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Improving the Business
Climate in Morocco

Legal Reform and Improved Commercial Court System

THE BANKRUPTCY REFORM PROCESS IN MOROCCO

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Improving the Business Climate in Morocco

Amélioration du Climat des Affaires au Maroc

IBCM Report

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LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
CIMAR	<i>Centre International d'Arbitrage et de Médiation de Rabat</i> Rabat International Arbitration and Mediation Center
DFID	UK Department for International Development
EBRD	European Bank for Reconstruction and Development
IFC	International Finance Corporation
MOJ	Ministry of Justice
OHADA	<i>Organisation pour l'Harmonisation en Afrique du Droit des Affaires</i>
ROSC	Reports on the Observance of Standards and Codes
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USAID	United States Agency for International Development

THE BANKRUPTCY REFORM PROCESS IN MOROCCO

This report, prepared by the USAID Improving the Business Climate in Morocco Program (the “Program”), is 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.

This report does not set out proposed legislative amendments or 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.

Likewise, the report does not purport to provide a detailed evaluation or assessment of the bankruptcy system as it stands today in Morocco. The Program (and previous USAID-funded initiatives) has been collaborating with Moroccan and foreign commercial law reform experts working on bankruptcy and related reform areas for a number of years. The authors of this report met with Ministry of Justice officials, judges, academics, business people, lawyers, bankers and other stakeholders in March 2008, in order to identify some of the key issues and concerns of the end users of the bankruptcy system.

Part I of this report outlines general considerations, strategies and resources relating to the bankruptcy reform process. 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. Part II does not, however, contain specific recommendations, as the legal, political and economic policies and technical solutions will need to be developed by Moroccan experts.

Please do not hesitate to contact the Program (contact@climatdesaffaires.ma) or Rémy Kormos (rkormos@dpkconsulting.com) if you have any questions or comments relating to this report.

PART I: GENERAL CONSIDERATIONS RELATING TO THE REFORM PROCESS

I.1. The Challenges of Bankruptcy Reform

Bankruptcy law is unique within the context of commercial law and institutional reform because it is a highly specialized, technical and difficult area of the law that few professionals typically master and because it involves enormous political, social and economic stakes. Reforming a bankruptcy system is far more challenging for example than enacting company law reform or drafting a new mediation statute.

One of the technical challenges of bankruptcy law reform is the fact that there is a large number of actors in a modern bankruptcy system, including the enterprises that are experiencing difficulty repaying their debts; the management, shareholders, and employees of these enterprises, and the creditors who have lent to them; the judiciary; bankruptcy professionals; and the larger community where the enterprises operate. This makes it difficult to balance the various rights, obligations and interests of all involved in an equitable manner.

Bankruptcy reform is also inherently politically charged, as key business, financial, professional and political interests are potentially impacted. This is true both in developing and in industrialized countries; bankruptcy reforms in France and in the US, for example, engendered considerable controversy and faced major technical challenges.¹ Simply put, the problems are complex to diagnose and are seen differently by various stakeholders. The process of identifying possible legal and institutional “solutions” is also challenging, and requires careful balancing of conflicting public and private interests.²

Finally, bankruptcy systems are complex procedurally, and are closely linked to a number of other legal and regulatory frameworks, including real estate, secured transactions, banking regulation, company law, taxation and, of course, civil procedure and court administration.

Recommendations / Next Steps:

- Ensure that the reform process, including assessments, drafting and implementation, is participative and transparent, and that all stakeholders (both public and private sector) provide input at all stages of the reform process. This can be done in a variety of ways: through public hearings, informal forums and workshops, inviting written comments on draft legislation and/or

¹ For a description of the lobbying and controversy that took place in the US during the major reforms of 1978, see Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act of 1986*, 74 AM. BANKR. L.J. 35 (2000). The 2005 reforms in the US were also criticized as badly designed and over-influenced by the lobbying of the credit card industry. In France, 2005 amendments introducing the “sauvegarde” procedure (Law No. 2005-845 of July 26, 2005) were considered excessively pro-creditor by some senators, and it was unsuccessfully challenged in the French Conseil Constitutionnel.

² Ahmed El Hajjami, *Réflexions sur la nécessité de refonte du livre V du code de commerce*, Rapport du Colloque organisée par le Ministère de la Justice et le Projet de modernisation des lois commerciales et des juridictions de l'USAID (Rabat, 8-9 avril 2005) (hereinafter, «Colloque MOJ-USAID 2005 »)

regulations, or by using private/public drafting committees. Rather than having independent groups and donors work separately on draft laws and regulations (*chacun dans son coin*), the process should be open and collaborative.

- Given the technical challenges of bankruptcy reform, significant human resources, including legal, judicial, financial and business experts specialized in bankruptcy, are needed to analyze key legal and economic issues, to design legal, regulatory and institutional reforms, and to ensure adequate implementation. Unlike other areas of commercial law reform, no single public or private institution (or bilateral or multilateral donor) can take on the entire bankruptcy reform task. Multiple public-private working groups and parliamentary commissions can be tasked with addressing specific issues. Foreign donors can be asked to provide technical assistance on particular areas. If it becomes evident that there are insufficient resources for staffing on such a scale, it may be better to either reduce the scope of the reforms (for example, focus on implementing decrees or address only some issues) or to put the reform process on hold altogether.

1.2. Extent & Scope of Reforms

A key initial question is whether the system (a) should retain the same French-inspired procedural system, with reforms to adapt it to the Moroccan context and address the shortcomings identified over the last decade, or (b) requires a fundamental restructuring (*refonte*).

There are many arguments for retaining the existing structure, including the fact that the courts and bankruptcy professionals are just starting to gain familiarity with what is a relatively new system and are improving their performance.³ Another factor to consider is the close link between bankruptcy and other commercial law frameworks and institutions, since a major change to the bankruptcy system could have repercussions on other commercial laws, thus requiring a significant investment. French experts have advised against following their own example of instituting major bankruptcy reform reforms every 10-15 years;⁴ Moroccan academic experts have also argued for retaining the same basic structure and addressing specific shortcomings.⁵

On the other hand, Morocco may determine that a comprehensive reform which would move away from the French model and would provide more effective economic incentives. Such an approach would require significantly more resources

³ For example: in a number of interviews conducted by the authors, bankers and businesspeople acknowledged that the Casablanca Commercial Court has noticeably improved the implementation of the bankruptcy system in recent years.

