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**Alternative Dispute Resolution (ADR) for
commercial disputes in Morocco
Assessment and options for technical assistance**

Draft

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List of acronyms

AMCHAM	American Chamber of Commerce of Morocco
ADR	Alternative Dispute Resolution
CGEM	Confédération Générale des Entreprises du Maroc
CIMAR	Rabat Mediation and Arbitration Center
DAI	Development Alternatives, Inc.
DPK	DPK Consulting, subcontractor to DAI for the IMPROVING THE BUSINESS CLIMATE IN MOROCCO PROGRAM
ENE	Early Neutral Evaluation
Fédération PME/PMI	Fédération des Petites et Moyennes Entreprises / Petites et Moyennes Industries (which is a member of the CGEM)
ICC	International Chamber of Commerce
LOE	Level of effort
MOJ	Ministry of Justice of the Kingdom of Morocco
RIC/CRI	Regional Investment Center
USAID	United States Agency for International Development

Key Alternative Dispute Resolution (ADR) terms¹

Basic ADR processes

Arbitration (in French, *arbitrage*): An adjudicatory dispute resolution process in which one or more arbitrators issues a judgment (“arbitral award”) on the merits, which may or may not be binding after an expedited, adversarial hearing in which each party has the opportunity to present proofs and arguments. Arbitration is procedurally less formalized than court adjudication; procedural rules and substantive law may be set by the parties. Private arbitration (as opposed to court-annexed arbitration, see below under II) may be “administered” or managed by private organizations, or “non-administered” or “ad hoc” and managed by the parties.

Mediation (in French, *médiation*): A voluntary and informal process in which the disputing parties select a neutral third party (one or more individuals) to assist them in reaching a mutually acceptable settlement. Unlike a judge or arbitrator, the mediator has no power to impose a solution on the disputants; instead, the mediator assists them in shaping solutions to meet their interests. The mediator’s role in the process may vary significantly, depending on the type of disputes and the mediator’s approach. Mediators can employ a wide range of techniques, e.g. assist parties to communicate and to develop a cooperative, problem-solving attitude; identify parties’ underlying interests; identify and narrow issues; transmit messages between parties; explore possible options for agreement and consequences of non-settlement (e.g. risks and costs of litigation).

Conciliation (in French, *conciliation*): Often used interchangeably with mediation. Usually denotes an informal process where the third party neutral takes a less active role than he or she would in mediation, and meets with the parties separately.

Other ADR terms and concepts

Court-connected ADR: ADR processes that are linked to the governmental justice system; such ADR activities are authorized, offered, used, referred by, and/or based in the court system.

Court-Annexed ADR: ADR programs or practices formally authorized and used by the court system. See below under “Hybrid Forms” for examples of court-connected ADR procedures used today in other countries.

Mandatory vs. voluntary: These terms refer to how disputes enter ADR processes. If the parties are compelled to use ADR (by the court or statute, for example), then the use is *mandatory*. If the use is based wholly on the consent of the parties (e.g. they entered into a contract with an arbitration or mediation clause in it, or they agree in writing to mediate a dispute), then it is *voluntary*.

Nonbinding (or advisory) vs. binding: When the disputants are required to accept and respect the outcome of the ADR process, such as third party opinions, that process is *binding*. ADR outcomes that are advisory only are a feature of *nonbinding* processes. With some exceptions, disputants are not bound by an outcome or resolution in ADR, unless they agree to be bound.

Examples of “hybrid” court-connected ADR models

The following are some examples of the varieties (or hybrids) of court-connected mediation and/or arbitration that have evolved in developed and developing countries.

Early Neutral Evaluation (ENE): A court-based ADR process applied to civil cases, ENE brings parties and their lawyers together early in the pretrial phase to present summaries of their cases and receive a non-binding assessment by an experienced, neutral attorney with expertise in the substance of the dispute, or by a magistrate judge.

¹ Source: USAID Center for Democracy and Governance, Alternative Dispute Resolution Practitioner’s Guide (March 1998).

Fact-finding (in French *expertise*): A process by which a third party renders binding or advisory opinions regarding facts relevant to a dispute. The third party neutral may be an expert on technical or legal questions, may be a representative designated by the parties to work together, or may be appointed by the court.

Judge-hosted settlement conference: In this court-based ADR process, the settlement judge or magistrate (usually not the judge(s) who will preside over the trial if the parties do not settle their dispute) presides over a meeting of the parties in an effort to help them reach a settlement. If the parties do not settle, they go to trial. Judges have played a variety of roles in such conferences, including serving as mediator. This is the most common form of court-based ADR in the US, frequently denominated Mandatory Settlement Conference or “MSC”, and as its name implies is aimed at getting the parties to settle before trial.

Mediation-arbitration (Med-Arb): Parties agree to mediate their dispute, with the understanding that any issues not resolved by mediation will be resolved by arbitration using the same individual to act as both mediator and arbitrator.

Minitrial: A voluntary process in which cases are heard by a panel of high level participants from the disputing sides who have full settlement authority, either with or without a neutral party presiding. Can be court-based, and if the parties do not settle, the parties proceed to trial.

Settlement week: Typically, a court suspends normal trial activity for a week and with the help of volunteer lawyers, mediates long-pending civil cases. Unresolved cases go back on the court’s docket.

Introduction

Assignment description

This report is based on a consultancy conducted for the IMPROVING THE BUSINESS CLIMATE IN MOROCCO PROGRAM in July 2006. Part 1 of this report evaluates the demand and need for ADR for commercial disputes in Morocco. It analyzes the current state of development of commercial arbitration and mediation, and briefly sketches the historical, cultural and legal context. On the basis of that assessment, Part 2 develops a proposed strategic framework and present programming options for possible future assistance to Moroccan counterparts that could be provided by USAID through the PROGRAM.

This assignment was undertaken concurrently with the semi-annual review and updating of the PROGRAM Annual Workplan. Based on the evaluation set out in Part 1, this report concludes that ADR should be included in future program activities as part of the legal and judicial reform component, and presents several options for specific technical assistance.

