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Real Estate

Morocco

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MOROCCO

Law and Practice

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1. General

1.1 Main Sources of Law

The Moroccan real estate sector is regulated by numerous laws and decrees regularly amended and completed. Most of the laws are not codified.

The main sources of real estate legislation can be found in the following texts (non-exhaustive list):

- Dahir dated 12 August 1913 forming the Obligations and Contracts Code regulating the general rules of contract law (as amended from time to time);
- Dahir No 1-11-178 dated 22 November 2011, promulgating Law No 39-08 forming the Real Property Code (*Code des Droits Réels*);
- Dahir No 1-11-177 dated 22 November 2011, promulgating Law No 14-07 amending and supplementing the Dahir of 12 August 1913 on land titling;
- Dahir No 1-16-05 dated 3 February 2016, promulgating Law No 107-12 amending Law No 44-00 on off-plan sales;
- Dahir No 1-02-298 dated 3 October 2002, promulgating Law No 18-00 regulating the co-ownership rules applicable to erected buildings, as amended by Dahir No 1-16-49 of 27 April, promulgating Law No 106-12;
- Dahir No 1-92-31 dated 17 June 1992, promulgating Law No 12-90 on urban planning, as amended by Dahir No 1-16-124 dated 25 August 2016, promulgating Law No 66-12 on control and infringements in the field of town planning and construction;
- Dahir No 1-92-7 dated 17 June 1992, promulgating Law No 25-90 on allotments, housing groups and subdivisions;
- Dahir No 1-13-111 dated 19 November 2013, promulgating Law No 67-12 governing contractual relations between landlords and tenants of premises for residential or professional use;
- Dahir No 1-16-99 dated 18 July 2016, promulgating Law No 49-16 relating to the leases of buildings or premises rented for commercial, industrial or artisanal use; and
- Dahir No 1-03-60 dated 12 May 2003 promulgating Law No 12-03 on environmental impact assessments.

1.2 Main Market Trends and Deals

The Moroccan real estate market has been less dynamic and experienced a slowdown over the last 12 months, particularly regarding the residential sector.

An increasing demand for both high-quality office space and residential real estate is visible in the city of Casablanca, with the emergence of Casablanca Finance City.

The automotive market has witnessed a boom in the last ten years, and has contributed to boosted growth in the construction sector. Morocco thereby confirms its position as the emerging leader of the African automotive industry and continues to attract renowned automotive firms to install industrial plants in the country. In June 2019, French automaker PSA inaugurated a new plant in Kenitra.

In the retail sector, following the success of the Morocco Mall Casablanca, two similar projects are in preparation by the Aksal Property Group in the cities of Marrakech and Rabat.

Finally, the Moroccan real estate market has seen the introduction of a new investment vehicle dedicated to real estate and similar to REITs, called *Organismes de Placement Collectif Immobilier* (OPCI), with two OPCI approved by the Moroccan Financial Market Authority by the end of December 2019.

1.3 Impact of Disruptive Technologies

To date, the impact of blockchain, decentralised finance, proptech and other disruptive technologies on the Moroccan real estate sector is minimal.

1.4 Proposals for Reform

As highlighted in **1.2 Main Market Trends and Deals**, the publication in 2019 of the implementing regulations of Law No 70-14 introducing real estate investment trusts in Morocco will significantly boost the real estate market.

It should be noted that Morocco's Finance Law No 70-19 relating to financial year 2020 introduced several amendments to Moroccan tax law, in particular regarding the tax regime and incentives offered by Morocco's finance and business hub Casablanca Finance City (CFC), and the tax regime applicable to companies located in Export Free Zones or companies performing service outsourcing activities. Such reforms were taken in response to the conclusions of the European Commission that placed Morocco on the "grey list" of the Common European Union (EU) list of third-country jurisdictions for tax purposes.

Several reforms are expected in 2020, including regulation governing the profession of real estate agent and the building code, which should introduce all the rules and provisions necessary for construction. Recently, the Ministry of Industry, Investment, Trade and the Digital Economy also announced work on a draft law defining the rules applicable to the planning, development and management of industrial zones.

2. Sale and Purchase

2.1 Categories of Property Rights

Land Tenure

The Moroccan legal framework applicable to property rights can be described as complex. This is partially due to the multitude of legal regimes governing lands held under several sources (social, ethnic and religious), and partly due to the co-existence of unregistered and registered property systems.

Types of Moroccan land tenure can be presented as follows.

- State ownership:
 - (a) Public domain of the Moroccan State; and
 - (b) Private domain of the Moroccan State.
- Collective ownership:
 - (a) Collective lands (*terres collectives*): lands owned by local communities/tribes;
 - (b) Habous lands (*habous*): lands belonging to religious institutions (such as mosques, schools, etc); and
 - (c) Guich lands (*terres guichs*): lands owned by military communities.
- Individual ownership:
 - (a) registered title deed: characterised by the registration/publication process and the probative effect of being recorded in the Land Registry held by the National Agency for Real Estate Conservation, Property Registries, and Cartography (ANCFCC); and
 - (b) individual property of unregistered property called “moulkiya”: property governed by the traditional system based on local customs, under which ownership is based on peaceful possession and uninterrupted common knowledge for a period of ten years (towards third parties) or 40 years (towards family members). Such ownership is proven through the issue of a document called moulkiya from traditional notaries (*adouls*).

Rights in rem (*droit réels*)

The Moroccan Real Property Code (*Code des Droits Réels*) draws up a list of rights in rem divided into two categories, as follows.

- Main rights in rem (that can be defined as an autonomous right not depending on any other rights):
 - (a) freehold;
 - (b) easements and encumbrances;
 - (c) usufruct right;
 - (d) right of use;
 - (e) surface right;
 - (f) emphyteusis right;
 - (g) right of habous;
 - (h) right of zina;
 - (i) right of houa; and

- (j) customary rights properly constituted before the entry into force of the Real Property Code.
- Ancillary rights in rem (that can be defined as a right depending on a personal right):
 - (a) privileged liens;
 - (b) mortgages; and
 - (c) antichresis.