⁴ Andrée Brunet notes that major reforms were instituted in France in 1935, 1955, 1967, 1985, 1994 and 2005, and that each reform was quite radical. As a result, professionals were never able to truly master the system and bankruptcy law in France has become a “droit en perpétuel chantier”. Andrée Brunet, *Propos Critiqués sur le projet de réforme du droit français de la faillite*, Colloque MOJ-USAID 2005

⁵ See e.g. Prof. El Hajjami’s argument that minor amendments rather than a complete refonte were appropriate at this point, Ahmed El Hajjami, *Réflexions sur la nécessité de refonte du livre V du code de commerce*, Colloque MOJ-USAID 2005.

and time, particularly in light of the fact that bankruptcy law must be compatible with the rest of the Moroccan commercial law framework, which would remain modeled on French law.

A third option would be a compromise, largely similar to the French reform in 2005: this would retain (with necessary improvements) the basic existing framework for *redressement* and liquidation, but would add a third procedure (*sauvegarde*) which would take a different approach based on US Chapter 11. But even this approach will require significant human resources to design and implement, as was the case in France in 2004-2005. This third option is detailed in Part II of this report.

Recommendations / Next Steps:

- The initial decision concerning the scope of the desired reform should reflect the general consensus, should be made as early as possible in the reform process and should be communicated to all participants and stakeholders.

1.3. Document and Apply the “Lessons Learned” from the 1996 Reform.

The text of Morocco’s bankruptcy law (*Livre V*), based on the French law at the time, is coherent and logical. However, professionals and academics in Morocco generally agree that the reform process of 1996, as well as the implementation of the law, could have been more effective. Some of the shortcomings have been documented; studies have been carried out on the shortcomings of past reforms, problems in the legal text and in its application.⁶ For example, the legal experts (which we understand included foreign experts) involved in drafting the new law in 1995-1996 opted to transplant a slightly simplified version of the two French laws governing bankruptcy.⁷ This transplantation did not adequately take into consideration existing institutional frameworks such as the court system or the Moroccan socio-economic and business context.⁸ In addition, the drafters did not take into account the French socio-economic context, such as regional and local support and funding systems for businesses facing difficulties. There is no similar support system in Morocco.

Another shortcoming of the reform process in 1996 is that the reformers only looked to the French legislative text itself and did not take into account the French regulatory framework (*décrets d’application*, for example), government support to businesses (including regional and local funds directed to struggling businesses) and existing French case law. As a result, the legal provisions are incomplete and Moroccan judges have had to develop jurisprudence to fill in the gaps. The

⁶ See e.g. Mustapha Bentahar, *La protection des créanciers dans les procédures collectives*, Revue marocaine de droit, d’économie & de gestion, No. 53 (Hassan II University—Ain Chok) (2008), p. 67 ; Hajjami, note 2 above

⁷The French models which were transplanted included Law No. 84-148 of March 1, 1984 (introducing the *prevention* procedure), Law Nos. 85-88 and 85-89 of January 25, 1985 (substantive bankruptcy law overhaul relating to both *redressement* and liquidation).

⁸ Ahmed El Hajjami, *Réflexions sur la nécessité de refonte du livre V du code de commerce*, Rapport Colloque USAID 2005, p.2.

required regulatory framework is inexistent and the institutions charged with implementing the 1996 law were not as well prepared as they could have been; in 1996 then, Morocco got only “the law on the books” and not a complete bankruptcy system.

Recommendations / Next Steps:

- Technical assistance from foreign donors should support the work of Moroccan experts by providing resources and ideas for possible approaches, but the assessment, design, drafting and implementation of the reforms should ultimately be undertaken by national experts familiar with the local context, practices and institutions.

1.4. The Reform Process Should be “Holistic” and Should Target the Whole Bankruptcy System: The Legal, Institutional and Regulatory Frameworks

Much of the reform work that has taken place to date in Morocco has been focused on shortcomings in the text of the law and proposing possible amendments, *i.e.* legal reform.⁹ This work was instrumental in getting the reform process started and will likely continue. Similar research and analysis needs to be conducted on the problems and challenges relating to the implementation of the law, including the regulatory and institutional frameworks. For example, the absence of decrees (*décrets d'application*) relating to Livre V appears to have resulted in numerous implementation problems¹⁰. An assessment of the bankruptcy system in Morocco conducted by the World Bank in 2006 concludes that many of the priority areas for reform do not relate primarily to the legislation, but rather to its application by the courts (institutional framework) and the regulation and training of bankruptcy professionals (regulatory framework).¹¹ This has been echoed consistently in recent meetings held by the Program with stakeholders in Morocco.

Recommendations / Next Steps:

- Before embarking on legal reforms, the participants in the reform process should carefully analyze and agree on what aspects of the bankruptcy system should or can be addressed in regulations rather than in the law. A concrete example of a major “missing” regulatory framework is the absence of any rules in Morocco relating to the training, appointment, professionalization, supervision, compensation or discipline of syndics (discussed below). A first

⁹ See e.g. Ahmed El Hajjami, *Entreprises en Difficultés: Propositions d'amendements du Livre V du Code de Commerce*, Publication du Programme Amélioration du Climat des Affaires au Maroc de l'USAID (2007). We understand that other donors have also proposed draft amendments and that Moroccan commercial law experts are working on amendments as well.

¹⁰The absence of any implementing regulations was described as part of the “absence flagrante de mesures d'accompagnement” by Prof. Mustapha Bentahar, *La Protection des créanciers dans les procédures collectives: mythe ou réalité?* Revue marocaine de droit, d'économie & de gestion, No. 53 (2008), p. 67.

¹¹ World Bank, Report on the Observance of Standards and Codes (ROSC): Morocco, Insolvency and Creditor Rights Systems (2006).

step might be to study the framework of implementing decrees that were in place in France 1996, since French law served as the model for Moroccan law.

