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The Writing as a condition of validity in the arbitration agreement in Tunisian legislation

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Nowadays, arbitration is required in the world of international trade as the normal mode of dispute settlement. Indeed, the development of the business world and the intensification of global trade have contributed to the emergence of several conflicts between international traders, these conflicts are amplified with different cultures, mentalities and especially international legislation. The arbitration was then the best remedy since it is the justice that best suits the needs of traders. The private mode of dispute settlement offers them a certain serenity, to the extent that it has significant advantages. Arbitration is in fact a flexible way, confidential, fast and reasonably expensive. In addition, the technical qualifications of arbitrators and their specific vision of litigation are two factors that ensure the warring parties a satisfactory solution to the disagreement, leaving the door open to continuing business relationships.

Key words: Arbitration , Agreement clause, Tunisian legislation

INTRODUCTION

Nowadays, arbitration is required in the world of international trade as the normal mode of dispute settlement. Indeed, the development of the business world and the intensification of global trade have contributed to the emergence of several conflicts between international traders, these conflicts are amplified with different cultures, mentalities and especially international legislation (Mezghani, 1981). Therefore, it is legitimate to ask: To what extent the validity of the arbitration agreement stands does the legal regime of validity of the agreements in general. The arbitration was then the best remedy since it is the justice best suits the needs of traders (David, 1982). The private mode of dispute settlement offers them certain serenity, to the extent that it has significant advantages. Arbitration is in fact a flexible way, confidential, fast and reasonably expensive. This expansion of arbitration in economic life has given rise to a number of problems including the impossibility of establishing a clear and precise definition (Jarrosson, 1987). Indeed, the mere definition of arbitration as a

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private mode of dispute resolution will not answer to what it is today. Arbitration is not as simple and as fast as was thought to be. Each component has in fact attracted a number of issues and led to the solving of serious controversy between the authors, practitioners, legislators and judges. This is the problem concerning the arbitrability of the dispute, enforcement of foreign arbitral awards, or especially the validity of the arbitration agreement in our study. The legislature has defined the arbitration agreement within Article 2 CA as "the commitment of parties to settle by arbitration all, or certain disputes arising or which may arise between them concerning a particular legal relationship, contractual or not. The arbitration agreement takes the form of an arbitration clause or that of compromise". Article 3 of the code defines the arbitration clause as "the commitment of parties to a contract, to submit to arbitration, disputes that may arise from this contract." The compromise under the terms of article 4 of Code of Arbitration (CA), is "the commitment by which parties to a dispute already born, submit the dispute to an arbitral tribunal". In addition, the French parliament and after the reform it has adopted with regard to arbitration by the decree of January 13, 2011, defined the arbitration agreement within Article 1442 NCPC, which states: "The arbitration agreement takes the form of an arbitration agreement or compromise (De Boisseson, 1990). The arbitration clause is an agreement whereby the parties to a contract or contracts agree to submit to arbitration any dispute which may arise regarding this or these contracts. Compromise is an agreement by which parties to a dispute arising submit it to arbitration".

In fact, when we talk about validity, we refer to the set of formal requirements and background necessary for the formation of any legal act. The idea of submitting to arbitration has become a common practice now usual in most legal systems. In reality, this development experienced arbitration was strongly related to the validity of its contractual support what the arbitration agreement, because the latter is in fact the sole support of arbitration and the only manifestation the parties' willingness to use them to settle their disputes or potential, is in the absence of such agreement that arbitration will be more effective. First, the arbitrators' jurisdiction is inevitably based on the validity of the arbitration agreement. Moreover, even if made, the arbitral tribunal may make an award binding only on the basis of an agreement effective and void of defects that can mar the, if the sentence will be attackable. As a result, the validity of the arbitration system depends essentially that of the arbitration agreement, it is for this reason that the challenge to the effectiveness of the latter was the main reason that may advance a portion of bad faith to escape the performance of its obligations. As a methodology, we opt to examine the validity of the arbitration agreement. As a first condition, we examine the Writing as a condition of validity of the compromise. Then, in comparing Tunisian legislation with comparative one, we conclude, as a result, that Writing is a condition of validity of the arbitration clause and not only the compromise.

