

## The Enforcement of Investment Arbitral Awards under International Law and Moroccan Law

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### Abstract

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This article examines the issue of the implementation of arbitral awards as a very important point to all investors. After breaching items of the contract and the occurrence of the dispute, the disputants offer the dispute to the arbitral award. The issuance of the arbitral awards reaches implementation stage, as a point of interest to investors, in particular, more than the host state. In this paper we discuss the implementation of arbitral awards in investment dispute in international law according to the most useful conventions, namely Washington Convention and New York Convention, and in Moroccan law as a case of study.

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**Key words:** Implementation of Arbitral Awards, New York Convention, Washington Convention, Moroccan Law.

### I. Introduction

In this era of advancement and technology, developing countries like Morocco are in deep need of foreign investment for their development. The foreign investors are searching for mechanisms or means of settling their investment disputes with the host states. Therefore, the developing countries made more efforts to develop national and international laws such as signing so many conventions and changing some national laws to attract investors.

The international arbitration is considered as the most important way to resolve dispute. It gives two sided benefits as it not only gives the foreign investors confidence to go to arbitration in case of any dispute as the procedure in arbitration is far easier compared to the national courts wherein the law keeps on changing, but also protects the host state in many ways whenever such a dispute arises. Many efforts were made to organize the arbitration on the international as well as regional levels especially regarding the settlement of the investment disputes. Almost all the investors are worried about the implementation of arbitral awards after the dispute is resolved by the arbitration. The Washington Convention, which led the establishment and organization of International Centre for the Settlement of Investment Disputes (ICSID), and New York Convention are the commonly used mechanisms to implement arbitral awards in investment dispute.

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## II. The Implementation of Arbitral Award in Investment in International Law

### A. New York Convention

The New York Convention entered into force on the 7<sup>th</sup> June 1959,<sup>3</sup> the ninetieth day following the date of deposit with the Secretary-General of the United Nations of the third instrument of ratification or accession. The kingdom of Morocco was one of the first three states that have deposited their instruments of ratification or accession, 12<sup>th</sup> February 1959<sup>4</sup>. The United States acceded to the New York Convention in 1970 and implemented its provisions by enacting Chapter 2 of the Federal Arbitration Act<sup>5</sup>, and in 1986, the People's Republic of China ratified it too<sup>6</sup>. As of today, 146 States have ratified the convention.

Foreign arbitral awards which is defined in article I paragraph 1 of the Convention contains two definitions for a foreign award. The first definition, set forth in the first sentence of paragraph 1, is an award made in the territory of a State other than the State where recognition and enforcement are sought. Accordingly, paragraph 1 applies to awards made in any other State. However, a State, when becoming party to the Convention, can limit this field of application by using the first reservation of Article I(3). Article I (1) provides not only that it applies to the recognition and enforcement of an arbitral award made in another State (first sentence). It also provides that it applies to the recognition and enforcement of an arbitral award which is not considered as a domestic award in the State where recognition and enforcement are sought (second sentence).

A first point is that the second definition of the Convention's scope in relation to arbitral awards constitutes an addition to the first definition. This can be inferred from the word "also" in the second sentence. In other words, if an arbitral award is made in another (Contracting) State, the Convention applies to it in any case according to the first definition.

A second point is that, in view of the first definition, the second definition is relevant only for an arbitral award made in the country where its recognition and enforcement are sought. Conceptually, an arbitral award made in another (Contracting) State can also be considered non-domestic, but for the purposes of the Convention's scope this appears to be irrelevant.

A third point is that, unlike the first definition, the second definition is discretionary. This can be inferred from the word "considered" in the second sentence.<sup>7</sup> The convention stipulates that arbitral awards shall consist of not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. The continued strength of the New York Convention lies in Article V, which recognizes only seven grounds for refusing enforcement of an arbitral award. One important provision of the Convention is that it presumes the validity of awards and places the burden of proving invalidity on the party opposing enforcement (Article V). A party wishing to block the enforcement of an award bears the burden of proving that one of the seven grounds for refusing enforcement exists.<sup>8</sup> Article V (1) of the Convention sets five limited grounds for refusing to recognize and enforce an award. These include the given or following cases:

