

MOROCCO

Amin Hajji and Nadia El Baroudi-Kostrikis***

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 *Cherifiën* 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

* **Amin Hajji** is Professor of Law at the Faculty of Law of Casablanca (Morocco); Attorney at Law with the Casablanca Bar Association; Founding partner of Hajji & Associés law firm (Casablanca), Co-founder of the Mizan Arbitration Center in Casablanca (www.mizan-adr.com) and acting Chairperson of the Mizan arbitration court; Co-Chairperson of the Commission of Law Practice and Arbitration with ICC Moroccan branch.

** **Nadia El Baroudi-Kostrikis** is a former Attorney at Law, registered with the Paris Bar Association. She holds a doctorate degree in Law from the Faculty of Law of Montpellier I (France) and is a Fellow of the Chartered Institute of Arbitrators in London (UK). She is also a member of the CIArb Cyprus Branch Committee and the ICC Commission of Arbitration and ADR in Paris (France). She is listed in the roster of arbitrators of several arbitration institutions such as the Court of Arbitration for Art (CAFA), Hague (Netherlands), the China International Economic and Trade Arbitration Commission (CIETAC), Beijing (China), the Casablanca International Mediation and Arbitration Center (CIMAC), Casablanca (Morocco) and MIZAN, Arbitration and Mediation Center, Casablanca (Morocco).

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 *Ibidem*.

The legal framework of arbitration was established during the French protectorate in Morocco,³ specifically on August 12th, 1913, when the first Moroccan Code of Civil Procedure (*“Code de procédure civile”* or *“CPC”*) was adopted. This initial code was replaced by the adoption of a new Code of Civil Procedure on September 28th, 1974. The provisions of the latter are still applicable in Morocco. However, the section related to arbitration and mediation was profoundly modified by the adoption of the law 08-05 of November 30th, 2007 which amended the former arbitration provisions and established a complete new set of regulations on domestic and international arbitration.

The set of regulations on domestic and international arbitration provided for in the law 08-05 of November 30th, 2007, was recently and significantly modified by the adoption of the law 95-17 on Arbitration and Conventional Mediation (the *“Law 95-17”* or the *“Law”*).

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 recent investment charter of December 15th 2022,⁴ the law pertaining to Public Private Partnership published on December 24th, 2014 as amended on March, 6th, 2020⁵, in the provisions of the law on Delegated Management of Public Services published on February 14th, 2006,⁶ in the hydrocarbon code published on February 15th, 1992 as amended on February 15th, 2000⁷ and in the provisions of the Law establishing the Commercial Courts published on May 15th, 1997.⁸

2. Current law

The new Arbitration and Mediation Law of Morocco, formally known as Dahir n° 1-22-34 of 23 chaoual 1443 (May 24, 2022) promulgating the Law n° 95-17 on the Arbitration and Conventional Mediation, has recently been published in n° 7099 of the Official Bulletin (*Bulletin officiel du Royaume du Maroc, “BORM”*) of 13 kaada 1443 (13 June 2022).

Contrary to the former law 08-05 which was part of the Moroccan Code of Civil Procedure, the new Law 95-17 stands alone in a separate

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.

⁴ Articles 37 and 38.

⁵ Article 27.

⁶ Article 9.

⁷ Article 33.

⁸ Article 5.

legal text which does not form a Code *per se* as multiple provisions of various laws including the CPC refer or are linked with said Law 95-17.

The Law 95-17 is still inspired by the UNICITRAL model law and practically, it is continuously subject to the confirmation or to the clarification and even the interpretation of some provisions or principles of the applicable arbitration law.⁹ One of the greatest contributions of this Law 95-17 is to indirectly favor online arbitration¹⁰

a) Domestic arbitration law

The provisions that apply to Domestic Arbitration can be found in Articles 20 to 70 of the Law 95-17. The Latter does not explicitly define domestic arbitration. However, it provides a very explicit and clear definition of international arbitration. Indeed, its Article 72 provides that “*an arbitration is international...if it involves the interests of international trade and at least one of the parties is domiciled or with headquarter abroad.*” As a result of this definition, we can deduce that domestic arbitration in Morocco is the one that does not involve international trade.

b) International arbitration law

The provisions that apply to International Arbitration can be found in Articles 71 to 85 of Law 95-17. Unlike Domestic Arbitration, International Arbitration is expressly defined by Article 72 of said law. Indeed, Article 72 provides that arbitration is international when “*it involves the interests of international trade and with at least one of the parties domiciled or with a headquarter abroad*” (Free translation).

