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# Banking & Finance

Second Edition

Burundi  
Trust Juris Chambers

[chambers.com](https://www.chambers.com)

# 2019

## Law and Practice

*Contributed by Trust Juris Chambers*

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(petroleum, electricity and mining), telecommunications, banking and finance and transport. The firm has advised several banks in terms of regulations and has assisted international banks in debt recovery both in and outside Burundi. Very recently, Trust Juris Chambers has advised the World Bank group in banking regulatory issues.

### Authors



**Abdoul Mtoka** is the firm's founding partner. He holds an LLM in international business law (Brussels) and in OHADA business law (Paris). Abdoul has been involved in advising international banks and financial institutions and, in Belgium, participated in the development of an international bank based in France. He is active in the areas of banking and finance, corporate and commercial, competition, investment, infrastructure, telecommunications, transport and logistics, energy and mining, arbitration and public procurement.



**Faustin Cubahiro** is the head of banking and finance at Trust Juris Chambers. He has 11 years of experience in banking and debt collection in Burundi and has navigated at the heart of banking sector regulation. He is a former head of bank agency for a well-established Burundian commercial Bank and has been confronted with issues related to the compliance of legislation and regulations specific to the banking sector.



**Alain Tanguy Ntibwirizwa** is a junior associate at Trust Juris Chambers and holds an LLB (Burundi). He is active in commercial and corporate, intellectual property and telecoms.



**Issa Hatibu** is an associate at Trust Juris Chambers and holds an LLB (Burundi) and LLM (Turkey). He is active in commercial and corporate, employment and litigation.

## 1. Loan Market Panorama

### 1.1 Impact of Regulatory Environment and Economic Cycles

In Burundi, the Banking Act of 2003 has recently been reformed and banking activities are now governed by a new legal framework, namely law n°1/17 of 22 August 2017 (Banking Act) and its regulations. Several elements have contributed to the implementation of this reform, including the technological context which has been completely transformed by digital technology, the need to take into account the insolvency of banking sector players, the increasingly acute concern for consumer rights, the country's economic situation, the multiplicity of scattered and contradictory regulations, and so forth.

According to the 2018 Inflation statistics of the Central Bank, inflation decreased in 2018 (-2.74% against 15.97% in 2017). And in the 2017 Annual Report on Financial Stability of the Central Bank, borrowing rates fell slightly (16.2% against 16.5%), as did interest rates on loans (5.9% against 7.7% in the previous year). In the money market, interest rates have fallen. The marginal lending facility fell (7.1% in 2017 compared with 8.6% in 2016) as a result of the decrease in the rate on 13-week Treasury bills to which it is indexed. The liquidity provision rate also declined (2.8% vs 3.1% in 2016) and the interbank rate increased from 3.3% to 4.0% in 2017.

### 1.2 The High-yield Market

In Burundi, no high-yield market is yet existing. However, it should be noted that very recently a law on capital markets has been enacted, Law No 1/05 of 27 February 2019 (Capital Markets Act).

### 1.3 Alternative Credit Providers

In Burundi, the monopoly on the granting of credit is exclusively reserved for institutions that are subject to the banking rules, namely banks, microfinance institutions and financial institutions. Indeed, in accordance with Article 12 of the Banking Act, it is prohibited for any natural or legal person, other than a reporting institution, to carry out credit transactions.

### 1.4 Banking and Finance Techniques

Firstly, digital technology is transforming the banking and financial sector in Burundi. Indeed, it is now possible for all banks to offer financial services online and on mobile phones. This development has been acknowledged and encouraged by the new Banking Act of 2017, particularly in Articles 3 and 37, where electronic means of payment are permitted and regulated.

Telecommunications companies were the first to seize the opportunity created by digital technology and offer payment services via mobile phones, under the influence of the

region, particularly the famous M-Pesa. They are governed by the new Banking Act as payment institutions.

Secondly, the legal techniques observed are not the result of the creation of the Burundian legislator, but of practice. These techniques are used in the drafting of banking contracts that banks offer to their customers. For example, we can mention the mortgage mandate, which avoids the banker having to pay significant fees that are linked to the cost of credit and are likely to have a direct impact on the final consumer. Such inventions allow the law to be legally circumvented while protecting the interests of both the lender and the borrower. It is in this same vein that those who would like to facilitate the introduction of Islamic finance in Burundi should follow suit.