Background

Over the past few months, the PROGRAM has received numerous informal enquiries from Moroccan counterparts regarding possible technical assistance to develop ADR in Morocco. Given the nature of the PROGRAM and its ongoing work with the commercial courts, as well as with Moroccan government and private sector representatives, support for the development of commercial arbitration, mediation and other forms of ADR for business disputes represents a logical area for programming.

In jurisdictions around the world that are undertaking legal and judicial reforms, interest in developing ADR for commercial disputes is growing. Since the US has 20 to 25 years experience in this relatively new field, the lessons learned by US state and federal jurisdictions receive much attention. ADR procedures can reduce court backlogs, encourage parties to settle disputes before trial, reduce the time and cost of dispute resolution, and offer confidentiality and flexibility not available in the courts.

Support for ADR has proven to be an area where bilateral and multilateral technical assistance, institution building, legal reform and training can be effective as a useful complement to other legal and judicial reforms. This is particularly true in the commercial context.² Since ADR involves the development of new institutions and techniques, the reforms do not necessarily face the same level of institutional resistance and entrenched interests that often impedes large-scale institutional change. ADR programs can support a variety of development goals such as economic development as well as the rule of law. Finally, technical assistance in the ADR field is “scaleable”—it can, in certain cases, achieve impact without requiring large levels of funding. Nevertheless, careful evaluation of background conditions, extensive project preparation, flexible implementation, and collaboration with counterparts are critical to successful assistance.

² USAID, Commercial Dispute Resolution Project (SEGIR) Final Report (2005).

Part I: Evaluation of background conditions, legal framework, demand and current ADR institutions

Traditional and current forms of ADR

Historically, numerous forms of alternative dispute resolution have been in use in Morocco. Examples include traditional conciliation of disputes by tribal leaders, forms of arbitration of civil disputes by arbitrators (*amghar* or *anacham*) selected by the parties,³ and conciliation of civil and family disputes by Muslim religious leaders (*imams*). More relevant to commercial disputes, another form of traditional ADR was the mediation of business disputes by senior elected merchants in town markets (*prevôt des marchands* in French or *amine* in Arabic). All of these forms of ADR predate the French-influenced judicial system and legal framework. While recourse to the courts has become increasingly common and frequent in modern day Morocco, informal networks and local commercial customs continue to play an important role in commercial dispute resolution. Both arbitration and mediation are familiar concepts to business people and legal professionals alike.

The Moroccan judicial system has incorporated several forms of ADR which are in common use today, and in certain cases mandatory. Examples include mediation by family law judges in divorce cases (e.g. for child custody), arbitration of certain types of tax disputes involving the State, and even forms of plea bargaining and conciliation in certain criminal cases. In certain bankruptcy cases a judge can serve as mediator (*redressement judiciaire—procédure amiable*, by a *juge commissaire*).

These traditional cultural norms and traditions, the familiarity of forms of mediation and arbitration, as well as the integration of several forms of ADR into the legal system suggest that the Moroccan context is favorable to ADR for commercial disputes.

Commercial disputes

This report focuses on alternative dispute resolution for commercial disputes. Given the scope of the program and the fact that the Commercial Courts are the program's primary counterpart, "commercial disputes" are defined for purposes of the program as business disputes where the Commercial Courts would have jurisdiction. The Commercial Courts, a specialized jurisdiction established in 1997, have jurisdiction over cases when the amount in controversy exceeds MAD 20,000 (approx. USD 2,300) and involves commercial contracts, commercial paper or commercial goods. At least one of the parties must have the status of a merchant (*commerçant*) or a commercial entity.⁴ One area where ADR techniques are frequently used is employment and labor disputes. For now, the discussion here does not include labor or employment disputes, or consumer rights disputes in the concept of "commercial" disputes.

The Moroccan Code of Civil Procedure, which governs civil disputes including commercial disputes, explicitly recognizes arbitration and provides for enforcement of arbitral awards.⁵ The provisions of the Code that relate to arbitration (referred to as the "Law on Arbitration") are in the process of being modernized to recognize mediation. The draft law is discussed below. Note that the current arbitration provisions and the draft law address only contractual or non-mandatory ADR (*arbitrage / médiation conventionnelle*) where the parties have agreed to mediate or arbitrate disputes. The courts cannot require the parties to commercial disputes to submit to any form of mediation or arbitration. Accordingly, there are no non-mandatory forms of court-annexed or court-linked ADR for commercial disputes in use today.

³ See Mohamed El Habib Fassi Fihri, *L'itinéraire de la Justice marocaine* (1997), pp. 54-56.

⁴ Law No. 53-95 of February 12, 1997.

⁵ Code of Civ. Pro. Arts. 306-327.

The recognition of commercial arbitration by civil and commercial courts is a necessary pre-condition to the development of ADR in civil law countries. Such recognition alone, however, will not ensure its development. The development of effective ADR mechanisms ultimately is driven by demand. In Morocco, there is a great need and demand for ADR techniques as complements or alternatives to litigation in the Commercial Courts.

The need and demand for ADR in commercial disputes

Whatever the reasons—economic growth, the opening of the Moroccan economy to the global economy, or increasing litigiousness—the number of commercial disputes that result in lawsuits has steadily increased over the last decade. Today the MOJ reports that over 100,000 new cases are filed in the Commercial Courts, 600,000 total new cases in all courts together.⁶ As pointed out by Minister of Justice Mohamed Bouzoubaâ in 2004, these figures are very high given judicial resources. With a total of approximately 3,000 judges in the entire judicial system, on average each judge would have to hear approximately 1,000 separate cases per year.⁷ The average number of cases heard by Commercial Court judges, of which there are approximately 150, is slightly lower at approximately 600 cases per year. Commercial litigation, however, usually involves more complex legal issues and significant economic stakes given the jurisdictional limits. Over 60 percent of commercial cases are heard in the Casablanca Commercial Court alone.

