

Morocco

Hajji & Associés – Avocats

Amin Hajji



1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Morocco

The Moroccan civil procedure law of 28 September 1974 (Hereinafter “*Code de Procédure Civile*”: “CPC”) was amended on 30th September 2007 by law n 08-05 which provides for domestic and international arbitration modes. The internal arbitration has been modernised and the international one was for the first time organised in order to specifically enhance the efficiency of foreign arbitral awards in Morocco.

Under article 313 and 317 CPC, domestic arbitration agreements and arbitration clauses must be in writing in any executed contract document or referring one. Under the penalty of nullity, (i) arbitration agreements must determine the subject of the dispute and designate the arbitral tribunal or provide the terms of its designation, and (ii) arbitration clauses must either nominate the arbitrator(s) or provide for their designation mode.

In international arbitration, there are no similar requirements in respect the form of the arbitration agreements. However, such agreements should be proved.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Contracting parties are free to organise the terms and conditions of the arbitration agreement or arbitration clause except when referring to institutional arbitrations courts which rules are to be complied with.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Moroccan courts do not review the merits of an arbitral award and they would only look at formal and procedural matters for enforcement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Morocco?

Under Moroccan CPC law, a final arbitration award has the *res judicata* authority. However, the award should be enforced before

Moroccan courts in compliance with articles 327 – 31 *et seq.*, and articles 430 *et seq.* of the CPC.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The new amended CPC governs both domestic and international arbitral proceedings. Nonetheless, domestic arbitration is formally detailed and organised in around sixty articles (306 to 327 – 38 of the CPC) and international arbitration is structured in fifteen articles (327 – 39 to 327 - 54 of the CPC). “Arbitration is international when it involves international trade interests and which one of the parties at least has its residence or registered office abroad” (article 327 – 40 CPC).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The UNCITRAL Model Law has been partially adopted in Morocco. There are indeed some significant differences between the Moroccan international arbitration law and the Model Law. For example, Moroccan CPC law provides for the distinction between the arbitration agreement and the arbitration clause and the Model Law provides for simply the arbitration agreement.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Morocco?

Under article 327 – 51 of the CPC, an arbitral award rendered in Morocco in respect of international arbitration, may be subject to a judicial annulment remedy and be lodged within fifteen days starting the award sentence date before the competent appeal court.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Morocco? What is the general approach used in determining whether or not a dispute is “arbitrable”?

The subjects that may not be referred to arbitration under the governing law of Morocco are the ones relating to, among others, the civil status and the capacity of individuals, disputes concerning public entities, tax litigations, bankruptcy proceedings, etc.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Article 327 – 9 of the CPC provides expressly that the arbitral tribunal must, before any discussion on the merits of the case, rule *ex officio* or on any challenges to its jurisdiction.

3.3 What is the approach of the national courts in Morocco towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Moroccan courts would decline jurisdiction should a party submit to such courts in apparent breach of an existing arbitration agreement. The most diligent party should formally challenge any such wrongful judicial courts submission before the substantive discussion of the case before same courts.

However and notwithstanding the existence of arbitration agreement, judicial courts have jurisdiction for interim or conservatory relief before or during the arbitral proceedings. The judicial courts orders should not interfere with the merits of the case which are of the arbitral tribunal jurisdiction.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

A court can only address the issue of the jurisdiction and competence of an arbitral tribunal sitting in Morocco if the arbitration clause is obviously null and void.

3.5 Under what, if any, circumstances does the national law of Morocco allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The law of Morocco does not allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Morocco and what is the typical length of such periods? Do the national courts of Morocco consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The Moroccan civil law (“*Code des Obligations et Contrats*” of 1913) provides for statutes of limitation which are substantive. The rules of limitation are very specific for each type of civil or commercial contract activities and specifically, commercial claims are time-barred after five years.

3.7 What is the effect in Morocco of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

A Moroccan court ordering the insolvency of a person party to an ongoing arbitration proceeding would automatically, and by force of law, interrupt said proceeding. Under the control of the insolvency court, the designated judicial receiver may decide on whether the same arbitration proceeding is to remain suspended or to be continued. Any domestic or international arbitral award being

sentenced despite the entry into insolvency of a party may not be enforced on the ground of the breach of the public policy provision.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Moroccan international private law provides for the principle of the autonomy of will giving right to Moroccan persons entering, among others, in international commercial transactions to freely choose the law which would govern their international contract. The competent jurisdiction being judicial or arbitral, domestic or international should apply the law that the parties have chosen to govern the merits of the litigation.

