moderated by **Mr. Rémy Kormos**, Coordinator of the IBCM Program's legal and judicial reform component and an international business lawyer and commercial law reform expert.

**Mr. Mohammed Saber**, President of the Marrakech Commercial Court, presented a number of key issues relating to the participation of creditors in reorganization procedures. These included shortcomings in the **claims filing process** (*déclaration des créances*) set out in Arts. 686 and 690 of the Commercial Code which sometimes result in creditors--who through no fault of their own are not given adequate notice-- being excluded from the bankruptcy procedure altogether. Mr. Saber also raised the issue of **abusive bankruptcy filings** by debtor companies, intended solely to allow the debtor to benefit from the automatic stay (*suspension des poursuites*), which result in a loss of confidence in the system by many affected creditors.

The panellist also discussed practical problems relating to the consultation process by trustees, who are required to consult creditors on possible reorganization approaches, but often do not do so. Finally, Mr. Saber raised issues relating to creditors who lend money to a company in bankruptcy proceedings (**post-petition credit**, or "new money" which is essential to the implementation of a reorganization plan), in particular the absence of clear rules relating to priority vis-à-vis earlier secured creditors.

**Mr. Saïd Berbal**, General Counsel (*Responsable des Affaires Juridiques*) of a leading Moroccan bank, the *Banque Populaire*, and a member of the *Groupement Professionnel des Banques du Maroc* (GPBM) presented the viewpoint of banks, which as he pointed out, are the primary creditors in Morocco and often provide the sole source of corporate finance. Mr. Berbal emphasized that in recent years the banking community had noted a significant **improvement** in the implementation of bankruptcy procedures by the Commercial Courts and bankruptcy professionals; for example he noted that the courts have now established clearer standards for determining whether a company is insolvent (*suspension des paiements*), and judges now start liquidation procedures more promptly once it is clear that a company cannot be reorganized.

Mr. Berbal cited abuses by bad-faith debtor companies, who **abuse the system by filing fraudulent bankruptcy petitions**, and emphasized the need to find mechanisms to close these loopholes and to enforce the sanctions against executives. Mr. Berbal, like several other participants, also indicated that problems with **claims filing** (*déclaration des créances*) were significant and often hindered participation by creditors in reorganization proceedings; in particular he recommended that bankruptcy trustees be obligated to notify creditors even if the debtor company failed to list a creditor. Other issues raised included problems with determining interest rates under Art. 660, problems establishing priorities relating to post-petition financing ("new money").

A major impediment to effective participation by creditors in reorganization procedures is the **absence in the current law of effective mechanisms for creditor representation**; in practice the creditor representatives (*contrôleurs*) do not speak for the body of creditors in a bankruptcy proceeding, nor does the bankruptcy trustee, who must wear several hats. This is accordingly a key area for reform; Mr. Berbal emphasized that

the banks are not only the major creditors (and thus have an interest in the outcome of the bankruptcy), but are also usually in a position to help in both the diagnosis and resolution of the financial situation of the debtor company, because they have the financial expertise and because they have long-standing relationships with their clients and knowledge of their business. For example, Mr. Berbal indicated that the preparation of reorganization plans (*plan de redressement*) was left entirely to bankruptcy trustees and too often the plans were not true business plans based on the actual financial situation of the company and the specific business, but simply fill-in-the-blanks restructuring of the debts. Secured creditors such as banks should be involved in the preparation and approval of reorganization plans, as they are in other jurisdictions.

The presentations were followed by a lively debate and numerous questions relating to the themes raised in this panel.

*Panel 2: The Role of the Syndic (Trustee or Administrator) in Corporate Insolvency Procedures*

*Syndics* are an integral part of corporate insolvency procedures in Morocco. They play an essential role in reorganization, sale of the business or liquidation procedures and are tasked with various different functions and representing several different parties simultaneously.

However, their legal status, necessary qualifications, selection criteria, remuneration and oversight are not defined in the law and there are no implementing decrees or regulations. The Commercial Code specifies only that the court appoints the *syndic*, that the syndic can be a court clerk (*greffier*) or any other person selected by the court (Art. 568) and that the court can replace a syndic under certain circumstances (Art. 644). In practice, Moroccan courts generally appoint a court clerk to serve as syndic in liquidation cases (in which case no supplementary compensation is paid), and generally appoint a court-approved accounting expert in reorganization cases (such private sector professionals are paid by the court for their services). Apart from the supervision of the examining judge (*juge commissaire*) and the court in the specific case, there is no regulatory or disciplinary body responsible for the oversight of *syndics*.

This panel's goal was to address these issues and discuss possible reforms. The panel was moderated by Mr. El Hassan El Ghassem, First President of the Casablanca Commercial Court of Appeal and featured four presenters.

**Mr. Robert Sanderson**, is President of *INSOL International*, the international association which represents bankruptcy professionals and a Senior Consultant with KPMG; he has over 30 years of experience in corporate restructurings, sales of distressed businesses and is an international expert on bankruptcy.

In the first part of his presentation, Mr. Sanderson provided an overview of three key areas relating to trustees or administrators: (1) **Qualities** (business/management knowledge, legal knowledge, experience, personal qualities); (2) **Roles / Functions** in liquidation and reorganization (e.g. protecting the interests of stakeholders, preserving the value of the estate, bridging different constituencies; and (3) **Remuneration** (how to compensate trustees for their work: time-based vs. commission-based, factors that can determine quantum). Mr. Sanderson emphasized that the functions of the trustee vary significantly depending on whether the debtor company is in reorganization or liquidation. For example, in the US, trustees are rarely appointed in reorganization cases

as the existing management is kept in place to design and implement the reorganization plan under the court's and the creditor's supervision (debtor-in-possession).

After explaining these principles, Mr. Sanderson then illustrated how bankruptcy trustees are selected, licensed, supervised, remunerated, trained and disciplined in three countries: **Canada, the US and the UK**. This comparative presentation highlighted the variety of approaches that can be taken as well as the considerable variations among these three countries despite shared legal traditions. For example, the US, the judiciary (specialized federal bankruptcy judges) plays a very active role in bankruptcy proceedings and in providing oversight of the trustee's work. In contrast, in the UK the courts play a much smaller role and creditors are often in the driver's seat. In all three countries bankruptcy trustees are **private sector professionals**, and **all three have chosen to establish a regulatory framework and supervisory bodies** to ensure that bankruptcy trustees perform their important functions competently and honestly.

**Ms. Khadija Benjelloun**, a judge sitting on the Rabat Commercial Court and an expert on bankruptcy law, presented a candid evaluation of the issues and challenges relating to the work of *syndics* in bankruptcy cases in Morocco today, and proposed specific reforms. Ms. Benjelloun started by acknowledging that *syndics* have a very difficult role to play, given the absence of a professional status and absolutely no guidance or regulations.

She advocated for establishing regulations in several areas: requirements that *syndics* have both **business/financial and legal skills**, that a **professional, full-time corps of *syndics*** be developed and that standards relating to the **remuneration** of *syndics*, with fees (*indemnités*) and performance-based incentives (*primes de rendement*).

In counterpoint to ensuring that *syndics* are properly and transparently compensated, Ms. Benjelloun advocated for the establishment of **supervisory bodies and disciplinary rules**, to ensure that they **perform their duties** as set out in the law (e.g. to prepare thorough reports, to share financial information on the debtor company to the creditor representatives (*contrôleurs*), to obtain input from creditors, to meet deadlines) and to prohibit *syndics* from abandoning a case after accepting the appointment. Rules relating to professional liability for malpractice and criminal liability were also cited.

