



## **BUSINESS CLIMATE DEVELOPMENT STRATEGY**

Phase 1 Policy Assessment

**EGYPT**

**DIMENSION II-3**

**Business Law and Commercial Conflict Resolution**

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## EXECUTIVE SUMMARY

In order to remain competitive in the global marketplace, countries also compete against each other with regard to the attractiveness of their legal systems, and especially with regard to their business law regimes. Maintaining a sound, clear and transparent legal framework for the conduct of business activities is thus not only a prerequisite for being competitive in the international market place, it is also a major challenge for business climate policy makers.

Successful reform in countries such as Egypt would lead to a lowering of the risk perceptions of inward investors. The process through which business laws and regulations are conceptualised, drafted, enacted, and enforced should be transparent and interactive. The process of reforming existing legislation while also introducing new business law regimes is complex and requires consensus building. It is an incremental process which should involve the executive and legislative branches, law reform commissions, non-governmental organisations, academia, and a broader circle of stakeholders.

Egypt has been actively undertaking reform of its business laws for the last decade. It has a rich, sophisticated, well established legal system. Egyptian legal experts, thinkers and scholars have led the MENA region in creating solutions drawn from modern civil law systems – French and German –and tailored to the social and economic context that prevails in MENA. In Egypt, business law reformers are confronted with a combination of modern business law regimes and traditional sources of business law – a setting typical of the MENA region. This can add complications for policy makers trying simultaneously to tackle the reform of existing legal regimes and the introduction of new ones in response to changing market realities.

Although Egypt has recently embarked on a number of revisions of both traditional and modern business laws, there are a number of areas where legislation is still inadequate and fails to meet modern business needs. Areas such as land rights, collateral, and insolvency regimes stand out.

Business law reformers in Egypt are faced with the inherent inter-institutional complexity of business law reforms and systemic resistance. To overcome these requires strong political and strategic guidance and inter-institutional co-ordination – both still underdeveloped.

Furthermore, the best rules will not improve performance if other factors lead to their being flouted or impede compliance in other ways. The BCDS assessment of the Business Law regime therefore highlights the fact that the process of business law reform in Egypt requires that not one, but all issues need to be addressed, either simultaneously, or one after the other.

Moreover, there are several aspects of business law that in fact are related to other components of the business climate. Modern company law reforms must encompass the latest corporate governance standards (Chapter 8), while collateral law and land rights reforms are pertinent to better access to Finance (Chapter 10), and a strategic approach to business law reform in general benefits from regulatory reform initiatives as discussed in the chapter on better business regulation (Chapter 5). Common to all these policy areas is their strong impact on formality in that clearly drafted, modern business law regimes that support business needs can strengthen incentives for businesses to register and formalise their operations.

## **Achievements in Business Law and Commercial Conflict Resolution**

*Political awareness and commitment have grown*

Political commitment to business law reform has become stronger in Egypt. There are ongoing government efforts to modernise the country's legal infrastructure and to continue business law reforms. Promising initiatives, such as ERRADA, are in place.

*Recent amendments to business laws have been mainly positive*

Egypt has been actively undertaking reform of its business laws throughout the past decade. The first wave included laws on capital markets, banking, privatisation, commercial laws, and others that constitute the cornerstones of a vibrant market economy.

Specifically, a number of fundamental business laws have recently been amended:

- regarding access to land and property rights, Law 94/2005 asserts the principle of non-discrimination for foreign-owned companies (though agricultural land is still exempt);
- regarding collateral law, the New Commercial Code of 1999, the Mortgage Law of 2001, the Unified Banking Law of 2003 have improved the legal frameworks necessary to facilitate access to bank finance as well as consolidated and improved supervision of the banking sector.
- In addition, a number of more traditional business laws have been revised:
- with respect to labour legislation, reforms were introduced in 2003-5, while dispute settlement was also the subject of recent reform;
- as for planning permission and construction, Building Law 119/2008 was passed in 2008. It provides, in a clear and transparent manner, the conditions and procedures for obtaining building licenses, and determines building requirements in a manner which should restrict significantly the discretionary powers of government bureaucrats in issuing such licenses;
- Environmental Protection Law 1994/2009 brought improvements to the process of attaining an environmental license by a business operation.

*There is increased awareness of the issue of enforcement*

There is growing awareness of the need to increase enforcement capacities by continuously training judges and improving court clearance rates. Specialised economic courts have been introduced to deal with more complex commercial law cases often requiring knowledge of international private law and foreign legal systems.

## **Challenges in Business Law and Commercial Conflict Resolution**

The BCDS assessment of business law regimes in Egypt has identified a number of key challenges. Most apply to emerging markets at a similar stage to Egypt in the development of their economic law environment. However, Egypt has a strong legacy of state domination, which has concomitant effects on public administration and private sector regulation. This makes it particularly resistant to modernising and reforming business law regimes, often considered as driven by a "capitalist" or free market approach. With this in mind, a number of key challenges have been highlighted in the assessment.

*Comprehensive strategy and centralised reform supervision are key conditions for a coherent business law reform*

The absence of a comprehensive business law reform strategy backed by a powerful central law commission, or a similar reform supervisory institution, is a major challenge to business law reform in Egypt. Given the strong need to co-ordinate the line ministries involved in business law reforms and to involve Parliament from an early stage, the absence of a comprehensive business law reform strategy and central co-ordination unit constitutes a major shortcoming.

*Collateral law needs to address modern business needs*

As highlighted in Chapter III.3, “Access to Finance”, an efficient collateral law regime has a strong impact on access to credit for investors in Egypt. The issue is related to the soundness of movable and immovable property laws, available titling procedures, and the land register. Reforms in this area can have a tremendously important impact on the loan market and on investment decisions in Egypt. Egypt’s principal challenges are the lack of a unified law on secured transactions able to offer collateral protection in line with the requirements of a modern business community.

*Land laws and land titling act as basis for investor security*

Land rights provisions are scattered across the body of law and the public land management still awaits improvements. Land titling requires not only technical procedures to be in place, but costs to be reasonable and its benefits communicated to the public in a convincing way. Even if only partially correct, estimates that suggest a mere 2% of eligible properties are registered (*i.e.* titled) put the spotlight on the huge challenges for the business climate that stem from unclear land ownership rights and missed opportunities for using land as collateral for finance.

*Modernisation of insolvency law needs to become priority*

The recently enacted insolvency law reforms some core principles and concepts in a system that had prevailed for over a century. Although the law has brought welcome changes, they have fallen short of overhauling the entire system and complaints from the business community continue.

*The non-enforcement of business law regimes remains a major obstacle*

The general lack of any administrative and judicial enforcement capacity remains a deep-seated obstacle to doing business in Egypt. Contract law, property rights (including intellectual property rights), and competition law all need viable enforcement mechanisms if they are not to be just laws in the statutes books. Egypt is notorious for the inefficiency and complexity of its commercial court system – the single biggest grievance of foreign and local investors alike. While there have been positive developments, *e.g.* the introduction of the new economic courts, further efforts to strengthen law enforcement must be undertaken.

Strengthening the court system and developing alternative dispute resolution techniques have been mentioned as priorities for reform. This is confirmed by the interviews the OECD-MENA conducted for the purpose of this BCDS assessment. Most interviews said that modern legal frameworks exist but that the critical issue is the institutional incapacity to enforce the law. Other interviews argued that Egypt’s main challenge is the legal training of judges, practitioners, and lawyers, who need to be educated in modern business requirements for flexibility and mobility.

## **Recommendations for Business Law and Commercial Conflict Resolution**

To meet the challenges outlined above, the Government of Egypt and experts involved in business law reform should take a number of measures, all of which should be backed by strong political commitment and adequate resources.

### *The Formulation of a comprehensive strategy and centralised reform supervision*

A general strategy driven by a centralised institution would enable reformers to tackle different business law reforms at the same time, while ensuring that ministries and agencies acknowledge the interrelatedness of law reforms. Such a strategy should not be restricted to collecting and reviewing legislation. It should also test how useful existing business law is to the needs of modern business operations.

Key requirements in the strategy would be:

- High-level political commitment and leadership.
- Constant, formalised input from business representatives.
- A programme to improve the legal expertise of all players involved in reform. This would require close co-operation with law faculties, lawyers' organisations, judges, and other professionals operating in the judicial system.
- A central law commission that is accountable to the public and other stakeholders and reports directly to senior echelons of government. The commission would be invested with sufficient authority to review, suggest, and follow up the implementation of its recommendations. It should co-ordinate its work with all relevant ministries (Ministry of Justice, Ministry of Legal and Parliamentary Affairs, and other ministries and ministerial bodies whose work relates to business).

### *Improving collateral law*

Egypt should consider introducing a unified law governing secured transactions and the use of collateral in business transactions. The framework should be clear, simple, and rapidly enforceable. The law should seek to achieve a balance that takes into account the interests of debtors, creditors, and third parties.

Three issues should be addressed prior to the introduction a unified collateral law:

1. the kind of lending activity that the law should cover;
2. whether the law should cover all forms of property, including land, or should be restricted to personal property;
3. whether the law should apply to any transaction that serves as security (including credit and the seller's security) or whether it should be limited to securities that secure the payment of debts.

### *A single, unified law on secured transactions should be adopted*

To ensure legal simplicity and practical clarity, Egypt should consider issuing a unified law on secured transaction and the taking of collaterals in business transactions. As stated by both the UNCITRAL

Legislative Guide and the EBRD Model Law, the framework should be both simple and clear and capable of speedy enforcement. The law should aim at providing a balanced regulation that takes into account the interests of debtors, creditors, and third parties. Egypt should approach the reform process pragmatically by trying to find a balance between the needs of the parties without adhering to any theoretical, historical, or ideological guidelines.

The greatest need is for the introduction of non-possessory charges over movables, which would facilitate the provision of credit. A high degree of formality hinders the granting of security. Policy makers should opt for minimal formal requirements. Given the importance of registration, and considering that the success of non-possessory charges rests upon an efficient registration system, it is imperative that an efficient registration system should be instituted. Access to the registry should be unrestricted. Nobody should be required to prove their relationship to a borrower or obtain permission in order to search public records for information on the borrower.

Other suggestions include the introduction of a single and unitary form of security. Having a simple structure is needed for both legal simplicity and practical clarity. In this regard, all pre-existing forms of security should be abolished.

#### *Clarifying and simplifying land laws and land titling*

In the interests of clarity, all the currently scattered provisions governing land rights and land categories should be merged into a single piece of legislation which clearly sets out all existing rules. It would inform stakeholders as to their rights and permissible and non-permissible transactions.

The real challenge facing Egypt is to implement modernised cadastre system and use it to bring all new urban and existing urban areas, rural zones, and informal settlements into the ambit of the law. It would be a cultural revolution as well as an exercise in legal reform, which would require:

- A comprehensive awareness campaign to inform the general public of the benefits of registering property.
- A campaign to inform people of the challenges of the exercise and explain how the government would deal with competing claims on a single property in the light of the current ambiguity of the system.
- Formalising the property registration system and applying it throughout the country. This is an absolute necessity if a well functioning, formal market economy is to be created.

#### *Formulating and passing a new insolvency law*

A new insolvency law would be the single most useful piece of legislation for rapidly improving the business climate and ensuring easy, speedy access to finance.

Egypt needs to introduce a unified law on secured transaction. The objectives of the law could be achieved by a variety of legal techniques. Rules on liquidation should:

- prevent debtors from fraudulently concealing or transferring their assets to the detriment of the creditors;
- provide equality between creditors by preventing preferential payments to any of them;
- sell the bankrupt's assets expeditiously and at a fair price.

Procedures should be simple and designed to avoid delays. The person in charge of the liquidation procedures should be adequately compensated. The law might consider setting maximum time limits for the length of the different procedural steps involved in the process.

*A new law should be passed to acknowledge the concept of reorganisation*

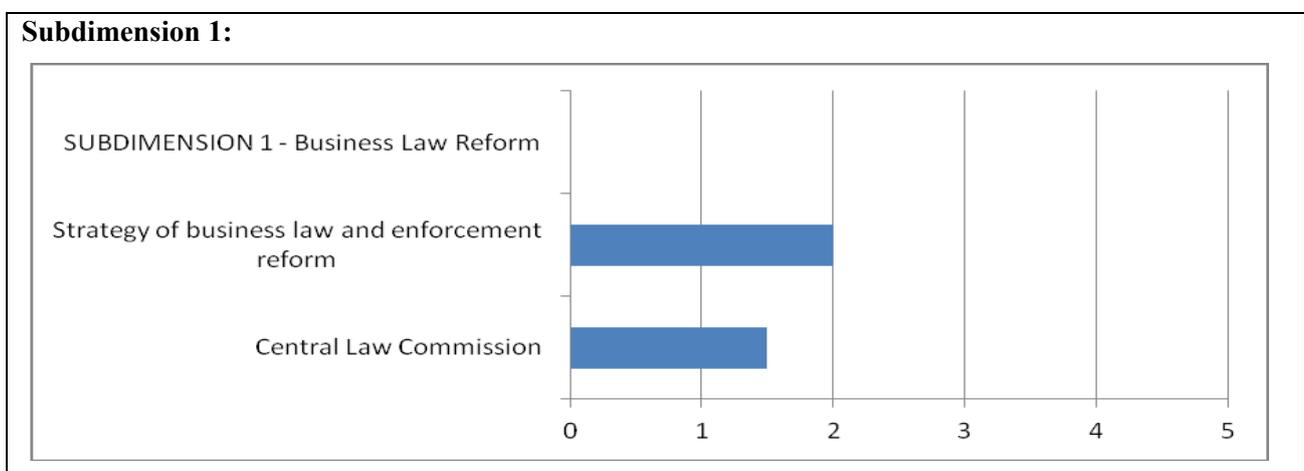
Reorganisation (as opposed to liquidation) is a system of legal rehabilitation that protects the interests of investors, safeguard the interests of employees, and protect enterprises of national importance. Reorganisation may, in fact, be more financially rewarding for the parties involved than liquidation. Such benefits, including the possibility of maintaining employment, have made corporate rescue procedures a common feature of modern insolvency legislation.

The legislator could also consider the introduction of the concept of private agreement concluded between the debtor and main creditors and sanctioned by the courts. Finally, improvement of the infrastructure governing bankruptcy is an absolute must for a smoothly operating legal framework.

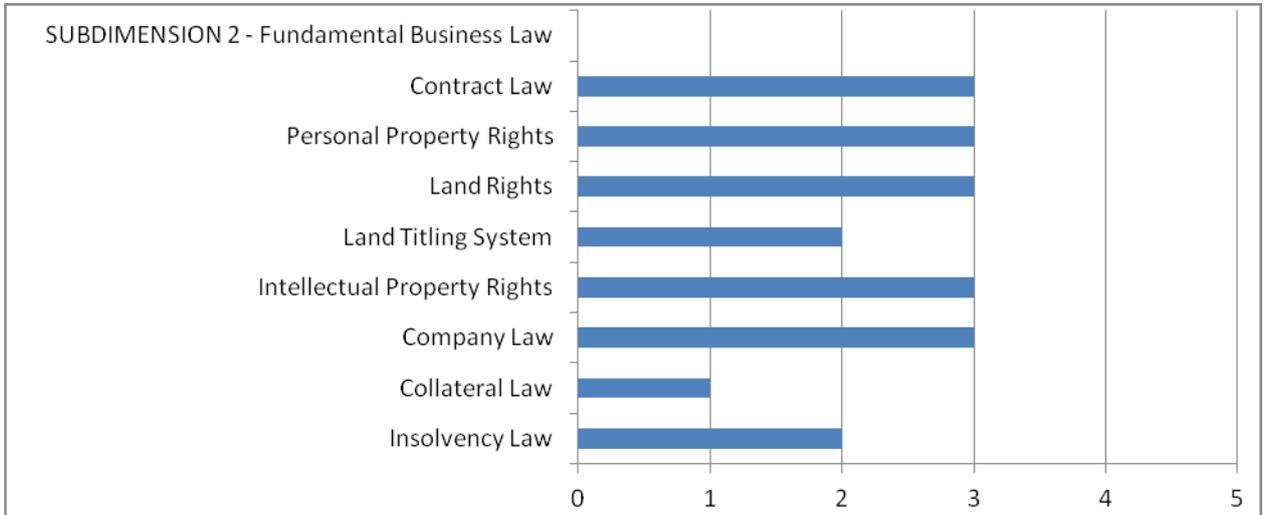
*Continuing to improve enforcement through the new economic courts*

Whilst the new special economic courts are a welcome development, it remains to be seen whether, in practice, they will deliver the expected results. At the moment, a major problem remains selecting and training commercial court judges and digitising the Egyptian court system in order to reduce administrative obstacles and simplify procedures. More resources should be given to train judges in modern finance and business practices in order to help speed up procedures.

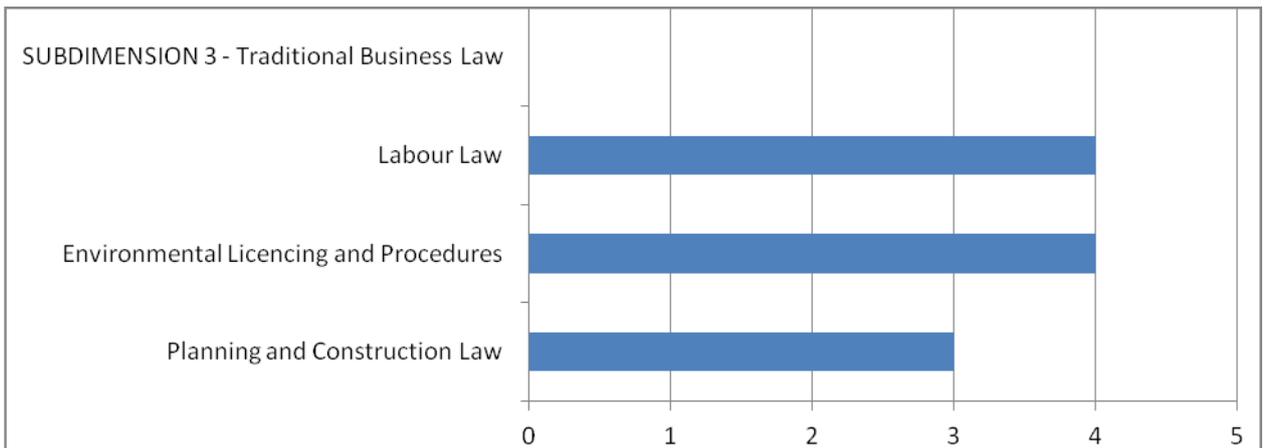
#### Scores by Subdimension: Egypt



**Subdimension 2:**



**Subdimension 3:**



## INTRODUCTION

This chapter of the Business Climate Development Strategy (BCDS) is of particular importance for enterprises operating in Egypt, the vast majority of which are small-and-medium sized enterprises (SMEs) and companies operating in the informal sector. Throughout the MENA region, business law often caters well for and sometimes even provides built-in protection for those who have the capacity and connections to use the laws and regulations of the business climate to their advantage. Under these conditions, smaller enterprises and informal businesses must often contend with greater risks than larger and formal firms. Barriers to entry to the formal economy often stem from business regulations that are too restrictive or outdated, as well as cumbersome enforcement procedures.

Businesses are more likely to remain informal when there is an absence of commercial laws clearly regulating rights and obligations. This is made worse by the absence of transparent property rights on land and movables, by excessive licensing requirements and taxation rules, and by labour and construction laws. Any thorough reform of business laws and enforcement capacities must therefore also address the question of helping informal businesses to use all their assets to become viable business operations.

Business law in Egypt is based on the typical combination of modern legal practice with traditional sources of law. A common feature in MENA countries is the continued effort to reform existing legal regimes and the introduction of new ones to respond to changing market realities. Egypt followed the path and recently embarked on reforms of key business laws and the introduction of new legal regimes.

The following assessment provides a snapshot of Egypt's business law and enforcement system with regard to the process of reforming basic and traditional business laws and introducing new-generation business laws. It does not cast any judgement on the quality or soundness of a particular legal tradition and enforcement system. Any reform of the business climate in emerging economies requires a comprehensive approach to evaluate the soundness of the existing system, define priorities for reform, and work on their implementation.

Research for this chapter was carried out during the period April-June 2009. Revisions were undertaken following missions to Cairo in October 2009 and again in March 2010.

