



CONSEIL DES INVESTISSEURS PRIVÉS AU BÉNIN  
COUNCIL OF PRIVATE INVESTORS IN BENIN

# THE ROLE OF THE JUDICIARY IN SAFEGUARDING BUSINESS INVESTMENTS AND TRANSACTION IN BENIN

*A paper presented by  
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The Council of Private Investors in Benin (CIPB) is an association founded by a group of entrepreneurs with significant investment in Benin. The CIPB brings together all professions and all sectoral activities with followings objectives:

- To promote a positive environment for investment and employment
- To assist the Government with issues of reform
- To optimize the local resources

April 2008.

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## Preface

### A justice system for development

The reform of the Beninese judiciary system constitutes one of the objectives of the implementation of the Millenium Challenge Account Program (MCA). The MCA is a fund that was set up by the American administration to improve the governance and the economic fabric of some eligible poor countries, among which Benin was selected.

The choice of justice as one of the priorities of the MCA program demonstrates to a large extent the correlation that exists between a performing judiciary system, the construction of a democratic state and an economically viable nation.

As investors we think it is indispensable and unavoidable to set up an independent, modern and dynamic justice system as a prerequisite in attracting investors to Benin. Investments need to be made secure by definitive and unequivocal laws whilst the investor is reassured by faster procedures with transparent and equitable justice decisions. Benin still has important efforts to make on these aforementioned points.

Madam Severine Lawson, former Public Prosecutor of the Republic, delivered an address during a dinner debate organised by the CIPB on August the 28<sup>th</sup> 2007, dedicated to justice and put forward, in our point of view, a clear and exhaustive diagnosis of the judiciary system in Benin.

It is with interest that we share with you the fruits of her reflection.

Enjoy

Roland Riboux  
President, CIPB

## Introduction

I have been asked to start off today's debate entitled **“the role of the judiciary in safeguarding investment and business transactions in Benin”**.

In keeping with the terms of reference at hand, one can easily guess that the organisers' expectation is to have us address how the judicial system influences investment. In other words, it simply means what possible impact do judicial procedures have on economic development activities in our countries.

I will begin my remarks by evoking certain cases.

**1) A prominent French businessman and director of a large import and export company is suing a Beninese company in the high court in Cotonou since 27<sup>th</sup> February 2002.**

On the 5th of September 2006, he wrote to a friend in Benin and the following is an extract;

**“Once again the hearing has been postponed for the 23rd consecutive times. I believe that, with the New Minister of Justice on board, one could finally expect an improvement so that on next hearing of 15th November the judgment will be passed”**.

**2) In a litigation introduced in 2005, the lawyer of the business company suing another company introduced an exception in plea bargaining. The relevance of the plea brought the judge to put the matter in deliberation. Two years later, the matter is still being deliberated on. Exasperated, the council of lawyers invited their client to authorize them to enter into negotiations with the other party judging that at that rate the ruling could take centuries.**

**3) A company in relation with foreign partners established a credit facility with the help of its bank, under the form of a letter of credit to ease up transnational imports transactions. Due to an error on the part of his bank, his supplier did not receive payments as planned for the success of the transaction. The company was obliged to use informal channels to guarantee his acquisitions and in turn sued his bankers for compensation. The case was constrained by many obstacles accumulating expected damages in hundreds of millions. When he filed claims for compensation in order to restart his business, his claims were rejected by the court.**

**4) A trader was offered in the year 2000 the purchase of a building to set up his business. The building needed a lot of renovation works. To cover up the selling price and the renovation works to be carried out, AB went for a loan of 20,000,000 francs. The undertaker who negotiated the building was responsible for everything including arranging for the loan from his bankers, deed for purchase from a notary and initiate renovation works to be carried out. A few months later, whilst the trader was wondering about when the work will be completed and the building handed over to him, he learnt that the undertaker had gone bankrupt and was on file for bankruptcy. The works had not started, but the total of the loan amount has being credited into the undertaker's account the day the building was sold. The building is still not in liveable condition, the money vanished, but now the trader is liable and must reimburse the credit.**

