

FINANCIAL SECTOR ASSESSMENT PROGRAM – DEVELOPMENT
MODULE

MALI

TECHNICAL NOTE

LEGAL AND JUDICIAL ASPECTS OF THE
CREDIT ENVIRONMENT

DECEMBER 2015

This Technical Note was prepared in the context of a Financial Sector Assessment Program mission in Mali during March 2015 led by Mehnaz Safavian, World Bank, and overseen by Finance & Markets Global Practice, World Bank. The note contains technical analysis and detailed information underpinning the FSAP assessment's findings and recommendations. Further information on the FSAP program can be found at www.worldbank.org/fsap.



WORLD BANK
FINANCE & MARKETS GLOBAL PRACTICE

Contents

Introduction.....	1
LAW ON SECURED TRANSACTIONS	4
1. General Legal Framework: the 2011 Reform.....	4
2. Security Rights in Movable Property: the Problem with the RCCM.....	4
3. Security Rights in Immovable Property: the Problem with Provisional Titles and Absence of a Land Register	6
4. Recommendations	8
LAW ON COLLECTIVE PROCEEDINGS	9
1. The Current Legal Framework Under Reform.....	9
2. The New Act Has Led to Numerous Improvements	10
3. Recommendations	13
CREDIT INFORMATION	13
1. The Current Framework: Absence of a Credit Information System Despite its Importance	13
2. The Law Submitted to Parliament—An Important Step Forward	15
3. Recommendations	15
LEGAL ENVIRONMENT	16
1. The Current Context: Lack of Confidence in the Courts	16
2. There Are Ways to Improve the Dispute Settlement Process	17
3. Recommendations	18

INTRODUCTION

A country's legal and judicial environment can help or hinder access to credit. In addition to the banking law governing the organization of the sector, the operations of credit institutions are subject to several laws. Four components of Malian business law are particularly relevant in assessing the position of creditors—the law on secured transactions, the law on collective proceedings, the law on information-sharing related to debtors (sometimes called the credit reporting law), and the law on collection and enforcement proceedings. If creditors cannot have confidence in their legal environment, they will be inclined to lend only to persons they know well. In this regard, it is telling to note that in Mali, the 50 biggest clients account for 39.3 percent of the credit extended by banks (although this percentage has fallen in recent times). Furthermore, access to credit remains a major constraint in the Malian business world. Although the reasons are not confined solely to the legal sphere, it is important to point out that, according to the 2010 Enterprise Survey, Malian enterprises cited access to credit as the main constraint hampering the business environment (43.9% of enterprises).¹ The same study showed that in the case of loans involving a security right, the value of the assets pledged stood at 201.4 percent of the amount borrowed, reflecting the lack of confidence by banks in their ability to actually enforce their rights. In addition, in view of the fact that 58 percent of loans require a pledged asset which, in most instances, takes the form of immovable property, persons who do not own such assets are, de facto, shut out of the system and unable to seek credit.

The Malian legal framework is domestic and regional. The business law in effect is largely derived from the OHADA Uniform Acts, which are directly applied in Mali. It should be noted that domestic law (for example, the Commercial Code or the Code of Civil, Commercial, and Social Procedures) is applied provided that it does not run counter to OHADA law, and therefore remains wholly relevant. With respect to banking and related matters (such as credit information), the applicable regulations are derived from the West African Monetary Union (UMOA).

With the noteworthy exception of the law on collective proceedings which is currently under revision, the provisions of Malian business law are generally appropriate (although they can be improved upon, given that they sometimes diverge from international best practices). However, their enforcement continues to be problematic. Although the pertinent provisions are analyzed in detail in this note, it is important to point out that in addition to legal provisions, a legal environment can be effective only if the law is properly enforced (whether or not in a judicial context). For example, the Malian law on secured transactions, which was recently amended (representing significant progress, although the OHADA Uniform Act is not in keeping with best practices in all respects, as noted below), does not completely fulfill its role as