⁹ It should be noted that even before the former 08-05 arbitration law of 2007 when international arbitration was not yet regulated, the Moroccan supreme court was ruling on international arbitration litigations giving valid legal basis for the arbitration practitioners.

¹⁰ Respectively and among others, Article 3 of Law 95-17 provides that the arbitration agreement is concluded in writing if it is made by means of an electronic message, Article 5 requires the identification of the parties including their electronic address, Article 33 empowers the arbitral tribunal to hold its meetings through modern communication technology, Articles 35 and 36 refer for the possibility for each of the claimant and the respondent to submit their statement of claim or Statement of response in an electronic manner and last but not least Article 51 authorises the issuance of the arbitral award electronically.

3. Law reform projects

The adoption of the Law 95-17 in 2022 intends to provide the business community especially foreign investors with a flexible but strong legal framework on arbitration in Morocco and it reinforces the country as a friendly place of arbitration in the African continent, taking into account the development of the Casablanca Finance city which disposes of the dedicated Casablanca International Arbitration and Mediation Center (CIMAC) which was launched in 2014.

4. Confidentiality and publication of awards

The Law 95-17 does not provide any specific rules on the confidentiality and publication of awards except those provided under Article 31 and Article 54 which provides respectively that “*arbitrators are bound by professional secrecy in conformity with the provision of the criminal code*” and “*the publication of the Arbitral Award or of excerpts of same can only be made upon authorization by the parties to the arbitration*” (free translation). Generally, Institutional Arbitration Centers do publish from time to time on an anonymous basis summary of the awards.

It is important to note that when the recognition and/or the enforcement of arbitral award is/are made before Moroccan courts, only a copy of the decision that recognizes and/or that enforces the arbitral award can be obtained or published. However, number of online publishers of such courts’ decisions do disclose on no name basis to the public information about the parties and the subject of the arbitral 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 well-know and ancient one 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 exceptional 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 Mediation et d’Arbitrage de Rabat*” (CIMAR) located in Rabat and the “*Cour Internationale d’Arbitrage Maritime et Aérien*” (CIAMA) which specializes in air and maritime arbitration dispute located in Casablanca. It is also important to note that the CIMAC started its activities in 2016 with the aim at becoming the main African international dispute resolution hub in the coming years.¹¹ Besides, a new arbitration center named Mizan developed highly secured dedicated arbitral digital platforms with the ongoing process of creating a predictive AI tool specialized in Moroccan and OHADA business laws, before expanding progressively toward other North African laws.¹²

2. Number of cases and other statistics

There is not yet any 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).¹³

¹¹ On December 2019, under the theme of “Investing and Doing Business in Africa, a fifth international conference named “The Casablanca arbitration days” was held in Casablanca. This event involved the participation of number of renowned scholars among them Emmanuel Gaillard, Mohamed Abdel Wahab, Thomas Clay, Mohamed El Mernissi, Laurent Levy, Mamadou Konaté, and representatives from lawyers association and international arbitration courts as The International Chamber of Commerce ICC Paris, the International Center 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.

¹² www.mizan-adr.com.

¹³ The most recent publication in arbitration law in Morocco was written by Youssef Hanane, Saad Bahiti and Riyad Fakhri, “*Moroccan case law in arbitration*” (In Arabic language), 2022 including approximately 90 recent related arbitral cases with principles that have been established by the authors with respect the challenge of the validity of the arbitration clause, the formation of the arbitral court, the enforceability of the arbitral awards, the ordinary or extraordinary recourses against arbitration awards or the application arbitration mode to social cases; M.D. Toumlilt and A.A. Toumlilt,

3. Development of arbitration compared with litigation

The Moroccan Ministry of Justice publishes every year litigation statistics pertaining to all Moroccan courts.¹⁴ The total number of ruled litigations before the Moroccan courts during 2021 was around 4.6 million.¹⁵ The number of cases submitted to the Moroccan appellate courts is approximately 450,000 with probably 150,000 cases before commercial courts, noting that around that fifty per cent of the commercial litigation decisions are rendered by Casablanca commercial courts.