**In 2002 he referred the matter to the civil court of Cotonou and sued the bank to have accepted to pay the total sum before the completion of works and the Notary for delivering the bill of purchase knowing very well the compromising status of the undertaker. Other victims of the same undertaker chose the criminal court, i.e. contacted an investigating judge and filed for civil action suit. The bank on the one hand sold the building through legal procedures and on the other hand referred the matter to court to obtain the reimbursement of the outstanding credit balance. During a few years, the lawyers of the trader and other victims and that of the notary of the undertaker shared conclusions. And then, when it was time for the ruling, the tribunal**

**informed them that since the criminal court has been seized earlier on, it has to wait for its ruling before reviewing the civil action. The criminal court prosecution itself lasted for 2 years and, in 2004, the criminal court found the directors of the undertaking company guilty of complicity and fraud. But the criminal court cannot compensate the trader for damages and interests since he has referred the matter to the civil court which in turn could not pass judgement prior to the criminal court. The guilty party put in an appeal that the court examined and, in 2005, their guilty sentence was confirmed. Meanwhile the notary challenged the Appellate Court decision.**

**Meanwhile, the interest rate on the credit loaned to the trader by the bank skyrocketed to a liability of 30 million francs for a building he never took possession of. After 7 years of judicial procedures, judgement on his request of compensation is still pending even at high court.**

These four cases clearly illustrate the consequences of an inefficient judiciary, the length and the complexity of procedures, the difficulties of access of citizens to judicial services.

The judiciary is faced with lots of criticisms: it is too slow, inequitable, corrupt despite its prominent role of facilitating social cohesion.

Considering the fact that in a democratic society, the credibility of the judiciary plays a stabilizing role, one can understand that the lack of confidence, the rupture between the population and the judicial system, between users of judicial services and their judicial institution influences the economic development of the nation.

The judiciary, an essential component of the rule of law that should be an element of peace, confidence and security, is perceived in these days as the producer of risks, injustice, fear, mistrusts and social destabilisation.

The image of a country that adopts rule of law is gauged through its judicial system.

Therefore if the judiciary system is dysfunctional, the rule of law which is the backbone of democracy will not exist.

More over, the impact of a sound, efficient, impartial and efficient judicial system managed by people of integrity on economic activities is evident. In fact, the economic world does not tolerate long delays. Some sort of judicial stability is necessary for trade transactions, a reassuring judicial environment is a sine qua non condition for investments.

But what we realize today is that there is lack of confidence within the judicial system which is sometimes due to decisions of unpredictable nature, too long delays and ineffective procedures.

These sentiments are usually accompanied with an impression of lack of competencies aggravated by all sorts of suspicions.

But despite its image of low confidence, the judicial system plays a vital role in the lives of people in general and in their economic livelihoods in particular. In any case it is the adequate channel for the resolution of disputes. In the world of business, its role is very important for the promotion of investments, especially in under-developed countries where capital is very necessary to create wealth.

To determine the role of the judiciary on economic activities, I have decided to treat the topic given to us to brainstorm on in 4 points.

First of all, I will try to present a brief description of the organisation and procedures of the judiciary system in Benin.

I will then revisit the diagnosis of the realities of our judicial system.

I will at the end talk about in what ways these organisations and their procedures influence our economic activities.

Finally I will throw the bases of certain views for a judicial system that safeguards investments and business transaction in Benin.

## 1. Organisation and the operating mode of the judicial system in Benin

Since traditionally it is good to deal with terms before developing concepts, I will attempt to define the Judiciary.

**“Justice is after all a virtue”.**

According to Georges Boyer Chammard, **“it is a feeling of equality innate in every conscience”**. It also covers the power to give to each and everyone what is due in a civil context or to make a penal verdict which respects law and order.

