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International Arbitration

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Morocco

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Introduction

In Morocco, arbitration is governed by Law No.08-05 promulgated by virtue of Dahir 1-07-169 (November 30th, 2007); and *Bulletin Officiel* n° 5584 of December 6th, 2007; p.1369 (contained in the Code of Civil Proceedings, CCP).

This reform takes its inspiration from the UNCITRAL Model Law and from French Law; it also adopts a number of decisions of the Moroccan Supreme Court (the **Court of Cassation)** as well as some principles of the New York Convention. In fact, Morocco was one of the first countries which signed the convention on February 12th, 1959. As for international arbitration, the same law listed above governs it (Articles 327-39 to 327-54).

In Moroccan arbitration law, the legislator distinguishes between domestic and international arbitration, and sets the rules of conventional mediation.

An arbitration is international when international trade interests are at stake and when one of the parties at least is domiciled or headquartered abroad (Article 327-40).

Arbitration agreement

Firstly, in Moroccan arbitration law, the legislator distinguishes between domestic and international arbitration, and sets the rules of conventional mediation.

The new provisions reduced the excessive formalism of the previous text which governed the arbitration agreement.

The provisions of Article 306 of the new CCP define arbitration by its object and its aim as follows: "The purpose of arbitration is the settlement of disputes by an arbitral tribunal which receives from the parties the mission of judging under an arbitration convention."

Regarding the admissibility of the arbitration agreement, the new provisions of the Moroccan CCP are maintaining the classical distinction between the arbitration submission agreement (*compromis d'arbitrage*), the parties' commitment to refer to an arbitral tribunal a dispute that has arisen, and the arbitration clause, an agreement by which the parties undertake to refer to arbitration all disputes that might arise from their contract. Nevertheless, the reform affects both the conditions of validity of the arbitration agreement and its effects.

Concerning the arbitration agreement's form, arbitration must obey the rules of consent and capacity newly established by the legislator.

The new law took into consideration the written form of the arbitration clause as a condition of validity. Indeed, the new Article 317 of the CCP requires that the clause shall be drafted in writing and included in the main contract, in a document unequivocally referring to it. Furthermore, the clause shall appoint the arbitrators, or at least it shall indicate the method

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of their appointment. It is also valid if a written contract refers to the provisions of a model agreement or an international convention or any other document considered as well. On the other hand, the arbitration submission agreements shall determine the subject-matter of the dispute and the names of the arbitrators or, at least, the method of appointing them.

According to the provisions of Article 313 CCP, there are different forms of drafting the agreement. Accordingly, it is not required any more to draft the agreements in writing to establish their validity. Therefore, apart from the written form required only for the arbitration clause but not for the arbitration submission agreement, and the determination of the subject/matter of the dispute required just for the submission agreement, both the arbitration clause and the arbitration submission agreement are governed by the same rules applicable to contracts.

As for the disputes that are arbitrable:

- Regarding the provisions of Article 309 of the CCP: "subject to the provisions of Article 308 above, the arbitration agreement cannot include the settlement of disputes relating to the state and capacity of persons or personal rights that are not subject to trade".
- In the Morocco arbitration law, disputes that are arbitrable regarding the Article above are commercial ones for the most part, as well as financial disputes arising from a relationship with the state and local governments, except litigation related to taxes.

An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules. It may also submit it to the law of procedure it determines.

The arbitration agreement determines the rules of law which the arbitral tribunal shall apply to the merits of the case. Failing a choice by the parties of the applicable law, the arbitral tribunal shall decide the dispute in accordance with the rules of law it considers appropriate.

In either case, the arbitral tribunal shall take trade usages into account.

Moroccan law accords great importance to the principle of ***compétence-compétence***. Based on Article 327-9 CCP, the court of a contracting state has to manifestly refer the parties to arbitration unless … it finds that the said agreement is null and void. The judge can exclude the arbitration clause in this case.

Regarding the consolidation of a third party, a decision of the Casablanca Commercial Court (January 15th, 2015) approved its extension to parties that are not signatories of the clause, based on the participation of this party in the negotiations, the conclusion and the performance of the contract. This extension depends on the interpretation of the parties' intent.

The court confirmed that the principle of extension applies to internationl arbitration (July 22nd, 2015).

Arbitrators

Regarding the provisions of Article 320 of the CCP: "The arbitrator's mission can only be performed by an actual person in possession of full capacity and not having been convicted for acts contrary to honor, probity or morality or depriving him of the ability to exercise trade or one of his civil rights."

