



CFC Africa Insights

Casablanca, a mediation and arbitration hub for Africa



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and arbitration hub
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Foreword



Said Ibrahim
CEO of Casablanca Finance City

We are delighted to bring to you this fourth edition of the CFC Africa Insights series.

This series of reports aim to provide the CFC community and more broadly international investors with up to date analysis and insider views on Africa's dynamics.

For this edition, we partnered with DLA Piper, one of Africa's leading multinational law firms operating in 20 countries over the continent and member of the CFC community since 2015.

We chose to focus on arbitration and mediation given the importance of legal certainty for investors who usually consider civil litigation in African jurisdictions as complex, time-consuming and costly. This publication aims at showcasing how the CIMAC can offer a reliable and efficient alternative for companies faced with Africa-related disputes.

The Casablanca International Mediation and Arbitration Center (CIMAC) which is fully operational since 2017, is a core component of CFC's value proposition to streamline doing business in Africa. We are confident that it will play a key role in bringing speed and building confidence for investors across the continent.

I wish you a pleasant read.



Christophe Bachelet
DLA Piper Casablanca
Country Managing Partner

On behalf of DLA Piper, and as a member of Casablanca Finance City, it is my privilege to present to you our report on Casablanca as an arbitration and mediation hub for Africa, part of the CFC Africa Insights series.

Casablanca Finance City has built over the years a strong membership community by supporting the deployment of its members' activities in Africa. The CIMAC comes as an additional tool in the first class ecosystem of the Kingdom of Morocco created by CFC to help operators efficiently deal with disputes that may arise when doing business in Africa.

In this publication, we explore the opportunities created by the CIMAC, which aims at providing the neutral forum sought by investors operating in Africa, as well as the challenges it may face.

We hope that this report will be helpful, to members of CFC as well as to all international operators, to understand arbitration in Africa and the contributions of the CIMAC in that regard.

AN INTRODUCTION TO ARBITRATION IN AFRICA

Over the last few decades, and in part thanks to increased foreign investments, better governance and the emergence of a booming consumer middle class, the African continent has shown impressive economic growth and is now considered the second fastest-growing region in the world.ⁱ

In 2018, despite a global downward trend, foreign direct investment (FDI) flows to Africa rose to USD46 billion, representing an 11% increase after successive declines in 2016 and 2017ⁱⁱ. Main source countries for FDI included France, the Netherlands, the United States, the United Kingdom and China.ⁱⁱⁱ

Traditionally, investment and trade were confined to the oil and gas and natural resources industries. However, in the last few years, there has been significant inflows taking place across various sectors, such as financial services, real estate, infrastructure, telecoms and consumer goods.

Given Africa's relevance as a foreign investment destination, international arbitration has simultaneously emerged as the most sought-after method in dealing with investment and Africa-related commercial disputes.

In 2016, there were 82 cases which involved African parties at the London Court of International Arbitration (LCIA), representing 6.4% of all cases. With regards to investment treaty arbitration, over the past 20 years, more than 100 investment arbitration requests have involved African parties, representing nearly 11% of all investor-State disputes worldwide.^{iv} Moreover, between 2013 and 2018, more than 56 actions were brought against African countries in the context of investment arbitrations.

Although the continent presents attractive investment opportunities, foreign investors remain hesitant because of the perceived risks associated with doing business in Africa. These range from economic to political instability as well as issues related to setting up businesses, land access to credit or inadequate infrastructure. These factors increase the complexity of investing and doing business in the region and can increase the likelihood of disputes.

In addition to the risks of doing business in Africa, investors usually consider civil litigation in African jurisdictions as complex, time-consuming and costly. Indeed, the legal systems across the continent are based on either common law or the codified civil law systems of the former colonial powers, sometimes mixing elements from both legal systems. Islamic and customary law can also be heavily influential in some jurisdictions, These specificities may be challenging for foreign investors.

Furthermore, some investors have complained about undue interference in African courts, in particular through the biased appointments of judges, the payment of bribes, or the ouster of sitting judges. It follows therefore that investors and businesses are increasingly turning to arbitration as a sensible option to avoid the difficulties of litigation before African courts.

As outlined above, the number and frequency of commercial and investment disputes involving Africa has increased, yet international arbitration has traditionally been administered under the aegis of western institutions ...

such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID).

Many African practitioners deplore the offshoring of Africa-related disputes, recalling that arbitration has been a part of the customary laws of many African countries long before the colonial era.