Should no express choice of law be provided in the contract, arbitral courts should enquire whether there is an implied common choice of law and if not, the arbitral tribunal can determine the appropriate rules of law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Arbitral tribunals sitting in Morocco or abroad must comply with Moroccan rules of domestic or international public policies, regardless of the substantive law chosen by the parties or ruled in default by the tribunal as being applicable to the dispute.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The formation, validity and legality of the arbitration agreement are based on the proved existence of the arbitration agreement or of the arbitration clause. The domestic arbitration ones should be in writing. In addition, article 318 of the CPC provides that an arbitration clause is independent of the other contract clauses. The nullity, termination or cessation of the contract may not have an adverse effect on the arbitration clause.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are some limits to the parties' autonomy to select arbitrators. Arbitrators may be legal or natural persons who must be and who must formally declare they are not conflicted and are independent.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting arbitrators fails within a time limit period of fifteen days starting from (i) the receipt from a party a request for designation of an arbitrator, or (ii) both nominated arbitrators are unable to reach an agreement for the designation of the neutral arbitrator, the appointment shall be made by the judicial courts upon a motion filed by the most diligent party as under Article 327 – 5 of the CPC.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

There is no other possibility than in question 5.2 above for a court to intervene in the selection of an arbitrator.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Morocco?

When an arbitrator accepts the arbitration mission entrusted to it, he must in writing declare and represent any circumstances which may give rise to doubts in respect to independence and impartiality (Article 327 – 6 – of the CPC). An arbitrator who assumes his person could be disqualified must inform the parties. Hence, he may not accept its mission, except if agreed by of the parties (Article 327 – 7 of the CPC).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Morocco? If so, do those laws or rules apply to all arbitral proceedings sited in Morocco?

The parties are free to determine the procedure applicable to their arbitration; otherwise, the arbitral tribunal has such power, provided that it complies for domestic arbitration with applicable civil procedure law and in international arbitration in accordance with the usual principles of due process as provided in applicable laws or with the arbitral institution rules if any (Article 327 – 42 of the CPC).

6.2 In arbitration proceedings conducted in Morocco, are there any particular procedural steps that are required by law?

Moroccan law provides for no particular procedure for initiating or implementing arbitral proceedings, whether domestic or international.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

The parties are free to agree on the procedure of the arbitration. Should no agreement be reached between the parties, the arbitral tribunal has the authority to determine a fair applicable procedure.

6.4 What powers and duties does the national law of Morocco impose upon arbitrators?

Arbitrators are required to carry out the arbitration with impartiality and independence. Indeed, the equality between the parties should be guaranteed during the arbitral proceeding.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Morocco and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Morocco?

There are rules restricting the appearance of lawyers from other jurisdictions before the Moroccan courts. However, such rules do not apply to arbitration proceedings having seat in Morocco.

6.6 To what extent are there laws or rules in Morocco providing for arbitrator immunity?

The laws or rules in Morocco do not provide for arbitrator's immunity from any civil or criminal sanction. For example, an arbitrator who stands down without valid ground could be sanctioned with damages.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Except for rare situations as, for example, the disqualification or the dismissal of an arbitrator, national courts do not have jurisdiction to deal with procedural issues arising during an arbitration.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Morocco permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Unless otherwise agreed by the parties, the arbitral tribunal may order, in accordance to a motion presented by a party, any of the conservatory or provisional measures it may deem appropriate, but within the limits of its mission. In addition, should the party against which the interim relief has been sentenced, fail to satisfy it, the claimant party may go to judicial court in order to obtain an enforcement order (Article 327 – 15 of the CPC).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The courts are competent to order provisional or conservatory relief before the constitution of the arbitral tribunal, subject the arbitration agreement provides for such intermediary reliefs or when there is a high risk of loss of assets or evidence vanishing.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Moroccan courts are not entitled to intervene during arbitration proceedings to preserve the jurisdiction except as in the situation as set in question 7.1 above.