The judges and attorneys interviewed for purposes of this report uniformly agree that the commercial judicial system is overwhelmed by the volume of litigation, and that court sessions often require judges to handle motions and decisions on dozens of separate cases in the same sitting. Part of the problem is the large percentage of cases that are relatively small in terms of the financial stakes, such as cases involving checks drawn on insufficient funds, but that must be adjudicated along with economically more significant cases.

Beyond the volume of new cases filed in the Commercial Courts, interviewees cited a number of other concerns regarding the ability of the courts to adjudicate large business disputes. It is beyond the scope of this report to evaluate or quantify these concerns, which include the time required for case adjudication and appeal, case backlogs, concerns regarding the technical expertise of some judges, delays and difficulties in enforcing judgments, and the perception of corruption among court staff and judges.

Regardless of these factors, there appears to be strong demand from the business sector for alternatives to litigation in certain cases. The business sector as a whole appears to be aware of the availability at least in principle of ADR techniques such as arbitration or mediation.

Current state of ADR for commercial disputes

Mediation and arbitration in the Moroccan context

Alternatives to litigation exist in Morocco. Mediation and arbitration are in use today. Although it is difficult to quantify how widespread their use is, clearly legal professionals, judges and the business sector agree that ADR for commercial disputes is in an early stage of development, and that its use should be broadened.

In Morocco, Mediation and commercial arbitration are perceived as being quite different. Mediation is an informal process where the parties themselves try to craft an acceptable solution to their dispute with the help of the mediator. It is commonly seen as being more appropriate for smaller or local business conflicts or non-commercial disputes. In contrast, commercial arbitration is considered to be

⁶ These figures are for 2004, and require further examination. We have requested more recent data on new filings, as well as any available statistics on case disposition and backlog. As soon as the updated information is available, this section will be updated.

⁷ Les Tribunaux de Commerce débordés, *l'Economiste*, 6 May 2004.

a more “prestigious” process, involving senior corporate lawyers, and is more appropriate for large business disputes with complex legal issues. As a general rule, arbitrators serve as private judges and issue decisions that are binding on the parties, as if they had gone to court. The parties do not craft their own solutions. In other countries, arbitration has been successfully developed for small disputes and with arbitrators who are not legal professionals. For example, in the United Kingdom, arbitrators are usually professionals in a specific industry or field. In the US, mediation has proven to be extremely effective in resolving complex multimillion dollar lawsuits.

Use of conciliation and mediation

Because of its current informal nature, it is difficult to determine precisely how often parties to commercial contracts submit their disputes to mediation. Most mediation is *ad hoc* outside of any formal framework or rules. Very few institutions provide commercial mediation services in Morocco today.

Mediation/arbitration centers affiliated with the Chambers of Commerce in Rabat, Casablanca and Agadir are operational and offer lists of mediators and arbitrators, as well as rules. However, the most active of these, the Rabat Mediation and Arbitration Center (CIMAR), reports supporting only 18 mediations since 2001.⁸ The CGEM, the main employer’s association, established a framework for mediation in 1997 and conducts approximately 40 mediations per year.⁹ With the exception of occasional international ADR conferences and study tours abroad, relatively little training has taken place for mediators.¹⁰

Use of commercial arbitration

A recent study conducted by the CGEM suggests that businesses in Morocco are aware of arbitration as a means of resolving disputes. The study reports that as many as 90 percent of its members have made recourse to arbitration at some point, although it appears that the majority of arbitrations in Morocco involve labor/employment disputes rather than commercial disputes.¹³ Although we were not able to find statistics from the Ministry of Justice on arbitration, an informal estimate from a Commercial Court president suggests that approximately one percent of the cases that are filed for execution of judgment are arbitral awards. Statistics on arbitrations should be available because the Code of Civil Procedure provides that all arbitral awards must be filed in court within three days. However, the actual figures may be biased: a loophole in the tax system favors arbitral awards over settlement agreements, which results in an inflated number of “false” arbitral awards in the Commercial Courts. The loophole will be closed shortly, so in the future these filings may serve as a means of establishing more accurate measurable indicators of how popular the arbitration alternative is being used.

One of the prerequisites for the development of voluntary commercial arbitration is the use of arbitration clauses in contracts between businesses. The current incidence of such contractual arbitration clauses in Morocco is unknown. Promoting the inclusion of these clauses may be a useful target for outreach and monitoring efforts under future programming; for example, the PROGRAM

⁸ Centre International de Médiation et d’Arbitrage de Rabat, Bulletin d’Information.

⁹ Naoufal Belghazi, “Le code d’arbitrage bientôt au SGG,” *l’Economiste*, 8 Sept. 2005. The figure of 40 includes employment disputes as well as commercial disputes.

¹⁰ The UK--funded Search for Common Ground Project will be training lawyers to be mediators through formal training programs targeting civil and family disputes and human rights.

¹³ Naoufal Belghazi, “L’Etat, désormais soumis à l’arbitrage,” *l’Economiste*, 2 March 2006.

could provide training for the private sector, business associations, and in-house legal counsel on the preparation of model arbitration clauses for use in business contracts.

Much of the domestic commercial arbitration that takes place in Morocco today is on an *ad hoc* basis. Arbitration is conducted without the administrative or technical support of formal arbitration institutions that would typically provide approved lists of arbitrators, administrative services, technical support and detailed procedural rules. Functional arbitration centers are lacking. A small group of well-known senior business lawyers and law professors who frequently serve as arbitrators were cited by several interviewees as being the leading experts on commercial arbitration in Morocco.

Notwithstanding the demand for commercial arbitration, the Rabat Chamber of Commerce ADR center (CIMAR) reports that it has conducted no arbitrations to date. Likewise, the Casablanca Chamber of Commerce ADR center has reportedly held only three commercial arbitrations, one of which ended in a scandal when the arbitral award issued against a French company defendant at a level that was seven times higher than the amount requested by the Moroccan plaintiff.

