



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA PROJECTS

**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

MOROCCO

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No.

The Moroccan *lex arbitri* as adopted by Statute No. 08-05 in November 2007 was inspired by both the UNCITRAL Model Law and French law.¹ The relevant provisions of the Moroccan Code of Civil Procedure (“MCCP”) – namely Articles 327-39 to 327-54 which govern international arbitration proceedings seated in Morocco – do not expressly provide for a right to a physical hearing in international arbitration.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be “oral”; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: It can be excluded.

While the Moroccan law governing international arbitration (Articles 327-39 to Articles 327-54 of the MCCP) does not expressly provide for the parties' right to a physical hearing, it is then necessary to assess whether such right can be inferred or excluded by way of interpretation of the Moroccan *lex arbitri* as set in the MCCP.

Moroccan international arbitration law contains very few provisions to look at in order to determine whether a physical hearing can be inferred or excluded by way of interpretation.

First, Article 327-42, paragraph 1, provides for the parties' right to choose the procedure that will govern their dispute when drafting the arbitration agreement. In fact, the arbitration agreement can, directly or by reference to an institutional rule, define which procedural rules will govern the proceedings.² Further, in the event the parties do

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¹ See Khalid ZAHER, “Le nouveau droit marocain de l'arbitrage interne et international”, *Revue de l'arbitrage* (2009) p. 71.

² Article 327-42, paragraph 1, MCCP provides that: “The arbitration agreement can, directly or by reference to arbitration rules, set the procedural rules to be followed during the arbitral proceedings” (free translation by the Author).

not identify which procedural rules will be applicable, the Moroccan *lex arbitri* explicitly provides in Article 327-42, paragraph 3, that the arbitral tribunal shall decide what procedure it deems appropriate by referring to a specific law or to an institutional rule.³

Article 327-42 does not give any clear indication whether a right to a physical hearing can be inferred or excluded, which confirms the freedom left to the parties and to the arbitral tribunal, to decide what procedure will govern the proceedings.

Second, there are the principles of due process, which are provided in Article 319, paragraph 4, of the MCCP. This provision defines the nature of the arbitration in Morocco (*ad hoc* or institutional), and requires that for both types of arbitration, the parties' due process (*droit de la défense* in French) must be respected.⁴ We can infer from such provision that the Moroccan *lex arbitri* imposes a general requirement that arbitration proceedings are subject to the constitutional right to a defence and due process.⁵ Therefore, although there is no obligation under the *lex arbitri* to hold physical hearings, the arbitral tribunal will have to make sure that the proceedings comply with these principles in order to avoid any enforcement issues.

Third, where the parties decide that the MCCP will govern the proceedings, Article 327-43 of the Moroccan *lex arbitri*, extends the provisions of Articles 306 to 327-38 (provisions of the MCCP governing domestic arbitration), to international arbitration.⁶ In fact, Article 327-10, paragraph 2, of the MCCP, which governs domestic arbitration, and international arbitration absent the designation of institutional rules, provides that the arbitral tribunal can meet at any location it deems appropriate.⁷ This has been interpreted to mean that the question of the conduct of hearings is left to the discretion of the tribunal. While the MCCP refers to "meetings" and "places" its language is not deemed to require physical hearings. Accordingly, international arbitration proceedings governed by the MCCP are very likely to fall within the situation in which the arbitral

³ Article 327-42, paragraph 3, MCCP provides that: "If the arbitration agreement does not provide for the set of rules to be followed, the arbitral tribunal orders which law or rules it will apply to the proceedings" (free translation by the Author).

⁴ Article 319, paragraph 4, MCCP provides that: "In any case, the rules relating to the right of the defence shall be respected" (free translation by the Author).

⁵ Article 120 of the Moroccan Constitution provides that: "[...] The rights to due process are guaranteed before all courts" (free translation by the Author).

⁶ Article 327-43 MCCP provides that: "If the arbitration is governed by the Moroccan Code of Civil Procedure, provisions under sub-section II & III of section I from the present chapter are applicable in the absence of a particular agreement" (free translation by the Author).

⁷ Article 327-10, paragraph 2, MCCP provides that: "The parties can decide the place of the arbitration whether inside or outside Morocco. In the absence of such agreement, the arbitral tribunal determines that place taking into account the proceedings' circumstances, the parties' address, without prejudice to the tribunal's power to meet in all places it deems appropriate for the conduct of the arbitration such as hearing the parties, the fact and expert witnesses [...]" (free translation by the Author).

tribunal is free to decide where and how the hearings shall take place, including remote hearings.

