

**IFC PEP-MENA**

**THE INSTITUTIONALIZATION OF COMMERCIAL  
DISPUTE MEDIATION IN MOROCCO:  
A PRELIMINARY NEEDS ASSESSMENT**



By:  
***Shelley M. Liberto, J.D.***  
Rabat, Morocco

In cooperation with:  
**The Ministry of Justice of the Kingdom of Morocco**

Funded by:  
**IFC PEP-MENA**  
**World Bank Group**  
**Contract No. 7143918**  
**August 2007 (rev. 11/07)**

## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b> .....	<b>1</b>
<b>ASSESSMENT TEAM</b> .....	<b>2</b>
<b>TERMS AND ACRONYMS</b> .....	<b>3</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>5</b>
<b>Background</b> .....	5
<b>Purpose</b> .....	5
<b>Methodology and Objectives</b> .....	6
<b>Summary of Findings and Recommendations</b> .....	6
<b>FINDINGS</b> .....	<b>9</b>
<b>The Demand for Alternatives to Commercial Litigation Is High</b> .....	9
<b>The Commercial Litigation Experience</b> .....	9
<b>The Interested Stakeholder Community</b> .....	12
<b>Mediation Services Among Implementing Institutions Are Sparse</b> .....	19
<b>Structure of the Moroccan Judiciary</b> .....	19
<b>The Commercial Courts</b> .....	20
<b>The Administrative Prerogative of the Commercial Court Presiding Judge</b> .....	21
<b>The Courts of General Jurisdiction</b> .....	22
<b>Communal Sponsored Conciliation – <i>MoHtassib</i></b> .....	23
<b>Private Mediation Services Among Supporting Institutions Are Weak</b> .....	23
<b>The Moroccan Chambers of Commerce</b> .....	23
<b>The International Chamber of Commerce</b> .....	23
<b>The CGEM</b> .....	24
<b>FMAEX</b> .....	24
<b>The Current Legal and Regulatory Framework Does Not Adequately Support Mediated Dispute Resolution</b> .....	25
<b>Traditional Means of Dispute Resolution in Morocco</b> .....	25
<b>The Hierarchy of Legal Authority</b> .....	25
<b>A Survey of Relevant Laws</b> .....	29
<b>New ADR Legislation</b> .....	30
<b>RECOMMENDATIONS</b> .....	<b>32</b>
<b>Create an Institutional Capacity for Commercial Mediation</b> .....	32
<b>Implement a Pilot Mediation Program in the Private Sector</b> .....	32
1. <i>Network of IFC Certified Mediators</i> .....	32
2. <i>Stand Alone Mediation Center</i> .....	34
3. <i>Mediation Center Hosted by an Existing Entity</i> .....	34
4. <i>Network of Mediation Centers</i> .....	35
<b>Concurrently Support Court-Annexed Mediation Pilots and Referrals</b> .....	35
<b>Create Advisory Component</b> .....	36
<b>Create a Resource of Competent and Reputable Mediators</b> .....	36
<b>Identify and Recruit the Mediator Pool</b> .....	36
<b>Train and Certify Mediators in Best International Practices</b> .....	37
<b>Strengthen Capacity of the Commercial Court Bench</b> .....	37
<b>Engage the Moroccan Bar in the Mediation Process</b> .....	38
<b>Standardize the Mediation Profession</b> .....	38
<b>Adjust the Legal and Administrative Framework</b> .....	38
<b>Support Administrative Policy for Informal Mediation in the Courts</b> .....	39
<b>Streamline the Enforcement of Mediated Agreements</b> .....	39
<b>Initiate the Process to Amend the New ADR Law</b> .....	40

<i>Recognize and Use Mediators as Judicial Experts</i> .....	40
<b>Engage a High Profile Awareness Program</b> .....	41
<b>CONCLUSION</b> .....	<b>41</b>
<b>APPENDICES</b> .....	<b>44</b>
<b>END NOTES</b> .....	<b>71</b>

## ACKNOWLEDGEMENTS

This preliminary needs assessment is the product of many contributors who generously donated their time, viewpoints and experiences as input. In particular, the assessment team expresses its gratitude to the Moroccan Ministry of Justice Division of Studies, Cooperation and Modernization by its director, M. Abdelmajid Rhomija. Substantial input was also contributed by the Presiding Justice of the Commercial Court of Appeal of Casablanca, the Honorable Lahoussein El Gassem, as well as the Presiding Judge of the Commercial Court of Casablanca, the Honorable Abderrazak El Amrani. Major NGO contributors were the General Confederation of Moroccan Enterprises (CGEM), the Federation of Moroccan Expert Associations (FMAEX) and Search for Common Ground. The team would also like to thank the USAID-Morocco Parliament Support Project for its contribution of legislative information and liaison with the Moroccan Parliament. Likewise, thanks go out to the USAID-Morocco IBCM Program for information regarding its activities in promoting ADR in Morocco.

Shelley M. Liberto

## ASSESSMENT TEAM

***Shelley M. Liberto.*** Mr. Liberto is a California business litigation attorney of 20 years who has served as a mediator, arbitrator, small claims judge, trial lawyer and counselor to businesses in California. Mr. Liberto has over 10 years' experience in development in the Middle East. He has worked as Chief of Party for the USAID-Morocco Project for Modernization of Commercial Law and the Judiciary, and as Senior Legal Reform Specialist for the USAID-Morocco Project to Improve the Business Climate in Morocco.

***Maria Bahnini.*** Ms. Bahnini is a business law counselor with over 10 years of practice in Morocco. She has been a consultant on several IFC Morocco projects including feasibility studies for the consolidation of information for the Moroccan Central Bank, and has provided legal counsel to the IFC on various subjects pertaining to business and commerce. She has also worked for the European Union to draft legislation on land transportation in Mauritania, and worked with the Ministry of Justice of Morocco to draft reforms to the system of commercial registries. She has also served as a consultant on several USAID-Morocco projects, including work analyzing the newly legislated law on arbitration and mediation.

***Zineb-Idrissia Hamzi.*** Ms. Hamzi is a business litigation and transactions attorney who represents domestic and international clients on commercial issues from the counseling stage through litigation, trial and judgment execution. She is extensively experienced in ADR and has been a long time activist for commercial mediation development in Morocco. Ms. Hamzi is certified as an expert supervisor by the EU Project to Promote ADR Techniques in the MEDA Region. She was the project manager for the EU-CMAP seminar on commercial ADR held in Casablanca in December of 2005. Ms. Hamzi also contributed to the efforts of the USAID-Morocco Project for Modernization of Commercial Law and the Judiciary to reform company insolvency law.

## TERMS AND ACRONYMS

<i>Arbitration:</i>	An adjudicative process that generally follows principles of law and evidence wherein a neutral third party enters a ruling on the merits of a dispute.
<i>Mediation:</i>	An open process whereby a neutral third party facilitates the formation of a settlement agreement between parties in dispute.
<i>Conciliation (French):</i>	As used in Moroccan law, a process whereby a neutral third party, frequently a judge, works with parties in dispute to identify, confirm and eliminate specific claims to be entered in a judgment.
<i>Transaction (French):</i>	As used in Moroccan law, a binding contract whereby parties settle potential or pending disputes.

ADR	Alternative Dispute Resolution
CC	Commercial Court
CCCasablanca	Commercial Court of Casablanca
CCP	Code of Civil Procedure
CGJ	Court of General Jurisdiction
CIMAR	International Center for Mediation and Arbitration
CMAP	Center for Mediation and Arbitration of Paris
Comm.C.	Commercial Code
DECM	Division of Studies, Cooperation and Modernization
DH	Dirham
EU	European Union
GPBM	Professional Group of Moroccan Banks
ICC	International Chamber of Commerce
ISM	Higher Judicial Institute
MOJ	Ministry of Justice
NGO	Non-Governmental Organization

PJ	Presiding Judge
RIC	Regional Investment Center
SGG	Secretary General of the Government
SFCG	Search for Common Ground
USAID	United States Agency for International Development
USAID-IBCM	USAID-Morocco Program to Improve the Business Climate in Morocco

## **EXECUTIVE SUMMARY**

### **Background**

The Kingdom of Morocco is a constitutional Islamic monarchy located in northwest Africa, bounded by the Mediterranean on the north, the Atlantic Ocean to the west, Algeria to the east, and Mauritania to the south. The population of Morocco is approximately 33.25 million. Its strategic location has made Morocco host to a variety of civilizations throughout history. Islam was established in the seventh century and a succession of dynasties has ruled the country to the current Alaouite dynasty, founded in 1649. Pursuant to the Treaty of Fes in 1912, Britain, France and Spain divided the Kingdom into three zones of influence eventually resulting in the creation of a French protectorate. The *Istiqlal* (Independence) Party initiated a movement for independence from France in 1944 in support of Morocco's exiled King Mohammed V. Full independence was obtained in 1956.

The King is the supreme ruler of Morocco, responsible for enforcing respect for Islam and the Constitution. Legislative power is exercised by Parliament which includes the Chamber of Representatives (the lower house) and the Chamber of Counselors (the upper house). The executive branch of the government is comprised of the Prime Minister and the Council of Ministers. The Prime Minister has the power to enact regulations and may delegate certain powers to ministers. The Council of Ministers enforces laws and manages the Kingdom's administration. The Council of Ministers is accountable to Parliament and the King. The King presides over the Council of Ministers and appoints the Prime Minister following legislative elections.

Morocco is divided into 10 regions (*wilayas*) which are subdivided into 24 municipalities (*preféctures*) and 35 additional provinces, each of which consists of urban and rural municipalities. The Constitution calls for a judicial authority that is independent from both the executive and legislative branches of the government..

### **Purpose**

The purpose of this assessment is to provide information to the IFC and its counterparts on the need for institutionalizing commercial mediation and to provide recommendations as guidance for implementation. The terminal objective is to provide a means of resolving commercial disputes that is more speedy and cost effective than court litigation. To date, very little has been done to institutionalize ADR let alone commercial

mediation. Although newly passed ADR legislation enjoyed the support of the MOJ-DECM and the SGG, that legislation failed to effect the use of mediation in the courts.

### **Methodology and Objectives**

The methodology employed to create this assessment consists of two major components: (1) *Findings* regarding the current demand for commercial mediation, enabling and supporting institutions, and legal and regulatory framework, and (2) *Recommendations* for the creation of a sustainable institutional capacity for commercial mediation, the identification and development of a pool of professional mediators, and supportive reform of laws, regulations, and discretionary administrative practices in the courts.

### **Summary of Findings and Recommendations**

Morocco has enjoyed a long history and tradition of reconciliation as a method for resolving disputes. Resort to the courts, however, has become increasingly necessary as tradition yields to modernization. The judicial system in its current state, however, cannot meet the necessities and expectations of Moroccan entrepreneurs.

Imported in 1916 by the French Protectorate, the civil court system has only marginally succeeded as an agent for resolving commercial disputes in the Moroccan context. The dispatch of commercial cases takes up to 2.5 years and frequently longer. Routine enforcement of a contract in the courts may cost up to 40% of the value of the debt sought to be recovered. These factors have given rise to a high demand for alternatives to court litigation in the business community.

The Moroccan Commercial Courts, a specialized jurisdiction, receive all commercial cases with an amount in controversy of 20,000 DH or more.<sup>1</sup> The Courts of General Jurisdiction receive all commercial cases that involve lesser amounts. Approximately 65% of all commercial cases are handled by the Commercial Court of Casablanca (CCCasablanca). The CCCasablanca offers no court-annexed mediation services. The CCCasablanca, however, has implemented creative means of reducing its case load and shortening case life by exercising informal administrative practices.

The Presiding Judge of the CCCasablanca, by exercising his inherent administrative authority, has created the position of designated Settlement Judge to whom he refers all cases addressing commercial lease forfeitures. The Presiding Judge also intervenes to settle bankruptcy reorganization cases. Statutory law expressly permits the Presiding Judge to intervene to attempt settlement of these cases. The Presiding Judge also *informally* counsels

select parties and attorneys to seek settlement and sometimes makes voluntary outside referrals to judicial experts to settle cases. Likewise, the Presiding Judge of the Rabat Court of General Jurisdiction assigns expedited matters with amounts in controversy less than 2,000 DH to an in-court settlement process.

These makeshift procedures, neither legislated nor formally ordered by the Ministry of Justice (MOJ), show the proclivity of court administrators to use creative means to solve administrative problems. The Presiding Judges openly express support for further experiments and pilot programs to integrate commercial mediation more formally into the commercial litigation process. The legal and administrative framework of the courts should be adjusted to allow them to do so.

Although Morocco's legal system is based in the Napoleonic Code, that system of strict compliance with black letter law has been diluted by the independence of Morocco in 1956, the subsequent Arabization of the courts, and several alternative avenues to governance other than legislated code. The Royal Decree or "*dahir*", promulgated by the King, is a primary source of authority that overrides all others, even legislated code. Other means include the Executive Order ("*décret d'application*") issued by the Prime Minister, and Administrative Directive ("*arrêté*") issued by the relevant ministry to give guidance to the administration of laws. By exercising all avenues of legal authority, the legal and administrative framework should be adjusted to enhance and support court-referred settlement and mediation. It should also be adjusted to support and interact with extra-judicial mediation, particularly in the court-ordered enforcement of privately mediated settlements.

In addition to legitimizing innovative and pilot programs in the courthouse, Presiding Judges and court administrators should be expressly directed to offer information on mediation and out of court referrals to certified mediators. As of this time, such informal referrals are regularly made by the Presiding Judges to judicial experts normally used by the court to give advice on technical matters. These judicial experts, organized as the Federation of Moroccan Expert Associations (FMAEX), already receive unsolicited requests to mediate commercial disputes by entrepreneurs before and during litigation.

FMAEX members, recognized for their technical expertise and impartiality, should be trained and certified as a first step in the creation of a competent and reputable mediator pool. Doing so would provide an immediate resource of mediators that is already recognized by the courts, the entrepreneurial community, and the public at large. A partnership with FMAEX as an initial bootstrap for delivering nationwide mediation services would not be exclusive.

Other professional groups and organizations including the CGEM, local Chambers of Commerce, bar associations, attorneys at large, judges and academics would also be invited to contribute to the pool of certified mediators. A network of certified mediation centers to support mediation activities would be developed concurrently nationwide.

At least four alternatives for a mediation support institution include:

- (1) A network of mediation offices centrally coordinated,
- (2) A stand alone mediation center,
- (3) A mediation center hosted by an existing entity,
- (4) A network of mediation centers.

The first alternative contemplates the mediator network as the backbone of the institution. Mediators themselves provide their own offices as the location for mediation activities. Offices that are qualified may be certified as mediation centers. These would necessarily be distributed nationwide but *coordinated centrally*.

The second alternative calls for the creation of a stand alone mediation center in Casablanca, the commercial center of Morocco. The third alternative suggests that a mediation center be hosted by an existing entrepreneurial entity such as the CGEM. Finally, a fourth alternative envisions a network of mediation centers sponsored by such entities as local Chambers of Commerce, local professional organizations such as bar associations, and the Regional Investment Centers to support and work in coordination with the nationwide network of mediators developed in the first example. The legal and administrative framework must be adjusted to support any such plan because the courts will be the tool by which mediated settlement agreements will be validated and enforced. The new ADR legislation should also be used as a springboard for introducing further legal and administrative changes.

The entire hierarchy of legal authority in Morocco from the Royal Decree through Executive Order, Administrative Directive, and the administrative discretion of court administrators should be exercised to achieve these goals. The new ADR law, passed in July of 2007, gives an adequate pretext to initiate these processes over time. The courts would be invited to experiment with creative administrative techniques to mediate and settle their case loads. They would also be advised to systematically refer cases, particularly those of lower amounts in controversy, to outside mediation. The courts would also use mediation to resolve cases that are already statutorily permitted to be settled by the court such as bankruptcy reorganization cases, and cases involving the forfeiture of commercial leases.

Support for experimental pilots in both court-annexed and extra-judicial mediation and settlement would be accompanied by a training and awareness raising process to inform the Moroccan judiciary of the means and advantages of settling its cases. A separate training and outreach program for private mediators would assure the competency and standardization of mediation practices by imposing a code of professional responsibility that addresses ethics, confidentiality and billing practices. Finally, a program of short, medium and long term objectives will guide the development of a sustainable comprehensive system of commercial mediation nationwide.

## **FINDINGS**

### **The Demand for Alternatives to Commercial Litigation Is High**

#### **The Commercial Litigation Experience**

Consensus is nearly universal that the judicial system is in crisis. The business community complains that commercial litigation is frustrating, costly, and an impediment to business operations. The courts suffer administrative stress in managing overbearing caseloads in a weak procedural environment exploited by attorneys working in an adversarial environment. The competency of court personnel is constantly under scrutiny.

In the Commercial Court of Casablanca (CCCasablanca), the average case takes approximately 2.5 years to resolve. This figure includes short matters such as cases of urgency and claims for payment on bad checks.<sup>2</sup> Although urgent matters may be resolved immediately by referral to the Presiding Judge, and bad check cases may resolve within two months, all cases are required by statute to be dispatched within five years. Costs are another cause for a concern.

Filing fees in the Commercial Courts are set at 1% of the amount in controversy plus flat rate counter fees and tax stamps currently totaling 90 Dirhams (DH).<sup>3</sup> Additionally, parties pay court-appointed expert fees ranging from 700 to 2,000 DH or more depending on the complexity of the matter. Add to this attorneys' fees and additional costs of executing a judgment that must be paid by prevailing plaintiffs.