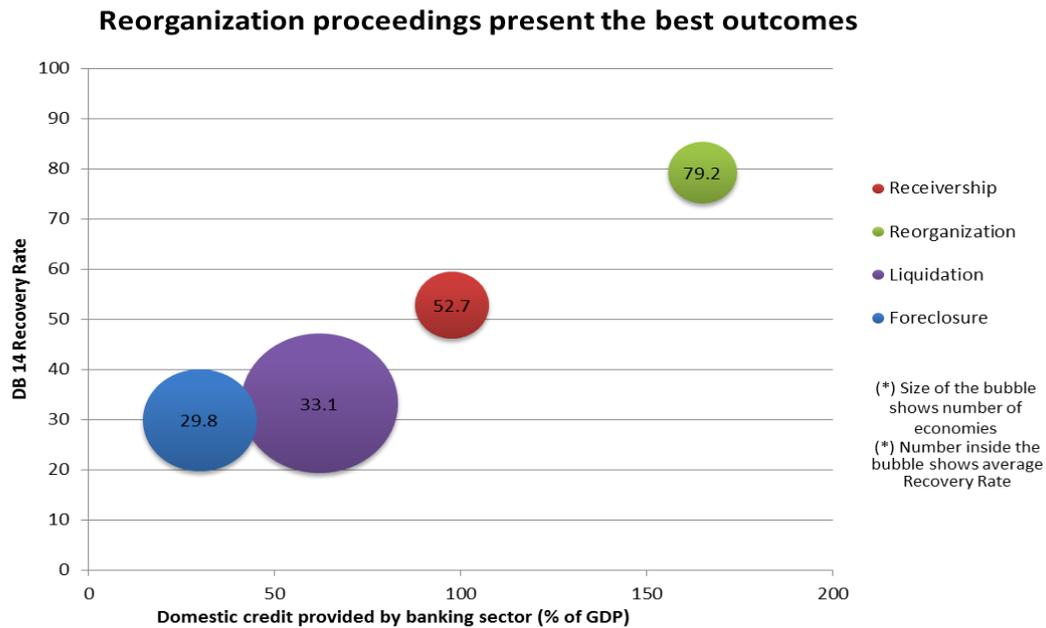
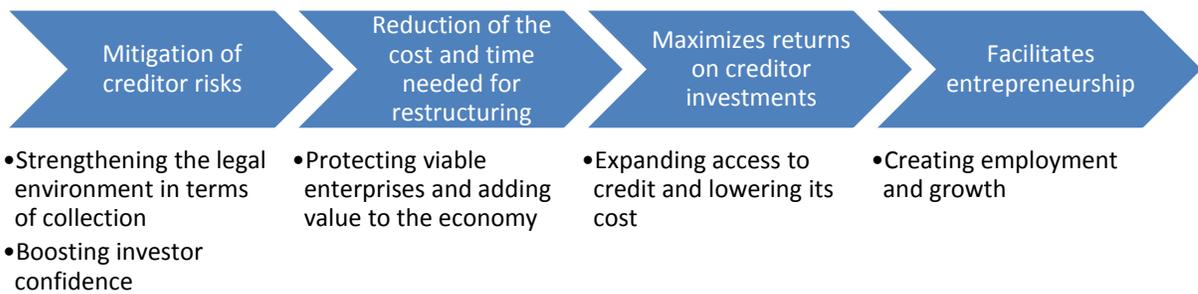
¹ Available at <http://www.enterprisesurveys.org/data/exploreeconomies/2010/mali#finance>.

there are deficiencies in the registers of movable and immovable assets. Similarly, consideration cannot be given to the law on collective proceedings without effective regulation of the receivers responsible for its actual enforcement.

Numerous studies have demonstrated the correlation between modern law and the volume of available credit. Several studies have confirmed this, in particular a comparative analysis done in Latin America (Brazil, Mexico, Argentina, and Chile), which pointed to a significant increase in credit granted following a reform effort that strengthened creditor rights.² Another comparative study of 88 economies showed that the inability to collect on claims impacted the volume of credit available at the macroeconomic level.³

² Funchal, 2012.

³ Djankov, Hart, McLiesh and Shleifer (2008).

Diagram 1: Correlation between the Collection Rates and the Level of Bank Credit**Diagram 2: Impact of the Legal Environment on Economic Activity**

This technical note assesses the relevant areas of Malian business law and proposes recommendations to improve their effectiveness. The topics covered are cross-cutting and should be read in parallel with the other technical notes (for example, the law on secured transactions impacts access to real estate and collective proceedings impact improvements in the microfinance sector). The analysis covers:

- The law on secured transactions
- The law on collective proceedings
- Credit information
- The legal environment and collection proceedings

LAW ON SECURED TRANSACTIONS

1. General Legal Framework: the 2011 Reform

The OHADA Uniform Act on the organization of secured transactions offers Mali a modern framework, albeit one with room for improvement. The reform effort has led to significant improvement with regard to the position of creditors. Several new techniques were introduced under the new Uniform Act that took effect on May 16, 2011. Forfeiture clauses, which permit the rapid transfer of the pledged asset of the defaulting debtor to the creditor (with very limited judicial intervention) were, in practice, welcomed.⁴ While the application is not as broad as creditors would like (in the case of real property, primary residences are excluded from the system), the bank creditors interviewed have already enforced them. Similarly, the possibility of obtaining a security right in future assets or the pledging of account balances has already been explicitly authorized, thus avoiding any residual ambiguity associated with the previous provisions. The banks with which discussions were held made no mention of the need to add new legal tools to the provisions.

However, the 2011 OHADA Uniform Act is not fully in line with international best practices. The United Nations Commission on International Trade Law (UNCITRAL) has published several lists of recommendations related to security rights (known, in the UNICTRAL context, as “secured transactions”).⁵

Application of the law on secured transactions is plagued by several problems. Although the legislation in effect is sound, its application gives rise to a host of problems in the areas of security rights in movable or immovable property, as indicated in the section below. This significantly curbs access to credit. Judicial collection matters are discussed in Section 5. Developments at this stage relate to the establishment of security rights rather than to their enforcement (although the two phases are, of course, linked as the first impacts the second).

2. Security Rights in Movable Property: the Problem with the RCCM

In practical terms, the Commercial and Personal Property Register (RCCM) is virtually non-operational. Although established by means of OHADA law, the RCCMs do not fulfill their role owing to a lack of modern resources. We note that the OHADA system provides for the existence of several registers in the same country, with all being connected by a single national file, which in turn is linked to a common register for the

⁴ Ecobank indicated that it welcomes and uses this technique, although it was unable to provide precise figures.

⁵ UNCITRAL legislative guide on secured transactions (2007) available at http://www.uncitral.org/uncitral/fr/uncitral_texts/security/Guide_securedtrans.html.

UNCITRAL guide on the implementation of a security rights registry (movable property) (2013) available at http://www.uncitral.org/uncitral/fr/uncitral_texts/security/2013Security_rights_registry.html.

entire OHADA region located in Abidjan, Côte d'Ivoire. A register of this nature needs to be automated in order to (i) ensure that it can be readily updated to record the chronology of pledges provided with respect to the same asset and (ii) guarantee adequate public disclosure for sector stakeholders and the other creditors.