MATERIALS AND METHODS

The study of the legal regime of the arbitration agreement allows us to affirm that there are no specifics primarily as to its validity compared to other conventions. The arbitration agreement must therefore satisfy the conditions of validity common to any legal act. Moreover, the arbitration agreement is in essence a contract between two or more parties to submit disputes which have arisen or may arise from a main contract to a private justice that is arbitration. The arbitration agreement is the sole support of arbitration and the only manifestation of the will of the parties to resort to this method of private dispute resolution, this is why it must satisfy the conditions of validity common to any legal document so that it becomes fully enforceable and that its effectiveness is questioned. The arbitration agreement is not a convention like any other. The parties submit to the decision to advance to third, who tell how their contract was to be changed, how their disputes should be resolved. It is conceivable that such agreement is permitted and sanctioned by law, but it is natural to admit that it is required that both persons have expressed unequivocally their will to submit to arbitration and have clarified be sufficient and the terms of the arbitration to intervene. Recognition of the arbitrators' decision implies that it has an indisputable basis, It is for this reason that most legal systems require that the arbitration agreement must be in writing so that it is valid.

We prefer to discuss the fact that Writing is a condition of validity of the compromise. In this direction, It seems that in many national laws, the distinction between the arbitration clause, relating to possible disagreements, and compromises on questions already existing, is often necessary. The compromise is defined as "the act by which the parties affirm their desire to escape the ordinary courts the dispute that divides them, and by which they specify the conditions under which they intend to settle this dispute described therein by the arbitrator or arbitrators designated therein" (Jarrosson, 1992). In most legal systems, which do not rule the principle of freedom of form, the writing was required for the validity of the compromise. The legislature as well as other national rights has chosen this solution in terms of national arbitration. In contemplating the Tunisian Code of Arbitration, we observe that before its promulgation in 1993, the legislature has spoken of compromise within section 261 of the 1959 CPCC that "the compromise cannot be established in writing." This form requirement was still retained in the Code of Arbitration within Article 17 in Chapter 2 relating to national arbitration, under which "the arbitration agreement shall, on pain of nullity, indicate the in dispute, the names of referees, expressly or precise enough, for there remain no doubt as to their individuality"(Meziou and Mezghani, 1993). We notice that after having said in the CPCC that the compromise cannot be established in writing, the Tunisian legislature says in the Code of Arbitration that certain information must, under penalty of nullity, be included in the arbitration agreement, unlike the two formulas, it is not fortuitous. Now, the writing is required for the validity of the compromise. It should be noted that the Arabic text of Article 17 of the Code speaks of compromise, which is the Arabic version which reflects the legislative intent. In addition, as provided in Article 17 of the Code of Arbitration compromise must contain certain particulars without which there will be zero, the subject matter and the names of referees.

The requirement for designation of the subject matter is perfectly compatible with the nature of the compromise that is seen by assumption when the dispute arose. It would then be possible for parties in conflict to designate the nature of the dispute that has arisen, failure to indicate the object in the compromise will void it. The second statement required by Tunisian law on pain of nullity, is the appointment of arbitrators in the compromise. While Article 17 speaks of a CA designation of "referees" in the plural in referring to this conventional system which appoints an arbitrator for each party, then a third arbitrator in case of equality, there is no reason in fact that the parties agree on the name of one arbitrator, and that alone should figure in the compromise. This would not for that void. There should be no ambiguity on the fact that this is a nomination of an arbitrator, even if the value of compromise will be affected. In fact, It only exists if there is a dispute, and if the parties agree to settle for one or more arbitrators of their choice. In the absence of such references, the agreement reached in such cases could be an agreement for appraisal, transaction, or any other contract, but not a compromise. The legislature has sanctioned the absence of appointment of arbitrators by the nullity of the compromise. The same penalty may be applied also when the arbitrator or arbitrators designated, lack capacity. Indeed, it is inconceivable that a person whose capacity is void perform the duties of an arbitrator. However, there are parties who would have nominated such arbitrators to make a new compromise, if they intend to pursue the arbitration proceedings. It should finally be noted that when the arbitrator appointed may be dismissed by reason of its relationship with one party or the personal interest he has in dispute or the affairs of a party, the invalidity could be joined to his designation is relative, and may be covered by ratification. This statement can be drawn to the provisions of Article 20 CA which states that "the arbitral tribunal dissolves, after the death, incapacity, refusal, the withdrawal or revocation of the arbitrator or the one of the referees.