7.4 Under what circumstances will a national court of Morocco issue an anti-suit injunction in aid of an arbitration?

Anti-suit injunctions may be ordered by Moroccan courts as far as the arbitration agreement is valid and the arbitral procedure is ongoing.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Moroccan law does not provide for national court and/or arbitral tribunal to order security for costs. However, a party whose interests are in high risk of loss may file a motion before said jurisdictions in order to obtain an order security for costs.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Morocco?

The arbitral tribunal is entitled to undertake all necessary steps to probe the case and gather evidences. The tribunal has the power to appoint experts to assess material findings of the case and to question witnesses whose testimony is given on oath.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

Article 327 - 11 of the CPC specifically provides for the arbitral tribunal to request from a party having evidence to deliver to it. Moreover, the arbitral tribunal may decide any necessary conservatory measure, but within its mission limitation.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

There is no provision under Moroccan law for a court to intervene in matters of disclosure/discovery once the arbitral tribunal has started its arbitration proceeding.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

There are no laws, regulations or professional rules which apply to the production of written and/or oral testimony in Morocco.

8.5 What is the scope of the privilege rules under the law of Morocco? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Moroccan CPC law does not provide for privilege rules, but in practice and legal professional rules, all communications with outside counsel and/or in-house counsel attract privilege. However, privilege is deemed to have been waived when expressly agreed in writing by the parties or their legal advisers.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of Morocco that the Award contain reasons or that the arbitrators sign every page?

Article 327 – 22 *et seq.* provide that arbitral awards must be in writing and be signed by at least the majority of the arbitrators. The award must contain the reasons for the tribunal's ruling except when ruling as mediator. Unless otherwise agreed by the parties and in domestic arbitration only, the arbitral proceedings cannot take more than six months from the date on which the latest arbitrator member of the arbitral tribunal has accepted its mission. This time-line can be extended by the agreement of the parties, by the arbitral tribunal or by the president of the Court. There is no

statutory time limit applicable to international arbitrations.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in Morocco?

Under article 327 – 36 of the CPC and notwithstanding any contrary clause, enforced domestic arbitration awards could be challenged before competent appeal court within 15-days, starting the notice date of the enforced award, subject, among others, to (i) the award being sentenced in the absence of an arbitration agreement, (ii) the arbitral tribunal has been irregularly organised, (iii) the tribunal has ruled without complying to its mission, (iv) a party was not in a position to defend itself, (v) the award has breached a public policy provision, and (vi) the arbitral proceeding was not complied with by the arbitrators.

In addition, Article 327 – 48 *et seq.* provides for appeal within a time limit of 15-days starting the court enforcement order when a refusal for enforcement is ordered or when an international arbitration award is enforced by a local court, but under some limited conditions. Finally, international arbitration awards sentenced in Morocco may be subject to a proceeding for annulment before competent appeal court (Article 327 – 52 of the CPC).

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Parties may agree to exclude any basis of challenge against a domestic or international arbitral award that would otherwise apply as a matter of law.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties can agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws.

10.4 What is the procedure for appealing an arbitral award in Morocco?

Domestic and international awards can be appealed once the parties have expressly agreed to the right to appeal, but generally, arbitration agreements specify for non-appeal provision in order to accelerate the solution to the dispute for the benefit of both parties.

11 Enforcement of an Award

11.1 Has Morocco signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention of 1958 came into effect in Morocco on 19 February 1959 with the choice of a reciprocity reservation as provided under article 1, paragraph 3 of the 1958 Convention which affirms the recognition and the enforcement of an award made in the territory of another Convention's contracting State.

11.2 Has Morocco signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Morocco is a party to the 1983 convention on judicial cooperation between the states of the Arab League (the “Riyadh Convention”) which provides for the enforcement of judgments and arbitral awards enacted and delivered in Arab states.

11.3 What is the approach of the national courts in Morocco towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Subject arbitration awards do not breach any of the internal law and international public law policies Moroccan courts have a positive approach towards the recognition and enforcement of arbitration awards. The most diligent party being generally the award’s beneficiary undertakes to file a motion before the competent judicial court in order to obtain under summary proceeding an enforcement ordinance. Unfortunately, many of the Moroccan commercial courts organise contradictory proceeding which delays the courts order for months.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Morocco? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Under Moroccan law, final arbitral awards have by law as *res judicata* authority. Moroccan courts favour the enforcement of arbitral awards and they do not entertain arguments that directly relate to the merits of the case and assessments of the arbitrators.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Any arbitral award which may be delivered in breach of any of Moroccan public policy provision cannot be enforced. In respect of the international arbitral award, the concept of public policy is to broaden the Moroccan conception of “international public policy” which is taking into consideration, among others, public international law principles.