As a conclusion, a right to physical hearing can be excluded by way of interpretation of the Moroccan *lex arbitri*.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes.

The Moroccan general rules of civil procedure do not expressly provide for a right to a physical hearing.

However, there are several indicators that those rules implicitly provide for a right to a physical hearing. First, in Article 42 of the M CCP, which refers to the summons of the parties to a dispute before Moroccan courts, its paragraph 2 specifically provides that when courts summon any party to a hearing, the party must appear in person or through its representative.⁸ In both cases, a physical presence to hearings is mandatory under Article 42 of the M CCP.

Second, Article 50 of the M CCP, which governs court decisions, requires that court decisions must be rendered in open court before the parties or their representatives and mention whether the proceedings were held publicly or privately.⁹

Thus, based on the Moroccan general rules of civil procedure, the right to a physical hearing can be inferred.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

The Moroccan general rules of civil procedure are not applicable as such to arbitration proceedings in Morocco, whether domestic or international. The Moroccan Legislator defined in the M CCP a separate set of rules applicable to arbitration independently from the general rules of civil procedure.

⁸ Article 42, paragraph 2, M CCP provides that: "Parties have to appear in person or through counsel before the court on the fixed date" (free translation by the Author).

⁹ Article 50, paragraph 1, M CCP, provides that: "Court decisions are rendered in open court" (free translation by the Author).

c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

As explained above, a right to a physical hearing in arbitration does not exist under Moroccan law.¹⁰

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No.

In Morocco, international arbitration (as well as domestic arbitration) is based on the principle of party autonomy, as it presupposed that the parties agreed to refer their dispute to arbitration.¹¹

In fact, the Moroccan *lex arbitri* allows the parties to choose the law governing the proceedings, which is binding on the arbitral tribunal.¹² Otherwise, the tribunal would violate the arbitration agreement and its mission, which would in turn constitute a ground for setting aside the award as provided in Article 327-51 of the M CCP.¹³

In the event the arbitral tribunal seated overseas violated the arbitration agreement, including the requirement to hold a physical hearing, (and its mission) by conducting remote hearings, the subsequent award will probably not be enforceable in Morocco as the arbitral tribunal violated the mission and instructions given by the parties.¹⁴

¹⁰ See paragraphs a and b above.

¹¹ Moroccan arbitration law is governed by the principle of party autonomy as provided by Article 230 of the Code of Obligations and Contracts, which provides that: “Contractual obligations that are validly formed are binding on the parties, and cannot be revoked unless with their mutual consent or in cases provided by law” (free translation by the Author).

¹² See sub-paragraph a.2 above.

¹³ Article 327-51 M CCP provides that: “The award rendered in Morocco in international arbitration can be set aside in the conditions set in Article 327-49 above” (free translation by the Author).

¹⁴ Article 327-49, paragraph 3, M CCP provides that: “Appeal of the decision recognizing or enforcing an arbitral award is possible in the following cases: [...] 3. The arbitral tribunal failed to comply with its mission” (free translation by the Author).

Whereas, in the case of an international award rendered by a tribunal seated in Morocco in which the M CCP was chosen to govern the arbitral proceedings, wherein the arbitral tribunal violated its mission or failed to comply with the parties' instructions, the legal consequence of such violation would be the setting aside of the award as provided in Article 327-36.7 of the M CCP.¹⁵

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: N/A

As already explained above, international arbitration law in Morocco does not provide the parties a right to a physical hearing.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

It is not possible to answer this question considering that Moroccan law does not recognise a right to a physical hearing in international arbitration as explained above under paragraphs a and b.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: It depends.

¹⁵ Article 327-36.7 M CCP provides that: "Notwithstanding any contrary provisions, arbitral awards can be subject to appeal in the ordinary forms before the court of appeal of the jurisdiction where it was rendered. [...] The appeal is open in the following circumstances: [...] 7. In the event the tribunal failed to comply with the procedural rules agreed by the parties or failure to apply with the law chosen by the parties to the dispute" (free translation by the Author).

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As the Moroccan arbitration law does not specifically provide for a right to a physical hearing in arbitration, answering this question will depend on whether the parties had agreed to hold remote hearings or not.

