

THE LAW FIRM OF OMAR T. MOHAMMEDI, LLC

ATTORNEYS AT LAW

NEW YORK, NY



# International Investment and Commercial Transactions

## The Algerian-American Experience

Woolworth Building

233 Broadway · Suite 801 · New York, NY 10279

Telephone: 212-725-3846 · <http://www.otmlaw.com> · [info@otmlaw.com](mailto:info@otmlaw.com)



## International Commercial Contracts

### Essential Provisions to Consider (law of the land v. law of the contract)

- Identity of Parties and Recitals
  - Name of the parties
  - Type of entity of each party (e.g. private parties, government-to-government, or private party-to-government) (will address the details)
  - Addresses
  - Background of the Agreement
    - Purpose of entering into the contract
    - Key assumptions for the contract



## International Commercial Contracts

### Essential Provisions to Consider

- Terms of the Contract
  - Is the contract for one type of service or are there various components?
  - Will the contract last for a designated time period? What is the duration of the contract?
  - Can the term of the contract be renewed or extended? If so, how should that be done?
    - Renewal can be automatic or upon notice (which applicable law)



## **International Commercial Contracts**

### Essential Provisions to Consider

- Value of the Contract and Representations and Warranties
  - What is the price of the service or product?
  - Is the price fixed or determined by a formula, a projection or some other manner?
  - What representation and warranties are to be made by the parties? Express and implied warranties and warranty for a specific purpose.



## **Essential Provisions to Consider**

- **Termination and Liability of the Contract**
  - What are the consequences of an early termination?
    - A party might require an early termination fee or require the other party to pay the remainder of the contract
  - Under what circumstances is one party liable (e.g. material breach of the agreement or grossly negligent performance of the services, delays)? (liquidated damages and other damages to consider)

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## International Commercial Contracts

### Essential Provisions to Consider

- Dispute Provisions
  - A good contract has dispute provisions.
  - Understand the law of the country where the service is rendered
  - Understand the law of the other party's country.
  - Consider the applicable law (e.g. civil law vs. common law and or international conventions)
  - Consider the forum to resolve the dispute and alternate dispute resolution methods (mediation, arbitration, etc.)
  - Anticipation of dispute saves time and money when dispute actually occurs

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# International Arbitration

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## International Arbitration

### – The Arbitration Clause

- Arbitration is common in international transactions and becoming increasingly popular.
- Parties agree to arbitration by including an arbitration clause in the contract.
- A good arbitration clause usually specifies the forum, the language of proceedings, the law governing the contract and the number of arbitrators.





## International Arbitration

### The Arbitration Clause

#### The Forum

- The venue of arbitration
  - The laws of the forum will govern the arbitration proceedings
- The Language
- This needs not be the national language of the forum nation.
  - English is a frequent choice of language.



## International Arbitration

### Arbitration Clause

- The Law Governing the Contract
  - This is the choice of law clause and is usually independent from the forum
  - It is Important to identify governing law, otherwise the parties will incur high costs in applying conflicts of law theory to determine the applicable law.
  
- The Number of Arbitrators
  - One arbitrator is usually sufficient for a reasonably simple dispute.
  - Three arbitrators may be required for a more complex commercial dispute.

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## **Benefits of International Arbitration**

### **– Neutrality and Flexibility**

- One party does not have to subject itself to unfamiliar, unfriendly domestic courts of another country.
  - Domestic courts of nonparty countries are unlikely to hear the disputes.
- Parties can choose place of arbitration, rules of procedure and law, and nationality and number of arbitrators
- Speed and Economy
- Arbitration is faster and less expensive than litigation.
- Limited scope for challenges to arbitral awards ensures no entanglement in lengthy appeal process.



## **New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards**

**(Algeria and the US are members of the New York Convention)**

- Ratification and Reservation
  - Both nations ratified with reservation that it will only apply to legal relationships considered “commercial” under national law.
- Requires courts of contracting states to:
  - Stay all proceedings in domestic courts that are subject to international arbitration.
  - Recognize and enforce foreign arbitral awards.

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## **Benefit of New York Convention**

### **Final and Binding Decisions**

- Final arbitral awards will be enforced in the courts of all 144 states that are signatories to the New York Convention of 1958.
- There is no comparable treaty that ensures enforcement of judgments from foreign domestic courts.
- Grounds of challenge against arbitral awards are very limited.
- The proceedings in most forums of international arbitration are confidential and off-record.

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## **New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards**

### **Benefits**

- It gave the forums for international arbitration the ability to enforce their final awards in any member state.
- Provided a faster and more cost effective solution to international commercial dispute resolution.
- Encouraged the proliferation of international commerce.

