

## Arbitration Agreements with Tunisian Parties – a Primer

By Meriem Rezgui

*Tunisia generally has a well-developed framework for international arbitration. Nevertheless, there are some specificities international parties tend to overlook. This alert discusses what international parties need to bear in mind when agreeing to an arbitration clause with a Tunisian counterparty.*

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### Tunisia's Legal Framework for Arbitration

Tunisia has a well-developed legal framework for arbitration and is one of the leading African and Arab states to regulate arbitration. In 1967, Tunisia adopted the New York Convention on the Recognition and Enforcement of Arbitral Awards. The Tunisian Arbitration Code ("**Arbitration Code**") was enacted on 26 April 1993.

Based on the UNCITRAL Model Law, the Arbitration Code demonstrates a drive to simplify and modernize both domestic and international arbitration law. The Code's promulgation and its considerable reform aim to attract foreign investment and promote Tunisia as a place of arbitration.

The Arbitration Code is generally supportive of arbitration, and also, the courts' case law shows a favorable inclination toward arbitration.

### Drafting the Arbitration Clause – What to bear in mind?

In addition to the fact that arbitration is faster than litigation, it also tends to diminish the hostility between the parties and establish a dialogue that would not necessarily exist in judicial processes. Additionally, the dispute will be resolved by arbitrators who are not necessarily civil servants but are specifically appointed by the parties. These arbitrators have specific knowledge and skills related to the arbitration's subject matter. Also, the fact that discretion characterizes the arbitral process due to its confidential nature means arbitration is more aligned with the objectives and practices of the business world.

However, some legal requirements should be taken into account when drafting arbitration clauses with Tunisian parties.

At both the national and international levels, arbitration clauses must meet specific validity criteria. Under the Arbitration Code, they consist of the written form requirement (Art. 6), arbitrability (Art. 7), and capacity (Art. 8).

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*“Any agreement to arbitrate must be made ‘in writing.’” – (Art. 6)*

Art. 6 of the Arbitration Code complies with the requirements of Art. 7(2) of the UNCITRAL Model Law. It states the arbitration agreement can only be established in writing, either by authentic or private deed or by minutes of the hearing or minutes drawn up by the chosen arbitral tribunal.

Therefore, the arbitration agreement is deemed ‘in writing’ when set out in a document signed by the parties or contained in an exchange of letters, telex communications, telegrams, or other forms of communication that prove its existence. Also, an arbitration agreement can be established in the exchange of findings in demand and conclusions in defense for which an agreement’s existence is a prerequisite and is alleged by one party and not contested by the other.

In a contract, a reference to a document containing an arbitration clause shall be deemed an arbitration agreement, if such a contract is drawn up in writing and the reference includes the clause as part of the contract.

*What matters are not arbitrable under Tunisian law? – (Art. 7)*

According to Tunisian legislation and jurisprudence, freedom of contract and party autonomy are fundamental principles. However, there are restrictions on parties’ ability to enter into arbitration agreements. For example, disputes that may involve sensitive matters of public policy fall within the exclusive jurisdiction of the national courts under national law.

Generally, Tunisia takes a liberal approach regarding arbitrability. Therefore, Tunisian judges have usually opted for a moderate approach when interpreting the non-arbitrability of some disputes. Disputes that are not arbitrable under Tunisian law are enumerated in Art 7. of the Arbitration Code and consist mainly of:

- Matters relating to public order, disputes relating to nationality, the conditions relating to personal status with the exception of disputes of a pecuniary nature arising therefrom, matters where no compromise can be reached, and
- Disputes concerning the state, public administrative establishments and communities’ local disputes, with the exception of disputes arising out of international economic, commercial or other relations or financial.

In this context, several court decisions have consolidated the exceptional nature of these limitations. Only cases based on purely administrative contracts are not arbitrable, which makes the interpretation of such exclusive jurisdiction regarding arbitrability very narrow. The restriction also concerns disputes relating to foreign exchange law, taxation, labor law,

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collective proceedings, and competition law within the limits of the Tunisian Competition Council's competence. However, it is crucial to consider how this limitation intersects with restrictions regarding public order matters.