### 1.5 Legal, Tax, Regulatory or Other Developments

Among the major innovations in credit, in Burundi, introduced by the new Banking Act of 22 August 2017, we can first mention the regulatory power that the Central Bank (Bank of the Republic of Burundi) has to carry out multifaceted controls on institutions subject to its Article 48.

Second, the new law includes provisions that protect consumers and improve access to credit. For example, there is a choice given to the defaulting debtor by allowing him to sell his/her property given as a security (mortgage) within one year.

Third, to regulate the surge in interest rates applied by banks, the "double rule" is provided for when the accumulation of interest on non-performing credit and expenses for recovery (lawyers' fees, etc) reach the remaining principal due. In this case, the reporting institution shall cease to calculate the interest due on the credit in question.

Fourth, under Article 85 Land Certificates are now eligible (and not just property titles) to serve as collateral for credits. This measure is intended to facilitate access to credit for the agricultural sector since the substantial tax exemption for the agropastoral sector is provided for in Article 84 of the said law. The profits of credits to the agropastoral sector are exempt up to 50%.

Fifth, one of the fundamental reforms is the management of institutions in difficulty, with the attribution to the Central Bank of the powers that were reserved for the Commercial Court in terms of recovery, forced liquidation and recovery of the debts of the subject institution. Under Article 106 of the same law, the Central Bank may divest an institution of systemic importance and itself initiate, without appointing a provisional administrator, the process of its restructuring with a view to limiting the negative effects of contagion that the failure of such an institution could have on the stability of the financial system and the country's economy.

Sixth, Article 97 of the Banking Act is providing for short period of time within which the sale of guarantees by creditors must take place. After the sale's decision by the President of the commercial court is communicated to the Registrar of Land Titles, which is the auctioneer in this case, the sale has to take place within 15 days.

In general, this new law is part of a major project launched on the harmonisation of rules with the sub-region (especially the East African Community) and changes in the banking sector at the global level.

## 2. Authorisation

### 2.1 Authorisation to Provide Financing to a Company

Credit institutions are governed by the Banking Act and its implementing regulations. According to Article 17 of this law, any credit institution in Burundi must first be approved by the Central Bank. Indeed, an approval file must be established and must contain various documents. In addition to these documents, the Central Bank reserves the right to request additional information if necessary.

The Central Bank shall decide on the application for authorisation and notify the person concerned of its decision to grant or reject it. The decision is notified to the applicant, to the Minister in charge of the institution, and thus published in the official gazette (BOB) at the applicant's expense. Reasons shall be given for any decision to reject it.

## 3. Structuring and Documentation Considerations

### 3.1 Restrictions on Foreign Lenders Granting Loans

Only approved institutions in Burundi are allowed to grant loans. Foreign credit and payment institutions may only establish themselves in Burundi in the form of subsidiaries or representative offices. The opening in Burundi of subsidiaries and representative offices of these institutions is subject to the approval of the Central Bank.

### 3.2 Restrictions on Granting Security to Foreign Lenders

There are no specific restrictions on the granting of security or guarantees to foreign lenders.

### 3.3 Restrictions and Controls on Foreign Currency Exchange

The exchange rate regime, which until 1992 was administered by the Central Bank, underwent gradual liberalisation from May 1992 onwards, reaching full liberalisation in December 2006. A new Foreign Currency Exchange Regula-

tion has been very recently enacted on 17 September 2019. And according to its Article 5, international financial transactions relating to current transactions and investments are free, while transactions relating to the investment of residents abroad are subject to approval by the Central Bank.

In addition, Article 8 of the same Regulation continues by calling on any intermediary or money changer authorised to ensure that transactions with customers comply with the laws and regulations in force and especially in compliance with the provisions of Law No 1/02 of 4 February 2008 Anti-Money Laundering and Anti-Terrorist Financing Act (AML & ATF Act) and its implementing regulations.

However, in practice, some restrictions may be observed on access to foreign currency, particularly by legal persons of foreign origin, especially NGOs, which are still not authorised to freely open their bank accounts in foreign currencies.

### 3.4 Restrictions on the Borrower's Use of Proceeds

Banks and financial institutions must inform the Central Bank of illegal activities related to customer funds. This last amendment is part of the fight against money laundering in accordance with Article 30, letter 6 of Circular No 21/2018 on corporate governance in credit institutions. This is in accordance with the provisions of the 2008 AML and ATF Act and its implementing regulations.