12 Confidentiality

12.1 Are arbitral proceedings sited in Morocco confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

No provision under Moroccan arbitration law provides for the confidentiality of arbitral proceeding. However, article 326 of the CPC provides for the professional confidentiality to which are submitted the arbitrators.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings cannot be referred to, or relied on, in subsequent proceedings, unless otherwise agreed on by the parties.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Under article 327 – 18 of the CPC, the arbitral court sentences the dispute in accordance with the rules of law agreed between the parties, and it has to take into consideration the contract clauses object of the dispute. Therefore and unless the parties have agreed otherwise, the only limits expressly placed upon the remedies including damages that may be sentenced by an arbitral tribunal are the elected applicable law provisions.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Legal interest on an award becomes enforceable when said award is enforced before local courts. The current legal rate of interest is 6%.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

There are no legal provisions in respect of the recovery of arbitrators and legal adviser’s fees and/or arbitration costs. Though, the arbitral tribunal do generally determine the amount of the arbitration fees and costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is not subject to tax.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of Morocco? Are contingency fees legal under the law of Morocco? Are there any “professional” funders active in the market, either for litigation or arbitration?

Under Moroccan laws, there is a prohibition on third parties, including lawyers, in funding claim. Moreover, contingency fees are not legal under the law of Morocco and there are no “professional” funders active in the market, either for litigation or arbitration

14 Investor State Arbitrations

14.1 Has Morocco signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as “ICSID”)?

Morocco is a party to the ICSID Washington Convention 1965 since 10 June 1967.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is Morocco party to?

Morocco has entered into around 40 bilateral investment treaties

with multiple states in all of the five continents and most of them contain arbitration dispute resolution.

14.3 Does Morocco have any noteworthy language that it uses in its investment treaties (for example in relation to “most favoured nation” or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Morocco has a noteworthy language that it uses in its investment treaties generally known as the non-discriminatory treatment of investors which refer to the international principles of the “most favoured nation” or the “national treatment”.

14.4 What is the approach of the national courts in Morocco towards the defence of state immunity regarding jurisdiction and execution?

The position of the Moroccan courts towards the defence of state immunity regarding jurisdiction and execution is restrictive except when the public entity party to an arbitral dispute has expressly and with full capacity waived its jurisdiction and enforcement immunities from the jurisdiction of the Moroccan courts. However, the enforcement of an arbitral award could anyway be challenged by a concerned public entity on the ground of the state immunity.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in Morocco (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

There are currently no noteworthy trends affecting the use of arbitration or arbitration institutions in Morocco.

15.2 What, if any, recent steps have institutions in Morocco taken to address current issues in arbitration (such as time and costs)?

The enforcement of judgments and arbitral awards is a dominant subject in discussion with a national commission in charge of the national justice reform. Generally, the enforcement procedure is too long and complex and this may compromise the final settlement of the case.

**Amin Hajji**

Hajji & Associés - Avocats
28 Bld Moulay Youssef
Casablanca
Morocco

Tel: +212 522 48 74 74
Fax: +212 522 48 74 74
Email: a.hajji@ahlo.ma
URL: www.ahlo.ma

Education:

Juris doctor in Law, Faculty of Law. University Hassan II - Casablanca.
Postgraduate Doctorate in Law, Faculty of Law & Economics of Toulouse - France.

Professional Career:

Professor at the Faculty of Law of Casablanca: doctoral studies in international commercial law and business law.

Associative & Scientific Activities:

Founder member of the Moroccan Association of business lawyers.

Acting Chair of the ICC Morocco Commission on Law and Practice.

Working Languages:

Arabic, English and French.



The Law Firm Hajji & Associés provides legal services to mainly international corporations. The firm activities cover the main business law subjects.

Amin Hajji and his partner, Myriam Bennani, co-animate a team formed of seven lawyers.