Automation is critical to the smooth functioning of a movable property register. A security right in personal property lies in the guarantee that the creditor can enforce his rights with respect to the property pledged. Depending on the security right involved, collection may take different forms (for example, the asset may be repossessed or subject to forced sale in order to obtain reimbursement). In all instances therefore, this creditor must, before agreeing to a security right, be able to easily verify that the asset is not already encumbered by another pledge. Alternatively, if a security right already exists, subsequent creditors must know precisely their ranking for reimbursement purposes. This applies to both conventional credit and leasing—it is important to record in a register the fact that the asset financed belongs to the financial lessor and not to the debtor (in possession of the asset) if there is to be rapid restitution (or sale) in the event of default. Lastly, the same requirements apply to commercial credit (related to a deadline for payment rather than to a financial loan)—a supplier may wish, for example, to register a retention of title clause to guarantee proper enforcement thereof.

Currently, the RCCM in Bamako cannot fulfill its mission owing to the fact that information on the existence or chronology of security rights is not easily accessible. At the moment, there are three RCCMs in Mali—in Bamako, Mopti, and Kayes. Our analysis focuses on Bamako, where the RCCM is the most developed. Although a register is kept at the commercial court, it is an outmoded paper version. The existence of a security right can be verified by conducting extensive research; however, legal security regarding the chronology (and therefore ranking) is very weak. While in theory public access is certainly possible (since anyone can consult the paper records of the RCCM), in practice this is not realistic because no creditor is able to spend hours (or days) on this task. Safeguarding the paper records in case of fire is also a real problem, as there is no backup in an electronic database. Moreover, several banks expressed the view that the dilapidated state of the building housing the RCCM does not appear to be in keeping with professional standards.

The establishment of a single, fully automated register that is accessible via the internet will have a positive effect on expanding credit in Mali. It should be noted here that the RCCM in Bamako does exist; however, the use of paper documents in its operations poses a problem. Automation of the register, with secure and easy remote access via the Internet, is extremely important. This will allow all creditors to verify the existence and ranking of their security rights. On-site registration can continue, provided the pre- and post-registration information can be easily accessed remotely. A project carried out by the *Global Practice Trade and Competitiveness* is currently under review and should be

closely followed by the Government. A project in Liberia to computerize a register similar to the RCCM facilitated, inter alia, the granting of US\$27 million in credit to the private sector during the six-month period following its introduction. This register has led to a significant increase in credit given that formerly, only debtors who could pledge immovable property could obtain a loan. A central pillar of the Liberian register is its very user-friendly website,⁶ which allows for the following to be carried out remotely: (i) connection to a personal account in the case of debtors and creditors; (ii) registration of security rights through direct payment of the appropriate fees, thus ruling out the possibility of misappropriation; and (iii) free verification of the existence of security rights by conducting a search by the relevant name or asset.

3. Security Rights in Immovable Property: the Problem with Provisional Titles and Absence of a Land Register

As is the case with security rights in movable property, the applicable OHADA law is satisfactory. The 2011 revision also led to the modernization of the system for secure rights in immovable property and no further reform is required at the moment. It can nonetheless be noted that a number of very modern techniques currently present in civil law have not been incorporated into the revised provisions, such as revolving mortgages (*hypothèque rechargeable*), real property pledges (*gage immobilier*) or living pledges for immovable property (*antichrèse*), retention of title (*réserve de propriété immobilière*), transfer of immovable property pledged (*cession d'immeuble à titre de garantie*), or reverse mortgages (*prêt viager hypothécaire*).⁷ The financial institutions with which discussions were held during the FSAP mission did not mention the need for recourse to such instruments at this point in time. However, it is important to note that Mali has the liberty to adopt domestic laws that go beyond the Uniform Act, as long as they do not run counter thereto. The Government is therefore free to engage in consultations with the financial sector with a view to the possible establishment of new security rights.

The difficulties encountered by creditors in the area of mortgages relate to the titles themselves. Security rights in immovable property are logically based on the rights of the debtor to the asset pledged with respect to the creditor. Although OHADA law relates to the system of security rights (their establishment and execution), the movable and immovable property system continues to be regulated at the level of each member State.

There are very few land titles in Mali and numerous cases of provisional titles. Pursuant to Law No. 02-008 of February 12, 2002 on the amendment and ratification of Order No. 00-027/P-RM of March 22, 2000 relating to State-Owned and Private Land,

⁶ www.registry.cbl.org.lr

⁷ For an analysis of this issue, see Mactar SAKHO, *The New OHADA Uniform Act Organizing Security Rights*. Preliminary remarks related to the thorough revision of the law on secured transactions. ERSUMA Journal, November-December, 2001.

provisional title refers to rural and urban concessions.⁸ Article 60 of this law defines the two concepts as follows: “an urban or rural concession for dwelling purposes consists of the right accorded by the public authorities, as grantor, to a person known as the holder of rights (*cessionnaire de jouir*), on a provisional basis, to use the land in order to improve it, under the conditions set forth in the concession instrument and the stipulations that may be associated therewith.” These titles (urban or rural concessions for dwelling purposes) confer on the beneficiary surface rights in land and exclude all ownership rights. Consequently, Article 61(2) states that “surface rights conferred by an urban or rural concession for dwelling purposes is deemed to be movable property and can be listed in the land register.” It is estimated that more than 80 percent of titles related to immovable property involve provisional rather than land titles.

