

MOROCCO

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I. INTRODUCTION: ARBITRATION IN MOROCCO HISTORY AND INFRASTRUCTURE

A. *History and Current Legislation on Arbitration*

1. Historical evolution of law relating to arbitration

Formal arbitration is a mode of dispute resolution that exists in Morocco since the end of the 17th century. Indeed, in 1693, the Sultan Moulay Ismael of the *Cherifien* Empire of Morocco and the French king Louis XIV concluded a bilateral treaty called the bilateral treaty of Saint Germain¹ which provided that arbitration will be the mode of resolution of any potential dispute related to foreigners visiting Morocco. This was the official beginning of arbitration in Morocco.²

The legal framework of arbitration was established during the French protectorate in Morocco,³ specifically on August 12th, 1913 when the first Moroccan Civil Procedure Code (“CPC”) was adopted. This initial code was replaced by the adoption of a new Code of Civil

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¹ A.Darmich, *L’arbitrage international dans le domaine commercial* (Arabic language), Thesis for the obtention of diploma of higher studies in Private Law , Faculty of Law, Casablanca, 1983 p.130 and A. Boudahrain, *L’arbitrage commercial interne et international au regard du Maroc* (French language), Ed. Al Madariss, 1999, p.27.

² Ibid.

³ The French protectorate started on March 30th, 1912 and finished the day the independence of the kingdom of Morocco occurred on March 2nd, 1956.

Procedure on September 28th, 1974. The provisions of the latter are still applicable in Morocco. However, the section related to arbitration and mediation has been profoundly modified by the adoption of a new law, the law 08-05 of November 30th, 2007⁴. This new law amended the former arbitration provisions and established a complete new set of regulation on domestic and international arbitration.

Also, it is important to note that arbitration as a mode of dispute resolution has been adopted in many regulations in Morocco. For example, it was included in the provisions of the law pertaining to Public Private Partnership adopted on December 24th, 2014⁵, in the provisions of the law on Delegated Management of Public Services adopted on February 14th, 2006⁶, in the provisions of the Moroccan Labor Law adopted on September 11th, 2003⁷ and in the provisions of the Law establishing Commercial Courts adopted on May 15th, 1997.⁸

2. Current law

The Law 08-05 of November 30th, 2007 is based on the UNICITRAL model law, French Civil Procedure Law and decisions of the Moroccan Supreme Court in arbitration. One of the greatest contributions of this law is the fundamental distinction it makes between domestic and International Arbitration Law. However, as you will see below the ambiguity of the provisions of the law in this regard is likely to surround with uncertainty the practice of arbitration in Morocco.

a) Domestic arbitration law

The provisions that apply to Domestic Arbitration Law can be found in Articles 306 to 327-38 CPC. The Law 08-05 does not explicitly define domestic arbitration. This lack of definition can be problematic since the definition of international arbitration is not clear at all. As a result, it makes it difficult to distinguish clearly what is domestic or international arbitration in Morocco.

⁴ Dahir 1-07-169 of November 30th, 2007 adopting the law n°08-05, Official Bulletin n°5584 of December 6th, 2007.

⁵ Article 24.

⁶ Article 9.

⁷ Article 567 *et seq.*

⁸ Article 5.

In France, domestic arbitration is not defined by the French Domestic Arbitration Law which could be the reason why the Law 08-05 does not include a definition. However, French International Arbitration Law provides a very explicit and clear definition of international arbitration. According to the provision of French International Arbitration Law “an international arbitration is one that involves the interests of international trade.”⁹ As a result of this definition we can deduce that domestic arbitration in France is the one that does not involve international trade. In Morocco, the definition of international arbitration is so unclear that it is not possible to deduce anything from it in order to define domestic arbitration.

b) International arbitration law

The provisions that apply to international arbitration can be found in Articles 327-39 to 327-54 of the CPC. Unlike domestic arbitration, international arbitration is expressly defined by the Law 08-05¹⁰. Article 327-40 CPC provides that arbitration is international when it involves the interests of international commerce and in which one of the parties at least has its domicile or headquarters abroad. However, the same article also provides three additional definitions of international arbitration in a subsequent paragraph. Indeed, Article 327-40 para. 2 CPC provides that arbitration is international if (i) the parties to the arbitration agreement have, at the conclusion of the said agreement, their establishments in different countries; or (ii) if the place of arbitration or the place where a substantial part of the obligations is to be performed or the place with which the subject of the dispute has the closest connection is located outside the country in which the parties have their establishments, or (iii) when the parties have expressly agreed that the subject of the arbitration agreement has links with more than one country.

The content of Article 327-40 CPC shows that the legislature has adopted two cumulative criteria for the definition of international arbitration. The economic criteria which refers to international trade and, the legal criteria which refers to the location of the parties' domicile or headquarter.¹¹

⁹ Article 1505 French CPC.

¹⁰ Article 327-40 CPC.

¹¹ K. Zaher, *Le nouveau droit marocain de l'arbitrage interne et international* (French language), *Revue de l'arbitrage* 2009, p. 115.

The above definition of international arbitration is problematic since it does not allow a clear distinction between domestic and international arbitration under Moroccan Arbitration Law. On one hand article 327-40 paragraph 1 CPC provides that arbitration is international when it involves interests of international commerce and one of the parties at least has its domicile or headquarters abroad. On another hand, article 327-40 paragraph 2 CPC provides in point 2.a, among other specific situation, that arbitration is international if the place of arbitration is located outside the country where the parties have their establishments. As a result, one can wonder how can be qualified the arbitration that involves two Moroccan nationals whose establishments are located in Morocco and which dispute does not involve the interest of international trade when those parties chose a place of arbitration outside of Morocco?