### 3.5 Agent and Trust Concepts

The agent and trust concepts are not provided for in Burundian legislation. However, parties are free to provide in a contract for the terms and conditions governing them and to include similar or similar concepts.

### 3.6 Loan Transfer Mechanisms

In Burundian legislation, credit transfer can be carried out using several legal techniques, including novation and assignment.

First, novation is a legal operation resulting from a transformation of the legal obligation and resulting in the creation of a new legal obligation. In Burundi, novation takes place in three ways:

- when the debtor incurs a new debt towards their creditor which is substituted for the old one, which is extinguished;
- when a new debtor is substituted for the old one which is discharged by the creditor; and
- when, as a result of a new commitment, a new creditor is substituted for the old one, against which the debtor is discharged.

Second, the assignment of a receivable is one of the mechanisms for the circulation of the bond. It is traditionally defined as "an agreement by which a creditor, called an

assignor, transfers his claim to his co-contractor, called an assignee". It should be noted that in this transaction to which the debtor is a third party, the debtor is referred to as the assigned debtor. In addition, the Banking Act expressly governs factoring contracts. It is a means of financing and collecting receivables that can be used by a company and consists in entrusting a third party (specialised credit institution) with the management of its receivables in order to obtain, among other advantages, early repayment.

### 3.7 Debt Buy-back

The repurchase of credit consists in substituting one or more existing credits for a single credit, at a lower rate if possible, but amortisable over a longer period in line with the borrower's income. Since the lender and borrower are free to determine the terms and conditions of their credit agreement, they can include this technique and thus allow the repurchase of credit by any person on the terms provided for this purpose.

### 3.8 Public Acquisition Finance

In Burundi, there is no legislation or regulation on takeover bids. However, it should be noted that very recently a law on capital markets has been enacted, Law No 1/05 of 27 February 2019 (Capital Markets Act).

## 4. Tax

### 4.1 Withholding Tax

Interest payments or other payments to lenders are subject to withholding tax. In addition, a rate of 5% is applied to a financial asset for any person resident in Burundi received from a non-resident person in Burundi in accordance with Article 114 of the Income Tax Act.

### 4.2 Other Taxes, Duties, Charges or Tax Considerations

No other consideration is to be taken into account.

### 4.3 Usury Laws

Usury is governed by the law governing banking activities in its Article 3, which stipulates that usury rate is the overall effective rate that reporting institutions may not exceed in credit granting operations. It is set by the Central Bank according to the types of credit and according to the evolution of the environment and market conditions.

## 5. Guarantees and Security

### 5.1 Assets and Forms of Security

The assets generally available as collateral in our jurisdiction are generally real estate, partners' rights, bank accounts, insurance policies, etc.

First, real estate includes land and any buildings and developments on such land, and the security interest in it is enforced by the signature of a deed of mortgage between the debtor (mortgagor) and the person to whom the security interest is granted (mortgagee). A mortgage is a real right on real estate assigned to the discharge of an obligation. Each part of the building is liable for the entire debt and each part of the debt is guaranteed by the entire building pursuant to Article 134 of the Land Act.

Secondly, the security interest in the shareholders' rights is provided for in Article 148 of the Commercial Code, which specifies that the shareholders' rights (share or share) may be the subject of a conventional or judicial pledge. The pledge must be constituted by authentic instrument or by private deed. Pledge notices created by a company must be entered in the Personal Property Credit Register pursuant to Articles 151 and 168 of the Commercial Code.

Third, a security right in the proceeds of a bank account may be provided in the form of fixed or variable fees under article 75 of the law governing conventional personal property security rights ("*Loi régissant les sûretés mobilières conventionnelles*"). Under article 76 of the law governing conventional security rights, a charge to a bank account must be registered in the national personal property security rights registry.

Fourth, Article 111 of the Insurance Act provides that contractual rights may be pledged or assigned in whole or in part by the policyholder. The pledge or assignment of rights shall be recorded in an amendment signed by the transferor, the secured creditor or the transferee and the insurer.

Fifth, in the light of the provisions of Article 80 of the law governing conventional security rights and Article 159 of the Commercial Code, security may be taken over intellectual property rights. However, the pledge shall not extend unless otherwise agreed by the parties to accessories and fruits resulting from the exploitation of intellectual property rights.