It is also an institution, a machinery, an organization. In this latter sense, the judiciary is an enormous administrative machinery (courts, tribunals, magistrates, paralegals) who contributes to the judicial system.

In the Republic of Benin, the judiciary is independent of the executive and of the legislature. It renders its services through the Supreme Court, courts and tribunals that are under the jurisdiction common law.

Apart from common law jurisdictions, there are two other political jurisdictions which are the Constitutional Court and the High Court of Justice.

A general overview of the judicial organ in Benin shows that the judiciary branch in Benin is organised in jurisdictions and judiciary staff.

These jurisdictions are divided into judiciary law and administrative law, 1st degree and 2<sup>nd</sup> degree jurisdiction, Courts of Appeals, Supreme Courts, jurisdiction of content, referral courts, common law courts, special jurisdictions, collegial jurisdiction and single judge jurisdictions.

### 1.1 Reconciliation tribunal

The judicial organ is presented in a pyramid form with reconciliation tribunals at the base formed by administrative districts with their own status and for each district. This reconciliation tribunal is composed of a chairman and two deputies. These tribunals have authority to handle any cases except special cases planned by law relating to modern civic cases, penal, individual conflicts of employment and staff matters.

But their referrals is optional

### 1.2 The Circuit Courts

They exist in each township a Circuit Court with a special status.

There are Circuit Courts of Second Class in 25 communes that are Ouidah, Calavi, Allada, Adjohoun, Avrankou, pobé, Sakete, Come, Aplahoue, Lokossa, Dogbo, Abomey, Bohicon, Cove, Savalou, Dassa-Zoumè, Save Nikki, Bembereke, Kandi Malanville, Djougou, Natitingou, Kouande, Tanguieta.

A Circuit Court is composed of a chairman, one or several deputies, one or several examining judges, public prosecutor, magistrates, deputy prosecutor, senior court registrar and court registrars. The Circuit Courts magistrates are competent on common law in penal, civil, commercial and administrative matters.

### 1.3 The Appeal courts

They exercise at the 2nd level of jurisdiction There are three Courts of Appeal: Court of Appeal of Cotonou, Abomey and Parakou.

The Court of Appeal is composed of the 1st President of Chambers and Counsellors, Attorney General, Substitutes Generals, Senior court registrar and registrars.

### 1.4 The Assize Courts

An Assize Court is established near each Appeal Court. It has the power to judge criminal offences.

### 1.5 The Supreme Court

It is the highest jurisdiction in administration, Judiciary and Audit. It is also competent in matters of contest of results of local elections. It is important to understand the procedures of the judiciary system, to know that the magistrates are nominated through proposition of the minister of Justice after consultations with the Upper Counsel of Magistrates. This means that the magistrate function depends greatly on the executive.

There are 2 types of magistrates: The Bench Magistrates and the Public Prosecutors.

The Bench Magistrate has the power to pass judgements after examining a case, listens to the parties and their lawyers. He is called the sitting Magistrate because he functions in sitting whilst the Public Magistrate also known as the Standing Magistrate fills his functions by standing.

The Sitting Magistrates are irremovable and independent. To this end, they handle matters laid before them according to the law. They cannot be influenced, incited, threatened directly or indirectly and should ignore interventions from everybody and from everywhere. They cannot be transferred to a new posting without their consent even if it is a promotion.

The Public Prosecutors receive orders from the Minister of Justice who can give them instructions that they need to obey. But they can give their divergent opinion during hearings. The seriousness of decisions taken by the judges and the importance of functions that they occupy implies duties and obligations. These duties and obligations are attached to objectivity and independence which characterises the duties of the judiciary functions.

Irremovability is not for the comfort of the judge but rather to guarantee their independence. This independence consists of rejecting or ignoring possible pressures. But we should admit that independence, issue of personality, is first of all what the judges make of it.