In conclusion, Ms. Benjelloun noted that all the participants in a bankruptcy proceeding—the debtor company's management and counsel, the creditors, the creditor representatives, the clerk's office and the judge—as well as the *syndic* must perform their assigned functions assiduously in order for the system to function.

**Mr. Karim Mouttaki**, a business lawyer and Vice-President of the *Confédération Générale des Entreprises du Maroc* (CGEM) Legal Commission, also indicated that the current law provided insufficient guidance for and supervision of *syndics* and requires *syndics* to represent conflicting interests simultaneously while remaining neutral, an extremely difficult task. Mr. Mouttaki noted that in reorganization procedures it was often impossible for a *syndic* to fulfil all his duties vis-à-vis the creditors and the court while at the same time assuming management functions for the debtor company—serving as *chef d'entreprise*.

Specific reform suggestions include clarifying and **reinforcing supervisory mechanisms, professionalizing *syndics***, allowing the appointment of **corporate entities** (*personnes morales*) as *syndics* for larger or more complex reorganization cases,

establishing **funding mechanisms** through the court fees to adequately compensate *syndics*, and revising procedures to encourage ADR techniques and negotiation more generally (*pour un processus plus amiable*).

This panel ended with a presentation by **Mr. Ahmed Khardal**, a court approved expert and practicing *syndic* based in Casablanca. Mr. Khardal, speaking from the point of view of a *syndic*, also emphasized the enormous pressures put on syndics under the current law by virtue of **having to represent both the debtor and the creditors** and because of the centrality of his or her role in the bankruptcy process.

Mr. Khardal provided a comprehensive **overview of all of the syndic's duties** under the law and in practice, including evaluating the debtor company's financial situation, verifying the list of creditors, contacting the creditors, reviewing and certifying claims and other documentation, preparing the Syndic Report, evaluating and proposing a possible solutions (reorganization, liquidation, sale), reviewing of all the debtor company's contracts to determine which to continue and which to cancel, consultation with the debtor company's management and with creditor representatives, in the case of reorganization developing a reorganization plan or in the case of liquidation arranging for the sales of assets (*vente aux enchères*).

In addition to considering a different allocation of responsibilities among the actors in the bankruptcy process (such as strengthening the power and role of *contrôleurs*, Mr. Khardal also advocated providing more legal protection and independence for syndics.

Mr. Khardal indicated that the **Moroccan Association of Syndics** was preparing proposed amendments to Book V to provide an improved legal framework for the syndic's work.

The discussion session which followed indicated that there was a general consensus that 1) the **allocation of responsibilities** among the various actors in bankruptcy procedures (*syndic*, *contrôleurs*, creditors, court etc.) should be re-evaluated, 2) that there are considerable **differences between reorganization and liquidation** procedures which should be reflected in the legal and regulatory framework, and 3) that **clear regulations and effective supervisory institutions** relating to the qualification, training, discipline, supervision and compensation of syndics were needed. The moderator, Mr. El Ghassem, also advocated careful comparative studies of the experience in other countries.

### *Panel 3. The Prevention Procedure*

A "rapid alert" system is provided for in the law as a way to identify companies in financial difficulty before they become insolvent (Arts. 546-559). The *internal prevention* procedure allows the auditors (*commissaires aux comptes*) or partners/shareholders (*associés*) of a company to formally notify the company president (*chef d'entreprise*) of financial problems so that preventative measures can be attempted before bankruptcy proceedings are commenced. The *external prevention* procedure allows the president of the Commercial Court to mandate mediation and/or encourage negotiations between the debtor and its main creditors for a short period of time, again in an effort to avoid a bankruptcy filing. According to experts, both *internal* and *external prevention* procedures are very under-utilized in Morocco.

This panel, moderated by **Mr. Brahim Lisser**, Civil Affairs Director, Ministry of Justice, aimed to provide possible explanations the underutilisation of prevention procedures and possible amendments to the legal framework to encourage its use.

**Mr. Khalifa**, President of the Agadir Commercial Court, provided an overview of the existing legal provisions and then a real-world evaluation of their implementation in practice. In practice neither internal or external preventions are actually started—instead the overwhelming majority of cases go straight to a formal bankruptcy filing and then on to liquidation or reorganization.

Why? As to internal prevention procedures, neither the company accountants nor its management have an incentive to start the procedure, and there are no sanctions for failing to do so despite the presence of financial difficulties. As to external prevention, the debtor company president not only has **no incentive to start the procedure**, but has significant cultural disincentives from doing so (they want to save face, “*sauver la face*”) and no sanctions for failing to do so. And while the court has the power to order the start of prevention procedures, judges rarely have the required, up-to-date financial information to know what companies in their jurisdiction are facing a risk of bankruptcy.

Mr. Khalifa suggested a number of possible approaches. Proper **incentives and sanctions** might be developed to encourage prevention. The tax authorities (*Direction des impôts*) and/or the commercial registry (*registre de commerce*) could **analyze data about companies and notify court presidents directly** when a company reaches pre-determined financial ratios. Sources of financing or aid for struggling companies could be identified (again as in France) and made available during the prevention phase, and ways of involving creditors (in particular secured creditors) in pre-filing negotiations were also suggested.

**Prof. Andrée Brunet**, a professor at the *Université Paris-Dauphine* and an expert on commercial law, presented an overview of the French prevention procedure, which is similar to the Moroccan procedure and has both “internal” and “external” prevention procedures. In her view prevention **does not work well in France**.

Prof. Brunet recommended **linking the “alert” mechanisms** from internal prevention (usually the auditors) with the external prevention procedure, that is, having the auditors inform the commercial court directly, thus avoiding the situation where the debtor company management fails to take action and ensuring that the court is immediately made aware of a company facing difficulties.

Another problem in France is that if the debtor company should fall into insolvency (*cessation de paiements*) during the prevention phase, it ends automatically. Prof. Brunet advocated **eliminating the insolvency test** altogether and instead allowing the court to evaluate the likelihood that conciliation / negotiations will be successful (if there is a likelihood, then the prevention process should continue; if not the formal bankruptcy proceedings should commence).

#### *Closing Remarks*

**Mr. Brahim Lisser**, the Director of Civil Affairs Ministry of Justice, highlighted all of the ongoing efforts by Commercial Court and Commercial Court of Appeals judges to improve the implementation of bankruptcy proceedings and develop case law (*jurisprudence*) to fill in gaps in the current legal framework, as well as the work conducted

by the Ministry to get input from judges into the reform process and document the good judicial practices (*pratique judiciaire*). Mr. Lisser indicated that the Ministry of Justice recognized the importance of bankruptcy reform and more broadly of commercial law reform to Morocco and to economic development, and acknowledged the challenges. The need to have all stakeholders contribute to the reform process was also highlighted. In conclusion, Mr. Lisser thanked USAID and the IBCM Program and all of the participants, and indicated that additional conferences, workshops and similar events would be planned for the future in order to maintain the momentum of the reform process.

**Ms. Lara Goldmark**, Director of the USAID “Improving the Business Climate in Morocco” Program closed the conference by highlighting a few key points that had emerged from the proceedings. These included the fact that bankruptcy procedures aim to resolve **business and financial** issues as much if not more than **legal** issues. Ms. Goldmark reiterated the importance of finding ways of pushing the parties to **negotiate** and find out of court settlements and indicated that the continued development of commercial mediation in Morocco represented an opportunity, since more and more mediators have received training and are practicing. Ms. Goldmark also thanked all of the participants and the Ministry of Justice.