2.2 Laws Applicable to Transfer of Title

In addition to the general rules of contract law related to sale and purchase agreements, the transfer of private registered property is governed by specific pieces of legislation, such as:

- Law No 39-08 forming the Real Property Code (*Code des Droits Réels*);
- Law No 14-07 amending and supplementing the Dahir of 12 August 1913 on land titling; and
- Law No 107-12 amending Law No 44-00 on off-plan sales.

There are also particular laws that govern the transfer of certain types of real estate – ie, land belonging to the private state domain, collective lands, individual property of unregistered land (*moulkiya*), etc.

No specific provisions are in place to deal with the industrial, office or retail sectors.

2.3 Effecting Lawful and Proper Transfer of Title

Regarding registered lands, a notarised deed of sale has to be signed before a notary public in order to transfer title to real estate.

A deed of sale has to be registered with the Land Registry (*Conservation foncière*) once executed before a notary public, and the ownership of registered land transfers to the buyer only when the deed of sale is registered with the Land Registry.

Title insurance is not common in Morocco. Ownership is guaranteed under the Moroccan Constitution, and for registered land the title is guaranteed by the Land Registry, which ensures that the deeds are properly registered. The information contained in the Land Registry is available to the public and can be obtained for a nominal cost.

2.4 Real Estate Due Diligence

Due diligence reviews are generally conducted by buyers, and cover technical, commercial and legal matters.

With regard to legal matters, the review will generally concern:

- the title and encumbrances, in order to confirm the valid and full ownership of the seller, and that the title is free and

clear from any liens or encumbrances whatsoever – such as mortgages, preventive seizure, etc;

- construction matters (building permits, certificate of conformity, guarantees and related insurance coverage);
- third party rights;
- the rental situation;
- contracts relating to the property;
- corporate matters (a comprehensive corporate due diligence should be conducted if the asset is acquired through a share deal); and
- documentation regarding litigation and other contracts relating to the property and the target company.

2.5 Typical Representations and Warranties

The following warranties are imposed on the seller, and can be extended or limited by the parties:

- a guarantee of eviction, protecting the buyer from any restriction on his use of the property by the seller or by any third parties who claim rights over the real estate; and
- a guarantee against hidden defects (*vices cachés*) (ie, defects that substantially reduce the value of the property or render it unfit for its intended use) – such claim must be brought within 365 days of the handover of the property (unless otherwise agreed). However, the seller cannot be liable for obvious defects, or those the buyer knew or could easily have known about.

Concerning a share deal, the warranties granted by the seller include representations and warranties relating to the company being sold (eg, the existence of the company, share capital and ownership of the shares, corporate matters, the accuracy of the accounts, the company's activity, financial standing, significant contracts entered into by the company, employment matters, litigations, tax matters, etc).

2.6 Important Areas of Law for Investors

When considering the purchase of real estate in Morocco, investors should take the following into account:

- general principles of contract law (particularly the provisions that are applicable to the sale and purchase of real estate);
- tax regulation and structuring aspects;
- foreign exchange control regulations, and especially the rules applicable to transferring abroad any revenues generated from investments made in foreign currencies in Morocco);
- registration and publicity formalities;
- construction, urban planning and zoning regulations;
- environmental law (for instance, the need to obtain any permit prior to building or operating a property);

- regulations applicable to the contemplated business activity to be conducted from/within the building; and
- regional and local practice or customs.

2.7 Soil Pollution or Environmental Contamination

Moroccan environmental law is based on the “polluter pays” principle, which means that the person responsible for the pollution will be liable for damages and is responsible for taking appropriate actions to remediate such pollution. Therefore, if pollution is discovered, the property owner must prove that the pollution was generated by the previous owner or by a tenant in order to avoid liability.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

Zoning and planning regulations must be checked before planning a construction project and applying for a building permit.

The plans and regulations for each local region are usually available to the public for a nominal fee from the relevant local urban agency (*agence urbaine*), through a dedicated application form (*note de renseignement*) informing about applicable uses and restrictions regarding footfall, maximum height of buildings, etc.

No agreement with public authorities is necessary in order to facilitate a private development project. However, in some cases involving a specific real estate project (mostly to promote touristic, industrial and/or artisanal projects, as well as social housing), it is possible to request and obtain an authorisation from the relevant authorities to derogate from the applicable urban regulations.

2.9 Condemnation, Expropriation or Compulsory Purchase

Under Law No 7-81, the Moroccan State is allowed to expropriate land for reasons of public necessity or for temporary use. In such cases, the expropriated entity must be compensated. The compensation is based on the current and effective damage directly caused by the expropriation according to the value of the property on the day of the decision pronouncing the expropriation.

The expropriation process can be divided into:

- an administrative phase, including a declaration of public utility (*déclaration d'utilité publique*), a public enquiry (*enquête publique*) and a transfer order (*arrêté de cessibilité*); and
- a judicial phase, if the owner concerned contests the public utility or the proposed indemnity amount.

2.10 Taxes Applicable to a Transaction

In the case of an asset deal, the following fees are due:

- Notary public fees, which vary depending on the value of the transaction and are generally borne by the buyer, unless agreed otherwise:
 - (a) sale price of MAD300,000 or less: fixed fees of MAD4,000;
 - (b) sale price from MAD300,001 to MAD1,000,000: 1.5% of the sale price;
 - (c) sale price from MAD1,000,001 to MAD5,000,000: 1.25% of the sale price;
 - (d) sale price from MAD5,000,001 to MAD10,000,000: 0.75% of the sale price; and
 - (e) sale price of more than MAD10,000,000: 0.5% of the sale price.
- Registration duties with the tax administration – the purchase of real estate is subject to mandatory registration duties. Article 133-I-F-1° of the Moroccan Tax Code (MTC) provides that the registration of the real estate purchase agreement triggers the payment of registration duties at the rate of 5%, calculated on the purchase price. These registration duties are borne by the buyer.
- Registration fees with the Land Registry – Decree No 2-16-375 dated 18 July 2016 sets out rates applicable to real estate property and provides that the purchase of real estate triggers the payment of registry fees with the Land Registry amounting to 1.5% of the purchase price (required to register the deed of sale and update the Land Register). Such fees are also borne by the buyer.

