Q U I D J U R I S ?

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BANKING LAW.

March and April are marked by the publication of important texts concerning banking law. The dahir 1-05-178 of February 14, 2006, promulgates the law 34-03 (called « banking law ») related to the organizations of loans and similar institutions .The dahir 1-05-38 of November 23rd 2005, promulgates the law 76-03 related to the articles of association of Bank Al-Maghrib.

These reforms related to the banking and financial sectors depend on a more general reform process, which aims at the modernisation of the economical life in the kingdom. Through this process of modernisation the authorities align themselves on international standards and get inspired from the European and American models.

We also notice the evolution in the allocating of auditors who should control very closely the loan institutions and insure that they respect the texts in use concerning accounting, internal control loan institutions, and the measures of caution. They should report to Bank Al-Maghrib as soon as they notice any violation to the regulations and the legislative dispositions by a loan institution.

In the institutional field we notice that the "Conseil National de la Monnaie et de l'Epargne" will become "le Conseil National du Crédit et de l'Epargne", this board is in charge of debating all the issues concerning the development of savings as well as the evolution of the loan institutions.

As for consumer protection, we notice the obligation of information that weighs on the loan institutions, as in the case of the closing of an agency, and the possibility for a depositor to claim compensation when his deposit is unavailable at another loan institution.

The new articles of association of Bank Al-Maghrib have distinguishing points: we can note a growth of Bank Al-Maghrib's autonomy towards the ministry of finance and the administration in general, notably in the field of monetary politics.

Bank Al-Maghrib is entrusted with the difficult task of fighting inflation insuring the stability of prices (like the B.C.E. and the F.E.D, we should note however that the latter should discharge its duty by putting it in a perspective of full employment.)

As for the foreign exchange policy, which is decisive for the import of foreign products and especially the volume of export of Moroccan products, the governor of Bank Al-Maghrib should follow the orientations as defined by the minister of finance.

In its relationship with the treasury, Bank Al-Maghrib has been denied the possibility to grant any financial help to the state under the condition of some overdraft facilities not to exceed 5 % of the fiscal revenues made during the course of the past budgetary year. We should note that Bank Al-Maghrib can suspend the use of this easiness of cash flow when it judges that the situation of the monetary market justifies it.

At the same time, we notice a greater parliamentary control with notably the setting up of a procedure of examination of the governor of Bank Al-Maghrib who is from now on required to answer the questions of the parliamentary commission of finance concerning monetary politics of organizations of loans and similar institutions.

We notice then a double process that allows a greater independence of Bank Al-Maghrib towards the administration and a greater transparency of the institution towards the parliament.

Bank Al-Maghrib is entrusted with the mission of insuring the safety of the system and the means of payment, this mission helps secure the financial transactions and in a certain way protects the consumer.

As for the new « banking law » concerning the organizations of loans and similar institutions, it too specifies the missions of Bank Al-Maghrib, particularly when it comes to the control of the banking institutions.

The governor of Bank Al-Maghrib is the only competent person to give the necessary approval needed for the creation of a banking institution, in case of an amendment in the shareholders or in the case there is a change in their board of directors; (change in control, transfer of shares of the capital, nomination of directors). The same applies in the case of change in the nationality.

Thus, in order to freely achieve its mission of supervisor of the financial sector, Bank Al-Maghrib should leave starting February 20th 2006 all the controls of the organizations of loans and similar institutions, in which it has a right of an « ultimatum » that runs until February 20th 2009. It should then give up its portfolio of contribution in the loan institutions.

INTELLECTUAL PROPERTY LAW.

Two years after the application in December 18th, 2004 of the first version of the legislation related to the protection of the intellectual property, the dahir 1-05-190 of 14 February 2006 promulgating the law 31-05 completes, not to say fulfils, the discrepancies of the initial text.

This second version has been needed in order to have the Moroccan legislation comply with the international commitments of the Kingdom, (more specifically, the free trade agreement signed with the USA 2003).

The new law, related to the protection of industrial property introduces an opposition procedure that can be expressed by the owner of the trademark protected or already registered at the Moroccan office of the industrial and commercial property (O.M.P.I.C.); or by the owner of a known trademark as explained in article 6 bis of the Paris convention on the protection of the industrial property, or by the owner of a geographical indication or a protected original label, on the condition that the opposing party makes the due payments.

The beneficiary of an exclusive licence of exploitation of a trademark has also the right of opposition, unless the licence contract states otherwise.

The text extends intellectual property protection to sound signals and olfactory trademarks.

The text allows applying by way of an on-line service at the OMPIC, for all commercial trademarks registration.

The dahir 1-04-192 of February 14, 2006 promulgating the law 34-05 modifying and completing the law 2-00 related to the royalties, related fees, marks an evolution in the field of intellectual property law.

