



# Litigation & Dispute Resolution

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**Ninth Edition**

Contributing Editor:  
**Ted Greeno**

# Global Legal Insights

## Litigation & Dispute Resolution

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Contributing Editor: Ted Greeno  
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# GLOBAL LEGAL INSIGHTS – LITIGATION & DISPUTE RESOLUTION

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## PREFACE

Since the last edition of this book, the global business community has been forced to face the many new challenges that have been thrown up by the Coronavirus pandemic and the almost universal lockdown measures that have been taken in response to it. Courts all over the world have also had to adapt and change.

It might be said that the lockdown strategies pursued by governments would not have been sustainable but for the internet and the ability it affords us to work remotely. Certainly, courts around the world have adapted to this way of working, with procedural hearings and depositions, and even full-scale trials, being conducted exclusively on videoconference platforms. The use of video technology to take witness evidence is, of course, not new. It goes back 20 years or more. However, it was not embraced by commercial litigators because its lack of immediacy impaired the quality of the evidence and sometimes last-minute technical hitches could disrupt and delay trials. Over the last few months, however, the improved technology available and the need to make remote hearings work have shown that they are a reasonable, if not ideal, substitute for in-person attendance.

It remains to be seen how permanent the move to remote hearings becomes. I doubt that trials will be held remotely once all Coronavirus restrictions are lifted. Courts will revert to in-person hearings, but it is surely likely that videoconferencing technology will be used more than it was before the lockdown for procedural hearings and other hearings where no oral evidence is required, both in international litigation and arbitration. The saving of the time and cost of travel, as well as the environmental benefits, will be a significant incentive.

One factor that may play on the need for remote hearings is the potentially sharp increase in litigation that is likely to flow from the forthcoming lockdown-induced recession. A growing volume of cases will inevitably put pressure on the capacity of courts to cope with the increased demand. We are yet to know how serious a recession it will be, but the stress on contracts and cash flows that recessions bring always leads to an increase in commercial disputes. Litigation, even of a weak defence, is sometimes the least worst option for cash-strapped companies. Recessions also tend to expose long-running fraudulent schemes, as the money moved around to create an impression that nothing is missing ultimately runs out. As Warren Buffett famously said, albeit in a different context, it is only when the tide goes out that you discover who has been swimming naked.

In such times, a swift and efficient commercial court system is all the more essential to the economic health of a nation. This time round, disputes will be even more international in nature than in the last recession. Countries can therefore help themselves and each other by easing cooperation between them for the service of process, the taking of evidence, the enforcement of judgments or awards and the swift resolution of jurisdiction challenges.

To that end, this book aims to provide an insight into how such issues are managed by the court systems and procedures of jurisdictions around the world, with a particular focus on practical considerations. I hope it is a useful guide for all lawyers who advise businesses that trade internationally.

Finally, I am grateful to all the contributors from across the globe for the clarity and expertise of their contributions.

Ted Greeno  
Quinn Emanuel Urquhart & Sullivan

# Morocco

Youssef Hanane & Ayoub Berdai  
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## Efficiency of process

The efficiency of process in the Moroccan judicial system is based on a structured and highly functional legal procedural framework, as well as on the proclamation by the Moroccan Constitution of 2011 of several measures and principles which asserts the independence and impartiality of the judiciary system. The above-mentioned efficiency may be analysed through several points and measures, including in particular:

- The liberty to resort to alternative dispute resolution mechanisms. It should be noted that the Moroccan legal system provides for two methods of dispute settlement, with some exceptions depending on the nature of the dispute. The first is judicial procedure and the second is voluntary procedure, being an alternative to the first method, in which two types of instruments may be selected, i.e. mediation and arbitration, which are beginning to become widespread in disputes between companies (business-to-business disputes). Foreign businesses that are involved in Moroccan trade opt for arbitration as a dispute resolution mechanism given the international enforceability of arbitral awards. The choice of mediation as a dispute resolution mechanism in cross-border trade may supersede arbitration in the near future due to the entry into force of the Singapore Convention on International Settlement Agreements Resulting from Mediation.
- The Moroccan judicial system encourages judicial specialisation. In fact, there are various judicial institutions entrusted with the exercise of judicial power, organised in the civil, criminal, administrative, commercial, labour, constitutional and military orders. These institutions must handle and settle all disputes that must be pursued in Morocco, depending on their nature. Moreover, and subject to some particularities and requirements, these institutions may be single judge courts or collegiate courts, e.g. the administrative courts are empowered to resolve issues concerning customs, taxation, abuse and misuse of power by public authorities, land-use, etc., while the commercial courts are specialised in business-to-business disputes. Such specialisation enables judges to be aware of the legal and technical particularities of cases submitted to the court to the jurisdiction to which they belong and thus contribute to making the judicial system more efficient.
- The Moroccan judicial system is a three-tier judicial system. The first degree comprises general civil courts (including criminal and labour chambers or courts), and administrative and commercial courts of first instance; any appeals from the courts of first instance are brought before a court of appeal within the territorial jurisdiction of the lower court and, as the highest court in the structure of the ordinary courts, we find the Supreme Court “Court of Cassation”.