Consequently, the State's power to arbitrate is recognized in commercial matters. In this regard, Art. 3 of the 1988 Decree on the State and State Administrative Entities Representation Before Courts authorized the State litigator to represent the State and the State administrative entities before foreign courts and international arbitration institutions whenever they are involved in commercial disputes.

#### *Capacity – (Art. 8)*

Under Art. 8 of the Arbitration Code, parties to an arbitration agreement must have the capacity to enter into such an arrangement. Though this requirement may not be problematic for natural persons, it does raise the issue of companies ensuring they are represented by their authorized legal representative or by a third party by way of proxy to accurately fulfill the Art. 8 requirement.

#### **The Seat and Language of the Arbitration: Applicable Law and Arbitration Rules**

The Tunisian legislature demonstrated an exceptional amount of liberalism when it separated arbitration from State laws. It also gave parties the ability to choose the seat, language, and applicable law of the arbitration, detailed as follows:

- The parties are free to determine the rules applicable to the arbitration.
- The parties are free to determine the language and seat of the arbitration.
- The parties are free to determine the law applicable to the dispute.

In fact, under the arbitral tribunal's constitution and its procedure, the parties choose the applicable rules either directly or by reference to arbitration rules. Additionally, the parties' silence does not mean mandatory State rules apply. The arbitrators are free to determine which procedure to apply; however, their power is limited by the fundamental principles of civil and commercial procedure, particularly the rules relating to the rights of the defense.

#### **The Law Applicable to an Arbitration Clause and Judicial Control of the Agreement to Arbitrate**

The Tunisian courts recognize and have adopted the principle of autonomy regarding arbitration clauses, which means it remains valid if the supporting contract is deemed null and void. Additionally, arbitrators maintain their own jurisdiction, thereby allowing parties to avoid litigation or judicial proceedings prior to or contemporaneously with the arbitral proceedings.

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### *Annulment of Awards*

Under the Arbitration Code, a party may seek recourse against an arbitral award at the Court of Appeal of Tunis via an application to set aside.

The application to set aside may not be made until three months after the date on which the party making that application receives the award, or if a request has been made to correct the issued arbitral award, from the date on which the arbitral tribunal disposed of that request. Suppose the court sets aside the award, either wholly or partially. In that case, it may decide on the merits, if necessary, and on application by all parties, which it shall decide as an amiable compositor. The rejection of the application to set aside the award grants leave to enforce the arbitral award.

When asked to set aside an award, the court may, where appropriate and so requested by a party, suspend the proceedings for a period of time it determines to allow the arbitral tribunal to resume the arbitral proceedings or to take such other action that, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside. This option concerns mainly material corrections that do not change the substance of the award. However, this is an exceptional occurrence, not usually deployed by the court.

Parties who do not have a domicile, principal residence, or business establishment in Tunisia may expressly agree to exclude all recourse against an arbitral award, either totally or partially.

### *Challenging an Arbitration Clause in Recognition Proceedings*

Tunisia is a signatory of the New York Convention on the Recognition and Enforcement of Arbitral Awards. However, to enforce a foreign arbitral award in Tunisia, the parties must complete an exequatur procedure before the Court of Appeals of Tunis. For these proceedings, the general rule is to recognize and enforce international arbitral awards.

Under Art. 81 of the Arbitration Code, the Court of Appeal of Tunis may refuse to recognize or enforce an award only in the following two cases, irrespective of the country in which it was issued:

- If the court finds that the recognition or enforcement of the arbitral award would be contrary to public policy as understood in private international law.
- At the request of the party against whom it is invoked, if that party provides proof that:

a.) A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which parties have subjected it, or, failing any indication thereon, under the rules of private international law.

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b.) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present their case.

c.) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

d.) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement in general, with the designated institutional arbitration rules, with the law of the country held to be applicable, or with the provisions of the arbitral tribunal's constitution.

e.) The arbitral award has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

**If you would like more information about this topic, then please contact us.**



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