Attorneys typically charge 15% of the amount demanded in the complaint regardless of whether they represent plaintiffs or defendants. They are paid up front in a lump sum. The arbitrary assignment of a fee based on the amount in controversy does not reflect the amount of legal work required to competently advocate a client's case. The amount in controversy

has nothing to do with, for example, the complexity of the matter when taking into account the number of witnesses, amount of documentary evidence, obstructive tactics of the opposition, complexity of expert reports, and interlocutory procedures such as pre-judgment attachment of property as security for a judgment. Accordingly, attorneys frequently renegotiate their fee while litigation is in progress. Clients have no choice but to submit to the increased fee or abandon their case.

Unlike a prevailing defendant, a prevailing plaintiff must also pay the cost of executing any judgment successfully obtained against a liable defendant. This may include a fee for the levying officer of 100 DH, the cost of publishing notice of auction of seized property in the amount of approximately 500 DH, court-appointed expert fees of 700 to 2,000 DH, and clerk's counter fees approximating 80 Dirhams. A summary of the estimated cost associated with a 20,000 DH case in the Commercial Courts is:

Pre-Execution Costs

Filing fee	300 DH
Administrative Costs	90 DH
Expert Fees	700 - 2,000 DH
Attorneys' Fees	3,000 DH
Total	4,090 - 5,390 DH

Expenses for Execution for Judgment (plaintiff)

Levying Officer	100 DH
Publication	500 DH
Counter fees	80 DH
Expert Fees	700 - 2,000 DH
Total	1,380 - 2,680 DH

The total estimated cost of litigating a 20,000 DH case, the minimum jurisdictional limit of the Commercial Courts, is therefore 6,750 to 8,070 DH or approximately 40% of the amount in controversy.<sup>4</sup>

Delays are frequently blamed by the courts on a panoply of dilatory tactics by attorneys who are motivated to prolong the resolution of cases to earn a higher fee. The tactics are enabled by a weak legal and procedural structure that allows opportunities for abuse. While judges and administrators are reluctant to assume responsibility for delays

themselves, they recount horror stories wherein attorneys have exercised obstructionism and deceit in their relationships with not only the courts, but also their own clients. They also cite a lack of rules and laws to sanction attorneys and parties for dilatory and abusive tactics.<sup>5</sup>

Even when a plaintiff prevails in court, the plaintiff meets with a weak and ineffective system for executing judgments. The Commercial Court judges cite a lack of resolve on the part of court levying officers (*huissiers*) who are charged with collecting on money judgments. Levying officers regard their statutory duties to have been dispatched merely by returning written reports to the court that the judgment debtor simply does not answer the door at their residence or cannot be found at their place of business. There is no system for compulsory debtor examination wherein a judgment debtor would be required to appear and disclose information about assets available for levy. Likewise, the system provides no means for detection or abatement of the fraudulent transfer of assets by judgment debtors who evade execution. In the fortunate circumstance where a plaintiff creditor has obtained a pre-judgment attachment order, a judgment debtor's assets are already secured and may be sold to satisfy the judgment, but only to the extent the value of the liquidated asset is adequate to cover the amount of the judgment.

Accordingly, due to an approximate delay of 2.5 years for relief, costs that can approach 40% or more of the claim, and the absence of an effective means of executing a judgment, the ability to collect on a breached contract in Morocco is viewed by entrepreneurs as poor. The demand for alternatives to this process is therefore high among the business community.

The vast majority of respondents to a survey of business owners express overwhelming support for the institutionalization of alternatives such as commercial mediation to avoid court process. All are willing to pay the cost of mediation services themselves. Respondents recognize that mediation will save them time and money. Most, however, have only heard of mediation and have never actively used mediation services. Mediation is generally regarded as an alien process used abroad. Respondents cite the most important attributes of a mediator to be competency and integrity. Others confuse mediation with arbitration. They express a baseless fear that a mediated agreement would lead to an unfair adverse judgment against them when, in fact, mediators make no rulings and mediated settlement agreements are entered into voluntarily.

## The Interested Stakeholder Community

The following is an inventory of the interested stakeholder community among agencies of the Moroccan government, donor agencies, NGOs, and the private sector:

**The Ministry of Justice - DCEM.** The MOJ-DCEM is responsible for examining and implementing ways to improve the administration of justice in Morocco. This division of the MOJ is the Ministry's point of contact with international organizations with whom the MOJ has agreements of cooperation. The MOJ-DCEM is also the launching point for the Ministry's proposed legislation pertaining to laws relevant to commerce and the Commercial Courts.

The MOJ-DCEM has been a stalwart supporter of judicial reform and efforts to integrate arbitration and mediation as alternatives to litigation. Its interest is founded in the reduction in case load the courts would experience from the popular use of ADR. The MOJ would therefore be the first-line beneficiary of any institutionalized system of commercial mediation. The MOJ-DCEM enjoys the active support of the Secretary General of the MOJ for its ADR advocacy.

### Judicial Activity 2006 - MOJ

	Cases Filed	Cases Ongoing	Judgments Entered
Supreme Court	36 638	79 000	41 004
Court of Appeal	246 431	408 982	263 989
Commercial Courts of Appeal	10 466	17 306	9 846
Administrative Courts of Appeal	773	773	54
<b>Sub-Total</b>	<b>294 308</b>	<b>506 061</b>	<b>314 893</b>
Courts of General Jurisdiction	2 058 265	2 482 270	2 036 396
Commercial Courts	115 612	149 509	116 253
Administrative Courts	12 536	19 472	12 459
<b>Total</b>	<b>128 148</b>	<b>168 981</b>	<b>128 712</b>
<b>Grand Total</b>	<b>2 480 721</b>	<b>3 157 312</b>	<b>2 480 001</b>

**The Commercial Courts.** By definition, the Commercial Courts serve as the Kingdom's primary medium for commercial dispute resolution. Since their creation in 1997, they have been the object of examination and analysis by the MOJ-DCEM, donor agencies and NGOs. Presiding appellate justices, presiding judges, and first level magistrates have all expressed enthusiasm for any alternative to the current system, be it internal or external, that

would relieve their case loads or make their jobs easier. Judges and justices interviewed in the course of this assessment have all expressed their willingness to implement new administrative methods, procedures and pilot projects in support of mediation and settlement of commercial disputes both originating within the courts and outside of the court system.

***Judicial Experts – FMAEX.*** The Federation of Moroccan Expert Associations (FMAEX), a non-profit association, has expressed aggressive enthusiasm for participating in any IFC-related project that advances commercial mediation and arbitration in Morocco. FMAEX is a self-regulated federation of 17 independently administered associations of professionally licensed experts recognized by the MOJ and regularly used by the courts in commercial cases. These include, but are not limited to, associations of accountants, banking experts, bankruptcy trustees, medical experts, digital information experts, architects, engineers, aerospace technicians, and genetic engineers (DNA). Attorneys are not included in this group.

FMAEX experts regularly assist the Commercial Courts by providing analysis and recommendations to resolve issues in bankruptcy reorganization matters, accounting issues, and all other matters wherein the Commercial Court judge feels the need to consult an outside expert. FMAEX experts also regularly provide mediation and settlement services to parties who are *informally referred* by the Commercial Courts, or who seek pre-litigation solutions to conflict. The Federation derivatively represents 2,000 licensed professionals who are regulated by their own associations. FMAEX is a member of the African Organization of Experts, and the European Federation of United Nations Approved Experts.

Although FMAEX experts are required to have a minimum of six years post-Baccalauréat training (approximately two years' graduate professional training), their qualifications emphasize experience and reputation. They have no formal training in settlement or mediation. Due to their regular interaction with the courts, however, FMAEX members are in frequent communication with the presiding judges of the Commercial Courts by researching and rendering expert opinions on court cases, and seeking court approval and execution of their settlement agreements. Settlement documents produced by FMAEX mediators contain terms describing specific procedures for their expedited enforcement in the event a settlement agreement is breached (*conditions suspensives*).

*CASE IN POINT – FMAEX MEDIATED DISPUTE. The owner of the copyright to a literary work files suit in the Commercial Court of Casablanca against a printing company that has copied and distributed his protected work and sold it for a profit. The presiding judge informally suggests that the parties consult a specific FMAEX expert who has experience in settling intellectual property damages disputes. The expert accepts the case for a daily fee based upon the estimated number of days required to settle the action. The expert calculates damages in an amount in excess of 10 million DH. The parties settle and the expert acts as escrow agent by receiving and paying the money to the claimant, as well as delivering the distributor's declaration of ownership in favor of the claimant. The distributor is released from liability. The expert prepares a judgment signed by himself, the parties and their attorneys, prepared for the signature of the Presiding Judge of the Commercial Court of Casablanca. The stipulation for entry of judgment recites the basic terms upon which the printing company will pay the copyright owner and how it will be enforced in case of breach. The stipulated judgment is accepted by the Presiding Judge who signs and enters it in the court record and dismisses the case.*

FMAEX has no centralized office. The offices of its individual members serve as the venue for both reconciliation and consultancy services. Inasmuch as its membership consists of associations and not individuals, it is the individual members, and not the federation in name, who mediate and settle cases.

***General Confederation of Moroccan Enterprises (CGEM).*** The CGEM is the largest and most significant association of Moroccan businesses. It was established in 1947 as a means of pooling resources to support enterprises in Morocco. The CGEM consists of 3,000 member companies, most of whom are small and medium size enterprises. Approximately 120 of those are non-profit associations. Its indirect membership is approximately 30,000 individuals. Accordingly, the CGEM represents what would be the largest organization of private sector beneficiaries of institutionalized commercial dispute resolution.

The CGEM is organized by region throughout the Kingdom although it is headquartered in a single office in Casablanca. It has been drawn upon by the Commercial Courts as a source of expertise for mediating bankruptcy cases from time to time as permitted by statute. The CGEM leadership has expressed strong enthusiasm for working with the IFC on any project related to commercial mediation. It has signed a memorandum of understanding with the IFC to participate in laying the groundwork for establishing a pilot commercial mediation center. It has also established a committee charged with creating rules and procedures for mediation, training company managers in mediation principles, and raising awareness among businesses regarding the advantages of mediation and arbitration. The CGEM also hosts a committee on law.

***The International Chamber of Commerce (ICC).*** The Moroccan chapter of the International Chamber of Commerce, based in Paris, is a loose association of legal professionals who, among other things, host arbitrations required under specific terms of a contract in dispute. The ICC is open to participating in the institutionalization of commercial mediation as a provider of mediation services addressing both international and local disputes. The ICC has forged cooperative relationships with the CGEM and the Professional Group of Moroccan Banks (GPBM) to investigate the possibility of partnerships for ADR delivery. The ICC is currently in discussions with the CGEM on topics that might permit it to receive arbitration referrals from the CGEM in exchange for its mediation referrals to the CGEM. These negotiations, however, are highly tentative and at an embryonic stage.

In terms of international disputes, the ICC considers itself as a primary source of ADR be it by mediation or by arbitration. The ICC has no central offices. The offices of its individual professional members serve as the venue for ADR services that its members provide.<sup>6</sup>

***The Local Chambers of Commerce.*** The local chambers of commerce in Casablanca and Rabat, as well as some other major municipalities, provide a structure for ADR services. In reality, however, these organizations are inactive in the ADR field. The consensus is that the Chambers of Commerce lack a recognized body of competent and reputable ADR professionals. They also lack adequate funding. The presidents of the Chambers of Commerce remain receptive to participating as either ADR providers or providers of mediator training.<sup>7</sup>

***Search for Common Ground (SFCG).*** SFCG is an international NGO based in the UK that is dedicated to conflict resolution. SFCG has been active in Morocco for five years under three distinct MOUs with the MOJ. It has thereby established itself as the most experienced international agency working on ADR in Morocco.

SFCG has focused on training, outreach and awareness raising. SFCG targets a core group of 35 potential mediators comprised primarily of judges and MOJ representatives, and less so attorneys, entrepreneurs and judicial experts. It has hosted 16 in-country events and sponsored several study tours abroad, all within the past three years. Events include formal training sessions, round table discussions, seminars, and training events in London and Paris. In September of 2005, SFCG held an outreach conference in Rabat that drew over 200 participants. SFCG also partnered with the MOJ-DECM to lobby for passage of new ADR legislation in an effort to institutionalize court-annexed mediation. It also offered seminars to parliamentarians on proposed ADR legislation during the final week of the 2007

Parliamentary session in the Parliament itself. SFCG has expressed its desire to participate in any IFC based program to institutionalize commercial mediation in Morocco.<sup>8</sup>

*SFCG SUCCESS STORY. In February of 2007, SFCG held an outreach seminar in Rabat on the merits of mediation. The seminar was attended by the Rabat Bar Association and the principal of a large insurance company. By coincidence, the Rabat Bar and the insurance company were in litigation regarding a costly insurance issue. During the course of the event, a third party suggested that the two attempt mediation to resolve their issue as described in the SFCG presentation. The parties did so and by May of 2007, the case was settled. The event is particularly significant because the parties involved attorneys and a large corporate entity, both of whom fit the profile of groups who have expressed skepticism about mediated solutions.*

**USAID-IBCM.** USAID-IBCM has been engaged in activities supporting commercially related ADR in Morocco since 2005. It has published an assessment with options for technical assistance for commercial ADR.<sup>9</sup> USAID-IBCM contributed technical assistance to the Chamber of Commerce of Rabat (CIMAR) in partnership with SFCG in a series of workshops focusing on commercial mediation in June 2007.

**Professional Monitor (“MoHtassib”).** By Royal Decree of 1982, each *wilaya* elects a Professional Monitor who receives small claims against tradesmen for the purpose of settling disputes.<sup>10</sup> The *MoHtassib* declines jurisdiction over claims against licensed tradesmen by referring them to their corresponding regulatory body. The *MoHtassib* engages in direct mediation between the consumer and *unregulated tradesmen* only.

Examples of the sort of trades treated by the *MoHtassib* are building subcontractors, carpenters, plumbers, painters, auto repair shops, and small shop owners (*hanutes*). The monitor records results of each mediation in a report and assures performance of the settlement agreement himself. Cases of fraud by tradesmen are reported to the local *wali*. Cases that cannot settle are referred to the Court of General Jurisdiction where the monitor’s report is made part of the record. In 2006, the Professional Monitor for the *wilaya* of Rabat received 137 cases of which approximately one-half were settled, 35% were referred to a professional licensing authority, and 15% were referred to the Court of General Jurisdiction.<sup>11</sup> The monitor is not specifically trained in mediation techniques. Nor is confidentiality required in the process.

**Professional Group of Moroccan Bankers (GPBM).** The GPBM is a professional association of 15 of the largest banks in Morocco. The GPBM operates to serve the needs of

its membership as both lobbyist and advisor on common problems in the banking industry. Members of the GPBM are generally respected and regarded as competent organizations.

The GPBM does not participate in the formal mediation of disputes with its debtor clients. On the other hand, it does negotiate the restructuring of debts on a regular basis. The GPBM does not favor arbitration of disputes due to the poor reputation of the arbitration process. Likewise, the GPBM generally discourages adversarial processes against its debtors because banks are sensitive to their reputation among clientele, the debtor community. Nevertheless, a substantial number of commercial court cases are filed by Moroccan banks for the collection of debts. The GPBM is currently in discussions with the ICC for assistance in formulating language in its loan documentation that would require arbitration to resolve commercial disputes without court litigation.

***The Higher Judicial Institute (Institut Supérieur de Magistrature - ISM).*** The ISM is the institution primarily responsible for training and qualifying judges in Morocco. The ISM, located in Rabat, is a fully equipped state of the art training institution with classrooms, a large auditorium, and facilities for lodging trainees. It operates independently of the MOJ under a board of directors comprised of representatives of the MOJ, Supreme Court, law faculties, and court administrators. The ISM has been in operation for over 40 years. Although the purpose of the ISM is to provide the initial training for Morocco's judges, it also provides a continuing judicial education (CJE) program for sitting judges.

The ISM accommodates approximately 200 trainees per training session. Candidates for entry into the ISM must complete four years of undergraduate work in law and pass an entrance examination. Trainees then attend two years of mandatory coursework at the ISM. The second year of training entails internship with the courts. The ISM has recently undertaken to revise its curriculum to engage pedagogical techniques more in line with best international practices. These include the case study method. At the end of the two-year training period, trainees are assigned to the bench by the High Council for the Judiciary.

The ISM is open to hosting mediation training with an eye to making it a permanent feature of its CLE program for sitting judges. The ISM offered a CJE course on judicial settlement procedures to 35 sitting judges in April of 2007. The ISM does not currently provide training in mediation or ADR to its judicial trainees.

***Regional Investment Centers (RIC).*** The Ministry of Interior supports 16 Regional Investment Centers in commercially dense locations throughout the Kingdom. These centers offer information, counseling and support to the business community and local and international investors. The RICs act as a networking hub among business organizations,

banks and government agencies including the local Commercial Courts who record registrations of new companies initiated by the RICs.

The RICs do not directly engage in arbitration or mediation, but have expressed an interest in acting as a referral agent, and as a location for commercial mediation activities for local businesses who wish to implement ADR solutions. In some cases, activist RICs such as the RIC in Fes have hosted *ad hoc* reconciliation meetings among large local corporate interests, employees and creditors. The RICs seek to assure a vibrant local economy and adequate employment in their respective regions.

**European Union-CMAP.** The EU has been active in ADR development in Morocco. In December 2005, the EU hosted a two-day seminar on the advantages of alternatives to commercial litigation. The seminar focused on introducing the concept of commercial mediation. The organizing implementer was CMAP, the Center for Mediation and Arbitration of Paris. Moroccan CMAP affiliates have expressed support for the continued involvement of the EU in developing ADR in Morocco.