Only land titles, which are few and far between, can be used for mortgage purposes. It is impossible to register a mortgage using provisional title, as the latter is movable rather than immovable in nature. The scope of application of mortgages is therefore greatly reduced as this is predicated on the existence of a land title. One practice, quite problematic and complicated, has therefore been adopted, whereby banks obtain security rights in movable property (non-dispossession pledges) with respect to assets that are, however, immovable, given that the property title (to the land or building) is movable as it is provisional. In the event of default, it is the right to movable property that will be exercised by the creditor, although the underlying asset is immovable. In theory, a situation of this nature should call for greater protection of the person involved.

Linkage between the existence of provisional titles and the application of the OHADA law on secured transactions creates confusion. Under the Malian Code on State-Owned and Private Land, provisional titles may be transferred and thus be the object of a pledge. They confer the right of use or dwelling and involve a right of access to land ownership. However, the OHADA Uniform Act Organizing Simplified Recovery Procedures calls for the prior registration of immovable property and thus even property of this nature held under provisional title, prior to seizure followed by sale.⁹ In fact, based on the current practice in Mali, arrangements by a creditor/beneficiary of a pledge involving provisional title are much simpler than those recommended in the Uniform Acts on secured rights and enforcement proceedings. Indeed, given that a creditor’s claim is established, liquid, and payable, this creditor, in possession of an enforceable title (notarized instrument or legally binding decision), can institute proceedings to seize movable property through a

⁸ Article 59 states that “As with any owner, local governments have their private real estate. Land of this nature to be used for habitation purposes may be assigned in the form of an urban or rural concession for dwelling purposes.

However, the land mentioned in the foregoing section shall be the object of direct transfer when such land involves the private real estate of a local government in an urban area for which a development and urban planning master plan has been prepared.”

⁹ Article 253 of the OHADA Uniform Act Organizing Simplified Recovery Procedures.

seizure and auction process. We were unable to ascertain whether this point involved an intentional omission in OHADA law or rather a concrete solution (seizure of movable property takes only two weeks) to the paucity of land titles. It is true that, *stricto sensu*, OHADA law does not cover ownership of pledged assets. However, the exercise of security rights in movable property relating to immovable assets is not a satisfactory solution and brings to the fore enforcement problems insofar as mortgages are concerned.

The use of provisional title in support of security rights adversely affects banking ratios. Obtaining security rights via provisional title, which is more the rule than the exception in Mali, leads to 100 percent mandatory provisioning, in accordance with prudential regulations.

Use of the mortgage system is also hobbled by the lack of a comprehensive land register. Other than the initiative to convert provisional titles and the widespread introduction of land titles, which was started in 2005 but has not been completed, the land register covers only a small part of Malian territory. There are numerous advantages, which clearly transcend security rights and lending, of having a land register. The precise registration of lots clearly enhances legal security in terms of ownership. In fact, regardless of determining whether land title or provisional title is involved, access to reliable information makes it easier for the creditor to grant credit. A study conducted in India¹⁰ in 2012 revealed that the automation of the land register led to a 15 percent increase in credit over a very short period.

4. Recommendations

- Full modernization and automation of the Bamako RCCM, with consideration being given to consolidating the Bamako, Mopti, and Kayes RCCMs, a process that could be facilitated by the existence of a single computerized system.
- Review the possibility of resuming the process of conversion of provisional titles into land titles.
- Complete the land register development process as set forth in the *Ministre des Domaines de l'Etat, des Affaires Foncières et du Patrimoine* (MDEAFP) report entitled "Land Management Reform with the Aim of Creating a Land Register in Mali" (*Réforme de la gestion foncière visant l'instauration d'un cadastre au Mali*), October 2014.

¹⁰ Klaus Deininger, Aparajita Goyal, Going Digital: Credit Effects of Land Registry Computerization in India, Policy Research Working Paper 5244, The World Bank.

LAW ON COLLECTIVE PROCEEDINGS

1. The Current Legal Framework Under Reform

The OHADA Uniform Act on Collective Proceedings for Debt Clearance has just been revised to reflect the new international best practices. The previous Act dated back to 1999 and contained a host of mechanisms that remain relevant in the present context. However, numerous techniques aimed at addressing debt distress have emerged since the 2008 financial crisis. A modern law on collective proceedings is aimed at safeguarding and restructuring viable enterprises while facilitating the rapid liquidation of those that are not, with the ongoing aim of optimizing the economic use of productive assets. To this end, the insolvency law should provide a series of techniques, which may or may not be judicial in nature, to guarantee creditors and debtors greater legal security.

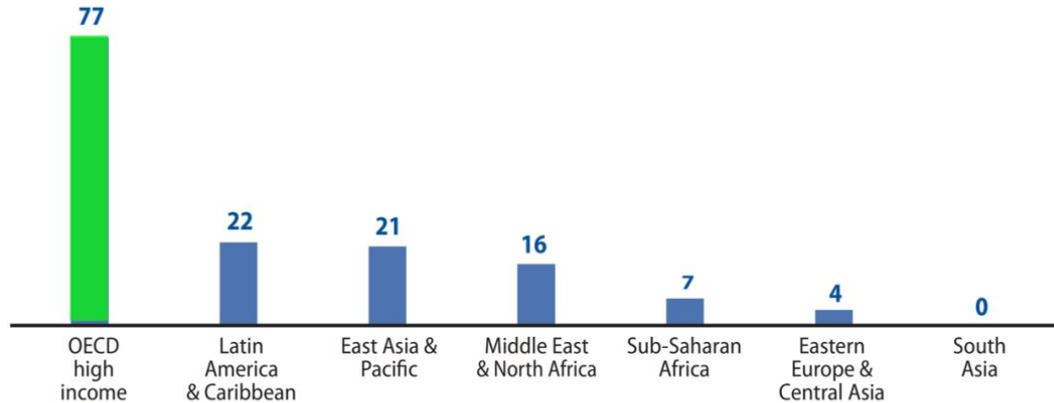
A modern insolvency law should protect viable enterprises. Although OHADA has instituted different restructuring techniques, including preventive settlement and rehabilitation procedures, recourse to collective proceedings in Mali is limited,¹¹ while liquidation proceedings are commonplace. Creditors and debtors hardly use the other procedures (or do so in bad faith, as explained below in the context of preventive settlement, which was later changed). However, it should be noted that developed economies are also the ones where the restructuring procedures are the most effective.