As a first scenario, let us suppose that the parties agreed that the proceedings will be held remotely (in the arbitration agreement or later on when the tribunal requested their respective consents). Thereafter, neither parties would be able to validly set aside the award on the grounds that the proceedings should have been held physically. This is because the Moroccan arbitration law is based on the principle of party autonomy.

Where the arbitral tribunal orders a remote hearing without the parties' consent, the arbitral tribunal would have to meet the requirements set by Article 120 of the Moroccan Constitution and Article 327-49 of the M CCP, which impose a due process requirement.¹⁶ Otherwise, the arbitral tribunal would be in violation to the Moroccan Constitution whose provisions are part of Morocco's public policy.¹⁷

Consequently, conducting a remote hearing in violation of due process can constitute a ground for setting aside the award. However, conducting a remote hearing even without the consent of the parties (but not in violation of the parties' prior agreement) is not a ground for setting aside the award so long as particular care is given by the tribunal to the parties' due process rights.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: No.

¹⁶ Article 120 of the Moroccan Constitution provides that: "Everyone has a right to a fair trial and to a judgment rendered within a reasonable time. The rights to due process are guaranteed before all courts" (free translation by the Author).

¹⁷ See sub paragraph 6 above, and Article 327-49, paragraph 4, M CCP, provides that: "Appeal of the decision recognizing or enforcing an arbitral award is possible in the following cases: [...]. 4. When due process has not been respected." (free translation by the Author).

The Moroccan Constitution recognizes the supremacy of duly ratified international conventions over domestic law.¹⁸ Thus, as Morocco ratified the New York Convention in 1959, its provisions supersede Moroccan law on arbitration and Moroccan courts always refer to its provisions when ruling on the recognition and enforcement of foreign arbitral awards.

In fact, Moroccan courts analyze *sua sponte* whether the “material results” of the award violate the Moroccan public policy before ruling on the recognition and enforcement of foreign awards. Therefore, a breach of a right to a physical hearing without the violation of the due process principle would not be considered as a ground for refusing recognition and enforcement of a foreign award under the New York Convention.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Yes.

Since 2018, Morocco has started testing electronic court filings in the commercial courts of Rabat and Casablanca. However, Moroccan attorneys did not use this platform and the physical filing continued to be the standard practice before Moroccan courts. However, when the pandemic happened, attorneys began using the electronic court filing platform very frequently.

Given the general lockdown decided due to the Covid-19 pandemic, and the need to control and reduce the spread of the virus, Moroccan officials started to meet remotely (using videoconference applications such as Skype, Zoom, MS Teams and so on) in order to discuss the consequence of the Covid pandemic on the country. Officials even decided to temporarily postpone all hearings except criminal hearings and emergency procedures. While emergency procedures were still being held physically, the Moroccan criminal courts decided to hold remote hearings in criminal trials when the accused consented. In fact, since the beginning of the Covid pandemic, the Moroccan Supreme Council of Justice reported 393 remote hearings.¹⁹

During the lockdown, a draft bill concerning the use of electronic exchanges in judicial proceedings was prepared by the Ministry of Justice. This draft was supposed to

¹⁸ See the Preamble of the Moroccan Constitution dated 2011, available at <http://www.sgg.gov.ma/Portals/0/constitution/constitution_2011_Fr.pdf> (last accessed 27 January 2021) p. 4.

¹⁹ See the Supreme Council of Justice statistics, available at <<https://www.cspj.ma/actualites/Details/6173>> (last accessed 30 November 2020), where 393 hearings were held remotely.

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amend the Moroccan Code of Civil Procedure and update the judicial system by using new technologies. For instance, the notification of a party would be electronic if the court has its official electronic address.²⁰

With regards to arbitration law in Morocco, a draft bill submitted by the Ministry of Justice was adopted by the Government Council a few days before the lockdown in Morocco on March 5, 2020. Several amendments are listed in this draft including the possibility to sign an arbitration agreement electronically, but no reference to remote hearings was made.²¹

²⁰ See the draft bill suggested by the Ministry of Justice in 2020, available at <https://justice.gov.ma/Loi/Fichier_pdf/Utilisation_des_medias_electroniques_dans_les_procedures_judiciaires.pdf> (last accessed 30 November 2020).

²¹ See the draft bill No. 95-17 adopted by the Moroccan Government Council, available at <http://www.sgg.gov.ma/portals/0/AvantProjet/160/Avp_loi_95.17.pdf> (last accessed 30 November 2020).