## Conclusion

### *The Reform Process Generally*

The **reform process must be transparent and collaborative**, and needs input from all stakeholders in the public and private sectors. There are significant economic, social and political interests involved and debate, negotiation and compromise is necessary to bankruptcy law reform.

If a single stakeholder group dominates the bill drafting process (whether it’s the banking sector, the business sector or the public sector), regardless of the fact that the law will have been voted by Parliament, the resulting reforms will not be considered legitimate and will be difficult to implement. There are numerous examples of failed bankruptcy reforms from other countries, including in the US and France, which failed at least in part because the reforms were perceived to have been dominated by a single interest group.

The other reason why bankruptcy reform should be open and collaborative is that **each stakeholder group has part of the technical expertise** and knowledge of how the process works in practice: Judges have the knowledge of how the procedures are implemented (*pratique judiciaire*) in the Commercial Courts; bankers know much about the financial aspects and can provide the perspective of creditors, businesspeople know much about specific sectors and how business entities of different sizes are best managed.

Since bankruptcy reform is technically challenging, it is necessary to leverage all available resources and technical experts; the expertise **should not be limited to legal expertise**—much of **the underlying issues relate to economics, finance, management and other disciplines**. The reform process should also address **the entire bankruptcy system: this means working on implementing decrees and working to strengthen institutions such as the Commercial Courts, as well as amending the text of the law**. Jurists have a tendency to focus exclusively on law

reform; this is yet another reason to include economists, bankers and managers in the reform process

As set out in Part I of this Final Report, **training** of judges, clerks, syndics and other bankruptcy professionals should be a priority and training should be designed and implemented in close coordination with the reform. Continuing training of experienced professionals can provide input to the reform process, and extensive training during and after the reform can help facilitate the implementation of the reforms.

There is no single “right way” to design bankruptcy procedures. Each country in the world has a unique system and there are enormous variations between countries (even within the same legal family) and variations over time. There are of course general principles and guidelines (such as UNCITRAL), but they don’t provide the specific mechanisms or solutions. The reform process must be lead by national experts, with foreign and international resources being leveraged as much as possible; likewise comparative studies of bankruptcy procedures in a variety of countries should be undertaken, rather than modeling on a single country as was done in 1996 with France.

### Specific Issues

A number of key areas for reform have been identified by Moroccan experts and the IBCM Program’s staff and consultants. These include topics identified in the 2008 Report on Bankruptcy and further analyzed during the May 2009 Ministry of Justice and USAID/IBCM Conference on Bankruptcy Reform:

- Ensuring **more active participation by creditors** in the reorganization process, and more broadly, finding an equitable balance between the rights and obligations of creditors and those of debtor companies.
- Identifying regulatory and institutional reforms targeted at improving the selection, training and supervision of **syndics**.
- Re-designing the **prevention phase** so that it is used more often, ADR techniques are leveraged by conciliators, and fewer bankruptcy proceedings are commenced.

These important topics are being studied, comparative studies are being prepared and work on proposed reforms to address these is ongoing. However, it is extremely important to note that **there are a large number of other important topics** that should also be evaluated and discussed at this stage of the reform process.

These include (but are absolutely not limited to):

- Improving the **claims filing** process (*déclaration des créances*)
- Reconsidering the **allocation of responsibilities** among the key actors (*syndics*, auditors, creditors, debtor company president, court) notably to reduce the conflicts and pressures imposed on syndics by virtue of their obligation to represent both the creditors and the debtor company.
- Improving the functioning of the **reorganization procedure** in general, in addition to issues of creditor participation and syndic competence raised above.
- Streamlining the **liquidation process**, which to our knowledge has not been the subject of much discussion or analysis in Morocco to-date.

- Eliminating the procedural and other “loopholes” which bad-faith parties abuse is also an important priority. For example, representatives of the banking sector have identified a number of such abuses and procedural games that are used to delay bankruptcy procedures. Others are well-known to bankruptcy judges, bankers and other professionals. The legal and regulatory reforms should eliminate these loopholes and ensure that the sanctions in the law and regulations are fair and applied systematically to deter abuses, fraud and corruption.

## **PART III: THE COMMERCIAL REGISTRY**

USAID originally charged the “Improving the Business Climate in Morocco” Program with working towards the modernization of Morocco’s method of registering moveable collateral. The goal was to provide small and medium enterprises with easier access to credit. Preliminary work and discussions with partners (in the form of roundtable discussions with the private sector) allowed the Program to arrive at two conclusions: (1) the modernization of the collateral registry system necessitates a modernization of the Commercial Registry and (2) updating the registry, by itself, is not sufficient to guarantee access to credit. Rather, it must be accompanied by an overhaul of the general security system and work on the legal framework for bankruptcy.

USAID plans to support the process of modernizing the commercial registry in its 2010-2015 strategy. This chapter presents the results of the Program’s preliminary studies. These findings can inform the Ministry of Justice about the key issues involved and illuminate the way forward.

### ***Economic issues require a consideration of the economic model***

When the Commercial Registry was founded in 1913 in Morocco, its main objective was to allow the government to “know” what businesses were doing, and to guarantee the enforceability (*opposabilité*) of legal actions. As commerce has developed, the information contained in the Commercial Registry has become increasingly important for business partners: bankers, suppliers, and customers. Specialized companies have begun processing this data in order to add value to the information and re-sell it. Everywhere, today, financial information on private firms is paid for and valued based on different business models. Some countries have had their information online for over 25 years, and over time this has created a large market (in Europe, more than 2 billion Euros (€) in turnover in 2008; €100 million per annum in France).

Anglo-Saxon models prefer to trust the management of the business registries to private or semi-private offices (for the last 160 years, Dun & Bradstreet, a private society, has been the global leader for business financial information). In France, court clerks (who have the status of independent legal professionals) have organized themselves to take advantage of this windfall, while the French Institute for Intellectual Property (INPI - the French equivalent of OMPIC) was able to sell information to the central registry this year.

Today, in Morocco, only OMPIC handles the marketing information for the Commercial Registry. OMPIC sells the complete registry and updates it annually for an estimated turnover of 10-15 MDH, The Ministry of Justice has no involvement; and the information is not 100% accurate. It goes without saying that a modernized Commercial Registry (that is, one with updated information that is readily available) would make the content more attractive. All that remains is to clearly define the model that best suits Morocco.