- The institutional aspects of the bankruptcy system also need to be carefully evaluated early in the process. This might include developing institutional support and oversight for syndics and other semi-independent professionals, ensuring that such professionals are adequately compensated and incentivized, and improving the institutional capacities of the commercial courts to process bankruptcy cases, through improved internal case management and specialized initial and continuing training for judges and *greffiers* in areas such as accounting and business management.

I.5. Commercial Court Case Law and Doctrinal Writings

Over the last few years, the Moroccan commercial courts have rendered judgments which address some of the gaps in the legal framework and resolve specific practical questions on the application of bankruptcy law. Likewise, law professors in several of the Kingdom's law faculties have analyzed many aspects of Moroccan bankruptcy practice.

Recommendations / Next Steps:

- Existing case law (*jurisprudence*) relating to bankruptcy cases as well as doctrinal writings should be collected, organized by areas of bankruptcy law and made available to all participants in the reform process. We understand that much of this work has already been done. One of the contributors to the 2005 USAID/ Ministry of Justice Roundtable prepared a table of relevant case law from the Casablanca Commercial Court and Court of Appeal,¹² and reference is also made to the attached bibliography, which cites a number of articles and studies on bankruptcy law in Morocco conducted by academics, lawyers and financial professionals.

I.6. A Note on the Evaluation of the Existing Bankruptcy System and Data on Bankruptcy Cases.

A review of existing studies and articles on bankruptcy law reform in Morocco, as well as the interviews conducted by the authors in 2008, suggests that the key areas which need to be addressed have already been identified by stakeholders. On some issues there is agreement that the current system is not performing as expected: an example is that the prevention procedure is not used effectively. On other issues, certain stakeholders advocate for more specific reforms— banking sector representatives, for example, are working on proposals that would increase the participation of creditors.

¹² Mohamed Jaouhar, *Les sanctions applicables aux dirigeants dans le cadre des procédures collectives*, Revue marocaine de droit, d'économie & de gestion, No. 53 (2008), p. 101.

The fact that most of the key reform issues have been identified notwithstanding, it does not appear that statistical data on bankruptcy cases in the commercial courts, are publicly available. General statistics on the number and type of cases heard by the Commercial Courts and Commercial Appeal Courts do exist, and can give an overview of the activities of specialized jurisdictions.¹³ In 2007, 119,695 new cases (in all categories) were filed, 155,525 were ongoing and 125,226 were adjudicated. In the same year, 608 new bankruptcy cases were filed, 831 were ongoing and 769 were adjudicated. Casablanca's Commercial Court had the highest case volume, rendering decisions in 307 bankruptcy cases out of Morocco's total of 769 in 2007. In terms of personnel, 122 sitting judges (*magistrats du siège*) and 16 prosecutors (*magistrats du parquet*) were assigned to the commercial courts, and 33 sitting judges (*magistrats du siège*) and six prosecutors (*magistrats du parquet*) were appointed to the commercial appeal courts in 2007.

However, these general statistics do not allow for a detailed analysis of bankruptcy cases. The authors have not seen any recent commercial court statistics on bankruptcy cases. Some publicly available data on bankruptcy cases in the Casablanca commercial courts for the years 1998-2002 are set out in [Table 1](#). These data clearly show a large increase in the number of filings during the period between 1998 and 2002, which makes sense given that the new procedures were introduced only in 1996. Likewise the data suggest that far more new petitions are coming in each year (492 in 2002) than are being finally adjudicated (45 *redressements* and 57 liquidations in 2002).

Table 1: Bankruptcy Procedures in the Casablanca Commercial Court, 1998-2002.

Procedure	1998	2002
Filed Petitions (<i>Demandes enregistrées</i>)	39	492
Adjudicated Petitions	29	503
Pending Petitions (<i>Affaires en cours</i>)	10	67
Rehabilitation Judgments (<i>Jugements de redressement</i>)	13	45
Liquidation Judgments (<i>Jugements de liquidation</i>)	16	57

Source: Ministry of Justice, cited in WORLD BANK, REPORT ON THE OBSERVANCE OF STANDARDS & CODES (ROSC), MOROCCO, INSOLVENCY AND CREDITOR RIGHTS SYSTEMS 6 (2006).

Overall, however, these (out of date) figures provide very limited information on the performance of the bankruptcy system. Thus, we cannot tell how long it takes for the initial petition to be considered by the court (we only see the annual total of adjudicated petitions), nor can we tell how long the entire process to complete a reorganization (*redressement*) or liquidation takes (because, again, we only have

¹³ Source: Ministry of Justice, December 2008. Seven categories are differentiated: *référé*s, *ordonnances d'injonction de payer*, *ordonnances sur requête*, *procès de fond*, *distribution à l'amiable*, *ordonnances du juge délégué* and *entreprises en difficultés*.

annual totals, and the final judgments recorded in one year were filed an unspecified number of years earlier).

More extensive and up to date statistics on bankruptcy cases in the Commercial Courts would help ensure that existing shortcomings in the bankruptcy system are accurately identified, and would help in designing legal, regulatory and institutional reforms. A few examples of how statistical data may be helpful are set out below:

- If data on how long different types¹⁴ of bankruptcy cases take to be adjudicated in different jurisdictions are available, it may be possible to better determine whether legal versus institutional reforms are needed.¹⁵
- If the data allow a breakdown of bankruptcy filings by who makes the filing (debtor company or creditor), it may be possible to better evaluate whether or not the balance of rights and obligations in the current framework is equitable. Interviewees have indicated that virtually all bankruptcy filings are made by debtor companies, which, if true, would suggest that the existing system may inappropriately favor debtors over creditors.
- If the data allow a breakdown of the type of solution (reorganization, liquidation) adjudicated by the court, it may allow reformers to identify specific legal reforms that may be needed.
- Data on appeal rates may likewise help ascertain the quality of Commercial Court judgments and variations in how procedures are implemented.

Recommendations / Next Steps:

- The most extensive and up to date statistics available on bankruptcy cases in the Commercial Courts should be made available to the public, or at least available to the working groups.
- It may also be useful to undertake detailed qualitative studies of reorganization (*redressement*) cases that track what happens in the years following the approval of the reorganization plan, to see how well designed the plans are in practice. If a high percentage of reorganized companies fail to regain financial stability and/or fail to repay the restructured debts, it may be that the reorganization procedures are not being well implemented.