### 5.2 Floating Charges or Other Universal or Similar Security Interests

In the light of Article 6 of the law governing conventional personal property rights in Burundi, a security right is authorised in all present and future assets of an enterprise.

### 5.3 Downstream, Upstream and Cross-stream Guarantees

Under Article 4(2) of the Banking Act, a person acting for consideration may make or promise funds available to another person or make a commitment by signature in the interest of another person, such as a guarantee, guarantee or any other security.

#### 5.4 Restrictions on Target

Under Article 53 of the Banking Act, targets are not allowed to grant financial assistance for the acquisition of their own shares. However, the shareholder or group of shareholders is invited by the central bank to provide financial assistance when the target encounters financial difficulties under Article 26 of the same law. Loans to related parties, or waivers of receivables in their favour, must be approved by the Board of Directors.

#### 5.5 Other Restrictions

The granting of guarantees or sureties is subject to the approval of the Board of Directors in accordance with Article 53(2) of the Banking Act.

#### 5.6 Release of Typical Forms of Security

The formalities for security release depend on the type of security granted.

First, with respect to the pledge, under Article 60 of the law governing conventional security rights, security will lapse when the obligation is extinguished with respect to both capital and interest and other ancillary charges. However, in the case of a pledge with delivery, the obligation is extinguished if there is a voluntary return of the asset to the grantor, if it is lost or if the competent court orders its return for fault of the pledgee (Article 61 of the law governing conventional personal property security rights).

Then, with regard to mortgages, security will be released by the extinction of the main obligation but also by the creditor's renunciation of his mortgage. Some formal requirements may apply to the removal of the security concerned. The removal of a mortgage from the land register will only be possible on the basis of a consent to such discharge issued by the creditor having the capacity to do so or by virtue of a judgment which has become final. It is then mentioned on the land title (Article 368 of the Land Act).

Finally, with regard to pledges, pursuant to Article 170 of the Commercial Code, the cancellation of the pledge in the Personal Property Credit Register is carried out by the Registrar of the Commercial Court. Consequently, there must be either the consent of the parties concerned by the filing of an authentic instrument or a private deed, or a judgment which has become *res judicata*.

#### 5.7 Rules Governing the Priority of Competing Security Interests

According to Article 42 of the law governing conventional security rights, a pledge that attaches to an asset or group of assets ranks in priority from the time it has been made effective against third parties either by registration in the National Personal Property Security Registry or by possession by the creditor or an agreed third party.

In the event of multiple creditors, the order of priority of competing security interests shall be determined according to the time of registration in the earliest Trade and Personal Property Credit Register in accordance with Article 157 of the Commercial Code.

The priority or privilege may be modified contractually pursuant to Article 155 of the Commercial Code, which provides that any contractual or judicial modification of the seller's pledge or privilege is subject to an amending registration under the conditions and forms provided for the initial registration.

### 6. Enforcement

#### 6.1 Enforcement of Collateral by Secured Lenders

Under Article 605 of the Civil Code Book III, an unpaid secured lender may, by request of the judge, obtain authorisation to sell the guarantee after formal notice from the debtor.

In general, the creditor may use the normal enforcement procedure but depending on the context and urgency the creditor often uses the urgency procedure. Furthermore, according to Article 239 of the Code of Civil Procedure: "Except in the case of a mortgage or preferential claim, enforcement shall be continued first against movable property and then, in the event of its insufficiency, against immovable property".

Enforcement procedures vary depending on the type of security. For example, with regard to mortgage enforcement, Article 96 of the new Banking Act allows the mortgagor to sell the mortgaged property by himself, within a period of one year at the latest from the first formal notice, to satisfy the creditor's interest with the realisation price. In the absence of a sale by the debtor, Article 97 of the same law provides that the creditor may address a request for a public sale of the mortgaged property to the President of the Commercial Court who, by order, seizes the Director of Land Titles for the purpose of organising a public sale.

However, certain circumstances may render the seizure procedure ineffective. Indeed, Article 158 of the Insolvency Act provides that in the event of a judgment declaring bankruptcy, the enforcement attachment procedure shall be stopped at the request of unsecured creditors and creditors with a general lien.

#### 6.2 Foreign Law and Jurisdiction

In Burundi, the law recognises the freedom of the parties to designate, according to their own will, the law applicable in their contracts as well as the competent court to rule on any dispute arising between them. In addition, the parties may also appoint one or more arbitrators to settle their dispute definitively.

