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# **MOROCCO COUNTRY CHAPTER**

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## **Introduction**

Due to its thousand-year-old history, its geographic location and the stable political policy, Morocco has always been called to play an important role on the international scene to keep up with the globalization changes.

Since the decline of the Soviet Union, considered as the departure point of the international economical current leap, Morocco has been working to improve its economical and financial structures in order to put itself in tune with its international partners.

Morocco has promulgated an arsenal of laws in economical and financial domains resulting from the emergence of the partnership spirit and encouragement of private initiative, and pressure of the different international influences and in order to respond to the requirements of globalization, so as to meet the international plans drawn by the counsels of the international Monetary Funds and World Bank. Moreover, to open on the Anglo Saxon world and guarantee both international and regional integration and welfare, Morocco held GATT conference in Marrakech which gave birth to the World-Wide organization of commerce in 1994.

The need of modernization also dictated itself by a popular will aiming at the restructuring of the administration and justice which gave birth to the adoption of new laws to encourage the privatization initiative and to adopt the regional policy. In addition, it ratified the policy of decentralization, in accordance with the recommendations of the Marrakech Convention. It also dictated new laws relating to privatization, the reorganization of the financial market, the legal framework forming charter of the investment, the law on the stock market and, by the influence of the Dahir 1.96.83 of the 01/08/96, the law forming the commerce code - a modern instrument able to assure the stability in the commercial field. The adoption of all the laws and the ratification of the different significant international conventions need to be empowered by institutions in order to assure stability.

## **PART I: COMMERCIAL DISPUTES IN MOROCCAN LAW**

### **I – COMMERCIAL LITIGATIONS:**



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## **A/ Definition of the commercial litigation:**

### **a- Broad Concept:**

It is important to underline that Morocco is one of the countries that has access to a "commerce code" which is specific, autonomous and distinct from the civil code. This code applies to merchants and to the commercial activities. This arises from the terms of the first clause that stipulates: "The present law governs the commerce acts and the merchants". Therefore, in its wider conception, terminology "commercial litigation" could include all the litigation of which the object or one of the parties is a merchant. These litigations would be inherent to the exercise of the commercial activity and to the obstacles impeding it daily, these obstacles being both internal or external and resulting from relationships of the merchant with employees, customers, suppliers, banks etc.

The merchant, physical person or moral is conditioned by obligations towards his environment, his activity domain, the work tools and the management methods.

This report tries to give an outline of the commercial legislation, principally resulting from clause 5 of the law relating to the creation of the commerce courts.

### **b- Narrow Concept:**

The narrow definition of the commercial regulations would find its basis in the terms of the clauses 5 and 9 of the law relating to the creation of the commerce courts and clause 2 of the commerce code.

Clause 5 stipulates that: "The commerce courts are competent to know:

1. Actions relating to the commercial contracts.
2. Actions between merchants related to their commercial activities
3. Actions relating to the commerce effects;
4. Disagreements between associated of a commercial corporation.
5. Disagreements to reason the commerce funds.

The matters relating to road accidents are excluded from the competence of the commerce courts. The merchant can suit with the non-merchant to attribute competence



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to the commerce court to know litigations being able to oppose them in the exercise of one of the merchant's activities. The parties will be able to suit to submit the above enumerated disagreements to the refereeing procedure in conformity at the disposal of the clauses 306 to 327 of the civil code procedure ". And clause 9 stipulates that: "The commerce court is competent to know the commercial litigation related to a civil object ».

Article 2 of the commercial law lays out that it is ruled... "... in commercial matters in accordance with the laws, habits and uses of the trade, or with the civil law insofar as it does not contradict the fundamental principles of the commercial law". It consists of the reading of the provisions of the known articles mentioned, although relating to the commercial disagreements. It is not easy to give a definition, to draw up a precise list or speak in a detailed way of all the litigations which could occur at the time of the exercise of a commercial activity form given the complexity of the latter. That is confirmed, indeed, with the reading of certain articles of the commercial law such as article 6 which stipulates that: "subject to the provisions of chapter II of title IV relating to publicity with the trade register, the quality of tradesman is acquired by the usual or professional exercise following activities such as:

- 1) the purchase of body or incorporeal pieces of furniture in order to resell them after having worked them or in order to rent them.
- 2) the hiring of body or incorporeal pieces of furniture for their under hiring.
- 3) the purchase of buildings in order to resell them in the state or after transformation;
- 4) the search and exploitation of mines and careers.

Clause 8 states that "The quality of a merchant is obtained equally by the habitual professional exercise of all activities being assimilated to the enumerated activities to clauses 6 and 7 above", as well as articles 10 and 11 which enact respectively that: "Equally renowned trade acts accomplished by the merchant related to his trade, except opposite proof"and "All persons that, in spite of a ban, a decline or of an incompatibility, habitually exercise a commercial activity, renowned as merchant".

### **B/ Legislative framework of commercial litigation:**

In a concern to promote commerce, investments and exchanges, both on a national and international basis, the Moroccan legislature had to adopt texts of laws aiming at the protection of both commerce and merchants.



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This is as well as several new texts in the form of dahirs, decrees, laws and ministerial forms, according to the signed international conventions.