Furthermore, it is important to emphasise that Moroccan courts are making strenuous efforts to accelerate judicial proceedings in order to avoid excessively long court proceedings. The Ministry of Justice is constantly analysing and proposing various means of streamlining the procedure before the Moroccan courts, pursuant to the continuing calls for efficiency and speed at the national and international levels.

In this context, one of the new measures taken as part of the modernisation of the Moroccan judicial system is the gradual use of new technologies. It is currently possible to carry out a number of operations from the official courts' website (<https://www.mahakim.ma>) and/or the e-justice application, such as the monitoring of cases, filing submissions and motions by lawyers (available for the moment in limited cases), and requesting judgments. Also, and for the first time since the impact of the COVID-19 pandemic, Morocco has been testing the use of the videoconferencing system in criminal cases. This kind of remote court hearing is a possibility, but so far it has not been very successful and requires the prior approval of the parties and their lawyers.

### **Integrity of process**

The judges in Morocco are impartial and their independence is strongly protected by the Moroccan Constitution of 2011. Moreover, the basic right of natural and legal persons to effective judicial protection in the exercise of their legitimate rights and interests is recognised as a constitutional right. The judicial system of Morocco is commonly regarded as fair and impartial with regard to all parties to a dispute and is considered to be of integrity.

### **Privilege and disclosure**

The premise of legal professional privilege to protect information and documentation from disclosure has not been developed in Morocco as is the case in common law jurisdictions. However, Moroccan law recognises the protection of the confidentiality of information and in particular the legal advice provided by a lawyer to his clients through the principle of professional secrecy.

The general framework of professional secrecy is set forth in Article 446 of the Moroccan Criminal Code, which provides that: "All persons who are entrusted with secrets by virtue of their status or profession or function are prohibited from disclosing them" (non-official translation from the Arabic language of the official Moroccan Criminal Code). Non-compliance with this provision is punishable by imprisonment from one to six months and a fine between MAD 1,200 to 20,000 (approximately GBP 100 to 1650). Furthermore, legal professional privilege is protected by Article 36 of Law No. 28-08 dated October 20, 2008 organising the profession of lawyers, which forbids them from disclosing any information in breach of legal professional privilege.

Thus, and according to the aforementioned regulations, lawyers are bound by the said principle of confidentiality and they must therefore keep secret all factual elements or information they have received during their professional performance, so that the relationship between lawyers and their clients is protected by a strict duty of confidentiality. The obligations that imply professional secrecy will remain even after the lawyers have ceased to provide services to their client.

Accordingly, the breach of professional secrecy by lawyers may lead to various disciplinary consequences which, depending on their severity, range from a warning to disqualification of their position for a specific period of time, or even expulsion from the Bar Association to which they belong.

## Evidence

Unlike many legal systems that adopt single judicial systems, the Moroccan judicial system is both adversarial and inquisitorial, depending on whether it is a civil, commercial or criminal matter.

In civil matters the system is adversarial, and the parties to the dispute may support their arguments and facts by only submitting to the judge the means of proof listed in Article 404 of the Moroccan Civil Code of 1913 “*Dahir formant Code des Obligations et Contrats*” which provides that “[t]he means of proof recognized by the law are: (i) the confession of the party, (ii) the written documentation, (iii) the testimonial evidence, (iv) the presumption and (v) the oath and the refusal to take it”. Moreover, Article 443 of the aforementioned law adds that conventions and other legal facts intended to create, transfer, modify or extinguish obligations or rights, and any value exceeding MAD 10,000 (approximately GBP 825), must be proven by an executed document.

As to the commercial field, the proof of evidence is free according to Article 334 of the Commercial Code of August 1, 1996, thus letting the parties to the commercial dispute support their cases by submitting to the judge any type of evidence. However, it should be noted that such evidence must be reported in writing when required by a specific law or by an agreement executed between the parties.