1.7. Benchmarking to International Standards & Assessment Methodologies

Since the 1996 legislative reforms in Morocco, considerable work has been done by international organizations, multilateral banks and bilateral donor agencies to

¹⁴ e.g. based on size of the debtor and/or the number of creditors

¹⁵ For example: given that the same law applies throughout Morocco, if you find wide variations in the time necessary to adjudicate a case between different jurisdictions, and you can correct for differences in caseload, it may be possible to identify specific institutional implementation issues, such as case management bottlenecks or insufficient training, that need to be addressed. Likewise, best practices from Moroccan commercial courts which show better performance, can be applied to courts that have been performing less well. Such data may also help confirm anecdotal information obtained from interviews with bankruptcy system users.

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” that same year.¹⁶ 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 professionals (*syndics*).¹⁷

New assessment methodologies have also been developed, based in part on these standards. The World Bank / IFC’s bankruptcy assessments are known as ROSC (Reports on the Observance of Standards and Codes). A ROSC was prepared for Morocco in 2006, the results of which were reviewed for this report. 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.¹⁸ The IRIS Center at the University of Maryland, in collaboration with the UK’s DFID (Department for International Development), has prepared benchmarks to assess the level of commercial law development (including bankruptcy systems) in several Mediterranean countries, including Morocco.¹⁹

The advantage of these international standards and methodologies is that they are generally policy neutral and not specific to common 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.

Recommendations / Next Steps:

- The Program has put together many of these international resources (as well as comparative materials) and provided copies to a number of stakeholders in the bankruptcy reform process. These resources are also available on the IBCM website at www.climatdesaffaires.com, and can help in the reform process. Further research can be undertaken upon request.

¹⁶ 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).

¹⁷ European Bank for Reconstruction and Development (EBRD), Law in Transition Online: Making Bankruptcy Work (2007).

¹⁸ 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.

¹⁹ See www.iris.umd.edu for more information. It is not clear whether assessments were actually undertaken, and the report is not available to the public.

1.8. Use of Comparative Analysis

Regardless of whether the existing framework is retained or a fundamental change is decided on for the Moroccan bankruptcy system, comparative legal and institutional research can be extremely helpful to the reformers. This is particularly so if study of foreign models is combined with use of the international resources discussed above in Section 1.7.

Recommendations / Next Steps:

- The first task in applying comparative legal analysis is to prioritize the specific legal, regulatory and institutional issues to be addressed. For example, it may be decided that a key area of interest is how reorganization plans are developed, approved and implemented.
- A second task is to ascertain which jurisdictions to study. This task is difficult, given that bankruptcy law has developed quite differently in each of the major Western jurisdictions. For the purposes of the present reform, it might be useful to follow the lead taken by the French Senate research team working on the so-called *sauvegarde* reform of 2005, which added a third type of procedure (inspired by the US Chapter 11 model of reorganization) to the French bankruptcy system. The French Senate team examined existing bankruptcy law in the US, Germany, Australia, Canada, Spain, Great Britain, New Zealand and the Netherlands²⁰. For Morocco, one might add to this list France (in particular the *sauvegarde* procedure as it was enacted),²¹ and perhaps Tunisia, the new bankruptcy law and the OHADA model bankruptcy law.

Comparative analysis should not be limited to the text of the law itself, but should include the regulatory framework, existing institutions being studied (for example, court structure and syndic supervision), and, to the extent possible, the broader judicial and socio-economic context of the bankruptcy system.

Comparative analysis is only one tool among many, and the mistakes of the 1996 reform, which was based on the French legal model, should not be repeated. This means avoiding at all costs a simple transplantation of a foreign text. Foreign legal models and comparative analysis does not provide any shortcuts to effective reform; in fact, some respected scholars have argued that when a country chooses to model a law or particular legal provision on a foreign law, the *process* by which it implements the reform is usually far more important than *which foreign rule* is used.²²

²⁰ La sauvegarde des entreprises en difficulté, Série Législation Comparée / Documents de travail du Sénat No. LC135 (2004). This document is extremely useful and provides a concise summary and comparative analysis of a few key aspects of bankruptcy law. It has been made available by the Project, and can also be found on the French Senate's website.

²¹ For a detailed critique of the French *sauvegarde* procedure and the reform process more broadly, see Prof. André Brunet, *Propos critiqués sur le projet de réforme du droit français de la faillite*, Bilan de 8 ans d'application de la nouvelle législation des procédures collectives au Maroc, Colloque MOJ-USAID 2005.

²² "...the process of lawmaking rather than the contents of legal rules determines the effectiveness of legal institutions. Where law develops internally through a process of trial and error, innovation and correction, and with the participation

PART II: SPECIFIC ISSUES TO BE ADDRESSED

Part I of this report addressed the bankruptcy reform process; Part II lists a number of specific legal, regulatory and institutional reform issues and decisions which will likely need to be addressed during in the course of the bankruptcy reform process in Morocco. This second part of the report does not contain specific recommendations or next steps, as the legal, political and economic policies and technical solutions will need to be developed by Moroccan experts. While the issues have been listed in rough order of importance, with the most critical and controversial issues discussed first, the order of priorities should be determined by local experts. Finally, the list does not purport to be comprehensive, and it is unlikely that all the issues listed will be or even should be addressed.

II.1. Balancing Creditor and Debtor Rights and Obligations

Finding an equitable balance between the rights and obligations of creditors and debtors is one of the key functions of an effective bankruptcy system. French bankruptcy law, particularly as it stood in 1996²³, is famously pro-debtor and expressly states that the bankruptcy system's first priority is to preserve jobs. This same policy was transferred to Morocco in 1996 when the French legal framework was transplanted. Changing the balance of the rights and obligations of debtors and creditors is a complex and controversial policy decision, which should only be taken after appropriate research, discussion and input from public and private sector stakeholders.

It appears from interviews conducted in March 2008, past assessments, studies and press articles, that many stakeholders, including banking industry representatives, feel that the current bankruptcy framework results in insufficient participation by creditors in the bankruptcy process.²⁴ As a result, creditors lack confidence in the bankruptcy system and feel that their rights are inequitably balanced against those of debtor businesses; this may in turn limit available credit and economic development more generally.