For the comparative, many legal systems have required the written form for the validity of the compromise. The definition of these terms is so obvious and of great interest. Indeed, the arbitration agreement is the only manifestation of the parties' agreement to settle their disputes, arisen or may arise following the execution of a prime contract, by arbitration. It is actually the centerpiece of the start of any arbitration, whether national or international. As a result, the arbitration agreement may take the form of an arbitration agreement or compromise. The arbitration clause is the contractual clause whereby the parties, by their signature and before any dispute, agree that disputes will arise eventually and that some of them are subject to arbitration. However, the compromise means an agreement necessarily written, by which parties to a dispute that has already emerged; agree to submit to one or more arbitrators of their choice. These would include the socialist countries where the writing is always necessary as valid when one party is a public company. This solution is applicable also to certain rights under which the compromise can be made in the form of a deed such as Spain, Portugal, Colombia, Mexico, Peru. Other countries simply a private act, it is the case of Latin America, Argentina, Chile to the equator, Panama. In Colombia, if compromise is not made by deed, it must be in writing signed by the parties and a qualified lawyer. A similar rule is in Texas, where compromise must be signed not only by the parties, but also by their legal advisers. Moroccan law has also dedicated this formal requirement for the validity of the compromise, and this, in section 307 of the former Code of Civil Procedure. It is the same for Lebanese lawmakers (Article 765 CPC Lebanese), and Algeria (Article 458 bis 1, al2, CPC) who have chosen this solution as well. French law also, and after the reform it has suffered by the decree of January, 2011, issued a regulation unitary form of compromise and arbitration, while having in the art 1443 CPC that the arbitration agreement is written to be valid. That was not his position under the former CPC which states in Article 1449 on the compromises that it must be in writing. This article may be understood as a rule of evidence, and not as a condition of validity. In turn, the Egyptian legislature has required the writing for the validity of the arbitration agreement within article 12 of Law No: 27 of 1994 on Arbitration in Civil and Commercial Matters. The article states: "on pain of invalidity of arbitration agreement must be written. It is renowned as if included in a writing signed by both parties, or in letters, telegrams or other means of written communication exchanged between them. "Of course, the term arbitration agreement used by the Egyptian legislature is a term generic encompasses both the arbitration agreement and compromise. In addition and as already seen in the Tunisian legal system, the writing must contain a minimum of references, without which, the compromise will be zero. It must specify clearly the opposition which will be submitted to the arbitrators, and certain rights law requires that such distinction is very accurate. In many rights, you must disclose the names of the arbitrators, or at least providing for their designation. Under Moroccan law, and according to the provisions of the article 309 of the former CPC, the parties must under penalty of nullity designate within their compromise in dispute and the names of referees. This accuracy has become a burden on arbitration, it is for this reason that the new text has carefully avoided repeating those particulars cumbersome while providing that the compromise must, on pain of nullity determine the subject matter, and appoint the arbitral tribunal or providing for the appointment. Many other points require the other to be specified in the compromise, as the place of arbitration, the period within which the arbitrators must make their decision, the powers given to arbitrators, certain rules of procedures. In contrast, several other legal systems are not favorable to the formalism of validity in terms of the compromise, and require the written merely as a means of proof. It cites as an example the case of Belgium, Italy, England etc. In these countries, plays a role written evidence. Formalism is excluded, it is not necessary therefore that a special act to be trained to observe the parties' agreement, the compromise may even result from a simple exchange of letters. In general, it is required as valid or as a means of proof, the writing requirement in terms of the compromise is perfectly logical, since one cannot imagine that everything could be settled without writing. This requirement is the same wide application in terms of the arbitration clause.