**Attorneys.** The vast majority of Moroccan attorneys are litigators who are solo practitioners. Inasmuch as a license to practice law is issued by the local bar association, Morocco has no centralized national bar entity to oversee professional activities. Concern with the enforcement of ethics has been growing in the legal and judicial communities. Disciplinary actions and disbarment are rare.<sup>12</sup>

Attorneys are generally regarded by the business community as a source of problems rather than solutions. Attorneys are accused of seeking compensation by employing tactics that irretrievably commit entrepreneurs to court without a clear definition of objectives, results, or closure. Attorneys are frequently accused of deliberately prolonging litigation to extract more fees from their clients. Commercial Court judges note that in cases of court sponsored settlement, attorneys tend to adopt an obstructionist posture.

Most interesting is the aggressive activist role that lawyers have taken to defeat ADR objectives, and specifically mediation, through political lobbying. For example, jurists complain that the lawyer lobby is responsible for *repealing a legal requirement that court-appointed judicial experts attempt settlement of disputes*. Former Article 63 of the Code of Civil Procedure once compelled experts to attempt to reconcile disputes over the technical aspects of the litigation to which they were assigned. Examples are accounting issues, bankruptcy reconciliation and questions of competency bearing on a defendant's professional malpractice. The attorney lobby is attributed with pinpointing code language on the

settlement role of court experts and having it repealed by the Moroccan Parliament in December of 2000.<sup>13</sup>

Likewise, the attorney lobby is generally seen to be responsible for eviscerating new ADR legislation passed by the Moroccan Parliament in July 2007. In its original form, the bill would have compelled commercial litigants to attempt court-sponsored settlement in cases with amounts in controversy less than 5,000 DH. Attorneys are believed to regard the proposed alternatives as a threat to their business.

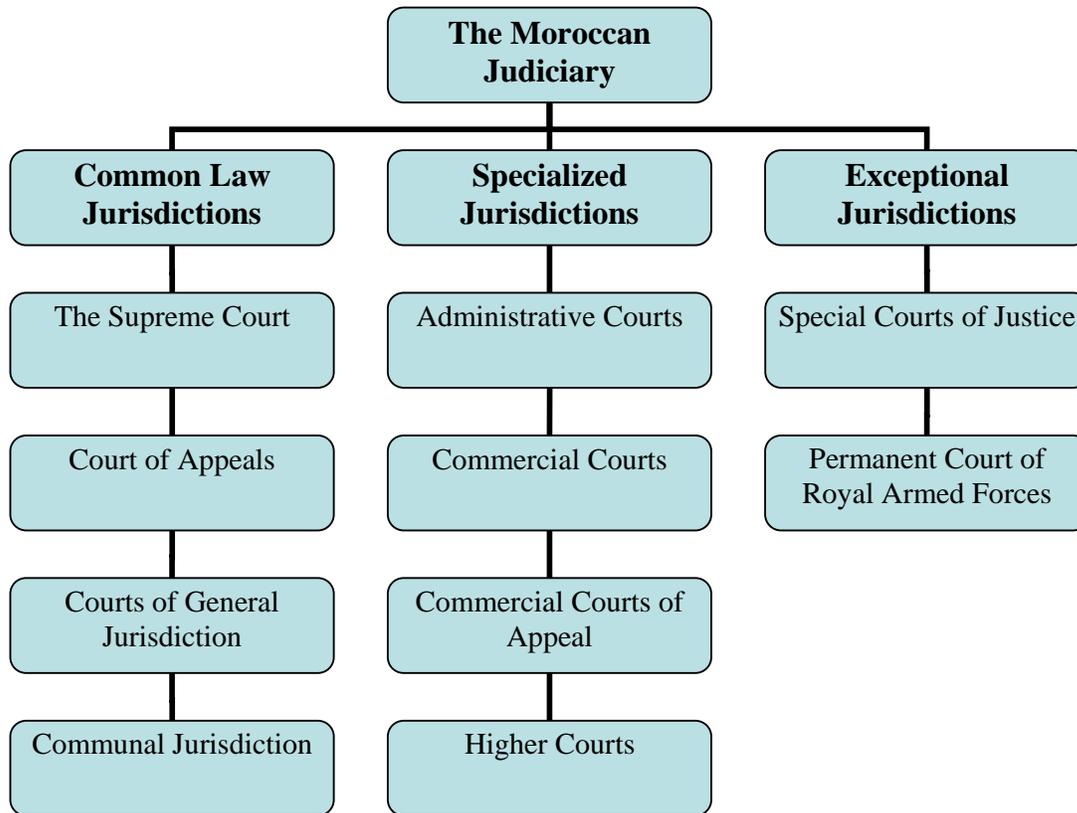
While in the past attorneys as a group may have pursued a misguided campaign against ADR, some have recognized the potential for a new business opportunity. A few have undertaken to market themselves as arbitration and mediation specialists to corner what is almost an exclusive market in the legal profession. The President of the Casablanca Bar has expressed support for the participation of attorneys in commercial mediation.

Regardless of the posture of the lawyer community, lawyers remain a vital and powerful link in the successful implementation of a commercial mediation system in Morocco. The co-opting of the legal profession is necessary to assure the long term sustainability of any institutionalized commercial mediation system. The conversion of the lawyer community will require substantial awareness raising, consensus building, and a specific demonstration that ADR and commercial mediation present new and lucrative business opportunities.

### **Mediation Services Among Implementing Institutions Are Sparse**

#### **Structure of the Moroccan Judiciary**

The current organization of the Moroccan judiciary was created by law in 1974 and amended in 1981 to add the administrative courts. In 1997, the Commercial Court was added as one of the specialized courts. The three major types of courts in Morocco are the Common Law Courts, Specialized Courts and Exceptional Courts. The Courts of General Jurisdiction (CGJ) fall under the category of Common Law Jurisdictions which include the Supreme Court. Commercial Courts fall under the Specialized Jurisdictions which include Administrative Courts and the Higher Courts dealing with regulatory and disciplinary matters. Exceptional Courts include the Moroccan military court.<sup>14</sup>



### The Commercial Courts

Eight Commercial Courts hear commercial cases with amounts in controversy of 20,000 DH or more and a claim that involves a *commercial act* defined as:

- (1) A commercial transaction by a merchant,
- (2) A transaction involving commercial paper including checks, e.g.,
- (3) Relations among associates of a registered company such as officers, directors and shareholders, or
- (4) The business operations of a registered company.

The forum for “mixed actions” is determined by the status of the defendant. For example, a mixed action involving a merchant and non-merchant would be heard in the Commercial Court if the defendant is a merchant, or the CGJ if the defendant is a non-merchant. Appeals from the Commercial Courts are received by one of three Commercial Courts of Appeal in Casablanca, Fes, and Marrakech.

Approximately 62% of all of Morocco’s commercial cases are handled by the Commercial Court of Casablanca (CCCasablanca). According to MOJ statistics, approximately 2.5 million court judgments were entered in Morocco in 2006, 116,253 of

which were in the Commercial Courts. Of those, 71,661 were entered in the CCCasablanca.<sup>15</sup> Notwithstanding the immense case load of the Commercial Courts, they use no formal mechanism for court-annexed mediation. Nevertheless, pragmatism and necessity have given rise to *ad hoc* solutions.

### **The Administrative Prerogative of the Commercial Court Presiding Judge**

The Presiding Judge of the Commercial Court (PJ) is responsible for efficient and effective administration of all matters before the court. The PJ delegates cases to lower level magistrates for routine handling. The PJ himself, however, handles urgent matters and engages in statutorily sanctioned *conciliation* of bankruptcy reorganizations with creditors, and the settlement of cases pertaining to the forfeiture of commercial leases. Under Moroccan law, “*conciliation*” is a method by which parties agree to waive specific rights in controversy under the legal advice of a judge, resulting in a judgment by stipulation. Cases not settled by this manner are returned to the court’s docket for handling by a magistrate. No member of the administration of the Commercial Courts engages in mediation or in the official referral of cases to outside mediation services.

As a matter of pragmatism, however, PJs *informally* counsel parties and their attorneys that in certain cases they would benefit from the services of an outside mediator who may assist in settling their dispute. The informal referral to outside judicial experts for this purpose is not uncommon. PJs are in the best position to gauge which cases are amenable to outside mediation and settlement, and which experts to their experience are best fitted for the job.

Additionally, and also as a matter of administrative necessity, the PJ of the CCCasablanca has created the position of designated settlement judge who is dedicated to handling commercial lease forfeiture cases. The relevant statute specifically allows the PJ to intervene to settle these matters. This *juge consiliateur* receives approximately 2,800 cases per year. For the six month period of January through June of 2007, the CCCasablanca settlement judge settled approximately half of that number of cases, while returning an equal number back to the court docket for resolution. Altogether, 3.55% of the entire case load of the CCCasablanca was settled in 2006, the average being 4.22% for all commercial jurisdictions. These creative administrative solutions, although helpful, do not offer the benefits of standardized mediation services. Nor do they apply to most cases managed by the Commercial Courts.

### Cases Settled in the Commercial Courts -- 2006 (MOJ)

<b>Commercial Court</b>	<b>Judgments</b>	<b>Cases Settled</b>	<b>Percentage of Cases Settled</b>
Casablanca	71,661	2,544	3.55%
Rabat	14,958	1,059	7.08%
Fes	6,260	442	7.06%
Meknes	4,056	219	5.40%
Tanger	5,167	201	3.89%
Oujda	2,380	80	3.44%
Marrakech	5,833	196	3.36%
Agadir	5,985	164	2.74%
<b>Total</b>	<b>116,300</b>	<b>4,905</b>	<b>4.22%</b>

#### **The Courts of General Jurisdiction**

By definition, the Courts of General Jurisdiction (“First Instance Courts” or CGJ) receive all civil matters that are not subsumed under the jurisdictions of other courts, regardless of the amount in controversy. The CGJ therefore receives all commercially related cases that do not meet the jurisdictional requirements of the Commercial Courts. These reflect cases that fall below the required minimum amount in controversy of 20,000 DH or do not involve a “commercial act.” Unlike the Commercial Courts, parties in the CGJ are not required to be represented by counsel. Due to the relatively small amounts in contest in the CGJ and the fact that attorneys charge fees based on the amount in dispute, very few parties in the CGJ are represented by attorneys.

Discussions with the CGJ of Rabat reveal a strong desire to engage a formal process of in-court settlement and mediation that would address all cases regarded amenable to mediation. These are said to include: (1) Real estate sales cases of which approximately 800 are received each year in the Rabat CGJ, (2) unlawful detainer eviction cases which comprise approximately of 15% of the court’s entire case load, (3) medical malpractice cases, (4) contract cases, and (5) “expedited cases” defined by a 1980 law as involving amounts in controversy under 2,000 DH.<sup>16</sup> The Rabat CGJ does not believe that simple collection cases are amenable to settlement because they are cut-and-dried issues with little controversy or room for compromise. These include cases regarding checks drawn on insufficient funds. The CGJ does not use specialized settlement judges as used by the CCCasablanca. The Rabat CGJ is open to validating and enforcing agreements that settle litigation by mediation. The court is also willing to appoint dedicated settlement judges if it were provided the human resources to do so.

### **Communal Sponsored Conciliation – *MoHtassib***

Each regional municipality or “*wilaya*” maintains the office of *MoHtassib*, a consumer affairs monitor who settles small claims brought against non-regulated tradesmen by using an *ad hoc* method of claim settlement. The *MoHtassib* of Rabat settled 731 cases for the period 2001 to 2006 at a rate of almost 50%. Only 8% were referred to the Court of General Jurisdiction for resolution. The remaining 625 cases were referred to the proper licensing authority of the tradesmen whose accounts were in dispute.<sup>17</sup> The process is speedy and without cost, although no confidentiality attaches. But for the services of the *MoHtassib*, these cases would be absorbed by the CGJ.<sup>18</sup>

### **Private Mediation Services Among Supporting Institutions Are Weak**

#### **The Moroccan Chambers of Commerce**

The Chambers of Commerce are rarely used for any form of ADR. The Chamber of Commerce and Industry and Services of Casablanca (CCISC) began to offer arbitration services in May of 2003. It has hosted only a single case in April of 2005. Likewise, the Center for International Mediation and Arbitration (CIMAR) of the Chamber of Commerce of Rabat began its ADR services in 2001. CIMAR has hosted 19 arbitrations, and only one within the past two years. Of these, eight dealt with financing agreements, seven with commercial issues, two with real estate, and two with general contract issues. The Chamber of Commerce of Marrakech lists as one of its components the Center for Arbitration and Settlement of Marrakech, but apparently no such entity exists and no services by that name are known to have been provided.

To its credit, CIMAR promotes precise criteria for its mediators and arbitrators who must be a licensed professional, attorney, judge, or the principal of a business with seven years’ experience in their field if the candidate holds a professional degree. Absent a professional degree, the candidate must have at least 10 years’ experience in his or her field. CIMAR imposes an age requirement of at least 36 years old. CIMAR imposes no requirement of training in arbitration or mediation techniques.

#### **The International Chamber of Commerce**

The ICC of Morocco has hosted no ADR services within the past year. Parties and their counsel opt for submitting contractually compelled arbitration cases to the ICC in Paris

due to a general lack of confidence in ADR solutions in Morocco. Much of the problem may be attributed to the notorious reputation that arbitration has earned as a result of the *Alstom Affair*.

*THE ALSTOM AFFAIR. In 2004, a Moroccan building company exercised its right to binding arbitration under a contract for construction services provided by Alstom of France. The arbitration was heard by a panel of two local arbitrators wherein a demand for 7 million DH in contract damages terminated in an award of 43 million DH based largely on punitive damages. The aggrieved party claimed that Alstom demonstrated bad faith by threatening to abandon the project and repatriate to France unless it was paid according to its version of terms in dispute. The arbitration clause allowed the arbitrators to both adjudicate the merits of the claim and to interpret the terms of the arbitration contract. The Commercial Court of Casablanca upheld the award under the rationale that the arbitrators had the power to award punitive damages according to the arbitration agreement. Inasmuch as the clause did not bar punitive damages, the award was upheld. The case received wide exposure and continues to be generally cited as proof of the dangers of arbitration when used by large companies.*

### **The CGEM**

Although the CGEM provides referrals for arbitration services, they have mediated only about 40 disputes since their inception in 1947. In late 2006, the CGEM formed a Mediation Rules Committee. The formation of this committee is in anticipation of the need among its entrepreneurial membership for guidance on the new ADR law of July 2007, and possible cooperation with the IFC under a recently signed memorandum of agreement.

### **FMAEX**

The only supporting institution that seems to be actively engaged in mediation and settlement of commercial disputes at this time is the membership of FMAEX. FMAEX, however, is not held out as a mediation service. Although no figures are available on their activities, some FMAEX members receive requests from parties who are in pre-litigation disputes. They also receive informal referrals from the Commercial Courts. FMAEX members have the advantage of enjoying a reputation of impartiality and competency in their various fields of expertise. FMAEX members are also familiar with the court process. This allows them to regularly interact with the courts to assure that cases they handle are settled conclusively and that settlement agreements and judgments prepared by FMAEX members are easily executed in the event of breach.

## **The Current Legal and Regulatory Framework Does Not Adequately Support Mediated Dispute Resolution**

In July of 2007, the Moroccan Parliament passed a law amending the Code of Civil Procedure to include provisions for contractual mediation. The law has not been promulgated as of the date of this writing. Law No. 08-05 is the only occurrence of any legal or regulatory mention of mediation in the whole body of Moroccan law, notwithstanding a long cultural tradition of dispute resolution in Morocco. An examination of the legal and regulatory framework does, however, reveal scattered mention of various forms of *conciliation* and settlement.

### **Traditional Means of Dispute Resolution in Morocco**

Although formal mediation is relatively unknown in Morocco, Moroccan culture is deeply rooted in the assisted reconciliation of disputes. Traditionally, a community based tribal leader, the “*sharif*”, resolved local conflicts without the force of law. Decisions were followed out of respect for the *sharif*'s position. Informal conciliation was also used to resolve family and neighbor conflicts through a third party. Religious leaders, *imams*, would also intervene under specific Koranic authority to settle disputes.

In the case of family disputes, representatives of the husband's and wife's families would meet to reconcile conflicts. This traditional form of mediation survives today in the new Moroccan family code, the *Moudawana*. The code has its roots in the Koran which encourages the settlement of disputes in family matters.

Traditional means of dispute resolution in Morocco have for the most part disappeared due to the imposition of foreign systems of justice. Urbanization has also rendered local neighborhood mediators obsolete. The culture at large nevertheless remains open to reviving mediation and reconciliation as a primary means of resolving disputes outside the courts.

### **The Hierarchy of Legal Authority**

*Dispelling Myths of the Napoleonic Code.* International observers frequently comment that Morocco's legal structure is a straight-jacket that frustrates the efficient administration of government because it is rooted in French Napoleonic Code. The assumption is that government officials, including judges, may not exercise discretion when dispatching justice unless specific black letter law gives them permission to do so. This is

observed to be a distinction between the Napoleonic Code system and the Anglo-Saxon system of justice which relies on precedence, not code, for judicial authority to do justice. This analysis is simplistic and naïve. It does not reflect the reality of judicial practice in Morocco's civil code jurisdiction. For example, rulings of the Moroccan Supreme Court are binding as precedent on the Courts of Appeal.