### **a- Internal Laws:**

Among the texts of laws relating to commerce and to relationships between partners, that were promulgated, we draw attention to the following as examples:

- D. O. C ( dahir on the obligations and contracts of 12/08/1913) : This dahir draft, includes items from 982 to 1063, general rules relating to the civil and commercial corporations, as well as relations of the associates between them and with others at last dissolution of corporations.
  - The commerce former code of 12/08/1913 draft, item 29 to the item 57, commercial corporations to know: the S. N. C (corporation in collective name), the corporation of sponsors, the (anonymous corporation) and the commercial corporation in participation added by the dahir of 18/06/1927;
- The dahir 1.97.49 relating to the S. N. C, to the corporation of simple sponsors, and the corporation of participation;
- The dahir 1.96.83 of 01/08/96, putting in application the law 15.95 relating to the new commerce code that consists of 5 books including merchants, commerce funds and contracts.
- The dahir of 24/05/1955 relating to the lease of the local usage of what is commercial, industrial or hand-crafted.
- The dahir of 05/01/1953 relating to the revision of the rents of the local usage of what is commercial, industrial or hand-crafted.

Morocco promulgated important texts in the field of the right of businesses and the money market, for example:

- Dahir 1.00.71 creation of the Moroccan Office of the Patent rights and Commercial;
- Dahir 1.93.147 relating to their control and credit institutions;

To enhance the financial structure modernization, Morocco promulgated important texts in the financial and business domains.

### **b- The international conventions**

Among the conventions relating to international trade signed by Morocco, one can distinguish three types:



1) conventions related to the uniformity of international rules in commerce without affecting the national law, as it is the case with the convention of Morocco has elaborated all an arsenal of lawful texts in the economical and financial domains arsovia in 1929 concerning air transportation, the convention of Geneva of 1956 relating to road transportation of merchandise, the Bern convention of 1890 relating to the transportation of merchandises and of 1911 relating to the travel transportation.

2) conventions extending to the standardization of internal laws such as the Geneva convention of 1930 relating to the letter of changes and of 1931 relating to the cheque, the convention of the United Nations of 1988 relating to the letter of international changes and to the ticket order, the New York convention of 1958 relating to the execution of the arbitration sentences and the convention of sale of furniture goods .

3) bilateral conventions dictating commercial relations between partners regarding their development in the domains of customs, imports and exports.

Morocco has ratified several international commercial conventions such as:

- The convention on the recognition and the execution of the foreign arbitration sentences (dahir of February 19 1960);
- The international convention on the protection of the commercial and industrial sign, signed in 1883 in Paris and modified successively in 190 in Brussels, in 1911 in Washington, in 1925 in Hague, in 1934 in London, in 1958 in Lisbon, in 1967 in Stockholm (Dahir of September 25 1918 a modified one of October 20 1930 and at last by the dahir of October 20 1969).

As for the bilateral conventions, they are numerous and include:

- The commercial convention of signed indexation between Morocco and Tunisia in 1973 (Dahir of the 30/08/1975)
- The convention Marocco-Syrien relating to the commercial exchanges and to the economical cooperation signed in Damask (Dahir of the 14/11/1974).
- The convention of the brotherhood, friendship and mutual aid between Morocco and the Saudi Arabia (Dahir of the 13/05/1960).

## **II – MECHANISMS FOR RESOLUTION OF COMMERCIAL LITIGATION:**



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### **A/ The creation and constitution of commercial jurisdictions :**

To perfect this modernization and to take care of the good application of this legal arsenal, it was necessary to create specialized jurisdictions of trade by means of law 53.95 of January 06 1997. The first article stipulates: "it is created under the terms of the present law of the commercial courts and the courses of call of trade." This law instituting the jurisdictions of trade is presented in the form of code made up of 25 articles, divided into eight titles.

### **B- The constitution of trade jurisdictions:**

Pursuant to article 2 of law N° 53.95 of January 06 1997, the Commercial courts are composed by;

Firstly, a president, vice president and magistrates;

The public ministry, who consists of an attorney and of one several deputy public attorneys;

A transplant and secretary office of the public ministry.

Commerce courts can be shared out, in several rooms according to the nature of the matters of which it is entrusted. Nevertheless, every room can instruct and adjudicate the matters subject to the course.

The president of the commercial court designates, on suggestion of general assembly, a magistrate who is in charge of the follow-up of the execution procedures.

The courts of commerce appeal, and in accordance with the item 3of law 53.95, it's includes;

A first president, room presidents and counsellors;

A public ministry which consist of a general attorney and of its deputy public attorney;

A transplant and secretary office of the public ministry.

The courts of commerce, appeals can be shared out, in several rooms according to the nature of the matters of which it is entrusted. Nevertheless, every room can instruct and adjudicate the matters subject to the course.



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The item 4 of the law 53.95 gives rise to an important remark relating to the collegiality of these commercial jurisdictions. In fact, the aforementioned item stipulates that... “...the audiences of the commercial courts and courts of appeals are held and their judgements returned by three magistrates, of which a president, attended by a clerk...”

### **C- Competences and distribution**

#### **a- Competences of commerce jurisdictions:**

Title 3 of the law instituting commerce jurisdictions is divided in two chapters which distinguish between the competence because of the matter, notably in the items 5, 6, 7,8 and 9, and territorial competence in the items 10, 11 and 12. The code granted the president of the commerce court and first president of the court of commerce appeals.