Furthermore, it is important to note that Law No. 53-05 relating to the electronic exchange of legal data dated December 6, 2007, which has amended the Moroccan Civil Code, provides that electronic exchange and documentation are accepted as evidence under the conditions provided by the same law.

On the other hand, at the request of one of the parties or *ex officio*, a judge may appoint an expert to provide the court with technical opinions on specific issues. However, such expert conclusions are of solely advisory value and they are therefore not considered evidential, meaning that the judge is not bound to retain them as part of the judicial decision.

In criminal matters, the Criminal Procedure Code dated October 3, 2002 provides that the criminal justice system is inquisitorial and therefore allows the judicial police broad investigative powers to gather evidence, including by means of searches.

## Costs

In Morocco, procedural costs are all the expenses that arise from legal proceedings. Among the most important are judicial tax, bailiff fees, expert fees, if any, and the costs of translating documents when it is necessary to obtain the translation.

As for judicial tax in Morocco, the Law on Judicial Expenses of 1984 regulates judicial expenses in the civil, administrative and commercial fields and provides that the value of the judicial fee varies according to the type and nature of a tax claim. There are some lawsuits that result in a fixed fee, and there are some types of claims for which judicial fees are paid according to the value of said claims.

The Moroccan Code of Civil Procedure allows the prevailing party to obtain payment by the other party of the costs and disbursements incurred throughout the proceedings, as well as all the other expenses incurred during the course of the trial. However, according to the aforementioned law, the judge is empowered to decide to divide the costs between the parties in litigation.

Furthermore, it is important to note that, unlike legislation in other countries, the lawyers’ fees are not considered by Moroccan law as a procedural cost and thus the state courts do not order the unsuccessful party to pay the other party’s lawyers’ fees.

## Litigation funding

Court proceedings in Morocco are usually funded by the parties themselves. Moroccan law does not provide for any specific provisions with respect to third-party funding for judicial disputes nor for arbitration, and we are not familiar with the practice of such a financial service. However, as the discussion around the creation of third-party-funding institutions dedicated to conditionally supporting arbitration fees is beginning to emerge, we believe that such a service should soon be implemented.

## Class actions

As a general rule, class action suits, as understood by common law jurisdictions, are not recognised under Moroccan law. However, and insofar as Moroccan procedural law does not prohibit it, it is theoretically possible to file a class action before courts, as long as the parties' claim has, among other things, the same object and interest when going to court.

## Interim relief

According to the Moroccan Code of Civil Procedure dated September 28, 1974, interim relief proceedings are assigned to the President of the court to whom the case is heard in an *inter partes* manner at a public hearing and, if necessary, the judge delivers an interim order. However, in cases of special summary proceedings, the judge may also order interim measures on an *ex parte* basis, i.e. without hearing the opposing party. This is the situation where there is a risk that the enforcement of the measure will be frustrated if the opposing party is informed of the requested relief before it is sentenced.

The Moroccan Code of Civil Procedure provides that a party may submit a request for interim relief either before or after the main proceedings have become pending. In this context, the claimant must prove that (i) the claim is urgent, (ii) a right to which he is entitled has been violated or that a violation is impending, and (iii) the violation threatens to cause harm that cannot be rapidly and efficiently remedied.

The application for interim relief can be submitted to the President of the court at any time on business days. Moreover, in case of extreme emergency, the “*hour to hour*” interim relief proceedings can be initiated in order to offer an expeditious solution, even during public holidays and non-working days, either in the hearing room or at the judge's residence. The interim relief order rules only provisionally and does not settle the dispute on the merits. It is, however, provisionally enforceable.

## Enforcement of judgments/awards

Pursuant to Articles 428 to 451 of the Moroccan Code of Civil Procedure of September 28, 1974, an application for enforcement of a domestic judgment is filed with the registry of the court that issues the decision. However, as a general rule, subject to a few limited exceptions, the enforcement of domestic judgment is suspended if an appeal is ongoing.

Foreign court judgments are only enforceable in Morocco after having been vested *exequatur* by the Moroccan court of the domicile or residence of the defendant or, failing that, the place where the execution of such a judgment must be carried out. The seized Moroccan court must ensure the legality and validity of the foreign judgment and the jurisdiction of the foreign court who rendered the judgment. The Moroccan judge should also verify whether any stipulation of this decision undermines Moroccan public order.