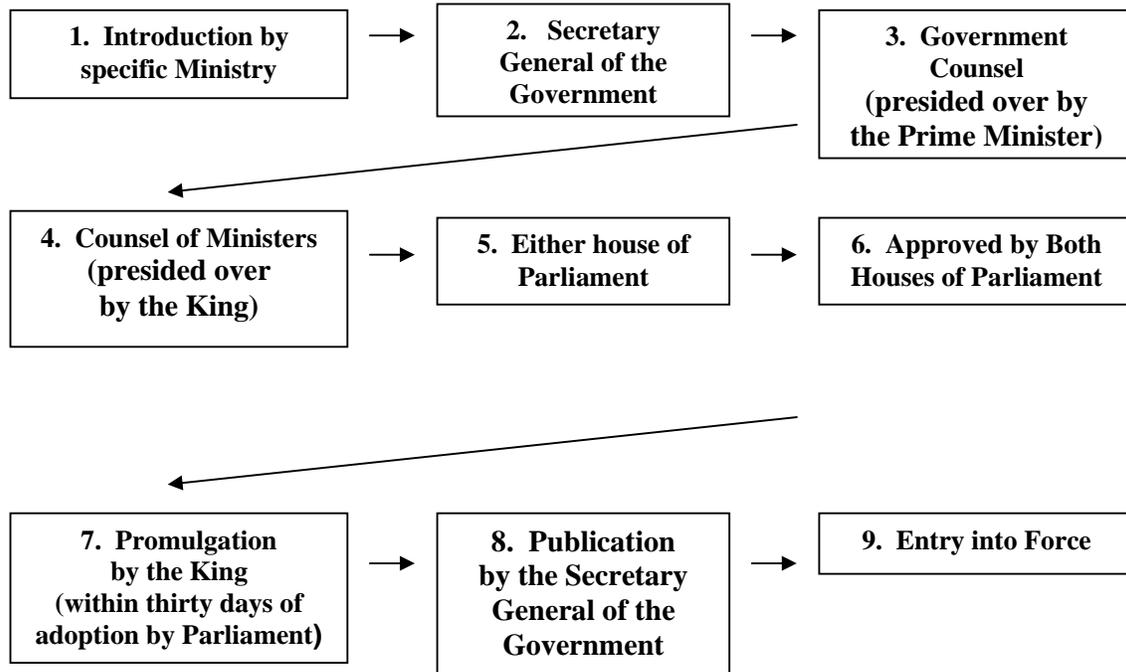
From an historical standpoint, the French Napoleonic Code was a formula created to dictate constraints rather than define rights. Its export to Morocco in 1916 was alien to Koranic *sharia* law and tribal custom. These methods of governance have been in competition with the Napoleonic Code since its inception. With Morocco's independence in 1956 and subsequent movements to Arabize the Moroccan judicial system, the Napoleonic Code has been diluted. It survives today as only one of many avenues of governance that may be exercised in the Moroccan courts. Legislated code, while a powerful index for the management of the courts, is not the exclusive means by which justice is administered.

***The Royal Decree (“dahir”).*** A Royal Decree promulgated by the King carries more authority than any other form of law or regulation in Morocco. The King may originate the substantive law contained in a Royal Decree, or issue a Royal Decree in promulgation of a legislated act originated by the Parliament as is required by the Constitution. The Royal Cabinet consists of eight members who act as the King's personal counselors.<sup>19</sup> These counselors manage and advise the King on all aspects of governing the Kingdom including the promulgation of Royal Decrees. Among the several sources of legal and administrative authority, a Royal Decree is executed without equivocation, subject only to the supplemental explanatory dictées of the office of the Prime Minister and the various ministries. Royal Decrees have no basis in the Napoleonic Code.

***Legislation.*** Morocco's Constitution calls for a bicameral legislature consisting of a Chamber of Councilors (upper house) and Chamber of Representatives (lower house). Legislation may be introduced directly by political parties through a committee system. The vast majority of legislation, however, is introduced by a sponsoring ministry.

The sponsoring ministry submits its proposed law or “*projet de loi*” to the Secretary General of the Government (SGG), the legal advisor to the King and the government. The SGG then manages the legislative process through passage, promulgation by the King, and entry into force. A legislated law becomes effective upon publication in the Official Bulletin.

## The Legislative Process in Morocco



**Executive Order (*décret d'application*).** Executive Orders are issued by the office of the Prime Minister. These are initiated by the various ministries, Parliament, or interest groups who approach the Prime Minister's office directly. An Executive Order is directed to the ministry responsible for its subject matter as guidance on how to administer a specific law, be it legislation or a Royal Decree.

**Administrative Directive (*arrêté*).** Administrative Directives issue from the ministry level to the various offices and bureaus charged with the first-line administration of a specific law. Although they do not have the strength of a Royal Decree, law or an Executive Order, they are respected and followed. Administrative Directives have the advantage of being crafted to implement a specific remedy for administrative problems as they arise in the real life course of executing laws. Because they are narrowly tailored in nature, they can be very effective in ameliorating inefficiencies such as issues of delay or conflicts in procedures. Administrators in all offices of the Moroccan government are aware of, and regularly consult the accumulated body of circulars (*circulaires*) containing Administrative Directives that pertain to their individual function.

**Inherent Administrative Discretion.** It is a truism that all government administrators have some degree of discretion to accomplish the tasks defined by their position. In an environment rife with systemic dysfunction, the administrator becomes the "legislator of last

resort” by exercising pragmatic solutions to problems as they arise. Administrative discretion has been exercised liberally, although carefully, by the Presiding Judges of the Commercial Courts who are responsible for efficient court administration under very dire circumstances.

In the case of the CCCasablanca, the PJ created the position of a dedicated settlement judge to handle commercial lease forfeitures because it made sense to do so. No law, Executive Order or Administrative Directive, however, calls for the creation of the position of settlement judge. Nor does any express authority allow for the delegation of settlement duties to such a magistrate when the law actually calls for the PJ himself to do the job. Administrative prerogative has also given rise to “informal mediation” of litigated disputes without statutory sanction.

It is common practice in the Commercial Courts for the PJ to informally attempt to settle matters in the presence of parties and counsel. The practice targets cases wherein the track record of a particular case profile indicates a good possibility of settlement and the parties are open to resolving their dispute. As well, the PJ frequently suggests to counsel and parties informally that they might consider consulting a specific judicial expert who is known to specialize in and settle cases of the sort concerned. Neither in-court informal settlement of cases at large, nor informal outside referrals is specifically called for in any law.

When queried as to their authority to exercise these remedies, PJs cite their inherent responsibility as the administrator of the courts to dispatch justice quickly and efficiently. As one PJ aptly stated, “If the law is silent and the act is not forbidden, I do what is necessary within my role as administrator of the court.” The MOJ supports this approach to pragmatic problem-solving at the court administrative level.

*CASE IN POINT – THE CASABLANCA SETTLEMENT JUDGE. In 2002, the Commercial Court of Casablanca experienced a backlog of cases. The Dahir of 1955 Article 28 addressing the forfeiture of commercial leases calls for the Presiding Judge to attempt settlement. The Presiding Judge appointed a Settlement Judge dedicated solely to the dispatch of these cases. The Presiding Judge automatically assigns all of these cases to the Settlement Judge. As of this date, the Casablanca Settlement Judge receives approximately 2,800 cases per year and settles half of them. Cases not settled are returned to the court docket. In the event of settlement, the Settlement Judge drafts a stipulated judgment which is signed by the parties and their attorneys, enters it into the court record, and dismisses the case. The Presiding Judge also directs to a specialized settlement judge cases that involve the repossession of automobiles wherein a written contract requires an attempt at reconciliation.*

## **A Survey of Relevant Laws**

***Commercial Lease Forfeiture Law.*** Article 28 of the Royal Decree of 1955 requires the Presiding Judge of any court to attempt to settle matters pertaining to the forfeiture of commercial leases whether the forfeiture is requested by a tenant, or a landlord seeking an eviction order.<sup>20</sup> Approximately 3,000 commercial forfeiture lease cases are entertained in the CCCasablanca every year. Of those, approximately half are successfully settled by the PJ or his Settlement Judge delegate.

***Bankruptcy Reorganization.*** The Code of Civil Procedure calls for the PJ of the Commercial Court to appoint a mediator for a three-month term to settle debts between creditors and corporate debtors in bankruptcy reorganization proceedings.<sup>21</sup> Approximately 5% of all cases settled in the CCCasablanca are of this type.<sup>22</sup> These approximated 125 cases in 2006. The PJ appoints a mediator from any source he wishes. The MOJ provides a list of approved experts for this purpose. The CCCasablanca uses members from the Association of Court Appointed Trustees, a FMAEX member. These are primarily accounting and banking experts.

***Marital Dissolution.*** The Moroccan Family Code (“*Moudawana*”) empowers a family court judge to engage a panel of two arbitrators who may be family members to attempt to settle a marital dissolution action. In the event of reconciliation, the court is required to enter and execute the terms of any settlement agreement that is signed by the parties and the arbitrators.<sup>23</sup> Approximately 18% of all marital dissolution cases submitted to the family court terminate in a compromised judgment (*conciliation*).

***Professional Monitor - MoHtassib.*** By Royal Decree of 1982,<sup>24</sup> representatives of local tradesmen whose professions are *not licensed or regulated* elect a professional monitor (*MoHtassib*) to receive and dispatch complaints by consumers against them. These include, for example, building subcontractors, painters, plumbers, auto repair shops and small merchants (*hanutes*). Due to the consumer public’s lack of familiarity with the details of the Royal Decree, approximately one-half of the cases submitted to the Professional Monitor are without jurisdiction because they are mistakenly brought against licensed and regulated professionals. These cases are referred to the appropriate regulating body.

Substantially all of the authorized cases are settled. The Professional Monitor enters minutes of the settlement into a file which is not kept confidential. The few cases that do not settle are referred to the Court of General Jurisdiction for resolution. Submission to the jurisdiction of the Professional Monitor is voluntary; however, the monitor may not receive cases, even upon stipulation, that exceed 100,000 DH.

**Collective Bargaining Labor Cases.** Article 41 of the Moroccan Labor Code allows for reconciliation of collective bargaining labor disputes. According to interviews with various PJs of the Commercial Courts, this code is rarely used in the context of commercial litigation. On the other hand, external mediation of collective bargaining disputes has been handled by the CGEM and is appropriate for intervention by the local *wilaya* when the dispute may have an adverse impact on the local economy. No specific method of formal mediation, however, is defined or employed in the dispatch of collective bargaining cases.

**Contractual Settlement.** Title 9 of the Moroccan Contracts Code recognizes contracts of settlement to prevent or terminate contract disputes ("*transaction*"). This code section is frequently exercised by the courts and is mentioned in statutes as the sub-authority for enforcing waivers and settlement agreements. The new ADR law of July 2007 specifically invokes this component of the Moroccan Contracts Code.

### **New ADR Legislation**

On July 24, 2007, the Moroccan Parliament passed ADR related legislation that focused largely on arbitration.<sup>25</sup> The provisions of Law 08.05 are substantially pared down from various proposals submitted by the sponsoring agency, the Ministry of Justice. The MOJ-DECM played a major role in drafting the legislation. It also made a valiant, although failed effort to include text requiring a compulsory attempt to mediate all cases with amounts in controversy of less 5,000 DH as a precondition to court jurisdiction.<sup>26</sup> The SGG also played a critical role. The SGG, as manager of the legislative process in general, participated in the preparation of the arbitration portion of the text and managed the legislation to assure introduction of the mediation provisions. The SGG's support, along with that of the MOJ, will be needed to assist in any legal, regulatory or major institutional steps taken to further promote ADR.

The new law, which focuses on private agreements to mediate, does not define mediation. This is significant because references to mediation are otherwise absent in the entirety of Moroccan law. The text does, however, define a mediation agreement as an enforceable contract whereby the parties agree to nominate a mediator whose mission is to facilitate the formation of a contract to terminate current or future litigation ("*transaction*"). Some of the major features of the law are:

- The ability to agree to mediation after the initiation of litigation, denoted a "mediation compromise."

- The recognition of a contractual requirement to mediate, denoted a “mediation clause.”
- A stay of court proceedings in the event either party seeks to enforce a mediation compromise or a mediation clause.
- The requirement of a writing bearing the signature of the parties, or competent extrinsic evidence of a mediation agreement.
- The requirement that the mediation agreement identify the contract to which it applies, or in the case of a mediation compromise, the relevant litigation.
- The requirement that a mediation compromise include the nomination of a specific mediator or provide for nominating procedures.
- The denial of jurisdiction to the court hosting any pending litigation until the mediation is concluded or an agreement for mediation is cancelled.
- A three-month time limit for concluding mediation after the mediator is appointed unless otherwise extended by agreement.
- A requirement of confidentiality by the mediator under threat of criminal sanctions under the Penal Code section relating to professional confidentiality.
- A bar against presenting findings or statements to the judge overseeing relevant litigation or in any other legal proceeding without the parties’ consent.
- A bar against requiring special qualifications for the mediator who may be any individual or business entity.
- The requirement that a breached settlement agreement be submitted for enforcement by a court, and that it carry the binding force of *res adjudicata* in both the lower court and on appeal.

The absence of references to mediation in any other Moroccan law, and a lack of defining terms in the new code, leave much to interpretation and perhaps even disagreement. The absence of strict and clear definitions of the means and procedures for mediation also opens the door for legislative enhancements such as Executive Orders and Administrative Directives. It also invites PJs to exercise administrative prerogative as they see fit. Finally, the lack of precision suggests that Law 08.05 may be the first in a series of ADR related bills to go before the Moroccan Parliament over time as may be indicated by lessons learned from field experiences in its implementation.

## **RECOMMENDATIONS**

### **Create an Institutional Capacity for Commercial Mediation**

#### **Implement a Pilot Mediation Program in the Private Sector**

A private sector pilot program should be created based on one of four alternative models:

*1. Network of IFC Certified Mediators.*<sup>27</sup> The IFC should formalize a non-exclusive relationship with the network of 2,000 FMAEX judicial experts to serve as a provisional national network for mediation services nationwide. In addition to their current services as judicial experts, FMAEX members would continue to receive clients in conflict through formal and informal referrals from their local courts, and receive parties directly from the private sector who seek help independent of litigation. Upon completing an IFC certification program, the experts would be branded “IFC-Certified” and be permitted to hold themselves out as mediation professionals affiliated with an IFC sanctioned program.

The mediators would use their own professional offices, already established to support their own professions, as the location of delivery of mediation services. Each certified mediator would be given the opportunity to have his or her office certified as an “IFC Mediation Center” if the location meets qualifying criteria. These may include consideration of whether the office enjoys a convenient location, provides adequate facilities such as meeting rooms, and employs a full-time receptionist. These resources would coincide with those used by the mediator in his or her separate professional practice.

Concurrently with the immediate engagement of the FMAEX network, professionals other than judicial experts, be they individuals or associations, should be invited into the certification process as certified mediators and mediation centers through their corresponding networks. These might include local bar associations, individual attorneys, heads of business enterprises, professional associations, Chambers of Commerce, RICs, the CGEM, and academic institutions such as law schools and business schools.<sup>28</sup>

A designated office to coordinate the network, perhaps one of the IFC certified mediation centers, one of the RICs, or the Business Center at Al Akhawayn University would operate primarily as an exchange of information and referrals. It would eventually host a small training and mediation facility for use by certified mediators in need of a mediation location. The center would also serve as a site for international mediations when facilities are

otherwise lacking. Coordination services should first be implemented on a pilot basis through a private sector association that has the capacity to do so such as the CGEM, and then as a stand alone operation.

The ultimate support organism for the national network of Moroccan certified mediators would be a free standing Moroccan non-profit corporation (*association*) much like any other Moroccan professional association. Once the organization is developed, this Association of Certified Moroccan Mediators would be supported financially by its own membership, with only temporary support from donor agencies and NGOs. The Association itself could become a member of other federations such as the CGEM or FMAEX. Inasmuch as the association would serve primarily as an information exchange, overhead should be minimal.

#### ADVANTAGES

- Exploits pre-existing network of judicially recognized experts and other professionals, and their professional office locations.
- Can be implemented immediately.
- Uses judicial experts who are highly regarded as impartial and competent, the two major characteristics sought by the private sector.
- Engages a cogent group of legal professionals who are in regular contact with and are well known by the courts.
- Benefits from the legal know how of judicial experts who interact procedurally with laws, rules, and court regulations when settling litigation matters.
- Engages judicial professionals who are already *de facto* providing mediation services on a regular basis.
- Financially sustainable.
- Nationwide coverage.

#### DISADVANTAGES

- Requires creation of a centralized capacity to coordinate mediation activities, training and certification.
- Would first be dominated by the judicial expert community, although open to any qualifying individual or association.

**2. *Stand Alone Mediation Center.*** As opposed to co-opting a pre-existing network, another alternative might see the creation of a single stand alone mediation center organized as a non-profit association. The likely location for the mediation center would be Casablanca inasmuch as Casablanca is Morocco's domestic and international commercial hub. The center would provide all services related to mediation: Mediation facilities, outreach and information, training facilities, and a referral exchange.

#### ADVANTAGES

- Provides comprehensive resources in a single location.
- High-profile geographical presence.

#### DISADVANTAGES

- Lack of accessibility to parties and mediators at locations distant from Casablanca.
- Questionable sustainability due to expenses associated with supporting a single full-service mediation center for the entire country.

**3. *Mediation Center Hosted by an Existing Entity.*** This model would engage a currently operating entity or association to host an IFC-supported mediation center. The primary candidate would appear to be the CGEM. This would require the entity to provide, maintain and support the same complement of services and resources offered by the centralized center described above. Alternatively, the local Chambers of Commerce, RICs and academic institutions might also be appropriate candidates.

#### ADVANTAGES

- Uses pre-existing administrative infrastructure.
- In the case of the CGEM, provides immediate availability and access to business clientele.

#### DISADVANTAGES

- Host entities not regarded as neutral.

- Questionable sustainability due to expenses associated with operating a single full-service mediation center for the entire country.