#### **b- Distribution of Commerce Jurisdictions:**

To allow these jurisdictions to start up, six first commerce courts were established that were divided up on the principal cities of Morocco: Casablanca, Folds back, Fès, Tanger, Marrakesh and Agadir, while the two last ones were assigned to Meknes and Oujda.

As for the courts of commerce appeals three were divided up on the cities of Casablanca, Fès and Marrakesh.

Statistics relating to the work of the jurisdictions indicate that the distribution of the litigations is perfectly proportional to the economic importance of the cities which are in the springs of the aforesaid jurisdictions. Thus the commercial court of Casablanca comes at the head from the Moroccan commercial courts from the number of the businesses which were submitted to it. That does not have anything astonishing if it is known that Casablanca is the economic capital of Morocco and that the spread of its commercial court extends beyond its limits to include other cities having a considerable economic importance.

## **PART II: ARBITRATION IN MOROCCO**

### **I – STATUTES RELATING TO ARBITRATION**



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Sources of arbitration in Moroccan law are national and international.

## **A- National Sources**

### **a- Current Status of the Internal Legal Mechanism**

Arbitration is not a new institution within the Moroccan private judicial law. The Dahir making provisions for the Civil Procedure dated on August 12, 1913 evoked the arbitration issue. This issue has also been evoked in the Code of Civil Procedure enacted on September 28, 1974. Nevertheless, the internal law governs only the ad hoc arbitration and covers up institutional arbitration. An assessment of the Moroccan arbitration system indicates gaps and shortcomings, and thus, the system is still on a different wavelength from the international standards governing arbitration. The existing legislation governing ad hoc arbitration is insufficient.

The Civil Procedure Code deals with arbitration in 21 sections (sections 306 to 327), which insufficiently address internal arbitration regardless of international arbitration. The same provisions apply to both cases. Further, section 306 of the Civil Procedure Code namely limits the field of intervention of arbitration, excluding certain matters such as:

- disputes relating to deeds or properties which fall within the public law: contracts entered into with the Moroccan State; this rule deals only with internal arbitration and the Moroccan jurisprudence has confirmed the same in disputes which arose between public law institutions and their co-contractors within the framework of the international commerce;
- disputes concerning the performance of a fiscal law due to the public character of the said law;
- disputes on the nullity and winding up of companies;
- this exclusion does block the arbitrability of contestations arising out of the application of the corporate agreement, such as proceedings on the liability of partners against directors or managers, or the nullity of the deliberations of a general meeting, and generally judicial proceedings between partners;
- disputes concerning donations, various legacies and those concerning the status and capacity of persons.



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It is more complicated to have recourse to ad hoc arbitration to the extent that the Civil Procedure Code authorizes the parties in a commercial deal to appoint in advance the arbitrator (s); but requires, for this appointment to be valid, that the arbitration clause be handwritten and specially approved by the concerned parties.

Nevertheless, the arbitration field has been extended to include other fields thanks to some special statutes:

- collective industrial disputes: governed by a conciliation and arbitration procedure in pursuance of Dahir issued on January 19, 1946, whose provisions have inspired sections 557 to 585 of the new Employment Code. This Code imposes the recourse to the arbitration of the Labor Board in the framework of a conciliation procedure prior to any legal proceedings;
- a recent incitement to arbitration is set forth in Act N° 53-95 enacted by Dahir issued on February 12, 1997 establishing the Courts of Commerce. Section 5 of this Act gives a list of the cases falling within the jurisdiction of the courts of commerce and encourages the recourse to arbitration. It reads *"the parties may agree to submit the abovementioned disputes to arbitration procedure"*.

#### **b- Outlines of the New Draft of the Arbitration Code**

A complete draft arbitration code dealing with institutional arbitration and ad hoc arbitration and governing recourse to international arbitration has been worked out. Currently, the draft is under examination at the Secretariat General of the Government. This draft gives arbitration a complete seat in the mechanism of dispute settlement and may have a psychological impact by pointing out the fact that the issue regards an ordinary and simple settlement mode of disputes. The draft is based on proven methods: the model act of the UNCICL (but by adopting a methodological approach and a different wording), the French civil code and the civil procedure code, as well as the experience of the ICC. It adopts a dualist system distinguishing internal arbitration from international arbitration, like the French, Swiss, Algerian, Tunisian, Senegalese, Mauritanian and Lebanese systems. It focuses on promoting a large conception of the capacity to compromise and to arbitration.

Unfortunately, some issues have not been addressed such as multilateral arbitration, joinder of causes of action, acknowledgment of *lex mercatoria* or definition of the international public order.



## **B- International Sources**

Paradoxically, arbitration is often used in Morocco in the international field despite the nonexistence of an internal statute governing this matter. On the international level, the State of Morocco was the second country to adhere to the New York Convention of June 10, 1958 relating to the acknowledgement of foreign arbitration awards. It also adhered to Geneva Convention of April 21, 1961 as well as to the convention of 1952 on the execution of decrees and arbitration awards between Arab States. Morocco was amongst the first countries that adhered to the Washington Convention of March 18, 1965 for the settlement of disputes relating to investments between states and nationals of other states. This Convention was signed on October 11, 1965. In addition, the first case submitted to the CIRDI in 1972 opposed Morocco to the American companies: Occidental Petroleum and Holiday Inn. Other disputes opposing Moroccan public institutions (OFFICE CHERIFIEN DES PHOSPHATES, OFFICE NATIONAL DE L'ELECTRICITE ...) have been settled by various arbitration institutions abroad, namely by the arbitration tribunal of the International Chamber of Commerce.