¹¹ 20 proceedings pending before the Bamako Commercial Court as of March 15, 2015.

Diagram 3: Level of Economic Development and Effectiveness of Collective Proceedings for Restructuring

In OECD high-income economies viable businesses are more likely to keep running after bankruptcy

Share of economies where companies are sold as a going concern (%)



Note: Sale as a going concern is considered an efficient outcome in the *Doing Business* case study.
Source: *Doing Business* database.

The reform under way was started in 2012 and has just been completed with the adoption of the new Uniform Act of September 10, 2015. After analyzing the current legislation and points that could be improved upon, legislation was proposed and submitted for comment to the OHADA States in the spring of 2015. Mali participated in a constructive manner in the drafting process of the new Act and should be commended for its work, along with its national OHADA committee.

2. The New Act Has Led to Numerous Improvements

The new Act incorporates international best practices to address the current deficiencies. The following scenarios present the limitations of the current Uniform Act, along with the proposed solutions.

Preventive settlements are currently used as a delaying tactic by debtors operating in bad faith in Mali. The previous Act made provisions for collective proceedings to be instituted prior to the cessation of payments and which, like any other collective proceedings, leads to the suspension of proceedings by creditors. It seems that in Mali and, more generally, in the entire OHADA region, these proceedings have been used by debtors as a delaying tactic—as soon as the creditor sought payment, the debtor took action to institute preventive settlement proceedings in order to benefit from the suspension. Under normal circumstances, this period should not be a protracted one; however, improper application of provisions and the slow pace at which the justice system moves has led to the virtually indefinite suspension of proceedings. To address this problem, the new Uniform Act limits the suspension of proceedings to six months, with the possibility of a single three-month extension. Following this extension, suspension automatically ends, with there being no need to go before a judge to seek a ruling.

The small and medium enterprises operating in good faith (including the individual businesspersons in the informal sector) are unable to take advantage of the system owing to a number of cumbersome procedures. While collective proceedings are applicable regardless of the size of the debtor's enterprise, the previous system was too cumbersome for small enterprises in view of the fact that the different formalities generate expenses for a debtor. For example, the documents to be presented to request the institution of proceedings required a minimum amount of preparation, sometimes by legal experts or accountants. Receivers, who have to be paid, can also scare off SMEs. The new Uniform Act therefore sets forth a streamlined system for preventive settlement, rehabilitation procedures, and court-supervised liquidation by lifting some of the constraints that could serve as an impediment to SMEs. Deadlines have also been shortened, given that most procedures are often simpler for small debtors and should therefore be quicker. In addition, the informal sector was excluded from the process. The new Uniform Act greatly expands the scope of application and covers, in particular, non-commercial entrepreneurs. In general terms, the new Act was completely overhauled to make all procedures accessible to small debtors.

The previous Act was very heavily focused on the judicial system and did not leave room for extra-judicial procedures. Under this Uniform Act, all proceedings were judicial in nature. Proceedings were started, conducted, and concluded before a judge. International best practices, while recognizing the importance of the courts, tend to leave it up to the parties to negotiate, with limited judicial intervention whenever possible. Consequently, conciliation was used in many civil law countries. Common law countries have a similar system of "out-of-court workouts" (OCWs). The new Uniform Act creates a fourth type of proceedings known as conciliation, which are started and concluded by a judge but managed by a conciliator who facilitates the negotiations between the parties. These proceedings are confidential (and thus do not affect the debtor's reputation) as well as extra-judicial (creditors do not have to agree to reduce debt).

The rules applicable to judicial representatives require improvement. There are no real regulations applicable to receivers or judicial representatives in Mali. The commercial code sets forth procedures applicable to legal experts who, in practice, play the role of receiver and are court appointed. However, professionals responsible for supervising recovery and liquidation operations perform very specific activities that require specific rules, particularly in the ethical realm. The importance of this is linked to the fact that judicial representatives will bear responsibility for the application of the insolvency law. Consequently, the criteria applicable to qualifications, appointment, rights and duties, and ethical conduct of judicial representatives are areas that should be covered by specific legislation. The previous Uniform Act did not contain any provisions in this regard. The new Uniform Act includes a well-developed system and will offer the advantage of making all judicial representatives in the OHADA region subject to the same rules. The areas covered by the new provisions pertain to the obligation to obtain occupational insurance and professional training as well as the establishment of a National Commission in each country responsible for oversight of the profession.