There are numerous possible explanations for this inequity. Some relate to the implementation of the law: bad faith debtors and their legal counsel have found tactics, such as omitting creditors, to delay the proceedings and instigate litigation (see below for more examples), and judges and *syndics* are often reportedly unable to screen out improper bankruptcy petitions due to insufficient training and resources and a lack of transparency in financial reporting.

and involvement of users of the law and interested parties, legal institutions tend to be highly effective.” Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *The Transplant Effect*, 51 Am. J. Comp. L. 163, 189 (2003).

²³ Note that the 2005 reforms in France sought to increase the role of creditors in the bankruptcy process, in part by creating “creditor committees” much like those under US law.

²⁴ See WORLD BANK ROSC REPORT at page 9 (“The law confers little control to creditors whose protection is devoted to... *syndics*”); Saad Benmansour & Fadel Agoumi, *Redressement judiciaire: les banquiers s'inquiètent!*, LA VIE ECONOMIQUE, 29 July 2005. (“La requête des banquiers est simple : les demandes de redressement judiciaire ne doivent avoir de suite qu'après un examen approfondi...de la situation de l'entreprise demanderesse, qui doit dûment justifier sa requête...Si les banques ont fait une telle demande, c'est parce que, dans la plupart des cas, elles sont perdantes.” (emphasis added).

Some experts suggest that part of the problem is that while Morocco used the French legislative text, the Kingdom does not have the resources to establish the extensive monitoring and support system for businesses that France has. For example, in France there are financial reporting systems that allow commercial courts to effectively make decisions as well as national, regional and local commissions which provide financing and restructuring advice to businesses.²⁵ Having the financial resources and support systems that help businesses get back on their feet justifies many of the “pro-debtor” provisions in French law. Indeed, creditors may accept a pro-debtor system if the system is effective and creditors are ultimately repaid, at least in part in a sufficient number of cases. In contrast, if in a country like Morocco too many businesses use the pro-debtor provisions of the law as a shield against creditors but do not get any assistance and ultimately fail to repay their debts, creditors will legitimately complain that the overall system is unfair. This is an example of the risks of transplanting a law into a different regulatory and economic context.

Some explanations for the imbalance in the rights of debtors and creditors relate to the text and structure of the existing law, which as discussed above, reflects the intentionally pro-debtor French policy of the mid-1980s. Assuming that Morocco opts to amend the existing legal framework, rather than undertaking a complete restructuring, and that the decision is made to modify the balance of rights and obligations to afford creditors more rights, many avenues are open. In fact, a number of Moroccan experts have formulated specific reforms aimed at providing a better balance of the rights of creditors and debtors. A few illustrative examples are set out below:

- Abolishing the “Declaration Guillotine”: Filing of Claims (*Déclaration de créances*). The entire system of notice and claim filing could be overhauled to better notify and protect creditors.²⁶ The current system allows far too many abuses by debtor companies and imposes superfluous formalities on creditors.
- Increasing the participation of creditors in the *redressement* procedure, in particular by providing creditors access to financial information, creating more effective representation mechanisms to creditors, allowing creditors to participate in the preparation of the plan and/or providing for creditor voting mechanisms.²⁷ Note that the institutional representative of the creditors under French law, the *représentant des créanciers*, was not included in the Moroccan legal framework during the 1996 reform. While Moroccan law does provide for a *contrôleur* to participate as a representative of the creditors, they are given no access to debtor information and do not vote on the reorganization plan.

²⁵ These include the *Comité interministériel de restructuration*, le *comité régional de restructuration industrielle* and the *comité départemental d'examen des problèmes de financement d'aide aux entreprises*. Mustapha Bentahar, *La protection des créanciers dans les procédures collectives: mythe ou réalité ?*, Revue marocaine de droit, d'économie & de gestion, No. 53 (2008), p. 67. The fact that records for many Moroccan SMEs are not always accurate makes such work much more difficult.

²⁶ Ibid

²⁷ These propositions might seem revolutionary given current Moroccan law, but these mechanisms, inspired by US Chapter 11 reorganization, were adopted in France for the new *sauvegarde* procedure, which provides for creditor committees, allowing creditors to participate in the preparation of the plan and the right to approve it (by majority vote).

Reportedly, the creditors often do not appoint a *contrôleur*, and when they do, the *contrôleur* often represents only one creditor's interests.

- Improving the quality of the trustee report / reorganization plan (*Rapport du syndic*). Studies of trustee reports suggest that trustees often overestimate the financial capacity of the company to continue its operations and meet its obligations. As a result, some companies which should be promptly liquidated end up in protracted *redressement* procedures.²⁸
- Revising the existing system of filing deadlines. The current law provides for a large number of strict filing deadlines, but the sanctions for missing the deadlines are generally applicable only to creditors and not to other actors (debtor company, the trustee, the court).²⁹

II.2. The Commercial Courts

Judges serving on bankruptcy cases play a central role in the implementation of bankruptcy law. Thus, broader judicial reforms, training and other initiatives supporting the work of magistrates in the commercial courts will also benefit the performance of the bankruptcy system.

When specialized commercial courts were established in Morocco in 1997 (the year after the bankruptcy law was passed), the new courts were staffed by judges with the same status and training as their colleagues sitting in the civil and criminal jurisdictions.³⁰ This is quite different from France, where the “judges” of the commercial court of first instance, or *tribunal de commerce*, which has jurisdiction over bankruptcy cases, are not magistrates, but lay businesspeople elected by the local Chambers of Commerce.³¹ French bankruptcy procedures are intended to be supervised and implemented by experienced businesspeople. This explains, at least in part, why judges under French bankruptcy law were given a central role in making many key bankruptcy decisions that involve business judgment, experience and financial skills (deciding, for example, whether to proceed with reorganization or liquidation, or approving the plan).

It would appear that the 1996 and 1997 reforms resulted in a bit of a disconnect in Morocco when the French *legal* framework was copied, but a completely different *institutional framework* (i.e. a commercial court system with professional judges) was put into place to implement that framework. This is not to say that the choice to assign professional judges to the commercial courts was misguided; indeed, bankruptcy judges in the US are usually bankruptcy lawyers who become full time professional judges upon appointment. However, the disconnect between a French-inspired legal framework and a completely different institutional

²⁸ Mohammed El Idrissi, *Les effets de la procédure de redressement judiciaire sur les intérêts de la banque*, Colloque MOJ-USAID 2005.