Morocco has also signed the model regulation on the international commercial arbitration, in the draft approved by the UNCICL in 1985. Morocco has been a member of this commission and has participated in the working out of this regulation.

Further, Morocco has concluded with several countries:

- judicial cooperation agreements providing for the acknowledgment and execution of arbitration awards by the signing states;
- investment agreements giving the choice to the foreign contracting party, either to have recourse to Moroccan courts, or to the arbitration of the CIRDI, or else to the ad hoc arbitration governed by the UNCICL.

For instance, Morocco has namely entered with France into an agreement for reciprocal encouragement and protection of investments on January 13, 1996. This agreement provides for two mechanisms to settle disputes as per their nature. When disputes opposing a party to an investor from the other state and that these disputes have not been settled amicably within 6 months, the said investor may ask the same to be submitted, either to the competent jurisdiction of the party involved, or to the CIRDI, provided that the option be final once the institution informed. The solution retained by the said agreement diverges from the investment agreements which do not contemplate the



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recourse to the international arbitration. But it joins the provisions already applied with Algeria or some countries from the Latin America. As regards the disputes relating to the interpretation and the application of this agreement, and failing their amicable settlement through diplomatic channel within six months, shall be submitted to an ad hoc arbitration tribunal whose awards shall be final and binding.

Nevertheless, difficulties persist in implementing and integrating the provisions of these international conventions into the national legislation, despite the efforts made by the Moroccan legislature, during the last decade to improve the investment climate.

## **II- IMPACT OF ARBITRATION IN MOROCCO**

### **A- Arbitration as Regarded by Local Business Community and Legal Profession.**

At the level of international commerce the Moroccan economic operator, including but not limited to the operator in the public law, has adapted to the necessity of observing the contractual rules in use, namely the arbitration clauses which became a determinant condition in contracts, as well as a reference to a foreign law. At the national level, recourse to arbitration is not widespread for several reasons. Arbitration is deemed expensive and slow. This slowness is generally the consequence of an insufficient mastery of the arbitration procedure and its rules. The lack of remedy against arbitration awards frightens potential users off in addition to the limited recognition for these awards.

In addition Moroccan economic operators face difficulties with the tax administration which openly denies the judicial value of arbitration awards. It is question about arbitration awards delivered in cases of dismissals. Section 66 of Income Tax Act exempts dismissal compensation and damages ordered by decree, which fact is recognized by the tax administration.

In actual practice, and due to the slowness of the judicial proceedings, recourse to arbitration has become frequent and thousands of awards have been rendered recently, grating compensation and damages in industrial cases. These awards are often delivered and become enforceable pursuant to a decree delivered by the presiding justice of the court of first instance. Yet, the tax administration does not recognize the judicial value of these awards and therefore, compensation granted therein do not benefit from the



exemption set forth in the abovementioned section 66. This is a strange paradox: on one hand, the legislator and the public authorities try to promote arbitration; on the other hand, the tax administration is determined to slow down and limit the extent thereof.

Another paradox must be noticed: if the tax administration denies the judicial value of an arbitration award delivered in industrial cases, it recognizes this value to other awards which, except for this field, grant compensation and makes them benefit from the tax exemption which would have been applied in case of a decree.

### **B- The Current Policy for Promoting Arbitration**

During the last decade, a wide opening with respect to international arbitration has been noticed, together with a real will of the public authorities to encourage recourse to arbitration in the framework of the global policy for the promotion of external investments. There exists an agency for external investments within the Ministry of Commerce and Industry, in charge of facilitating and promoting foreign investments in Morocco. At the same time, several Moroccan universities have introduced arbitration and mediation in their degree courses. Law schools in Casablanca and Rabat have established a second degree (third degree in Morocco) with a major in arbitration and mediation.

### **III- EXISTING ARBITRATION INSTITUTIONS AND THEIR EFFICIENCY**

Existing ad hoc arbitration in Morocco cannot be measured exactly, but the multiplication of arbitration institutions in charge of promoting institutional arbitration can be noted.

#### **A- Existing Arbitration Centers, Their Status And Organization:**

##### **a- centers**

- Maritime Arbitration Chamber in Morocco is the first center of private arbitration, founded on May 27, 1980 and officially accredited to develop arbitration or conciliation concerning conventions, agreements and other maritime activities in Morocco, or between Morocco and foreign countries, and possibly between foreign countries.

This Chamber, situated within the premises of the representative of P&I clubs, has not, until this day, settled a dispute.



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- Morocco houses the Commercial Arbitration Arab Center created by the Amman Convention on April 14, 1987.

- An Arbitration Tribunal was created in 1998 on the initiative of the ICC-Morocco. In pursuance of its articles of incorporation, this Chamber is limited to the settlement of national disputes. Should the parties to an agreement give it competence in an international arbitration case, it shall refuse to acknowledge jurisdiction for the benefit of the International Arbitration Tribunal of the International Chamber of Commerce in Paris. Arbitration organisms have been created within the chambers of commerce, industry and services in several economic centers in the country.