Although Malian banks are considering offering cross-border credit, there was no legal framework for international collective proceedings. Several banks are already dealing with the complexity of international collective proceedings and have

indicated that this issue could even delay the establishment of regional banks in Mali. Numerous banks would like to expand into a number of cities near the Malian border and thus offer cross-border loans. Consequently, there is real need to provide clarification regarding the application of collective proceedings involving two OHADA states. The matter was not addressed in the previous Uniform Act. In fact, there are procedures where the creditor is located in one country and the debtor, in another. This therefore gives rise to a host of issues related to international law, such as the implications for one country of instituting collective proceedings in another. The new Act devotes an entire chapter to this issue. It is based on the model prepared by the United Nations Commission on International Trade Law. This legislation was prepared by some of the most renowned international experts. It can be adapted to both civil law and *common law* countries. At the moment, it is the most advanced set of provisions that allow for strengthening the legal security of cross-border lending and their inclusion in the new Uniform Act represents a major step forward for OHADA law. It should be noted that the provisions were not merely replicated; they were adapted to the OHADA context.

Modern restructuring techniques were not covered in the previous Act. Debt-for-equity swaps, a best practice widely applied in advanced economies, were not covered in OHADA law. This subject is now covered in specific provisions that recognize but exercise control over this practice (creditors, for example, cannot be forced to agree to swaps). In addition, under the previous Act, personal guarantees were not protected when preventive settlement proceedings were instituted; in other words, the suspension of proceedings did not apply to them. The new Act has amended this point so as to encourage debtors to seek a solution to their debt overhang as quickly as possible.

Liquidation proceedings are not properly utilized as they scare off debtors. As indicated above, a modern insolvency law should permit the rapid liquidation of non-viable insolvent enterprises. This facilitates an efficient redistribution of economic assets. At the moment, individual proceedings against debtors (physical persons) can be resumed by creditors once liquidation operations have been completed. As a result, Malian debtors prefer to sell off some assets (thus putting their enterprises at risk) in order to repay creditors perceived as dangerous, which is precisely what the insolvency law seeks to avoid. In order to encourage enterprises to move toward liquidation should this procedure be the best alternative from an economic standpoint, the new Uniform Act prohibits the resumption of proceedings, except under limited circumstances, against debtors operating in good faith. This constitutes an international best practice.

Implementing measures for the new Uniform Act will be necessary. The new Act has been adopted and will be published by October 10, 2015. Ninety days following publication, it will become immediately and directly applicable to Mali. The Government can therefore make plans now for all the measures necessary to ensure its smooth application, namely, (i) organizing comprehensive training for judges, lawyers, and professionals on the new system; and (ii) adopting enforcement measures, primarily with respect to receivers. Indeed, Article 4 of the Act stipulates that “each State party shall adopt, as appropriate, the regulations for application of the provisions of this Chapter. Based on the appropriate procedures, it provides for the regulation and supervision of judicial representatives acting in their own countries, by establishing, as necessary, a national body whose organization, composition, and operations shall be determined by it.”

In order to facilitate the effective application of the new collective proceedings, the Government should (i) immediately establish the National Commission provided for in the provisions; (ii) prepare the national list of judicial representatives stipulated in Article 4-3 of the Act; (iii) prepare the pricing terms provided for in Article 4-19 of the Act; and (iv) establish a national entity as set forth in Article 4 of the Act, should Mali not wish to assign all the functions to the Ministry of Justice.

3. Recommendations

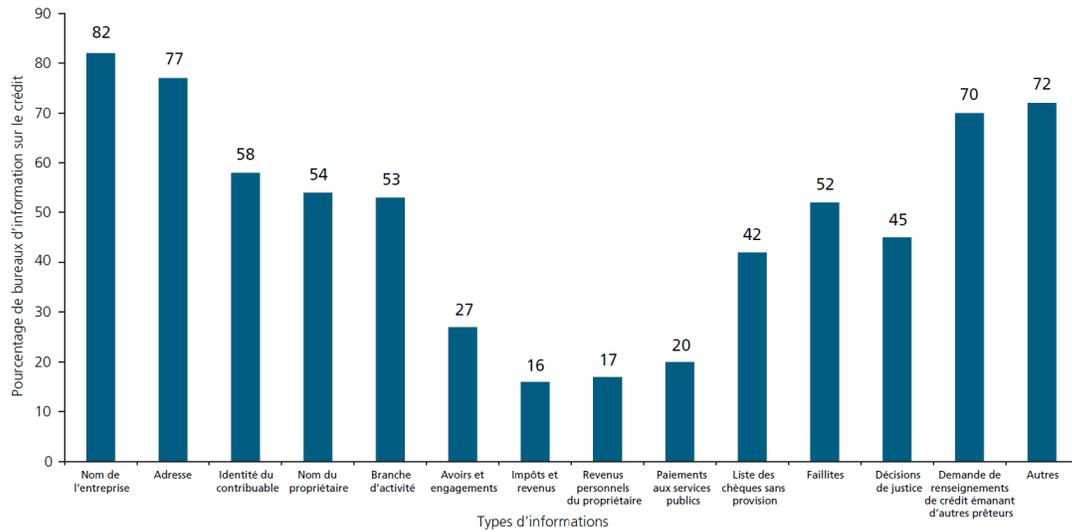
- Adopt the measures related to judicial representatives