²⁹ Abdallah Es-Saghir, *La protection des créanciers dans les procédures collectives*, Colloque MOJ-USAID 2005.

³⁰ Dahir No. 1-97-65 of February 12, 1997.

³¹ Code de l'Organisation Judiciaire, Arts. 413-1 et seq. See generally, Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France*, 70 AM. BANKR. L.J. 437 (1996).

framework, does, result in a system that requires commercial court judges to make complex business decisions, despite the fact that they are generally not trained, experienced business people. The solution to this problem may lie in a combination of legal reforms (e.g. finding ways to better incentivize the parties to negotiate to find a solution), institutional reforms and judicial training.

II.3. Syndics: Need to be Better Selected, Trained, Supervised and Incentivized

An often cited impediment to the effective implementation of the Moroccan bankruptcy system is the quality of the services provided by *syndics*. The *syndic* is appointed in a specific case by the Commercial Court, but in the absence of any regulatory framework, there are no educational, training, seniority or ethical requirements for their selection and appointment. Other than the appointing judge (who can sanction misbehavior by the syndic in a particular case), it does not appear that there are any institutional or regulatory frameworks setting professional standards for, or imposing discipline on, *syndics*. In practice, judges in Morocco generally appoint as syndic either a court clerk (particularly for smaller cases likely to end up in liquidation) or an independent accounting professional who is qualified by the courts to serve as an expert witness.

The existing legal framework gives syndics a key role in the bankruptcy process—in making both business and legal decisions—and often requires the syndic to balance conflicting interests.³² Interviewees indicated that syndics (both those who are court clerks and those who are outside accounting professionals) are often perceived as having limited skills and experience, as being inadequately compensated, and as having little incentive to achieve an equitable result.

The failure to establish a regulatory framework for syndics in Morocco is striking, especially given that, in France, there had been decades of experience with the profession of *administrateur judiciaire*, and that an extensive regulatory framework had been established.³³ Likewise, international bankruptcy standards and principles clearly require that bankruptcy professionals, such as *syndics*, be regulated.³⁴

A first step, regardless of the scope of the reforms, will be to review foreign implementing decrees (in particular the French implementing decrees cited above) and international standards on the regulation of syndics, and to carefully determine what regulatory framework is needed for Morocco. Because it is not currently a profession, it is not clear whether there are any associations regrouping syndics but

³² Mohamed Jenkal, *Auxiliaires de justice: Syndics, Avocats, Experts*, in Colloque MOJ-USAID 2005.

³³ Decree No. 85-1389 of 27 December 1985 sets out detailed provisions relating to the selection, training, supervision and discipline of trustees (*administrateurs judiciaires*) and related professionals and establishes several supervisory agencies and bodies. Decree No. 85-1390 of 27 December 1985 sets out detailed rules as to how these professionals are to be compensated, based on a number of factors such as the size of the debtor.

³⁴ See UNCITRAL Legislative Guide on Insolvency Law (2005); World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, and European Bank for Reconstruction and Development (EBRD) Standards Relating to Bankruptcy Professionals.

it may also be advisable to gather input from the clerks and the accounting professionals who currently serve as syndics.

A related problem in the existing framework in Morocco is that the syndic has been assigned multiple roles. French law provides roles for several bankruptcy professionals: in addition to the bankruptcy judge (*juge commissaire*) and the trustee or *syndic (administrateur)*, it provides for a creditors' representative (*représentant des créanciers*), one to five "observers" (*contrôleurs*), and a plan implementation supervisor (*commissaire chargé de veiller à l'exécution du plan*) or a liquidator (*mandataire judiciaire*). In contrast, Moroccan law makes do with only the *juge commissaire*, the *syndic* (equivalent to the French *administrateur*) and one to three *contrôleurs*.³⁵ This requires the Moroccan *syndic* to wear several hats at the same time and, according to numerous interviewees, may end up representing only one side. If the French model is retained, it may be necessary to consider what other professionals are needed to ensure that all parties are represented.³⁶

II.4. Prevention (Arts. 548 to 559)

One of the innovations of the French Law of 1984 was the introduction of "early-warning" mechanisms designed to notify the courts and business support associations that a business is facing financial difficulties and is at risk for insolvency, in order to attempt to prevent bankruptcy altogether through negotiation and/or mediation (by a court-appointed mediator) between the debtor business and creditors.

Morocco adopted the same prevention framework, set out in Articles 548 to 559 of the Commercial Code, including the possibility of appointment of a mediator by the court to try to get the debtor company and the creditors to find an out-of-court solution. It appears however that the prevention procedure is very rarely used in Morocco. Some of the reasons cited for this include (a) the fact that the obligation on the part of the debtor company or its outside auditors to notify the court is not backed up by any legal sanction; (b) the fact that most small companies in Morocco cannot afford to have outside auditors, and (c) the fact that judges often don't have the requisite business background and accounting skills to contribute to the *prévention* process.

One might also surmise that if debtors (and/or their legal advisors) believe that they can manipulate the system in order to shield their business from creditors, then they do not have the incentive to participate meaningfully in the prevention process. As a result, business debtors often come too late to the court (i.e. already insolvent), and do so without having gone through the informal negotiations that might facilitate the bankruptcy process.

³⁵ Compare Arts 638-645 of the Moroccan Commercial Code with Arts. 621 and 622 of the French Commercial Code.

³⁶ But note that under US Chapter 11 reorganizations, the general rule is that the management of the debtor remains in place and no trustee is appointed (unless the judge determines that the management is not respecting its obligations).

Several Moroccan experts have studied the problems relating to prevention and have proposed ways of improving the system; these proposals are all based on retaining the basic French-inspired legal framework.³⁷ Another way of improving the system would be to ensure that only competent, trained mediators are assigned to bankruptcy cases. Interest in mediation for the resolution of business disputes in Morocco has been growing in the last few years and that there are now a number of trained mediators developing their practices independently (ad hoc mediation) and through ADR service providers such as the Rabat International Arbitration and Mediation Center (CIMAR). The IBCM program has also been supporting the development of mediation in Morocco and can provide more information and contacts.