## **THE BUSINESS LAW AND COMMERCIAL CONFLICT RESOLUTION ASSESSMENT FRAMEWORK**

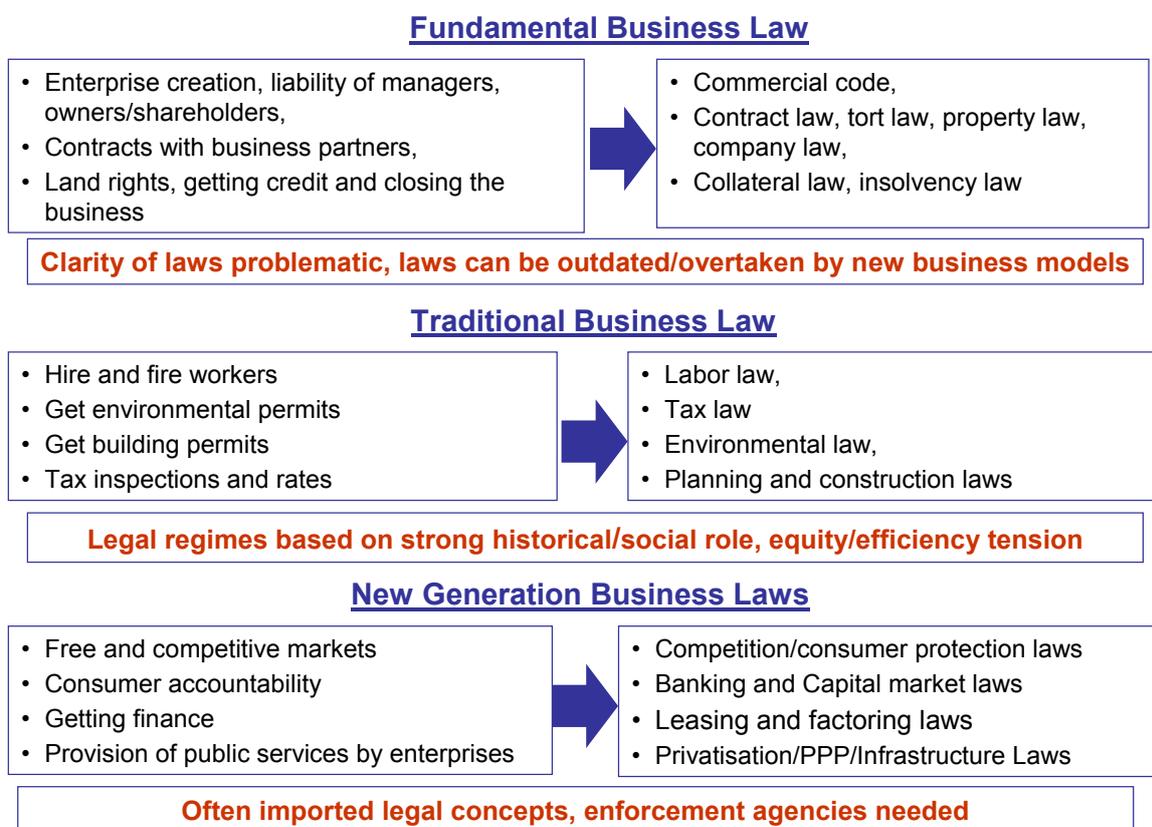
Business law can be defined as the body of law which governs business and commercial transactions. It covers any legislation that affects commercial enterprises and agents. The term “commercial law” is often used interchangeably with “business law”. The terms are indeed very similar, although “commercial law” may suggest a stronger focus on trade and transactions, whereas “business law” is a broader term that also encompasses other legal regimes. For the sake of structuring information collected in the assessment, the following document distinguishes between four sub-dimensions, three of which are shown in Figure 1.

“Fundamental Business Law” is particularly grounded in traditional sources. The first sub-dimension focuses on very basic legal regimes such as contractual rights, property rights, collateral and insolvency laws. They are fundamental for a functioning business environment. As is the case in many other countries, however, reforming them may require considerable political courage, dialogue, and the ability to convince powerful interest groups. But the benefits of reforming them are substantial: changing business models and modernising commercial transactions can make reforms an important priority for fostering the overall business environment.

The second sub-dimension describes “Traditional Business Law” by thematic regime. These laws are strongly rooted in historical or social concepts. Obviously, reform must take into account these origins and powerful interest groups can make life difficult for reformers.

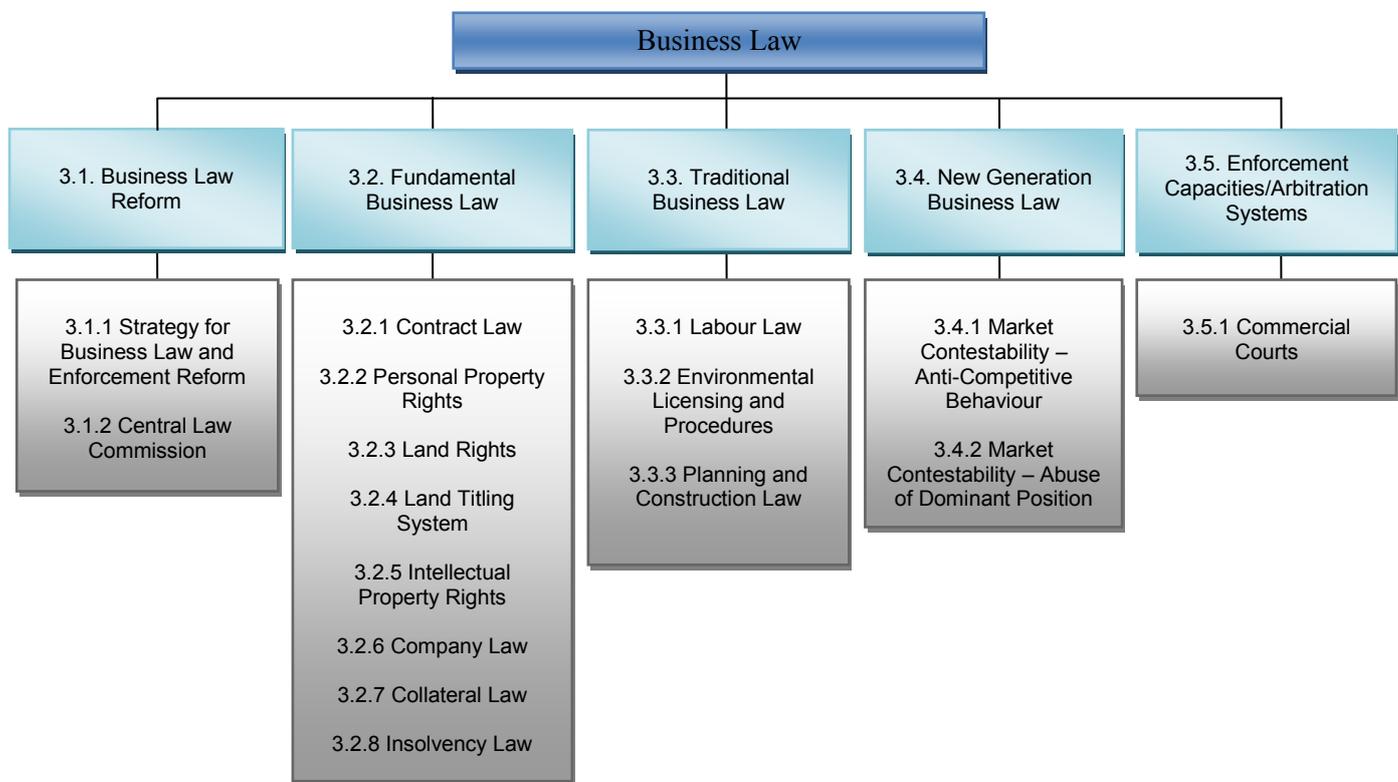
Finally, Egypt provides a showcase for a wave of “New Generation Business Law” regimes, which have been providing the basis for successful free market economies in other parts of the world. Difficulties may arise from simply implanting concepts foreign to a particular legal culture and underestimating the enforcement challenge.

Figure 1. Business law reform: main issues



In the final sub-dimension, which does not appear in Figure 1, information on enforcement capacities for the rights granted by the first three sub-dimensions is collected and assessed. Enterprises have to rely on the guarantee of due process, which includes a limited time period of enforcement of their rights and any litigation. Commercial conflict resolution is the established method for resolving disputes between parties to a commercial agreement.

**Figure 2: Overall framework of Dimension II-3 Business Law**



### **SUB-DIMENSION 3.1. BUSINESS LAW REFORM**

In the globalised marketplace a country's legal system is important for the overall attractiveness of the country as an investment destination. A sound, clear and transparent legal framework for the conduct of business is a prerequisite for being competitive. However, making sure that the process of making laws is transparent and interactive is a challenge for policy-makers. The way in which laws are conceived, drafted, enacted, published and enforced should be part of a country's investment promotion strategy. At the same time, business law reform is an ongoing, incremental process that involves the executive and legislative branches, law reform commissions, non-governmental organisations, and a broader circle of stakeholders.

Effective and coherent legal reform requires a comprehensive, sustainable approach that avoids importing so-called “models” inconsistent with national legal and socio-economic norms. Legal reform efforts often involve institutional restructuring, rewriting old laws, and drafting new ones. Yet even in stable, democratic countries, creating sound laws and regulations is a challenge. In developing and transition countries, political interference, a lack of experience and resources, and the constraints imposed by weak enforcement agencies often make the job of business law reform even harder. Reformers sometimes also fall into the trap of believing that new laws can solve problems simply by virtue of the fact that the laws exist. Yet laws and regulations that are overly complex, fail to take into account weaknesses of the agencies that are supposed to enforce them or are socially not acceptable, can create more problems than they solve. Governments struggling to create a minimal political consensus may find that their laws, often filled with last minute additions and deletions, conflict with one another or fail to serve the purposes intended. Finally, a tendency to over-regulate can lead to regulations that are ignored, harming the reputation of the legal system as a whole.

Business law reform is inherently intra-sectoral and/or intra-institutional in its focus. The best operational rules will not improve performance if external factors force their violation or otherwise impede compliance. This has been Egypt's main problem and challenge as reported by the interviewees for the purpose of this Business Climate Development Strategy assessment.

Most local respondents to the BCDS questionnaire confirmed that, in the majority of cases, modern legal frameworks exist and that the main issue is that of implementation and institutional capacity. Others argued that Egypt's main challenge is the legal education and training of judges, practitioners and lawyers. Nevertheless, the remainder of this chapter will highlight that the process of business law reform in Egypt requires addressing all the foregoing. There are, for example, a number of areas where legislation is still inadequate and do not respond to modern business needs. There is also a dire need to raise the level of legal education in the country and link it with true business needs. Moreover, strengthening the court system and developing the alternative dispute resolution techniques should also be a priority.

In light of the above, the two elements included in this sub-dimension are: 1) whether there is a strategy for business law reform; and 2) whether there is a central law commission or similar powerful entity at the heart of government that undertake law reform activities. The first question explores whether there is a strategy at all, the manner in which it has been developed, the process of drawing it up, and the priorities it defines. The second element takes an institutional perspective and addresses optimum technique towards implementing and co-ordinating the elements of a strategy.

### 3.1.1. Strategy for Business Law and Enforcement Reform

Reform is not limited to legislative bodies changing the text of the law. It is a process that should involve an identification of the main areas of concern and consultation of the different stakeholders. There must be dialogue on the best way to approach the areas of concern and on the techniques for addressing shortcomings. And the general public must be consulted on an ongoing basis. The different social and economic repercussions must also be treated wisely in order not to create tension between different segments of the society. It thus appears that drawing up a pragmatic and achievable strategy within the business law framework is a complex undertaking. Furthermore, there is a growing consensus that it should not be left up to justice ministries, but should involve a broader circle of stakeholders who include legal practitioners, business associations, and other civil society representatives. For business law reform, the inclusion of business associations and representatives in the assessment and execution phases is a key requirement, as is the existence of a reform strategy which has the support of the higher echelons of government.

Egypt has been actively undertaking reform of its business laws throughout the past decade. It should be noted that Egypt has a rich, sophisticated, well-established legal system and that Egyptian jurists and scholars have been regional leaders in creating solutions inspired by modern civil law systems, such as the French and German, while tailoring them to the predominant social and economic texture. The reform of business law in Egypt started at the end of the 1990s with the economic reform programme that attempted to steer the country back on to the path of economic development. The first wave included laws on capital markets, banking, privatisation, commercial laws, and others that constitute the cornerstones of a vibrant market economy.

However, such modernisation efforts were not part of an overall strategy for business law reform as described in this sub-dimension:

- So far, there has been no intergovernmental strategy which has enjoyed the necessary political support, has benefited from the contributions of different stakeholders, and has proceeded to the implementation phase.
- Business organisations have rightly reported that, whilst there have been reforms to business-related legislation in the past few years, the lack of an overall vision has led to only partial reform and some conflicting regulations have remained. This has rendered reform efforts in a number of cases obsolete.

#### **Box 1: Law Reform Initiatives and the Law Enactment Process**

Several programmes have been developed by international agencies to assist Egypt in drawing up and implementing a reform strategy. However, there are no reports of any initiative that has been so far successful. This may be attributed to the nature of the process of proposing legislation in Egypt.

It is worth pointing out that, in 2007, there was an initiative supported by USAID to modernise economic legislation in Egypt. It was supervised by a national law commission established by a Prime Ministerial decree for this purpose. The initiative produced no documents, the commission is no longer operative, and the committee reportedly does not exist anymore. The reasons for the failure of the initiative are not clear and there are no available documents and/or reports that may shed light on its work.

Traditionally, each ministry or administrative agency seeks to promote its own legislative agenda with the government. Each administrative agency has a counsellor from the Council of State who assists it – together with a group of experts recruited by the relevant government body – in drafting the legislation that falls within its jurisdiction. The draft is then discussed by the Council of Ministers and later submitted to Parliament as a bill for the parliamentary process to commence and possibly pass the bill.

The process of consultation is not practiced uniform. Some ministries engage with stakeholder representatives and consult them in the preparation phase and some do not. The political co-ordination comes

at the Council of Ministers level. Nevertheless, in 2005, the Ministry of Legal and Parliamentary Affairs was set up by a Presidential Decree to oversee the co-ordination of the government's legislative agenda and provide the necessary legal support to the government. The ministry did not, however, devise any strategies for a co-ordinated reform of business regulations.

Source: PSD/OECD

Despite the lack of a concerted strategy, Egypt's efforts to reform its business laws have not stopped. On the contrary, there are currently reports of an initiative from GAFI to reform the company law. GAFI issued a draft for comments by all relevant stakeholders and posted it on its website for comments by the general public. This is a welcome effort and should be replicated in other sectors.

The Ministry of Justice, together with GAFI, is also currently seeking to reform bankruptcy legislation, although there is no information yet available on how the effort progresses.

Another initiative which may be considered a reform strategy is the Egyptian Regulatory Reform and Development Activity, or ERRADA (discussed in greater detail in the BCDS chapter, "Better Business Regulation"). ERRADA is a four-step initiative.

First, each ministry taking part in ERRADA should draw up an inventory of all laws and regulations that affect individuals and businesses. Second, a review of the inventory should be carried out within a public-private triage or coalition of

- i) special ministerial units (GMUs),
- ii) a central independent body of experts (GRU), and
- iii) a coalition of private business and professional organisations (BAC).

Third, there should be an open review process giving access to the inventory on the Internet. Finally, the process should lay the groundwork of systems, institutions, and principles for the effective use of regulatory impact assessment (RIA) as the foundation of economic governance in Egypt.

Careful analysis of ERRADA reveals that it is not a strategy for business law reform. It is a review mechanism of existing legislations designed to provide a database of all business regulations in force for the purposes of transparency and communication – an important step. It does not offer a platform for full review of business laws in Egypt with the possibility of suggesting new regulations and/or amendments to existing regimes.

### **Score for Strategy for Business Law and Enforcement Reform: 2**

Egypt lacks a strategy for business law reform, although political commitment for reform is strong. This suggests a score of 2. Indeed, the efforts of the government to modernise its legal infrastructure and carry out business law reforms continue are supported by the international community. In addition, there are promising initiatives in place such as ERRADA, though they do not deal with substantive business law reforms and strategy.

### ***Recommendations for Strategy for Business Law and Enforcement Reform***

Current efforts should converge towards an overall strategy that reflects the needs of the business community and the public and is endorsed by inter-ministerial consensus. The strategy should not be restricted to collecting and reviewing legislation. All its components should be backed up by high-level political commitment and leadership. The strategy should also provide for a programme to improve the

technical expertise of all the different actors involved. This would require close co-operation with law faculties, lawyers' organisations, judges, and other professionals operating in the judicial system.

### 3.1.2. Central Law Commission

In many countries, law commissions are set up to draft and improve a country's business law. The need for some organised expert body to advise government on business law reform stems mainly from the fact that legal reform is highly complex and different reforms must often be conducted in parallel because of the interconnectedness of the whole legal system.

Countries have made successful use of central law reform commissions or permanent legal audit bodies in the past. Their role is to ensure the uniformity of the law and business law system and to guarantee that their provisions are as fair, modern, simple, and cost-effective as possible. Their work consists of codifying the law, repealing obsolete and unnecessary enactments, and reducing the number of separate statutes. In this manner, law commissions can contribute to greater transparency in the law-making process. While their use and effectiveness has been demonstrated in many developed countries, they remain underutilised in many countries undergoing legal and judicial reform.

The creation of a well functioning law commission often requires specific enabling legislation, careful selection of members, the establishment of effective support staff, a clear methodology, links with similar organisations around the world, and proper research tools and facilities. The make-up of the commission and the involvement of the public in its activities are key factors in its success. Experience in other countries has shown that the more publicity is given to the work of the commission, the more the reform process benefits from the participation of key stakeholders (see Box 2 on the Indian experience).

Another critical requirement is robust political backing with commission members co-ordinating closely with the government to guarantee the efficiency of their work.

#### Box 2: How the Indian Law Commission works

The Commission's regular staff consists of about a dozen research personnel of different ranks and varied experiences. A small group of secretarial staff looks after the administration side of the Commission's operations.

Basically the projects undertaken by the Commission are initiated in the Commission's meetings which take place frequently. Priorities are discussed, topics are identified and preparatory work is assigned to each member of the Commission. Depending upon the nature and scope of the topic, different methodologies for collection of data and research are adopted keeping the scope of the proposal for reform in mind.

Discussion at Commission meetings during this period helps not only in articulating the issues and focussing the research, but also evolving a consensus among members of the Commission. What emerges out of this preparatory work in the Commission is usually a working paper outlining the problem and suggesting matters deserving reform. The paper is then sent out for circulation in the public and concerned interest groups with a view to eliciting reactions and suggestions. Usually a carefully prepared questionnaire is also sent with the document.

The Law Commission has been anxious to ensure that the widest section of people are consulted in formulating proposals for law reforms. In this process, partnerships are established with professional bodies and academic institutions. Seminars and workshops are organised in different parts of the country to elicit critical opinion on proposed strategies for reform.

Once the data and informed views are assembled, the Commission's staff evaluates them and organises the information for appropriate introduction in the report which is written either by the Member-Secretary or one of the Members or the Chairman of the Commission. It is then subjected to close scrutiny by the full Commission in prolonged meetings. Once the Report and summary are finalised, the Commission may decide to prepare a draft amendment or a new bill which may be appended to its report. Thereafter, the final report is forwarded to the Government.

It is obvious that the success of the Commission's work in law reforms is dependent upon its capacity to

assemble the widest possible inputs from the public and concerned interest groups. The Commission is constantly on the look out for strategies to accomplish this goal within the limited resources available to it. In this regard the media plays an important role which the Commission proposes to tap more frequently than before.

The Commission welcomes suggestions from any person, institution or organisation on the issues under consideration of the Commission, which may be sent to the Member-Secretary.

Source: <http://lawcommissionofindia.nic.in/>

### **Score for Central Law Commission: 1.5**

Overall, the Egyptian experience of a law commission for business law reform has not been successful. Hence the score of 1.5. In 2006, upon a recommendation from USAID and as part of a commercial law reform project, a prime ministerial decree set up the Central Law Commission to modernise economic legislation. The commission was composed of experts from the Ministry of Justice, economists, academics, and legal experts. There were no representatives from the private sector and/or business organisations. The commission was not an independent body, but subject to the supervision of the Ministry of International Cooperation. Its mandate was to undertake a thorough analysis of business laws and propose any amendments or new laws that would improve the business environment. The commission's recommendations and proposals were to be submitted to the government and Parliament. According to government officials, the commission was funded from donations made by USAID as part of its technical assistance programme. By the end of 2008, its mandate was terminated and it was dissolved. Shortly before its dissolution, there was a discussion on transferring supervision of the commission to the Ministry of Legal and Parliamentary Affairs in order to centralise law reform efforts within a single government department.

The reasons for the termination of the commission's mandate are not clear. Reports highlighted the following points:

- For two-and-a-half years, only one amendment to one law was discussed and one law suggested. The amendment was not enacted by Parliament due to internal opposition from the ruling party. The commission attempted to discuss a new law on bankruptcy but its mandate was terminated before discussions opened. (The Ministry of Justice and GAFI are currently undertaking a reform of bankruptcy legislation.)
- Other reports say that the commission was not successful due to resistance from ministries which were not represented in the commission and would not therefore co-operate with it.
- The work of the commission was not publicised. Several legal practitioners and business organisations interviewed were not even aware that such a body had existed. The involvement of the private sector was minimal and the public was not consulted on what the priorities ought to be.
- The commission lacked a clear vision of its mandate and priorities.
- It also appears that the commission did not have sufficient political support to overcome internal resistance from other ministries and see through its mandate efficiently. The weakness of the political support became evident when USAID discontinued its funding and the government showed reluctance to take over.

### ***Recommendation for Central Law Commission***

A central law commission that is accountable to the public and stakeholders and reports directly to a senior government office should be set up. It should wield sufficient authority to review, suggest, and follow up the implementation of its recommendations. The commission should co-ordinate its work with all relevant ministries (Ministry of Justice, Ministry of Legal and Parliamentary Affairs, and other ministries and sub-ministerial bodies dealing with business activities).