The International Chamber of Commerce (ICC), is a private entity which among other activities offers support and administrative services for international commercial arbitration. The ICC is based in Paris with a “branch” in Casablanca, but it is unclear how often the ICC hosts arbitrations in Morocco using the ICC branch. Several attorneys indicate that no arbitrations have taken place under the aegis of the ICC Casablanca since the branch was established in the 1960s. The president of the ICC Casablanca, was unable to offer any figures on how often it has hosted commercial arbitrations. Major Moroccan companies sometimes use arbitration clauses specifying the ICC in Paris for domestic and international commercial disputes despite the cost. ICC arbitration clauses are typically used for international transactions with any resulting arbitration taking place in Paris.

New arbitration tribunals are apparently being established by some of the international chambers of commerce in the Tangier free trade zone.. Morocco also participates in regional conferences and congresses, such as the Union Arabe d’Arbitrage Internationale.

Hybrid or court-annexed forms of ADR for commercial disputes

It does not appear that any hybrid or other forms of ADR other than “traditional” private arbitration and conciliation/mediation are in use for commercial disputes in Morocco.

A preliminary assessment of political will, key stakeholders, and potential opposition

Private Sector

The driving force behind the development of mediation and arbitration for commercial disputes in Morocco is the private sector. Representatives of multisector associations such as the CGEM and the Fédération PME/PMI, and several local Chambers of Commerce and Industry, have indicated strong interest in ADR. They have started efforts to develop commercial ADR and are likely primary program counterparts or “champions.” Representatives from specific sectors, including key Moroccan industries (e.g. agribusiness, textile, publishing, construction materials, automobile sector) and services (e.g. banking, insurance and transportation) will likely have specific needs and interests relating to ADR that should be taken into consideration in program design. Likewise, international chambers of commerce such as the American Chamber of Commerce constitute possible counterparts.

Government

Strong political will on the part of the government to support the development of ADR for commercial disputes is apparent, as confirmed at a meeting at the Ministry of Justice. A review of

press articles over the last years confirms that assessment.¹⁴ It appears that this support extends beyond the Minister of Justice.

At the same time, we do not foresee any significant opposition to the creation of a network of non-court neutrals in Morocco. Further coordination and discussion will be necessary in recognition of the inherent tension between the private sector on one hand, and the executive and judicial branches on the other with regard to the independence of ADR institutions. An illustration of a possible nexus of controversy is the fact that the current draft Arbitration and Mediation Law provides that the King's Prosecutor shall be responsible for creating and regulating the lists of approved arbitrators.¹⁶

Judiciary

The Commercial Court judges interviewed for this assessment expressed support for ADR. The Commercial Courts face an increasing number of new cases filed, while judicial resources remain limited. The judges therefore perceive the successful development of arbitration and mediation as providing relief to their This support appears to extend to court-annexed forms of ADR, and some of judges als expressed interest in the development of pilot court-annexed mediation.

Legal profession

There appears to be interest in the continued development of commercial arbitration by lawyers; however, our research suggests that the legal profession is not yet open to mediation and opposes any form of court-annexed ADR. The reason for this opposition is likely a concern that mediation and court annexed mediation will take business away from the legal profession. Evidence of this opposition is the legal profession's intervention to prevent the inclusion of court-annexed ADR in the draft Arbitration and Mediation Law currently in Parliament. There are of course different factions within the legal profession, and there appears to be some competition between lawyers to serve as arbitrators.

Other professions

Several other professions have voiced an interest in ADR, and in serving on arbitral tribunals and as mediators. These include court experts in a broad variety of sectors and professions, accountants and notaries (*notaires*). Newly established associations supporting ADR include the Association Arabo-Africaine d'Arbitres (AAAA) and the Association Marocaine des Arbitres, des Médiateurs et des Experts Diplômés. Some tension already exists between professional groups and attorney groups regarding "ownership" of arbitration. This tension is reflected in the debate as to whether or not commercial arbitrators should have formal legal training or not.

Other stakeholders

Our research suggests that a number of additional institutions have an interest in the development of forms of commercial ADR and should be included in the design and implementation process. These include the Regional Investment Centers (RICs); for example, both the Fes and Settat RICs are pursuing ADR initiatives. They also include law faculties; a number of law professors within law faculties are developing expertise in arbitration and teaching courses).

¹⁴ See e.g. Fadwa El Ghazi, Un code d'arbitrage commercial marocain pour bientôt, *l'Economiste* 2 July 2004.

¹⁶ The public prosecution (Office of the King's Prosecutor) is present in the civil courts as well as the criminal courts and plays a role in monitoring the execution of judgments, bankruptcy proceedings and monitors complaints against judges and court personnel.

Challenges: Why ADR remains underdeveloped

Commercial ADR in Morocco remains relatively undeveloped despite the positive historical and cultural background, the existence of a supportive legal framework, the need and demand for ADR, and strong political will. Several factors may help explain this situation.

Nascent or underdeveloped ADR institutions.

Existing ADR institutions in Morocco have been in existence for some time. but have limited support. For example, the ADR centers within Chambers of Commerce and Industry appear relatively well developed on paper. They have internal rules and regulations, and access to potential ADR users (their membership). In reality, their close link to the government (they exist under the “*tutelle*” of the Ministry of Commerce and Industry) and the politicization of funding decisions has resulted in the ADR centers receiving limited resources.¹⁷

Insufficient body of trained professionals

There appear to be very few active and trained arbitrators and mediators. Several professors are teaching arbitration courses to law students. A handful of lawyers and court experts are very interested in arbitration, but don't have the needed institutional support or training. Another issue is that business litigants still lack confidence in the process and arbitrators' ability to render impartial decisions. Their concerns derive from the absence of any certification, training or regulatory process, Arbitral awards are not subject to appeal, further compounding their fear.