- The parties were suffering through some incapacity or the arbitral agreement was invalid. Almost the countries, such as Morocco, according to article 308, have taken it as a basic condition for enforcement.
- The party against whom the award is invoked was not given proper notice of the arbitrator's appointment or the arbitration proceedings or was unable to present this case. This is a lacuna for which the awards is invoked to evade and not enforce the awards. For this reason, I suggest to put a limited period of time on the stages of the lawsuit.
- The award decides matters not within the scope of the arbitration agreement;

<sup>3</sup> [http://www.uncitral.org/uncitral/ar/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/NYConvention.html)

<sup>4</sup> <http://www.wipo.int/amc/en/arbitration/ny-convention/text.html>

<sup>5</sup> Federal Arbitration Act, 9 U.S.C. § 201-208 (1980).

<sup>6</sup> [http://www.mwe.com/info/pubs/BLR\\_1109.pdf](http://www.mwe.com/info/pubs/BLR_1109.pdf)

<sup>7</sup> Albert Jan van den Berg, The New York Convention of 1958: An Overview, available at: [http://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf)

<sup>8</sup> Joseph T. McLaughlin, Laurie Genevro, Enforcement of Arbitral Awards Under the New York Convention-Practice In U.S. Courts, Berkeley Journal of International Law, 1986, Volume 3, issue 2 winter, PP. 249-272, Available at: <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/2>

- The composition of the arbitral tribunal or the procedure used did not accord with the parties' agreement or applicable law; or
- The award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was rendered.

Article V (2) provides two further grounds for refusing to enforce an award:

1. Non-arbitrability of the subject matter;
2. The recognition or enforcement of the award would be contrary to public policy.<sup>9</sup>

United States courts recognize Article V as the exclusive source from which authority to deny enforcement of a foreign arbitral award may be drawn under the New York Convention.<sup>10</sup> This recognition is consistent with the Convention's implementing legislation, which states that a "court shall confirm the award unless it finds one of the grounds specified in the said Convention."<sup>11</sup> U.S. judicial interpretations of the Convention place the burden of proving that the award should not be enforced on the party seeking to prevent enforcement in the United States.<sup>12</sup>

The provision of a "public policy" defense to enforcement of an arbitral award under Article V(2)(b) might appear to have created a major loophole in the New York Convention's pro-enforcement policy. While concern about this possibility has been expressed,<sup>13</sup> precedent has shown that U.S. courts will uphold this defense only where enforcement would violate the "most basic notions of morality and justice."<sup>14</sup>

Some state did not satisfy for this ground for refusing enforcement like U.S. It would impose additional obstacles to enforcement; in Section 207 of the implementing legislation provide that the U.S court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the awards specified in the... Convention."<sup>15</sup> This provision makes clear that the grounds for refusing enforcement of an award enumerated in Article V of the Convention will be considered exhaustive under U.S. law.

Inconsistencies between section 208 of the Federal Arbitration Act and Article III of the Convention, which provides that awards shall be enforced according to the forum State's procedural rules, have created some problems under U.S. law. For example, domestic law requires arbitration agreements to include an "entry of judgment" clause in which the parties consent that a judgment of a court with jurisdiction over the matter shall be entered on the award. No such requirement exists under the New York Convention. No such requirement exists under the New York Convention.<sup>16</sup> The New York Convention (e.g., Articles IV, V, VI) refers only to an application for recognition and enforcement of an award. The only allusion to setting aside an award occurs in Article V(1)(e), which states that one ground for refusal of recognition is that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of that country the award was made."<sup>17</sup>

<sup>9</sup> For more information about these Grounds for Refusing, see; Enforcement of Foreign Arbitral Awards, by R. Doak Bishop & Elaine Martin, PP.12 to 36. available at : <http://www.kslaw.com/library/pdf/bishop6.pdf>

<sup>10</sup> *Iptrade Int'l, S.A. v. Federal Rep. of Nig.*, 465 F. Supp. 824, 826 (D.D.C. 1978). See also *Parsons & Whittemore Overseas Co. v. Soci6t6 General de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974).

<sup>11</sup> 9 U.S.C. § 207 (emphasis added)

<sup>12</sup> See, e.g., *Parsons & Whittemore*, 508 F.2d at 973; *Imperial Ethiopian Gov't v. Baruch- Foster Corp.*, 535 F.2d 334 (5th Cir. 1976).