### ***The economic model infers a mode of governance and organization***

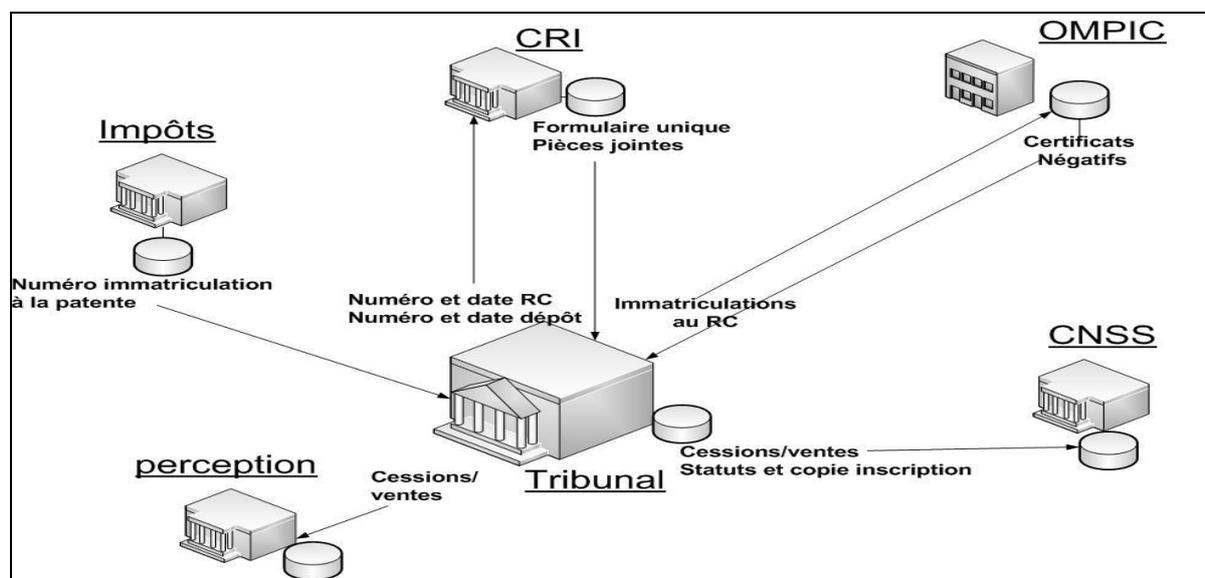
In Morocco, the law (contained in the Commercial Code) entrusts the management of the Commercial Registry to the Ministry of Justice, and each court updates trade records (registration, modification and cancellation of businesses, etc) in local registers for all

companies or establishments that fall under their jurisdiction (that of the Commercial Court of First Instance).

The Ministry of Justice determined that OMPIC would be responsible for the handling of information contained in the Commercial Registries. Some information is never centralized (as is the case with moveable collateral) because there is no simple way to transmit information from local registries to the central one. On the other hand, there is no simple way to consolidate all information about a business or establishment (this problem triggered the Program's work on the Common Business Identifier, carried out in partnership with the Ministry for Economic and General Affairs - MAEG).

Thus, the situation today is one in which clerks perform manual data entry. OMPIC collects this information manually and re-enters it, and then markets the information, without extending any benefit to the clerks (as opposed to France, where the clerks receive half of the revenue). The modernization of the Commercial Registry is likely to impact clerks and change the organization of institutional partners which currently communicate with the Commercial Registry (see Figure 11).

**Figure 11: The Commercial Registry and its institutional partners**



### **Legal rigidity is not conducive to modernization**

Today, the Commercial Code stipulates that the maintenance of the Commercial Registry is the responsibility of the Ministry of Justice, which does not allow for the evolution of regulatory practices. Considering the organization of the Commercial Registry requires a consideration of its legal status. Legislation must not only accompany the modernization process, but also allow for and stimulate broader changes that the current laws do not permit: even the input field names in forms are written in the law, and any attempt to change them is very difficult (see for example the Program's recent work on new forms for "business registration").

Moreover, the advent of modern communication methods requires a modernization of legal texts (the management of electronic signatures is still in progress in Morocco). For example, the current laws make reference to paper registers that must be updated manually. In practice, this means that when computers are available, clerks are forced to use two forms of management for information: manual and technological. Modernizing

the law takes a long time to accomplish: between consultation, development and adoption of a law, there may be three years of work necessary. This presents a formidable task: the production of a law that is relevant in a changing environment. Distinguishing the necessary content for the laws is also a consideration. This involves many questions that must be considered (see Mrs. Bahnini's 2005 report for examples of such questions, and Mr. Benay's report that provides recommendations for a complete restructuring of the security regime, or the Ministry's work towards the reform of Commercial Code Book V).

The Commercial Registry (CR) in Morocco was created by the adoption of the Commercial Code of August 12, 1913:

- It contains 9 articles that describe the organization of the CR;
- It provided for the first creation of local registries without the existence of a Central Registry;
- It does not stipulate a requirement for merchants to register with the local CR.

**Table 6: Evolution of the legal framework governing the Commercial Registry**

1913	<b>Creation of the Commercial Registry</b>
1921	<b>Creation of a central CR, and the obligation to share existing information between central CR and local CRs.</b>
1926	<b>Requirement for businesses and societies to register</b>
1962	<b>Introduction of a new formal procedure</b>
1997	<b>Implementing decree for the Commercial Registry</b>

### ***New technologies at the heart of modernization***

Today the clerk is the principal actor in maintaining the Commercial Registry, and all registrations. The majority of Courts of First Instance are not equipped with computers, and Commercial Courts host an application developed by the ministry for the maintenance of registries, but this application does not coordinate with OMPIC, nor with any other information database of the Ministry of Justice (see the report "Pre-feasibility Study on the Opportunity for the Computerization of the Commercial Registry in the Souss-Massa-Drâa Region").

Modernizing the Commercial Registry, then, implies (i) the computerization of all courts and (ii) the interconnection of registries with the database of the central registry. This must be done in light of the new organization of the registry, which creates a new legal framework, and the necessity for the agreement and formation of all actors (beginning with clerks). This would also take place at a time when the European Union (Meda II) and the Ministry of Justice are in the process of computerizing the Civil Affairs Courts. But the problem of transitioning from the paper era to the era of information technology remains.

All developed countries, for the last 10-20 years, have been developing technological solutions for the management of their commercial registries. These can be sufficient tools for measuring the relevance of new modern requirements. Today, such tools are common and unremarkable. They require the use of information technologies (computers that are connected to the internet) that allow for the updating of registries in real time, and

information that is available 24/7 from a distance. The implementation of such tools has become simple, and their deployment reduces training times for agents and future users.

The most complicated element is frequently the management of the transitional phase from manual to computerized data entry, which necessitates the treatment of existing information. At the time that the prefeasibility study in Agadir was conducted, the Program discovered that paper archives were not always well maintained. For example, for archives of businesses created before 1991 were all stored in Marrakesh. Moreover, it was necessary to reprocess had-recorded data from 1913! While this represents a colossal endeavor, other countries that have modernized their commercial registries have handled similar challenges, so why not Morocco?

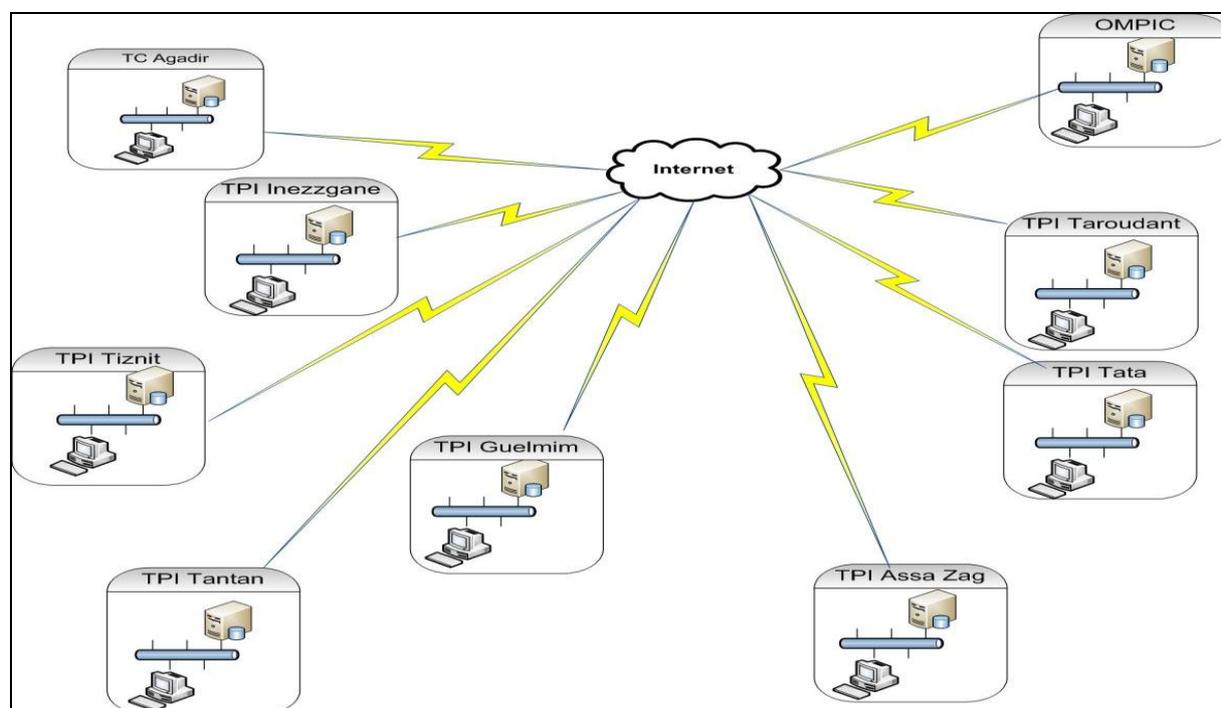
The pre-feasibility study for the Souss-Massa-Drâa region identified four possible scenarios for technological evolution, listed below.