If the decision is taken to abandon the French-inspired model altogether, then it will be necessary to conduct comparative studies of how other jurisdictions encourage out-of-court settlements. In the US, for example, the bankruptcy judge may encourage the debtors and creditors to negotiate or settle disputes not only at the onset of a case, but at any time during the proceedings. It would also be useful to link research on bankruptcy reform with the current work being done in Morocco to promote mediation in commercial disputes.

II.5. Commencement of Proceedings and Procedures Common to Redressement & Liquidation (Arts. 560-570 and 637-701)

There are any number of issues relating to the overall procedure that might be addressed in the bankruptcy reform. A few specific examples are set out below, by way of illustration.

- (a) Issues Relating to the Commencement of Proceedings: The definition of cessation of payments or insolvency (*cessation de paiements*), which is the prerequisite for filing a bankruptcy petition, is not clearly defined in Art. 560 of the Commercial Code. Some case law has been developed over the years requiring proof that the debtor is truly not able to pay its debts as they come due, but the lack of a standard continues to pose problems.
- (b) Abuse by Bad Faith Debtors. Procedures can be manipulated by bad faith debtors who file for bankruptcy in order to obtain the protection of the automatic stay of proceedings (*suspension des poursuites*) and go through the motions of *redressement* and/or liquidation, while at the same time hiding assets, favoring insider or family creditors and/or transferring operations and assets to another entity. One often cited subterfuge used by bad faith debtors is to deliberately “forget” to include a creditor in the list of creditors and liabilities the debtor is required to file with the court pursuant to Art. 562. As a result, that creditor is likely to miss the deadlines required to file

³⁷ See e.g. Ahmed Hajjami, *Réflexions sur la nécessité de refonte du livre V du Code de Commerce*, Mimoun Cherqui, *Obligation de prévention et risques des banques face aux entreprises en difficultés*, Mustapha Bentahar, *La protection des créanciers dans les procédures collectives : mythe ou réalité*, all in Colloque MOJ-USAID 2005.

its claim against the debtor, and the proceedings are often delayed as the court and the *syndic* try to deal with reinstating the creditor.

- (c) Confusing Translations and Inadequate Notice to Creditors. A related problem cited by banks is the fact that the public notice in the *Bulletin Officiel* of the opening of the bankruptcy proceedings in Art. 569 of the Commercial Code is often insufficient to provide real notice to creditors. The two month period for filing claims is often missed, with serious consequences. Smaller creditors do not have the resources to read the *Bulletin Officiel* every day, but even large banks and government agencies, which have personnel tasked with scouring the *Bulletin Officiel*, often miss the notices because they are usually published only in Arabic, while the names of business entities in Morocco are often in French. The Arabic translations are sometimes incorrect or misleadingly literal and often lack the company's Commercial Registry registration number, leading creditors to sometimes not recognize the name. To try to remedy this problem in part, some courts, such as the Casablanca Commercial Court, have established the practice of sending notice by registered mail to all known creditors of the filing debtor and of providing summaries of filed bankruptcy petitions to the tax and other government authorities.

II.6. Redressement (Arts. 571-618) and Modern Trends for Reorganization / Sauvegarde

Many, if not most of the issues enumerated and discussed in this report relate directly or indirectly to the *redressement* procedure, which is at the center of the current Moroccan bankruptcy system. For example, many of the proposed legal reforms relating to increasing participation by creditors relate essentially to *redressement*, as do many of the regulatory and institutional reforms discussed in this report.

As bankruptcy systems in most countries moved away from 19th century legal frameworks which were essentially punitive and focused on liquidation, the challenge has been how to design mechanisms for reorganizing the enterprises which can be saved. A number of different approaches have been developed over the years. As discussed above, many industrialized countries such as France have ended up undertaking frequent reforms of their bankruptcy systems to address performance shortcomings in *redressement* or reorganization cases, or to attempt to balance creditor and debtor rights and obligations. In the US, the existing framework for reorganization, set out in Chapter 11 of the Federal Bankruptcy Code, appears to have had more staying power, perhaps because it provides economic incentives for both debtors and creditors to actively collaborate in finding a solution.³⁸

³⁸ Gary Kelly, *Debtor Reorganization: the American Experience*, p.2, Colloque MOJ-USAID 2005.

The latest wave of reforms in the major industrialized countries has explicitly sought to adopt the philosophy and/or specific parts of the US Chapter 11 model for reorganization. The French Senate research department came to this conclusion in 2004 after conducting comparative research on recent reforms in Germany, Australia, Canada, Spain, Great Britain, New Zealand and the Netherlands.³⁹ France joined this trend in 2005, when a new procedure inspired in large part by US Chapter 11, the *procédure de sauvegarde*, was incorporated into the French Commercial Code in 2005.⁴⁰

Some elements of US Chapter 11 reorganization which have recently been adopted in other jurisdictions include the following:

- The ability of the debtor company to file rapidly for reorganization protection, even prior to actual insolvency (*ouverture de la procédure sans attendre la cessation des paiements*). This approach was adopted in Germany in 1994, in Spain in 2003, Great Britain in 2003, and in France for the new *sauvegarde* procedure.
- The immediate start of the automatic stay which protects the debtor against claims and lawsuits by creditors during the proceedings (*le caractère immédiat de la suspension des poursuites*). For example, in Germany, the court can order such a stay even before accepting the petition; similar reforms were also instituted in Canada, Great Britain and France.
- The management of the debtor company usually remains in place during the reorganization proceedings (debtor-in-possession, in French, *l'administration par le débiteur*), instead of being managed by the bankruptcy trustee/administrator/syndic. This somewhat controversial element of US practice—after all the current management is usually at least in part responsible for the company's financial troubles—has been adopted in Spain (but with supervision by a creditor representative and other professionals), in Germany (for certain cases only) and in France for *sauvegarde* proceedings (the *chef d'entreprise* is assisted by an *administrateur judiciaire*).
- Exclusivity period granted to debtor company to propose a reorganization plan (*le droit exclusif du débiteur de proposer un plan de redressement en début de procédure*). Similar exclusivity periods now also exist in Spain, Germany and France.
- Existence of formal mechanisms for creditor representation, such as creditor committee(s). The *sauvegarde* procedure in France, for example, provides for the establishment of creditor committees for larger bankruptcy cases, during *sauvegarde* proceedings.