Certain scholars have raised the inconsistency of the definition of international arbitration which according to them was not thought through by the legislature and is simply the result of the combination of international arbitration's definition included in two sets of regulation.¹² The French International Arbitration Law for the economic criteria¹³ and the UNICITRAL model law¹⁴ for the legal criteria.

3. Law reform projects

The adoption of the law 08-05 in 2007 intended to provide the business community with a better legal framework on arbitration in Morocco. The new law recognizes the contractual and jurisdictional nature of arbitration and is innovative in several ways. it distinguishes for the first time domestic from international arbitration, it simplifies certain provisions of the previous law applicable to arbitration agreement, it allows the state and legal entities of public law to resort to domestic or international arbitration to resolve any potential dispute they may have and it organizes for the first time the nullification of an arbitral award¹⁵.

¹² M.D. Toumlilt and A.A. Toumlilt, *Le droit de l'arbitrage au Maroc* (French language), Les éditions Maghrébines, 2014, p.496.

¹³ Article 1504 CPC.

¹⁴ Article 1.

¹⁵ K. Zaher, op.cit. p. 114; M.D. Toumlilt and A. A. Toumlilt, op.cit. p. 17 and 18.

4. Confidentiality and publication of awards

The Law does not provide any specific rules on the confidentiality and publication of awards except those provided under Article 326 and Article 327-27 CPC which provides respectively that “arbitrators are bound by professional secrecy under the terms provided in criminal law” and “the publication of the arbitral award or of extracts of same cannot be made without the authorization of the parties to the arbitration” (free translation). Generally, Institutional Arbitration Centers do publish from time to time on an anonymous basis summaries of the awards.

It is important to note that when the recognition and/or enforcement of arbitral award is made before Moroccan courts only a copy of the decision that recognize and/or enforce the arbitral award can be obtained or published. Number of online publishers of such courts decisions do disclose to the public information about the parties and the subject of the dispute.

B. Arbitration Infrastructure and Practice in Morocco

1. Major arbitration institutions

There are very few active arbitration courts or centers in Morocco. The most important center is the Moroccan Arbitration Court of the ICC Morocco. This court named “*Cour Marocaine d’Arbitrage*” (CMA) was established in Casablanca in 1998 with the approval of ICC Paris. The CMA is the sole foreign branches of ICC Paris which has been authorized to have an arbitration court. However, this court administers only Moroccan domestic arbitration. The CMA has its own arbitration rules as amended on May 2010.

There are other arbitration centers linked to local commercial, industrial and services chambers. Namely, the “*Centre de Médiation et d’Arbitrage de Casablanca*” (CMAC) located in Casablanca, the “*Centre International de Médiation et d’Arbitrage de Rabat*” (CIMAR) located in Rabat and the “*Chambre d’Arbitrage Maritime du Maroc*” (CAMM) which specializes in maritime arbitration dispute located in Casablanca. It is also important to note that a future international arbitration center called “Casablanca International Mediation and Arbitration Center” (CIMAC) was launched in late 2014 and is scheduled to start its activities in 2017. The CIMAC is not entirely new. It is taking over from the *Centre Euro-Méditerranéen de Médiation et d’Arbitrage* (CEMA). The CIMAC will be dedicated to a

new financial city center that will be located in Casablanca under the name of “*Casablanca Finance City*.”¹⁶ The main goal of the CIMAC is to become the main African international dispute resolution hub in the coming years.¹⁷

2. Number of cases and other statistics

There is no central statistics data base in respect to the number of arbitration cases in Morocco. An idea of the number of arbitration cases in Morocco can be found in scholar’s publications which refer to courts decisions. The study of these publications shows that domestic and international arbitration decisions were rendered by all level of Moroccan jurisdictions (Court of First Instance, Appeal court and Supreme Court).¹⁸

3. Development of arbitration compared with litigation

The Moroccan Ministry of Justice publishes every year litigation statistics pertaining to all Moroccan courts.¹⁹ The total number of pending litigations before the Moroccan courts during 2014 was

¹⁶ Casablanca Finance City is a financial center launched in 2010 which aims is to promote financial investment in Africa and to become a financial hub for North and West Africa.

¹⁷ On December 27th, 2014 an international conference named “The Casablanca arbitration days” was held in Casablanca for the launching of the CIMAC. This event involved the participation of number of representatives from lawyers association and international arbitration courts (i.e. The International Chamber of Commerce ICC Paris, the International Centre of Dispute Resolution ICDR, the London Court of International Arbitration LCIA, the Singapore International Arbitration Center, the Hong Kong International Arbitration Center HKIAC and the International Arbitration Association IBA). See. The Moroccan daily economic newspaper “L’Economiste” dated December 1st, 2014.

¹⁸ The most recent publication in arbitration law in Morocco was written by M.D. Toumlilt and A.A. Toumlilt, “*Le droit de l’arbitrage au Maroc*”, editions Maghrébines 2014 which refers to approximately 550 Moroccan case laws and which includes 283 Supreme Court decision; There is also a case law book written by O. AZOUGGAR et A.EL ALAMI, guide pratique de l’arbitrage au Maroc (Arabic language), Annajah Al Jadida, 1^{ère} édition 2012 which contains 70 detailed exhibits extracts of recent arbitration cases submitted to Moroccan court and which refers to around 200 non published recent Moroccan case laws.

¹⁹ <http://adala.justice.gov.ma/FR>.