In fact, this text, with considerable economic and cultural stakes, marks the entry of the Moroccan traditional patrimony in the protected national cultural patrimony. The use of the traditional for the sake of commercial work is submitted to the authorization of the Moroccan Bureau of Copyrights, and all transfers, partial or total, of the rights on a certain work inspired by the Moroccan folklore, or an exclusive licence on that work, is subject to the approval of the “Bureau marocain du droit d’auteur”.

This Bureau, guardian of the cultural patrimony and guarantor of the protection of copyrights, has now the ability and possibility to lodge an appeal in the case of any violation to the dispositions of the law 34-05.

The duration of the protection of copyrights is of 70 years after the death of the author.

It may be added that all trademark registration; patent, etc. at the OMPIC are done without any guaranty from the government.

COMPANY LAW.

The dahir 1-06-21 of February 14, 2006 promulgating the law 21-05 which modifies and completes the law 5-96 on the private companies, sleeping partnership companies, partnership limited by shares companies, limited liability companies completes and modifies the current legislative dispositions.

1. Amendments related to the limited liability companies (LLC.)

- The minimum nominal amount of a share in a LLC changes from 100 Dirham to 10 Dirham.
- The shares of a LLC do not have, as a rule, to be totally paid up.
- However, the shares that represent contribution should be fully paid up.
- The shares that represent contributions in cash should be paid up by a quarter of their value. The paying up of the surplus takes place once or many times upon the decision of the manager, in a period of time which should not exceed 5 years from the time of the registration of the company with the trade registry.
- The capital should however, be fully paid up before the subscription of new shares, to be paid up in cash, otherwise the operation is void.
- If in a period of 5 years there has not been a call for funds to fully pay up the capital, anyone can ask the

presiding judge of the court of commerce, to rule in chambers, for the manager to proceed, under a periodic penalty payment, to this call for funds or to mandate someone to complete the formality.

- Henceforth the claim against the administrators of the LLC resulting from elements in the results of the fiscal year is barred at the end of five years from the date of the deposit of the said results at the registry of the court.
- If, after noticing losses in the annual accounts, the net situation of a company is lower than the quarter of the capital, and the manager or the auditors did not prompt a decision or if the shareholders did not properly deliberate, then anyone involved can ask in court for the winding up of that company. From now on, the court can give a deadline of maximum one year (instead of six months) in order for the company's situation to be sorted out.
- From now on instead of publicizing extracts from the articles of association of a company, a notice can be advertised in a legal section of a newspaper or in the « Bulletin Officiel ». The content stays the same except than it mentions the registration number at the trade registry instead of the registry of the court where the company has registered and the date, as it is mentioned in article 95.

PUBLIC FINANCE.

The dahir 1-06-11 of the 14th of February 2006, promulgating the law 38-05 related to the funded accounts of public companies and institutions. It forces this latter to publicize funded accounts according to the international standards and the current legislative dispositions.

Public institutions, as well as State companies (companies whose capital is totally owned by public organizations), public subsidiaries (companies of which more than half of the capital is owned by public organizations), concessionary companies (companies in charge of a public service pursuant to a concession contract in which the state in the contracting authority), who own or control subsidiaries and the participations mentioned in articles 143 et 144 of the law 17-95 related to joint stock companies, should establish and present funded annual accounts according to the current international standards.

The law comes into effect by the second fiscal year after March 16, 2006.

FINANCE LAW.

The decree 2-06-178 of the 4th of April 2006 authorizing the « Caisse de dépôt et de gestion » to create a subsidiary called "CDG Capital S.A".

The « Caisse de dépôt et de gestion » is authorized to create a subsidiary called «CDG Capital S.A. » with a capital of 500 million DH.

This way, and in accordance with its purpose, being that of an investment bank, CDG Capital, a joint stock company with a board of directors and a capital of 500 million DH paid up and fully allotted by the CDG, will be structured around the following: management of assets, market activities, banking and financial services and corporate banking.

CORPORATION LAW.

The dahir 1-06-15 of February 14, 2006 promulgating the law 54-05 related to Public tender for management of public services sets the legal frame of delegated management of public services. This law comes in the process of modernizing the Moroccan economy by opening new opportunities to private operators who in turn can manage and exploit public services instead of the State or public institutions.

The text defines the delegated management of public services contract as follows :

> « a contract by which a legal entity of public law called "principal" delegates, for a determined period, the management of a public service for which it is responsible towards a legal entity of public or private law, called "Agent", who is given a right of payment on the users and/or the right to make profits on the said management.
>
> Delegated management can also concern the realization and/or the management of a public work competing for the delegated public service ».