## SUB-DIMENSION 3.2. FUNDAMENTAL BUSINESS LAW

The Fundamental Business Law Sub-Dimension is grounded in traditional sources. Its analysis focuses on such base legal regimes as contractual rights, property rights, collateral, and insolvency laws – fundamental for a functioning business environment. However, reforming this body of law requires considerable political courage, dialogue, and the ability to win over powerful interest groups. Yet reform would be of great benefit as changing business models and the demands of modern commercial transactions make the modernisation of fundamental business laws a priority for fostering a favourable overall business environment.

The criteria for assessing this sub-dimension are:

- whether businesses are able to enforce their contracts swiftly and efficiently;
- the existence of adequate constitutional protection for private and personal property that would enable its unimpeded transfer;
- the existence of a clear framework for registering and transferring real estate;
- whether there is sufficient protection for intellectual property rights and efficient enforcement of such protection;
- whether there is a stable, accommodating framework for establishing, managing, and operating companies;
- the existence of a sound, secured transactions regime enabling businesses to obtain credit;
- whether market exit is transparent and relatively easy.

Egypt's principal challenges in this sub-dimension are secured transactions, insolvency, land rights, and land titling systems. The government recognises these challenges and has put in place plans to deal with some. The following section discusses the components of this sub-dimension. Land rights and land titling systems are discussed together for the sake of clarity. (See Dimension I-1, "Investment Policy and Promotion" for further discussion of land rights and titling.)

### 3.2.1. Contract Law

A recently published study has shown that a country's ability to enforce contracts constitutes an important determinant of comparative advantage. Surprisingly, this study finds that contract enforcement capacity explains the pattern of trade more than physical capital and skilled labour combined.<sup>i</sup> Further, in 1990, Douglass North analysed the causes of economic growth and concluded that the absence of low-cost means of enforcing contracts was "the most important source of both historical stagnation and contemporary underdevelopment in the Third World".<sup>ii</sup>

Contract law is the natural corollary of the Latin axiom, *pacta sunt servanda* ("agreements must be honoured"). As such, it is one of the pillars of the rule of law. When two parties strike a bargain, there must be some mechanism provided by the country's legal regime for ensuring that each party sticks to the terms of the agreement and for adapting those terms in the event of a change in the contracting parties' circumstances. For example, in MENA countries, economic development with regard to large scale

infrastructure projects depends on long-term contracts where purely relational factors are insufficient. Civil or commercial codes must contain clear provisions governing contractual rights and obligations.

### **Box 3: Tools of Contract Enforcement**

Enforcement of contract rights is fundamental for a smoothly performing market economy. In fact, it is a cornerstone of the market economy. Some contracts can be enforced through private mechanisms alone while others require resorting to the courts. A healthy environment for enforcing contracts must contain a mix of both public and private institutions. Neither private nor public means by themselves are sufficient.

Private mechanisms come in many forms. Trademarks and advertising are one way in which firms can unilaterally commit to keeping their promises by signalling their willingness to deliver the quality of goods they promised. Besides such unilateral devices, the contracting parties have a number of bilateral mechanisms. They can secure their promises with a pledge of land or some other type of property. Or they may devise “self-enforcing” contracts by, for example, shifting the allocation of profits or tying the sale of one good to another – in both cases to provide additional incentives for one side or the other to comply. Or they can include various forms of “self-help” provisions that permit enforcement without going to court. Finally, firms can refuse to do business with those who have breached their obligations in the past.

Governments can take a number of actions to foster such private mechanisms. They can establish or strengthen registers for land, other forms of property, and trademarks; establish rules governing advertising and access to advertising media; review their laws to ensure self-enforcing and self-help contracts are permitted; and lastly they can promote the creation of credit bureaus and other credit reporting agencies to disseminate information about firms’ and consumers’ credit histories.

Courts are the most important public contract enforcement institution. Not only because they are an avenue of last resort in the event of a breach, but because the threat of a lawsuit can deter breaches. Court procedures should be simplified and the management and processing of cases automated. The incentives that lawyers sometimes have to delay cases should be examined and, where they exist, changes should be made in the way the profession is regulated to remove such incentives. Although court reform ultimately rests with the judiciary, the executive can take the lead by ensuring that its use of the courts is efficient and consistent with the broader public interest.

*Source: PSD/OECD*

Contract enforcement is not very efficient in Egypt. The issue still stands out in all major business environment appraisal reports as one of Egypt’s main obstacles. In the World Bank’s 2010 *Doing Business Report*, Egypt is ranked 148th in enforcing contracts, with no particular improvement over the past three years. This measurement, which factors in how many days and procedures it takes to enforce a presumptive contractual right, and what cost, shows that Egypt is seriously lagging behind some of its peers in the MENA region. For example, it takes 41 different procedural steps and 1 010 days for a contractual party to enforce its legal right in Egypt, while in Morocco (ranked 108th in enforcing contracts) 40 steps and 615 days are required.

### **Score for Contract Law: 3**

The root cause of the problem does not seem to be the clarity of legal texts, the legal framework for the conclusion of contracts, or the available contracting techniques – even though the Civil Code dates from 1948 and a poor contract enforcement record is indicated. Egypt’s main problem lies not in the law but in its enforcement. A score of 3 thus seems adequate.

The Egyptian Civil Code which sets out general principles on contracts and those on specific contracts has been in place since 1948. Whilst the general principles appear to stand the test of time and to accommodate modern business needs, some enterprises argue that the “Named Contracts” category, which covers companies, guarantees, agency, loans, construction, employment, sales, lease, mortgage, as well as other forms of contracts, requires revision. For example, the regime governing construction contracts is outdated and does not take into account the new international standards on construction contracts. But this is a minor point since the code recognises the parties’ freedom to agree on any contractual terms they deem fit, as long they do not enter conflict with public morals or public order.

The general legal framework thus allows parties to contract outside the conditions set forth in the law. Other provisions, more specific to the exercise of business activities, are found in the Commercial Code of 1999. They relate to commercial sales, leases, agencies and, more importantly, to the transfer of technology. The latter category has serious limitations on freedom of contract, especially with regard to licensors' rights. The law does not allow, for instance, the contracting parties to agree on a foreign law or a foreign forum which, in some cases, does not suit technology exporters.

Business organisations did not report any ambiguities or obstacles in identifying contractual rights or techniques. That said, they did report a strong inability to enforce contracts and especially payment obligations. They identified the following problems:

- Credit bureaus are not widely used in Egypt, so businesses are unable to confirm the creditworthiness of their contracting partners.
- The lack of transparent, efficient means of obtaining security that would reduce their transaction costs and guarantee them recovery of their debts in case of default. Up to 1st October 2007, when the incrimination of bad cheques was abolished, the best available security for businesses was to obtain post-dated cheques signed in person by their contracting partners in order to be able to bring criminal action should there be default.
- Recourse to the courts for debt collection is time-consuming, cumbersome, and costly. The problem is thus related to obtaining security and the ability to collect debts and payments through the court system.

### ***Recommendations for Contract Law***

The treatment prescribed for these chronic problems faced by a number of developing countries is one based on international best practices:

- reform secured transactions legislations;
- implement a credit bureau system available to all business organisations;
- update the Civil Code (a move the government has announced);
- provide access to a fair, speedy court system which would settle claims expeditiously.

These changes do not simply require the introduction of new legislation, but a cultural change and engagement with the business community. The deterrent effect of the court system, as well as the information-sharing process based on the credit bureau mechanism, would undoubtedly help to overcome the enforcement issue.

### **3.2.2 Personal Property Rights**

Many regard the right to own property as an essential human right and it is enshrined in the constitutions of a number of MENA countries. An owner of property has the right to consume, sell, mortgage, transfer, or exchange his or her property. Important types of property include real estate (land, buildings), personal property (other physical possessions), and intellectual property (ownership rights over creations of the mind, *e.g.* works of art, inventions, etc.). The business law environment should put in place a legal framework guaranteeing efficient enforcement of property rights – first and foremost, personal or

movable property rights, which have to be clearly regulated in a country's legal system, not least in order to be useable as collateral for business financing and leasing.

The objective of this section is to examine whether there is constitutional protection for property rights and what the categories of such rights are in the legal system.

The main challenges in this area are:

- the ability to provide and/or obtain adequate security on personal property, whatever form it takes, including compensation in the event of expropriation;
- the ability to transfer property,
- and the ability to enforce rights related to property.

### **Score for Personal Property Rights: 3**

The legal framework for property rights in Egypt is quite developed – a score of 3 seems adequate.

There is constitutional protection, albeit in a conservative manner, reminiscent of socialist thinking. Article 32 of the Egyptian Constitution of 1971 provides that:

“Private ownership shall be represented by non-exploitative capital. The law regulates its social function in serving the national economy and within the framework of the development plan without any abuse or exploitation. Its usage must not contradict the general interest of the people.”<sup>iii</sup>

This article clearly reflects the Constitution's suspicion of private property and suggests that private ownership aims at taking advantage of the poor and is therefore abusive. This does not comfort investors – be they local, regional, or foreign – who fear they are putting their funds at risk. It should also be noted that a number of constitutional provisions were amended in 2007 with a view to reconciling the Constitution with a modern market economy. But Article 32 was not amended.

However, there is adequate protection against the taking of property. Article 34 of the Constitution provides that:

“Private ownership is safeguarded and may not be sequestered except in cases specified in the law and pursuant to a court order. It may not be expropriated except for the public good and against a fair compensation in accordance with the law.”

Article 35 affords similar protection against nationalisation. For investors, the provisions of the Investment Law 8/1997 on investment guarantees are also relevant. It should be noted that the application of these provisions has been extended to all forms of companies by virtue of Law 94/2005. Article 8 of the Investment Law provides that “companies and establishments may be neither nationalised nor confiscated”. However, it is probably obsolete since it contradicts Articles 34 and 35 of the Constitution and investors would not be able to sue for damages under Article 8 as there is no provision regarding compensation. But for foreign investors, protected by a bilateral investment treaty, investor-to-state arbitration can be considered, and national investors should be able to call on the protection afforded by the Constitution.

### ***Recommendations for Personal Property Rights***

Revision of Article 32 of the Constitution is recommended, as is clarification in the Investment Law as to the level of compensation expected, the procedure to be followed, and the time frame for such compensation.

Provisions governing the protection of personal property rights are also found in the Egyptian Civil Code. These are, however, outdated and require revision. Of particular interest are those provisions which are influenced by Islamic law. For example, Articles 935 to 948 of the Civil Code regulate acquisition through the exercise of a statutory right of first refusal. They essentially create a license which allows the licensee, in specified circumstances and according to established procedures, to claim immovable property by precedence over third-party purchasers. These outdated legal devices may create uncertainty and confusion for businesses and should therefore be revised.

Egypt's main business law reform challenge, as reported by a number of practitioners of the law, lies in the inability to provide a transparent regime for the transfer of ownership of real and personal rights, as well as the inability to use personal rights as security for commercial transactions. These issues are dealt with in further detail in the following sections.

#### **3.2.3. Land Rights**

Land rights affect economic growth in a number of ways. First, secure property rights increase the incentives of households and individuals to invest and often entitle them to better access to credit. Improve access to credit in itself can provide a substitute for insurance in the event of mishap. Second, the operational distribution of land affects output and economic growth given that highly unequal land distribution reduces productivity. Secure, well-defined land rights are therefore key for households' asset ownership, productive development, and effective factor market functioning. If property rights are poorly defined, or cannot be enforced at low cost, individuals and entrepreneurs will be compelled to spend valuable resources on defending their land, thereby diverting effort from other purposes, such as investment.

Secure land tenure also facilitates the transfer of land at low cost through rentals and sales, improving the allocation of land while, at the same time, supporting the development of financial markets. Without secure rights, landowners are less willing to rent out their land, which may impede their ability and willingness to engage in non agricultural employment or rural-urban migration. Poorly designed land market interventions and the regulation of such markets by large and often corrupt bureaucracies continue to hamper small enterprise start-ups and non-farm economic development in many parts of the world. High transaction costs in land markets either make it more difficult to provide credit or require costly development of collateral substitutes, both of which constrain the development of the private sector.

In sum, land rights are fundamental to business development. Without them consequences are serious:

- A business owner cannot mortgage his or her property where no legal infrastructure protects it or states its metes and bounds.
- A business owner who cannot mortgage property cannot borrow to improve his or her business. Greater legal certainty also improves land prices and investment in infrastructure.
- Secure, verifiable, transferable entitlements – including land registers and cadastre information – to agricultural and other types of land and forms of property give entrepreneurs an incentive to move into the formal economy.

Immovable property rights are often the only real collateral which a borrower can offer to banks in MENA countries. If these rights are not clearly attributed or their scope clearly defined, banks will be hesitant to lend. In transition countries such as Egypt, land plays a paramount role in the economy. Land ownership and related rights have been identified as principal assets in the economy. Literature is abundant on the importance of a sound land ownership framework and an efficient land registration mechanism for the functioning of a market-based economy.<sup>iv</sup>

### **Score for Land Rights: 3**

The legal framework for land rights in Egypt is relatively clear. Land categorised according to its use includes farm land, desert land, and industrial/commercial/residential land. As for land classification in accordance with their ownership rights, there exists a distinction between privately-owned land and public land.

The category of public land poses a series of problems. In a nutshell, businesses are suffering greatly from the ambiguities of the institutional framework for publicly owned industrial land. Investors seeking to access industrial land not in investor-specific free zones are dealing with anything up to 20 different entities, including the National Urban Communities Authority (in addition to any of its 15 different new town authorities) and the 19 different governorates that own inland industrial estates. Many of these entities have different sets of rules and procedures, applicable land prices, and different availability of land and infrastructure services. Not one system, entity, or location is consolidating information on all these issues, which investors need when choosing the best site for their activities.

This fragmented institutional control over industrial estates, spread across central and local government entities, the different procedures, and the lack of information make access to land for industrial development a very complex process for investors. The urgent need to consolidate and harmonise access to public land for industrial investment led the Ministry of Industry and Trade to establish the General Authority for Industrial Development in 2005. It was hoped that this new entity would centralise scattered procedures and assist investors. Its work has yet to be assessed.

The problem of publicly-owned land is not limited only to industrial land, but also to land set aside for tourism and farming. Here again, the ambiguities of the legal and institutional framework are also apparent. In the tourism category, the primary problem remains security issues related to sites' locations near borders. There is also the issue of the indigenous population's historical ownership which, in many cases, poses problems for investors. Law 15/1963, which prohibits foreigners from owning farm land, was enacted at a time when the spirit of the Egyptian revolution of 1952 was still felt. The ban included ownership of arable and desert land. Ownership by foreign individuals and companies of industrial, commercial, and residential land was also subject to some restrictions.

In 2005, Law 94/2005 was issued to amend some of the provisions in the Companies Law No. 159 of 1981 and Investment Law 8/1997. It granted all companies – whether incorporated under the Companies Law, the Investment Law, or the Trade Law – the right to acquire the real estate necessary to the conduct of their business activities or the expansion thereof, regardless of the nationality of their partners or shareholders and regardless of their domicile. The only exception was real estate located in areas to be designated in a prime ministerial decree. On 22 February 2007, Prime Ministerial Decree No. 350 designated the areas subject to the restrictions referred to in Law 94/2005. The restricted locations were mostly of strategic importance to the government and included the Sinai Peninsula, where only a usufruct right – or temporary use or possession of real estate – was allowed.

Decree No. 350 did not, however, contain any restrictions pertaining to the size of the real estate that could be temporarily used or owned by foreigners in the restricted areas. Neither the decree nor

Law 94/2005 were clear on whether or not such permission extended to agricultural land. Nevertheless, it is understood that the prohibition regarding agricultural land still persists. However, Prime Ministerial Decree No. 548/2005 granted non-Egyptians the same legal rights as nationals with regard to ownership of residential units in the popular holiday areas of Sidi Abdel-Rahman, Hurghada, Ras Al-Hekma, and the Red Sea coast. It is also now permissible to grant leases to non-Egyptians for residential units in Sharm Al-Sheikh City for a period of 99 years.

### ***Recommendation for Land Rights***

It is recommended that the scattered provisions on land rights and categories should be consolidated into a single piece of legislation which sets out all the different rules. It would make things clearer for foreign and local business community stakeholders, who would be aware of their rights and permissible and non-permissible transactions.

Another requirement is to address the issue of historical title rights.

### **3.2.4. Land Titling System**

A land title contains legal information about a parcel of land, *e.g.* registered owner(s) names, historical title information, and registration number. With land titling legislation in place and documented titling information in hand business owners have added security that land purchased is not subject to claims for restitution. A cadastre is a comprehensive register of the real property of a country and commonly includes details of ownership, tenure, precise location, dimensions (and area), and the value of individual parcels of land.

#### **Score for Land Titling System: 2**

The Egyptian regime for land titling and transfer of ownership is complicated and inefficient. Hence the score of 2.

The Egyptian Civil Code requires registration for purposes of ownership transfer. Two registration systems exist in Egypt: deeds registration (*Siguel El Shakhsi*), sometimes referred to as the “personal deed registration system”, and title registration (*Siguel El Ainee*). The first corresponds to the registration of contracts, claims, and other documents that establish specific rights to a certain property. The second category relates to the registration of transactions that occur on a specific parcel of land and/or property. The current Deed Registration Law (114/1946) dates back to 1946 and operates mainly in urban areas, while the Title Registration Law (142/1964) was enacted in 1964 and operates mainly in rural areas.

Neither the laws nor their executive regulations are problematic *per se* and provide an adequate framework for titling as well as registration. They both adhere to the general principle that real property should be described unambiguously in documentary form, such as conveyance deeds or documents of title, in order for a property to be granted, sold, or otherwise disposed of, in a formal legal procedure.

The problem lies in the capacity of the institutions and the technical procedures. The current process relies on a very complex and outdated paper-based system which has not been able to cope with the rapid transformation from overwhelmingly public to predominantly private ownership of land. Although the time needed for the registration process has dramatically shortened, it takes an average of 72 days (compared to the 36.1-day MENA average) to complete and involves many complex steps. In an interview with one of the government officials working on the reform of this process, it was stated by officials interviewed *that Egypt’s registered properties do not exceed 2% of the eligible properties*, which – if correct – would constitute a real challenge for the business climate in the country.

The efforts made by the government should help Egypt to achieve a Level 3-4 BCDS score. It now recognises the long-term economic benefits of modernising the land titling and registration systems and bringing a vast number of properties into the formal system. Egypt is streamlining the process and replacing the manual registry index with a parcel-based deeds registration system developed using automated software and linked to a digital cadastre employing advanced GIS and mapping technology. This cadastre system, which is advertised as the largest in the MENA region, is set to be implemented by the end of 2009. The first phase would include five areas in the Greater Cairo.

Another important change relating to the registration of real estate was introduced by Law 83/2006, amending some of the provisions of Law 70/1964 relative to authentication and publication fees, and the Real Estate Register Law 142/1964. According to Article 1 of Law 83/2006, duties and fees collected on registering in the Real Estate Register depend on the size of the property being registered, but should not exceed EGP 2 000. Furthermore, Law 83/2006 and Ministry of Justice Decree No. 5424/2006 have shortened the time required to complete the registration process.

### ***Recommendations for Land Titling System***

The real challenge facing Egypt is to bring all new and existing urban areas, rural areas, and informal settlements into the ambit of the law. It would be a cultural revolution, as well as an exercise in legal reform that would require:

- a robust awareness campaign informing the general public of the benefits of registering their property;
- the government to communicate to the people the challenges of the property registration exercise and how it would deal with competing claims on a single property in light of the current ambiguity of the system;
- the property registration system to be formalised and deployed nationwide as absolutely necessary to a well functioning formal market economy.

### **3.2.5. Intellectual Property Rights**

As noted in the *PFI User's Toolkit*, intellectual property (IP) rights give businesses an incentive to invest in research and development, fostering the creation of innovative products and processes.<sup>v</sup> They also give their holders the confidence to share new technologies through – *inter alia* – joint ventures and licensing agreements. In this way, successful innovations are, in time, diffused within and across economies, bringing higher productivity and growth. The main formal IP instruments are patents, trademarks, copyright, new varieties of plants, industrial designs, and geographic indications.

#### **Score for Intellectual Property Rights: 3**

The protection of intellectual property rights in Egypt has been a priority on the legal reform agenda, which warrants a score of 3. Egypt acceded to the WTO in 1994 and, accordingly, implements the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement.

The enactment of Egypt's first comprehensive intellectual property law – Law 82/2002, known as the "IP Law – significantly improved the protection of intellectual property rights in Egypt and demonstrated Egypt's intention of moving towards a new era of innovation. Unlike previous laws, the new IP Law unified various laws relating to intellectual property, thus forming a single body of law governing trademarks, patents, copyright, and industrial design. For example, one of the major changes in the area of

pharmaceuticals, agricultural chemical products, and medicines is that protection now extends to products (unprotected under the old law), in addition to processes, which were protected under the old law. Ministerial Decision No. 2/2004 of 10 January 2004 created an IP Unit to communicate the importance of intellectual property to businesses in Egypt. The unit also assists specialised industries in protecting and managing their IP rights and fully benefiting from them (see Dimension I-1, “Investment Policy and Promotion”, which discusses IP at some length).