In the case of a share deal, the following fees are due:

- Registration duties with the tax administration – such tax varies depending on whether or not the target is considered a real estate company, with Article 61-II of the MTC defining a real estate company as any company whose gross fixed assets are composed of at least 75% real estate assets (including other real estate companies), determined at the beginning of the financial year in which the taxable sale occurs (properties used for the purpose of a commercial, industrial and other activity are not taken into account in the 75% threshold). If the target does not qualify as a real estate company, a share purchase agreement has to be registered with the tax office, but is no longer subject to the payment of registration duties. Pursuant to Article 133-I-A-2° of the MTC, if the target does qualify as a real estate company, the sale of shares triggers the payment of registration duties at the rate of 6% of the purchase price, payable by the buyer.
- Registration fees with the Land Registry/notary public fees – unlike a direct purchase of assets, the purchase of shares in a real estate company does not trigger the payment of notary

public fees (as the sale and purchase agreement does not need to be notarised) nor the payment of property registry fees (the title deed does not need to be updated, as the owner of the property remains the same).

2.11 Legal Restrictions on Foreign Investors

Under Moroccan law, except in certain specific business sectors such as agriculture, fishery, audiovisual, banking and insurance, there are no restrictions on foreign investors acquiring real estate (either directly or indirectly through the purchase of a company holding real estate assets).

Pursuant to the provisions of the Dahir relating to the purchase of agricultural land in rural areas, dated 23 April 1975, foreign individuals, or entities whose share capital is held at least in part by foreign entities, are not allowed to acquire agricultural land for agricultural purposes, and may only lease such areas for up to 99 years.

However, if a foreign investor plans to carry out a non-agricultural project on agricultural lands (such as an industrial or residential project), a specific temporary and final certificate of non-agricultural purpose may be obtained from the administration, which will allow the foreign investor to acquire the land and carry out the contemplated project.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Commercial real estate acquisitions in Morocco are generally financed by real estate investors through a combination of equity (including internal financing by the shareholders) and/or banking debt.

3.2 Typical Security Created by Commercial Investors

Lenders usually require the following securities:

- a mortgage (*hypothèque*) over the real estate asset;
- a pledge over the general business concern (*nantissement de fonds de commerce*);
- a pledge over receivables (*nantissement de créances*);
- a bank account pledge (*nantissement de compte bancaire*);
- an assignment of insurance proceeds (*délégation des indemnités d'assurance*); and
- a pledge of shares (*nantissement d'actions*).

It is also common to obtain personal securities, such as a guarantee from a company (usually a parent company) covering cost overruns, completion, interest and principal.

Law No 21-18 relating to personal property securities provides for the establishment of a national register of personal property security centralising data on the pledged properties.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

Legal restrictions on granting security over real estate to foreign lenders by Moroccan companies are mainly driven by the Foreign Exchange General Instruction, as amended in January 2020.

The enforcement of any security in Morocco that benefits a foreign lender would result in a transfer of the enforcement proceeds outside of Morocco. As this operation is not already authorised under the General Instruction, such a transfer would require the lender to obtain a spot authorisation from the foreign exchange office. Such authorisation is a typical request from lenders.

Concerning repayment under a loan agreement, the General Instruction pre-authorises foreign financing under certain circumstances that would allow a Moroccan borrower to repay a loan to a foreign lender.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

The registration of a mortgage generates registration duties and land registry fees charged as follows:

- Registration duties – the Moroccan Tax Code (MTC) provides that the taxable basis is composed of the total amount mortgaged and includes, in particular, the amount mortgaged in principal, the estimated expenses (or 6% of the principal if there is no estimation) and interest (capped to the value of interest paid over two years). The amount of the mortgage (as calculated according to the rules described above) is subject to registration duties at the rate of 1.5%.
 - Land registry fees – the registration of a mortgage triggers the following fees, which depend on the value of the mortgage:
 - (a) lower than MAD250,000 (around USD27,000): 0.5%;
 - (b) between MAD250,000 and MAD5,000,000 (around USD530,000): 1.5%; and
 - (c) above MAD5,000,000: 0.5%.
 - A fixed duty (per property) of MAD100 also applies.
- There are no stamp duties on credit or security agreements (subject to exceptions).

No specific fee is required for the enforcement of a security.

3.5 Legal Requirements Before an Entity Can Give Valid Security

In addition to corporate authorisations, when granting any security, a Moroccan entity must ensure that the following rules are respected.

Financial assistance (*assistance financière*) rule: pursuant to Article 280 et seq. of Law No 17-95 relating to joint stock companies, it is prohibited to provide financial assistance to the target company in the form of advances of funds, loans or security with a view to the subscription or purchase of its own shares by a third party. Article 280 refers to financial assistance “in view of” the acquisition/subscription – ie, at the time of the transaction or in contemplation of a transaction. The provisions prohibiting financial assistance under Law No 17-95 relate to joint stock companies and do not in theory apply to limited liability companies. In addition, the SARL code does not set out similar provisions.

Corporate benefit (*intérêt social*) rule: any decision regarding a company must be taken in the best interest of the company. The existence of a corporate benefit is ultimately a business decision and, as such, is an issue for the company’s directors to resolve. Any evaluation of the existence of a corporate benefit should be assessed on a case-by-case basis.

Corporate purpose (*objet social*) rule: any security granted by a Moroccan entity to the benefit of third parties must comply with the corporate purpose of the entity. No definition of corporate purpose is provided by Moroccan law, but Law No 17-95 relating to joint stock companies specifies that the corporate purpose “must be specified in the articles of association.”

3.6 Formalities When a Borrower Is in Default

Secured lenders should be able to enforce a mortgage without any obstacle, provided the following conditions are met:

- the mortgage is duly registered in the local Land Registry (*conservation foncière*);
- it is a first ranking mortgage; and
- the borrower is not undergoing insolvency proceedings.