- The CIMAR (International Arbitration & Mediation Center in Rabat) founded by the Chamber of Commerce, Industry and Services in Rabat on April 28, 1999, which actually begins its activity in 2001.

- The Chamber of Commerce, Industry and Services in Casablanca (CCISC) offers, since May 2003, arbitration and mediation services to the economic operators. But since its creation, this center has settled only one case in April 2005.

- The Conciliation & Arbitration Center of Marrakech created in July 16, 1999 whose existence and efficiency are very limited.

Finally, on July 07, 2005 within the Chamber of Commerce, Industry & Services in Agadir, the President of the ICC – Agadir, the President of the ICC of navigation of Las Palmas and the President of the ICC of navigation of Santa Cruz in Tenerife have signed a partnership agreement aimed at the creation of the Atlantic Court of International Arbitration Agadir – Canary Islands, to settle any possible commercial disputes.

## **b- Status**

These centers generally have the status of independent non-profit-making institutions endowed with the legal personality and the financial and administrative autonomy. According to their regulations, based on the arbitration regulation of the UNCICL (at least as regards the Center of Rabat), their mission is to organize arbitration of internal or international disputes resulting from economic, commercial or financial relationships to which the State, the public institutions or the local communities are party or not.



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### c- Organization

Existing arbitration centers did not opt for a uniform organization model. Some, such as the Center of Rabat, are more structured than others, for instance the Center of Casablanca. One of the rare similarities noticed at this level consists in the fact that they enjoy relative independence as regards chambers of commerce to which they belong.

Mediation and arbitration centers belonging to chambers of commerce generally comprise:

- A board of directors composed of the president of the chamber and members appointed by the general meeting. Its powers are as follows:

- to attend to the normal course of the center's works;
- to work out rectifications to the regulations and approve them;
- to appoint members of mediators and arbitrators and accredit the rolls;

- An executive department composed of an executive officer and a secretary appointed by the president of the chamber on the proposal of the board of directors, namely in charge of:

- keeping the rolls of mediators and arbitrators;
- receiving mediation and arbitration requests, replies of parties and documents relating to the dispute, and assuring the follow-up of the files;
- determining the mediation and arbitration fees and other administrative costs.

- A body of mediators and arbitrators

This is at least the organization set out within the Mediation and Arbitration Center of Rabat, of which regulations we have obtained a copy, which is more difficult as regards the other centers.

The Center of Casablanca is unusual in the way that it has opted for the status and organization concerning associations. Its members have to pay subscription. The center is governed by a board of directors composed of members elected by the general meeting of members. It is presided over by the president of the Chamber of Commerce and



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Industry in Casablanca. The executive office is composed of a deputy president, a managing deputy president, a general secretary, an assistant general secretary, a treasurer and his assistant.

### **B- Conditions Required to be Appointed as Arbitrator**

To the best of our knowledge, only CIMAR has set precise criteria for the appointment of arbitrators. It only retains experts. According to the internal regulation of the Center of Rabat, arbitrator or mediator shall have exercised as tradesman, jurist, manager of businessman for at least 7 years should he have a university degree equivalent at least to the bachelor's degree or to any university degree, and shall be 36 years-old. This period is increased to 10 years should he not have a university degree. He shall be at least 50 years-old in this case. Regulations of other centers do not require, for their major part, that the arbitrator have precise university training or a determined professional experience.

As regards arbitration clauses, regulations of these centers do not recommend any special ones, except for the ICC Morocco which recommends those proposed by the International Chamber of Commerce. As far as arbitration costs are concerned, regulations of the existing centers are more or less precise.

### **C- Statistical Data of Arbitrations Conducted**

The current trend is characterized by the absolute domination of internal arbitrations. We have no official statistics concerning the number of arbitrations conducted by the different Moroccan centers; but, by adding the number of cases processed by the two centers of mediation and arbitration in Rabat and Casablanca, we notice a global volume of 20 cases or about. This number is derisory compared with 600.000 files processed every year by the courts, of which 100.000 falls within the jurisdiction of the courts of commerce. To this day, the result of this activity is weak and the CIMAR has received 19 files: 8 financial, 7 commercial, 2 real estate and 2 contractual. The Chamber of Commerce, Industry & Services of Casablanca (CCISC) offers, since May 2003, arbitration and mediation services to economic operators. But, since its incorporation, it has only settled one case in April 2005.



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To conclude, it appears that Moroccan businessmen are reluctant about the mediation and arbitration, and do not appreciate what they consider interference of third parties in their own business.

#### **IV- ROLE OF THE JUDGE IN ARBITRATION**

##### **A- Role of the Judge in the Appointment of Arbitrators**

The parties rarely appoint arbitrator (s) in the arbitration clause. They generally appoint them once the dispute arises. Real problems of arbitration in Morocco begin at this first stage. Despite the preexistence of an arbitration clause, we notice, as it infers from the few cases submitted to arbitration, that a party, often insincere, resists or simply does not appoint its arbitrator. In practice, the clause rarely provides for the appointment of one arbitrator. Generally, each party may appoint its own arbitrator. Frequently, the voluntary appointment of arbitrators fails because of the inertia or the refusal of a party. In this case, *"should a party refuse in a dispute to make this appointment, the other party may ask the presiding justice of the competent court, which will thereafter deliver the arbitration award enforceable, to render a final decree appointing thereby arbitrators"* (section 309 of the Moroccan Civil Procedure Code).