Where there are to be three arbitrators, each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator. If a party fails to appoint an arbitrator within 15 days following receipt of a request to that effect by the other party, or

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if the two arbitrators fail to agree on the third arbitrator within 15 days of having accepted the last one, the president of the competent court shall make the designation at the request of either party (Article 327-5).

Arbitrators shall carry out their mandate until it is completed, unless there is a legitimate reason for them to refuse to act or to resign.

The arbitrator who implies in his person a ground for challenge must inform the parties. In this case, it cannot accept his mission without the agreement of the parties.

Arbitrators can be challenged in accordance with the provisions of the CCP.

According to Article 323 of the CCP : "an arbitrator may be challenged if:

1. he has been the subject of a final judgment of one of the events listed in Section 320 above;
2. his spouse, ascendants or descendants have personal direct or indirect interest in the dispute;
3. there are relatives or an alliance between the arbitrator or his spouse and one of the parties to the degree of first cousin;
4. there is an ongoing trial or a trial that has ended less than two years previously between one party and the arbitrator or his spouse, or their parents or descendants;
5. he is a creditor or debtor of one of the parties;
6. he has recently pleaded or applied or depositioned as a witness in the dispute;
7. he has had to act as legal representative of a party;
8. there is a relationship of subordination between the arbitrator or his spouse or his ascendant or descendant and one of the parties or his spouse or ascendant or descendant; or
9. there is a friendship or notorious feud between the arbitrator and a party."

The challenge shall be made in writing to the President of the competent tribunal, specifying the grounds for the challenge within eight days from the date the applicant of the challenge became aware of the constitution of the arbitral tribunal or circumstances justifying the challenge. When the challenged arbitrator does not withdraw voluntarily after being challenged, the President of the tribunal rules on the application within ten days with a non-reviewable decision.

When an application for recusal or removal of an arbitrator is presented, the arbitration procedure is suspended until a decision is made on this request, unless the arbitrator concerned accepts to withdraw.

The challenge shall not be admitted if made by a person with a historic recusal request on the same arbitrator in the same arbitration and for the same reason. When an arbitrator is challenged, the arbitration procedure in which he participated is declared null and void, including its award.

The President of the competent tribunal is pronounced by order not subject to appeal under adversarial proceedings.

Arbitration award

According to Article 327-23 of the CCP:

- "The award must be in writing. It shall mention the arbitration agreement and shall contain a concise statement of facts and contentions of the parties and their respective

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means, materials, the indication of the issues resolved by the award and a device acting on these issues.
- It must state the reasons on which it is based unless the parties have agreed otherwise in the arbitration agreement, or the law to be applied to the arbitration procedure does not require the grounds of the award.
- The award regarding a dispute, to which a person under public law is a party, must always state the reasons on which it is based."

Once it is made, the arbitral award has the authority of *res judicata* with regard to the dispute it resolves. The arbitration award is not subject to enforcement unless there is an enforcement order issued by the President of the Tribunal in whose jurisdiction the award was made.

The order refusing to grant enforcement must be justified. It is subject to appeal within 15 days of its notification.

When there is a dispute to which a legal person of public law is party, the arbitral award acquires authority of *res judicata* only under an enforcement order. In this case, the enforcement is required by either party before the administrative judge.

In contrast with domestic arbitration, there is no statutory time limit and only the parties have the power to define this time limit or to extend it.

If the arbitral award is not made within the period referred to in the paragraph above, any party to the arbitration may request the President of the jurisdiction to terminate the arbitration procedure by an order. Either party may then initiate legal proceedings in the court of competence over the dispute.

According to Article 327-24, at line 2:

"The arbitral award has to set arbitrators' fees, the arbitration expenses and the arrangements of the allocation of costs between the parties. If the parties and the arbitrators fail to reach an agreement about setting arbitrators' fees, those fees are set by an independent decision of the arbitral tribunal. This decision shall be open to challenge before the President of the competent jurisdiction. This decision is final and cannot be challenged."

Enforcement of the arbitration award

Articles 327-39 to 327-54 of CCP apply to international arbitration without prejudice to the provisions of international conventions ratified by the Kingdom of Morocco and published in the "Official Gazette".

Over 135 countries, including Morocco, joined the United Nations Convention of June 10th, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention". This ensures the recognition and enforcement of arbitral sentencing in all contracting countries.

Article V of the New York Convention enacts a substantive provision setting the conditions under which the recognition and enforcement of an award will be granted.