<sup>13</sup> See Note, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CALIF. W. INT'L L.J. 228, 228-29 n. 1 (1977) and authorities cited therein.

<sup>14</sup> *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *Parsons & Whittemore*, 508 F.2d at 974.

<sup>15</sup> Joseph T. McLaughlin, Laurie Genevro, Enforcement of Arbitral Awards Under the New York Convention-Practice In U.S. Courts, *Berkeley Journal of International Law*, 1986, Volume 3, issue 2 winter, PP. 249-272, Available at: <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/2>

<sup>16</sup> Joseph T. McLaughlin and Laurie Genevro, Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts, 3 *Int'l Tax & Bus. Law*. 249 (1986). Available at: <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/2>

<sup>17</sup> *International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990); Judgment of 1 February 1980, Austrian Supreme Court, summarized in VII Y.B. COM. ARB. 312 (1982) (International Council for Commercial Arbitration).

Courts in the United States and elsewhere have held that the language of the Convention provides that an application to set aside or suspend an award can only be made in the country where the arbitral proceeding was held and the country whose arbitral procedural, rather than substantive, law is applied (usually the same).<sup>18</sup> New York Convention took into account in the implementation of the awards of the arbitration no difference between the implementation of national and foreign awards through two main points:

The first, judicial fee stipulates no remarkable rise from those imposed for the recognition and implementation of the provisions of national arbitrators.

The second, who does not impose the recognition or implementation of the provisions of the arbitrators more severe conditions, takes into account the specificity of each country as if the judgment was in the country where the awards were issued and may not interfere with public order.

The International Court of Arbitration of the International Chamber of Commerce in Paris, has adapted to New York Convention for the implementation of foreign arbitral award in investment dispute, like case between Switzerland and Morocco for of doing hostels and the conferences Palace. File number: 2013/3/136 date of issue 2013/ 04/22.<sup>19</sup>

## B. Washington Convention

In 1965 the International Bank for Reconstruction and Development (IBRD) took the initiative to create new convention, which is named as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID). The Moroccan government has signed the convention on 11<sup>th</sup> October, 1965, and deposited for ratification on 11<sup>th</sup> May, 1967, and the convention entered into force on 10<sup>th</sup> June, 1967.<sup>20</sup> Since the Kingdom of Morocco has signed the Convention till now, there are three cases of Moroccan investment disputes front of ICSID. The first one; is case No. ARB / 72/1, It was between Holiday Inns SA and others, and Kingdom of Morocco. The second is Case No. ARB/00/4, it was between Salini Costruttori S.p.A. and Italstrade S.p.A. and Kingdom of Morocco. The third case, is No. ARB/00/6 between Consortium R.F.C.C. and Kingdom of Morocco.

The convention was created especially to encourage the international investment in part of international cooperation, which may help to achieve the economic development especially in the developing states. Hence this convention has established a center in Washington aiming to settle and resolve the disputes related to the investments. This center is named as the "international center for the settlement of the investment disputes" (ICSID) as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation and arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.

According to the provisions of the Washington convention, not only the consent of the parties is required but also there should be written request on behalf of the parties. The ICSID Convention "excludes any attack on the award in the national courts".<sup>21</sup> Investor-state arbitration has become an important form of dispute resolution, at least because of the growing number of bilateral investment treaties and free trade agreements. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the "ICSID Convention"<sup>22</sup>, establishes the most widely used institutions for those arbitrations. Many observers assume that final awards issued by arbitral tribunals organized under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) in investor-state arbitrations are final and self-executing, and that the ICSID Convention eliminates defenses in national court to the enforcement of these awards.<sup>23</sup>

<sup>18</sup> International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial Y Comercial, 745 F.Supp. 172, 178 (S.D.N.Y. 1990); Judgment of 1 February 1980, Austrian Supreme Court, summarized in VII Y.B. COM. ARB. 312 (1982) (International Council for Commercial Arbitration).

<sup>19</sup> For more cases you can see Moroccan commercial court website.

<sup>20</sup> <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>

<sup>21</sup> Maritime International Nominees Establishment (MINE) v Republic of Guinea, Case No. ARB/84/4, Ad Hoc, Committee Decision of December 22, 1989, 5 ICSID Rev.—FILJ 95 (1990).