**4. Network of Mediation Centers.**<sup>29</sup> A fourth solution might be to combine a decentralized network of mediation facilities with the network of independent mediators described above. The centers would be hosted by various supporting institutions such as the CGEM, local Chambers of Commerce, local bar associations, RICs, and academic institutions as may best serve the mediators in the immediate locale. The centers would be distributed throughout the Kingdom thereby serving the interests of each local entrepreneurial community.

#### ADVANTAGES

- Uses pre-existing administrative infrastructure of local institutions.
- Provides services distributed across geographical regions.
- Exploits the advantages of pre-existing professional networks such as FMAEX, CGEM and bar associations.
- Financially sustainable.

#### DISADVANTAGES

- Some centers may not be regarded as neutral.

### **Concurrently Support Court-Annexed Mediation Pilots and Referrals**

Any effort to institutionalize mediation in Morocco must provide a support mechanism that is interactive with the courts. Arguably, the courts are the primary beneficiary of extra-judicial dispute resolution because case loads will be reduced. It is the administrative pressure of case load management that has spontaneously created settlement and mediation pilots in the CCCasablanca under the discretionary authority of the Presiding Judge. These experiments should be supported, proliferated throughout the entire court system, and supplemented with new ideas. They would include the creation of dedicated settlement judges in each of the Commercial Courts.

By way of consciousness-raising efforts, judicial administrators would likely adopt the system already implemented in the CCCasablanca. Specialized settlement judges would immediately undertake to settle cases wherein the law expressly allows intervention by the

court to do so. These would be the settlement of cases involving the forfeiture of commercial leases, bankruptcy reorganization cases, automobile repossession cases wherein a requirement to attempt settlement is made part of the finance contract, and settlement of statutorily expedited cases in the CGJ.

With the authority of the MOJ-DECM, experimental pilots for referral of real estate sales and unlawful detainer cases in the CGJ should also be encouraged, perhaps by Administrative Directive or less formal means. Experimental pilots in the Commercial Courts should also be promoted to allow all cases with relatively low amounts in controversy to be referred to a designated in-court settlement judge. PJs of the Commercial Courts should also be freed to refer more complex cases, in their discretion, to outside mediation sources such as FMAEX experts in a transparent and systematic manner. In general, adjustment of court administrated practices should result in a referral source for the private sector mediation networks.

### **Create Advisory Component**

An advisory component should be created to oversee and coordinate efforts to execute tasks related to institutionalizing mediation in general. This might take a two-tier structure comprised of an advisory board and a steering committee. The advisory board members might include a few major stakeholders such as the IFC, MOJ, USAID, CGEM, and a legal advisor to the King. The advisory board would manage major policy and planning issues. The steering committee would have a broader base and include organizations more directly involved in the implementation process such as the Commercial Court of Casablanca, Commercial Court of Appeal of Casablanca, Casablanca Bar Association, ICC and FMAEX.

### **Create a Resource of Competent and Reputable Mediators**

The overwhelming consensus among stakeholders is that mediation is not exercised in Morocco because entrepreneurs do not have confidence in the competency or integrity of neutrals who would mediate a commercial dispute. A resource of competent and reputable mediators must be created as a pillar of any attempt to institutionalize mediation services by way of the following tasks:

*Identify and Recruit the Mediator Pool.* Candidacy for training and certification of mediators should remain open to all. Monopolies and cartels should be avoided. This said, however, some obvious professional resources should be tapped. FMAEX is the largest organized resource of certified professionals who have been engaging in both court-annexed

and independent mediation for years. Generally, with regard to competency, they are experts in their field of subject matter who have hands-on mediation experience. No other professional group exhibits such pre-qualification attributes of a certified mediator. Other professional resources are business leaders, attorneys, judges and Professional Monitors. The campaign to recruit certified mediators should be widely publicized.

***Train and Certify Mediators in Best International Practices.*** A comprehensive training effort should be launched to train mediators in practices that take into account not only mediation methodology but also professional conduct. Of particular concern is confidentiality. Standards should also define the means by which certified mediators will be compensated.<sup>30</sup>

The current trend of linking professional fees to a percentage of the amount in controversy should be avoided. A fee structure based on time should be suggested. Under this paradigm, a certified mediator, in consultation with the parties and their attorneys, estimates the number of days to dispatch a case before an assignment is accepted. The fee, based on a daily rate, is paid in advance. The certified mediator should be permitted to set his or her own daily rate. Mediators should also be trained in the drafting of both mediation and settlement agreements.

The key to gaining the confidence of entrepreneurs in a mediation process is the successful avoidance of litigation. In the event of breach of a mediation settlement agreement, the settlement document should contain devices allowing the agreement's expedited acknowledgement and enforcement by the courts. Accordingly, mediators must be trained in the use of settlement language. Settlement clauses should call for the immediate entry of a stipulated judgment against the breaching party, identification of assets subject to enforcement of the judgment, and the immediate seizure and sale of property and distribution of its proceeds to the aggrieved party.<sup>31</sup>

***Strengthen Capacity of the Commercial Court Bench.*** The Commercial Court bench should be included in any mediation training program. The PJs who are charged with mediating specific cases such as commercial lease forfeiture cases and bankruptcy reorganizations are obvious candidates. First level magistrates designated as settlement specialists should also be included. By virtue of the administrative structure of the MOJ, the ISM is the exclusive implementer of training programs for judges in Morocco. The ISM does so, however, in cooperation with the MOJ-DECM. The ISM would therefore be a likely partner in any program to train the judiciary.

***Engage the Moroccan Bar in the Mediation Process.*** The Moroccan Bar, although somewhat resistant to the idea of mediation, must be incorporated as an active participant. For the moment, the bar is skeptical if not vocally critical of the mediation of commercial disputes. Attorneys see themselves disenfranchised from the process and in competition with those who would resolve disputes from which they make a livelihood. Nevertheless, some attorneys express openness to the mediation process, especially in light of the new ADR legislation.

A strong awareness-raising campaign should be launched to inform the Moroccan Bar of the details of the new ADR law and new market opportunities for their practice. Certification as a mediator should be promoted as a ground-floor opportunity for attorneys who wish to expand the scope of their services especially in an environment where mediators are rare. They should also be made to understand that attorneys who solve their clients' problems with effective dispatch will gain prominence and recognition. Attorneys should also be invited to have their own offices certified as IFC Certified Mediation Centers by sharing with them the vision for a commercially viable mediation network throughout Morocco.

***Standardize the Mediation Profession.*** The mediation profession in general should be standardized following best international practices. All certified mediators should be required to submit in writing to a set of rules of professional conduct that address ethics and competency. The standards should encourage formal training in mediation techniques as well as fair billing practices.

Model contracts should be created for use by certified mediators that include: (1) An engagement letter defining the contractual relationship between the mediator and clients, (2) a model settlement agreement that documents the conclusion of a successful mediation, bearing the signatures of the parties and the mediator, (3) a standard list of clauses that might be contained in a mediation settlement agreement that are acknowledged by, and would be enforced by the courts, and (4) a list of court procedures to expedite the enforcement of a breached settlement agreement. Although mediators should be exposed to different mediation techniques, no specific mediation methodology should be required.

### **Adjust the Legal and Administrative Framework**

The entire hierarchy of legal authority in Morocco should be exercised to adjust the legal and administrative framework to accommodate commercial mediation. Target activities would include:

***Support Administrative Policy for Informal Mediation in the Courts.*** This task is two-fold: (1) Formalize what is already being done in the Commercial Courts, and (2) institute new administrative policies. By way of an Administrative Directive, the Ministry of Justice should be lobbied to issue instructions to PJs to initiate pilot programs to appoint and use specialized settlement judges. The administrative policy would follow the process already in place in the CCCasablanca. The directive should also advise PJs that, in general terms, they should make every effort to assure that parties and attorneys are aware of the resources for out-of-court mediation and settlement. This may take the form of mere informal advice. Parties should also be advised to explore the possibility of settling other cases that may be suggested by the MOJ-DECM such as automobile repossession cases, landlord-tenant disputes, and disputes with small amounts in controversy. The courts should be directed to use these methods at least with cases that are already expressly mandated by law to be settled by the PJ such as commercial lease forfeiture cases.

With regard to the new ADR legislation, the Prime Minister's office, through the MOJ, should be lobbied to issue an Executive Order within the scope of its authority to clarify application of the new ADR law. The vagueness of the new mediation legislation opens the door for such an explanatory order that would set out guidelines for its implementation. Substantial portions of the new law require interaction with the courts in any mediation process be it spawned by litigation or initiated privately. An Executive Order would clarify to the Ministry of Justice that it should undertake a number of steps to address this including:

- (1) Training judges and judicial personnel in the nature of mediation and procedures to enforce mediated settlements,
- (2) Advising and educating litigants and their attorneys as to the availability and benefits of mediation, and
- (3) Setting administrative procedures for expediting the enforcement of mediated settlements.

***Streamline the Enforcement of Mediated Agreements.*** This is a vital step in the adjustment of the legal and administrative framework. Without the ability to enforce mediated settlements, parties are faced with the same problem they had when they initiated mediation: Another breached contract. If mediation is initiated to resolve the breach of an original contract, the creation of a new settlement contract that is again breached resolves nothing. Likewise, the mediation process will not enjoy the confidence of the entrepreneurial

community unless it knows that litigation is avoided entirely, and results can be obtained swiftly and at low cost.

As contemplated by the new ADR law, a successful mediation will terminate in an agreement that must be recognized and enforced by the courts. The new law thereby provides an opportunity for the mediator and the parties to plant terms in the mediation settlement document that expedite enforcement in the event of breach. The PJs of the Commercial Courts acknowledge that they are willing to enforce such terms with the force of contract law, but warn that *the terms must be clear and specific*. Judges do not have the authority to invent settlement contract terms in aid of enforcement.

Such terms would include: (1) A clause for stipulation of immediate entry of judgment as an urgent matter against the breaching party; and (2) a stipulation for immediate seizure and sale of the breaching party's assets with immediate distribution of proceeds to the aggrieved party. These proposed contractual devices for enforcement of a mediated settlement agreement (*conditions suspensives*) should be brought to the attention of and acknowledged by the courts. They will require the official sanction of the MOJ through a clarifying Administrative Directive supported by the IFC. The MOJ should also authorize the waiver of court filing fees for requests for court acknowledgement of mediated settlement agreements and their expedited enforcement.

***Initiate the Process to Amend the New ADR Law.*** While the new ADR law is landmark legislation as regards mediation, it stands to be improved substantially. The process to strengthen the law in a form that was first proposed by the MOJ-DECM and advocated by the SGG should begin as soon as possible inasmuch as it may take years to complete. A new Parliamentary session may take a more forthright position on political platforms that emphasize judicial reform.<sup>32</sup> The scope of the new law's provisions should be expanded to compel mediation of disputes that fall below a designated level of an amount in controversy. Legislation should also recognize certified mediators as judicial experts defined by Section II of the Code of Civil Procedure.

***Recognize and Use Mediators as Judicial Experts.*** Once qualified, certified mediators and their professional associations would become a member of FMAEX and thereby achieve automatic recognition as judicial experts. This enables the courts to appoint them by using the same procedures currently used to appoint judicial experts for advice on facts related to substantive matters. Status as an expert would also legitimize mediators in the eyes of the entrepreneurial public at large.

### **Engage a High Profile Awareness Program**

In support of the campaign to institutionalize commercial mediation, the IFC should engage in a high profile awareness program that targets all stakeholders and, in particular, the business community, attorneys, and entrepreneurs. Through various NGOs such as local and international chambers of commerce and the CGEM, the business community would be made aware of how mediation works, its relationship with litigation and the courts, and its benefits. This may include seminars and workshops wherein entrepreneurs and the legal community are apprised of ways to include requirements for mediation and arbitration in business contract language. A clear distinction between mediation and arbitration should be emphasized to avoid misconceptions of unfairness that afflict the reputation of arbitration in Morocco.

A key element of instilling public confidence in competent and reputable mediation in Morocco will be brand identification. The IFC should lend its goodwill to any organized effort to publicize its program and to certify mediators and mediation centers.

### **CONCLUSION**

The consensus among both the public and private sectors is that court litigation is an uncertain, time-consuming and costly method of resolving commercial disputes. A pragmatic business community and court administrators share a common objective in steering commercial disputes away from the courts and toward mediation and settlement. Accordingly, the demand for the institutionalization of commercial mediation in Morocco is high. This calls for the creation of an institutional capacity for commercial mediation and a human resource of competent and reputable mediators. To achieve long-term sustainability of a viable commercial mediation system, a planning schedule might include:

#### **SHORT TERM**

- Establish a partnership with the nationwide network of judicially recognized experts (FMAEX) wherein its members submit to a certification program involving training and an acceptance of professional standards for mediation, while leaving candidacy open to all.
- Issue an open invitation to other professional networks such as the CGEM and bar associations to participate in the certification program.

- Obtain recognition of certified mediators as a *bona fide* judicial expert association recognized by the Commercial Courts to receive referrals.
- Sensitize the MOJ and Presiding Judges of the Commercial Courts to the availability of mediators for informal referrals.
- Promote innovative administrative techniques within the discretionary authority of the Presiding Judges of the Commercial Courts to expedite settlement and mediation of cases that is currently permitted by the legal framework (commercial lease forfeitures, bankruptcy).

#### MEDIUM TERM

- Designate a private coordinating entity to serve a nationwide network of mediators to receive and refer cases, and provide rudimentary information to the public.
- Invite certified mediators to seek certification of their professional offices for use as local IFC certified mediation centers.
- Seek Executive Orders and Administrative Directives as appropriate to expound on new ADR Law 08.05 by providing clarifying instructions for its implementation in detail. This would include directives that the PJs of the Commercial Courts and the Courts of General Jurisdiction systematically inform litigants and their attorneys of the availability of mediation outside of the courts, give priority to and expedite the enforcement of mediated settlement agreements, and submit judicial and administrative personnel to outreach and training activities.
- Initiate a public awareness program among the entrepreneurial community.

#### LONG TERM

- Promote the initiation of new legislative efforts to amend the new ADR law to formalize the prerogative of the Presiding Judges of the Commercial Courts and Courts of General Jurisdiction to freely use mediation and settlement as means of dispatching their case loads, both internally and by out-of-court referral.

- Revive the campaign to compel parties to submit to either in-court or outside mediation for matters with low amounts in controversy as a component of new legislation.
- Lend technical assistance and support to an independent association of professional Moroccan mediators to ensure its competency, integrity and financial stability.
- Lend technical assistance to assure the sustainability of the administration of private commercial mediation that offers referral services, information and outreach, mediation facilities, and training.

\* \* \* \* \*

## APPENDICES

Appendix 1: Explanatory Note – Professional Monitor <i>MoHtassib</i> .....	45
Appendix 2: Table of Matters Handled by the Professional Monitor .....	49
Appendix 3: Flow Chart of Moroccan Court Jurisdictions .....	50
Appendix 4: Comprehensive List of Activities in the CCCasablanca .....	54
Appendix 5: <i>Dahir</i> Establishing Professional Monitor <i>MoHtassib</i> .....	55
Appendix 6: <i>Dahir</i> Governing Commercial Lease Forfeitures .....	58
Appendix 7: CCP Article 553 .....	59
Appendix 8: Cases Filed and Judgments Entered in the CCCasablanca (two pages) .....	60
Appendix 9: New ADR Law Number 08-05 .....	62
Appendix 10: Persons and Entities Consulted .....	65
Appendix 11: Available Documents .....	68
Appendix 12: IFC Certified Mediator Network .....	69
Appendix 13: IFC Certified Mediation Centers .....	70

## **Appendix 1: Explanatory Note – Professional Monitor *MoHtassib***

### ***Wilaya of Rabat***

According to that article of Law 02-82 dealing with the specialization of the Professionals' Monitor, we find that the election of the Representative of the Professional Order is carried out through elections within all the craft and commercial professions. This appointment comes into force as soon as the concerned authorities approve it. For this reason, the Representative of the Professional Order is considered as a close assistant to the Professionals' Monitor when dealing with cases of resolution of conflicts. On the other hand, the Article 10 of the Law N°02-82 also specifies that the Professionals' Monitor is an authority of mediation between the parties in conflict and he is assisted by the Representative of the Professional Order. The Professionals' Monitor bases his judgement on the information given by the Representative of the Professional Order. This information is the basis of the agreement between the conflicting parties.

And based upon this, the Representative of the Professional Order is thus the first one who settles the disputes arising between the craftsmen and the workers or between the professionals themselves who in turn accept his judgement since he is a part of them, that he is the defender of the profession in addition to the fact that he is elected by them. Thus, the role of Representative of the Professional Order is a double one: First, he settles the disputes and secondly, he provides the Professionals' Monitor with the expertise that is of importance thus allowing the parties to come to an agreement.

The agreement between the parties in conflict is based upon the fact of bridging the gaps between the different points of view in so far as the dispute is concerned and through the respect of the ways and customs of the profession as well as by trying to reach an implementation of that agreement in order to solve the dispute. The agreement is generally an oral one and immediately stops the conflict. This way of doing in the field of the settlement of disputes remains a traditional one, taking into account the fact that the Representative of the Professional Order is considered to be a real master in his profession, that he knows perfectly well its rules and its techniques so much so that no room is left to transform a dispute into a problem that may later on shade on the reputation of the profession. (Any solution to the problems is brought in within the profession).

But in the case, if one of the parties does not agree with the Representative of the Professional Order's solution, the Representative of the Professional Order will submit the case to the Professionals' Monitor who will ask in his turn the Representative of the Professional Order to look at the matter and inform him of any evolution that will help to reach an agreement.