### Scenario 1: Local Databases and a National Database

In this configuration, each court has its own local database accessed by client computers. Applications for creation, modification and cancellation, articles of incorporation and pledges filed in each local court will be entered in its own database and will be available locally for consultation and certificate issuance.

A secure connection with OMPIC will enable each LCR to regularly update the national database.

**Figure I2: Scenario I**



**Table 7: Scenario I**

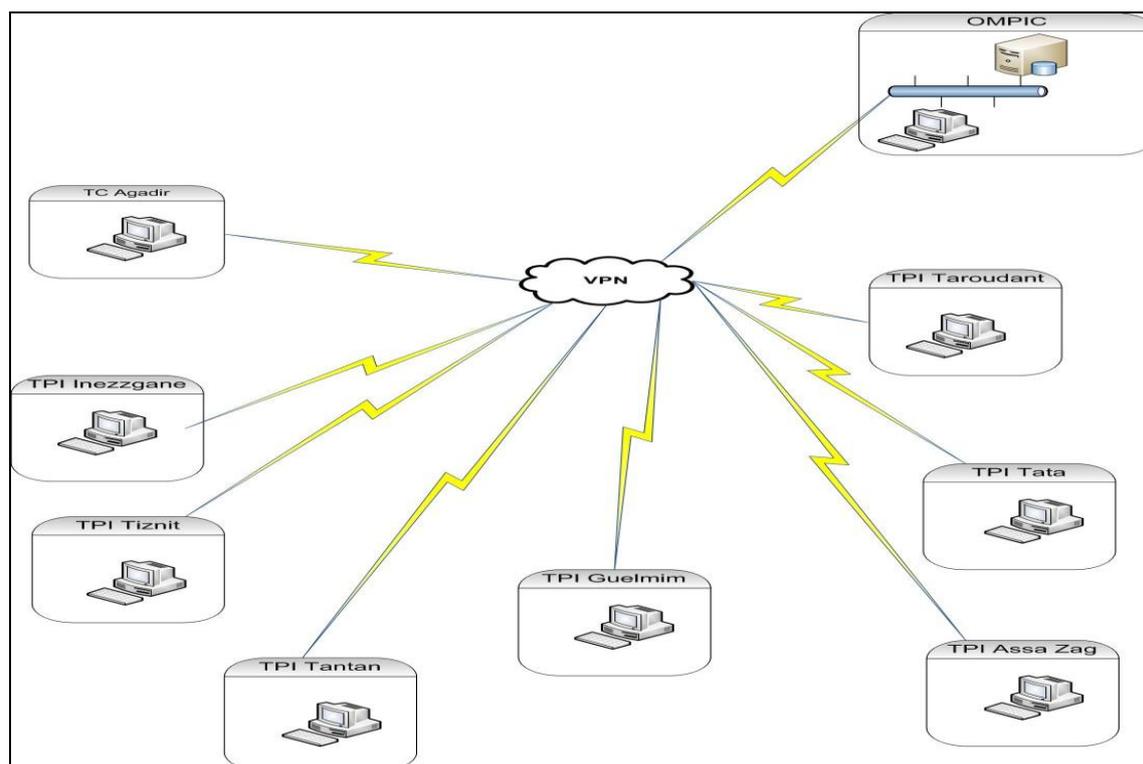
Advantages	Disadvantages
Local database available for consultation and certificate issuance.	The complexity of administering eight geographically dispersed databases.
Continuity of the system even in case of a connection failure.	The volume of transactions in the Commercial Registries of the Courts of First Instance does not justify hiring a full-time computer specialist in these Local Registries. However, the lack of a skilled IT technician on-site entails an important delay for the system restoration in case of computer failures.
The problems in one hub do not affect other hubs. For example, a computer network crash in Agadir does not affect any other courts in the region and they are still able to carry out business as usual.	The difficulty of grouping eight different conceptual models and eight different data repositories into a central database.
	The various institutional partners (OMPIC, CRI, NSSF, Tax Administration) must have a secure connection with each court to review the Commercial Registry information.
	The procedure for data backup and restoration is more complex.

A variant of this organization would include the same infrastructure at each hub, but the flow of information would not be the same. In this variation, data entries made at the local Commercial Registry would directly update OMPIC's central database. From that point on, one replication solution would feed each court's local databases.

This solution has the advantage of updating the central database in real-time, while increasing the system's availability at the Local Registries whenever OMPIC's database or the connections to the latter are unavailable.

### **Scenario 2: client workstations in every court, one national database.**

In this scenario, each local Commercial Registry will be equipped with client computers connected through a secure access to OMPIC's central database. Thus, application, modification and cancellation forms, articles of incorporation and pledge applications from each court will be entered directly into the central database, which will also be the main source for any consultations and for issuing various certificates.

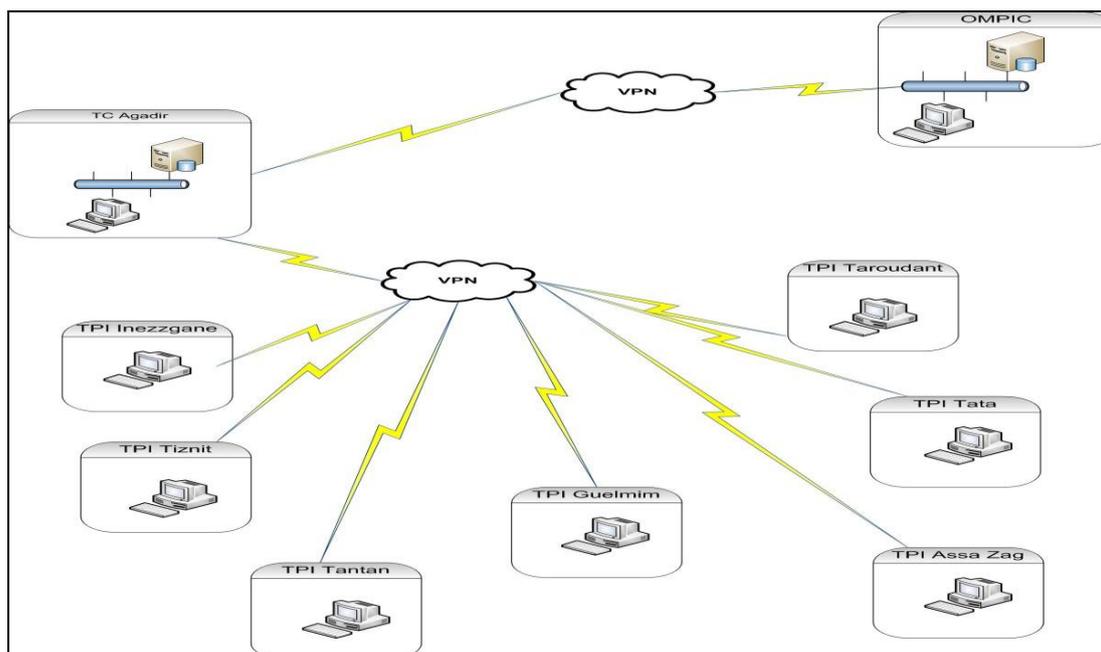
**Figure 13: Scenario 2****Table 8: Scenario 2**