RESULTS

In our first result, after studying several juridical texts, it is concluded that writing is a condition of validity of the arbitration clause. In fact, arbitration clause is defined as a clause in a commercial or civil contract, or a document to which it refers; and in which the parties thereto state that all disputes will be resolved by arbitration born out of the execution or interpretation of this contract. We deduce that the arbitration clause may be inserted in a contract from the bottom, or in a document to which it refers, the latter type of clause is called arbitration clause by reference. In several legal systems, the written form was required for the validity of the arbitration clause in the prime contract and that of the arbitration clause by reference. As a first feature, we state the arbitration clause in a main contract: the interest of the arbitration clause appears at first glance like an opportunity to further arbitration. Similarly, there is no doubt that in trade

relations, the arbitration clause is an element of ease, sometimes security. However, we must recognize that the arbitration clause rises, regarding the parties' consent, much harder than the compromise. Indeed the person who signs a compromise knows in advance that he is about to be involved, this is not the case when it comes to an arbitration clause that may go unnoticed in the main contract that contains it. It is only when a dispute occurs that parties become interested in the arbitration clause. This situation is seriously serious that when a party who, to escape the arbitration proceedings, raises it did not really consent to arbitration. To cope with this kind of delaying tactics and leave no doubt of its existence, it has been arranged in several legal systems that the arbitration clause must, on pain of nullity, in writing in the main contract. Indeed, the French legislature, and under the influence of the French Civil Code, required in the 1443 Art on national arbitration, the arbitration clause must on pain of nullity be expressed in writing in the main convention. After the reform of 13 January, 2011, the requirement of written form for the validity of the arbitration clause still persists. This is what can be learned from the provisions of the article 1443 NCPC who speaks both of the arbitration agreement and compromise, and which states that the arbitration agreement shall, on pain of nullity, be made in writing. It is the same for the old Moroccan legislation on arbitration, which requires the handwritten mention of the arbitration clause whenever the proceedings related to commercial contracts. This solution is taken from former section 309 CPC Moroccan enacts that "under penalty of nullity, the arbitration clause must be written by hand and specially approved by the parties". In the new Article 317 CPC, Morocco had missed this requirement. Now, the arbitration clause is valid when it is stipulated in writing, in the main agreement or in a document to which it refers. It's the same for the Lebanese legislature, which requires him the other in writing to the validity of the arbitration clause (El Ahdab, 1996). This is what can be learned from the provisions of article 763 of Lebanese CPC, which states that "the arbitration clause which will be valid if it is stipulated in writing in the main contract". This is true also of Egyptian and Algerian legislators. Regarding the Tunisian legislature, we can say that he does not spend the formalism for the validity of the arbitration clause. This is what can be learned from the provisions of the article 6 which provides that the CA arbitration agreement can't be established in writing, either by deed or by act under private agreement or even by trial - oral hearing or report prepared with the arbitral tribunal selected. The article does not expect the absence of written incur the invalidity of the arbitration agreement, indicating that the written form is required only as a simple means of proof.

The legislature also embodies the concept of the clause be deemed made in writing in paragraph 2 of that article that "the arbitration agreement is deemed to be in writing, when contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of communications which attest the existence, or, in the exchange of statements of claim and a defense, in which the existence of an arbitration agreement is alleged by one party and not denied by another. "Moreover, the arbitration clause must contain certain information in order to be valid. It cites as examples the CPC sections 763 and 1443 Lebanese NCPC French that require the arbitration clause must include under penalty of nullity, the appointment of the arbitrator or arbitrators in their person or their quality, or determining how to identify them (Fouchard et al., 1996; Boy et al., 1999; Chedly, 2001; Mezger, 1948; Ouerfelli, 2010; Robert, 1967). It is noteworthy in this context that the requirement for designation of the subject matter and the name or names of arbitrators in the arbitration clause is illogical, since it is hard to see that the contracting parties know in advance the exact nature of the litigation that will occur and the names of arbitrators who will be designated in future. Such a reference is likely to increase the arbitration proceedings and therefore reduce and weaken the effectiveness of any institution of arbitration. For this reason, it would be preferable to reduce the rigidity of the formalism adopted in arbitration. The arbitration clause by reference is in fact a sort of mitigation of this formalism, but the writing is still required for its validity.