To end this section on procedures, it is important to say a word on the emergency procedure, created to facilitate the quick settlement of disputes.

### 1.6 Referrals

It is a procedure of emergency introduced before the President of the Tribunal to cease a situation which is assumed to be against the law.

Referrals help obtain all the measures which cannot be seriously contested, all measures of conserving or remedying to prevent imminent damage or stop an illicit deed to be committed. The measures taken by the judge on referrals are temporary. The judge never says anything on the substance of the dispute.

This judicial setting within the judicial environment having been presented, one should ask what the actual situation of judicial procedures is in Benin.

## 2. Diagnosis of the judicial situation in Benin

The situational analysis of the judicial system in Benin is devastating. The world of justice is denounced everywhere.

First of all, the legal professionals are protesting against the fact that they are being neglected by the government authorities. This is manifested by the lack of resources at their disposal. The paralegals are denouncing the dysfunctional system and finally the justiciables deplore the slowness of procedures, their complexities, and difficulties of access to justice and a corrupt judicial staff.

Negative conditions that hamper the activities of the criminal court have been mentioned. The conditions that weaken the duties of the civil court that plays an important role in social justice is being severely criticised. These conditions include:

- The inadequate number of staff and the insufficient number of judges.

A total number of 108 judges are in the judicial system.

At the Circuit Court of Cotonou, only 18 judges are in charge of the 39 tribunals.

It is the same with non magisterial staff: out of a total of 137 of court clerks, only 120 are working in the judiciary and only 13 are in the Circuit Court of Cotonou.

With this, the jurisdictions do not possess the human resources indispensable to fully exercise their functions.

- The accumulation of litigations due to the “jurisdification” of the society. Hundreds of cases are registered in the civil and commercial courts of the Circuit Courts in Cotonou.
- Low budget allocations to the Jurisdictions  
The 87,639,000 Francs allocated to all the Circuit Court include staff expenditures, purchase of goods and services.  
How can one expect a good functioning of a Circuit Court in Cotonou with an operational budget of less than 3,000,000 francs per year?
- The offices are very small and in very bad conditions.
- The absence of refresher courses for the staff or the badly organized ones. Constant training is indispensable for the duties of Judge.
- The inexistence of libraries and the shortage of books in certain tribunals. These accentuate the mediocrity of services rendered by certain judges.
- Excessive delays in the handling of procedures due to a number of cases pending.

To this end, it is noticed that cases started in 1970 are still waiting for judgement.

Referral procedures initiated about 5 years ago continue to suffer successive adjournments.

Meanwhile, it is a universal right recognised to each and everyone that his or her case should have an equitable hearing within a reasonable lapse of time by an impartial jurisdiction.

Though it is a good excuse to fear the consequences of too quick judicial decisions, slow judicial procedures discourage the justiciable for whom sometimes the future or conditions of living may depend on the judgement of the dispute or litigation. All of these perpetuate feelings and situations of judicial insecurity, worsened by the idea that unpunished criminals are free.

The non implementation of judicial decisions is a serious dysfunction which annuls the necessity of the existence of judicial institutions. A decision made is not efficient until it is implemented.

Meanwhile the authorities refuse to authorise the implementation under the pretext of preventing public unrest.

I will not know how to wind up this item on diagnostic of the situation without touching an aspect of Justice drifts which unquestionably influence the judicial activity.

The disappearance of moral values such as integrity that discourages personal and material interests, essential factors of the legal profession, whilst handling cases.

In this area we have proofs of corruption cases. It is a rather delicate subject that even when denounced, is encouraged through daily acts of the justiciables.

There is no corruption without a briber; in the judiciary environment everyone is concerned. We unfortunately notice that the majority of people engaging in corruption acts are people in the business world. A lot of investors want decisions to be in their favour against the principles of the law.

This is disastrous and generalized and the consequences are detrimental for the entire nation.