Financial limitations

It remains unclear how ADR institutions, mediators and arbitrators will function from a business standpoint. Market studies will be required before services are rendered on any large scale. The institutions will need to develop business plans and build initial support. The business model for commercial arbitration agencies is clearer than that for mediation, since the parties to arbitration have already agreed to the terms of an arbitration clause. The high cost of arbitration nevertheless remains an inhibiting factor.

Legislative framework

While the current legislative framework permits arbitration, it provides minimal guidance on its implementation. It does not formally recognize mediation. An amended draft is currently in Parliament. This draft law would bring a number of improvements to the framework, including explicit recognition of mediation. At the same time, the current draft also raises some issues of the integrity of the process it proposes. Regardless of the final form of the text, a number of areas will need to be addressed separately. These include, for example, ethics rules for mediators and arbitrators, and standards for their selection and supervision.

¹⁷ Mohamed Larbi El Harras, *Secteur Privé au Maroc et ses structures représentatives* (1997).

Part 2: Options for technical assistance and training in the area of ADR for commercial disputes

Introduction

Part 2 of this report outlines a proposed strategic framework for different approaches to providing support to the development more effective ADR mechanisms in Morocco. The discussion assesses the opportunities and risks associated with these options. It does not provide a detailed listing of the appropriate level of effort (LOE), detailed timeframes, indicators or budgets for proposed technical assistance and training. These more detailed descriptions will be developed following USAID approval, and will require further discussions to obtain inputs from counterparts.

Whatever level of technical assistance in ADR is implemented, it should be long-term and sustained over the remaining three years of the IBCM project. Several donors have funded two or three day conferences in Morocco and abroad on commercial dispute resolution, but these conferences have been without follow up or even a sustained local presence. That type of support has resulted in frustration by the Moroccan participants and stakeholders who are actively seeking to develop ADR.

Key technical choices

Three major programming issues must be addressed by development agencies and stakeholders seeking to establish and proliferate ADR:

- (1) What forms of ADR should be supported? In the context of commercial ADR for Morocco, the choices include commercial arbitration and mediation/conciliation. Other hybrid forms of ADR may follow once both arbitration and mediation are more firmly established and institutionalized.
- (2) Should court-annexed ADR be developed, or should technical assistance be limited to voluntary, private forms of ADR which take place outside of the courts?
- (3) Which institution or body will determine and implement the selection, training and oversight of mediators / arbitrators, and therefore receive support?

These programming choices are discussed in detail below.

Proposed strategic framework and targets

The principal options for support for commercial ADR development describe three levels:

- Option 1 provides support exclusively for commercial arbitration;
- Option 2 would add private mediation, increasing the number of counterparts and types of training and technical assistance; and
- * Option 3 would add development of court-annexed forms of ADR.

Actual LOE and timeframes will of course need to be adjusted to available resources. Each type of ADR support is relatively “scalable”, but this incremental framework does lay out three increasingly large scopes of work. Each of these levels of support is summarized below, along with proposed targets¹⁸, a discussion of the potential benefits and risks, and some proposed activities/tasks.

Option 1: Provide support for commercial arbitration only

Opportunities and risks

Commercial arbitration is the most obvious choice for programming where the business sector is the primary beneficiary of an ADR project. It is familiar to stakeholders in Morocco, and more firmly established in terms of the legal framework. Buy-in from the private sector, legal profession and the

¹⁸ In the context of the legal and judicial reform activities under the IBCM Program, these targets should work towards meeting USAID Intermediate Result (IR) 3: Business Environment Improved, Indicator 2, “Efficiency of Contracts Enforcement.”

judiciary should be easier to obtain for arbitration than for mediation. Support for the development of commercial arbitration can also contribute to the promotion of international trade, as foreign investors and partners typically prefer to rely on arbitration.¹⁹ Arbitration is well suited to complex legal disputes since the parties can select arbitrators with specific industry or legal expertise.

However, because of its relatively high cost and complexity, contractual private arbitration is less likely to make a rapid, measurable impact on the judicial system, for example, by reducing backlog, and will likely involve primarily the larger businesses and international investors.²⁰ Another risk of focusing exclusively on arbitration is the fact that the success of arbitration will depend in part on the effectiveness of judgment enforcement, since arbitral awards have the same status as a court judgment and must be enforced to be meaningful.

Proposed targets

- Increase use of and effectiveness of commercial arbitration;
- establish a system to provide effective, specialized neutrals to resolve business disputes;
- increase efficiency of resolution of large / complex domestic and international business disputes; and • improve adjudication of business disputes involving technical or specialized legal areas such as accounting, finance and intellectual property rights.

Activities and tasks

- (1) Support ongoing legal reform to improve legal framework, in particular by providing input on Draft Arbitration and Mediation Law currently in Parliament (Fall 2006).
- (2) Provide technical assistance relating to the determination of which categories of businesspeople and/or legal professionals should serve as arbitrators and receive initial training. In other countries, lawyers, retired judges, other legal professionals, court experts, notaries, and/or prominent business people from specific industrial sectors serve as arbitrators.
- (3) Furnish institutional support for one or more Arbitration Center(s) such as an ADR center within a local Chamber of Commerce and Industry, a multi-sector federation such as the CGEM, within specific sectors, such as arbitration for textile industry disputes, or other private institution. This support may include market studies to quantify demand for arbitration, an assessment of the actual costs of court litigation for comparative purposes, assistance in developing business plans for sustainable operations, and establishing arbitration procedures. Bilateral and multilateral technical assistance programs sometimes focus ADR technical assistance on a single institution such as national, regional or local chambers of commerce. The advantage of this approach is that the project can focus resources. The disadvantage is that the risk of failure is increased if that single institution is unable to fulfill its mandate. Given the existence of several ADR centers already, it is likely that the PROGRAM will be able to support more than one type of ADR center in Morocco.²¹
- (4) Support outreach efforts by the arbitration centers. This assistance should include outreach to in-house counsel and business firms so that private sector actors are aware of arbitration as an alternative to litigation, and so that arbitration and mediation clauses are made a part of business contracts.