### **II- Role of the Professionals' Monitor in finding solutions to conflicts:**

In general all conflicts are taken to the Professionals' Monitor for information, and the conflicts are based upon claims from the part of the victim party, submitted orally or under a written form. Then, the Professionals' Monitor reads and studies the claims and calls in officially the conflicting parties to a convened meeting, in a fixed date in order to solve the problem. Thereafter he will open a file that gathers all the information from both the conflicting parties. The Professionals' Monitor will study the file opened in his office, and

will see if there is any precedent or if the parties have any authorization to carry out the duties of that profession.

In the presence of the conflicting parties, the Professionals' Monitor will hear them as well as the witnesses. He will also hear the Representative of the Professional Order who is responsible for finding a solution to the conflict. The Representative of the Professional Order's point of view is registered in the record that will be signed by the conflicting parties and through their signature, show their acceptance of the Representative of the Professional Order's judgement and ensure him they will follow his recommendations.

Based on what we have seen before, we can say that the Professionals' Monitor plays an important role in the resolution of the conflicts and this through his person as well as through the application of the taken resolutions. The trust and the respect the craftsmen and the industrial men and the customers put in the person of the Professionals' Monitor is what allows the success of the agreement process, acceptance and resolution of the conflict.

In spite of the difficulties in finding a solution to the conflicts, the intermediation through the Professionals' Monitor remains very easy for the nationals and simple in its procedure, compared with the judicial procedure. The latter will require lots of money and a long period of time in addition to the fact that the financial value of the case to be treated may not fall within the scope of competency of the concerned Court which obviously gives the right to the to deal with the matter. The intermediation of the Professionals' Monitor has become very important to the nationals as it has become for them the only way to be and feel protected. Thus, we are observing an acceptance from the part of the nationals of the solution given by the Professionals' Monitor to their conflicts and thus the advantages guaranteed by the record of the agreement amongst which we find:

**a. The simplicity of the intermediation procedure:**

Thus the agreement record is the official document that represents the parties' agreement and their obligation to observe these obligations. And finally, it is an agreement that ensures the end of the dispute between the parties under the honourable supervision of the Professionals' Monitor who participates in the resolution and the ending-up of the conflict existing between the parties.

Thus, the use of intermediation is very simple since it is performed based on each kind of dispute apart and claims submitted for a solution to the Representative of the Professional Order of the concerned profession so that he may give his opinion about them the fact which allows him to be confident in his decision. After that the Professionals' Monitor will gather all the elements linked with the conflicts in order to make both the parties be concerned by the importance of finding a solution and thereupon the parties agree with the judgement of the Professionals' Monitor. This judgement is written in a record that represents the agreement from the part of both parties.

**b. Gratis and without tax**

Contrarily to the Penal Procedure, the Intermediation record of the agreement is gratis and tax free so that the conflicting parts do not have to pay for it.

**c. Promptness of the action**

The record of the agreement puts an end to the conflict in a short period time, because not only it requires the good willing from both parties to put an end to the conflict by signing the record of the agreement but also because both parties are bound thereafter by the obligation of implementing its clauses.

**d. The procedures the Professionals' Monitor uses in the case one of the parties does not agree with the proposed solution.**

The Professionals' Monitor uses all the procedures available to him at hand, in order to find the right solution to the problems presented to him. This especially that, the law dealing with the speciality of the Professionals' Monitor gives the rules regarding the termination of conflicts by choice and a willingness to do so does not imply any punishment for the party who does not agree with the of the Professionals' Monitor judgement, but has left to the parties the choice to go or not to go to the Courts.

In the same case, most of the Professionals' Monitors will give a certificate about what has been decided upon in the record of the agreement in order to allow the victim party to go to the Courts.

**III- The power of the record of the agreement**

The question arises whether the record of agreement in cases of dispute, written by the Professionals' Monitor, is an official document or is simply an agreement, as it implies important and obligatory forms which allow it to be ready and true. These forms are detailed in the first paragraph of Article 11 in the Law 02-82 which states: "The agreement is registered in a record that is written by the Professionals' Monitor. The Professionals' Monitor signs it, as well as both the parties in conflict. In the case one of the parties does not know how to sign; this is specified in the record and underlined with the apposition of a finger print which is signified with the writing of the name of its proprietary..." But the judicial power having not limited the form, the contents of the record; this is left to the personal appreciation of the Professionals' Monitor who will organize the record according to the whole declarations of the conflicting parties that will allow him to come to a final agreement between them.

On the other hand, and based on Article 10, it appears out that the external forms of the agreement record make of it an official document and therefore we are in the right to ask about the legal status of the record of agreement and if it is possible for the conflicting parties who have signed it, to agree upon something which might be different.

Here, it will be necessary to define exactly the specificities of an official document as well as its nature and this in order to find out the real legal scope of the record of agreement and establish its effect as per law.

**a. Definition of the official document and the legal form of the record of agreement**

An official document is an official paper duly delivered by an official civil servant or a person in charge of the public services, within the limits of his prerogatives, and by virtue of which and in compliance with the legal rules and in the limits of his prerogatives and

specialisations, the civil servant establishes what has been set in terms by the concerned or competent persons and filled up thereupon by this official civil servant.

(no section b in original)

**Issuing of an official document from the part of a civil servant or a person in charge of a public service.**

In this case, we can analyse the legal status of the Professionals' Monitor and its position in the civil service. Article 2 of the Code of Civil Service says that: "Is considered to be a civil servant, any person who is occupant of a permanent position falling within the scope of one of the different scales pertaining to an administration belonging to the State"

Based upon that Article, we can see that the Professionals' Monitor complies with two conditions which are first of all his appointment by virtue of a Royal Decree and secondly the fact to work permanently at one service managed by the State. Nevertheless one condition remains unfilled in his case which is to be officially occupant of one of the different scales within the administration belonging to the State.

The appointment of the Professionals' Monitor comes as based by virtue of a Royal Decree; this while bearing in mind the fact that to be appointed by virtue of a Royal Decree is something that only higher civil servant benefit of as based on Article 30 of the Constitution. The Professionals' Monitor works in his specific defined territory as stipulated by virtue of the Royal Decree of Appointment, under the supervision of the Governor, according to the 1977 Royal Decree (Dahir Sharif) directives, who has Supervision on the Territorial Management of the Province or Prefecture.

## Appendix 2: Table of Matters Handled by the Professional Monitor

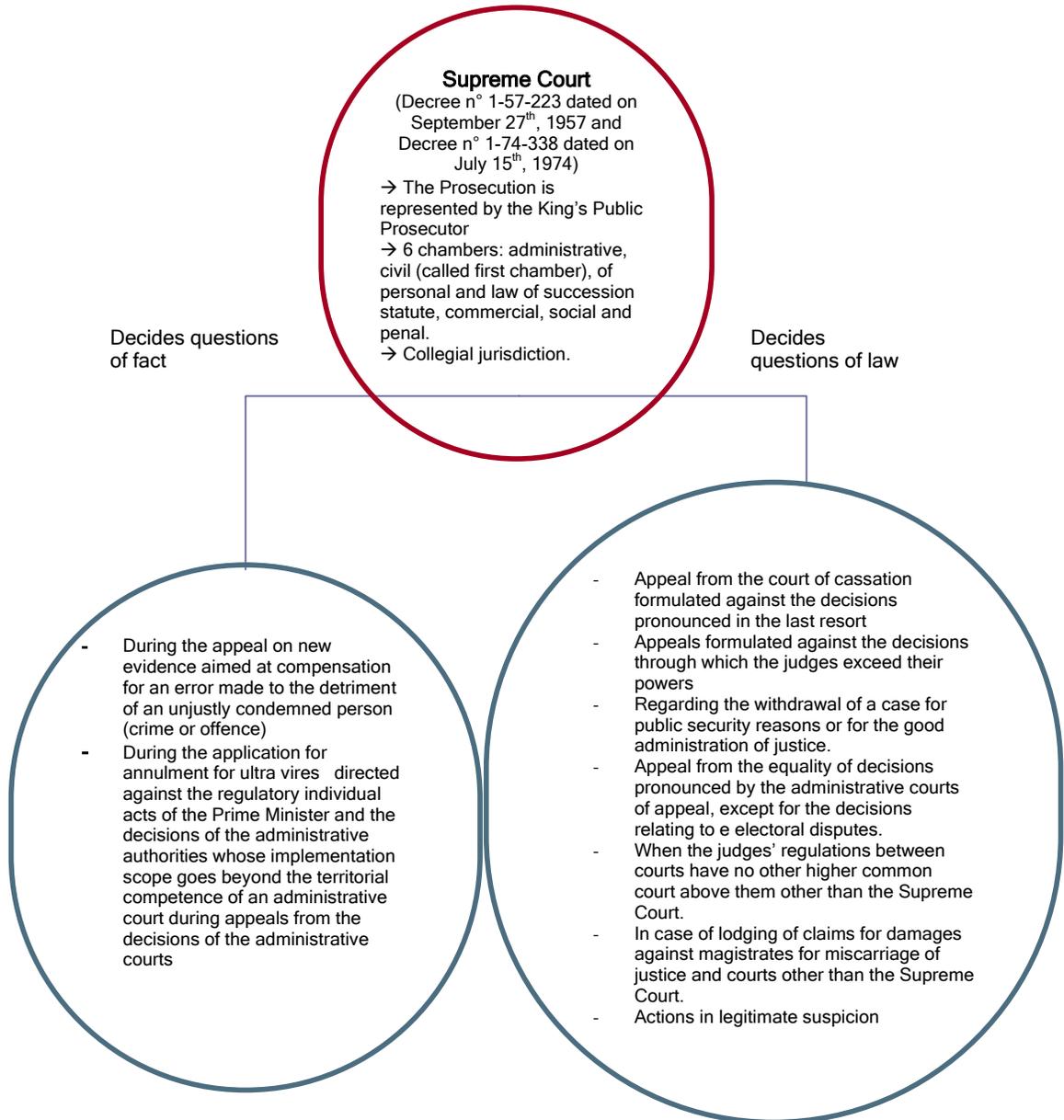
### Rabat MoHtassib 2001 – 2006

Year	Settlements	%	Referred to Licensing Authority	%	Referred to Court	%	Total
2001	128	47.06	138	50.73	6	2.21	272
2002	105	42.86	104	42.45	36	14.69	245
2003	164	56.55	118	40.69	8	2.76	290
2004	124	50.61	103	42.04	18	7.35	245
2005	116	50.22	82	35.50	33	14.28	231
2006	94	47.71	80	40.06	23	11.67	197
<b>Total</b>	<b>731</b>	<b>49.39</b>	<b>625</b>	<b>42.22</b>	<b>128</b>	<b>8.37</b>	<b>1480</b>

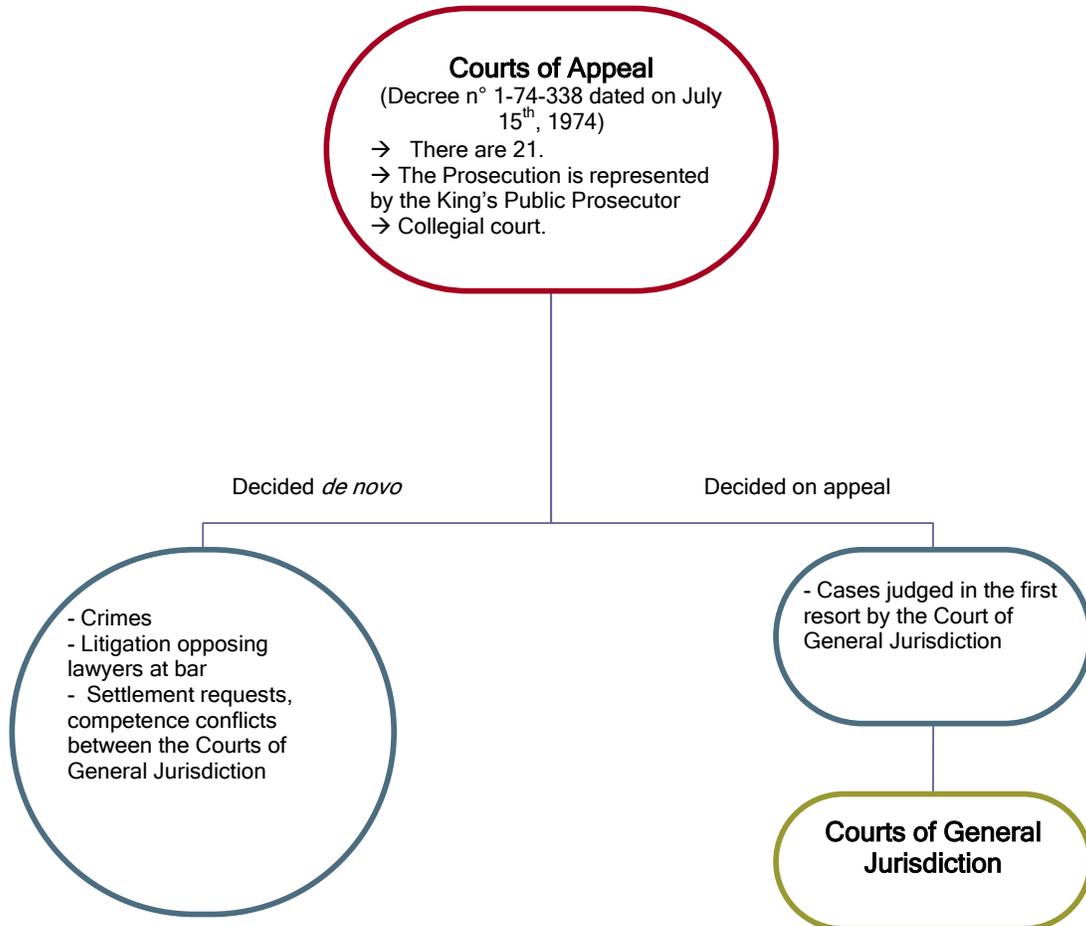
## Appendix 3: Flow Chart of Moroccan Court Jurisdictions