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## Algerian Law on International Arbitration

Legislative Decree 93-09 of the Algerian Code of Civil Procedure (ACCP)

- Definition of International
  - A matter is “international” where it concerns international commerce and at least one party has an address abroad.
  - This definition contains both an economic as well as a legal criterion
  
- Conditions of validity
  - An international arbitration clause must be in writing.
  - Where the main contract is deemed void, the arbitration clause may still be enforceable



## International Arbitration

### Legislative Decree 93-09 of the Algerian Code of Civil Procedure (ACCP)

- Jurisdiction
  - Once a party has initiated international arbitration in some arbitral tribunal, national courts shall cease to have jurisdiction over the dispute.
  - Arbitral tribunals may apply any “legal rules” agreed upon by the parties
    - The term “legal rules” allows for the application of general principles of law whether codified or not. It has to be specific in the contract.
- Enforcement
  - An arbitral award is enforceable if the claimant can prove its existence AND if its recognition is not contrary to public policy.



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United States Common Law System  
vs.  
Algerian Civil Law System

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## Common Law vs. Civil Law

### The American System (Common Law)

- Based on precedent
- Each provisions is well calculated by common law lawyers to protect the contracting parties
- Extensive discovery
- Jurisdictional issues
- Expansive jurisdiction
  - The Foreign Sovereign Immunity Act (FSIA)
  - Commercial exception to the FSIA

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## Common Law vs. Civil Law

### The Algerian System (Civil Law)

- Based on code
- The anticipatory provisions are simple and based on code (not precedent)
- Discovery issues are very limited
- Jurisdiction is less expansive
- Reliance on Private International Law in case of a dispute of applicable laws

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## International Commercial Transactions

### UN Convention on Contracts for International Sale of Goods (CISG)

- Combines elements of both civil and common law systems
- General
  - Signed in 1980, CISG is the only current contract law applicable on an international scale.
  - Currently there are 71 signatories including major trading states like the United States, China, Russia, Japan and France.
  - Algeria has not ratified the CISG yet but Algerian companies can still be subject to it if they submit to the jurisdiction of the Convention. (Recognition of harmonization of the legal systems)



## International Commercial Transactions

### UN Convention on Contracts for International Sale of Goods (CISG)

- Application of the CISG
  - Applies when two contracting parties have a place of business in two different signatory states. (i.e. one company is from United States and other from China).
  - Applies when conflicts of law rules lead to jurisdiction of a signatory state (i.e. Japanese and Brazilian company agree to settle disputes under laws of the United States)?
- Applies to all commercial goods except:
  - Goods bought for household use
  - Goods purchased at auctions
  - Ships and aircrafts
  - Electricity
  - Intangibles
  - Services

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# Investment in Algeria

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## Investment in Algeria

### Foreign Investments

- **Generally**
  - Foreign investors can invest in any sector
  - New laws restrict foreign stake in any investment to 49% (there must be Algerian majority stake).
  - Algerian national energy company, Sonatrach, must be majority stakeholder in investments in hydrocarbons.
  
- **Expropriation and Nationalization**
  - Constitution of 1996 guarantees against expropriation and confers the right of equitable compensation.
  - The government of Algeria has not engaged in any expropriation actions against the U.S. or other foreign firms.



## Investment in Algeria

### Market Entry and Entities under Algerian Law

- U.S. firms can open representational offices or joint ventures with Algerian companies.
  
- There are three types of organizations
  - **Liaison office**
    - Used to be the only option for foreign firms, now least attractive option. Limited in function and income.
  - **Branch office**
    - Resident Algerian entity without full legal benefits. Strict foreign exchange controls makes repatriation difficult.
  - **Permanent establishment**
    - Full but temporary presence in Algeria. Substantial repatriation, but cannot avail full tax benefits.





## Investment in Algeria

### Repatriation of Revenue

- Foreign investors can repatriate their profits even if the revenues exceed the original investment.
- Foreign Exchange Controls
  - The Central Bank controls repatriation of currency from payments.
  - A company can only receive 50% of its exports in U.S. Dollars (other 50% in Algerian Dinar)
  - Companies dealing in hydrocarbons must receive 100% of their export revenue in Algerian Dinar
- Repatriation is often restricted by reporting requirements
  - **Revenues from services can be repatriated without pre-approval from Central Bank**
  - Revenues from goods require approval

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## Investment in Algeria

### Tax Laws

- Modified tax laws
  - The tax laws were modified in August 2008
  - Tax on corporate profits was reduced from 25% to 19% on production of goods (excluding hydrocarbons) and tourism.
  
- Reinvestment requirement
  - Companies must re-invest within 4 years the value of any tax incentives
  - Failure to do so will result in a 30% tax penalty
  
- Double Taxation
  - Algeria has signed 12 bilateral treaties to prevent double taxation.
  - No treaty with the U.S., but U.S. provides tax credit or deduction for foreign taxes paid on overseas investments.

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## Investment in Algeria

### Overseas Private Investment Corporation (OPIC)

- OPIC is a U.S. government agency doing business in over 150 countries.
- OPIC provides political risk insurance and investment loans for private companies doing business overseas.
  - Political risk covers inconvertibility, political violence and expropriation
- OPIC can finance projects in developing or emerging markets where private finance institutions are reluctant or unable to lend.
- OPIC supported a \$250-million water desalination project in Algeria in 2008.

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This presentation is intended for informational purposes only. It does not intend to offer any legal advise. For further advise on a case by case basis:  
Please do not hesitate to contact:

Omar Mohammedi, Esq.

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