Advantages	Disadvantages
<p>National database updated in real-time.</p> <p>Synchronization of the local databases is no longer necessary as no batch programs (replication) need to be regularly executed for this purpose.</p> <p>The data exchange process between partners can be streamlined by reducing the number of connections.</p> <p>The human and financial resources needed to manage the Commercial Registry's database can be greatly reduced.</p> <p>The data history of each court is available simply by logging on to OMPIC's database.</p> <p>Two important sources of information on commercial businesses--OMPIC and local Commercial Registries--which are meant to be identical are synchronized.</p> <p>OMPIC's existent online payment infrastructure can be utilized as the basis for any future online business creation programs.</p> <p>Inter-Court transactions, such as the transfer or addition of facilities, are easier to perform.</p> <p>A single conceptual data model and a single data repository optimize the data exchange process, freeing up time and resources for other projects.</p> <p>Data back-up and restoration process facilitated by using a single database, rather than the nine needed by the first scenario.</p> <p>A single coding system (activities) facilitates the consolidation of data.</p>	<p>Ownership of information stored in the central database.</p> <p>A failure at OMPIC may make the system inaccessible at the national level, if alternatives are not provided.</p> <p>A study on the performance of OMPIC servers must be done to ensure they can respond to the users' connection, consultation and modification requests.</p> <p>A replication solution of the database should be established.</p> <p>Alternative solutions to the telematic connections must be established at each partner's level (Local Registries, CRI).</p> <p>Any connection failure makes the database inaccessible to the courts, hence the need for a Plan B locally in each court. That plan will ensure the service continuity of the Commercial Registry despite crashes.</p>

### Scenario 3: a regional database, a national database, and client workstations at local CRs.

The third scenario tries to find an intermediate solution between scenarios 1 and 2, through the creation of a regional hub—a regional database regularly synchronized with OMPIC’s national database. Each of the region’s Commercial Registries will be equipped with client computers connected through a secure access to the regional database. Thus, creation, modification and cancellation forms, articles of incorporation and pledges applications made in each court will be directly entered into the regional database, which will also be the main source for any consultations and for issuing various certificates.

**Figure 14: Scenario 3**



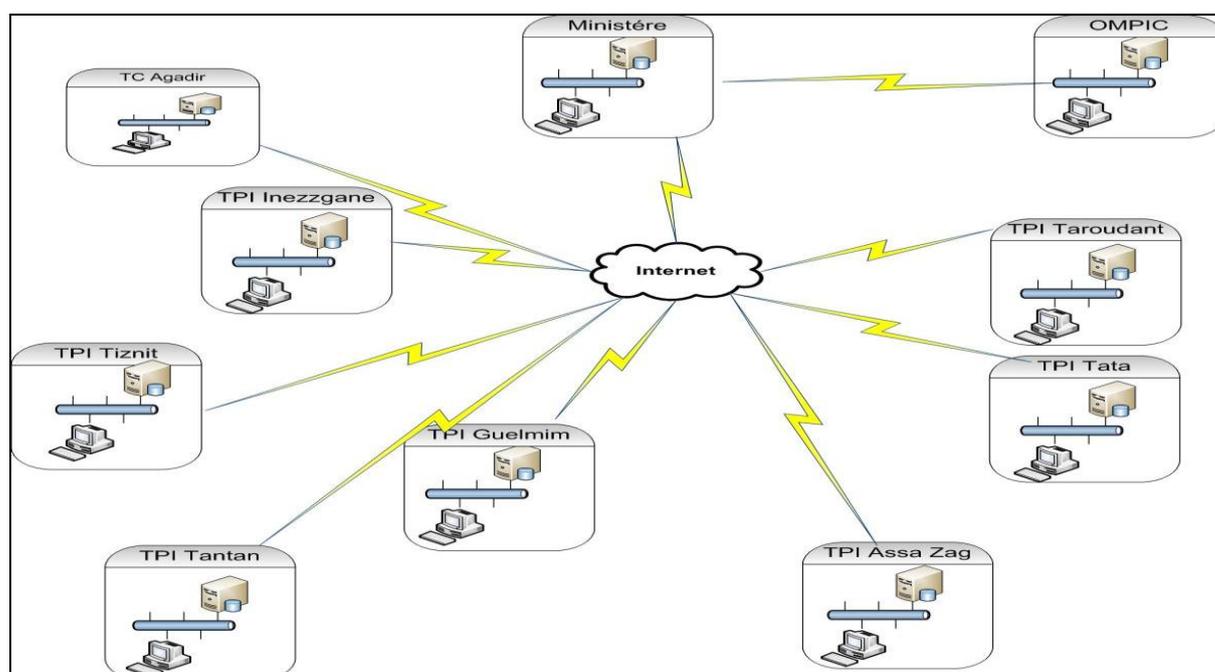
**Table 9: Scenario 3**

Advantages	Disadvantages
<p>In keeping with the country’s overall strategy, the region is the lever of economic development.</p> <p>Substantial reduction in the number of partner connections.</p> <p>Reduction of human and financial resources needed to manage the database on the Commercial Registry.</p> <p>Operations between courts in the same region, such as the transfer or addition of facilities, are made easier.</p> <p>A single conceptual data model and a single data repository per region, which optimizes the effort required to exchange data with stakeholders in the region.</p> <p>Backing up and restoring data is simpler: one database by region is required, instead of eight.</p>	<p>A failure at the regional hub, if alternative solutions are not provided, could make the system inaccessible at the regional level.</p> <p>The infrastructure of the regional hub is non-existent: an investment will be necessary for the establishment of a robust hub to respond to connection requests, consultation and modification of the database from stakeholders in the region. This may also be an advantage in that the absence of such a hub will enable the proper sizing of the necessary infrastructure.</p> <p>A replication solution, in a different site, of the regional database should be established.</p> <p>Alternative connection solutions must be established at each partner’s level (Local Registries, CRI).</p> <p>Any connection failure makes the database inaccessible to the courts, hence the need for a Plan B locally in each court. That plan will ensure the service continuity of the Commercial Registry despite crashes.</p>

### Scenario 4 : Two central databases, scattered local databases

This setup is similar to Scenario 1's, with the exception that the central database is replicated at the Ministry of Justice level. It should be noted that the Ministry of Justice has provided, through the MEDA II program, architecture similar to the database used for civil and criminal cases. In this project, the Ministry established a central site (SAN/NAS) which can also be used as a central site for the Commercial Registry's database.