<sup>22</sup> Done at Washington, D.C., March 18, 1965, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

<sup>23</sup> Edward Baldwin, Mark Kantor and Michael Nolan, Limits to Enforcement of ICSID Awards, 23 Journal of International Arbitration 2006, PP. 1–24.

The Washington convention expressly mentions the Recognition and Enforcement of the Award in Art. 53 which is the first of three Articles of Section 6 (titled "Recognition and Enforcement of the Award") of Chapter IV of the Convention. Art 54 deals more specifically with recognition and enforcement whereas Art 55 deals with the immunity of a foreign State from execution. The arbitration procedures are often called truly delocalized or denationalized.<sup>24</sup> This refers to the fact that they are governed exclusively by the international law provisions of the ICSID Convention and are exempted from the application of the arbitration laws and the control of the courts of Contracting States.<sup>25</sup>

According to the first sentence of Article 53(1) of the ICSID Convention, an award rendered pursuant to the Convention is binding on the parties and not subject to any appeal or to any other remedy except those which, like the remedy of annulment, are provided under the Convention itself. Also frequently mentioned in this context is Article 54 of the Convention. It addresses the enforcement of the awards. It is pertinent to mention here Article 54(1) of the ICSID Convention which requires each Contracting State to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of the State's courts. Moreover, under Article 54(2) of the Convention, recognition and enforcement of the award may be obtained from the competent court of a Contracting State on simple presentation of a copy of the award certified by the Secretary-General of the Centre.

The regime of the Convention does not, however, extend to the execution of the award. Such execution is, in accordance with Article 54(3) of the Convention, governed by the law on the execution of judgments in force in the country where execution is sought. Article 55 of the Convention additionally makes it clear that Article 54 does not derogate from the law of the enforcement forum on sovereign immunity from execution of an award.<sup>26</sup>

Although an autonomous and simplified system for recognition and enforcement of ICSID awards is established by way of Articles 53(1) and 54(1), the ICSID Convention does not establish a similar self-governing system for executing the final award against particular assets of the losing party. Instead, Article 54(3) of the ICSID Convention provides that "execution of the award shall be governed by the laws concerning the execution of judgments in force in the State whose territories such execution is sought."<sup>27</sup> Accordingly, it is determined by the local law regarding execution of judgments in the enforcement forum whether particular assets may be seized to satisfy an ICSID award. Article 55 of the ICSID Convention supports the position by declaring that "nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution."<sup>28</sup>

There are differences between awards rendered by ICSID and New York convention, the relevance of this lies in the fact that ICSID awards are not subject to scrutiny by domestic courts whereas awards rendered by 'private' arbitral tribunals have to pass the test of Article V of the New York Convention. On the other hand, awards that are issued by ICSID are subject to numerous grounds for annulment, whereas awards that are not governed by the ICSID convention may be subject to judicial review. In other words, unlike ICSID awards, any award rendered by a private tribunal will be subject to review under the arbitration law of the state where the arbitration had taken place – *lex fori* or scrutinized in light of Article V of the New York Convention.<sup>29</sup>

<sup>24</sup> A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* 57, (2004, 4<sup>th</sup> ed. with N. Blackaby and C. Partasides).

<sup>25</sup> A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* 57 (2004, 4<sup>th</sup> ed. with N. Blackaby and C. Partasides).

<sup>26</sup> Antonio R. Parra, *the Enforcement of ICSID Arbitral Awards*, 24<sup>th</sup> Joint Colloquium on International Arbitration Paris, November 16, 2007.

<sup>27</sup> See Article 54(3) of the ICSID Convention.

<sup>28</sup> Edward Baldwin, Mark Kantor and Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 *Journal of International Arbitration* 2006, PP. 1–24.

<sup>29</sup> <http://www.harmonius.org/dokumenta/Harmonius%202012-01.pdf>

## **II. The Implementation of the Investment arbitral Awards in Moroccan Law**

### **A. The implementation of national arbitral awards of investment in Moroccan law**

Morocco has adopted the arbitration to resolve and settle disputes in the most of the investments issues.

In the dispute and after submitting the case front of the arbitration, the arbitrator or arbitrators shall make decision on the subject of the dispute. The arbitral award should be written, according to Moroccan Code of Civil Procedure (article 313), and as stated in the article 327-24 the arbitral award shall have:

- The name, nationality, attribute and address of the arbitrators who issued it;
- The date of its issuance;
- Place of issuance;
- Full name of the parties and their address as well as their place of business or home address.