3.7 Subordinating Existing Debt to Newly Created Debt

According to Section 169 of Law No 39-08, priority ranks from the date of registration, with same-day registration ranking equally, and maintains its rank and validity without any additional formality, until the valid registration of its withdrawal (*mainlevée*).

In order to subordinate a mortgage already registered in favour of a new mortgage, a specific subordination or intercreditor

agreement between the concerned creditors exchanging ranks is required. The rules of subordination among creditors will be set out in that agreement, as well as rules governing the enforcement rights.

3.8 Lenders' Liability Under Environmental Laws

In principle, the holder of security over real estate is not liable for environmental damage, provided it did not cause the damage itself.

3.9 Effects of Borrower Becoming Insolvent

Under Moroccan law, a security interest granted by a borrower may not be made void if the borrower becomes insolvent.

However, borrowers will not be authorised to proceed with the enforcement of any security interest for the duration of the borrower's insolvency proceedings. Indeed, any creditor whose receivables are not privileged by law are prohibited from commencing or continuing any individual legal action against the debtor.

In addition, the insolvency court can void securities granted during the six-month period prior to the borrower's declaration of insolvency, if it is considered that granting such security is prejudicial to the borrower's bankrupt estate.

3.10 Consequences of LIBOR Index Expiry

Given the anticipated expiry of the LIBOR, parties to foreign currency facilities based on this index with a term extending beyond 31 December 2021 must pay particular attention to ensure that the risk of LIBOR being discontinued is sufficiently covered in those agreements. This is best done by drafting interest clauses that set out fallback options if the reference rate cannot be determined (such as alternative reference rates or interest adjustment clauses).

4. Planning and Zoning

4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning

Law No 12-90 on urban planning sets out the general principles applicable to strategic planning and zoning.

Strategic plans and zoning schemes are established through the issue of Urban Development Master Plans (*Schémas Directeurs d'Aménagement Urbain*) and zoning plans (*plans de zonage*). Development plans (*plans d'aménagement*) are prepared by each municipality, dividing the area into zones of different uses, and attributing building density ratios to each zone.

4.2 Legislative and Government Controls Applicable to Design, Appearance and Method of Construction

There are public law controls in place to determine whether a landowner may construct a new building or refurbish an existing building. This is done through an administrative authorisation (ie, a building permit including *ne varietur* plans), which has to be obtained prior to starting any construction work.

4.3 Regulatory Authorities

The authorities responsible for regulating the development and designated use of individual parcels of real estate are mostly the local authorities, including the urban agencies and municipal presidents responsible for issuing building permits.

4.4 Obtaining Entitlements to Develop a New Project

The following authorisations and permits are required for the construction of a real estate project (the list is not exhaustive as the situation depends on each particular project):

- Environmental acceptability decision (*décision d'acceptabilité environnementale*): projects relating to certain types of activity must obtain an environmental acceptability decision granted by the Ministry of Environment. Approval is granted on the basis of the results of an environmental impact study.
- Hazardous facilities (*installations classées*): before starting the construction of insalubrious, inconvenient or dangerous facilities, an approval has to be obtained from the relevant authorities, or a declaration has to be filed, depending on the nature/class of the facilities.
- Subdivision permit (*permis de lotir*) and authorisation to split up (*autorisation de morceller*): the splitting up of a plot into several parcels needs an authorisation to subdivide and an authorisation to split up in order to be able to split the primary land title into several land titles, allowing each lot to have a separate land title.
- Building permit: in order to carry out construction work, a building permit must be obtained. In practice, the permit is delivered once all the authorisations and visas required by specific laws and regulations have been obtained.
- Certificate of compliance (*certificat de conformité*) or occupancy permit (*permis d'habiter*): an occupancy permit or, if the building is not dedicated to private lodgings, a certificate of compliance/conformity must be obtained by the owner upon completion of any construction in order to confirm that the building complies with the provisions of the building permit. This permit/certificate is a prerequisite to the building being used.

4.5 Right of Appeal Against an Authority's Decision

As an administrative act, any decision taken by the authorities must be justified and may be appealed before the relevant authority (*recours gracieux*) and/or the administrative courts (*recours contentieux*). Third parties with a specific interest that deserves protection may also file a lawsuit before the administrative authority or court and ask for the decision to be annulled.

4.6 Agreements with Local or Government Authorities

There is generally no need to enter into agreements with local or governmental authorities or agencies, nor utility suppliers, in order to facilitate a development project.

4.7 Enforcement of Restrictions on Development and Designated Use

In the event of a failure to comply with an applicable regulation related to construction and planning law, the following measures could be taken:

- closing the construction site until a proper building permit is obtained; and/or
- ordering the constructions to be modified in order to conform with the regulations in force; or
- ordering the construction work to be demolished.

In any case, a fine ranging from MAD1,000 to MAD100,000 may be ordered against the violating party.

Furthermore, anyone who continues to operate a project despite a decision closing the construction site may be punished by imprisonment from 15 days to three months.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Real estate assets can be acquired either by individuals or by legal entities. Large or high-value assets are generally owned by companies, with the most commonly used corporate forms being:

- the joint stock company (*Société Anonyme – SA*) governed by Law No 17-95 (as amended);
- the limited liability company (*Société à Responsabilité Limitée – SARL*) governed by Law No 5-96; and
- the real estate civil company (*Société Civile Immobilière – SCI*) governed by the Moroccan Obligations and Contracts Code.

Law No70-14 dated 24 August 2016 introduced real estate investment trusts (REITs) into the investment legal framework known as “*Organisme de Placement Collectif Immobilier*” (OPCI).

There are two different forms of OPCI:

- a real estate investment trust (*fonds de placement immobilier – FPI*) organised in the form of a co-ownership without legal personality; or
- a real estate investment company (*société de placement immobilier*) organised as a joint stock company, listed for trading on the stock exchange.