### COMMON LAW COURTS

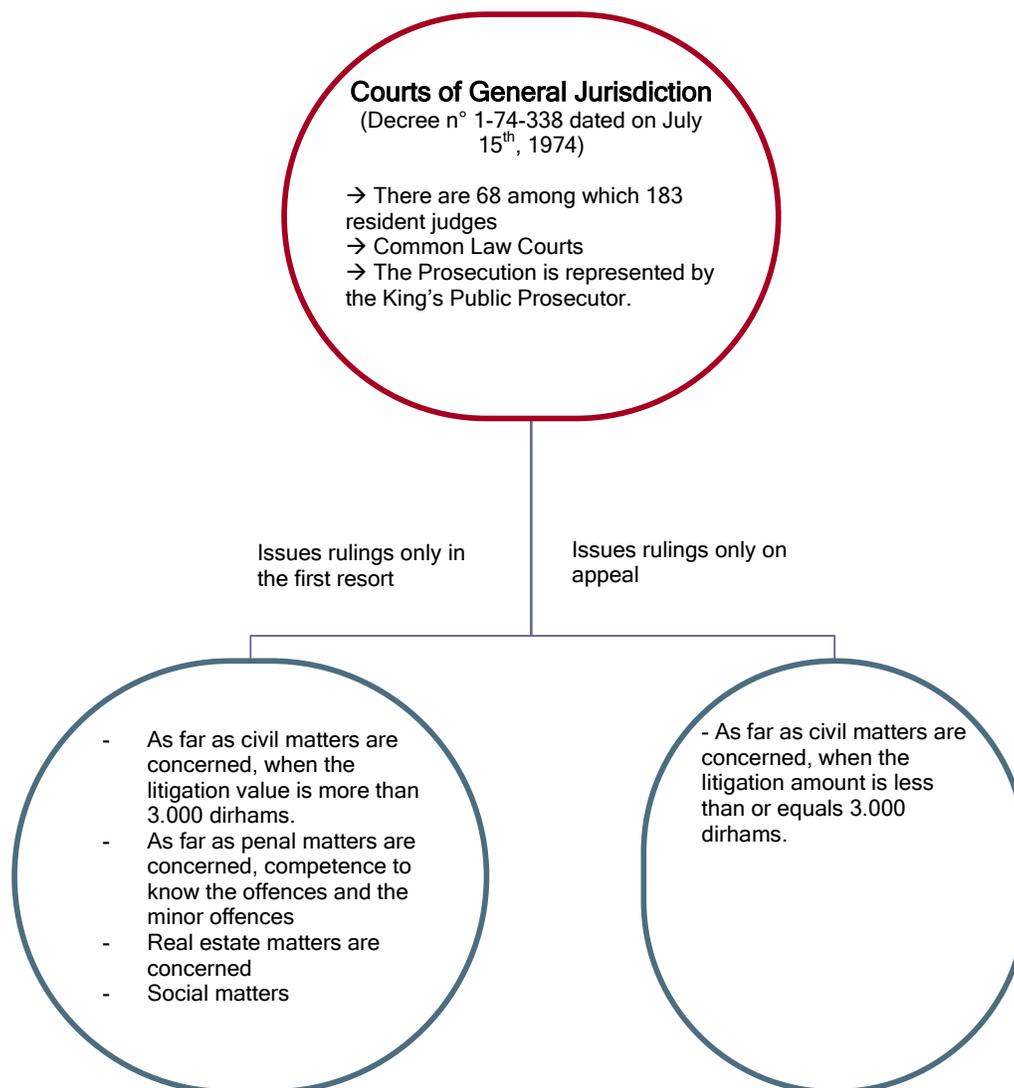
#### The Supreme Court



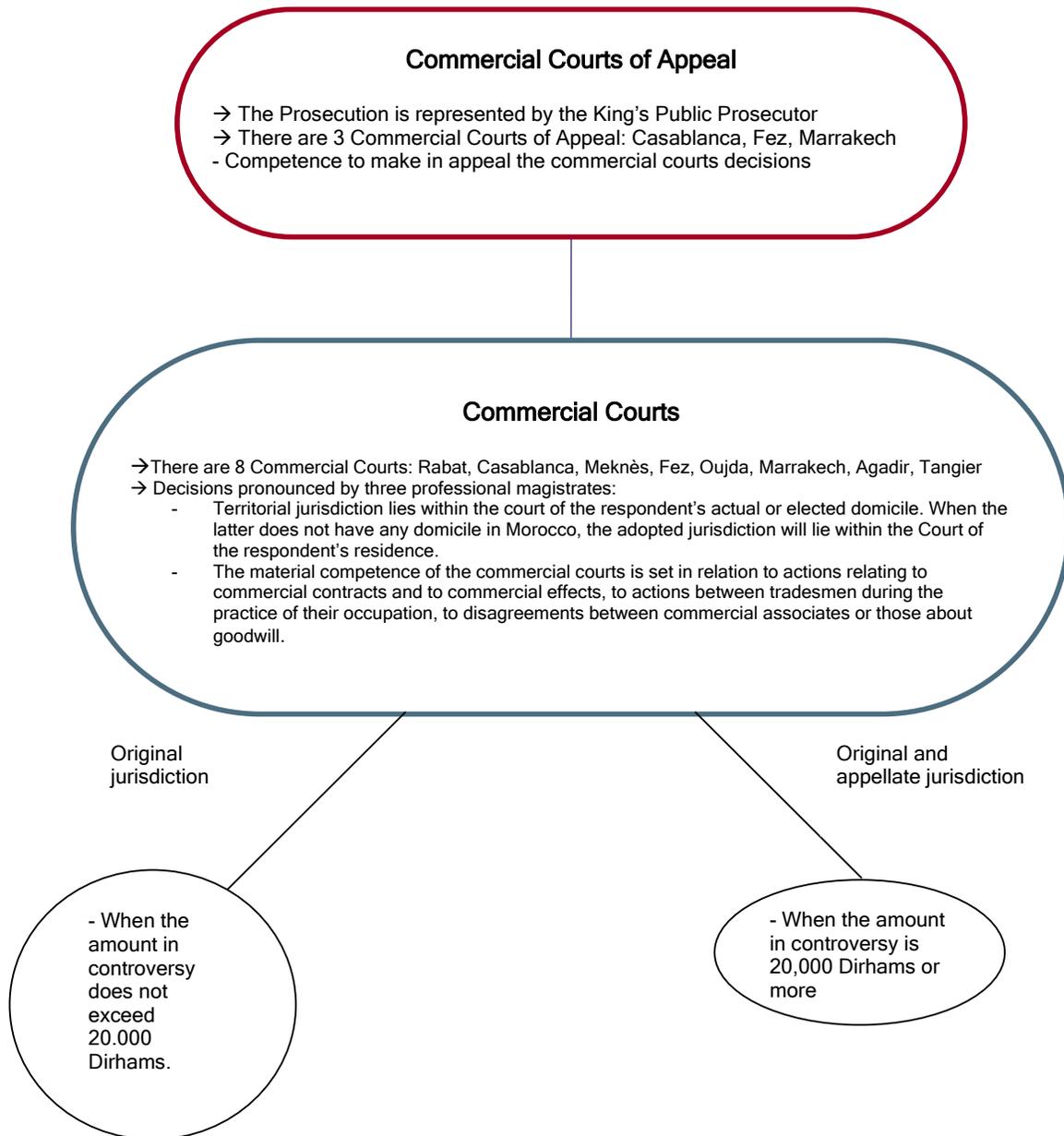
## Courts of Appeal



## The Courts of General Jurisdiction (First Instance)



**Commercial Court Jurisdictions**  
(Law n°53-95 dated on January 6<sup>th</sup>, 1997 promulgated by the Decree n°1-97-65 dated on February 12<sup>th</sup>, 1997)



## Appendix 4: Comprehensive List of Activities in the CCCasablanca

### Comprehensive List of Activities at the Commercial Court Casablanca for the year 2006 (MOJ-DECM)

Cases types	Ongoing Cases Continued into 2006	Adjudged cases in 2006	Pending cases End 2006
<b>Summary actions</b>	2839	2406	433
Auto repossessions	2321	2183	138
<b>Settlements</b>	3434	2544	890
<b>Miscellaneous (summary actions)</b>			
Orders to Pay	8331	8331	0
<b><u>Orders based on motion</u></b>			
Attachments/Seizure Orders	10615	10615	0
Seizure Sales	9908	9766	142
Other cases relating to orders based on request	9461	9363	98
<b><u>Substantive Cases</u></b>			
Trade contracts (or acts)	6000	3421	2579
Actions between tradesmen during their trade activities	9025	4868	4157
Litigation between business company associates	256	114	142
Actions relating to business acts	3775	2425	1350
Cases relating to bank contracts	208	99	109
Disputes relating to trade register registration			
Trade register cases	7	4	3
Trade register fines	1124	1121	3
Business sites rents	-	-	-
Unfair competition	399	211	188
Disputes relating to the Decree of May 24 <sup>th</sup> , 1955	2262	1164	1098
Enforceable suspended sentences	403	248	155
Others (business effects)	1379	771	608
<b><u>Orders of King's Prosecutor</u></b>	2789	2103	686
<b><u>Stipulated liquidation and distribution of seized property</u></b>	18317	8796	9521
Amicable distribution	6	6	0
Outside protection of assets	5	5	0
<b><u>Company Insolvency</u></b>			
Receivership	101	91	10
Winding-up by decision of court	40	37	3
Suspension of Continuation Plans	4	4	0
Transformation of a receivership to winding-up	13	13	0
Others	186	165	21
<b><u>Partial Total</u></b>	<u>93230</u>	<u>70887</u>	<u>22343</u>
<b><u>Jurisdictional cases</u></b>			
Jurisdictional rulings		478	
Rejection of jurisdiction declaration		296	
Effective total number of commercial cases	93230	71661	22343

## **Appendix 5: *Dahir* Establishing Professional Monitor *MoHtassib***

***Dahir* (Royal Decree) N°1.82.70, dated Chaâbane 28th, 1402 (corresponding to June 21st, 1982) stipulating the execution of the Law n°02.82 dealing with the qualifications of “Professional Monitors and Representatives of Professional Orders”.**

Glory to Allah the Unique  
The King’s seal and within it  
(Al Hassan Ben Mohamed Ben Youssouf Ben Al Hassan, May Allah The Almighty Protect Him )

That it be known by virtue of this Royal Decree,  
May Allah Help us through His Rightful Guidance that:

Based upon the Constitution and its Article 26, and by virtue of the power granted to us,

That:

We have decided what follows:

**Article 1:** The law n°2.82, dealing with the qualifications of Professional Monitors and Representatives of Professional Orders, that was passed and approved by the Parliament on the third of Rabiaa Ist 1402 (December 31<sup>st</sup>, 1981) Law n° 02.82 dealing with the qualifications of the Professional Monitors and Representatives of Professional Orders.

### **Chapter I Paragraph 1**

Qualifications of the Professional Monitors, dealing with the controlling of the quality of some of the products or services and their prices,

**Article 1:** The Professional Monitor is in charge of and has the power to - and within the qualifications he is entrusted with - to control the quality and prices of services and handicraft products, as well as the farming, the food products, the drinks and the beauty and cleaning articles.

The concerned products and services to be controlled by the Professional Monitor are mentioned in a list alongside with the relevant statutes and in compliance with the dispositions of the above mentioned Article 1.

**Article 2:** The Professional Monitor assures that products and services are compliant with specifications contained in the regulatory statutes as generally applied and recognized by the professionals, and if their prices appear in a code bar and /or if these prices are compliant with what is generally implemented on the market and this in case there are no specific tariffs regarding these products.

**Article 3:** He has the right to, if he sees the need, to apply the law, or to take some samples or stop the production of a corrupted item in order to make analyses that are compulsory.

**Article 4:** The Professional Monitor has the right, within his tasks, that are specified in the above-mentioned Article 1, to enter all places that can be visited by the authorities who are specialized in the fight against fraud and in charge of controlling prices, as specified by virtue of law.

**Article 5:** The Professional Monitor records faults dealing with the quality and the prices of the products and the services listed on the above mentioned Article 1. He therefore drafts them down in a record based on what he has seen and controlled and this for the purpose of price control and the fight against fraud.

The Professional Monitor's records and stands for authorities in charge of price control and the fight against fraud, as specified in the first paragraph of this Article.

A report is sent as soon as possible to the concerned authority, within ten days as from the date they have been written up, so that the Authorities may take the appropriate measures as specified by virtue of the law relating to price control and the fight against fraud.

However, the defendant has to pay a deposit to the Professional Monitor who shall provide him with a receipt in counterpart.

**Article 6:** The Professional Monitor has the right, and if he is granted a power of attorney to do so by the competent authorities as provided for by the law n°008.71 dated 21<sup>st</sup> Chaâbane, 1391 (corresponding to October 12<sup>th</sup>, 1971) and with the exception of any contrary disposition, to impose a fine of an amount of no more than 50,000 Dirhams.

He has also the right and in case he sees a fault or if the defender has at least two precedent faults within the same year, to close under a cautionary measure, his commercial or professional shop, until an investigation is carried out about that proven fault provided that this closure may not overpass a maximum period of 6 days.

## **Chapter Two**

### **Other Powers of the Professional Monitor**

**Article 7:** The Professional Monitor watches the good behaviour and application of the law in so far as health and cleanness are concerned at the level of both the city and rural markets as well as in the commercial and professional areas and this, in addition to his role of controlling the quality and prices of products and services, as shown in Article 1. He also registers and transmits anything that he has observed in terms of violation of regulations to the concerned authority and this for the purpose of the appropriate implementation of the law.

He on the other hand, informs the concerned authorities about any act or fact that is contrary to morality and good behaviour that may happen in a public space.

**Article 8:** The Professional Monitor takes advice in the field of fixing the prices of the products and the services he is controlling and takes part in the meetings of the local Commission of Prices and the Commission in the countryside or in the prefectures.

## **Chapter Two**

### **Guaranteeing the Profession/Composition of the Committee**

**Article 9:** The General Secretary of the Committee is appointed through the elections of the members of every professional and commercial Committee who operate in the field of their respective profession selling the products and services presented in the above mentioned Article 1. This nomination comes into force when the General Secretary while creating this committee, sends its composition to the concerned authorities, which will approve it.

**Article 10:** The General Secretaries assist the Professional Monitor in his important responsibility, and they all work under his supervision, each one of them in his specific field, so that the faults and conflicts are solved amicably or through an agreement:

1. Between the professionals and the merchants (or vendors) of the products presented in the above-mentioned Article 1, their trainees and employees in so far as the case object of their profession relationship is concerned.
2. Between the said professionals and merchants and their customers in the field of their products or their behaviour in relation with the products and services controlled by the Professional Monitor.

**Article 11:** The Professional Monitor writes up a report and signs it in conjunction with the concerned parties. But if some of these concerned parties can neither approve nor sign it, he shall have therefore to specify that in this record and sign it, adding at the same time an explanation about that as well as the name of the concerned person.

The record that bears the agreement of both the controller and the controlled parties becomes compulsory, works as an agreement between the two parties, and thus stops the discord between them.

**Article 12:** The present is published in the Official Bulletin  
And promulgated in Rabat on Chaâbane 28<sup>th</sup>, 1402 (June 21<sup>st</sup>, 1982)  
For countersignature  
The Prime Minister  
Signature: AL MAATI BOUABID

## **Appendix 6: *Dahir* Governing Commercial Lease Forfeitures**

***Dahir* – Royal Decree - (2 Shaoual, 1374) related to the leases of buildings or business, industrial or handicraft premises (Official Bulletin, June 10<sup>th</sup>, 1955, P. 826)**

### **Article 27 :**

A leaseholder who intends to either contest the reasons of eviction or refusal of renewal by the lessor, or who requires the payment of compensation for improvements stipulated in Chapter III of the present *Dahir*, or who does not accept the conditions proposed in the new lease, must submit the matter before the Presiding Judge of the local Court. Moreover, he must inform him about the situation of the building within a period of time of thirty days from the leave reception or the proprietor's answer that is foreseen at the first paragraph of Article 8.

Past this deadline and subject to the provisions of the last paragraph of Article 6 and the second paragraph of the above mentioned Article 8, he is barred and is considered either to have forfeited renewal or compensation, or to have accepted the new conditions proposed by the new lease.

### **Article 28 :**

The mission of the Presiding Judge of the local court where the matter is submitted or of the Judge who replaces him is to reconcile the parties.

During the reconciliation hearing, the Presiding Judge must write up minutes. These minutes will register the reasons of the refusal on the part of the lessor, as well as the demands and the offers from both the respective parties, such as on the price, the duration, the starting point and the other conditions of the lease, or as on the amount of the compensations that are mentioned in the present *Dahir* and that are owed by the leaseholder.

The parties can be assisted or represented by a lawyer. However, the Judge may order their personal appearance.

The matter is submitted before the Presiding Judge of the Court, through a written request or a declaration made in the office of the clerk of the Court and along with the payment of the judicial tax amount.

In no case shall the demand that seeks to evict the tenant be attached to the reconciliation procedure. The Presiding Judge of the Court will convene the parties to his hearing, at least eight days before, according to the forms that are stipulated in the Articles 55 and the following of the *Dahir* that constitute the Code of Civil Procedure.

## **Appendix 7: CCP Article 553**

### **Book V of the Commercial Code, Bankruptcy CCP Article 553**

The Presiding Judge of the Court may, if he finds that the proposals submitted by the owner of the company might help redress the situation of the company, initiate the proceeding for an amicable settlement. The Presiding Judge shall nominate a mediator for a three-month term of office which can be prolonged to an additional month upon request from the mediator.

## Appendix 8: Cases Filed and Judgments Entered in the CCCasablanca (two pages)

### Increase in Number of New Cases Filed 7/1/06 - 6/30/07 (from Commercial Ct. Casa.)

	Summary Actions			Auto Repossessions			Settlement Cases			Orders to Pay			Orders Based on Request			Company Insolvency			Orders of the King's Prosecutor			Stipulated Payments			Substantive Matters			total		
	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%
January	172	196	12,24	118	191	32,18	264	199	32,66	476	546	12,82	2099	2818	25,51	15	9	66,67	129	162	20,37	628	703	11,30	1536	1085	41,57	5437	5897	7,80
February	193	231	16,45	137	259	28,27	219	226	3,10	492	538	22,88	2443	2805	12,91	14	10	40,00	280	156	-79,49	678	653	-3,83	882	1265	30,28	5338	6175	13,55
March	282	244	15,57	217	171	16,22	231	278	16,91	715	396	80,56	3058	2978	-2,59	10	9	11,11	243	355	31,55	719	563	27,71	1197	1169	-2,40	6672	6251	-6,73
April	197	205	3,90	139	204	18,71	257	255	-0,78	597	692	13,73	2383	2740	13,03	6	5	20,00	234	293	20,14	721	992	27,32	914	1103	17,14	5448	6456	15,61
May	239	284	15,85	238	169	16,67	227	255	14,34	598	898	33,41	2838	3079	7,83	9	15	40,00	444	174	155,17	822	811	-1,36	1056	1165	9,36	6471	6895	6,15
June	260	280	7,14	220		30,18	256	250	-2,40	817	472	30,72	2867	3388	14,88	9	8	12,50	263	301	12,62	754	964	21,78	1166	1160	-0,52	6412	6972	8,03
July	256			133			220			507			2315			11			157			637			1028			5264		
August	102			154			147			318			1234			1			113			233			588			2890		
September	188			150			108			540			2052			3			114			392			762			4309		
October	185			75			181			1265			2087			8			227			708			1080			5816		
November	213			343			230			1235			3117			4			174			1001			1138			7455		
December	237			157			220			971			3511			9			195			1417			1912			8629		
Total	1343	1440	6,74	1069	1168	8,48	1454	1473	1,29	3495	3542	4,04	15688	17788	11,81	63	56	12,50	1593	1441	-10,55	4322	4691	7,87	6751	6947	2,82	35778	38646	7,42

**Increase in Number of Judgments Entered 7/1/06 - 6/30/07 (from Commercial Ct. Casa.)**

	Summary actions			Auto Repossessions			Settlement Cases			Orders to Pay			Orders Based on Motion			Company Insolvency			Orders of the King's Prosecutor			Stipulated Payments			Substantive Cases			TOTAL		
	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%	2006	2007	%
January	157	227	30.84	140	170	17.65	143	156	8.33	439	465	5.59	1947	2479	21.46	47	23	104.35	55	215	74.42	956	847	12.87	1828	826	121.31	5712	5408	-5.62
February	187	241	22.41	110	150	26.67	246	339	27.43	495	515	3.88	2410	3240	25.62	25	25	0.00	143	174	17.82	977	1372	28.79	1267	1211	-4.62	5860	7267	19.36
March	224	255	12.16	187	268	29.70	235	323	27.24	723	484	49.38	3044	2985	01.98	29	30	3.33	172	445	61.35	1093	1096	0.27	1489	1180	-26.19	7196	7064	-1.87
April	177	206	13.66	187	147	27.21	274	199	37.69	599	628	4.62	2333	2705	13.75	29	31	6.45	149	247	39.68	591	1354	56.35	1163	953	-22.04	5602	8469	14.95
May	248	240	-3.33	248	230	-7.83	216	342	36.84	592	1076	44.98	2777	3230	14.02	20	27	25.93	224	182	23.08	787	1403	43.91	1293	1233	-4.87	6405	7963	19.57
June	251	246	-2.03	248	253	1.98	214	348	38.15	635	472	34.53	2878	3169	9.18	12	35	65.71	217	201	-7.96	642	1779	63.91	1378	1252	-10.06	6475	7753	16.48
July	247			150			124			471			2318			37			260			643			1433			5683		
August	117			121			0			302			1162			0			22			136			0			1859		
September	189			150			130			543			2186			28			143			493			781			4643		
October	141			203			262			1033			2032			36			225			481			1385			5798		
November	224			148			460			1178			3288			29			292			964			1351			7934		
December	244			291			252			1321			3369			18			201			1034			1078			7809		
Total	1244	1414	12.02	1120	1216	7.89	1328	1705	22.11	3483	3640	4.31	15389	17808	13.58	162	171	5.26	980	1464	34.43	6046	7851	35.73	8418	6656	-26.49	37150	41924	11.39

## **Appendix 9: New ADR Law Number 08-05**

Law No. 08-05

Amending Chapter VIII, Title V of the Code of Civil Procedure

### Section III- Contractual Mediation

Article 327-52 – So as to prevent or settle a disagreement, the parties may agree on the nomination of a mediator whose mission consists of facilitating the conclusion of a settlement agreement barring of putting an end to litigation

Article 327-53 – A mediation agreement represents the contract whereby the parties agree on the nomination of a mediator whose mission is to facilitate the conclusion of a settlement agreement barring or putting an end to litigation.