**Figure 15: Scenario 4**



**Table 10 : Summary Table for Comparison**

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Central database updating delay	-	+	-	-
Administration	-	++	+	-
Exchanges with stakeholders	--	++	+	--
Compatibility with online business creation	--	++	+	--
Tolerance to the system's failures	++	--	-	++
Complexity of implementation	++	-	--	++

### Conclusion: which Commercial Registry system for Morocco?

The modernization of the Commercial Registry, which the King affirmed as a national priority in his recent speeches, depends on a parallel modernization of the judicial system. Modernization always requires political will, which can allow for dialogue: all actors must agree on goals and how to reach them, while synthesizing international experience to enrich the national strategy for modernization. Re-engineering and redesign of information systems can only happen after analyses are performed, in order to make sure expectations and deliverables match. Actors must be trained in their new roles and capacities to ensure the functioning of new processing systems.

As always, the human element is a key factor for success, not only in setting clear goals for modernization, but also in changing government and administrative practices for the benefit of all users.

## CONCLUSION

The main findings and recommendations of this Final Report relating to continuing training for judges and court personnel, bankruptcy reform, and modernization of the commercial registry are set out below.

### Continuing Legal Education / Training

Commercial Court judges in Morocco are well-versed in civil law and procedure and traditional commercial law, but are often less familiar with more technical or recently-amended business law areas such as intellectual property or bankruptcy. Due to their legal training and status as career judges (*magistrats*), these judges typically have limited non-legal skills—such as accounting—necessary to handle complex, globalized business and financial matters. In contrast, many countries have chosen to staff commercial courts with business people rather than career judges (e.g. French commercial courts) or require judges to specialize (e.g. federal bankruptcy judges in the US).

The Ministry of Justice, the ISM and the judiciary have instituted a number of initial and ongoing training programs for judges, including some addressing the specific needs of Commercial Court judges. There is a clear consensus that there is demand from judges and from the private sector (the ultimate users of the commercial court system) for more continuing training for judges. The importance of continuing training for judges and court staff was highlighted in HM King Mohammed VI in an important speech given on the occasion of the 56th anniversary of the Revolution and the King on August 22, 2009. All of the responsible institutions continue to identify ways of improving the number and quality of continuing training for judges.

USAID/Morocco has supported training for Commercial Court judges via several generations of projects, most recently under the “Improving the Business Climate in Morocco” Program. IBCM’s work in this area has been a learning process for all participants. This report summarizes the lessons learned and makes some recommendations for the future.

In 2005-2006, IBCM followed the tradition of past USAID programs in Morocco, designing and delivering training on specific commercial law topics as requested by the Ministry of Justice and Commercial Court Presidents. The courses given included: accounting for bankruptcy cases, banking law, corporate finance, and the role of banks in bankruptcy proceedings; the trainers were legal and financial experts from outside of the courts. A particularly successful experience involved the placement of an accountant inside the Casablanca commercial court, following a training given on the topic. The expert was available to judges for consultations over a three-month period.

Beginning in 2007, USAID encouraged the Program to adopt an approach which would not only deliver quality training but would at the same time strengthen Moroccan judicial institutional capacity to offer commercial law and business skills training. Given the resource limitations and the ISM’s need to focus primarily on training for new judges, the best way to achieve such a goal seemed to be an approach focusing on building trainer capacity, in the form of both subject-specific expertise and the ability to design and deliver trainings. In 2007, IBCM started working closely with the ISM and organized a workshop for commercial law trainers.

During 2007, IBCM developed a pilot training-of-trainers program focused on trademark law. The sequence of activities began with the development of a guide on trademark law (126 pp.) and was followed by the delivery of training to Commercial Court judges around the country, as well as a study tour for a group of judges, financed by the United States Patent and Trade Office (USPTO). The Program then worked with the Ministry of Justice and ISM to select four judges from this group that could become trainers. The four judges co-facilitated the next round of trainings offered to additional Commercial court judges. These judges have also become resource persons on this subject material inside their courts.

The survey conducted by IBCM in the summer of 2008 helped the IBCM Program's judicial training experts get input from commercial court judges and clerks, and provided positive feedback on the continuing training offered to-date by the IBCM program and other providers. Based in part on the survey, the decision was taken to continue investing resources in the "Four Judges" approach to training of trainers. The approach was used in the development of a Patent Law Guide (146 pp.) and training programs on patent law, training for (non-judicial) mediators, and training programs for *greffiers* on commercial registry procedures.

More specialized commercial law and business skills training is needed at all levels: (i) during the initial two-year ISM training for new judges (*attachés de justice*), (ii) prior to appointment or transfer to the Commercial Courts, and (iii) in the ongoing training programs for judges. Additional feedback mechanisms such as the development of training plans for practicing judges are also needed in order to allow judges to have more input into their continuing training. Given institutional and resource limitations, it is not realistic today to anticipate a rapid increase in the availability of such training; nor would the processes and feedback mechanisms recommended have any effect without the availability of additional training to accompany them. In the meantime, IBCM recommends that the Ministry of Justice, the ISM and the Commercial Courts prioritize one or a limited number of commercial law or business topics each year, and using some of the approaches developed over the course of the last few years by the IBCM program and its partners, support the development of high quality (1) materials, (2) training courses, (3) training of trainers, and (4) adaptation by ISM into the curriculum for new judges. If deemed appropriate, these recommendations can be implemented by the Ministry of Justice and ISM directly, as well as serving to orient other donor interventions in the area of judicial strengthening.

## **Bankruptcy**

Both the public and private sectors in Morocco have long recognized the importance of developing an effective bankruptcy system. With the remaking in 1996 of the Commercial Code (including Book V) and the establishment in 1997 of the Commercial Courts and Commercial Courts of Appeal, Morocco instituted an entirely new bankruptcy system, in both the legal and institutional sense. The system incorporates modern prevention and reorganization (*redressement*) procedures inspired by French law.

Implementing a new bankruptcy system is a lengthy, resource-intensive and challenging process for a judicial system and the professionals involved, due to the complexity of the legal, financial and business issues involved and the economic, political and social stakes. The process of implementing Book V of the Commercial Code has been a challenge, and the Ministry of Justice, other public sector representatives, the judiciary, bankruptcy professionals, lawyers, the business sector, the banking industry, academics, the press,

and donor-funded programs have worked hard over the last five years or so to identify the areas where the bankruptcy system can be improved and have begun designing the needed legal, regulatory and institutional reforms.

Some gaps in the law have already been resolved by Commercial Court judges and appellate judges through decisions (*jurisprudence*) and court practice (*pratique judiciaire*). In addition to the training programs above, IBCM contributed to the bankruptcy reform discussion in three main ways: (1) a 2007 report which aimed to help resolve some remaining gaps in the law, in the form of a report which suggested specific amendments; (2) A 2008 report, accompanied by research materials, which raised a number of issues relating to the overall reform process, such as the need for an open and transparent process in which all stakeholders have input and prioritized some of the specific reforms, and (3) supporting a continued public-private dialogue, including a conference addressing specific reforms in three priority areas: creditor participation in reorganization procedures, role of the *syndic*, and the prevention procedure. By way of illustration, a consensus appears to have been reached on a number of these issues.