5.2 Main Features of the Constitution of Each Type of Entity

A joint stock company (*Société Anonyme – SA*) is a form of limited liability company, as each shareholder's liability is, in principle, limited to the amount of its contributions to the company. An SA has at least five shareholders (unless incorporated between two legal entity shareholders and subject to certain requirements, in which case it is named a Simplified Joint Stock Company or *Société Anonyme Simplifiée – SAS*). It is the most common form of commercial company with limited liability for the operation of large businesses.

A limited liability company (*Société à Responsabilité Limitée – SARL*) is the Moroccan form of a limited liability company. It can be incorporated as a sole shareholder company (in which case the company is a sole shareholder limited liability company – SARLAU) and may have up to 50 shareholders. The SARL is often used for smaller businesses, especially because of its lighter and simpler management organisation and process.

Contrary to a joint stock company, a SARL cannot be listed on a stock exchange and cannot issue preference shares and debt or equity securities convertible into shares.

A real estate civil company (*Société Civile Immobilière – SCI*) is a civil company whose purpose is to hold real estate assets. As a civil company, in principle an SCI cannot have a commercial or trading nature. The shareholders are indefinitely liable for the company debts, in proportion to the shares they hold in the share capital.

5.3 Minimum Capital Requirement

A joint stock company requires a minimum share capital amount of MAD300,000. Contributions can be made in cash (*numéraire*) or in kind (*en nature*). Contributions in kind are subject to a specific appraisal procedure by an independent appraiser.

A limited liability company has no minimum share capital requirement. Contributions must be made in cash or in kind, with it being specified that contributions in kind are subject to a specific appraisal procedure by an independent appraiser.

A real estate civil company requires a minimum share capital amount of MAD1. Contributions can be made in cash or in kind, or may consist of technical skills (*apport en industrie*).

5.4 Applicable Governance Requirements

An SA can have either (i) a board of directors (*conseil d'administration*) or (ii) a management board (*directoire*) and a supervisory board (*conseil de surveillance*). The CEO (*directeur général*) is in charge of the day-to-day management of an SA and is vested with the widest power and authority to represent the company towards third parties.

A SARL is managed by one or more managers, who must be individuals and are vested with the widest power and authority to represent the company towards third parties, except for matters legally reserved for shareholders.

A real estate civil company (*Société Civile Immobilière*) is managed by one or more managers, who must be shareholders of the company (if the articles of association of the company are silent on this point, all the shareholders are vested with the powers and authority to manage the company).

5.5 Annual Entity Maintenance and Accounting Compliance

An SA must appoint at least one statutory auditor (two if the company is listed), and is required to file its accounts annually. These accounts must be certified by the statutory auditors, closed by the board of directors and approved by the shareholders' meeting before being filed with the local tax authorities and the trade registry. Stamp duties apply (up to MAD200), plus the costs of the statutory auditors for the certification of the annual accounts.

A SARL must appoint statutory auditors only if its annual turnover exceeds MAD50,000,000. A SARL is also required to file its annual accounts – duly approved by its shareholder(s) – with the local tax authorities and the trade registry.

There is no requirement to appoint a statutory auditor in a real estate civil company (*Société Civile Immobilière*), nor to file annual accounts.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

The main types of arrangements enabling an individual, a company or an organisation to have access to a property for a limited period of time without purchasing it outright are the lease agreement, usufruct, *commodat* (a free lease agreement for the use of the property) and, with regard to private State land, the authorisation for the temporary occupation of public land.

6.2 Types of Commercial Leases

In addition to general rules governing leases, as laid down by the Obligations and Contracts Code, Moroccan legislation includes specific laws governing commercial leases and professional leases.

Law No 67-12 regulates contractual relations between tenants and landlords for residential or professional premises.

Leases of buildings or premises used for commercial, industrial and handicraft purposes are regulated by Law No 49-16, which sets out a complete list of situations in which the landlord must grant a commercial lease, as follows:

- for premises or buildings in which a business (*fonds de commerce*) is operated;
- for premises or buildings considered an accessory to the main premises in which the business is operated;
- for premises that consist of undeveloped land that will be developed and used to operate a business;
- for premises or buildings used for commercial, industrial and handicraft purposes and as part of a private State domain; and
- for premises and buildings used as private schools, clinics or pharmaceutical laboratories.

Law 49-16 also provides that its provisions will not be applicable for the following specific types of premises:

- premises or buildings that are part of the public state domain;
- premises or buildings that form part of the private state domain, but which are used for public interest;
- premises or buildings located in a shopping mall; and
- premises or buildings located in a dedicated zone gathering companies operating in the information and communications technology sector and offshoring activities.

6.3 Regulation of Rents or Lease Terms

As a general principle, rents are freely negotiable between the landlord and the tenant.

Although permitted by law, variable rents are not common in leases for office premises, but are a common feature in retail leases for premium international brands (expressed as a percentage of the annual gross revenues of the tenant's business, subject to a specified minimum fixed rent).

6.4 Typical Terms of a Lease

Duration

The duration of commercial leases is not regulated by Moroccan Law, so the parties are free to enter into a lease agreement for any amount of time.

The right of the tenant to renew the lease is one of the main characteristics of a commercial lease. This right implies that, in the event of non-renewal, the tenant is entitled to an eviction indemnity based on the value of its business, among other considerations. In order to be entitled to such a right of renewal, the tenant must either have been occupying the premises for two consecutive years or paid "key money" (*pas-de-porte*).

In practice, commercial leases are entered into for a fixed initial period of three to nine years.

Work and Repairs

Regarding maintenance and repairs, the parties are free to allocate the various type of work and repairs. However, in general, the tenant is responsible for ordinary repairs and maintenance, and the landlord bears the costs of structural and major repairs, as well as repairs resulting from wear and tear, force majeure and construction defects.

Frequency of Rent Payments

The frequency of rent payments is freely negotiable between the parties. Rent for commercial premises is usually payable monthly or quarterly in advance.

6.5 Rent Variation

Under the applicable regulations, the amount of the rent, the conditions of its revision and the rate of its increase or decrease can be freely determined by the tenant and the owner.