As a second observation, we mention t*he arbitration clause by reference as another implication in this direction.* In general, we speak of the arbitration clause by reference, when the parties do not formalize in detail the terms of their agreement and are content to refer to pre-existing documents. The arbitration clause by reference is not contained in the contract dispute, but inserted either in general or in another document to which the contract giving rise to the dispute is referred to. Many national laws have required the writing on the arbitration clause by reference, are cited as an example the French law of national arbitration, which provides in article 1443 NCPC that: "On pain of nullity, the arbitration agreement is written. It can result from an exchange of documents, or document to which reference is made in the master agreement".

This formal requirement existed before reform of 2011, in the same article which provides that "the arbitration clause must, on pain of nullity, be expressed in writing in the main agreement or in a document to which it refers. Similarly, the Moroccan legislature adopted this solution in section 313 paragraph 3 of the CPC (Code of Civil Procedures) provides that any reference to a document containing the arbitration clause is considered an arbitration agreement in writing if clearly states that the clause is part of the contract. This is true also of Lebanese legislator in article 763 CPC, under which "the

arbitration clause is valid only if it is stipulated in writing in the prime contract in a document to which it refers".

The legislature has also dedicated this solution within the CA article 6 which provides that: "the reference in a contract, a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is established writing, and that the reference is such as to make that clause part of the contract". As a result, the written form is required for the main contract in which the arbitration clause is included; it must be clear and plain. The requirement of a clear mention of the reference is strongly supported as it is in fact the only manifestation of the will of the parties to resort to arbitration to settle any disputes. Internationally, the question of the validity of the arbitration clause by reference was referred in Case BOMAR-OIL/ETAP which pitted a Tunisian company to a Dutch company ETAP. Among the difficulties that prompted this case was whether the writing requirement should apply to both the contract to which the arbitration clause refers to the reference itself?

Some authors admit a general reference only, others required the written reference (Nammour, 2005). The case BOMAR-OIL did likewise subject to common law, and was decided by the decision in favor of consensus. In conclusion, we must not fail to note that the notion of the arbitration clause by reference is a kind of attenuation of the rigidity of the formalism adopted in arbitration. Indeed the development of business and the speed of transactions assumed ease of access to arbitration has become the normal and ordinary for the settlement of disputes that may arise between traders, it is for this reason that it was sufficient to refer to a contract or pre-existing documents containing an arbitration clause to found the jurisdiction of the arbitral tribunal (Nathalie, 2004). Therefore, it would be preferable to revise this formalism adopted in national arbitration and merely require certain basic conditions are in fact the base and the "heart" of any arbitration agreement.

Conclusion

The arbitration agreement is the commitment of the parties to a contract to settle by arbitration disputes arising or which may be born after the execution or interpretation of this agreement. It can therefore take the form either of a compromise on questions already existing or in the form of an arbitration clause for disputes can be born in the future. With respect and a commitment between two or more parties, the arbitration agreement is a contract, which, legally, is in the general rules on the validity of the agreements, it must meet certain of these fact legal requirements to be fully enforceable and produce the effects desired by the parties to the agreement. It's for this reason that the arbitration agreement must meet certain formal and substantive for it to be valid. Indeed, some jurisdictions require that it should be void take the form of writing. The legislature has not adopted this solution did not require writing as a means of proof. In addition, the consent to arbitration must come from a person or entity can legally and in accordance with the law to compromise. Moreover, the arbitration agreement must concern matters authorized by law, and which do not affect public policy or international. Once these conditions are met, the arbitration agreement is valid and enforceable mainly.

ABBREVIATION

CPCC: Code of Civil and Commercial Procedures, **CA**: Code of Arbitration, **CPC:** Code of Civil Procedures

Conflict of Interests

The author has not declared any conflict of interests.

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