Similarly, Article 327-31 of the Moroccan Code of Civil Procedure provides that the arbitral award may be enforced only pursuant to an order of *exequatur* issued by the President of the jurisdiction where the award was rendered. The proceedings before the competent lower court and the court of appeal to obtain an enforcement order are conducted *inter partes*.

With respect to the application for recognition and enforcement of foreign arbitral awards rendered abroad, such a proceeding may be carried out before a Moroccan jurisdiction. However, such recognition and enforcement are applicable if they are not manifestly contrary to Moroccan national or international public policy. Thus, the enforcement of a foreign award means that its terms are enforced by an *exequatur* and by judicial coercive and/or interim measures, if necessary.

### **International arbitration**

Arbitration is regulated by the Moroccan Code of Civil Procedure of September 28, 1974 as amended, among other laws, by Law No. 08-05 dated December 6, 2007 on Arbitration and Conventional Mediation. The current Moroccan framework, which adopted the UNCITRAL Model Law on international commercial arbitration, rules both internal and international arbitration. It provides all relevant issues in arbitration, including the arbitration agreement, its effects and validity requirements, arbitrators and their powers, the arbitration proceedings, the award, its effects, its enforcement and validity. The said enforcement is particularly supported by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which Morocco has been a party since February 12, 1959.

According to the aforementioned regulation, the parties are free to opt for an institutional arbitration instead of an *ad hoc* proceeding, thus relying on the rules set out by the relevant institution. There are several arbitration institutions in Morocco, such as the International Center of Arbitration and Mediation of Rabat, and the Mizan Institution which is considered a newly established arbitration and mediation centre in Casablanca.

Additionally, it should be noted that the current Moroccan law relating to national and international arbitration is expected to be amended very soon, as a project law is currently under discussion by the Moroccan Parliament. This new law, which will take the form of an Arbitration and Mediation Code, aims at encouraging international investment in particular, with better and more efficient international arbitral legislation.

### **Mediation and ADR**

The only alternative dispute resolution paths governed by the Moroccan Code of Civil Procedure are arbitration and conventional mediation proceedings. Arbitration is regarded as the main alternative dispute resolution path, with mediation proceedings being less common.

Neither the current regulation nor the project of law under discussion refer to judicial mediation. Only voluntary mediation is recognised by law, which defines such a procedure as a mechanism in which two or more parties try amicably to reach an agreement to resolve a dispute between them with the assistance of a third party: the mediator.

Similarly to arbitration, the Moroccan Code of Civil Procedure provides all relevant issues in mediation, including the mediation agreement, its effects and validity requirements, the mediator and their prerogatives, the mediation proceedings, and the transaction, its effects, enforcement and validity.

Moreover, in order to promote and facilitate international trade and commerce by enabling the parties to a dispute to easily enforce and invoke settlement agreements across borders, the Moroccan government is currently in discussions about whether to sign and ratify the Singapore Convention on International Settlement Agreements Resulting from Mediation dated December 20, 2018. Said decision should be released in the next few months.

### **Regulatory investigations**

Morocco has several independent institutions in charge of upholding the regulations applicable to some economical, industrial and environmental sectors of activity, such as banking, telecommunications, competition, and securities markets, among others. A few examples are the Competition Council “*Conseil de la Concurrence*”, Bank Al-Maghreb, the National Telecommunications Agency “*Agence Nationale de Réglementation des Télécommunications*”, the Data Protection Commission “*Commission Nationale de contrôle de la protection des Données à caractère Personnel*” and the Moroccan Capital Market Authority “*Autorité Marocaine du Marché des Capitaux*”, as well as various regulatory agencies with regard to specific professional groups (i.e. lawyers, notaries and accountants).

Each one of these agencies and institutions is empowered to carry out inspections and investigations in order to detect any breach of any mandatory legislation by companies or individuals operating in the sectors under its supervision. Moreover, Moroccan regulation allows such regulators extensive investigative and repressive powers. In particular, regulators may issue regulations, carry out inspections by making raids, check books and other documents, obtain copies of any documentation, question the staff of the operator under investigation, issue injunctions to comply with, and impose enforcement and protective measures as well as disciplinary and administrative sanctions, including substantial financial penalties (e.g. on January 27, 2020, the National Telecommunications Agency imposed a fine of MAD 3.3 billion on a Moroccan telecommunications company for abuse of a dominant position).

In general, the regulator’s decisions could be subject to review by the state courts, which will review both the verdict and, as the case may be, the pronounced sanction. Thus, the court may lift or uphold the regulator’s decision and/or decrease or increase the imposed sanction.

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