The IP Law also introduced specific provisions on enforcement, with an emphasis on conservatory measures such as seizure of goods to determine infringement and keep evidence and, in some cases, the seizure of the implements of the infringement and the infringing goods. In the past, injunctions have not often been granted in Egyptian courts. However, judges have recently begun issuing injunctions in IP cases and courts have handed down maximum sentences in some criminal cases and issued commercially appropriate damage awards in some civil ones.

Enforcement is primarily addressed through the Penal Code. For a civil lawsuit to be brought the criminal offence must be demonstrated. Egypt also attempted to strengthen enforcement by setting up an intellectual property unit in its police force together with teams of civil inspectors who were authorised to remove offending goods.

However, despite recent improvements, enforcement remains a challenge. Not only is civil action dependent on establishing the criminal offence, but civil cases take considerable time to process and run their course, administrative support services are minimal. On the other hand, enforcement in criminal cases was very brisk after the IP Law was enacted in 2002. Thereafter, the enthusiasm for intellectual property protection waned. The IP Unit referred to above has been dismantled and its authorities dispatched to other bodies, making it a toothless enforcement agency.

### ***Recommendations for Intellectual Property Rights***

In conclusion, the case of intellectual property in Egypt is a classic case of uncoordinated institutions and weak enforcement. The IP law is well developed and drafted in accordance with Egypt’s international obligations and standards. Enforcing its provisions remains a challenge.

Egypt’s focus should therefore be on beefing up enforcement agencies. It should revive the centralised IP unit which coordinated the efforts of different authorities and consider the training of judges, officials, and Interior Ministry officers a necessity. Indeed, several business organisations have reported that there is a serious lack of understanding of the basic elements of intellectual property among IP enforcement officials. A targeted awareness-raising campaign is recommended.

### **3.2.6. Company Law**

Company law sets out the basic legal framework within which companies operate. It deals with such diverse issues as forming companies, regulating the limitation of members’ liability, action taken by a company director against staff, liability issues, and accounting companies’ records of performance. Together with securities legislation, company law protects outside investors and the public by requiring minimum amounts of capital and the publication of information about a company. However, and importantly, company law also supports entrepreneurship by limiting the liability of company owners and investors. Countries around the world are today making significant efforts to re-think company law in the light of the internationalisation of trade and professional standards and in order to keep national standards up to date with modern business practices. In MENA countries, where the vast majority of companies are family owned, company law needs also to take into account corporate governance issues in non-listed companies.

Egyptian law recognises all forms of companies. Partnerships (general and limited) are regulated by the last chapter of the Commercial Code of 1882. Egyptian law also recognises companies in which a shareholder's liability is limited to the value of the shares held. Such companies are often referred to as "capital companies", since the liability of the shareholders and partners is limited to the capital they invested in the company. The Company Law, issued as Law 159/1981, regulates capital companies – *i.e.* limited liability companies, joint stock companies, partnerships limited by shares. It is currently under revision.

Investment Law – No. 8/1997 – grants businesses with certain kinds of activities incentives and guarantees, regardless of their legal form. The Capital Market Law, promulgated as Law 95/1992, also contains provisions relative to transfers of shares, increases of capital, and the issue of securities and debentures that apply to both joint stock companies and partnerships limited by shares.

The current establishment process has been simplified and indeed Egypt recently earned plaudits in *Doing Business 2010* as a major reformer in the field of business start-ups. The capital requirements of several companies have been greatly eased, allowing small and medium-size enterprises to enter the market in more formal ways.

Nevertheless, general rules applying to companies remain scattered across the law and are administered by different authorities, which can create conflicts of competence. Although the enactment of the new Company Law may overcome this regulatory dispersal, it is evident that there is a serious lack of corporate governance rules embodied in the law. This matter is further discussed in the BCDS chapter on corporate governance.

### **Score for Company Law: 3**

In late 2008, the General Authority for Investment and Free Zones (GAFI) distributed the draft of a new company law to stakeholders for them to consult. These included company law practitioners, business organisations, and legal experts. This was the first instance of a public consultation process where all interested parties had the opportunity to express their opinions on the provisions of the draft law. One member of GAFI's drafting committee stated in an interview that GAFI would post the draft on its website for the general public to make comments that would then be collected and reviewed prior to delivering the final draft to Parliament. This is a welcome precedent that should be made standard practice.

As for its substance, the draft law brought partnerships and corporations together under the umbrella of a single law, ending decades of separate controlling authorities, general rules and establishment procedures. It also introduced the idea of professionals (lawyers, accountants, etc.) creating companies and the concept of the sole-owner enterprises, where the liability of the owner is limited to the capital he or she puts into the enterprise. This should encourage small enterprises to do business in more formal ways, despite the fact that the rules on sole-owner companies are rudimentary.

The draft law states that there is no minimum or maximum capital requirement unless otherwise specified by a law – the Capital Market Law, for example, requires a minimum amount from companies operating in the capital markets. With the exception of sole-owner enterprises, shareholders and partners must number at least two (joint stock companies must currently have at least three shareholders).

GAFI's draft entitles joint stock companies to grant loans and provide guarantees to board members with the prior approval of the extraordinary general assembly, not allowed under the current Company Law. A joint stock company requires the approval of the ordinary general assembly to dispose of production lines, a real estate asset, or a main business asset. Interestingly, the text drafted by GAFI allows foreign companies to merge with Egyptian companies and vice versa, although provisions are not very

detailed, especially on the procedures. The draft law also abolishes the requirement for ownership of shares by members of the board of directors, expressly stating that they do not have to own shares.

GAFI's progressive initiative earns a score of 3.

### ***Recommendations for Company Law***

Minority shareholders should be able to affect corporate decisions through the general assembly. The GAFI draft does not, as was hoped, provide them with ways of doing so. Action should also be taken on the corporate governance front to separate the chairmanship of the board of directors from the actual management of a company.

Nevertheless, the draft law would be a welcome development should it pass into law. It may require some amendments in the areas identified above, but should take Egypt a step further in the field of company law reform.

#### **3.2.7. Collateral Law\***

Emerging economies have much to gain from improving their infrastructure for securitised credit. Collateral law aims at providing borrowers with options for guaranteeing repayment by facilitating businesses' broad access to credit at affordable rates. Borrowers able to offer collateral can obtain larger loans relative to their income with longer repayment periods and lower interest rates. Building the legal framework for finance with secured credit at its base represents an essential tool for private sector development.

In most MENA countries, businesses do not take full advantage of collateral even though they may have an array of productive assets – simply because their assets cannot serve as collateral. This limitation is due to the absence of an adequate legal framework for secured transactions, which seriously curtails lending. A modern legal framework governing collateral should be as detailed as specific guidelines in a textbook, reducing credit risk and, by the same token, increasing the availability of credit on improved terms.

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\* The terms “collateral” and “secured transactions” are used interchangeably in this indicator.

**Box 4: Objectives of a secured transactions law according to the UNCITRAL legislative guide on secured transactions**

- (a) Promote low-cost credit by enhancing the availability of secured credit;
- (b) Allow debtors to use the full value inherent in their assets to support credit;
- (c) Enable parties to obtain security rights in a simple and efficient manner;
- (d) Provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
- (e) Validate non-possessory security rights in all types of asset;
- (f) Enhance certainty and transparency by providing for registration of notice of a security right in a general security rights registry;
- (g) Establish clear and predictable priority rules;
- (h) Facilitate efficient enforcement of a creditor's rights;
- (i) Allow parties maximum flexibility to negotiate the terms of their security agreement;
- (j) Balance the interests of all affected persons;
- (k) Harmonise secured transactions laws, including conflict-of-laws rules relating to secured transactions.

Source: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/payments/Guide\\_securedtrans.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html)

Several international organisations have put considerable work into developing legislative guides and draft laws for secured transactions. The United Nations Commission on International Trade Law (UNCITRAL), for example, has produced a detailed legislative guide to an efficient, secured transactions law and the European Bank for Reconstruction and Development (EBRD) has drawn up a model law for secured transactions designed for its emerging economy members (see Boxes 4 and 5). Their work demonstrates the importance of a legal framework for secured transactions in promoting an efficient business climate in emerging and transition economies, where they play a vital role in financing.

All commercial investors are interested in making a profit from their investments. In many cases, however, the prime concern is to obtain protection against loss of the investment. A legal framework for secured transactions is a key requirement in creating an investor-friendly climate. Investors who know that they have legally recognised entitlements to their debtors' assets in the event of non-payment may assess an investment risk quite differently. Not only may a sound legal framework sway decisions whether to invest or not, it may also change the terms on which investors are prepared to lend (typically by lowering the interest rate on a loan). There is a direct relationship between the legal framework and the attitude of the investor. If there is a law on secured transactions which is seen to give practical protection and remedies in the case of non-payment of a debt, then security becomes a major factor in the investment decision, both for local and international investors. If investors do not feel that the law affords real protection and remedies, then security is irrelevant.

**Box 5: Features of the 2004 Model Law developed by the European Bank for Reconstruction and Development**

**1. Single Security Right**

The Model Law is based on the idea of a **single security right ("charge") in respect of all types of things and rights**. The distinction between various traditional types of security rights, such as pledges of movables, pledges of rights, and mortgages is merged in one right.

**2. Right in Property**

A charge under the Model Law is a **property right** and not a mere obligation. The right entitles the person receiving security to a sale, in enforcement proceedings, of the things and rights taken as security and gives preference over unsecured creditors in insolvency proceedings.

### **3. Securing Business Credits**

The Model is limited to securing **business credits** since this is the area of the most pressing need. It could be extended to cover personal and consumer transactions in countries where adequate rules on consumer protection exist.

### **4. Minimum Restrictions**

The parties to the charge are given a maximum **flexibility** to arrange their relationship as best suits their particular needs. Mandatory requirements and restrictions on what the parties can agree have been kept to a minimum.

### **5. Flexible Definition of Secured Debt and Charged Property**

There is also great flexibility in the way in which the parties can define the debt or debts which are secured and the things and rights which are given as security. In both cases they can be described specifically or generally, they can be present or future and they can change during the life of the charge. It suffices that they are identified at the outset.

### **6. Public Registration**

The Model works on the principle that charges are a matter for **public knowledge**. Since Roman law the creation of secret rights in assets has been disfavoured. A person who gives assets as security but does not indicate this to his creditors creates an impression of 'false wealth'. The Model achieves publicity mainly by relying on registration of charges at a separate registry.

### **7. Broad Rights of Enforcement**

Enforcement relies in the first instance on **self help**, the person holding the charge being given broad but clearly defined rights to sell the charged property in whichever way he considers most appropriate. This is supported by the right of any interested party to apply to the court for protection and to claim damages from the person enforcing the charge for any loss suffered as a result of wrongful or abusive enforcement. The interests of persons entitled to the proceeds of sale are further protected by distribution being made through a proceeds depository

### **8. Sale of Enterprise**

Where the charge covers all the assets of an enterprise there is the additional remedy of selling the enterprise as a going concern, which may enable an enterprise in financial difficulties to be salvaged while increasing the recovery of the secured creditor. This is a complex area which will require development in each jurisdiction, in particular to take account of insolvency laws, but the Model seeks to give at least a preliminary indication of how such a system might work.

### **9. Practical Application**

A number of provisions have been included in the Model to cover practical matters which often cause difficulties in secured transactions, such as the inclusion of a "**charge manager**" and a definition of the continuing licence of the chargor to deal in the charged property.

Source: EBRD, <http://www.ebrd.com/pubs/legal/secured.pdf>

## **Score for Collateral Law: 1**

The lack of a unified law on secured transactions in Egypt warrants a score of 1. The objectives of a law designed to achieve the economic benefits of secured transactions should be to: (i) enable the efficient taking of security over most debtors' assets, tangible and intangible; (ii) establish a clear system of priorities among holders of security interests; (iii) establish a fair, speedy, and inexpensive mechanism for enforcing security interests; and (iv) clarify and protect the rights of a secured creditor. Egyptian academics have not debated the issue of drafting a law on secured transactions at all, while the government has given it only scant attention. The lack of a modern legal framework is one of the few areas where Egypt lags seriously behind international standards.

Rules governing the taking of security may be found in the Egyptian Civil Code<sup>vi</sup>, and the Law on the Charging of Business Assets<sup>vii</sup>, as well as the new Commercial Code of 1999 which introduced new rules governing commercial pledges. Additionally, the Mortgage Law of 2001 introduced new rules on mortgage

financing and securities, albeit applicable only to personal accommodation. Finally, the Banking Law of 2002 contains some simplified procedures for the swift enforcement of particular types of securities, namely commercial papers.

Mortgages are historically the most widely used form of security in Egypt. Mortgage under the Civil Code only applies to immovable property. In a valid, enforceable mortgage the mortgaged property and the secured debt must be adequately specified. It is also noted that under the Civil Code, no future asset may be mortgaged. The mortgage must be evidenced in a deed executed before a public notary and must also be registered. The prevailing rules of mortgage of immovable property are very rigid and have proved highly problematic in practice. The rigidity is due to the theoretical foundation of the rules – primarily, the principle of mortgage specificity and the formality requirement. The principle of specificity is fatal to general charges over present and future corporate assets. It is also retreating in many jurisdictions. Meticulous identification is often inconvenient, sometimes impractical and always theoretical. As for formality, it is noted that the requirement for evidencing the mortgage in a notarised deed overprotects the debtor at the expense of the creditor. It also complicates the procedures for recovery.

As for pledges, the Civil Code recognises only possessory pledges where possession is transferred to the creditor or to a third party. Several mortgage rules apply to pledges. Movables may be pledged if provided for in a written contract adequately setting out the amount of the secured debt and the object of the pledge with established date. Non-possessory pledges of movables do not exist. This represents a major deficiency in the code, as the possessory pledge is of little value in practice, since businesses normally need to be able to use their assets and hence have possession. Further, Egyptian law does not recognise pledges of future assets.

As for business charges, Articles 8 to 18 of Law 11/1940 govern charges over business assets or, as it is often referred to, *nantissement de fonds de commerce*. The business asset that is the object of the charge is formed of “both tangible and intangible assets required for commerce”, as described by the Egyptian Court of Cassation. A charge over business assets must be notarised and registered within 15 days from the date of the charge. Otherwise the charge becomes null and void. Such registration takes place in the commercial registry. Despite the fact that the business charge is, by law, subject to immediate enforcement, regardless of any objection from the debtor or any third party, this rule is frustrated in practice. For the law stipulates that the creditor must seek the court’s permission to enforce his or her rights under the charge agreement, and it is left to the court’s discretion to grant such permission. If permission is not granted the creditor has no choice but to file a case before the court. Even if permission is granted, there are several legal and procedural vehicles intended to protect the interests of the debtor that can be used for delaying enforcement.

The rules on enforcement for securities, with the exception of those applicable to the Banking Law and the new Mortgage Law, are complex, formalistic, and aim, like other rules on security, to protect the debtor. Egyptian legal experts acknowledge that these complexities do not suit modern economic realities. They argue that Egyptian law has now been simplified and is free from the old perception which resulted in excessive debtor protection. The Egyptian legislator has attempted to modernise the regime governing pledges under the 1999 Commercial Code which represents an important step towards modernising the system. It has dealt with some of the outdated notions, which include: dispensing with the need for specificity and formality; shortening the notice period for enforcement to five days; ending the exclusivity of public auctions by allowing the court to order any other suitable method; and assigning specific provisions to securities traded on the stock markets. However, it has not dealt with some existing drawbacks such as: (i) unavailability of non-possessory pledges on movables; (ii) unavailability of pledges over future assets; and (iii) unavailability of future assets. The enforcement timeframe, too, must be revised as it could drag on for long periods which would harm the creditor. It is also suggested that the Banking

Law of 2002 introduced further procedural simplifications. However, these are again limited to a particular field of lending and their complexity makes banks reluctant to lend without the guarantee of real estate.

### ***Recommendations for Collateral Law***

Egypt should consider enacting a unified legal framework for secured transactions and the taking of collaterals. As stated by both UNCITRAL's guide and the EBRD Model Law, it should be both simple, clear, and speedily enforceable. It should aim at providing a balanced approach that takes into account the interests of debtors, creditors, and third parties. Egypt should approach the reform process pragmatically by trying to find a balance between the needs of the parties without adhering to any theoretical, historical, or ideological guidelines. In doing so, users of the system must be consulted and different legal and economic experts must actively participate in any reform efforts. With respect to the scope of the law, three issues should be considered: (i) the form of lending activity to be covered by the law; (ii) whether the law should cover all forms of properties including land or should only be limited to personal property; and (iii) whether it should apply to any transaction having the effect of security (including credit security together with seller security) or should be limited to securities made to secure payment of debts.

There are no "right" answers. These are issues to be addressed by policy makers in light of Egypt's transitional economic situation. Egypt may limit the application of the law to the financing of business activities, deciding not to include domestic or consumer financing – which would raise different policy questions such as consumer protection. As for the inclusion of land, this also must take into account the customary belief in Egypt that land is the most comforting form of security. All elements should be carefully addressed.

Other recommendations include the introduction of a single, unitary form of security, which would provide both legal simplicity and practical clarity. In this regard, all pre-existing forms of security should be abolished. The introduction of non-possessory charges over movables is most needed and would facilitate the provision of credit. Moreover, it cannot be disputed that a high degree of formality acts as a hindrance to the granting of security. Policy makers should opt for minimal formal requirements. The cost to the parties to secured transactions should not exceed the reasonable cost for the service they receive. If secured lending is to be encouraged, then the process of creating, maintaining, and enforcing a security must be carried out for a minimum fee. Given the importance of registration, and considering that the success of non-possessory charges rests upon an efficient registration system, it is imperative that an efficient registration system should be instituted. Access to the registry should be without restriction. A person should not be required to prove any relationship, or obtain any permission, in order to search public records for information on a potential borrower. Careful planning is required to establish an efficient registry system. Policy makers should only commence work on the registry and enforcement of the law when a tested system to satisfy its objectives is in place.

These recommendations are intended only to illustrate some of the issues that should be addressed by policy makers. Other issues include the parties' priorities, the classification of charges if the system is adopted, and the parties' rights.

Enforcement procedures represent the core of any law on secured transactions, as the purpose of taking security is, in the final analysis, to satisfy a debt by resorting to the collateral. The law may consider introducing the concept of private sales alongside public auctions which are time-consuming and procedurally complex. A policy decision should be made on which form of transactions may be enforced by recourse to which form of sale and what the safeguards of each path may be. This is by no means an easy task in light of the complexity of the matter and existing attitudes in the legal culture. However, it should be carefully considered.

### 3.2.8. Insolvency Law

The growing literature on law and finance has drawn attention to the importance of equity and creditor rights in influencing the development of financial systems and in affecting firm corporate governance and financing patterns. This literature finds that greater investor protection encourages the development of capital markets and that the better countries protect creditors, the more developed are their credit markets. Important aspects of the strength of creditor rights are the specific features of a country's insolvency regime and its enforcement. Recent financial crises have further highlighted the importance of well-functioning insolvency systems to prevent and resolve corporate sector financial distress. More generally, there is growing global interest in the design of insolvency systems from the perspective of resource allocation, efficiency, and stability, as well as equality and fairness. Insolvency regimes include a number of features, *e.g.*:

- whether the law provides for an automatic trigger when a company needs to file for bankruptcy;
- the ability to file for reorganisation or liquidation (and who may do so);
- the weight given to the debtor, the creditors (bank loans, trade financing), the company's management and other stakeholders in preparing reorganisation proposals;
- the ability of management to stay during reorganisation;
- whether an automatic stay of assets exists.

Through these design features an insolvency regime tries to balance several objectives, *e.g.* protecting creditors' and other stakeholders' rights – essential to mobilising capital for investment, working capital, and other resources – and preventing viable firms from going into premature liquidation. A good insolvency regime should also prevent managers and shareholders from taking imprudent loans and lenders from making loans with a high probability of default. At the same time, it should allow for a degree of entrepreneurship in the economy as a whole. An insolvency regime should also deliver an efficient *ex post* outcome, in the sense that the highest total value is obtained for the distressed firm with the least direct costs and losses in going-concern value.

The workings of countries' judicial systems further complicates the task of balancing incentives. In addition to recognising adequate legal rights, there is a need for an efficient judicial system to enforce them or, at least, to serve as a credible threat. Analytical literature and recent crises have already highlighted the complex role of creditor rights, not only in affecting the *ex post* resolution of distressed corporations, but also in influencing *ex ante* incentives and, more generally, an economy's degree of entrepreneurship. As the structure of economic production and the values of stakeholders continuously change – often in response to recent crises – many countries are also currently reevaluating components of their creditor rights regimes and how their insolvency systems deal with financially distressed firms. This has proven to be a complicated area in many countries, with discussions on reform taking considerable time.