The mediation agreement, pursuant to the provisions of article 62 of the Decree of Ramadan 9<sup>th</sup>, 1331 (August 12<sup>th</sup>, 1913) consisting of the obligations and contracts procedure, does not address the issues excluded from the scope of implementation of the settlement agreement and can be concluded only under reserves, conditions or limits required for the settlement agreement validity in pursuance to articles 1099 to 1104 of the same Decree.

Article 327-54 – A mediation agreement may be created after litigation has begun. It is thus called a “mediation compromise.”

It can be contained in the main agreement. It is thus called a “mediation clause.”

It can proceed during legal proceedings. In this case, the court should be informed as soon as possible and thus the proceedings should be stayed.

Article 327-55 – The mediation agreement must always be drafted either through an authenticated act, a private agreement, or via a report filed with the Court.

The mediation agreement is acknowledged in a writing that is recorded in a document bearing the signature of the parties or in an exchange of letters, telex communications, telegrams or any other telecommunication means which certifies its existence, or also through the exchange of claim of allegations and defence of the allegations, whereby the existence of such an agreement is invoked by one party and not contested by the other one.

The reference in a contract of a document including a mediation clause constitutes a mediation compromise provided that the contract is in writing and that the reference be such that it makes the clause a non-equivocal part of the contract.

Article 327-56 – A mediation compromise is an agreement enabling the litigants to submit litigation before a mediator.

The compromise can be concluded even under a pending legal proceeding already submitted before the court.

Article 327-57- The compromise is null and void unless it:

1. Specifies the litigation subject, and
2. Nominates the mediator or provides for his nominating procedures.

When the nominated mediator does not accept the appointment, the parties may agree on the nomination of another mediator. Failing to do so, the compromise is null and void.

Article 327-58 – The mediation clause is the agreement whereby contracting parties agree submit to mediation a dispute regarding the contract that contains the clause.

Article 327-59- The mediation clause is null and void unless it appears in the main agreement or in a document referring to that agreement. Under the same sanction, the mediation clause either nominates the mediator, or provides for a procedure for nomination.

Article 327-60 – The party demanding mediation immediately informs the other party and engages the mediator nominated in the clause.

Article 327-61- The court before which the litigation is submitted, and about which the parties have concluded a mediation agreement pursuant to the clauses of the present section, should declare its lack of jurisdiction until the exhaustion of the mediation procedure or cancellation of the mediation agreement.

If the mediator is still not nominated, the court should also declare its lack of jurisdiction unless the mediation agreement is rendered null and void.

In both cases, the court may not exercise jurisdiction over the matter.

In the second case, it must inform the petitioning party to initiate the mediation before the maximum time limit at the end of which the mediation should have started once or the agreement is null and void.

Article 327-62 – The mediation duration is initially set by the parties within a three month time limit from the date the mediator has accepted his mission. The parties may nevertheless extend this time limit by agreement concluded within the same form as adopted for the mediation agreement.

Article 327-63 – The mediator is obliged to keep the proceedings confidential vis-à-vis third parties under the conditions and sanctions provided for by the Penal Procedure relating to professional confidentiality. The mediator's findings and statements may be presented to the judge in charge of the litigation only under the concerned parties' consent. They cannot be used in another legal proceeding.

Article 327-64- Mediation may be entrusted to an individual or a corporate body.

Once the mediator has accepted the assignment, he informs the parties via registered mail with an acknowledgment of receipt or via an extra-judiciary act.

The mediator can resign his mission only with consent of the concerned parties when the time limit provided for in article 327-62 above has expired without the parties having concluded a

settlement agreement, by virtue of a judicial order as mentioned in the cases provided for in article 327-61 above.

Article 327-65- The mediator may hear the parties and compare their points of view in order to find solutions to their conflict.

He may, with the parties' consent and for mediation purposes, listen to third parties who so agree.

He may, with the parties' consent, retain or ask to retain any expert in order to clarify the litigation.

At the end of his mission, he suggests to the parties a settlement agreement or a report of his activities.

As per the article 327-66 provisions above, the settlement agreement concluded by the parties is submitted for execution and its effects to the provisions of title IX of the second book of the Decree of Ramadan 9<sup>th</sup>, 1331 (August 12<sup>th</sup>, 1913) consisting of obligations and contracts.

Article 327-66 – The settlement agreement has, between the concerned parties, the binding force of *res adjudicata* in the last resort and is enforceable.

For this purpose, the President of the Court with jurisdiction to judge the litigation arising from the implementation of the main agreement, and territorially competent in view of the place where the settlement agreement is to be executed, and who has been requested by a party to the settlement agreement, orders the execution of the act presented to him.

#### **Section IV- Miscellaneous provisions**

Article 327-67 – The provisions of the present chapter regard the texts instituting special procedures for the settlement of litigation.

##### Article 2

For implementation of this law, the provisions of chapter VIII of title V of the following Civil Procedures remain applicable:

- To agreements concluded before the date when the present law enters into force ,
- To any legal proceedings still before the courts or pending before the jurisdictions at the said date until their definitive settlement and the exhaustion of all paths for appeal.

##### Article 3

The provisions of the 4<sup>th</sup> paragraph of article 5 of the Law n° 53-95 instituting commercial court jurisdictions are modified as follow:

Article 5 (4<sup>th</sup> paragraph). The parties can agree to submit .....to the arbitration and mediation procedures pursuant to the provisions of articles 306 to 327-67 of the Code of Civil Procedure.

## Appendix 10: Persons and Entities Consulted

AL BAYNE, Khadija  
Presiding Judge of the Commercial Court of Rabat

BANANAYA, Abdendbi  
Professional Monitor (*MoHtassib*)  
Wilaya of Rabat

BENNANI, Abdelhak  
President  
International Chamber of Commerce  
Casablanca

BENNANI, Said  
Director, Higher Judicial Institute (ISM)  
Rabat

BRUNIN, Dominique  
Director General  
French Chamber of Commerce in Morocco

DEMICHELIS, Julia  
Chief of Party  
USAID Parliament Support Project  
Rabat

DERMICHE, Abdellah  
President  
Casablanca Bar Association

EL AMRANI, Abderrazak  
Presiding Judge  
Commercial Court of Casablanca

EL AYOUNI, Mohammed  
Statistician  
MOJ-DECM  
Rabat

EL GASSEM, Lahoussein  
Presiding Justice  
Commercial Court of Appeal of Casablanca

EL MERNISSI, Mohammed  
President of Arbitration Committee  
International Chamber of Commerce  
Casablanca

FASSI-FIHRI, Abu El Mahassine  
Country Director  
Search for Common Ground  
Rabat

GOLDMARK, Lara  
Chief of Party  
USAID-IBCM  
Rabat

HAMMOUMI, Saad  
CGEM  
Vice President Committee on SMEs  
Casablanca

KABADI, Abid  
President, Committee on Mediation Rules  
CGEM  
Casablanca

KELLY, Ron  
Professional Mediator  
Berkeley, California USA

LARHOUATI, Mohammed  
President, Management Dynamics  
Coaching, Mediation, Negotiation  
Casablanca

LIDIDI, Mohammed  
Secretary General  
Ministry of Justice  
Rabat

LIMGOURGH, Mohammed  
President of the Court of General Jurisdiction of Rabat

OUBLAQ, Abdullah  
Designated Settlement Judge  
Commercial Court of Casablanca

OUZZINE, Fouad  
Director, Regional Investment Center  
Fes

NAJIA, Rahali  
Director of Modernization  
MOJ-DECM  
Rabat

ROCH'D, Nabil  
Judicial Expert, Architecture  
President of ARABO-African Arbitration Association  
Casablanca

RHOMIJA, Abdelmajid  
Director  
Division of Studies, Cooperation and Modernization (MOF-DECM)  
Moroccan Ministry of Justice  
Rabat

SAFA, Oussama  
General Director  
Lebanese Center for Policy Studies  
Beirut

SAOULA, Salima  
Director of the Center for Studies and Economic Research  
French Chamber of Commerce for Morocco  
Casablanca

TABET, Samir  
Judicial Accounting Expert  
Secretary General of the Moroccan Federation of Expert Associations (FMAEX)  
Casablanca

TAHTAH, A. Hakim  
Chief of Committee Services  
Moroccan Parliament  
Rabat

TAZI, Hon. Abdelhaq  
Senator for Fes-Boulemane  
Chief Representative of the *Istiqlal* Party  
Moroccan Parliament  
Rabat

ZOGLIN, Katie  
Senior Legal Reform Specialist  
ABA-Morocco Rule of Law Program  
Rabat

## **Appendix 11: Available Documents**

1. *Efficient Prevention and Resolution of Commercial Litigation, A Presentation of Actual European Practices*, Casablanca, December 8-9, 2006, The European Commission (French).
2. Report of the Senate Committee of the Judiciary on Proposed Law 08.05, analysis and political commentary, Moroccan Parliament, May 2007 (Arabic).
3. *Evaluation of Search for Common Ground's Support to the Formative Stages of Mediation in Morocco*, November 2005 (English).

## Appendix 12: IFC Certified Mediator Network

### **IFC CERTIFIED MEDIATOR NETWORK**

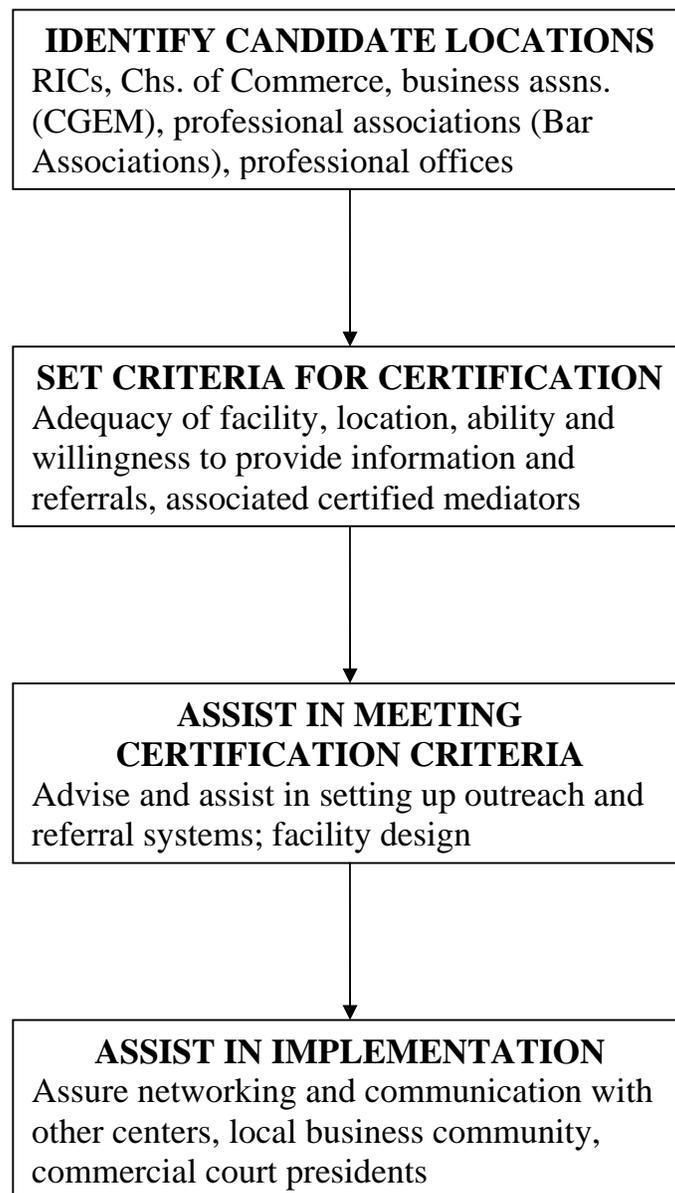
Locally renowned mediators recognized by business community and courts as impartial, competent and ethical



## Appendix 13: IFC Certified Mediation Centers

### **IFC CERTIFIED MEDIATION CENTERS**

**A network of locations recognized as sources of information and referrals, and suitable for hosting impartial mediation services**



## END NOTES

---

<sup>1</sup> As of the date of this writing, 100 Moroccan Dirhams was valued at approximately \$12.10 US, placing the jurisdictional minimum at about \$2,420.

<sup>2</sup> This figure rises dramatically when short matters of urgency and simple cases are removed from the calculation. Attorneys and court personnel report cases that can take the statutory limit of 5 years to resolve.

<sup>3</sup> The 90 DH supplemental fee includes 10 DH for the public defender fund, 30 DH clerk's fee and a 50 DH tax stamp earmarked for the local bar association.

<sup>4</sup> Beyond this, parties may be required to post a bond to secure attachment of property while the case is pending or face a demand for payment of additional attorneys' fees.

<sup>5</sup> The exception to this is a provision of the Code of Civil Procedure that provides for sanctions against attorneys for frivolous appeals. This provision, however, is not known to have ever been used.

<sup>6</sup> The French Chamber of Commerce of Morocco is currently considering a program to support independent commercial ADR centers.

<sup>7</sup> CIMAR was recently the beneficiary of a series of workshops on commercial mediation delivered by a partnership of SFCG and USAID-IBCM.

<sup>8</sup> See *Evaluation of Search for Common Ground's Support to the Formative Stages of Mediation in Morocco*, November 2005.

<sup>9</sup> *Modes alternatifs de règlement des conflits pour les différends commerciaux au Maroc, September 2006* (Final Denominated "Draft"), USAID-IBCM, available at [www.climatdesaffaires.ma](http://www.climatdesaffaires.ma).

<sup>10</sup> Appendix 1, Explanatory Note – Professional Monitor (*MoHtassib*), Wilaya of Rabat.

<sup>11</sup> Appendix 2, Table of Matters Handled by the Professional Monitor – Rabat *MoHtassib*, 2001-2006 (English).

<sup>12</sup> According to the Legal and Judicial Sector Assessment issued by the Legal Vice Presidency of the World Bank, over 25% of Casablanca attorneys are "homeless", have no fixed business address, and operate with a portable telephone from undisclosed premises. This class of lawyers is unsupervised and said to prey on the uninformed by maintaining frivolous suits to collect higher fees. *Morocco Legal and Judicial Sector Assessment, June 2003*, p. 20.

<sup>13</sup> CCP Art. 63 as amended by Law Number 85.00, promulgated by 1.00.345 (December 26, 2000).

<sup>14</sup> Appendix 3, Flow Chart of Moroccan Court Jurisdictions.

<sup>15</sup> Appendix 4, Comprehensive List of Activities at the Commercial Court of Casablanca for the year 2006 (MOJ-DECM).

<sup>16</sup> Statistics by volume or case type were not available for the Courts of General Jurisdiction at the time of this assessment.

<sup>17</sup> Appendix 2, Table of Matters Handled by the Professional Monitor – Rabat *MoHtassib*, 2001-2006 (English).

<sup>18</sup> Appendix 5, *Dahir* Establishing Professional Monitor *MoHtassib* (English).

<sup>19</sup> *Trombino*, Directory of the Moroccan Government, 2006.

<sup>20</sup> Appendix 6, *Dahir* Governing Commercial Lease Forfeitures (English).

<sup>21</sup> Appendix 7, CCP Article 553.

<sup>22</sup> Appendix 8, Cases Filed and Judgments Entered in the Commercial Court of Casablanca, 7/1/06-6/30/07 (English).

---

<sup>23</sup> Family Law (*Statute Personnel*) Articles 82, 94-95, 97.

<sup>24</sup> Appendix 5, *Dahir* Establishing Professional Monitor *MoHtassib* (English).

<sup>25</sup> Appendix 9, New ADR Law No. 08-05 (English).

<sup>26</sup> The removal of the mandatory settlement language is attributed to the lawyers' lobby.

<sup>27</sup> Appendix 12, IFC Certified Mediator Network.

<sup>28</sup> Al Akhawayn University in Ifrane maintains a media and business outreach center that appears to be well suited for status as a certified mediation center.

<sup>29</sup> Appendix 13, IFC Certified Mediation Centers.

<sup>30</sup> Best international practices appear to call for course work of approximately 40 hours for certification.

<sup>31</sup> The field of potential mediator training organizations may include, without limitation, The ADR Institute of Canada ([www.adrcanada.ca](http://www.adrcanada.ca)), The Lebanese Center for Policy Studies ([www.lcps-lebanon.org](http://www.lcps-lebanon.org)), and The Center for Mediation and Arbitration of Paris ([www.cmap.fr](http://www.cmap.fr)).

<sup>32</sup> The primary political proponent of the new ADR law was the USFP Party (*Union Socialiste des Forces Populaires*).