The arbitration award must determine the arbitrators' fees, expenses of arbitration and how they are distributed among the parties, if there is no agreement between the parties and arbitrators to determine the arbitrators' fees. The arbitrators' fees shall be determined independently from the decision of the arbitral tribunal. If the parties agreed on awards, they could implement automatically and voluntarily, but if one of the parties does not accept this award, the other party cannot resort to the methods of compulsory enforcement. Only after the grant of arbitration award of the Executive formula by the competent judicial authority, which is made in its influence sphere, the competent judicial authority is the president of commercial court According to Article 20 of the Law of the commercial courts.

In morocco, the arbitral award is not implemented fatalistically except if it gets an exequatur from the president of the Court, and shall be accompanied by the original arbitral award, and a copy of the Arabic translation of the arbitration agreement. The arbitral award must be put in investment dispute in commercial court during 7 days following the date of issuance (article 327-31).

The Executive formula is placed on the origin of the arbitral awards, its can not unappealable, and if the court refused exequatur, this reject must be reasoned (article 327-32, 33).

### **B. The implementation of international arbitral awards in investment in morocco**

According to the said Code, arbitration is considered as 'international' if it relates to international trade and provided that at least one of the parties resides abroad (article 327-40),and what is applicable to trade applies to investment.

Arbitration is also considered international if:

1. The parties have their place of business in different states;
2. The place of arbitration is in a state other than the parties' place of business;
  - a. A substantial part of the obligations resulting from the commercial relationship must be performed outside the state in which the parties have their place of business;
  - b. The place with which the subject matter of the dispute is most closely connected is outside the state in which the parties have their place of business; or
3. The parties expressly agree that the subject of the arbitration agreement has connections with multiple countries.

The Moroccan law respects what was signed in New York convention; it is reported in article 4:

1. To obtain the recognition and enforcement, the party applying for recognition and enforcement shall, at the time of the application, supply:
  - (a) The duly authenticated original award or a duly certified copy thereof;
  - (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

It is necessary to provide a translation of the documents supplied, because the Moroccan courts conduct proceedings in Arabic, so all documents filed must therefore be translated into Arabic to save time and to facilitate the work of the Court, according to Article 327-47 of civil procedure law of Morocco.

But in practice, some commercial documents, including contracts, are accepted by the courts in French language to facilitate the work of the Court. Thus the enforcement of the arbitration awards on investment disputes are subject to the general rules which apply generally to the enforcement of the arbitration awards in Morocco, no matter whether they are national or international. As Moroccan law (code of civil procedure) to recognize the arbitral awards shall prove this arbitral awards and who clings for it (article 327-47).<sup>30</sup> The executive forma in international and national arbitral awards gives from the president of commercial court, and this indicate that the Moroccan The legislator not divided between international and national arbitral awards

### **Conclusion**

The Washington Convention and New York convention have proved their efficiency in resolving investment disputes, despite criticism. The fact that the arbitration detracts the sovereignty of the state over its territory and resorts to the foreign arbitral courts means the inefficiency of national courts. Some countries, such as Iraq, have refused to sign the convention. From the other hand, some scholars have faulted that the implementation of foreign arbitral awards may need exequatur to implement them in some countries like Morocco, where the implementation of these awards could fail because of the public order, which will be different from country to the other, because of religions, customs and traditions.

Even if there is this criticism, we can see that the arbitral awards have been implemented successfully, this success is clear through the caseload - which rises day after day- and their enforcement under the name of these two conventions. Morocco is one of the countries that have implemented foreign arbitral awards in any disputes, not only in investment. It is one of the countries that establish their domestic laws to suit the international systems. The cases Offered in ICSID confirm that the kingdom of Morocco respects their contracts and gives them more attention to attract investment.

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30 Article 327-46: Les sentences arbitrales internationales sont reconnues au Maroc si leur existence est établie par celui qui s'en prévaut et si cette reconnaissance n'est pas contraire à l'ordre public national ou international.

Sous les mêmes conditions, elles sont déclarées reconnues et exécutoires au Maroc par le président de la juridiction commerciale dans le ressort de laquelle elles ont été rendues, ou par le président de la juridiction commerciale du lieu d'exécution si le siège de l'arbitrage est situé à l'étranger.