#### Box 6. World Bank Commercial Insolvency Principle

Though country approaches vary, effective insolvency systems should aim to :

- (i) Integrate with a country's broader legal and commercial systems;
- (ii) Maximise the value of a firm's assets and recoveries by creditors;
- (iii) Provide for the efficient liquidation of both nonviable businesses and those where liquidation is likely to produce a greater return to creditors and the reorganisation of viable businesses;

- (iv) Strike a careful balance between liquidation and reorganisation, allowing for easy conversion of proceedings from one procedure to another;
- (v) Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- (vi) Provide for timely, efficient, and impartial resolution of insolvencies;
- (vii) Prevent the improper use of the insolvency system;
- (viii) Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;
- (ix) Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;
- (x) Recognise existing creditor rights and respect the priority of claims with a predictable and established process; and
- (xi) Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

Source: [http://www.worldbank.org/ifa/rosc\\_icr.html](http://www.worldbank.org/ifa/rosc_icr.html)

In 1999, the World Bank launched an initiative to develop benchmarking principles for commercial law systems, leading to the development of the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. The principles are designed as a broad-spectrum assessment tool to assist countries in their efforts to evaluate and improve the core aspects of their commercial law systems that are fundamental to a sound investment climate and commerce: credit access and protection mechanisms, risk management and restructuring practices and procedures, formal commercial insolvency procedures, and related institutional and regulatory frameworks, etc. (Box 6 lists the specific objectives and policies in the field of commercial insolvency).

The *Principles* are part of the World Bank and IMF joint initiative to develop internationally recognised standards and codes that could provide a framework for strengthening domestic institutions, identifying potential vulnerabilities, and improving transparency. The *Reports on the Observance of Standards and Codes* (ROSC) are designed to assess a country's institutional practices against an internationally recognised standard and, if needed, provide recommendations for improvement. The process of participation and the production of the report are intended to help spur reform and foster strengthened economic institutions in member countries. It should be noted that Egypt has recently been through the ROSC exercise for corporate governance, but is yet to undergo the same exercise for creditor rights and insolvency.

Another development in 1999 came when UNCITRAL approved a proposal to develop its *Legislative Guide on Insolvency Law* to encourage the adoption of effective national corporate insolvency regimes. The *Legislative Guide* was endorsed by the United Nations General Assembly on 2 December 2004.<sup>viii</sup> In its formal resolution, the General Assembly recommended "that all States give due consideration to the *Legislative Guide* when assessing the economic efficiency of their insolvency regimes and when revising or adopting legislation relevant to insolvency". The *Legislative Guide* discusses issues central to the design of an effective, efficient insolvency law, based on policies and practices recognised in many legal systems. It also contains detailed legislative recommendations that incorporate flexibility, as appropriate, to accommodate different policy choices and contexts.

Both UNCITRAL's *Guide* and the World Bank's *Principles* provide valuable tools for benchmarking a given system of insolvency and also set out clear guidelines as to what exactly should be reflected in an efficient insolvency regime. The Egyptian insolvency regime is not by any means up to international standards. In fact, it needs serious rethinking.

In Egypt, parallel systems govern trading in the economy: commercial law, which covers the activities of “merchants”, *i.e.* “commercial” activities, and civil law which applies to everything else. This dichotomy gives rise to two separate systems of bankruptcy: *al-eflass* (commercial bankruptcy), regulated by the Commercial Code, and *al-ea’sar*” (civil bankruptcy) governed by the Civil Code.

The new Commercial Code of 1999 made little change to the principles and concepts underlying the old commercial law system. In terms of procedure and presentation, it codified many practical solutions from case law to overcome certain difficulties caused by wording or omissions in the old code. It also brought scholarly solutions to bear on practical problems not regulated by the old commercial law and introduced procedural rules to add flexibility by giving the courts discretionary powers to implement the general guidelines of the law.

The new code seems to have succeeded in providing a well structured, theoretical set of rules and regulations that govern bankruptcy procedures. It introduced two new elements: a definition of commercial transactions, which affects the scope of the law; and a section on corporate bankruptcy. As regards the definition of commercial transactions, it did not change the dual bankruptcy system. It simply expanded the scope of commercial bankruptcy to encompass transactions traditionally governed by Civil Law and civil bankruptcy.

The Commercial Code of 1999 has, in fact, substantially expanded the notion of commercial transactions. Article 5 enumerates commercial transactions which include the exploration of natural resources, poultry, construction, purchase or lease of real estate with the intention of resale or lease, and the supply of water, gas and electricity. Characterising these transactions as commercial represents a substantial development in commercial law.

Another important new notion is to be found in Article 7 which reads as follows: “It is also deemed commercial any transaction analogous to the above transactions in terms of characteristics or objectives.” What is significant is that Article 7 confers flexibility on the notion and definition of commercial transactions. Article 10.2 stipulates that all companies incorporated in accordance with the Companies Law shall be deemed merchants. However, Article 20 states that state-owned enterprises may not acquire the capacity of a merchant, although the new Commercial Code applies to their commercial transactions.

Regarding corporate bankruptcy, Articles 698 to 711 represent a major development in the bankruptcy system. They deal mainly with the procedural aspects of filing a bankruptcy against a company and the rights and obligations of the bankrupt company’s shareholders. In respect of bankruptcy provisions applicable to companies, two articles deserve particular mention. First, Article 702 stipulates that a court may, at the request of a company, stay bankruptcy proceedings for three months if it considers that the company’s financial standing is likely to improve, or if it deems that it is in the interests of the national economy to stay proceedings. The court may also order measures it deems necessary to safeguard the company’s assets. Second, Article 704.2 stipulates that if the company’s assets do not satisfy 20% of its debts, the court may order all, or some, of the board members to pay, jointly or severally, such debts in whole or in part unless they can prove that they have prudently managed the company. Articles 702 and 704.2 thus address two important aspects of bankruptcy provisions applicable to companies.

### **Score for Insolvency Law: 2**

To sum up: the new Commercial Code, designed to reform a system that had prevailed for over a century, made welcome changes to some of the core principles and concepts in the old code. Hence the score of 2. However, the new code has fallen far short of wholesale reform and there are still complaints from the business community. The now dissolved National Law Commission had put overhaul of the system at the top of its agenda, but it produced nothing to mention. The Ministry of Justice, together with

the Ministry of Legal and Parliamentary Affairs, has now undertaken a programme to reform the current Commercial Code's bankruptcy provisions.

However a number of shortcomings remain in the code:

- Egyptian bankruptcy law is unable to overcome the traditional perception of bankruptcy as the result of wrongdoing, criminal or otherwise. This is manifest in the bankrupt being deprived of certain work-related and civil rights.
- There is failure to appreciate that bankruptcy can be caused by unforeseen events outside the control of the debtor. Accordingly, a law that sees bankruptcy as caused mainly by mismanagement and gross error cannot hope to do justice to debtors, creditors, employees, or the economy at large.
- The system focuses on individual (as opposed to corporate) bankruptcy. Indeed, the Commercial Code shows few signs of being drafted with companies in mind.
- Provisions dealing with the detention of the debtor, and the loss of civil and work-related rights indicate a preoccupation with individuals.
- The limited number of provisions devoted to corporate bankruptcy cannot deal with the complex insolvency of the entities that actually dominate the economy.
- The focus is on liquidation at the expense of rehabilitation.
- The Commercial Code allows for no form of judicial rehabilitation. Its main concern is to organise liquidation.

This latter point is probably based on the assumption that facilitating liquidation is the sole or primary objective of bankruptcy legislation. However, this is not generally the case. On the contrary, bankruptcy legislation should assist financially distressed but viable firms in the interests of all those involved in the process.

**Box 7: OECD-MENA Investment Programme Policy Brief on Insolvency in MENA Countries**

**Issues for Consideration**

- Efforts are needed to build more sophisticated insolvency laws in the MENA region and the institutional capacity required for their implementation. There are important international reference points, such as the World Bank *Principles for Effective Insolvency and Creditor Rights Systems* and the UNCITRAL *Legislative Guide on Insolvency*, which could be of assistance to MENA jurisdictions, interested in strengthening their insolvency systems in line with recognised standards .
- There is no "one size fits all" insolvency model fitting all countries. Insolvency systems will embody different policy choices on risk allocation, and should take into account the strengths and limitations of the institutional infrastructure, the level of economic development and the existing social traditions .
- Insolvency reforms will not get off the ground unless policy makers acknowledge the benefits of sound insolvency systems for the efficient reallocation of resources. In contrast, the absence of a well-functioning insolvency regime may precipitate capital flight, and destroy value in the corporate and financial sector, frustrate creditors and discourage domestic and international investors .
- Notwithstanding the importance of country-specific approaches, there are certain core features of effective insolvency systems. One of them is the need for balancing the interests of debtors and creditors. Given

the existing limitations of MENA insolvency systems, there is a case to be made for empowering the creditors. Conversely, in order to encourage entrepreneurial behaviour, there is a need to reduce the stigma of insolvency and make it possible for debtors to restart business on a clean slate after a failure .

- Comprehensive insolvency reforms in the MENA should encompass rescue and restructuring proceedings, which are largely lacking in their current frameworks. Otherwise, MENA economies will continue to bear considerable insolvency related costs .
- Furthermore, formal and informal (out-of-court) mechanisms should complement each other. Effective formal mechanisms have a disciplining effect for debtors and creditors. Well-developed informal mechanisms are needed as courts are unlikely to have adequate capacity to deal with all insolvency cases .
- Court systems in particular are at the heart of the insolvency infrastructure. Their independence and integrity, expertise and quality of service should be improved in order for them to fulfil their role .
- The court systems in the MENA countries would be severely strained if asked to actively conduct complex bankruptcy and re-organisation proceedings. While there is a need for judicial supervision of such proceedings, the burden of courts would be more manageable if the negotiation and settlement rights of creditors and their representatives are further developed .
- To this end, it is important to focus on facilitating the emergence of qualified professionals, who could act as trustees or advisors to enterprises undergoing re-organisation. A clear set of rules regarding licensing, duties, responsibilities and ethics need to govern the insolvency professionals .

*See also: Abu Dhabi Declaration issued by Hawkamah, OECD and others*

Source: <http://www.oecd.org/dataoecd/11/52/42551472.pdf>

### ***Recommendations for Insolvency Law***

As mentioned above, there is currently debate in Egypt over bankruptcy legislation reform with the private sector taking part.

The objectives of bankruptcy law in Egypt should be to:

- provide efficient, impartial and fair procedures to help in expeditious settlements of bankruptcy cases;
- provide the necessary mechanisms to distinguish between viable and unviable firms and assist viable firms in overcoming any temporary problems they might be facing;
- assure market participants that the law will intervene to protect their legitimate expectations and interests;
- draft the law in a flexible fashion, so that it can adapt to the changing needs of the economy;
- take into account the social and economic implications of bankruptcy;
- encourage private settlements;
- deal with insolvent entities at an early stage.

These issues were discussed in a forum that brought together all members of the OECD-MENA Investment Programme, OECD experts, representatives from other international organisations, and regional practitioners (see Box 7). Also highlighted at this forum was the fact that for MENA countries to reform their insolvency regimes, the main challenge would be to improve the quality of insolvency practitioners as well as the capacities of institutions operating in this field.

The objectives of the law as laid out above could be achieved by a variety of legal techniques. Rules on liquidation should (i) prevent the debtor from fraudulently concealing or transferring his or her assets to the detriment of the creditors; (ii) ensure equality between creditors by preferential payments to any of them; and (iii) sell the bankrupt's assets at a fair price in an expeditious manner. Procedures should be simple and avoid delays. The person in charge of the process should be adequately compensated. The law might consider providing time limits for the different procedures in the process.

Another important tool that the new law should introduce is the concept of reorganisation. Such a system of judicial rehabilitation would protect the interests of investors, safeguard the interests of employees, and protect enterprises of national importance. Moreover, in economic terms, there may be greater value for participants in reorganisation than liquidation. The foregoing benefits have made corporate rescue procedures a common feature of modern insolvency legislation. Law makers could also consider introducing the concept of the debtor and major creditors reaching a private agreement endorsed by the court. Finally, improved infrastructure for dealing with bankruptcy is an absolute must for the smooth operation of the legal framework.

### **SUB-DIMENSION 3.3. TRADITIONAL BUSINESS LAW**

This sub-dimension describes traditional, but thematic, business law regimes which are strongly rooted in historical and social concepts. Obviously, reforming such regimes has to take into account their origins and powerful interest groups can often render the task difficult. The core elements of this sub-dimension are:

1. labour law;
2. environmental law and the issuance of environmental licenses;
3. the issuance of construction permits; and
4. tax law regimes.

#### **3.3.1. Labour Law**

Labour law (also known as employment law) is the body of laws, administrative rulings, and precedents which address the legal rights of – and restrictions on – employees. Most jurisdictions cover three bodies of law: employment law, industrial relations law, and social security law. Any business must involve itself in managing relations with its work force in a potentially highly regulated environment. Public policy considerations play an important role in designing the legal regimes covering those relations. Labour law regimes are also increasingly tasked with making it easier for the different players (employers, employees, and trade unions) to adapt to evolving forms of work organisation. Governments in the MENA region need to ensure that public policy consideration leaves enough breathing space, particularly for SMEs, to react with some flexibility to their fast changing business needs.

#### **Score for Labour Law: 4**

Egyptian labour law is recognised as being employee-friendly and often causes employers considerable problems. The rules organising employer-employee relations in Egypt are set out in the New Labour Law – *i.e.* Labour Law 12/2003 plus Labour Law No. 90/2005 which updated and amended it – and in Articles 674 to 698 of Law No. 13/1948 of the Egyptian Civil Code.

The New Labour Law, which came into force on July 6, 2003, abolished the old Labour Law, No. 137/1981. Additional provisions may be found in the Social Security Law No. 79/1979. Article 32 of the New Labour Law lists a number of compulsory provisions which a labour contract must contain. The minimum legal wage for the private sector is EGP 35 per month. However, employees who earn less than EGP 50 per month are entitled to a substantial cost-of-living allowance, which ranges from 10% and 17.5% of the employee's basic salary, depending on the salary and social status of the employee.

Employment contracts usually begin with a three-month trial period and may be fixed term or open ended. If a contract is for a fixed term and the employer accepts work performed beyond the expiry of the contract, it automatically becomes open-ended, provided the employee is Egyptian. Under the Old Labour Law, employers could enter into only one fixed-term contract with the same employee. The New Labour

Law allows the parties to agree to multiple fixed-term contracts. Employment contracts must be expressly renewed, preferably by written agreement between the parties.

Employment contracts may be terminated only for a very limited number of reasons. They are contained in an exhaustive list found in Article 69 of the Labour Law. Notice of termination may only be served after employer and employee have gone before a conciliation committee. Legal proceedings in labour courts were traditionally lengthy and their outcome often unpredictable. A key criticism levelled at the New Labour Law is that it has failed to institute a system that resolves labour disputes speedily. Law 90/2005 introduced amendments to that end, but to no avail.

Prior to the amendment, any dispute between employer and employee pertaining to the application of labour law was referred to the Ministry of Labour for initial conciliation. If it failed it was then referred to a Judicial Committee composed of five members – two judges, and representatives from the Ministry of Labour, the General Labour Union, and the employer's business sector association. The rulings of the committee were majority decisions which served like decisions of a court of first instance.

A more recent amendment has replaced the Judicial Committee with a proper judicial review. Under the new rules, a dispute may first be referred to a committee composed of representatives from the Ministry, a trade union, and a business association. If no settlement is reached within 21 days, then either disputing party may refer the matter to the ministry for submission to court, or submit it directly to court after 45 days. This means that (i) referral to the tripartite committee is not obligatory; (ii) any party can refer the matter to the court directly. The competent courts are new, specialised labour courts which are to be established at all Egypt's Primary Courts. The labour and employer representatives are notified and may attend the court proceedings, but have no say in determining the outcome. The new court will have fast-track procedures and will determine whether an employer dismissed an employee fairly within 15 days of the case coming before it.

### ***Recommendations for Labour Law***

It transpires from the above that Egyptian labour rules are balanced, although they do sometimes tilt in favour of employees for historical and political reasons. The major problem facing employers – besides now amended dispute settlement procedures – is the ability to terminate contracts at will and not only for the specific reasons set out in the New Labour Law. This is obviously a tricky issue where solutions depend on a country's social structure. Indeed, some developed countries have rigid laws on employee dismissal as social safety nets. There can be no one-size-fits-all solution.

### **3.3.2. Environmental Licensing and Procedures**

Many business use environmental resources for their operations and, especially in the manufacturing industries, obtaining an environmental license has become an important legal requirement. The public interest and environmental protection must be balanced with efficient licensing procedures and business requirements.

On February 4, 1994, Egypt introduced its new Environmental Protection Law (EPL), Law No. 4/1994. It replaced numerous separate laws and decrees that had previously spread the responsibility for environmental protection among 17 ministries and failed to safeguard the environment adequately. The objective of the unified legislation is to lay down guidelines and standards, to enable the enforcement of effective penalties for breaches of the law, to give competent bodies greater authority, and to establish binding rules for examining the compliance of new investment projects with environmental requirements. Some of the EPL's statutory provisions are supplemented by its Executive Regulations (Decree No. 338/1995), which came into effect on 1 March 1995. They stipulate, for example, thresholds for noise and

pollutants, and contain forms for recording procedures. In 2009, amendments to the EPL further restricted “noise pollution” and the burning of garbage, an issue that impacts on investment not only in the field of garbage collection but also on the carbon certificates market.

After the EPL was enacted in 1994, one of the business community’s most persistent complaints was how difficult it was to obtain environmental permits. Businesses reported that they had to deal with too many institutions, the procedures were complex, and officers reviewing their projects were not properly qualified. The 2009 amendments to the EPL have introduced an important – although potentially costly – shift in policy. Government departments no longer scrutinise projects’ environmental impacts. Companies are now required to submit their own environmental impact assessment studies to regulatory agencies in their field (industry, tourism, services, etc.). The result is a much wider use of private sector expertise and consultants, which clears the way for a speedier, more transparent process.

#### **Score for Environmental Licensing and Procedures: 4**

On the whole, fines have significantly increased in recent years through amendments to the law. There are too many of them and they are too detailed to be listed here but their net effect has been that most fines have doubled. Moreover, more serious breaches of the law are now punishable by imprisonment. It is imperative that companies, factories, and establishments take the issue of environmental compliance much more seriously and resort to professional expertise in this matter. Furthermore, Article 28 of the EPL now includes a new provision under “Compensation”: “compensation shall include the restitution of traditional and environmental damages and the costs of bringing things to their original state or fixing the environment”.

#### ***Recommendations for Environmental Licensing and Procedures***

In principle, the amendments introduced in 2009 have modernised the law on environmental protection and the licensing framework in response to complaints from business organisations. The amendments have yet to be put to the test, so have not been assessed.

### **3.3.3. Planning and Construction Law**

The availability of land specifically devoted to industrial or other business activities is often an issue of concern to businesses. Local and regional government zoning and planning regulations fail to take sufficiently into account how much business needs available industrial land and infrastructure. Once land has been allocated to a project, construction laws determine safety and other public interest requirements, which all new business premises must implement. Construction licenses and related inspections can put unnecessary burdens on businesses and may give rise to transparency issues if regulations and administrative guidelines do not limit the discretionary powers of the authorities.

#### **Score for Planning and Construction Laws: 3**

Until May 2008 when Egypt enacted a new building law, investors in Egypt and business groups had serious complaints about the process of obtaining construction permits within a reasonable period of time, irrespective of the kind of building. Procedures were complex and subject to the discretionary powers of local authorities known to be anything but transparent. More particularly, the procedures for obtaining a building permit to start an industrial development were extremely prohibitive, time-consuming, and costly for investors, all of which badly tarnished Egypt’s image.

Whilst it is not the intention of this exercise to detail each and every step in the building permit application procedure, it would be useful to take a look at just how complex it was.

The process for a city-sited development started at the Planning/Engineering Department in the place of jurisdiction – the district (*hayy*) – where a company requested planning permission (the planned use was cross-checked against the zoning/land use plan) and a list of building regulations.

(In theory, this step was not needed for new town developments since the allocation decision was based on approved use and the subsequent allocation of an appropriately sited parcel, although the applicant nonetheless needed to obtain building regulations from the New Urban Communities Authority).

By law, the processing time for the planning authorisation was 30 days from the date of receipt of the completed file or, if the information was readily available, three weeks (though it is unclear why such a long time should have been needed). On reception of the planning permission and building regulations, the applicant would prepare the building permit application file – which involved supplying at least 20 different documents – and submit it to the Engineering Department in the place of jurisdiction (the New Urban Communities Authority or the District Office in an existing city). The law stated that permit applications should be processed within 30 days from the date the completed application file had been submitted. The problem was, however, that to put together such a complex file took a long time, many visits to the competent authority, and a lengthy cycle of submission and revision, rejection and resubmission.

Once it had eventually been accepted, the file was inspected by the Engineering Department against the building regulations, with special attention given to the blueprint. The cleared file was now forwarded to the different departments from which approvals were required – although the location and project specifics were such that only the jurisdictional authority could ever say exactly which departments had to give their approval. However, the approvals needed usually included those from: the Ministry of Defence (for security clearance, especially of use and height); the Quarries Department (to ensure the area was without significant mineral deposits); the Agriculture Department (to ensure that the site was not on agricultural land protected against development); the Antiquities Department (to ensure the area was without archaeological significance); the water, power and sanitation authorities (to ensure that the area was serviced and network capacity could accommodate the new development); and Civil Defence (to ensure compliance with fire regulations).