## 6.3 A Judgment Given by a Foreign Court

In the light of the relevant provisions of the Code of Civil Procedure and the Code of Judicial Organisation and Jurisdiction, a foreign judgment or arbitral award may be enforceable without a new trial on the merits after an enforceable procedure before the court.

## 6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no restrictions applicable to foreign lenders specifically.

## 7. Bankruptcy and Insolvency

### 7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

There are procedures for preventing and rescuing the company in difficulty outside insolvency proceedings.

First, with regard to preventive procedures (which are entirely non-contentious, ie, they do not require the intervention of the judge and are confidential), the law provides for an amicable settlement procedure without the intervention of the judge, a mediation procedure and a conciliation procedure.

Secondly, with regard to the rescue procedure for the company in difficulty (which requires the intervention of the judge and is not confidential), the law provides for a procedure aiming at the recovery of the company through a rescue plan which must be validated by the mass of creditors, under the supervision of a Commissioner for Suspension (*Commissaire au sursis*).

### 7.2 Impact of Insolvency Processes

First, in terms of the company's recovery, the implementing measures are suspended, and all current contracts must be maintained and cannot be directly terminated.

Secondly, in bankruptcy cases where the company is declared insolvent, any payment, transaction and act made today is unenforceable against the creditors' estate in accordance with Article 149 of the Insolvency Law. The bankrupt debtor is replaced by the receiver for the administration of the bankrupt company. In addition, under Article 155 of the same law, the insolvency proceedings make unmatured debts due to the bankrupt.

Moreover, as from the judgment declaring bankruptcy, the interest rate on any claim not guaranteed by a special privilege, pledge or mortgage is fixed only with respect to the mass of creditors.

Finally, the insolvency proceedings shall stop any seizure made at the request of unsecured creditors and creditors with a general lien.

## 7.3 The Order Creditors Are Paid on Insolvency

Under Article 232 of the Insolvency Act, the amount of the bankrupt's assets is distributed among all creditors at the 'marc le franc' of their claims in the following order:

- costs and expenses of the bankruptcy administration;
- relief provided to the bankrupt and his family;
- preferred creditors; and
- unsecured creditors.

## 7.4 Concept of Equitable Subordination

The shareholders of the company, if they are creditors of the latter, may only be paid after the payment of the mass of the other creditors.

## 7.5 Risk Areas for Lenders

The judge has power to challenge transactions that occurred in the last six months before the onset of insolvency and that give a creditor a preference over other creditors and were entered into with the desire to prefer that creditor.

## 8. Project Finance

### 8.1 Introduction to Project Finance

Project finance as a new financing technique in Burundi used to finance large projects especially in the sector of energy, infrastructures and transportation. The first legislation relating to Public Private Partnership (PPP) has been enacted since 2015. Project finance entails the raising of finance on a non- or limited-recourse basis by a special purpose vehicle ('Project Co'), with the repayment of the financing dependent on the internally generated cash-flows of the project.

The project financing structure includes the equity investor(s) and owner(s) of Project Co and the lenders (usually composed of a consortium of financiers, including commercial banks and, often, export credit agencies).

Project finance in Burundi is subject to a specific legal framework. Some legislative texts can be mentioned, among others:

- Law on the general regime for public-private partnership contracts (PPP Act), 2015;
- Public Procurement Act, 2018; and
- Investment Act, 2008.

### 8.2 Overview of Public-Private Partnership Transactions

The legal regime applicable to public-private partnerships in Burundi is governed by the 2015 law on public-private partnership contracts. Under Article 3 of the PPP Act, a public-private partnership contract may cover in whole or in part the design, financing, construction or alteration, operation, management, maintenance or servicing of works, equipment



or intangible property necessary for the provision of a public service as well as other services contributing to the exercise by the public person of the public service mission for which it is responsible.

In accordance with Article 9 of the PPP Act and Article 1 of the Decree on procedures applicable in the award of PPP contracts, an expert public service called the Agency for the Support of the Execution of Partnership Contracts is established in our jurisdiction. The Agency's role is to organise the procedures applicable in the choice of a private economic operator for a project subject to the public-private partnership regime, on behalf of one or more public persons jointly referred to as the "contracting authority".

In addition, pursuant to Article 11 of the PPP Act, any partnership project must be subject to prior evaluation by the Agence d'Appui à la Réalisation des contrats de partenariat, sanctioned by a notice of opportunity.