However, Law No 07-03 on the revision of the amount of rent for premises of commercial, industrial or handicraft use prohibits increases in rent within the first three years from the date of concluding the lease agreement, or from the date of the last judicial or contractual review, and/or prohibits parties from agreeing on an increase in excess of the rates set out by law (ie, 8% for residential leases and 10% for others, including commercial and professional leases).

If no agreement has been reached between the tenant and the landlord regarding the conditions for the rent revision and the

rate of its increase, the parties may apply for judicial review on the basis of the rates mentioned above.

In practice, the parties generally stipulate a rent review clause that is based on the conditions imposed by Law 07-03 (ie, an increase in rent by 8% or 10% every three years).

6.6 Determination of New Rent

Law 07-03 provides that a rent increase may only apply every three years following the conclusion of the lease or the date of the previous judicial or contractual rent review, provided that any such increase is limited as follows:

- for commercial leases – a 10% raise as regards the current rent; or
- for residential leases and professional leases – an 8% raise as regards the current rent.

6.7 Payment of VAT

VAT is payable on rent in the following cases:

- Taxable rental transactions:
 - (a) rental of furnished premises;
 - (b) rental of equipped premises for business purposes;
 - (c) rental of non-equipped premises for business purposes in which an intangible asset of the business is included; and
 - (d) rental of premises in commercial complexes ("shopping malls").
- Rental transactions not subject to Moroccan VAT:
 - (a) rental of unequipped premises for business purposes; and
 - (b) rental of equipped premises with an annual turnover of less than MAD500,000.

The landlord can opt to pay VAT (at 20%) regarding non-equipped business rentals. This option is made through a formal request and can apply globally or partially to the taxpayer's activities (ie, the option can apply to a given real estate project, or to just a single building/premise/apartment).

6.8 Costs Payable by Tenant at Start of Lease

Apart from a registration duty payable to the tax administration (fixed at MAD200), there are no additional costs to be paid by the tenant at the beginning of the lease term, according to Moroccan law. It is market practice for the tenant to carry out and bear the registration duty, even though the Moroccan Tax Code does not expressly specify which party must pay this.

6.9 Payment of Maintenance and Repair of Communal Areas

The tenant will usually be responsible for ordinary repairs and maintenance of rented premises. The tenant usually bears the costs of maintenance and repairs for common areas (ie, gardens, parking areas, stairways and elevators), in the form of service charges, in proportion to the area of the premises occupied by each tenant, as compared to the total area of the property. In practice, the service charges are generally agreed through a lump sum.

6.10 Payment of Utilities and Telecommunications

Parties are free to determine which of them will pay the operating costs (eg, electricity, water, telecommunications and other utilities), but the costs of utilities are generally borne by the tenants according to their specific needs and usage.

6.11 Insuring the Real Estate that is Subject to the Lease

The parties generally provide for a clause under which the tenant undertakes to take out insurance covering its professional civil liability, and any damage caused to third parties or property as a result of its activities on the premises, or due to external events (fire, explosion, water damage, theft, etc). Landlords can take out an insurance policy for the building itself, though this is quite unusual.

6.12 Restrictions on Use of Real Estate

The use of rented premises may be limited by legal or regulatory provisions, such as urban planning and zoning regulations. The parties generally provide that the leased premises are rented for a specific use, with any modification being subject to the landlord's consent.

With regard to commercial leases, the tenant may be authorised by a judge (even after a refusal by the landlord) to engage in one or more activities that are ancillary or related to the initial business activity, provided that they are not incompatible with the purpose, characteristics and location of the building, and that they are not likely to affect its security.

6.13 Tenant's Ability to Alter and Improve Real Estate

Law No 49-16 governing commercial leases does not provide for any details relating to work initiated by the tenant.

In any event, the parties to a lease agreement are entitled to agree on the preferred work regime for the tenant, and it is generally provided that the tenant may not modify or improve the premises without the landlord's prior consent, especially if the

work is substantial and has an impact on the structure of the building.

6.14 Specific Regulations

Specific regulations apply to financial leases (*credit bail*), lease agreements for the use of agricultural land (*bail à ferme*), authorisations to temporarily occupy publicly owned land (*autorisation d'occupation temporaire du domaine public*), etc.

6.15 Effect of Tenant's Insolvency

Law No 15-95 (as amended by Law 73-17 published in April 2018) establishing the Moroccan Commercial Code provides for the regime applicable to insolvency proceedings, but does not provide for a specific regime or mechanism applicable to the leases if the tenant is declared insolvent. In the case of insolvency proceedings that do not lead to liquidation, it is customary for the court to appoint an administrator, who may decide to keep the lease in force if it is deemed necessary for the tenant's business activities.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

The main forms of security provided to a landlord to protect against a failure by the tenant to pay rent are as follows:

- cash security deposit for an agreed amount (limited to two months' rent for professional leases);
- prepaid rents; and
- guarantees issued by a bank or a parent company.

6.17 Right to Occupy After Termination or Expiry of a Lease

A tenant is not entitled to continue to occupy real estate after the expiry or termination of a lease, and the landlord may obtain a court order to recover possession of the real estate if it is not vacated on time. In addition, the lease agreement may provide for other penalty clauses if it remains occupied without due cause after the expiry of the lease.

6.18 Right to Assign Leasehold Interest

Pursuant to Law No 49-16 governing commercial leases, the tenant under a commercial lease cannot, in any circumstances, be deprived of the right to assign its leasehold interest – with or without its business (ie, separately).

The tenant and the assignee must give notice of the assignment to the landlord, and the assignment only becomes enforceable against the landlord from the date of the notification.

The tenant remains liable to the landlord with respect to all prior commitments.

According to Law No 49-16, unless set out otherwise in the lease agreement, a tenant is permitted to sublease any part of the leased premises. The tenant must notify the landlord about the sublease, and the sublease is enforceable against the landlord only from the date of notification.

6.19 Right to Terminate Lease

Law No 49-16 governing commercial leases sets out that the landlord may request a judicial termination of the lease if the lease provides for a termination clause (*clause résolutoire*) and at least three months' rent remain unpaid by the tenant, despite 15 days' formal prior notice.