This solution is more efficient than the compulsory enforcement of the arbitration clause. Nevertheless, it has only a limited extent. Firstly, it does not divert the threats of challenge and removal as section 313 of the Moroccan Civil Procedure Code permits it. Once this first difficulty resolved, arbitrators, in several cases, do not reach a common agreement and the appointment of a third arbitrator becomes necessary. The judge will appoint this third arbitrator when the arbitrators appointed by the concerned parties fail to do so (section 315 of the Moroccan Civil Procedure Code).

##### **B- Role of the Judge in Enforcing the Arbitration Awards**

This is a substantial role. The recourse to the judge is necessary to obtain the exequatur of an arbitration award resulting from national or international arbitration. In pursuance of the provisions of the Civil Procedure Code, the judge shall assure that the arbitration award is not contrary to the Moroccan public policy. This condition often leads the parties who have already accepted the arbitration clause, to introduce a plea on the nullity of this award at the time of enforcement. Moroccan jurisprudence is less and less inclined to admit their plea and generally deliver the exequatur asked for.



Nevertheless, the arbitration award being subject to appeal, opposition, retraction and cassation, the enforcement thereof may be significantly delayed. The remedy does not concern the tenor of the award. The judge only verifies whether the exequatur decree confirms the award though it violates the public policy and to assure that the arbitration subject does not relate to any matter excluded from arbitration and that it is based on an arbitration clause which complies with the proceeding condition required for the validity thereof. In the practice, the parties overuse the right to appeal against the exequatur decree.

### **PART III: MEDIATION**

#### **I- LEGAL STATUTES OF CONVENTIONAL MEDIATION OR COMPARABLE LEGAL MODES / TECHNIQUES FOR SETTling DISPUTES**

##### **A- General Theory**

###### **a- Condition of Drafting Mediation Convention**

Contrary to the legal or arbitral cause of action, there is no legal provision that sets forth the proceeding rules to observe in conventional mediation. Due to this silence in Moroccan statutes, the mediation convention remains governed by the law common to obligations and by the contract validity conditions set forth by this general legal frame. It appears from section 2 of Dahir making provisions for the Code of Obligations & Contracts (Civil Code) that to be valid, a contract shall satisfy four conditions: capacity, consent, object and cause. The parties to mediation must first of all be capable to enter into such a convention, and therefore, be capable to compromise and prove their capacity to waive their rights in a dispute.

The second element required for the validity of the mediation convention is consent. Consent is one of the applications of the principle of free will. There is no mediation without a free consent of the parties. A party cannot reach a compromise against its will or in its absence. Therefore, consent confirms the prominent role of the will of the parties and their actual participation to the amicable settlement process. Consent must then be



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expressed by the parties with full knowledge of the facts. The recourse to mediation must not be conducted by error, marred by fraud or obtained by violence.

Section 2 of the Code of Obligations and Contracts provides for the elements that make up the contract "*a certain object that is the contract object*". The object must exist, be determined and be licit. It may be defined as *the obligation that a party undertakes towards another party*. The mediation convention generally aims at creating the obligation on the parties to cooperate and contribute to the mediation process with a view to reaching a solution of the dispute.

The last element required for a contractual obligation to be valid is the existence of a legal cause to create obligation. The cause indicates the reason that leads the parties to enter into a contract. As regards the mediation convention, the parties have to control the dispute and to reach a solution without recourse to the state or arbitration courts.

Contrary to the substantial conditions, no proceeding condition is required by the law for mediation. Nevertheless, the parties, as for any contract, generally witness in writing the mediation convention so they may determine the extent of their obligations. The operation of the amicable process consists of appointing the third mediator.

### **b - Nature of the Mediation Convention**

Should we refer to the classic theory of obligations, it may be possible to consider this special convention as an innominate contract. It results therefrom the inexistence of compulsory rules provided for by the legislator and which specially apply to nominate contracts. Further, the mediation convention could be analyzed as a superimposing of two synallagmatic contracts: the first binding the mediator to the parties by imposing reciprocal obligations and the second binding the parties in the contestation by imposing also reciprocal obligations. The mediation convention appears at last to be a contract with consideration, at least in its part as regards the mediator – the parties, because the service provided by the mediator is generally remunerated. We have to specify that the mediation convention falls within the category of successive performance contracts, because the mediator's mission (task) shall be conducted in a certain laps of time.



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### **c- A Bill On Arbitration And Mediation Under Discussion In The Parliament**

A bill on mediation is currently introduced before the Moroccan Parliament. This bill, making part of the Code of Obligations and Contracts, sets forth some provisions relating to conventional mediation: part 3 including sections 327-52 to 327-67. The bill proposes a definition of mediation in section 327-53 as *"the mediation convention is a contract whereby the parties agree to appoint a mediator in charge of facilitating the conclusion of a compromise to put an end to the dispute resulting or to result"*. This bill resumes the notions of mediation clause, mediation compromise and mediation convention. Mediation may be entered into before or when the dispute arises, even during legal proceedings. The bill requires a deed as proceeding condition for the mediation convention. The parties shall witness their understandings in writing, by deed or private agreement, or else in minutes drawn up in the court. The bill requires a formal proceeding, failing which the convention would be null: compulsory clauses of mediation compromise; mediation written clause.