CREDIT INFORMATION

1. The Current Framework: Absence of a Credit Information System Despite its Importance

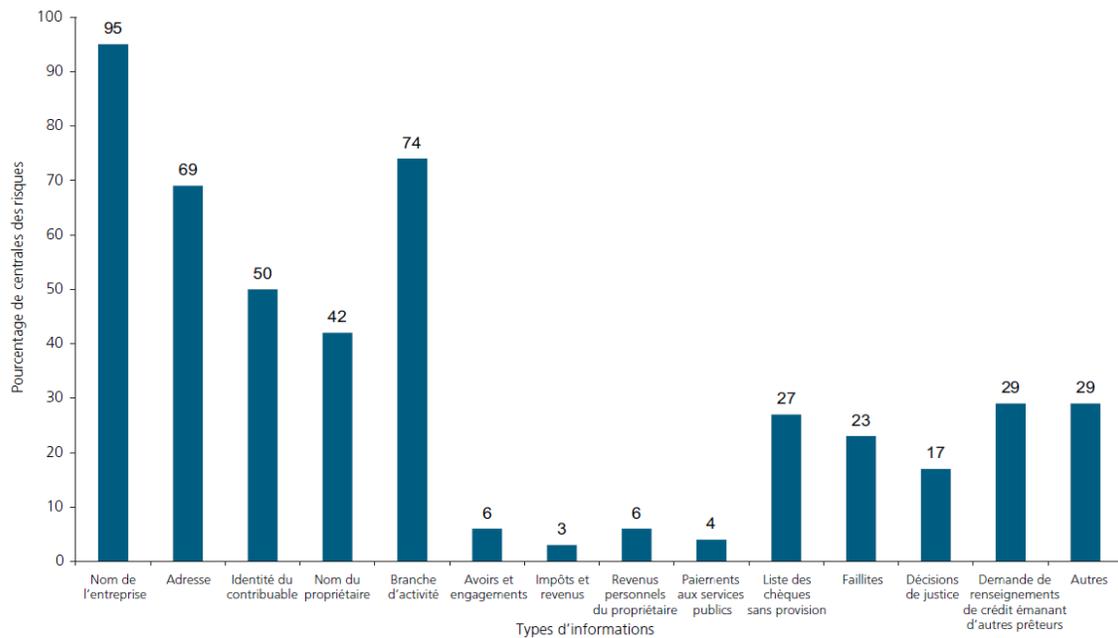
Currently, there is no platform for the exchange of information on clients. Whenever banks have to provide credit to a debtor, they do not have a database that is easily accessible for the purpose of verifying payment history. Better credit information, along with better governance regulations, would have helped avoid the irregularities observed in the microfinance sector in Mali, where some debtors obtained loans without having the financial resources necessary to repay them. It is important to note that the Central Credit Registry (*Centrale des risques*), managed by the Central Bank of Mali, does not perform the same functions, as its information is not sufficiently detailed. A credit reporting bureau gathers much more relevant information.

Diagram 4: Difference between a Central Credit Registry and a Credit Reporting Bureau (*Bureau d'information crédit*)



Source: Calculs de l'IFC basés sur les indicateurs *Doing Business* (base de données) 2012.

Enterprise information gathered by credit reporting bureaus



Source: Calculs de l'IFC basés sur les indicateurs *Doing Business* (base de données) 2012.

Enterprise information gathered by credit reporting bureaus

Access to credit information is all the more important for countries with a large informal sector. In theory, banks would be able to review loan applications based on reliable accounting documents. However, these are precisely the documents that SMEs, the informal sector, and agricultural sector do not have. This situation does not impact

credit to professionals. For example, the employee of an informal shopkeeper in Bamako does not have a salary statement or paystub to hand over to a bank to request a personal loan, even if he has worked for this employer for several years. The banks in Mali with which discussions were held expressed great interest in the establishment of a credit reporting bureau, precisely to be able to expand the range of services they offer to the informal sector.

2. The Law Submitted to Parliament—An Important Step Forward

The Uniform Law on Credit Reporting Bureaus was adopted by the Council of Ministers and submitted to Parliament. A regional initiative was launched by the BCEAO to establish one or several credit reporting bureaus common to the UMOA region. These bureaus are moral persons, generally private in nature, which must be approved by a UMOA member State, with the approval of one State being valid in the entire Union. In Mali, the law will apply to credit institutions and major decentralized financial systems (DFS), that is, the entities placed under the authority of the Banking Commission. However, it should be noted that passage of this law by the National Assembly is still pending.

While the law incorporates best practices, special attention should be paid to its enforcement. The draft law is satisfactory as it offers a clear legal framework related to the sharing of information. Non-traditional data providers (water, power, and telecommunications companies) have been involved in the reform effort. In addition, the Malian Telecommunications Regulatory Authority (*Autorité Malienne de Régulation des Télécommunications* AMRT) is represented on the working group established in Mali, which is responsible for supervising work related to the establishment of national credit reporting bureaus. Although the Government makes provisions for these entities to be part of the Credit Reporting Bureau during a second phase, the current scope of application of Article 60 of the draft law covers only credit institutions and DFS. However, a credit reporting bureau is effective only if the information it collects (whether positive or negative) is as comprehensive as possible. It is therefore essential for the second phase to be implemented as quickly as possible in order to include the stakeholders mentioned above.

A public announcement on the prior consent condition will be necessary. The credit reporting bureau system is based entirely on the prior consent of the client, which is required before any information can be shared. In this regard, the Government should make provisions for two types of announcements—(i) one public announcement (radio, newspapers, and television) encouraging Malians to provide their consent and underscoring the advantages of this information in facilitating the provision of credit and the reduction in lending costs, and (ii) another related to legal training for banks and DFS on the legal techniques to be used to obtain consent in an appropriate and reliable manner.