- The need for a **more active participation by creditors in the reorganization process**, and more broadly, finding an equitable balance between the rights and obligations of creditors and those of debtor companies. Specific reforms to attain this goal include: improving the claims filing process and developing better mechanisms for creditor representation (for example, to allow creditors substantive input into reorganization plans).
- Identifying reforms which will establish **clear regulations and effective supervisory institutions relating to the qualification, training, discipline, and compensation of syndics**. Specific suggestions relating to this goal include: skill and training requirements for syndics, including business, finance, and law; the development of a full-time, professional corps; setting standards for remuneration, including fees and performance-based incentives; establishing a supervisory body with a disciplinary function.
- **Redesigning the prevention phase so that it is used more and more effectively**. Specific suggestions include: establishing better incentives for using, and sanctions for not following, this procedure; setting up better “alert” mechanisms, leveraging ADR techniques and the possibility of court referrals to increase the early settlement rate.

A consensus has already emerged on many of these key issues and considerable research and work has already been done; there are many other areas for reform that will need to be identified as well. It appears that a consensus has also emerged that the reforms will involve improving the existing legal framework, rather than attempting to completely redesign it or to introduce new procedures.

The ongoing public-private dialogue and the research by jurists, economists and banking experts should continue; the next phase of the reform process—the drafting of proposed amendments to the law, of implementing decrees and the development of institutional strengthening measures should start (if it has not already done so). We understand that the Ministry of Justice is expected to take the lead, with input from the Ministry of Industry, Commerce and New Technologies and private sector stakeholders. A public-private committee has been formally established to develop reform proposals, as part of

the *Pacte Nationale pour l'Emergence*, signed by representatives of the public and private sectors, in the King's presence, during February 2009.

These are only some of the areas where further research and debate is needed and where stakeholders working together in committees can develop specific **amendments to the law**, proposed **regulations** (*décrets*) and reforms to **strengthen the implementing institutions** such as the Commercial Courts.

### **Commercial Registry**

The commercial registry represents the first point of contact between a business and the government. At several points during a company's life cycle (registration, change of address, borrowing from a bank, negotiations with creditors, closing), the commercial registry serves as the primary, and the only legally recognized, source of information about businesses operating in Morocco.

IBCM was originally mandated by USAID to work towards the modernization of Morocco's system for registering moveable collateral, with the aim of increasing access to credit for small enterprises. Early diagnostic work by the Program and discussions with partners showed that (1) the moveable collateral registry system is only one of the many functions of the commercial registry, and (2) the Ministry of Justice requested that investments in modernization (i.e., administrative simplification and information technology) of the commercial registry could not be "telescoped", i.e., limited only to the information concerning collateral, but should address the overall functioning of the entire registry. A legal diagnostic also outlines the regulatory and legal reforms that would be needed to make a modernization of the collateral registry system effective, that is, contain incentives for banks to lend. Without the legal reforms - and banks participating in two roundtables in Casablanca and Agadir confirmed this - the availability of real-time, reliable information on liens on movable collateral would not lead to an increase in lending.

An information technology diagnostic presented several possible modernization scenarios for the commercial registry, and identified a critical issue on which work was begun. The commercial registry data is centralized via OMPIC, with up-to-date information available at the national level 60 days after changes are made at the regional level. The identification number used by the central commercial registry was (is) not the same as the number used by other Moroccan government agencies. Agencies such as the tax and social security authorities have no way to compare their information to the commercial registry's data, and therefore the government of Morocco was (is) incapable of identifying (for sure) an enterprise - i.e., linking its correct name to its correct address and legal status. IBCM addressed this problem by initiating work under its regulatory reform component (see the Program complete final report- volume III) on a proposal entitled the "common business identifier". IBCM supported the work of an interministerial committee led by the Ministry of Economic and General Affairs. Agreement has been reached to institute a communication protocol (and information system) which will allow Moroccan government agencies to trade information about enterprises. A pilot test was successfully deployed at the court of first instance in Mohammedia. Additional work linked to modernizing the commercial registry included training courses for *greffiers* on the registering a business procedure (following the 'four judges' training of trainers model) and a diagnostic (flowchart) of current operational practices.

The steps described above have laid the groundwork for modernization of the commercial registry system. USAID has announced continued support to this process in its 2010-2015 strategy. It is expected that these efforts will build on the work conducted by IBCM. Following is a list of issues or questions which the IBCM Program believes will need to be addressed and debated as the Ministry of Justice moves forward with the modernization of Morocco's commercial registry.

- 1) **Basic objective of the commercial registry.** Morocco's commercial registry, like the French, was established as an integrated part of the legal system, which uses this information to ensure the legality and enforceability (*opposabilité*) corporate documents and acts. The other functions of commercial and pledge registries in other countries—such as providing prospective lenders definitive confirmation that no other lenders have a security interest in a borrower's assets, or providing information on a business to potential investors—are only secondary and were not prioritized in the design of the commercial registry. As a first step, it will be necessary to agree on the basic objectives of the registry and which institutions can best implement those functions.
- 2) **Economic model.** Private sector entities regularly pay to access information on businesses which is maintained in the commercial registry. The sale of information from the registry and the management of that information prior to its sale can be organized in a variety of ways: by competitive private sector entities (e.g. Dun and Bradstreet), by private sector contractors filling a government-defined need, by public institutions directly, or by public institutions with market-based or performance-based incentives (such as the body of clerks or *greffiers* in France).
- 3) **Institutional governance and organization.** This question relates closely to the one above, but has its own dimension, related to the final responsibility for the management of the information in the commercial registry, its use and who can access it, and the collaboration between different Moroccan government entities. Specifically, in Morocco, this question relates to the arrangement made whereby the Ministry of Justice has delegate management of the national registry to the Moroccan industrial property office (OMPIC). OMPIC has been, and should continue to be, a positive force in the modernization process. Another key element in the institutional and operational structure is the establishment of positive incentives for the *greffiers*, the principal operators of the registry. *Greffiers* must be viewed as central actors in the reform process – their active support and contributions are needed both during and after the reform process. The Ministry will want to think about how to best motivate *greffiers* during and after the reform process, starting with how to include their input during the design phase.
- 4) **Legal & Regulatory framework.** The commercial registry's current legal framework is extremely restrictive and outdated; containing, for example, references to making manual entries in ledgers, using a red pen to indicate a business that has closed, and specifying the individual fields and spaces in forms to be filled out by business owners. Modernization of the commercial registry in Morocco will require an overhaul not only of the laws pertaining to the commercial registry, but also an analysis of what should be specified in the law, versus what should be in implementing decrees and circulars, which are easier to modify or update. Legal and regulatory reforms need to be accompanied by

institutional strengthening and training in order to be successful. Last, legal reforms should take into account the particularities of the Moroccan context.

- 5) **Investment in information technology.** Investments in information technology will be an important component of the commercial registry's modernization. A feasibility study conducted by IBCM presents several IT scenarios: investments can be made to develop local databases in each commercial registry, a web-based system can be used with central database only available at the national level, or there are intermediate solutions as well such as regional commercial registry databases. Also, systems should obviously be designed to be compatible with the ongoing EU MEDA court automation initiative. The trade-offs and variables which may influence the choice of IT scenarios relate to objective factors such as cost, complexity, and benefits like whether real-time data is available at all times. These objective factors, though, will make sense to consider only after a set of key institutional, economic, and legal decisions have been taken.

The analytical work conducted by IBCM provides a platform from which to move forward in debating the issues listed above. Each set of issues may require some additional benchmarking, or, for example, comparative legal research. Future diagnostic work should be focused, however, towards filling specific gaps in knowledge which will make it possible for policy makers to take decisions. If indeed there is the political will to move forward with the modernization of the commercial registry, the reform team should be able to move rapidly towards a pilot implementation phase in one region.