Once all approvals had been obtained (a process that took more than a year), the last step was for the application file to be forwarded to a consortium of large insurance companies, which gave it to a private engineering consultancy (with at least 25 years experience) chosen from a list of ministry-approved experts. The firm scrutinised the structural integrity of the building and returned the file to the consortium, which issued to the applicant an insurance policy equal to 0.5% of the value of the construction work if it exceeded EGP 150 000 (new constructions) or EGP 75 000 (vertical expansion or modification). It was this last step, introduced after the collapse of several structures in the 1992 earthquake, that proved to be the major bottleneck in the whole process, as all applications converged on one location.

It should nevertheless be noted that in free zones, industrial zones, and special economic zones that the foregoing approvals needed only to be obtained once for the entire area, which significantly reduced the processing time for individual applicants. Some investors stated, however, that they had to personally seek all the additional approvals even though the overall area/site should in theory have been cleared by the authority or development company in overall charge of the site. In reality, design faults rarely were remedied as municipal building inspections typically incorporated the payment of “gifts” for inspectors to disregard minor and sometimes major building faults. The process was clearly complicated, cumbersome, and extremely time-consuming.

### ***Recommendations for Planning and Construction Laws***

In recognition of the difficulties faced by investors, the government of Egypt has attempted to modernise the system related to construction permits. In May 2008, it passed its Building Law 11/2008. The law sets forth, in a relatively clear and transparent manner, the conditions and procedures for obtaining building licenses, and determines building requirements in a manner which should restrict significantly the discretionary powers of government bureaucrats in issuing such licenses.

As regards the procedures for issuing building licenses, the most significant of them is that the applicant for a building license will present his/her application to the competent administration accompanied by certain basic and specific documents, including the drawings made on the basis of previously published conditions and specifications, and certified by a engineering consultant. This private sector consultant is responsible for the soundness of the drawings and replaces the whole previous system whereby the drawings were to be reviewed and approved by engineers from the state administration. Moreover, the competent administration has to accept the application or reject it within thirty days of submission, otherwise the application would be considered accepted by operation of law. It is worth noting in this respect that among the various Doing Business Indicators issued by the World Bank in its annual benchmarking report, Egypt's ranking in obtaining a building license was one of the worst worldwide. Not to mention the fact that this has consistently been a major source of complaint from Egyptian investors. The law is perhaps over-ambitious in setting out best-practice terms and conditions which may prove difficult to apply. But even if it is applied partially or gradually, it should make a real difference.

### **SUB-DIMENSION 3.4. NEW GENERATION BUSINESS LAW**

This sub-dimension considers those elements of the business law environment that are important to support the new requirements of a modern, market-based economy.

Two elements are discussed in this section. They both refer to competition law. The first is whether or not there exists an adequate legal framework and efficient institutional enforcement to curb anti-competitive behaviour among enterprises. The second element is whether or not there exists a legal tool to fight abuses of dominant positions by businesses.

Taking into account the fact that Egypt's Competition Law has not been in place for long and that the Competition Authority needs to try more test cases, the indicators in this section have not been scored by the BCDS team.

#### **3.4.1. Market Contestability: Anti-Competitive Behaviour**

A competition regulator is a government agency, typically a statutory authority, which regulates and enforces competition laws, and may sometimes also enforce consumer protection laws. In addition to such agencies, there is often another body responsible for formulating competition policy.

The Law on the Protection of Competition and the Prevention of Monopolistic Practices – Law No. 3/2005, the “Competition Law” – was promulgated in May 2005. This long-awaited measure was designed to eliminate from the Egyptian market trade practices that undermined competitiveness or were considered unfair. The implementing regulations became effective on 18 August 2005 (Decree No. 1316/2005). The Competition Law applies to all economic activities, in both goods and services, carried out within Egypt, with the exception of state-managed public utilities. Its scope also covers practices outside Egypt that have a direct effect on the Egyptian market. The key areas regulated by the Competition Law are: agreements concluded between parties with the purpose or effect of harming competition; any unilateral conduct by dominant enterprises that result in competitive abuse. Horizontal agreements entered into between competitors are regulated by Article 6. In particular, such agreements are prohibited if they have as their object:

- directly or indirectly fixing the prices of products;
- dividing or partitioning markets on the basis of geographical zones, distribution centres, type of customers, or periods of time;
- restricting manufacturing, marketing, or distribution processes.

Article 7 also prohibits agreements entered into between companies and any of their suppliers or customers (vertical agreements) that limit or aim to limit competition. The Competition Law defines agreements as express or implied agreements. However, it does not include the concept of concerted practices, as adopted by the more developed European competition systems.

Depending on its nature, any breach of the Competition Law voids the prohibited sections of the agreement. The offender also faces fines of up to EGP 300 million for each infringement, as well as the

confiscation of property and a ban on commercial activities for a period of up to three years. Injured competitors also have the right to claim compensation before Egyptian courts.

The Competition Law provides for the establishment of a competition agency that oversees the application of the law. The competition authority conducts investigations into suspected violations, monitors the market, and studies prevailing conditions in search of price irregularities. To do all this, a competition agency must enjoy a transparent, independent, and impartial administrative structure. It also needs qualified staff, where the difficult is not the people who preside over the agency, but the economists, lawyers, and others who will be engaged in the daily activities of the agency – given that a properly functioning agency would require a substantial number of these professionals. And, of course, competition agencies also require adequate resources to attract qualified staff and ward off corruption.

It is counterproductive to introduce a sophisticated piece of legislation that is difficult to implement by a newly established competition agency. Establishing an efficient enforcement agency capable of implementing sophisticated competition legislation can only be seen as a long term objective. Those who overlook how long it has taken Western regulatory services to reach their present level of sophistication tend to have unrealistically high expectations of nascent agencies in emerging economies.

There is also an apparent problem of lack of expertise in the field of competition, which makes the application of the law all the more challenging. Economic analysis forms an integral part of any competition legislation. Implementing such legislation requires therefore the involvement of economists and lawyers. Lawyers must be specially trained for involvement in the field of competition. They must develop an understanding and knowledge of economics, the operation of markets, and pricing theories. This type of lawyers is rare in Egypt and no appropriate training is provided in the faculties of law. Judges are another problem. They, too, lack the necessary training to enforce laws that require economic analysis.

The foregoing problems became very clear in connection with the first two major investigations undertaken by the Competition Authority. The first conviction was in the matter of an agreement between horizontal competitors in the cement market. This led to the imposition of a fine of EGP 10 million on each of the infringing companies and the responsible persons in management. The conviction was, in fact, widely criticised by the business community, as the period between the publication of the law and the imposition of the penalty was short, not allowing businesses to adapt to the new provisions. It was also reported that the new Competition Authority did not seek to inform the business community of the new law and how to adapt to it. It was therefore suggested that a proper awareness campaign should have been undertaken to allow businesses to understand the culture of competition prior to being faced with harsh penalties.

This criticism may account for the fact that the second case, an investigation into abuse of dominant position in the steel market by a local steel maker, Al Ezz Steel, was closed with the Competition Authority finding no case to answer. This was despite the fact that Al Ezz Steel controls 58% of Egypt's domestic steel market and that domestic prices remained significantly above market prices.

Hence the two first case investigated by the Competition Authority ended up sending rather mixed messages to the market. The BCDS team therefore suggests that in order to compensate for the lack of expertise and the short history of competition rules in Egypt, the Competition Authority should – as is the case in other modern jurisdictions – issue guidelines explaining the different infringements as well as the rules applying to these infringements and the methods of calculating the different thresholds. This should allow users to familiarise themselves with the particular aspects of the law.

### **3.4.2. Market Contestability: Abuse of Dominant Position**

Abuse of a dominant market position by an incumbent company firmly established in a specific sector is another way of limiting market access to businesses.<sup>ix</sup>

The Egyptian Competition Law also prohibits the abuse of dominant positions in Article 8 of the Competition Law. “Dominance” is defined as the ability of an individual or entity controlling a market share in excess of 25% to prevent effective competition in the relevant market and the power to behave independently of competitors. In order to determine whether a dominant position exists, a firm’s or individual’s 25% market share should be accompanied by effective control of such market.

Enterprises with dominant positions are prohibited from:

- placing bans on manufacturing, production, or distribution for a defined period of time;
- refraining from concluding contracts with sellers or buyers that limit the co-contractors’ freedom;
- imposing tie-in arrangements;
- preventing suppliers from dealing with competitors;
- selling products at prices lower than marginal cost or average variable cost.

The Competition Law also allows for conditional exemptions from its provisions in a limited number of cases where the public interest and the interests of the consumers are patently affected, independently of considerations of free competition.

## **SUB-DIMENSION 3.5. ENFORCEMENT CAPACITIES/ARBITRATION SYSTEM**

Egypt has a reputation amongst investors for the inefficiency and complexity of its commercial court system. This represents the single most complained-about matter by foreign and local investors alike. Whilst the new Special Economic Courts represent advancement, it remains to be seen whether they will, in practice, deliver the expected results. A major problem remains the selection and training of commercial court judges and the digitalisation of the Egyptian court system in order to reduce administrative obstacles and simplify procedures.

### **3.5.1. Commercial Courts**

#### ***General Observations***

One of the basic principles of jurisdiction and the guarantee of due process consists of guaranteeing a limited time period for litigation. As a concept of fairness underlying the administration of justice, diverse time periods should be prescribed by law for each stage in the resolution of a conflict. Any discrepancies or non-respect of the compulsory time periods should be considered as a legal fault. A judicial dispute resolution mechanism that is too expensive for the parties can have the effect of rendering that system functionally useless. There should be a legal frame for clarifying uncertainty about the appropriate costs in all types of litigation.

The clearance rate measures whether the court is keeping up with its incoming caseload. If cases are not disposed of in a timely manner, the backlog will grow. The clearance rate measure is a single number that can be compared within the court for all case types, from month to month and year to year, or between one court and another. Knowledge of clearance rates by case type can help a court pinpoint emerging problems and indicate where improvements need to be made. Courts should aspire to clear at least as many cases as have been filed, reopened, or reactivated in a period by having a high clearance rate.

Judicial independence requires a well trained, educated judiciary. A judiciary must often address delicate issues concerning liberty, property, and access to public services. Judges must be well prepared. In many countries judges are personally responsible for developing their knowledge and skills. Although some seminars are offered, they are not done so systematically. Recently, Egypt has increasingly come to regard continued skills development as judges' responsibility during their working life and has made it a standard element of legal and judicial reform programmes. Judicial training includes a variety of subjects designed not only to improve knowledge, but also change attitudes. In some countries, training assists the judiciary in developing an impartial independent dispute resolution mechanism. In other countries, judicial education emphasises attitudinal changes in order to improve integrity or root out hidden bias on gender or ethnic issues. Some countries have adopted the view that the overall control and direction of judicial training must be in the judiciary's hands. In other countries, training is provided by separate entities such as law schools or judicial training institutes managed by the Ministry of Justice.

In order to avoid unreasonable administrative burdens and inefficiencies in dispute resolution, common procedures and deadlines should be set. The right to fair trial is an essential right in all countries that operate according to the rule of law. In order to guarantee the quality of the judicial system, certain conditions must be guaranteed. The essential ingredients for a fair civil trial must include systematic measurements of the quality, efficiency, predictability, and consistency of the judicial system.

### *Specialised Economic Courts*

The new Economic Courts established in Egypt by the Economic Courts Law of April 2008<sup>x</sup> are not totally separate from the rest of the Egyptian judicial system. They are specialised courts that have been incorporated into the system. In fact the law states that one such “court” will be established as part of each of Egypt’s courts of appeal. Determining the Economic Courts’ jurisdiction is the most critical factor in their future success. The Economic Courts Law determines the jurisdiction of the Economic Courts as including all criminal as well as civil/commercial disputes relating to the following:

- Company Law
- Capital Markets Law
- Investment Law
- Financial Leasing Law
- Mortgage Finance Law
- Intellectual Property Protection Law
- Banking Law
- Investment Companies Law
- Protection from bankruptcy provisions in the Commercial Code
- Competition
- Investor Protection Law
- Communication Regulation Law
- Electronic Signature Law.

In addition, the criminal jurisdiction of the new courts extends to another three laws – Insurance Supervision, Securities Depository, and Anti-Dumping – and to the provisions governing fraudulent bankruptcy in the Commercial Code. The courts’ civil/commercial jurisdiction extends to provisions in the Commercial Code governing commercial representation, technology transfer agreements, banking operations, and bankruptcy.

Three judges sit at each economic court – whether for preliminary hearings or appeals. Each court has a summary judge empowered to issue swift injunctions in matters that cannot be delayed. The real breakthrough to be anticipated from the Economic Courts Law is its departure from a number of established norms in ordinary litigation procedures through fast-track procedures. The key elements in this alternative approach are the following:

- The summary judge is obliged – should he or she not accept or reject the injunction request – to reschedule the matter for hearing by the competent economic court. This should ensure speedy decisions on urgent matters.

- Economic Courts have the jurisdiction to decide on all requests pertaining to the execution of substantive decisions. This is an important element because one of the key reasons for the delay in closing commercial disputes in the ordinary system is that the decision by the court, once issued, may be obstructed by numerous procedural challenges.
- The Economic Courts Law introduces the concept of requiring a judge to “prepare” the case before it is submitted to the court. The process of “preparation” involves listening to the parties, completing the file, attempting an amicable resolution of the dispute and, in general, ensuring that once the file is submitted to the court, it will not be delayed for completion of documents or procedures. The process of preparation may take no more than 60 days.
- The use of “experts” in the Egyptian judicial system is standard. However, those experts are employees of the Ministry of Justice. The new law departs from this practice by allowing the use of experts from the business community and outside experts. This is a crucial provision because it allows the courts to have access to professional experts in complex financial and commercial matters without being restricted to the traditional pool of ministry employees.

### ***Recruitment of Commercial Court Judges***

Whilst the introduction of the law is a welcome improvement, a major drawback to the system – seldom mentioned as a drawback in the Egyptian context – is the lack of technical ability. While judges might, on the whole, be of the highest technical standards in criminal, administrative, and personal status law, the same cannot be said of civil and commercial matters. Practitioners have observed, in some circuits, that judges do not appear to fully comprehend all the provisions of the Commercial Code or related business practices.

The method of recruiting judges can go a long way towards explaining the lack of technical capabilities in civil and commercial matters. Judges are generally recruited from within the bureaucracy, having previously served as prosecutors. Their experience is mainly in criminal law, and they have had virtually no exposure to civil or commercial matters. Accordingly, in their first years on the bench, their judgments will be based solely on reading law books.

## CONCLUSION

The business law reformer in Egypt is confronted with a combination of modern business law regimes and traditional sources for business law – a setting typical for the MENA region. This can be a source of complication for policy-makers trying to tackle at the same time the reform of existing legal regimes and the introduction of new ones in response to changing market realities. While Egypt has recently embarked on a number of reforms of traditional and modern business laws, there are a number of areas where legislations are still inadequate and do not respond to the modern business needs – land rights, collateral and insolvency regimes stand out.

Another challenge faced by a business law reformer in Egypt stems from the inherently inter-institutional complexity of business law reforms which would require strong strategic guidance and inter-institutional coordination – both currently not sufficiently developed.

Furthermore, the best operational rules will not improve performance if external factors force their violation or otherwise impede compliance. Strengthening the court system and developing the alternative dispute resolution techniques have been mentioned as priorities for reform efforts. This has been Egypt's main problem and challenge as reported by the interviewees for the purpose of this BCDS assessment. Most respondents confirmed that, in the majority of cases, modern legal frameworks exist and that the main issue is that of institutional capacity for implementation.

Other stakeholders who participated in the assessment argued that Egypt's main challenge is legal education and training of judges, practitioners and lawyers to bring them up to speed with modern business requirements for flexibility and mobility.

The Business Climate Development Strategy (BCDS) assessment of the policy dimension Business Law and Commercial Conflict Resolution has highlighted the fact that the process of business law reform in Egypt requires addressing all of the above-mentioned issues. Moreover, this policy dimension has touched upon issues also dealt with in many other of the 12 BCDS dimensions. Modern company law reforms must encompass latest Corporate Governance standards (Dimension II-2); collateral law and land rights reforms are pertinent for enhanced Access to Finance (Dimension III-3), and a strategic approach to business law reform in general benefits from regulatory reform initiatives as discussed in the chapter on Better Business Regulation (Dimension I-5). Common to all these policy areas is their strong impact on reducing the scope for operating in the informal economy. This is because a clearly drafted and modern business law regimes can strengthen the incentives for businesses to register and formalise their operations.

### ***Challenges to Business Law and Commercial Conflict Resolution***

The BCDS assessment of business law regimes in Egypt has identified a number of key challenges – none of them untypical for countries at a comparative stage of development of their economic law environment. However, Egypt with its state-socialist past of public administration and private sector regulation can show a particular resistance to modernising and reforming business law regimes often considered as driven by a free market approach. With this in mind, five key challenges have been highlighted in the assessment:

- **Comprehensive strategy and centralised reform supervision are key conditions for a coherent business law reform:** The absence of a comprehensive business law reform strategy backed by a powerful central law commission or similar central reform supervision institutions is a major challenge for business law reform in Egypt. Given the strong need for inter-institutional coordination on business law reforms involving various line ministries and the need to involve – at an early stage – also the parliament, the absence of a comprehensive business law reform strategy and central coordination unit constitutes a major obstacle.
- **Collateral law needs to address modern business needs:** As highlighted in the Access to Finance Chapter of this assessment, the need for an efficient collateral law regime has an important impact on access to credit for investors in Egypt. The issue is related with the soundness of movable and immovable property laws, the available titling procedures and the land register. Reforms in this area can have a tremendously important impact on the loan market and on investment decisions in Egypt. Egypt's principal challenges are the lack of a unified law on secured transactions able to offer collateral protection fitting with the requirements of a modern business community.
- **Land laws and land titling act as basis for investor security:** Provisions on land rights are scattered and the public land management is still awaiting improvements. The titling of land requires not only technical procedures to be in place, but also costs to be reasonable and the benefits highlighted to the public in a convincing way. If it is only approximately correct that according to some estimates only 2% of the eligible properties are registered, *i.e.* titled, the huge challenges for the business climate stemming from unclear land ownership rights and missing opportunities to use land as collateral for finance could not be more evident.
- **Modernisation of insolvency law needs to become priority:** The recently enacted insolvency law which aimed at reforming the system that prevailed for over a century has done well to change some of the core principles and concepts that existed in the old law. However, this has proven to be insufficient for the overall reform of the system and there still remain complaints from the business community.
- **Enforcement of business law regimes remains key obstacle:** Lack of administrative and judicial enforcement capacity is a current theme throughout this chapter. Contract law, property right including intellectual property rights, competition law all need viable enforcement mechanisms to not just remain laws on the books. Egypt is notorious for the inefficiency and complexity of its commercial court system. This represents the single most complained about matter by foreign and local investors alike. While there have been positive developments such as the introduction of commercial courts, further efforts to strengthen enforcement have to be made.

### ***Recommendations for Business Law and Commercial Conflict Resolution***

To remedy these challenges, we recommend the government of Egypt and the experts currently involved in business law reform to concentrate on the following measures, backed by strong political commitment and sufficient resource allocation:

- **Comprehensive strategy and centralised reform supervision:** A strategy and a centralised institution would enable reformers to tackle various business law reforms at the same time and would guarantee that the interconnectedness of law reforms across different ministries/agencies would be fully acknowledged. The strategy should not be restricted to collecting legislations and reviewing them, but should test the usefulness of existing business law regimes for the needs of modern business operations. Key elements are:

- A constant and formalised input from business representatives should be envisaged to that end;
  - The components of such a strategy must be backed up by high-level political commitment and leadership;
  - The strategy should also foresee a program for the improvement of the different actors' technical expertise. This includes a close cooperation with law faculties, lawyers' organisations, judges, and other professionals operating in the judicial system;
  - A central law commission that is accountable to the public and the stakeholders and is reporting directly to the political leadership should be set up with sufficient authority to review, suggest, and follow up the implementation of the recommendations. The commission should coordinate its work with all relevant ministries (Ministry of Justice, Ministry of Legal and Parliamentary Affairs, other ministries dealing with business activities as well as sub-ministerial organisms).
- **Collateral law:** Egypt should consider issuing a unified law on secured transaction and the taking of collaterals in business transactions. The framework should be both simple and clear and capable of speedy enforcement. The law should aim at providing a balanced regulation that takes into account the interests of debtors, creditors, and third parties. Three issues should be considered:
    1. the form of lending activity to be covered by the law;
    2. whether the law should cover all forms of properties including land or should only be limited to personal property; and
    3. whether it should apply to any transaction having the effect of security (including credit security together with seller security) or should it be limited to securities made to secure payment of debts.
  - **The introduction of a single and unitary form of security:** This simple structure is needed for both legal simplicity and practical clarity. In this regard, all pre-existing forms of security should be abolished. The introduction of non-possessory charges over movables is most needed and will facilitate the provision of credit. Moreover, it is undisputed that a high degree of formality acts as a hindrance to the grant of security. Policymakers should opt for minimal formal requirements.
  - **An efficient registration system should be instituted:** Given the importance of registration, and of an efficient registration system, this is a key recommendation. Access to the registry should be made without restriction. A person should not be required to prove any relationship, or obtain any permission, in order to search for public record information on a potential borrower. Enforcement procedures represent the core of any law on secured transactions, as the purpose of taking security is, in the final analysis, to satisfy a debt by resort to the collateral. Thus, the law may consider introducing the concept of private sales alongside the concept of public auctions which are time consuming and procedurally complex.
  - **Land laws and land titling:** For Egypt to attain a higher score, it is recommended to consolidate all the currently scattered provisions on land rights and different land categories into one legislation which sets out all the different rules for the interest of more clarity to the business community whether foreign or local. This would allow stakeholders to be aware of their rights as

well as the permissible and non-permissible transactions. These challenges are recognised by the government of Egypt, and plans have been put in place to deal with some of the obstacles, but further advice and continued political support will be needed. The real challenge facing Egypt is to bring all the new urban areas, the existing urban and rural areas, and the informal settlements into the ambit of the law by making use of the modernised cadastre system once it is implemented. It is a cultural revolution, as well as a legal reform exercise. Therefore, a number of initiatives are recommended:

- A comprehensive awareness campaign informing the general public of the benefits of registering their properties should be put in place;
  - There must be also information on the challenges of this exercise and how the government would deal with competing claims on a single property in light of the current ambiguity of the system;
  - Formalising the property registration system and applying it throughout the country is an absolute necessity which would create a well functioning formal market economy.
- **Insolvency law:** To address those it is mainly recommended to introduce a unified law on secured transaction. The objectives of the law could be achieved by a variety of legal techniques. Rules on liquidation should
    1. prevent the debtor from fraudulently concealing or transferring his assets to the detriment of the creditors;
    2. provide equality between creditors by preferential payments to any of them;
    3. provide equality between creditors by preventing preferential payments to any of them; and
    4. sell the bankrupt's assets at a fair price in an expeditious manner.