3. Recommendations

- Support the passage of the law by the National Assembly
- Expand the scope of application of the entities impacted by information sharing to include water, power, and telecommunications companies

- Provide information on prior consent in order to encourage clients to agree to this
- Organize a seminar with credit institutions and DFS to train them in appropriate legal techniques to register client consent

LEGAL ENVIRONMENT

1. The Current Context: Lack of Confidence in the Courts

Credit institutions do not have confidence in their courts. While civil and commercial courts are very important in a lending environment, they are not perceived by banks as guaranteeing predictability and legal security. As indicated earlier in this note, the Malian courts have a central role to play in the enforcement of provisions—enforcement of security rights (before the Bamako commercial court in the case of most enterprises, or before the civil court in the case of mortgages or civil guarantees) and collective proceedings (Bamako commercial court). The banks and enterprises with which discussions were held expressed skepticism regarding the effectiveness of the courts. The enforcement of security rights in immovable property could, for example, take more than five years. It should be noted that *commissoria lex* clauses (which, in enforcing the law on secured transactions, allow for the sale of the asset pledged) are very popular in Mali, precisely because they call for the intervention of the courts. In addition, as indicated above, the practice of banks of obtaining movable property pledges with respect to immovable assets is a tactic that allows for circumvention of the judicial enforcement of a mortgage, which can take more than ten years in Mali.

In addition to legal delays is the problem of transparency. The justice system rarely moves as quickly as stakeholders would like, whether or not the country is a developed nation. This issue relates, of course, to the size of the budget allocated each year to recruit judges and court employees, to spend on buildings, etc. The premises of the Bamako commercial court are substandard. Not only are they dilapidated; worse still, they are very small. There is only one court room, a situation that naturally impacts the number of cases that can be processed daily. Plans should be made to relocate the commercial court. In addition, stakeholders have pointed to several problems with legal decisions owing to the fact that the grounds therefor are either partial or totally absent, thus preventing an understanding of the reasoning advanced by the judge and, in turn, of assessing the advisability of filing an appeal. Mention was also made of cases of contradictory decisions being issued by the same judge within a few days of each other, while the facts related to the case had remained unchanged. The pressure exerted on judges by the parties is therefore obvious.

Some civil and commercial court judges are unfamiliar with the law applicable to banking operations. Several legal provisions applicable to credit operations are fairly technical, such as the law on secured transactions or the law on collective proceedings. Professional judges and non-professional judges at the commercial court (in other words,

persons from the business world who are not career judges) are not always properly trained in this field, a situation that poses a problem in terms of gaining a sound grasp of disputes. This problem also stems from the method used to distribute cases among judges, as there is no clear system allowing non-professional judges at the commercial court from handling [text missing] in this sector.

2. There Are Ways to Improve the Dispute Settlement Process

The Professional Association of Banks and Financial Institutions (*Association Professionnelle des Banques et Etablissements Financiers* APBEC) has created its own out-of-court mediation system. This mediation is fully funded by banks (even in instances where expert opinions are needed, costs are paid by APBEC) and is therefore provided free of charge to clients.

APBEC would like to offer free training seminars for judges. It has been noted that APBEC has, on several occasions, tried to contact the Ministry of Justice to discuss business law training for all commercial court judges. It seems that no headway has been made with this initiative.

Grace periods and accounting reports should be supervised. Malian banks have indicated that they are very concerned over the ease with which judges accept applications of this nature. This systematically slows down the enforcement of security rights, given that debtors request accounting reports as a delaying tactic. Article 39 of the OHADA Uniform Act Organizing Simplified Recovery Procedures does, however, provide strict provisions regarding the procedures related to grace periods—proof of good faith on the part of the debtor and of a difficult financial situation. In addition, while the period cannot, in theory, exceed one year, they frequently exceed this time frame. Furthermore, debtors abuse the option provided to request accounting reports (the deposit of all the account statements pertaining to the application). This delays the proceedings as the banks are then required to produce a number of financial documents that some judges do not know how to assess, creating the need to appoint a legal expert.

Specialized divisions should be created within the commercial court. Mali has specialized commercial courts, something that gives it an advantage relative to other countries. However, given the problem of the distribution of cases among judges, it would be most advisable to create specialized divisions. The new President of the commercial court has indicated his support for this project. A specific division could be established for certain types of disputes, such as one for all banking or collective proceedings disputes. There are only nine judges in the commercial court, only two of whom are professional judges. Greater budgetary resources should be allocated to this area.

Alternative dispute settlement mechanisms (mediation and arbitration) can reduce the backlog in courts. In Mali, people are truly drawn to out-of-court dispute settlement methods, owing to the country's traditions. Mali's Center for Conciliation and Arbitration

(CCAM) was established in 2004. Although it is operational, it has not handled many cases, because of a lack of visibility. While international arbitration is more suited to major contracts, mediation is often very successful in the case of minor disputes. However, Mali does not have a mediation law (while in 2010, the Code of Civil, Commercial, and Social Procedures did contain articles related to this practice, the mediation envisioned is handled by a judge rather than a private mediator). There is also no mediation law at the OHADA level.

Guarantees need to be provided that judicial decisions will be more widely publicized. Several countries in the OHADA zone have decided to institute a system for publishing legal decisions on a dedicated website. This provides information to the parties as they can know the outcome of their case without having to go to the clerk of the court, as well as greater transparency of the operations of the justice system, which could potentially shine a light on ethical problems. The Abidjan commercial court in Côte d'Ivoire provides on-line information on its website at the end of any hearing and would like to quickly implement a process of communicating the actual decisions.

3. Recommendations

- Organize ongoing training for judges on the law, handling of cases, and writing of decisions
- Provide training for commercial court judges related to the ethical obligations linked to their responsibilities
- Promote the use of alternative methods of dispute settlement and review the possibility of passing a law on mediation
- Create specialized commercial divisions
- Consider building new and modern office space for the commercial court
- Ensure the public disclosure of these legal decisions