In accordance with Article 17 of the above-mentioned Act, the procurement methods for a PPP project are as follows:

- open call for tenders preceded by a prequalification procedure;
- restricted tendering; and
- competitive dialogue.

According to Article 11 of the above-mentioned Decree, the Agency is responsible for evaluating bids taking into account the following award criteria: performance objectives defined according to the subject matter of the contract, the technical value and innovative nature of the bid, the overall cost of the bid, the share of contract performance that the candidate undertakes to entrust to small and medium-sized enterprises and craftsmen, the time required to complete the works or equipment and their aesthetic or functional quality.

### 8.3 Government Approvals, Taxes, Fees or Other Charges

The approvals required depend on the nature of the project. In our jurisdiction, certain activities require specific authorisations prior to their launch. These include mining, energy (including electricity), telecommunications and other activities.

The tax regime governing project finance transactions is generally the same as for other commercial loan transactions as set out in 4. Tax. In addition, there are number of tax incentives to attract investments, such as those brought in by the Investment Act 2008.

### 8.4 The Responsible Government Body Oil and Gas

The oil and gas sectors report to the Minister of Trade, Industry and Tourism. Currently, although Burundi imports

oil and gas products, it does not yet produce any. However, there is a draft law under preparation on the Petroleum Code (exploration and production) which provides for the possibility of exploring and exploiting (if there is a discovery) petroleum resources. The regulation governing the oil sector is Decree No. 100/110 of 25 June 2008 regulating the import and marketing of oil products.

### Electricity

The electricity sector is governed by Act No. 1/13 of 23 April 2015 on the reorganisation of the electricity sector in Burundi and its implementing regulations. Under article 13 of the Electricity Act, the competent authority to grant the required licences is, as the case may be, the President of the Republic and the Minister of Energy and Mines after consultation with the Electricity Control and Regulation Agency.

### Mining

The mining sector is governed by Act No. 1/21 of 15 October 2013 on the Mining Code of Burundi. The competent authority to grant the required licences is the Minister of Energy and Mines.

### 8.5 The Main Issues When Structuring Deals

During the structuring of a project, it is crucial to assess the bankability of the contractual arrangement. The various risks should be identified by the stakeholders and appropriately allocated in the transaction documents to the parties which are best placed to bear such risks.

The equity investor(s) and owner(s) of the project company can be a single party but are more commonly a consortium of sponsors. Project companies are commonly a special purpose vehicle incorporated as a limited liability company.

In Burundi, normally there are no restrictions to foreign investors.

Under Article 37 of the PPP Act, there are performance objectives assigned to the contracting partner or to the technical, economic, commercial and environmental specifications, norms and standards with which the contracting partner is required to comply, in particular with regard to the quality of services provided, the quality of works and equipment, the conditions under which they are made available to the public entity and, where applicable, their level of use.

### 8.6 Typical Financing Sources and Structures for Project Financings

Under Article 4 of the Banking Act, financing operations may be carried out by credit institutions, payment institutions and microfinance institutions approved by the Central Bank of the Republic. Any entity carrying out a financing and/or guarantee operation in Burundi for taxable persons is subject to the control of the Central Bank.

## 8.7 The Acquisition and Export of Natural Resources

In accordance with Article 12 of the Mining Code, with regard to natural resources, particularly in the mining sector, mining licences are required for an exploration authorisation, along with a research licence and an operating licence. The competent authority to grant the required licence is the Minister of Energy and Mines.

## 8.8 Environmental, Health and Safety Laws

The main laws governing the environment and health are:

- Law No. 1/010 of 30 June 2000 on the Environment Act of the Republic of Burundi;
- Law No. 1/12 of 30 May 2018 concerning the Code of the provision of health care and services in Burundi;
- Law No. 1/13 of 9 August 2011 revising the Land Act;
- Law No. 1/21 of 15 October 2013 on the Mining Act;
- Law No. 1/07 of 15 July 2016 revising the Forest Act; and
- Mining and Petroleum Act of 1976 (the part relating to the petroleum sector is still in force).

The competent authority is generally the Minister of the Environment.

## 9. Islamic Finance

### 9.1 The Development of Islamic Finance

Islamic finance is not covered by Burundian law. However, the law allows the parties to agree on the terms and conditions of their private contracts, and nothing in the legislation prohibits several contractual techniques that Islamic finance offers.