³⁹ French Senate, *La sauvegarde des entreprises en difficulté*, Les documents de travail du Sénat, Série Législation Comparée (No. LC 135, 2005).

⁴⁰ Note that the French *sauvegarde* procedure does not replace the *redressement* procedure—instead it is an optional step which takes place earlier in the process.

- Creditors vote on the proposed reorganization plan before the bankruptcy court approves it, and a plan may be approved despite the opposition of certain creditors. Under Moroccan law, the bankruptcy court approves the proposed reorganization plan as developed by the syndic and creditors have little or no say in the development and approval of the plan. In contrast, under US Chapter 11, the plan must first be voted on by the creditors, voting in classes of similarly placed creditors (*groupes de créanciers*) and then approved by the court. This gives creditors a key role and encourages negotiation among the parties. The Chapter 11 voting mechanism and so-called “cram-down” provisions also allows plans to be approved despite the opposition of certain creditors (*homologation forcée du plan de redressement*). This approach, which further encourages negotiation between creditors and debtor and among creditors, has also been adopted in Germany, where under certain cases a plan can be adopted despite the opposition of a class of creditors (but only where the members of that class are treated fairly in the plan).

This list is by no means exhaustive, and integrating any of these mechanisms into a non-US bankruptcy system is an enormous technical challenge. Chapter 11 is unique, and not easily transplantable into other legal systems—even into other Common Law jurisdictions. As noted by the French Senate researchers, US Chapter 11 remains unique in that secured creditors are strictly bound by reorganization plans to the same extent as are unsecured creditors, while in other Common Law jurisdictions secured creditors can sometimes avoid the restrictions of the reorganization plan. Adopting Chapter 11 mechanisms is even more challenging where civil law jurisdictions are involved, since the commercial law framework and the implementing institutions are so different. It is for this reason that the research conducted in France during the *sauvegarde* reform is of particular interest to Moroccan reformers, since France did ultimately adopt a number of elements of US Chapter 11.

Finally, the fact that a number of jurisdictions have opted to adopt elements of US Chapter 11 reorganization into their bankruptcy systems does not mean that such an approach is appropriate for Morocco; this is a decision for Moroccan experts. US Chapter 11 reorganization has a number of significant drawbacks, such as lengthy and costly procedures. Finally, the balance between creditor and debtor rights as established in the US legal framework might be completely altered should the legal provisions be transplanted into another legal and economic context—indeed it is already considered comparatively pro-debtor, and in another country it might become inappropriately so.

II.7. Other Topics

The following are some additional important elements of the bankruptcy system that may need to be addressed in the reform process, together with some references to research which has already been conducted on those topics.

- Liquidation (Arts. 619-636). Although most of the discussion to date in Morocco has been on the *redressement* procedure, the liquidation procedure should also be carefully examined. Many of the regulatory and institutional reforms discussed above would apply directly to liquidation—for example, if syndics are better incentivized and supervised, they will perform better in their role during liquidation.⁴¹
- Sanctions (Arts. 702-736). The system of sanctions set out in the final provisions of the law may need to be re-examined; perhaps because they are quite strict, the sanctions against management are rarely enforced by the courts. Likewise, as noted above, it may be necessary to devise sanctions against the other actors in the bankruptcy process, including syndics.⁴²
- Another important topic is the treatment of executive contracts (*contrats en cours*), which relates to the rights of the syndic or the management of the company to enforce or abandon certain legal obligations of the company. A major concern is the predictability of the legal provisions.⁴³
- Expedited Proceedings for Small Businesses. French law provides for a simplified reorganization procedure for businesses with fewer than 50 employees and annual revenues below a specified total; this alternate procedure was not incorporated into Moroccan law in 1996.⁴⁴ Such a simplified procedure might be useful in Morocco, particularly for smaller, family owned businesses.

⁴¹ For a general discussion of the existing liquidation procedure, see Hassania Cherkaoui, *Droit Commercial* (2003) at pp. 300-311.

⁴² For a general discussion of the existing system of sanctions against management, see Mohamed Jaouar, *Les sanctions applicable aux dirigeants dans le cadre des procédures collectives*, *Revue marocaine de droit, d'économie & de gestion*, No. 53 (2008), p. 101

⁴³ For a general discussion of executive contracts under Moroccan law, see Leila Zouhry, *Légitimité de la continuation des contrats en cours dans les procédures de redressement*, *Revue marocaine de droit, d'économie & de gestion*, No. 53 (2008), p. 31

⁴⁴ Art. 620-2 of the French Commercial Code.

CONCLUSION

As stated in the introduction, this report is intended to accompany the bankruptcy reform process and to identify existing resources and possible approaches to the reform process. It is the intent of the Program to continue to make available comparative and international resources, and to accompany the reform process as it progresses.

The key points raised in this report are summarized below; please do not hesitate to contact the Program if you have any questions or comments relating to them.

- 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.
- 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 should be carefully retained.
- The reform process should address the entire bankruptcy system: this means the regulations and the institutions as well as the law. In 1996 the reform was largely limited to the law; again today, the discussions have focused primarily on proposed amendments. 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.
- In terms of regulatory reform, a first step would be to study the framework of implementing decrees which were in place in France 1996 that don't have an equivalent in Moroccan law (e.g. regulation of syndics).
- The institutional aspects of the bankruptcy system will need to be evaluated early in the process. This might include identifying ways of improving the institutional capacities of the commercial courts to process bankruptcy cases through improved internal case management and specialized training for judges.

- The most extensive and up to date statistics available on bankruptcy cases in the Commercial Courts should be used in the assessment and drafting process.
- The reform process should leverage the international and comparative materials available. See www.climatdesaffaires.com.
- A major challenge will be how to find an equitable balance between the rights and obligations of creditors. 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.
- A priority will clearly be identifying regulatory and institutional reforms targeted at improving the selection, training and supervision of syndics, as well as researching international standards in this area.
- Considerable research has already been undertaken by Moroccan experts to evaluate ways of improving and making more transparent the existing prevention, *redressement*, and liquidation procedures and penalties. Reformers should build on this work and on the international and comparative resources available.
- 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.

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