The bill recognizes the opposability of the mediation clause to state courts which must *"refuse jurisdiction until the mediation process is fully implemented or the mediation convention is annulled"*; *"the court cannot automatically resume jurisdiction"*. The draft provides for a period of three months for the closing of mediation. This period may be extended by the parties should the need arise. It retains the principle of confidentiality limited to the person of the mediator. It enables the appointment of a mediator, natural or legal person. It enables the mediator to call for the assistance of experts, third parties, but it is vague on the possibility granted to the mediator to have separate interviews with the concerned parties. The bill limits the mediation object to the research of a compromise and gives it the normal effects thereof.

### **B- Existing Mechanisms: Compromise, Judicial Conciliation**

Moroccan law provides for some mechanisms to reach an amicable settlement of disputes.



**a- Judicial Conciliation**

Moroccan law provides some statutes setting forth compulsory or optional procedures for conciliation, be they judicial or legal: the preliminary conciliation procedure set by Dahir of May 24, 1955 relating to commercial lease, procedures in cases of divorce set in the Civil Procedure Code of September 18, 1974 and confirmed by the New Family Code of February 03, 2004 in section 81, the Labor Code in its Chapter VI relating to settlement of collective industrial disputes, and its section 41 concerning the individual industrial dispute, Code of Commerce of August 01, 1996 in its Chapter regarding business difficulties.

**b- Compromise**

In section 1098, the Moroccan Code of Obligations and Contracts reads *"the compromise is a contract whereby the parties put an end to or foresee a dispute, each waiving its claims on the other, or the assignment of a value or right to the other"*. In some situations, the parties could not put an end to their dispute and may not reach a mediation agreement unless they reciprocally waive their rights and claims. In this case, the mediation agreement includes *"reciprocal waiver"*: this is what we call a compromise. In Morocco, the compromise efficiency is sustained by the provisions of sections 1105, 1106 and 1112 of the Code of Obligations and Contracts which read: *"the compromise aims at annulling the rights and claims making the subject purpose of the contract ..."* *"the compromise cannot be rescinded even by the consent of the parties ..."* *"the compromise cannot be contested due to error de jure, and due to wrong except for fraud"*. The compromise effects lead some legal experts to define the compromise as a specific contract having the effects of a judgment. At last, mediation processes do not lead to a compromise, to the extent that mediation agreements do not always comprise reciprocal waiver.

**II- INSTITUTIONAL FRAME OF MEDIATION**

**A- Institutions**

Morocco currently counts a number of centers proposing commercial mediation for the settlement of commercial disputes, as listed below:

The cities of Agadir and Meknes:



- Creation of centers, low activity since several years.

Casablanca:

- Arbitration Tribunal of the International Chamber of Commerce
- Mediation and Arbitration Center within the Chamber of Commerce of Casablanca

Rabat:

- Mediation and Arbitration Chamber

CGEM (employers):

- Creation of a commission on mediation and ADR

Mediation Maritime Chamber:

- This Chamber seems no more operates several years ago

Despite the variety of these centers, mediation practice remains inexistent. Therefore, we cannot confirm if the mediation is used in settling commercial disputes.

## **B- History, Local Uses And Customs**

In Morocco, the role of the conciliator can be compared to that played by the "L'AMIN", head of a traditional craft corporation elected by his peers and not by the parties in dispute. He used to intervene beyond any judicial body to settle the dispute.

Before the protectorate era, Moroccans used to avoid the MAKHZEN judge and submitted their disputes to OULEMAS or FKIHS (Muslim jurists) whose knowledge came from the CHRAA (Muslim Law). They were accredited for their full knowledge and experience as regards professional uses and customaries and they were of good morality. Also, representatives of tribes appointed due to their ethical qualities and their knowledge, discussed issues relating to the disputes between members of the community within the JMAA (meeting) and proposed conciliations or arbitrations as the case may be. The appearance of modern courts has influenced Moroccans going to trial, who abandoned the amicable settlement modes for the state justice; nowadays, the society has gone "judicial" and citizens prefer the recourse to the judge who remains, for some, the only "legal" and final means to settle the dispute. Amicable remedies are sometimes considered useless or dilatory.



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### **III- MEDIATION PROMOTION MODE**

#### **A- Current Situation**

With regard to the current situation, it can be noted :

- Bill relating to conventional mediation introduced in the Parliament; we then notice that the public authorities are really interested in this amicable settlement mode;
- Lack of statistics: unknown rate of success of prior and compulsory judicial conciliations in proceedings relating to commercial lease, divorce, industrial disputes. To address the issue of the status of the mediation and MARL within the economic and social tissue, we need these tools to understand interactions between these various proceedings, the professional practices and the operation of courts;
- The public authorities are willing to promote the ARD with a view to unblock and reduce the overload of the state courts; which constitutes a risk for the mediation of "under-justice" with a pure economic mobile.
  - Some associations and chambers of commerce are willing to promote the ARD but as we have said before these different ADR structures remains without success.