### 9.2 Regulatory and Tax Framework

As previously specified, Islamic finance is not yet regulated in Burundi.

### 9.3 Main Shari'a-compliant Products

#### *Al murabahaha*

In the murabaha transaction, the creditor (the bank) buys a given asset at a price known to both parties on behalf of its client. Then, the creditor sells the asset to the customer for payments, staggered or not, over a given period of time, at a price agreed in advance between the two parties and higher than the purchase price. This financial product, although singularly very similar to a traditional credit agreement, nevertheless differs from it in certain essential aspects, in particular the absence of interest rates.

#### *Al Ijara*

An Ijara operation consists for the creditor (the bank) to purchase goods that he rents to a customer who can benefit from the possibility of repurchasing at the end of the contract. Ijara is very close, in form and spirit, to a leasing contract.

However, there are important differences. For example, in the event of late payments, it is not possible to provide for the payment of default interest, first because the fixed penalty is similar to an interest rate. But also, because Islamic ethics disapproves of any provision in a financial contract that penalizes a good faith debtor already in difficulty.

Also, in an Ijara contract, payments cannot begin until the lessee has taken possession of the asset in question, whereas in a traditional leasing contract, payments can begin from the time the lessor purchases the underlying asset. In addition, in a conventional lease, the risk of destruction or loss of the asset may be borne by the lessor or the lessee (usually the lessee).

In an Ijara contract, it is the lessor who continues to be liable for the property, except in case of malicious intent or negligence of the lessee.

Finally, in an Ijara contract, it is possible to determine the amount of each payment, not in advance, but on the expected delivery date of the underlying asset. This flexibility makes this instrument particularly useful in the case of project financing.

#### *Al Salam*

The Al Salam sale is a forward sale, ie, an operation where payment is made in cash while delivery is made in the future.

#### *Al Istisna'a*

This financial contract allows a buyer to purchase goods that he or she has been delivered in the future. Unlike Salam, in this type of contract, the price, agreed in advance, is paid gradually throughout the manufacturing process.

The concrete terms of payment are determined by the terms of the agreement between the buyer and the seller (in this case the bank). This financing structure is mainly used in real estate, shipbuilding and aeronautics.

#### *Al Mudharaba*

This operation brings together an investor (Rab al Mâl) who provides the capital (financial or other) and an entrepreneur (Mudharib) who provides his expertise. In this financial structure, the responsibility for managing the activity rests entirely with the entrepreneur.

A variant of the Mudharaba, the two-part Mudharaba, allows Islamic banks to play an intermediation role similar to that of conventional banks. In this structure, the bank acts as both an investor and an entrepreneur. On the liabilities side, as a Mudharib, it manages deposits entrusted to it by its clients. On the asset side, it makes the funds collected available to other investors. In other circumstances, the bank could be the lender (Rab al Mâl) and it is the customer who becomes Mudharib.

### Al Musharakah

In this operation, two partners invest together in a project and share the benefits according to the capital invested. In the event of a loss, it is borne by both parties in proportion to the capital invested.

### The Sukukuk

It is a financial product backed by a tangible asset with a fixed maturity that confers a claim on its owner. Sukukuk is thus a financial product that is similar to bonds, has a fixed maturity and is backed by an asset that pays a return on the investment. They are structured in such a way that their holders are exposed to “credit” risk and receive a share of the profit of the underlying asset (which must be legal) and not a fixed interest. There are two types of sukuks issues, sovereign (issued by a state) and corporate (issued by a company or bank). The underlying products of sukuks can be represented by contracts such as Ijara, Musharakah or Mudharaba.

### 9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

These claims are not addressed by the Burundian laws, although creditor claims in the con-text of an insolvent company are governed by Burundi’s insolvency Act.

### 9.5 Recent Notable Cases

Although Islamic finance is not yet regulated in Burundi, it should be noted that some private banks are considering launching Islamic banking products. However, several challenges remain: the lack of a legal and regulatory framework for Islamic finance, the scarcity of actors, particularly lawyers and advocates, who are familiar with the subject, the awareness of clients regarding the offer of these products, etc.

#### Trust Juris Chambers

Avenue Mwaro N° 7  
Rohero I (Quartier INSS)  
Bujumbura  
Bujumbura Mairie  
Burundi



Tel: +257 22 27 96 44  
Email: [info@trustjuris.com](mailto:info@trustjuris.com)  
Web: [trustjuris.com](http://trustjuris.com)