Fortunately, the status quo is evolving and arbitration in Africa is spreading all the while maturing.

The significant appetite for international arbitration in Africa is materialized by the implementation of numerous legal reforms along with the proliferation of arbitration institutions on the continent

Foundation of Southern Africa International (AFSA INTERNATIONAL), the Mauritius International Arbitration Centre (MIAC), the Common Court of Justice and Arbitration (CCJA) developed by the Organization for the Harmonization of Business Law in Africa (OHADA) or the Casablanca International Mediation and Arbitration Centre (CIMAC), to name only a few.

Today, there are nearly 80 arbitral institutions in Africa, which is a significant number considering that the continent comprises 54 countries.

The abundance of arbitral institutions on the continent can be explained by the willingness of African governments in sending a clear message regarding political and legal stability, with the hopes of reassuring foreign investors.

such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Nairobi Centre for International Arbitration (NCIA), the Kigali International Arbitration Centre (KIAC), the Lagos Court of Arbitration (LCA), the Arbitration

This publication will focus on the case of the Casablanca International Mediation and Arbitration Centre (CIMAC) in Morocco which aspires to offer a reliable and efficient alternative for users faced with Africa-related disputes.

Main FDI Sources



46 B\$ Foreign direct investment flows attracted by Africa in 2018 (+11%)



Sectors





WHY MOROCCO? WHY MOROCCO?

Morocco, a portal to Africa

In order to emerge as a regional business hub, the Moroccan government has implemented a series of strategies aimed at attracting foreign investment, through macro-economic policies, trade liberalization, investment incentives, infrastructure initiatives and structural reforms.

In addition to enjoying political stability, the country benefits from a strategic geographical position where Africa, the Middle East and Europe meet, making it a favorable entry point for investment in Africa.

Morocco has also been consolidating its diplomatic alliances with African countries over the years, through its return to the African Union in January 2017 and support of the launch of the African Continental Free Trade Area (AfCFTA) in March 2018. Morocco is also currently working towards membership of the Organization for the Harmonization of Business Law in Africa (OHADA) and the Economic Community of West African States (ECOWAS) which are additional means of promoting foreign investment and trade as well as accelerating economic development.

A favorable environment for arbitration

Morocco has always been at the forefront of the development of African arbitration, in particular through its early membership to the 1958 New York Convention relating to the recognition and execution of foreign arbitral awards.

It is also one of the first states to be party to the ICSID Convention permitting a recourse to investors against States in the event of a foreign investment infringement by the latter.

Morocco was also notoriously the very first state to be part of an ICSID arbitration under the 1965 Washington Convention with the *Holiday Inns v. Morocco* case.^v Moreover, one of the most emblematic cases in investment arbitration was between the Moroccan State and the Italian company Salini, to which we owe the legal definition of the notion of investment today, known as the Salini test.^{vi}

With regard to its national laws, Morocco established itself as a forerunner due to provisions on domestic arbitration that were already included in the 1913 Moroccan Civil Code of Procedure. The section on arbitration was later reformed in 2007 with the promulgation of Law 08-05,^{vii} inspired by the rules of various international arbitral institutions, which introduced a solid legal framework governing international arbitration to the Moroccan Civil Code of Procedure and amended the provisions relating to domestic arbitration and mediation.

Moreover, a dialogue has been initiated with Moroccan judges and training programs have been implemented to ensure active support from the local judicial system and to prevent potential court interference. An important meeting between the President of the International Bar Association and the President of the Moroccan Court of Cassation was held in December 2015, during which the latter made a clear commitment to create favorable conditions for arbitration in Morocco.

Such dialogues and exchanges are maintained to ensure that the representatives of the judiciary have a better understanding of arbitration, in particular for the enforcement and recognition of arbitral where they play a key role.

Nevertheless, Moroccan arbitration legislation has not been immune to criticism. Legislators have been attentive to these and a reform is expected early 2020. The objective of this new law would be to codify the provisions on arbitration. The reforms also aims at simplifying and modernizing the arbitration procedure, including the provisions relating to the production of documents by third

parties and electronic arbitration agreements. It is also understood that the new law would remove the current requirement for arbitrators to be recognized by the public prosecutor's office, thereby protecting the independence of arbitrators and increasing the number of potential nominees, as this requirement is not used in practice.

Morocco's membership to the New York Convention