¹⁹ Pierre Mayer, *Droit de l'arbitrage*, Collection Droit Uniforme Africain (2002).

²⁰ It is important to distinguish here between commercial arbitration based on a contractual agreement versus court annexed forms of arbitration, discussed below.

²¹ See for example the experience of the InterAmerican Bank for Reconstruction and Development, which funded a series of ADR projects focusing exclusively on chambers of commerce throughout Latin America.

- (5) Help develop “pacts” between Commercial ADR agencies and business and trade associations, whereby firms in a particular sector agree to include the agency’s arbitration or mediation clause in their contracts in a way that specifies the use of the agency’s rules and arbitrators.²²
- (6) Draft procedures, rules and regulations for arbitration institutions.
- (7) Develop standards for the selection, certification, training and oversight of arbitrators, including the drafting of rules on confidentiality and ethics.
- (8) Conduct formal training of arbitrators including theory, practice and the legal aspects of arbitration (e.g. following arbitration procedures or drafting arbitral awards), to include training of arbitrators without a legal background.
- (9) Conduct outreach and training for Commercial Court judges and court staff to facilitate the processing and enforcement of arbitral awards, and to ensure judicial “buy-in”.

Option 2: Support both commercial arbitration and private mediation

Opportunities and risks

Under the assumption that resources are available, we recommend that the PROGRAM support the development of mediation for commercial disputes in addition to arbitration. Mediation can be applied to a broader range of business disputes, as it is generally less formal, quicker and less expensive than arbitration. It is therefore useful for smaller business disputes and disputes within a specific sector where the parties will likely be working together in the future. The mediator helps disputants find their own solution. Mediation involves interest-based analysis and negotiation, thereby increasing the likelihood of a negotiated settlement, voluntary compliance with the settlement, and better future relations between the parties. It is also more likely than commercial arbitration to reduce court caseloads. The current draft law in the Moroccan Parliament covers both mediation and arbitration, indicating strong interest in both forms of ADR.

Mediation does not always result in a complete resolution of commercial disputes; however it is often attempted as a first step in the dispute resolution process. Moreover, the development of mediation for business disputes is likely to present more challenges than the development of commercial arbitration in Morocco. Mediation is a relatively new discipline with which most Moroccan legal professionals are not familiar, and is therefore more likely to draw some resistance. Developing a system for the training, selection and certification of mediators will be more intensive than those for arbitration.

Proposed targets

- Increased use and effectiveness of mediation of commercial disputes;
- improved adjudication of small to medium business disputes;
- reduced number of filings in Commercial Courts.

Proposed activities

- (1) Establish and guide a national Working Group or Commission on Commercial ADR. Any progress in the development of mediation will require some national level coordination involving the private sector, legal professionals, the Ministries of Justice and Commerce and Industry, and the judiciary. Such a working group could facilitate knowledge sharing and coordinate outreach, training and drafting tasks at the national level. In the consultant’s experience, such working groups or commissions sometimes work better if they are hosted by a

²² For an example on how this was done in another jurisdiction, see William E. Davis, “Creating a Commercial Dispute Resolution Center in the Palestinian Territories,” *Dispute Resolution Journal* (May-July 2005).

- foreign technical assistance program such as IBCM which can serve as a neutral meeting place between the private sector, the legal professions, government representatives and the judiciary.
- (2) Develop selection, certification, training, ethics and oversight standards for mediators.
 - (3) Provide formal training for prospective and current mediators. This training must include mediation theory, interest-based analysis, mediation techniques and practical role plays. Mediation training is substantially different from the arbitration training.
 - (4) Furnish institutional support of Mediation Center(s) based in Chambers of Commerce, CGEM and/or other private ADR agencies to conduct market studies and help develop business plans for sustainable operations and outreach activities.
 - (5) Support efforts to determine who will be mediators. Such efforts should go beyond legal professionals and retired judges, but should also include businesspeople with experience in particular sectors of the economy, and other professionals with specialized experience.
 - (6) Arrange for institutional support for private ADR associations such as the Arabo Africaine Association d'Arbitres (AAAA), Regional Investment Centers (for example the Fez RIC currently hosts ad-hoc mediation), and professional associations.
 - (7) Facilitate knowledge sharing for mediators and arbitrators through local and regional conferences, and events with American Arbitration Association and retired US judges, This may be, for example, in collaboration with the American Bar Association/CEELI, and Regional ADR Centers that include Egyptian, French, Italian and Spanish ADR centers.
 - (8) Support outreach activities targeting the private sector and legal professionals, including roundtables, and the development of a Commercial ADR website and publications on commercial ADR.
 - (9) Provide assistance for a course on ADR at the Institut Supérieur de la Magistrature (ISM) for trainee judges and judicial continuing legal education (CLE), conceivably co-branded with USAID.
 - (10) Assist law faculties for the development of courses on ADR as currently exist in several law faculties).

Option 3: Add court-annexed mediation component

Opportunities and risks

Based on our evaluation and the relevant experience in other jurisdictions, we believe that the PROGRAM should consider a court-annexed mediation component. Adding such an element would allow the Commercial Courts to begin using ADR tools directly to reduce their case load, and encourage parties to settle disputes. A court-annexed ADR program would benefit the development of private ADR as well as reducing case backlogs. Court-annexed programs give an official imprimatur, and reinforce mediator training and outreach. Furthermore, if an initial program is successful, the courts and the legal community would be likely to develop additional forms of court-annexed ADR to suit local needs. In the US for example, several of the “hybrid” forms of ADR were developed by federal and state courts to meet particular needs.

The initiative could take a number of forms. For example, Commercial Court judges could direct that the parties to small cases below a certain monetary threshold participate in a short mediation before the case can advance within the court. The mediators could be either judges within the same court, or more likely, attorneys, retired judges, court experts and/or businesspeople from key sectors technical and professional expertise. If the parties fail to come to a settlement in a prescribed time frame, the case would re-enter the court docket.