#### **B- Obstacles Blocking the Recourse to Commercial Mediation**

Considerations of possible obstacles include:

- The culture: the culture is not an obstacle. Through the history of Morocco we may compare the role of the mediator to that played by "L'AMIN", head of a traditional craft corporation elected by his peers and working beyond any judicial body to settle the dispute;
- Citizens do not trust this "private" mode of settling disputes, there is lack of trust in the mediator "independent third party", contrary to a judge appointed by the state, lack of confidence in this "liberal justice" which might employ different languages and which is not confined to closed procedures that mean "security" for some citizens. Generally, this behavior comes out of the lack of knowledge as regards what mediation is.
- Lack of knowledge in such areas as:



- Mediation process
  - What a mediator is
  - Advantages and disadvantages of mediation
  - The moment, the place and the grounds to have recourse to this remedy
  - Rights, obligations, qualities and competences of the mediator
  - The legal value of the final agreement of mediation
  - The extent of their role in settling the dispute
- This ignorance or inexperience of mediation comes from a lack of information,

And lack of information on the part of the public authorities, and the professional institutions as well for reasons such as:

- Mediation is not included in school course
- Few seminars organized on mediation for and by law professionals, who are members in several chambers of commerce, in the bar association, or who are presiding justices
- Lack of publicity and promotion concerning the success of this process
- No regulating statutes
- No training in this field.

#### **IV- Proposals to Promote Commercial Mediation in Morocco**

Proposals for promoting commercial mediation in Morocco include:

- Setting a legal frame for conventional mediation (in progress)
- Drafting a deontological code which would:
  - Enable defining rules between mediators, professionals and public authorities
  - Enable mediators to be bound by a predetermined frame
  - Enable the accreditation of the professionThis code shall have certain adaptability and simplicity.
- Information on mediation
  - Develop a national record of exercising mediators
  - Develop an information guide enabling each intervening person to acquire full knowledge of mediation. This guide could be drafted jointly by the Ministry of



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- Justice, the associations and chambers (CGEM, ICC, Chambers of Commerce ...): a large information from the very beginning as regards procedures
- Spread this guide via Internet, TV and press
  - Encourage actions to promote commercial mediation: conferences, editing booklets, books, TV programs
  - Consider the commercial mediation as a service offered to businesses.

#### **PART IV: ALTERNATIVE METHODS OF SETTLING CONFLICTS.**

To our knowledge there are no alternative methods of settling conflicts that are commonly used for commercial disputes, except traditional arbitration, mediation and conciliation. Thus, we are not aware of any other mechanism specific to a particular industry.



## **Appendix A: List of some Trade organisations representing SMEs**

Name	<b>Confédération Générale des Entreprises du Maroc (CGEM)</b>
Address	Angle avenue des FAR et rue Mohamed Errachid 20 000 Casablanca
Phone number	+212 (0) 22 25 26 96/97/98/99
Fax	+212 (0) 22 25 38 39
Mail address	<a href="mailto:cgem@cgem.ma">cgem@cgem.ma</a>
Internet site	<a href="http://www.cgem.ma">http://www.cgem.ma</a>

## **Appendix B: List of some Umbrella legal Entities**

Name	<b>Ordre des experts comptables</b>
Address	24, avenue de France, Agdal 10 100 Rabat
Phone number	+212 (0) 37 77 99 24/25
Fax	+212 (0) 37 77 99 39
Mail address	<a href="mailto:oeccn@menara.ma">oeccn@menara.ma</a>

Name	<b>Ordre des avocats à Rabat</b>
Address	Avenue Mohammed V, Cour d'Appel 10 000 Rabat
Phone number	+212 (0) 37 76 41 23
Fax	+212 (0) 76 60 88



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Name	<b>Ordre des avocats à Casablanca</b>
Address	Place Mohammed V, Tribunal de Première Instance 20 000 Casablanca
Phone number	+212 (0) 22 22 11 72
Fax	+212 (0) 22 27 02 74



## Appendix C: Some Providers of arbitration and Mediation services

Name	<b>Centre de conciliation et d'arbitrage d'Agadir (CCISA)</b>
Address	Avenue Hassan II, BP 240 80 000 Agadir
Phone number	+212 (0) 48 84 71 41/24
Fax	+212 (0) 48/84/54/55
Mail address	ccisa@ccis-agadir.com
Internet site	http://www.ccis-agadir.com

Name	<b>Centre International de Médiation et d'Arbitrage de Rabat (CIMAR)</b>
Address	1, avenue Gandhi, BP 131 10 000 Rabat
Phone number	+212 (0) 70 75 71 45
Fax	+212 (0) 37 26 23 80
Mail address	<a href="mailto:cimar@multimania.com">cimar@multimania.com</a>
Internet site	http://www.cimar.8m.net/

Name	<b>Commission Interministérielle des Investissements</b>
Competence	Chargée de statuer sur les problèmes qui bloquent la réalisation de tout projet d'investissement, sous la présidence du Premier Ministre
Adress	
Phone number	
Fax	

Name	<b>Agence Nationale de Règlementation des Télécommunications</b>
Address	Bd Ar-Ryad, Hay Ryad BP 2939 10100 Rabat



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Phone number	+212 (0) 37 71 84 00
Fax	+212 (0) 37 20 38 62
Internet site	<a href="http://www.anrt.net.ma">http://www.anrt.net.ma</a>