The procedures should be simple and avoid a delay in the process. The person in charge of the process should be adequately compensated. The law might consider providing time limits for the different procedures involved in the process.

- **The new law should introduce the concept of reorganisation:** Such system of judicial rehabilitation would protect the interests of investors, safeguard the interests of employees, and protect enterprise of national importance. Moreover, in economic terms, reorganisation may result in a greater value for participants than liquidation. The foregoing benefits have made corporate rescue procedures a common feature of modern insolvency legislation. The legislator could also consider the introduction of the concept of private agreement concluded between the debtor and major creditors which is sanctioned by the court. Finally, the improvement of the infrastructure dealing with bankruptcy is an absolute must for the smooth operation of the legal framework.
- **Enforcement:** Whilst the new Special Economic Courts represents advancement, it remains to be seen whether in practice it will deliver the awaited results. On the arbitration front, Egypt has quite an established legacy in this field. A major problem remains the selection and training of commercial court judges and the digitalisation of the Egyptian court system in order to reduce administrative obstacles and simplify procedures.



## NOTES

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<sup>i</sup> Nathan Nunn, [The Quarterly Journal of Economics](#), 2007, vol. 122, issue 2, pages 569-600.

<sup>ii</sup> Douglass North, "Institutions, Institutional Change and Economic Performance", 1990.

<sup>iii</sup> Article 32 of the 1971 Constitution of the Arab Republic of Egypt.

<sup>5</sup> See Dam, p. 134 et seq.

<sup>v</sup> OECD PFI: User's Toolkit – Draft User Guidance on the PFI Investment Policy Chapter; section on Intellectual Property Rights

<sup>vi</sup> Articles 1030 to 1084 and 1096 to 1129 of the Egyptian Civil Code.

<sup>vii</sup> Law 11/1940.

<sup>viii</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)

<sup>ix</sup> OECD (2007) Competition Assessment Framework : <http://www.oecd.org/dataoecd/15/60/39679915.pdf>

<sup>x</sup> Summarised for example in: <http://aegypten.ahk.de/index.php?id=1050&L=15>

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# **ANNEX**

## **DIMENSION II - 3: Business Law and Commercial Conflict Resolution**

## A1. ASSESSOR INFORMATION

Name:	
Organisation/Ministry/Agency:	
Title/Position:	
E-mail:	
Phone:	
Fax:	
Mailing Address:	
Date of Assessment:	

**A2. KEY DATA**

		2006	2007	2008
<b>Number of judges in commercial courts.</b>				
<b>Number of commercial court cases filed.</b>				
<b>Number of commercial court cases “finally” settled.</b>				
<b>Number of registered lawyers.</b>				
<b>Average lawyers’ fees calculated as a percentage of the total amount for the dispute.</b>				
<b>Number of supporting administrative staff for commercial courts.</b>				
<b>Average number of qualifying years</b>	Autonomous prosecutor			
	Autonomous judge			
	Autonomous lawyer			
<b>Number of notaries</b>				
<b>Number of commercial arbitrations</b>	Filed			
	Settled			

### A3. GENERAL OBSERVATIONS

**To be filled in by assessors:**

Please use this space to include any additional observations regarding the assessment of this policy dimension.

#### A4. OVERVIEW OF SCORES

<b>II-3 BUSINESS LAW AND COMMERCIAL CONFLICT RESOLUTION</b>		<b>SCORE</b>
<b>3.1</b>	<b>Business Law Reform</b>	
3.1.1	Strategy of business law and enforcement reform	<b>2</b>
3.1.2	Central Law Commission	<b>1.5</b>
<b>3.2</b>	<b>Fundamental Business Law</b>	
3.2.1	Contract law	<b>3</b>
3.2.2	Personal property rights	<b>3</b>
3.2.3	Land rights	<b>3</b>
3.2.4	Land titling system	<b>2</b>
3.2.5	Intellectual property rights	<b>3</b>
3.2.6	Company law	<b>3</b>
3.2.7	Collateral law	<b>1</b>
3.2.8	Insolvency law	<b>2</b>
<b>3.3</b>	<b>Traditional Business Law</b>	
3.3.1	Labour law	<b>4</b>
3.3.2	Environmental licensing and procedures	<b>4</b>
3.3.3	Planning and construction laws	<b>3</b>
<b>3.4</b>	<b>New Generation Business Law</b>	
3.4.1	Market contestability -anti-competitive behaviour	-
3.4.2	Market contestability - abuse of dominant position	-
<b>3.5</b>	<b>Enforcement Capacities/ Arbitration System</b>	
3.5.1	Commercial courts	-

## **A5. ASSESSMENT FRAMEWORK**

### ***A5.1. Introduction***

This chapter of the BCDS is of particular importance for enterprises operating in the MENA region, the vast majority of which are small companies and even companies operating informally. In general, and in MENA countries in particular, business law often caters well and sometimes even provides built-in protections for those who have the capacity and connections to use the laws and regulations of the business climate to their advantage. Under these conditions, smaller enterprises and informal businesses must often contend with greater risk than larger, formal firms.

- They spend more time and resources on monitoring their agents and partners, which explains why they usually do business with and employ relatives and close friends.
- They must choose low-risk businesses that often yield low returns.
- They operate with a limited amount of capital and, as a result, are forced to do business on a very small scale.
- They rarely accumulate capital.
- They have difficulties selling their businesses and profiting from both the tangible and intangible assets they have accumulated.

Barriers to entry to the formal business sector often stem from business laws that are too restrictive or outdated as well as from cumbersome enforcement procedures. The likelihood of businesses remaining informal is often increased by the absence of commercial laws clearly regulating rights and obligations, by the absence of transparent property rights on land and movables, by excessive licensing requirements under tax, and by labour and construction laws. Reform of business laws must, therefore, also be geared towards helping informal businesses to use all their assets to become viable business operations.

Business law throughout the countries of the MENA region draws on different families of law and combinations of modern legal practice with traditional sources of law. The basic, more traditional legal regimes regulating the business environment have evolved from numerous sources, including the traditions of Islamic law, the work of Ottoman legal scholars, and the 19th century Napoleonic Code, not to mention influential Egyptian scholars from the 20th century and traces of British, and other, colonial influences. These different traditions have led to a range of different business law regimes in the MENA region and different capacities for enforcement.

However, common to almost all countries in the region is the continuous effort to reform legal regimes and the introduction of new ones to respond to changing market realities. Recently a number of governments in the region – which recognise the need to strengthen private sector development and investment attraction – have embarked on reforms of key business laws and the introduction of new legal regimes. Lessons can be drawn from these reform initiatives and may provide insights for other countries to benefit from.

For that reason, the assessment indicators discussed below serve primarily as a structured way of collecting information on where a country's business law and enforcement system stands with regard to the process of reforming basic and traditional business law and introducing new-generation business laws. They do not pass judgement on the quality or soundness of a particular legal tradition and enforcement

system. But they can be useful in affording regulators insights as to where they stand on a continuum that runs from modernising business law to its impact on the business climate. Any reform of the business climate in emerging economies requires a comprehensive approach in order to evaluate the soundness of the existing system, define priorities for reform, and work on their implementation.

## **A5.2. Scope**

Business law can be defined as the body of law which governs business and commercial transactions. It covers any legislation that affects commercial enterprises and agents. The term “commercial law” is often used interchangeably with “business law”. The terms are indeed very similar, although “commercial law” may suggest a stronger focus on trade and transactions, whereas “business law” is a broader term that also encompasses other legal regimes. In the MENA region, as in many other emerging regional markets, and for the sake of structuring information collected information in the assessment, the following document distinguishes between four sub-dimensions.

In the MENA region, “Fundamental Business Law” is particularly grounded in traditional sources. The first sub-dimension focuses on very basic legal regimes like contractual rights, property rights, collateral and insolvency laws. They are fundamental for a functioning business environment. As is the case in many other countries, however, reforming them may require considerable political courage, dialogue, and the ability to convince powerful interest groups. But the benefits of reforming them are substantial: changing business models and modernising commercial transactions can make reforms an important priority for fostering the overall business environment.

This sub-dimension describes traditional, but “thematic”, business law regimes which are strongly rooted in historical and social concepts. Obviously, reforming such regimes has to take into account their origins and powerful interest groups can often render the task difficult.

Finally, the MENA region is bracing for a wave of “new-generation” business law regimes which have been providing the basis for successful free-market economies in other parts of the world. Difficulties may arise from simply implanting in a country concepts that are foreign to its legal culture and underestimating the enforcement challenge.

**Figure A1. Business law reform: main issues**

### Fundamental Business Law

- Enterprise creation, liability of managers, owners/shareholders,
- Contracts with business partners,
- Land rights, getting credit and closing the business



- Commercial code,
- Contract law, tort law, property law, company law,
- Collateral law, insolvency law

**Clarity of laws problematic, laws can be outdated/overtaken by new business models**

### Traditional Business Law

- Hire and fire workers
- Get environmental permits
- Get building permits
- Tax inspections and rates



- Labor law,
- Tax law
- Environmental law,
- Planning and construction laws

**Legal regimes based on strong historical/social role, equity/efficiency tension**

### New Generation Business Laws

- Free and competitive markets
- Consumer accountability
- Getting finance
- Provision of public services by enterprises



- Competition/consumer protection laws
- Banking and Capital market laws
- Leasing and factoring laws
- Privatisation/PPP/Infrastructure Laws

**Often imported legal concepts, enforcement agencies needed**

The final sub-dimension looks at the capacity to enforce rights granted by the first three sub-dimensions. Enterprises have to rely on the guarantee of due process, which includes a limited time period of enforcement of their rights (including litigation). Commercial conflict resolution is the established method for resolving disputes between parties to a commercial agreement. There are diverse forms of commercial conflict resolution. The classic form is the civil lawsuit. It begins when a plaintiff files a complaint with a commercial court for damages allegedly caused by the defendant, and seeks a remedy. A civil case can also be arbitrated through forms of alternative dispute settlement. As with arbitration generally, such forms are based on the contractual consent of the parties to a contract, *i.e.* their decision to submit any disputes to private adjudication by one or more arbitrators.

## **A6. Measurement**

### **Dimension II: Business Law and Commercial Conflict Resolution**

#### **Sub-Dimension 3.1.: Business Law Reform**

1. Strategy of Business Law and Enforcement Reform
2. Central Law Reform Commission

#### **Sub-Dimension 3.2.: Fundamental Business Law**

1. Contract Law
2. Personal Property Rights
3. Land Rights
4. Land Titling System
5. Intellectual Property Rights
6. Company Law
7. Collateral Law
8. Insolvency Law

#### **Sub-Dimension 3.3.: Traditional Business Law**

1. Labour Law
2. Environmental Licencing and procedures
3. Planning and Construction Laws

#### **Sub-Dimension 3.4.: New Generation Business Law**

1. Market Contestability: Anti-Competitive Behaviour
2. Market contestability: Abuse of Dominant Position

#### **Sub-Dimension 3.5.: Enforcement Capacities/Arbitration system**

1. Commercial courts

## Sub-Dimension 3.1.: Business Law Reform

### 3.1.1. Strategy of Business Law and Enforcement Reform

In the globalised marketplace countries use the attractiveness of their legal systems to compete with each other. The homepages of almost all investment promotion agencies have a strong section on the business law environment of their country. To remain competitive globally, foster local enterprise development and combat informality, business law reform is an ongoing task. Legal reform is a complex undertaking and there is a growing consensus that it should not be left to justice ministries, but involve a broader circle of stakeholders, such as legal practitioners, business associations, and civil society representatives. A key requirement of business law reform is the inclusion of business associations and representatives in the assessment and execution phases of reform. Also crucial is the existence of a reform strategy which has the support of the highest levels of government.

#### Questions

*Is there a strategy in place to reform existing business law and introduce new legal regimes required by international competition?*

*Has the strategy been drawn up in an inclusive manner to involve not only experts, but also key stakeholders?*

*Which category of business laws need to be addressed first?*

*How are different specific reform measures connected, what reforms can only work in parallel?*

*Has the implementation of the strategy for legal, judicial and regulatory reform started?*

3.1 BUSINESS LAW REFORM					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.1.1 Strategy for business law and enforcement reform	No strategy in place, but studies show the need for business law reforms as well as strengthening enforcement capacities.	Political commitment to reform has been generated and strategy has been drafted. But no inter-ministerial consensus on implementation steps has emerged yet and nor have stakeholders been consulted yet.	Strategy has been drawn up, backed by inter-ministerial consensus. Strategy has been presented to stakeholders and stakeholders' input has been taken into account.	Implementation of strategy has started and first reform measures have been implemented.	Business law and enforcement capacity reform is becoming effective and there is a coherent implementation of the strategy.

### 3.1.2. Central Law Reform Commission

The need for an organised group of experts to advise government on business law reform stems mainly from the fact that legal reform is highly complex and different reforms must often be conducted in parallel because of the interconnectedness of the whole legal system. Countries have made successful use of central law reform commissions or permanent legal audit bodies in the past. Their role is to ensure the uniformity of the law and business law system and to guarantee that their provisions are as fair, modern, simple, and cost-effective as possible. Their work consists of codifying the law, repealing obsolete and unnecessary enactments, and reducing the number of separate statutes.

Question:

*Would it be advisable to establish a central law reform commission/or permanent legal audit bodies for business law reform that is under consideration?*

*What will be its role and mandate in the reform process?*

*How is it structured, who is represented?*

*Will it be able to make recommendations to the government or work on implementation proposals?*

3.1 BUSINESS LAW REFORM					
	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.1.2 Central Law Commission</b>	No central law commission/or permanent legal audit bodies in place	Central law commission with experts and key stakeholders has been set up.	Central law commission with budget, permanent staff and specialised <i>ad hoc</i> committees has been set up and is fully operational. It has been tasked with auditing existing business laws and enforcement obstacles and identifying and proposing reforms.	Central law commission is proposing reforms of laws, regulations and enforcement procedures.	Level 4 <b>plus</b> law commission is managing the drafting process with all concerned parties involved.

## Sub-dimension 3.2 : Fundamental Business Law

### 3.2.1 Contract law

A recently published study has shown that a country's ability to enforce contracts constitutes an important determinant of comparative advantage. Surprisingly, this study finds that contract enforcement capacity explains the pattern of trade more than physical capital and skilled labour combined.<sup>11</sup> Contract law is the natural corollary of the Latin axiom, *pacta sunt servanda* ("agreements must be honoured"). As such, it is one of the pillars of the rule of law. When two parties strike a bargain, there must be some mechanism provided by the country's legal regime for ensuring that each party sticks to the terms of the agreement and for adapting those terms in the event of a change in the contracting parties' circumstances. For example, in MENA countries, economic development with regard to large scale infrastructure projects depends on long-term contracts where purely relational factors are insufficient. Civil or commercial codes must contain clear provisions governing contractual rights and obligations.

Question:

*Is there a distinctive set of law that govern contractual arrangements?*

*Are rights and obligations of parties clearly defined by this law?*

*Can contractual arrangements be adapted to changing circumstances?*

*Are contractual rights in principle enforceable?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.2.1 Contract law	Weak codification/clarity of contract law, texts are outdated, rights and obligations of contractual partners are not clearly defined.	Contract law is codified and clear. However, texts are outdated and the business community points to obstacles. Enforcement of contractual rights in general difficult and time consuming.	Contract law clearly drafted, legal rights clearly defined, contract law clearly defines rights and obligations of contractual partners, but private sector still reports obstacles regarding the contract law regime. Also, enforcement of contractual rights remains difficult and time consuming.	Contract law clearly drafted, legal rights clearly defined, contract law clearly defines rights and obligations of contractual partners, private sector reports no obstacles regarding the contract law regime. However, enforcement of contractual rights remains difficult and time consuming.	Level 4 <b>plus</b> enforcement of contractual rights in general possible within an adequate period of time.

### 3.2.2. Personal Property Rights

Many regard the right to own property as an essential human right and it is enshrined in the constitutions of a number of MENA countries. An owner of property has the right to consume, sell, mortgage, transfer, or exchange his or her property. Important types of property include real estate (land), personal property (other physical possessions), and intellectual property (ownership rights over creations of the mind, e.g. works of art, inventions, etc.). The business law environment should put in place a legal framework guaranteeing efficient enforcement of property rights – first and foremost, personal or movable property rights, which have to be clearly regulated in a country’s legal system, not least in order to be useable as collateral for business financing and leasing.

#### Question

*Does the constitution/basic law protect property rights and provide compensation for expropriation?*

*What categories of property rights are recognised by the civil/commercial codes?*

*Do these categories respond to modern business needs?*

*Does the regime protect non-possessory collaterals?*

*Are property rights enforceable?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.2.2 Personal property rights</b>	No constitutional guarantee of personal property rights, rights not clearly defined in civil code/common practice, important social and collective property rights regimes exist, personal property rights can not be enforced.	Constitutional guarantee exists, but civil code/common practice does not clearly define rights to own and transfer personal property.	Constitutional guarantee exists, civil code/common practice does clearly define rights, but enforcement options are weak.	Level 3 <b>plus</b> enforcement of these rights is feasible in an adequate period of time.	Scope of personal property rights clearly defined based on a constitutional guarantee, a number of property rights are granted, business community regards personal property regime as effective, property rights on movables can be used for collateral, and personal/movable property rights can be enforced.

### 3.2.3 Land Rights

Land rights and related resource rights are of fundamental importance for business development. Without them consequences can be serious. Business owners cannot mortgage their property where no legal infrastructure protects it or describes its metes and bounds. If they cannot mortgage the property, they cannot borrow to improve their business. Greater legal certainty improves also land prices and investment in infrastructure. Secure, verifiable, transferable entitlements – including land registers and cadastre information – to agricultural and other types of land and forms of property give entrepreneurs an incentive to move into the formal economy. Immovable property rights are often the only real collateral which a borrower can offer to banks in MENA countries. If these rights are not clearly attributed or their scope clearly defined, banks will be hesitant to lend.

Question:

*Are land ownership rights granted by national laws and do land registration institutions exist?*

*Are land rights transferable and under what conditions?*

*What are the different concepts of land ownership in a country, e.g. private, communal, state-owned?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.2.3 Land rights	Land ownership rights not clearly provided by national laws, different forms of ownership exist and much land is not private property. No common system for land registration.	Land ownership rights granted by national laws in principle, but legal uncertainty persists for many business owners. Land rights not easily transferable and administrative approvals required.	Land ownership rights granted with some certainty, common system for land registration exists, but no easy transferability of land.	Land ownership rights granted with certainty, common system for land registration exists, but land cannot be transferred easily.	Land ownership rights granted with certainty, common system for land registration exists, land can be transferred easily. Business community fully satisfied with legal rights to land.

### 3.2.4 Land Titling System

This indicator is the corollary to the previous one. A land title contains legal information about a parcel of land, e.g. registered owner(s) names, historical title information, and registration number. With land titling legislation in place and documented titling information in hand business owners have added security that land purchased is not subject to claims for restitution. A cadastre is a comprehensive register of the real property of a country and commonly includes details of ownership, tenure, precise location, dimensions (and area), and the value of individual parcels of land.