A quick comparison with the French method is interesting; the French law 2001-1168 of December 11,2001 called «MURCEF law » introduced in the law 93-122 of January 29, 1993 called « loi Sapin » a definition of the delegation of public services:

> « A contract by which a legal person entrusts the management of a public service it is responsible for, to a private or public Agent, whose payment is substantially linked to the result of the exploitation of the service. The Agent can be in charge of the construction or acquisition of properties necessary to the service. » (article 1411-1 of the code of territorial communities.)

It should be emphasized that the methods used by the French legislator concerning the « the substantial payment linked

to the results of exploitation » has given way to multiple interpretations, sometimes divergent from the jurisprudence, and contributing to blur the exact meaning of delegated public services contracts.

The Moroccan law lays down the principal according to which the object of the contract of public servicesmanagement is the right to receive a payment on the users and /or realise benefits from that management, this method seems more restrictive than the French one and so less prone to a judge's interpretation.

The law does not establish dispensation concerning public tender for management of administrative public service, but logically we can think that other regalian public services (Police, Justice, Defence…) cannot be subject of a contract of a public tender of management of public services.

The principles governing the phase preceding the signing of a contract of Public tender for management of public services are advertising and putting the operators into concurrence.

The first principle aims at increasing the quantity of the proposal by informing the potential Agent of the existence of a market to be conquered. As for the second principle, it tends to play with the competition in order to achieve a balance between the price in favour of the Principal and the quality of the service.

These two principles aim at allowing a greater transparency for the economic operators as well as ensuring in their application a healthy management of public funds.

The law foresees that the contracts for the Public tender for management of public service called « mineures » (public services of which the number of users is less than a certain threshold) concluded by the local community and their groups, the law allows a « direct negotiation » or another simplified procedure after governmental authorization, under the condition that :

> « The concerned sector of activity or the number of users of public services doesn't justify or doesn't allow the application of the current law».

The method used by the legislator seems flawed, since neither the notion of « sector of activity » nor that of « number of users » are precisely defined, therefore it should be left to the jurisprudence and the judges' interpretation to clearly see the capability for a territorial community or a group of territorial communities to resort to the procedure called "simplified" or the "direct negotiation" after governmental authorization, getting away from the advertising and concurrence procedures..

However, when the Public tender for management concerns a public service in the sector of water, purification, electricity, urban transport or the management of waist, the governmental authorization may legitimately not be given.

We generally notice that the Moroccan legislator does not specify the exact measures of publicity to be taken or the procedure of putting into concurrence.

The text stipulates one condition according to which :

> « […] le Principal has to […] call for a bid in order to insure equality among the competitors, the objectivity of the selection, transparency of the operations and the impartiality of the decisions. »

And the principle according to which :

> « The procedure of transfer of a contract of Public tender for management should undergo publicity ».

The text stipulates that :

> « The methods and terms of establishing documents for the call for bids and more particularly its different stages are set by the government for the local communities and by the board of directors or the deliberating organ for the public institutions. ».

This way, the Principal has a great freedom to set by himself the criteria used to choose the delegated manager of the public service.

Article 6 of the law indicates the cases when the direct negotiation is used, and they are limited to:

- When there is urgency to insure the continuity of the public service.
- For national defence, or public security reasons.
- For activities of which the exploitation is solely reserved for holders of a patent or for the services which can be entrusted only to a determined Agent.

However, local communities can resort to the procedure of direct negotiation after a fruitless transfer of contract.

Public tender for management of public services contracts obey publication measures in the Bulletin Officiel (for public

institutions) or in the Bulletin Officiel des Collectivités Locales (…local communities).

Article 29 of the law seems to indicate:

> « A contract of Public tender for management can authorize the Agent to collect on behalf of the Principal or the government, taxes, charges, funds or participations. »

The rest of the article indicates :

”The contract of Public tender for management sets the principles and modalities of price setting or of payment for the delegated service, as well as the conditions and the rules of adjustment or amendment or revision of prices.

INSURANCE LAW.

The dahir 1-06-17 of 15 moharrem 1427 (February 14, 2006) promulgating the law 39-05 modifies and completes the law 17-99 on the insurance code; it affirms the reform of the sector of insurance in the Kingdom. (special number of January/ February 2006)

- The dahir requires the elaboration, at the closing of each fiscal year, by the Board of Directors, of a report on the creditworthiness of the insurance company. This report of creditworthiness should contain an analysis of the conditions in which the company would be able to respect all its commitments.
  This report is forwarded to the administration and auditors.
- The dahir requires that the insurance and reinsurance companies set a system of internal control that will identify, evaluate, manage and follow up the risks. These companies should from now on have a structure of internal auditing which answers to either the board of directors or the board of and has a mission to verify the efficiency of the system of internal control. This structure of internal audit should establish at least once a year a report on its activity and give it to the company’s auditors.

The amendments brought to the dahir of February 14, 2006 must have been motivated by the international involvement of Morocco, particularly those resulting from the free trade agreement with the USA and the European union.

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