The number of arbitration related proceedings brought before Moroccan courts generally for enforcement proceedings or judicial recourses are around five hundred per year. Therefore, the proportion of arbitration cases submitted to Moroccan commercial courts is minimal in comparison with commercial litigation that is not submitted to arbitration. Moreover, it is important to note that a third of the litigations pertaining to arbitration relate to international disputes.

II. CURRENT LAW AND PRACTICE

A. Arbitration Agreement

Under Law 95-17, an arbitration agreement is an agreement by which the parties commit to use arbitration to solve an arising or future dispute related to a defined legal relationship regardless of its contractual or non-contractual nature.¹⁶ The Moroccan Arbitration Law distinguishes Domestic Arbitration agreement from International Arbitration agreement.¹⁷ It provides different set of rules whether the

"Le droit de l'arbitrage au Maroc," éditions 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 and A.El Alami, *"Guide pratique de l'arbitrage au Maroc"* (Arabic language), Annajah Al Jadida, 1ère 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.

¹⁴ <http://adala.justice.gov.ma/FR>.

¹⁵ <https://medias24.com/2022/01/27/audiences-decisions-plaintes-et-detention-preventive-la-justice-2021-en-chiffres/>.

¹⁶ Article 2.

¹⁷ *See above* – Section.

arbitration is domestic¹⁸ or international.¹⁹ An arbitration agreement is considered as international under Moroccan law when the agreement involves international trade interests and in which one of the parties at least has its residence or headquarters abroad.²⁰

1. Types and validity of agreement

a) Arbitration clause and submission agreement

Under Law 95-17 an arbitration agreement may be in the form of an arbitration clause or a submission agreement.²¹ The arbitration clause is an agreement by which the parties to a contract agree to submit to arbitration the disputes which may arise in relation to this contract.²²

The submission agreement is the convention whereby the parties to an existing dispute submit it to an arbitral tribunal.²³

b) Minimum essential content

Under said Law, minimum essential content of an arbitration agreement will differ depending on the nature of the arbitration agreement, domestic or international.

(i) Minimum essential content for domestic arbitration agreement

In the context of Domestic Arbitration, the provisions of the law regarding minimum essential content will be different depending on whether it is an arbitration clause²⁴ or a submission agreement.²⁵

- Arbitration clause

Moroccan Domestic Arbitration Law does not provide any minimum essential content for the arbitration clause.

¹⁸ Articles 20 to 70.

¹⁹ Articles 71 to 85.

²⁰ Article 72.

²¹ Article 2.

²² Article 6.

²³ Article 4.

²⁴ Article 7.

²⁵ Article 5.

- Submission agreement

Moroccan Domestic Arbitration provisions of Law 95-17 specify that, under penalty of nullity, the submission agreement should determine the subject matter of the dispute. In addition, it should contain all the information related to the identification of the parties, their physical addresses as well as their electronic addresses.²⁶

The submission agreement being a convention whereby the parties to an existing dispute submit it to an arbitral tribunal, the necessity to determine the litigation scope of the dispute in the submission agreement is imposed by the legislator to ensure that the arbitral tribunal would fulfill its mission and not rule *infra* or *ultra petita*.

- (ii) Minimum essential content for international arbitration agreement

Moroccan International Arbitration provisions of Law 95-17 does not provide any minimum essential content for international arbitration agreement.

Article 73 provides that “The arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or set down the terms of their appointment as well as those of their replacements” (free translation). By using the verb “may” instead of the verb “must”, the Moroccan legislator did not intend to condition the validity of an international arbitration agreement on the existence or not in said clause of provisions concerning the appointment of the arbitrators or the composition of the arbitral tribunal. This article gives an option to the parties; they may or may not include provisions regarding the designation of arbitrators in their agreement.

- c) Form requirements

The form requirements will be different depending on the type of arbitration agreement, domestic or international.

- (i) Form requirements for domestic arbitration agreement

Under domestic arbitration provisions and under penalty of nullity, the arbitration clause must be stipulated in writing and unequivocally.

²⁶ *Ibidem*.