Ultimately, the nature of the court-annexed mediation program will have to be determined in collaboration with the MOJ, the Commercial Courts, private sector representatives, the legal profession and other stakeholders. A few key issues to consider:

- * There is currently no legal framework for court-annexed mediation or arbitration. The current draft Arbitration and Mediation Law in Parliament does contain provisions that allow sitting judges to serve as arbitrators²³ as well as a provision which provides for putting a case “on hold” if the parties agree to mediate.²⁴ The legislation does not contain any prohibitions on establishing court-annexed ADR. However, the absence of explicit statutory provisions for court-annexed ADR may constitute an obstacle, particularly in a civil law country such as Morocco. Permission from the MOJ and court authorities would have to be obtained.
- * Some opposition from the legal profession to court-annexed mediation is likely. Attorneys unfamiliar with ADR may fear that ADR techniques, particularly mediation, will take business away from them.²⁵ Outreach and training components will have to take this opposition into consideration, for example, by including attorneys and providing information on how the legal profession has benefited from the development of ADR in other countries.
- Support for court-annexed mediation would best be established as a pilot project in a single Commercial Court, with implementation beyond that court as the responsibility of program counterparts. The Presidents of both the Rabat and Tangier Commercial Courts have indicated interest in such a pilot, subject of course to further discussion and appropriate clearances.
- The development and implementation of a pilot initiative involving a completely new dispute resolution method is a long term initiative that requires substantial resources and ongoing support. Its success is also dependent on the development of forms of ADR outside of the courts.

Proposed targets

- Improved adjudication of small to medium business disputes;
- increased rate of settlement of disputes prior to trial in Commercial Courts;
- successful execution of a pilot project of court-annexed ADR in at least one Commercial Court.”

Proposed activities

- (1) Design court-annexed mediation pilot initiative with a Commercial Court, including development of rules, training program, local outreach, selection criteria and mechanisms.
- (2) Train local mediators prior to the launch of a pilot program; such a program cannot start until a body of mediators is established, trained and proper supervisory systems are in place.
- (3) Train judges and court personnel.
- (4) Implement pilot project. The PROGRAM would have to direct substantial resources to supporting the pilot initiative over several years. The design and training phase will likely take at least a year, with implementation starting thereafter.

General program design considerations

A few key program design considerations are listed below for reference should the IBCM Program proceed with commercial ADR activities.

²³ Art. 322, Projet de Loi No. 08-05.

²⁴ Art. 327-54, Projet de Loi No. 08-05.

²⁵ Christine Cervenak, David Fairman and Elizabeth McClintock, *Leaping the Bar: Overcoming Legal Opposition to ADR in the Developing World*, *Dispute Resolution Magazine* (Spring 1998).

- * Employ a participatory design process. Even more so than traditional judicial or legal reform activities, it is essential that technical assistance for the development of ADR include all stakeholders, including the private sector, the legal profession, the MOJ and the judiciary. A proper balance of control and independence must be established among the judiciary, executive and the private sector. Finding this balance for ADR initiatives can be a challenge, given that ADR, unlike the formal court system, is not an exclusively state provided service.
- Ensure that ADR institutions are financially sustainable and that adequate business models are established. This applies to all of commercial arbitration, private mediation, and court-annexed forms of ADR. If mediators and/or arbitrators are not paid for their services and a market is not established, ADR initiatives will fail.
- * Build in effective program evaluation techniques. Measurable indicators, data collection and regular review mechanisms are essential.
- Manage opposition effectively. The development of ADR usually engenders initial opposition from some stakeholders, such as members of the legal profession, or in certain cases, some judges. This opposition must be carefully taken into consideration and appropriate outreach activities included.

Coordinate with other donors

Overall coordination

The *Direction des Etudes, de la Coopération et de la Modernisation* (DECM) within the Ministry of Justice is responsible for coordinating international technical assistance. The DECM provided the consultant with an overview of past and planned ADR activities in Morocco. This overview allowed us in turn to meet with some of the other donors working in Morocco. As program design moves forward, extensive and ongoing coordination will be essential in order to avoid overlap and needless “turf battles”. Currently we have identified three other bilateral and multilateral donors who have either provided support in the past or are currently supporting ADR initiatives in Morocco.

Embassy of the United Kingdom / Search for Common Ground (SFCG) ADR/Mediation Project.

This ongoing project focuses on developing mediation for civil disputes. The goal is to work with Civil Society Organizations to strengthen the protection of civil rights, defend minorities’ rights, and improve the resolution of family disputes. It does not target business disputes. Nor does it work with Commercial Courts. The project currently plans to provide lawyer training on mediation throughout the country in order to gain “buy in” from the legal profession. The SFCG is also planning public outreach so that citizens are aware of mediation as an alternative to going to court. The SFCG Project Director has indicated a willingness to coordinate with future USAID funded Commercial ADR initiatives.²⁶

European Union / MEDA

The European Union does not appear to be supporting any ADR initiatives in Morocco at this time, but we did not contact the EU as part of this consultancy. We recommend discussion, perhaps through the MOJ, prior to designing USAID funded ADR activities. Given the allocation of technical support already in place as between USAID and EU regarding judicial reform, , an overlap

²⁶ In November 2005 Phase I of the Search for Common Ground ADR program (ADR I) was evaluated. ADR I focused on work with the MOJ and judges and included some outreach and training conducted with judges. Key problems encountered during Phase I included insufficient outreach / visibility, conflicts among magistrates, CSOs and lawyers interested in mediation; resistance from lawyers, which prompted the project to focus Phase II on training and outreach to lawyers.

of efforts is unlikely. This is so because USAID has taken the lead in supporting the Commercial Courts, while the EU is involved with the other Civil Courts. One interviewee reported that the EU had commissioned a preliminary study on the development of arbitration and mediation in Morocco, but no details were available. Some short conferences on arbitration have been held with EU and bilateral French, Italian and Spanish entities (e.g. with the Chamber of Commerce of Rome, the Chamber of Commerce and Industry of Paris).