#### Questions

*Is titling legislation in place?*

*Are there backlogs of court cases concerning property titles?*

*Has titling been completed for urban and rural land? Have restitution processes been completed? Is there a land cadastre and register of liens?*

*Has cadastre updating been completed? Is cadastre and lien information easily available at limited cost?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.2.4 Land titling system	Titling legislation incomplete and inconsistent. Long backlog of court cases over property titles. Land cadastre and register of liens not properly functioning.	Titling legislation in place. Titling under way, but not fully completed. Cadastre information not easily accessible, same for the register of liens.	Titling of properties within urban areas largely completed. Property restitution process well under way. Cadastre updating largely completed. Register of liens in place.	Titling completed, including rural areas. Restitution process largely completed. Cadastre updating completed.	Titling legislation transparent. Cadastre and lien information easily available at limited cost.

### 3.2.5 Intellectual Property Rights

As noted in the *PFI User's Toolkit*, intellectual property (IP) rights give businesses an incentive to invest in research and development, fostering the creation of innovative products and processes.<sup>12</sup> They also give their holders the confidence to share new technologies through – *inter alia* – joint ventures and licensing agreements. In this way, successful innovations are, in time, diffused within and across economies, bringing higher productivity and growth. The main formal IP instruments are patents, trademarks, copyright, new varieties of plants, industrial designs, and geographic indications.

#### Questions

*Has the government implemented laws and regulations for the protection of intellectual property rights? What is covered by the IP law?*

*To what international agreements regarding IP does the government adhere (e.g. WIPO or WTO)?*

*How does the government enforce its IP laws? Are there criminal procedures and penalties for cases of counterfeiting, piracy, patent infringement, etc.?*

*Is there an IP office to register intellectual property?*

*Do civil and other mechanisms exist to settle IP disputes?*

*Are all cases of IP violation reviewed and investigated by the authorities?*

*Do officials responsible for enforcement and the judiciary receive specialised training to properly enforce IP laws?*

*Does the government use information campaigns to raise awareness of penalties for IP infringement? If a judicial body issues an award on the basis of a violation of IP laws is it always enforced?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.2.5 Intellectual property rights	No legislation on intellectual property in place, systematic violation of IP rights.	Legislation on intellectual property under preparation.	IP rights legislation approved and ratified for registering and protecting various forms of intellectual property including <i>inter alia</i> : patents, trademarks, copyright, new varieties of plants, industrial designs, and geographic indications, new varieties of plants and related rights. IP legislation is consistent with WIPO administered agreements <sup>13</sup> and WTO TRIPs Agreement. Enforcement of IP laws and regulations is weak, as evidenced by a lack of criminal procedures and penalties for cases of counterfeiting, piracy, patent infringement, etc. No IP office to register intellectual property; and country appears on various watch lists and/or receives poor peer reviews. <sup>14</sup>	Level 3 <b>plus</b> the government has made efforts to improve its record of enforcement. This includes <i>inter alia</i> enforcement of criminal penalties for IP infringement; creating a national IP office for registering intellectual property; and providing civil procedures and mechanisms for settling IP disputes. Awards are not consistently enforced. The country has been downgraded or removed from various IP watch lists and receives improved peer reviews where appropriate.	Level 4 <b>plus</b> all cases of IP violation are reviewed and investigated. Awards are enforced. Officials responsible for enforcement and the judiciary receive specialised training to properly enforce IP laws. Government uses information campaigns to raise awareness on penalties of IP infringement.

### 3.2.6. *Company Law*

Company law sets out the basic legal framework within which companies operate. It deals with such diverse issues as forming companies, regulating the limitation of members' liability, action taken by a company director against staff, liability issues, and accounting companies' records of performance. Together with securities legislation, company law protects outside investors and the public by requiring minimum amounts of capital and the publication of information about a company. However, and importantly, company law also supports entrepreneurship by limiting the liability of company owners and investors. Countries around the world are today making significant efforts to re-think company law in the light of the internationalisation of trade and professional standards and in order to keep national standards up to date with modern business practices. In MENA countries, where the vast majority of companies are family owned, company law needs also to take into account corporate governance issues in non-listed companies.

#### Questions

*Are all necessary models of company incorporation available to entrepreneurs?*

*Are there incorporation forms limiting the liability of owners but, the same time, protecting shareholders at?*

*Is there an evaluation procedure in place to guarantee that national standards keep up to date with modern business practices?*

### 3.2 FUNDAMENTAL BUSINESS LAW

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.2.6 Company law</b> <sup>15</sup>	Company law inadequately provides basic models of company incorporation, protection of shareholder rights is weak, equitable treatment for all shareholders, timely and accurate disclosure, and the transparency and accountability of boards. No benchmarking of company law against international standards is undertaken.	Company law provides some models of incorporation, but does not cater sufficiently to the needs of small businesses. Company law is periodically benchmarked against international standards with a view to strengthening corporate governance. Business community is regularly consulted.	Company law provides for basic models of company incorporation, including small businesses, protection of shareholder rights, equitable treatment of all shareholders, timely and accurate disclosure, and the transparency and accountability of boards. However, research shows that the latest international corporate governance standards and practices are not fully implemented and enforcement is overall weak.	Level 3 <b>plus</b> latest international corporate governance standards are reflected, but enforcement remains weak.	Company law sufficiently provides for the protection of shareholder rights, equitable treatment of all shareholders, timely and accurate disclosure, and transparency and accountability of boards. All these elements are effectively enforced. Latest developments in international corporate governance standards are taken into account.

### 3.2.7 Collateral Law<sup>16</sup>

Emerging economies have much to gain from improving their secured credit infrastructure. Collateral law aims at providing borrowers with options for guaranteeing repayment by facilitating businesses' broad access to credit at affordable rates. Borrowers able to offer collateral can obtain larger loans relative to their income with longer repayment periods and lower interest rates. Building the legal framework for finance with secured credit at its base represents an essential tool for private sector development. In most MENA countries, businesses do not take full advantage of collateral even though they may have an array of productive assets – simply because their assets cannot serve as collateral. This limitation is due to the absence of an adequate legal framework for secured transactions, which seriously curtails lending. A modern legal framework governing collateral should be as detailed as a textbook, reducing credit risk and, by the same token, increasing the availability of credit on improved terms.

#### Question

*Are there unreformed collateral laws preventing important classes of property from serving as collateral, blocking the use of collateral in certain transactions, and preventing agents from offering collateral and others from accepting it?*

*Is there a credit information system in place or planned in the near future? Does the law adopt a unified approach covering all transactions that function as security devices?*

3.2 FUNDAMENTAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.2.7 Collateral Law</b>	Existing secured lending/collateral law is either absent or does not provide for ability to use assets as collateral.	Collateral law covering a wide array of productive assets is under preparation. Or an existing law is benchmarked regularly against international standards. No regular consultation of business community.	Collateral law approved or revisions undertaken according to international benchmarks. Judicial and non-judicial enforcement systems are strengthened. Business community is regularly consulted.	Collateral lays out clearly defined rules and procedures for granting security interests (mortgages, charges, etc.) and all types of interests in immovable/movable assets, security interests in loans, clear rules on competing claims in the same assets and a system of registration the security interests with public access. Enforcement of secured as well as unsecured debt is not efficient and transparent.	Collateral law lays out clearly defined rules and procedures for granting security interests (mortgages, charges, etc.) and all types of interests in immovable/movable assets, security interests in loans, clear rules on competing claims in the same assets, and a system of registration of security interests with public access. Enforcement of secured as well as unsecured debt is efficient and transparent by means of court proceedings or non-judicial dispute resolution procedures.

### 3.2.8. Insolvency Law<sup>17</sup>

Insolvency regimes have evolved in very different ways, with laws focusing on different strategies for dealing with the insolvent corporate. The principal focus of modern insolvency, bankruptcy legislation and business debt restructuring practices no longer rests on the liquidation and elimination of insolvent entities, but on the remodelling of the financial and organisational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. Key objectives which need to be balanced in any insolvency frameworks are protecting the rights of creditors and other stakeholders as well as obviating any premature liquidation of viable firms. A sound system should inform on who can file for reorganisation or liquidation; whether the law provides for an automatic trigger when a company needs to file for bankruptcy; the weight given to the debtor; the priorities given to the creditors, the company's management, and the other stakeholders in preparing reorganisation proposals; the ability of management to stay during the reorganisation; and whether an automatic stay of assets exists.

#### Questions

*Does the insolvency law state who can file for reorganisation or liquidation?*

*Does the law clearly lay out the weight given to the debtor?*

*Does the law set forth the priorities given to the creditors, the company's management, and the other stakeholders in preparing reorganisation proposals?*

**3.2 FUNDAMENTAL BUSINESS LAW**

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.2.8 Insolvency law</b>	Insolvency system not geared towards maximising the value of a firm's assets and recoveries by creditors, efficient liquidation or reorganisation not provided for; no guarantee of due process, particularly, notification and information; administration of insolvency proceedings lacks coherence.	Good guarantee of due process, particularly notification and information; easy access for debtors and creditors; no provisional measures to protect the assets yet; system does not uphold rights and priorities of creditors established prior to insolvency; no state of the art administration of insolvency proceedings.	Full guarantee of due process in particular notification and information; easy access for debtors and creditors; access to provisional measures to protecting the assets; system upholds rights and priorities of creditors established prior to insolvency; no state of the art administration of the insolvency proceedings	Full guarantee of due process in particular notification and information; easy access for debtors and creditors; access to provisional measures for protecting assets; system upholds rights and priorities of creditors established prior to insolvency; state of the art administration of the insolvency proceedings in place.	Insolvency system is fully geared towards maximising the value of a firm's assets and recoveries by creditors in case of efficient liquidation or ensuring efficient reorganisation; full guarantee of due process, particularly notification and information; easy access for debtors and creditors; provisional measures protect the assets; system upholds rights and priorities of creditors established prior to insolvency; state of the art administration of the insolvency proceedings.

### **Sub-Dimension 3.3: Traditional Business Law**

#### *3.3.1 Labour Law<sup>18</sup>*

Labour law (also known as employment law) is the body of laws, administrative rulings, and precedents which address the legal rights of – and restrictions on – employees. Most jurisdictions cover three bodies of law: employment law, industrial relations law, and social security law. Any business must involve itself in managing relations with its work force in a potentially highly regulated environment. Public policy considerations play an important role in designing the legal regimes covering those relations. Labour law regimes are also increasingly tasked with making it easier for the different players (employers, employees, and trade unions) to adapt to evolving forms of work organisation. Governments in the MENA region need to ensure that public policy consideration leaves enough breathing space, particularly for SMEs, to react with some flexibility to their fast changing business needs.

#### *Question*

*What are the maximum durations of fixed-term contracts and minimum wages for trainees or first-time employees?*

*Scheduling of non-standard work hours and annual paid leave?*

*Notification and approval requirements for the termination of a contract and redundancy plans?*

*Obligations to reassign or retrain and priority rules for redundancy and reemployment?*

*Notice requirements, severance payments and penalties due when terminating a redundant worker?*

### 3.3 TRADITIONAL BUSINESS LAW

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.3.1 Labour law</b>	Employment laws, collective relation laws, and social security laws do put unnecessary burden on business, especially SME not allowing the necessary flexibility for operating a private enterprise. The business community has strong views on the need for reforms.	Government develops a strategy to regularly assess the impact of employment laws, industrial relation laws, and social security laws on private sector development objectives.	Government has a strategy in place to regularly assess the impact of employment laws, industrial relation laws, and social security laws on private sector development objectives.	Employment laws, industrial relations laws, and social security laws are being regularly reviewed based on reforms of employment laws, collective structured input from business, trade unions and other stakeholders.	Employment laws, industrial relations laws, and social security laws strike a reasonable balance between worker protection on the one hand and allowing the necessary flexibility for businesses on the other.

### 3.3.2. Environmental Law and Licensing Procedures

Many business use environmental resources for their operation. For many business activities, especially in manufacturing industries, environmental licenses have become an important legal requirement for getting operational. The public interest of protecting the environment must be balanced with efficient licensing procedures and requirements for businesses.

#### Question

*What percentage of new business registrations require licensing under environmental laws and regulations?*

*How long does it take on average to get an environmental license for an environmentally sensitive investment project?*

3.3 TRADITIONAL BUSINESS LAW					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.3.2 Environmental licensing and procedures	Environmental protection laws unclearly drafted; considerable discretion of environmental ministry/agencies for granting licenses, conducting inspections and imposing fines; no plans for reform of environmental licensing procedures.	A strategy for regular assessment of the system of environmental licensing procedures is envisaged with a view to streamlining and reducing the number of licenses. Business community is consulted.	A strategy and process for regular assessment of the system of environmental licensing procedures is conducted with a view to streamlining and reducing the number of licenses required. Business community is consulted closely.	Level 3 <b>plus</b> discretion of environmental agencies to grant licenses is limited by implementation regulation or administrative guidelines.	A process of regular assessment is in place, environmental protection laws are clearly drafted, obligations and licensing requirements are clearly defined; discretion of environmental ministry and agencies to grant licenses is limited by implementation of regulations and administrative guidelines; environmental licenses are granted in a short time period and compliance with requirements is not time consuming.

### *3.3.3 Planning and Construction laws*

The availability of land specifically devoted to industrial or other business activities is often an issue of concern to businesses. Local and regional government zoning and planning regulations fail to take sufficiently into account how much business needs available industrial land and relevant infrastructure requirements. Once land has been allocated to a project, construction laws determine safety and other public interest requirements, which all new business premises must implement. Construction licenses and related inspections can put unnecessary burdens on businesses and may give rise to transparency issues if regulations and administrative guidelines do not limit the discretionary powers of the authorities.

#### *Question*

*What is the process of drawing up zoning and planning laws for land used for industrial purposes?*

*Is the business community consulted?*

*How long does it take to obtain a construction license for an average business project and how often are inspections conducted?*

### 3.3 TRADITIONAL BUSINESS LAW

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.3.3 Planning and construction laws</b>	Zoning and planning laws are drafted without consultation with businesses; insufficient consideration is given to the needs for industrial land; construction laws unclearly drafted; considerable discretion of construction supervisory agencies exist to grant and refuse licenses, conduct inspections and impose fines; no plans for reform of construction licensing procedures.	A strategy and process for regular assessment of zoning, planning and construction laws and licensing procedures is envisaged with a view to make them more efficient and limit discretion of supervisory agencies. Business community is consulted closely.	A regular assessment of the system of zoning, planning and construction licensing laws and procedures is conducted with a view to streamlining them and reducing the number of licenses. Business community is consulted closely.	When needed, revisions are implemented on a regular basis taking into account business input; sufficient consideration is given to industrial land in zoning and planning laws; construction laws are clearly drafted, but discretion of implementing agencies is not prescribed.	Zoning and planning laws are drafted in close consultation with business; sufficient consideration is given to the needs for industrial land; construction laws are clearly drafted; discretion of construction supervisory agencies to grant and refuse licenses, conduct inspections, and impose fines is limited by regulations or administrative guidelines.

## **Sub-Dimension 3.4: New Generation Business Law**

### *3.4.1. Market Contestability – Anti-Competitive Behaviour*

A competition regulator is a government agency, typically a statutory authority, which regulates and enforces competition laws, and may sometimes also enforce consumer protection laws. In addition to such agencies, there is often another body responsible for formulating competition policy. An important aspect of policy making that is often neglected in the field of market contestability is informing businesses of new policies prior to their actual enforcement. It is also important to introduce a culture of competition.

#### Questions

*Have the authorities undertaken any consultations or studies – including awareness raising campaigns – with a view to preparing policy reforms that address anti-competitive behaviour? Have the authorities prepared policy proposals to address anti-competitive behaviour?*

*Have the authorities brought into force laws and regulations guaranteeing market contestability by prohibiting that all action by private market players to prevent, restrict or distort competition within their respective markets? Are these laws and regulations periodically reviewed with a view to encouraging competition and increasing benefits to consumers? Are they enforced by specific institutions?*

**3.4 NEW GENERATION BUSINESS LAW**

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.4.1 Market contestability – anti-competitive behaviour</b>	The authorities have not undertaken any consultations nor have they initiated any studies with a view to preparing policy reforms addressing anti-competitive behaviour.	The authorities are in the process of consulting stakeholders and undertaking studies with a view to preparing reforms addressing anti-competitive behaviour.	The authorities have prepared policy proposals to address anti-competitive behaviour. This may include the preparation of specific laws and regulations guaranteeing market contestability by ensuring that all actions by prohibiting that all action by private market players to prevent, restrict or distort competition within their respective markets.	The authorities have put in force laws and regulations guaranteeing market contestability by ensuring that all actions by prohibiting that all action by private market players to prevent, restrict or distort competition within their respective markets. This relates namely to price fixing agreements, agreements on limitations of production, and on the share of markets or sources of supply. Laws and regulations restricting access to certain markets are periodically reviewed with a view to encouraging competition and increasing benefits to consumers.	Level 4 <b>plus</b> institutions and enforcement systems are in place to effectively implement laws and regulations.

### *3.4.2 Market Contestability – Abuse of Dominant Position*

Abuse of a dominant market position by an incumbent company firmly established in a specific sector is another way of limiting market access to businesses.<sup>19</sup> It is crucial to draw a distinction between a firm's ability to grow, expand, and acquire greater market share based on merit and fair competition, on the one hand, and the firm's abuse of such acquired market power. Clear criteria of dominance and the abuse thereof must be clearly set out by law.

#### *Questions*

*Have the authorities undertaken any consultations or studies with a view to preparing policy reforms that address markets or sectors where dominant positions prevail?*

*Have the authorities prepared policy proposals to prevent the abuse of dominant positions?*

*Have the authorities put in force laws and regulations guaranteeing market contestability by ensuring that any abuse by one or more market participants of a dominant position is prohibited?*

*Do the authorities periodically review markets where dominant positions prevail with a view to encouraging competition and increasing benefits to consumers?*

*Are laws and regulations preventing abuse of dominant positions enforced by specific institutions?*

**3.4 NEW GENERATION BUSINESS LAW**

	Level 1	Level 2	Level 3	Level 4	Level 5
<b>3.4.2 Market contestability – abuse of dominant position</b>	The authorities have not undertaken any consultations nor have they initiated any studies with a view to preparing policy reforms that address markets or sectors where dominant positions prevail.	The authorities are in the process of consulting stakeholders and undertaking studies with a view to preventing abuse of dominant positions.	The authorities have prepared policy proposals to address abuse of dominant positions. These proposals may include the preparation of laws and regulations guaranteeing market contestability by ensuring that any abuse by one or more market participants of a dominant position is prohibited.	The authorities have put in force laws and regulations guaranteeing market contestability by ensuring that any abuse by one or more market participants of a dominant position is prohibited. This relates namely to imposing unfair purchase or selling prices; limiting production to the detriment of consumers; or imposing other unfair conditions on business partners. The authorities periodically review markets where dominant positions prevail with a view to encouraging competition and increasing benefits to consumers.	Level 4 <b>plus</b> the authorities have put in place institutions and enforcement systems to effectively implement laws and regulations guaranteeing market contestability.

## Sub-Dimension 3.5 – Enforcement Capacities/Arbitration System

### 3.5.1 Commercial Courts

Commercial Courts deal with complex cases arising out of business disputes, both national and international. There is particular emphasis on international trade, banking, commodity, and arbitration disputes. As a public institution with the authority to adjudicate legal disputes and dispense commercial justice in accordance with the rule of law, courts are the central means of dispute resolution, and it is generally understood that all persons should be able to bring their claims before a court.

#### Questions

*Are there serious plans to establish independent specialised commercial courts or commercial chambers?*

*Has a relevant law been drafted?*

*Have independent experts taken part in cases and provided advice?*

*Are academic or practical training courses on commercial conflict resolution available? If so, are they compulsory?*

3.5 ENFORCEMENT CAPACITIES/ARBITRATION SYSTEM					
	Level 1	Level 2	Level 3	Level 4	Level 5
3.5.1 Commercial courts	Independent specialised commercial courts or commercial chambers do not exist.	There are plans to establish independent specialised commercial courts or commercial chamber. A relevant law has been drafted.	Independent specialised commercial courts or commercial chambers have been established.	Independent specialised commercial courts or commercial chambers have been established. And independent, economically trained experts take part in trials / provide advice.	Independent specialised commercial courts or commercial chambers have been established. And independent economically trained experts take part in trials / provide advice. High-tech equipment (modern IT, journals, etc.) enables commercial courts/chambers to effectively deal with cases.

## Notes to Annex

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<sup>11</sup> Nathan Nunn, *The Quarterly Journal of Economics*, 2007, vol. 122, issue 2, pages 569-600.

<sup>12</sup> OECD PFI: User's Toolkit – Draft User Guidance on the PFI Investment Policy Chapter; section on Intellectual Property Rights

<sup>13</sup> Full list of WIPO administered agreements can be found here: <http://www.wipo.int/treaties/en/>

<sup>14</sup> Such as through WTO Trade Policy Reviews.

<sup>15</sup> For details, OECD Principles of Corporate Governance,  
[http://www.oecd.org/topic/0,3373,en\\_2649\\_34813\\_1\\_1\\_1\\_1\\_37439,00.html](http://www.oecd.org/topic/0,3373,en_2649_34813_1_1_1_1_37439,00.html)

<sup>16</sup> The indicator is taking into account the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems.

<sup>17</sup> Ibid.

<sup>18</sup> Based on *The Regulation of Labor* by Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, June 2004.

<sup>19</sup> OECD (2007) Competition Assessment Framework : <http://www.oecd.org/dataoecd/15/60/39679915.pdf>