In addition, in several cases the landlord also has the ability to deny the right of the tenant to the renewal of the lease without paying an eviction allowance (*indemnité d'éviction*). Such cases include default of payment, unauthorised alterations to the premises, use of the premises in breach of the originally agreed use, sublease of the premises contrary to the terms of the lease, etc.

6.20 Registration Requirements

It is market practice for the tenant to carry out and bear the registration duty, even though the Moroccan Tax Code specifies that the party to which the lease is advantageous must pay the registration duty, but the agreement can provide for a different situation. Such registration duty also applies to signatures of amendments and appendices.

6.21 Forced Eviction

As mentioned under **6.19 Right to Terminate Lease**, Law No 49-16 entitles the landlord to request from the Court an early termination of the lease agreement and the eviction of the tenant in certain cases. However, in practice, it is a fairly long and difficult process.

6.22 Termination by Third Party

Third parties are not entitled to request the termination of a valid lease agreement. Law No 49-16, however, states that any public authority may terminate the lease if it is in the public interest, in which case the landlord is not bound to pay an eviction allowance (*indemnité d'éviction*) to the tenant.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The parties may choose between two types of pricing mechanism for construction projects (which may sometimes be combined):

- quantity construction contracts (*marché au mètre*), whereby the contractor carries out construction work for a price that depends on the quantities actually used for the work; or
- lump sum price construction contracts (*marché à prix forfaitaire*), whereby the contractor performs the work for a fixed and non-revisable price agreed when signing. The contractor is not entitled to request additional payment or compensation, except for limited cases such as modifying or additional work requested by the client.

7.2 Assigning Responsibility for the Design and Construction of a Project

There are various types of contractual regimes that can be foreseen by the owner:

- separate contracts with the design team (architects, engineers, etc) and the construction contractor, in which case responsibility for the design will be assumed by the design team, while the contractor will be responsible for the work; or
- a single design and build contract (*contrat de contractant général*) with a contractor, under which the contractor responsible for the work will also assume responsibility for the design.

In any case, the assistance of a Moroccan architect is mandatory when applying for a building permit, and this architect is responsible for preparing the conception plans and the building permit application file, monitoring the proper execution of the work and assisting the owner at the delivery of the work, as well as issuing the declaration of completion in order to obtain the certificate of conformity or the occupancy permit.

7.3 Management of Construction Risk

The tools that are typically used to manage construction risks under a private construction contract (and freely negotiated by the parties) are as follows:

- representations and warranties of the contractor regarding the feasibility of the project, its knowledge of the technical, environmental and legal framework applicable to the project and its ability to carry out the work under the conditions provided for in the contract;
- holdbacks, whereby the owner retains payments of a certain amount (usually up to 10% of the contract price) in order to guarantee the remediation of any defects arising on the date when the work is provisionally accepted. Generally, the contractor will ask to replace this retainer with a bank suretyship (*cautionnement bancaire*);
- a performance bond, usually from 3% to 10% of the contract price, to secure the payment of any penalties that may be imposed on the contractor for a delay or breach of contract,

which is normally returned to the contractor or cancelled following the final acceptance of the work (occurring 12 months after the provisional handover of the work);

- a penalty for breach/liquidated damages; and
- insurance policies covering professional constructing activities (such as civil liability insurance of contractors; professional insurance of architects, experts, engineers) and the protection of certain goods (such as all-risk insurance for a construction site and a decennial ten-year warranty due by contractors).

7.4 Management of Schedule-Related Risk

The schedule-related risk on construction projects is generally managed by including provisions on delay in the event that the agreed milestones or completion date are not met (unless the delay is due to force majeure or some other unforeseen event, or is attributable to the owner). Delay penalties are often capped at a certain percentage of the price of the contractor agreement.

Pursuant to Article 264 of the Moroccan Obligations and Contracts Code, the amount of contractual penalties may always be assessed and then reduced by the judge.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Owners generally request security from contractors to guarantee both timely completion and the correct performance of the work. A completion guarantee/performance bond and hold-backs (usually replaced by a bank guarantee) are commonly provided by the contractor to the client (See 7.3 **Management of Construction Risk**). The client may also request an advance payment bond, payable on first demand, to guarantee the repayment of any advance payment paid by the client at the beginning of the work.

7.6 Liens or Encumbrances in the Event of Non-payment

There are no specific provisions in Moroccan law regarding the possibility for contractors and/or designers to place a lien or otherwise encumber an asset in the event of non-payment by the client. As the real estate is generally the property of the client, the latter is therefore the only one entitled to use the property as collateral.

7.7 Requirements Before Use or Inhabitation

In general, the construction contract sets out conditions precedent that must be met before the handover can take place.

In practice, upon completion of the work, the parties will arrange for a provisional handover/acceptance (*réception provisoire*), even if there are some minor defects or snagging still outstanding, which the contractor undertakes to repair during

the warranty period (which normally lasts one year). Once the guarantee period has elapsed, a final handover/acceptance takes place (*réception définitive*).

In any case, upon completion of construction, the owner must obtain an occupancy permit or, if the building is not intended for private accommodation, a certificate of conformity certifying that the building as erected complies with the provisions of the building permit. This certificate is a prerequisite to the use of the erected building. Using a building without such permit may give rise to fines and criminal liability.

8. Tax

8.1 VAT

VAT is not payable on the sale or purchase of real estate. Pursuant to Article 89-I 4° of the Moroccan Tax Code (MTC), VAT is payable on real estate work, subdivision/allotment operations and real estate development transactions (the sale of plots in a real estate project is subject to VAT at a rate of 20%).

8.2 Mitigation of Tax Liability

The acquisition of large real estate portfolios has the same tax consequences as the purchase of a single real estate property: if the transaction involves the direct purchase of property, it is subject to registration fees and property registration (see 2.10 **Taxes Applicable to a Transaction**).