World Bank

The World Bank provided support in 2004 to the drafting of the first version of the proposed Arbitration Law; however, it does not appear that any follow up activities are planned in terms of implementation or other support for ADR. Again, it is important that the MOJ and/or the World Bank be contacted to ensure that there is indeed no planned support addressing ADR for Morocco.²⁷

ADR support as part of the Improving the business climate in Morocco Program

There are obvious complements between the PROGRAM's current legal and judicial reform activities and commercial ADR activities. One key factor is the close relationship that the program has established with the leadership of the Commercial Courts. This relationship, as well as the program staff's understanding of key judicial and legal reform issues facing the courts in Morocco today, should be leveraged in the design and implementation of commercial ADR initiatives. ADR activities will also require the development of closer ties with private sector representatives such as chambers of commerce and industry, multi-sector organizations and other stakeholders who will in turn benefit non-ADR programming.

An area that is vital to the success of arbitration is improvement of the system of enforcement of judgments in Morocco. Arbitral awards are equivalent to a court judgment. Unless the losing party voluntarily complies with the award, the prevailing party must go to court to execute. The PROGRAM will undertake a series of initiatives in the area of enforcement, and these should be closely coordinated with ADR activities.

Finally, we note several "cross-cutting" aspects of ADR technical assistance and training that should be coordinated with other judicial and legal reform activities. For example, the PROGRAM will be working with counterparts on reforms in the area of trademark opposition with the Office Marocain de la Propriété Industrielle (OMPIC), the Moroccan trademark office. The PROGRAM will assist in developing an arbitration-like system for trademark for an administrative resolution for trademark opposition disputes. Another cross-cutting area is bankruptcy. Current law requires debtors and creditors to attempt settlement or conciliation as a component of the bankruptcy process. The PROGRAM's experience and success in bankruptcy law reform and judicial training in bankruptcy will help ensure that training activities relating to the development of ADR will be effectively and efficiently designed and implemented in this area.

²⁷ World Bank, Morocco Legal and Judicial Sector Assessment (2003).

Annex I**List of interviewees**

Tuesday, July 11

Mr. Nabil ROCH'D, Court Expert, Architect, President of the Association Arabo-Africaine des Arbitres.

Mr. Said AQRI, Secrétaire Général, Regional Investment Center (Centre Regional d'Investissements, Settat

Wednesday, July 12

Ms. Maria BAHNINI, Commercial lawyer

Thursday, July 13

Mr. Abdelmajid RHOMIJA, Directeur des Etudes, de la Coopération et de la Modernisation, Ministère de Justice, Royaume du Maroc.

Mr. Said BENNANI, Directeur General de l'Institut Supérieur de la Magistrature (ISM)

Friday, July 14

Mr. Chemseddine ABDATI, Directeur, Centre International de Médiation et d'Arbitrage de Rabat (CIMAR);

Mr. Mohammed MOUJAHID, Chamber of Commerce and Industry of Rabat.

Monday, July 17

Judge AL-BAYNE, President of the Rabat Commercial Court

Mr. Abou EL MAHASSINE-FIHRI, Country Director, Search for Common Ground Morocco

Tuesday, July 18 (Casablanca)

Mr. Saad HAMMOUMI—SGEM (Employers' Association) Federation des PME, small business owner.

Prof. Mohamed El Mernissi, Private sector attorney and arbitrator ; one of the drafters of the original MOJ / World Bank funded Arbitration Law; Head of the International Chamber of Arbitration (ICC / CCI) Branch for Morocco.

Mr. Moustafa BRIOU—Attorney, commercial arbitrator and Secrétaire General, Centre d'Arbitrage et Mediation de Casablanca (affiliated with Chamber of Commerce).

Mr. Réda OULAMINE, Business Lawyer, Casablanca

Wednesday - Thursday, July 19-20 (Tangier)

Judge AMRANI, President of the Tangier Commercial Court.

Monday, July 24

Mr. Richard PATON, Regional Director, American Bar Association

Mr. Youssef EL FALAH, Judicial Reform Program, American Bar Association

Thursday, July 27

Working meeting in Casablanca with private sector representatives for discussion of draft Arbitration and Mediation Law, presentation of US models, discussion on implementation issues. Materials prepared for this Program are attached as Annex 2.

Annex 2

ADR: Modes Alternatifs de Résolution des Conflits Commerciaux aux Etats-Unis

→→→ Augmentation de la participation de l'arbitre / médiateur à la résolution du litige →→→→				
Non-Assistée	(Sans Avis / Sentence: Les parties trouvent la solution)	(Avec Avis / Sentence Non-Obligatoire)	Arbitrale Obligatoire	Tribunal (Non-ADR)
<p>Negociation entre les parties sans arbitre / médiateur)</p> <p>Mini procès (<i>Minitrial</i>) (sans arbitre)</p>	<p>Conciliation</p> <p>Médiation conventionnelle</p> <p>Médiation rattachée au tribunal (<i>Court-Linked or Court-Annexed Mediation</i>)</p> <p>Conférence de transaction tenue par le juge (<i>Judge-Hosted Settlement Conference</i>)</p> <p>Mini procès (<i>Minitrial</i>) (avec un arbitre, mais sans avis)</p>	<p>Arbitrage non-obligatoire / non-exécutoire (<i>Non-Binding or Advisory Arbitration</i>)</p> <p>Arbitrage non-obligatoire rattaché au tribunal (<i>Court-Annexed Arbitration</i>)</p> <p>Evaluation préliminaire neutre (<i>Early Neutral Evaluation, ENE</i>)</p> <p>Expertise / Avis Non-Obligatoire</p> <p>Mini procès (<i>Minitrial</i>) (avec avis)</p>	<p>Arbitrage Conventionnel</p> <p><i>Private Judging</i></p> <p>Expertise Obligatoire</p>	<p>Procédure Judiciaire</p>

Source: U.S. Agency for International Development (USAID) Center for Democracy and Governance, Alternative Dispute Resolution Practitioners' Guide (1998).