The arbitral award rendered in Morocco in an international arbitration may be subject to an action for annulment in the cases set out in Article 327-49:
- if the arbitrators gave judgment in the absence of an arbitration agreement or on the basis of a void or expired agreement;
- if there was an irregularity in the constitution of the arbitral tribunal or in the appointment of the arbitrator;
- if the arbitrator's decision does not conform to the terms of his mission;

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- when the adversarial principle has not been observed; or
- if the execution is contrary to international and domestic public policy.

Regarding the provisions of Article 327-50, the annulment is brought before the court of appeal in the jurisdiction in which the award was made. It is filed within 15 days of notification of the order.

The action for annulment brought within the period is suspensive unless the award is subject to provisional execution. In this case, the court examines the appeal and may suspend enforcement if it deems it warranted.

In an international arbitration, the arbitral award rendered abroad is recognised in Morocco before the president of the commercial court within the jurisdiction where it was made, or by the president of the commercial court of the place of performance if the seat of arbitration is located abroad.

The existence of an arbitral award shall be proven by producing the original award, together with the arbitration agreement, or duly authenticated copies of such documents. If such documents are not in the Arab language, the party applying for recognition or enforcement shall produce a translation.

An arbitral award may only be enforced by virtue of an enforcement order issued by the President of the Tribunal of the place where the award was made or, if the award was made abroad, by the Tribunal where the execution exists.

Exequatur proceedings shall be adversarial.

The appeal shall be brought within 15 days following signification of the order.

An action to annul an award or an appeal against an enforcement order shall suspend enforcement of an award.

The issue of enforcement of international arbitral awards set aside in their country of origin, refers to the New York Convention. From the reading and the interpretation of this Convention, in particular Articles V and VII, two conceptions have been developed:

- A first approach, adopted by some legal systems, considers an award set aside in the country of origin to be completely void and incapable of execution somewhere else.
- A second approach on the contrary advocates the autonomy of the award as for its place, allowing the survival of the award set aside in other countries.

The provisions of Article V-I, serving as they do to highlight the exhaustive nature of the possible reasons for rejecting the recognition, should not be understood as refusing the recognition and the enforcement of the award has thus been set aside at the seat of arbitration, because the provisions of this article are optional.

In a judgment rendered on August 26th, 2008, the Commercial Court of Appeal of Casablanca held that the setting aside of the award at the seat of arbitration would justify refusal of its enforcement, according to Article V of the New York Convention.

In this case the Moroccan judge set as a refusal condition that the setting aside of the award needs to be effective. An action for annulment may not be sufficient.

Under this judgment, it is imperative to refuse enforcement in case of the setting aside of the award in the country of origin.

It should be recalled that, on the one hand, the position adopted in this judgment was adopted under the auspices of the former text governing the arbitration, i.e. sections 306 to 327 of the Code of Civil Proceedings, and that the law does not draw a distinction between domestic arbitration and international arbitration, unlike the new Law No. 08-05.

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Law No. 08-05 includes provisions relating to the recognition of international arbitral awards including Article 327-46, 327-47, 327-48 and 327-49. The latter provides cases of refusal of the enforcement.

The annulment of the award is not included in Article 327-49 as a basis to refuse to grant enforcement.

In this case we can apply Article VII **of** New York Convention, which provides that "the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

But the position of the Moroccan courts after the 2007 reform was based on the application of the Convention which, in Article V, contains the reason for setting aside the arbitral award as a reason for refusing recognition and enforcement.

Investment arbitration (*arbitrage d'investissement*)

Morocco has concluded over 60 BITs, of which 37 are in force (eight with Arab countries, 18 with European countries, five with African countries, four with Asian countries and two with American countries).

For the first time in the case of a Free Trade Agreement (FTA) signed by Morocco, a further component on investment (beyond a mere cooperation clause) was included in the agreement with the United States of America.

At the multilateral level, Morocco has signed various conventions on trade and investment, such as the New York Convention (1958) on the Recognition and Enforcement of Foreign Arbitral Awards, the Washington Convention (1965) establishing the International Centre for Settlement of Investment Disputes (ICSID) between States and Nationals of Other States, and the Seoul Convention (1985) establishing the Multilateral Investment Guarantee Agency (MIGA).

Since its ratification in 1967 of the Washington Convention of 1965, Morocco has experienced three arbitrations that took place under the auspices of ICSID.

The first case, *Holiday Inns SA and others vs. Morocco*, is the first dispute ever to decide an ICSID arbitral tribunal. The two other cases involving the Kingdom of Morocco, *Salini Costruttori SpA and Italstrade SpA vs. Maroc* and *Consortium R.F.C.C. c. Morocco*, took place in parallel before a court in the same way and are, like the first one, known for their contributions on jurisdiction in the "ICSID jurisprudence".

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