However, in order to mitigate the tax cost, it may be possible to purchase shares in a company that does not qualify as a real estate company (ie, does not have gross fixed assets composed at least 75% of real estate properties/other real estate companies). In that case, the transaction would be exempt from registration duties and no property registration fee would be due (see 2.10 **Taxes Applicable to a Transaction**).

8.3 Municipal Taxes

There are two main municipal taxes that must be paid when occupying commercial/industrial premises: business tax and the tax on municipal services.

Business Tax

Article 6-II-1° of Law No 47.06 on local taxation provides that all newly created professional activities benefit from a total exemption of business tax for the first five years after starting their activity. Business premises benefit from this exemption.

In principle, the taxable basis for business tax is based on the gross annual rental value of all the assets at the company's disposal (including assets purchased and rented).

Companies that do not own the premises they occupy must also include the amount of rent paid to the owner for all types of leases (real estate, leasing, etc) in the taxable basis.

The applicable rate depends on the nature of the activity and ranges from 10% to 30%, applicable on the annual rental value of assets used for the activity.

Tax on Municipal Services

The taxable basis for the tax on municipal services is determined by reference to the rules applicable to business tax. In principle, the municipal tax services taxable basis is the same as for business tax (the taxable basis is reported in the same return for both taxes).

The tax rate on municipal services tax varies according to the geographical location of the activity, as follows:

- 10.5% for properties located within the perimeter of urban municipalities, delimited centres, and summer, winter and spa resorts; and
- 6.5% for properties located in peripheral areas of urban municipalities.

Hence, companies that do not occupy the premises or buildings they own are not subject to business tax and municipal tax on that property. The tenant is subject to the taxes relating to these properties on rent.

8.4 Income Tax Withholding for Foreign Investors

The applicable scheme is based on the distinction between individuals and companies.

Companies

According to the MTC, foreign investors owning property in Morocco are subject to corporate income tax on revenues deriving from that property.

The following rates apply, depending on the taxable income:

- net tax income lower than MAD300,000: 10%;
- net tax income between MAD300,000 and MAD1,000,000: 20%; and
- net taxable income higher than MAD1,000,000: 31%.

Individuals

The real estate income of individuals is subject to the following rates:

- less than MAD30,000: exempt;
- between MAD30,001 and MAD120,000: 10%; and
- more than MAD120,000: 15%.

If the real estate income is paid by a professional (public or private legal entities or individuals), the personal income tax is withheld by the latter on behalf of the real estate owner, though owners can opt for a withholding waiver and handle the filing and tax payment requirements themselves.

Capital gains on real estate properties are subject to personal income tax at the rate of 20%; in the case of a capital loss, the minimum tax payable amounts to 3% of the sale price.

Exemption

The following are exempt from personal income tax:

- the amount of the gross annual taxable real estate income that does not exceed MAD30,000; and
- capital gains made by anyone who, during the calendar year, transfers buildings with a total sale price not exceeding MAD140,000.

Double Tax Treaties

Double tax treaties signed by Morocco generally provide that income from immovable property may be taxed in the Contracting State in which the property is situated.

Based on these provisions, the domestic treatment provided by the MTC is generally confirmed and the rental income derived by a foreign investor will be subject to (corporate) income tax in Morocco.

8.5 Tax Benefits

When legal entities such as companies subject to corporate income tax own real estate, they may benefit from amortisation, which is deducted within the limits of the authorised rates, according to the practices of each profession, industry or branch of activity.

The rates recommended for the tax deduction of the taxable basis by the tax authorities are 4% for residential or commercial buildings, and 5% for industrial buildings built on a permanent basis.

Furthermore, the main recent innovation regarding real estate ownership is the implementation of Moroccan REITs (OPCIs), which benefit from the following tax incentives:

- Regarding the OPCIs' upfront capital investment:
 - (a) exemption from the tax on capital gains on in kind contributions (*apport en nature*) for all OPCIs created before the end of 2020;
 - (b) taxes on capital gains are paid on the sale of all or part of the shares, with a 50% deduction for all OPCIs created before the end of 2020;

- (c) exemption from registration duties to the tax administration; and
- (d) 1.5% for registration fees with the Land Registry.
- Regarding the taxation of the OPCI:
 - (a) exemption from corporate income tax; and
 - (b) exemption from taxes on dividend and interests.
- Regarding the taxation of shareholders:
 - (a) corporate income tax at the standard rate of 60%;
 - (b) taxes on dividends received by individuals at a rate of 15%;
 - (c) taxes on dividends received by non-residents at a rate of 15%;
 - (d) capital gains tax for individuals at a rate of 20%;
 - (e) capital gains tax for companies at the standard rate of 60%; and
 - (f) exemption from registration duties to the tax administration.

The OPCI may benefit from a total exemption from corporate income tax (rental income, capital gain, dividend), provided that it meets the following conditions:

- assessment is made by an auditor;
- it holds the assets for a minimum period of ten years from the date of contribution; and
- it distributes:
 - (a) at least 85% of the result of the fiscal year relating to the leasing of buildings built for professional use;
 - (b) 100% of the dividends and shares received;
 - (c) 100% of the fixed investment revenues received; and
 - (d) a minimum of 60% of the capital gains on the sale of securities.

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Gide Loyrette Nouel is one of the first business law firms to have set up in Morocco, established in 2003. The Casablanca office brings together about 15 Moroccan and French law practitioners, and Gide is one of the only firms in the country to offer legal assistance that covers the various fields of Moroccan and international finance and business law. Lawyers in Casablanca can prepare documents in French, English, Spanish or Arabic. Besides its Casablanca office, Gide's Africa team works from offices in Algiers, Tunis and Cairo, but also from

Europe (mostly London and Paris), and works in close collaboration with the firm's offices in China and Turkey in order to develop co-operation between investors of these countries in the African continent. Clients include institutional investors, investment and commercial banks, leading Moroccan groups, public institutions and foreign investors operating in various sectors of activity (banking, insurance, telecommunications, agribusiness, services, real estate, tourism, industry, utilities, infrastructure, etc).

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MOROCCO LAW AND PRACTICE

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