This sad picture only emphasizes the loss of confidence in the judiciary.

Meanwhile every potential investor of good faith should have confidence in the way Justice is made for the development of business. This shows the important role that the judiciary plays in business transaction and the existence of enterprises.

### 3. The role of the judiciary in the development of economic activities

A good judicial and judiciary environment is the first condition that would make a country attractive.

Transparent judicial system and judiciary security is essential to develop business transactions.

Is it worth it to invest, and sign contracts if one knows that his enterprise is exposed to judicial insecurity or if the business will not be profitable?

Commercial activity hates fluctuations and does not accept delays and uncertainties.

Therefore the judicial environment plays a dominant role, since a good management of disputes is strategic in the existence of the enterprise.

There are numerous constraints paralysing it, one of which is delays. Delayed justice leaves hanging a state of incertitude which is dangerous.

No one can ignore the effect of trade disputes since heavy debts can lead to bankruptcy and disappearance of an enterprise if the law suit slides into an endless procedure. It is the same with the seizure of perishable goods, if dispositions are not taken to preserve them.

In the same way, decisions taken too late result in impoverishment of one party in detriment of another, and decisions reformulated in an opposite sense years later, makes the economic cost of the situation huge.

It ends up that trade transactions cannot be developed without equality and confidence which has to be inspired by the judiciary. But because of the guilty silence of decision makers, and the incapacity of the justice to enhance its image and to put into order its functioning, lack of confidence aggravates and the dysfunction will only push back the justiciable who comes into contact with them. In these conditions, the investors, the entrepreneurs who are in need of serene, stable, efficient and impartial justice become reserved and timid.

It is therefore necessary that the security of economic activities be guaranteed to favour great strides and to encourage the investments of the 14 African heads of state who agreed to adopt in 1993 the treaty establishing the Organisation for the Harmonization of Trade Laws in Africa. On the other hand, if the harmonization of commercial laws is necessary to win the confidence of investors, it is not enough because the emergence of an equitable and secured judicial environment comes through the improvement of the judicial system.

#### 4. Leads of solutions to secure investments in Benin

The overview of the judiciary system and its influence on economic development proves that a general awareness is necessary for a better judicial and economic security relationship.

In this matter, a legislative reform is indispensable so that the cumbersome bureaucratic procedures will lighten and, on the other hand, other methods of settling of disputes should be implemented.

For example, mediation, conciliation, amicable agreement could be envisaged. Also the transfer of some part of activities of the judge can go to the notary for action. These are usually simple cases that unnecessarily burden the jurisdictions.

If developed countries are flooded with laws to satisfy a well organized and perfect judicial system, in Benin it is the other way round.

The framework of fundamental texts of litigation is archaic and their updating is less a concern to the Beninese legislator.

The diagnosis brings out the seriousness of the situation and the urgency to operate a real change.

It is necessary that the cry of alarm be heard at all levels so as to create a general awareness.

As far as I am concerned, I know that there is still hope because within the judiciary, there are men and women who are conscious of their role and need some encouragement/efforts from the authorities.

The improvement of the judiciary system can happen only through a real political will by taking important decisions such as the implementation of the law on the reorganisation of the judiciary and by gradually installing the circuit courts created.

But in the short term, it is necessary to consider a substantial raise of budget allocations in the jurisdictions and the improvement of working conditions of the judicial staff.

Computerization must also become a reality.

Internally, the judges have to be moved by a solid determination in the exercise of their duties with the primary objective of being efficient. To this end, they have to keep in mind that their responsibilities are very crucial.

The authorities should have at heart the improvement of basic training facilities of all the actors of the judicial system and be particularly meticulous during recruitments.

To conclude, I will say that I have tried to bring out the elements which seem very important for me. It is necessary to brainstorm and debate on this in order to contribute to the improvement of the services rendered by the judicial institutions for the securing economic activities in Benin.

Thank you for your attention.

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