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### **I- Investment, Factories, Machinery Mortgage**

Owners of Factories may need to obtain loans or other banking facilities against the security of their factories and machinery. Until the enactment of the Investment Promotion law No. 16/95 (*the Law*), there were no specific and clear legal provisions in Jordan for the non-possessory mortgage of machinery and the registration thereof. Article 34 of the Law provides that it shall be permissible to register mortgages on equipment and machinery that are part of the fixed assets of any project, as security for extended credit facilities. For the purpose of implementing this Article, the Investment Promotion Corporation shall, pursuant to instructions to be issued by the Board of Directors of the Corporation, maintain an industrial register listing the said equipment and machinery. In the light of this article, the following remarks may be pointed out:

- 1- Contrary to the general rules governing the mortgage of movables (*e.g. Art. 1372/Civil Code & Art. 62/Commercial Code*), the Law permits the mortgage of equipment and machinery (as movable property) without requiring the transfer of their possession to the creditor or to a third party.
- 2- The Law is silent as to whether the mortgage should always be authenticated in the industrial register or not, nor did the Law state the effect of non-authentication. Most probably, the mortgage must be authenticated or, else, it will not be effective towards third parties.
- 3- The instructions referred to in article 34 above, have not been issued yet. Consequently, no mortgage transaction has been

registered at the Corporation. It is hoped that the Board of Directors of the Corporation will issue the required instructions as soon as possible to implement the Law on the one hand, and to overcome the existing practical difficulties relating to the mortgage of equipment and machinery of factories, on the other.

## **II- Banks, Central Bank, Interest**

The "Ottoman Murabahah Regulation" (the OMR), which is still in force in Jordan, provides that the annual interest rate shall not exceed 9%. On the other hand, article 43 of the Law of the Central Bank of Jordan No. 23/71, provides that the Central Bank (the CB) may issue instructions fixing the interest rate on banking loans and deposits. Pursuant to this article, the CB had frequently issued instructions fixing a rate of interest higher than that provided for in the OMR. Since 3/2/1990, the interest rate has been floated by the CB (Memo 11/90). Courts in Jordan severally held that the instructions issued by the CB pertaining to interest rate supercede the provisions of the OMR (*e.g.*, *Civil Cassation 683/94, BAJ 1995, P. 2477; 1362/94, BAJ 1995, P. 2543*). OMR contains another rule stating that the amount of interest shall not exceed the amount of the original debt even in cases of compound interest. This rule, as has been decided by the Court of Cassation, is applicable to loans given by banks regardless of any contradictory instructions of the CB (*e.g.*, *Civil Cassation 2273/97, BAJ 1998, P.1399*). This means that such instructions apply to interest rate (*20% for instance*) irrespective of the provisions of the OMR, while the OMR applies to the total amount of interest irrespective of the said instructions. The question which arises here is whether there is an upper limit to the interest rate that may be fixed by the CB pursuant to article 43 referred to above, *i.e.*, whether the CB can fix the rate of interest at, for instance, 110% per annum. The answer should be positive according to the

majority of case law, and negative according to the precedent No. 2273/97 referred to above.

### **III- Government Tenders, Delay in execution,** **Penalty clause**

Under the Jordanian Civil Code, contracting parties may stipulate, in their contract, the amount of damages in advance if a breach occurs (*Art. 364/1*). This contractual term is called "liquidated damage or penalty clause". However, the Civil Code provides that courts may, upon the request of either party, increase or decrease such damages to make it equal to the actual damage sustained by the injured party and any agreement to the contrary shall be void (*Art. 364/2; Civil Cassation 221/91, BAJ 1993, p. 186*). It should be noted that Jordanian law does not, as a general rule, differentiate between administrative and civil contracts where the rules of civil law, in its wide sense, apply to both. Therefore, the said rule in the Civil Code governing the penalty clause applies to the both types of contracts. The Court of Cassation confirmed this fact in a dispute concerning a sale contract to which the Ministry of Supply was the purchaser (*Civil Cassation 391/87,BAJ 1990,P. 234*).

However, in a recent judgment concerning a sale contract in which the Ministry of Supply was also the purchaser, the Court of Cassation held that the amount of damages set out, in advance, in an administrative contract could not be reduced upon the request of the supplier due to the nature of such contract, its relation to public interest and its effect on the proper running of public utilities (*Civil Cassation 825/96, BAJ 1998, p. 1428*). Accordingly, the power of courts to reduce the amount of damages set out in a penalty damage clause does not apply to administrative contracts. The question which may arise here is whether there is a new

judicial trend to make a distinction between civil and administrative contracts. This question is prompted by the fact that in countries acknowledging this distinction (such as France and Egypt), the distinction was initiated and developed by courts therein.

#### **IV- Construction, Foreign Companies**

Under the Construction Contractors Law No. 13/87 (*the Law*) a contract for the execution of construction works in Jordan by a non-Jordanian contractor is void unless it falls within the exceptions provided for in Article 16 of the said law. These exceptions include:

- 1- **Specialized projects.** These projects may be performed by a foreign company in participation with a Jordanian contractor. The Technical Committee formed pursuant to article 16 (b) of the Law is entitled to determine whether a given project is a specialized one as well as the conditions of participation and submits its recommendation to the Council of Ministers to take the appropriate resolution in this regard.
  
- 2- **Construction projects financed by foreign development loans.** These projects may be executed by a foreign company in participation with a Jordanian contractor, or by a foreign company alone if public interest so requires. In its decision No. 10/992 construing this provision, the Special Tribunal for Interpreting Laws (*Art. 123 of the Constitution*) has concluded that the authority entitled to determine what may fall within the term "public interest" is the Council of Ministers (*Official Gazette, 1992, p. 1444*).

A foreign company executing construction works in Jordan, whether solely or in participation with a Jordanian contractor, shall register at the

Jordanian Association of Contractors and shall pay the required fees (*Art. 18 of the Law*).

Since the above exceptions have not been interpreted by courts yet, the following observations may be pointed out:

1- A foreign company is not permitted to perform a specialized project solely, i.e., without the participation of a Jordanian partner, except where the project is financed by a foreign loan. This case, however, falls within the scope of the second exception which does not differentiate between specialized and non-specialized projects.

2- It is possible that the second exception applies to cases where the development loan is granted to companies or persons of private sector, *i.e.* this exception is not restricted to the loans given to the Government or any other public entity.

3- The wording of the second exception limits its scope to development loans. We believe that this exception should be applicable to development subsidies too. If a lender is enabled to stipulate in the loan agreement that a company of his own country should execute the project, this privilege, *a fortiori*, should be available to providers of development subsidies.

#### **V- Agents, Intermediaries, Arbitration, New York Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in New York on 10 June 1958. Jordan acceded to this convention in 1979, which was then published in the Official

Gazette in 1988 (P. 2195). Article 5/2 of the Convention clearly indicates that the court in the country before which recognition and enforcement of a foreign arbitral award is sought is empowered, on its own motion, to dismiss the case if it finds that such recognition and enforcement would be contrary to public policy in that country. By virtue of article 20 of the Commercial Agents and Intermediaries Act No. 44 of 1985 (*the Act*) the forum of the place at which an agent performs his activities shall have jurisdiction over any dispute arising out of an agency contract, regardless of any agreement to the contrary. In applying this article, it has been held that this rule is of public order and cannot be violated. The result is that the courts in Jordan would have exclusive jurisdiction over any dispute between a Jordanian agent and a foreign principal. This may lead to the understanding that judicial authorities prohibit arbitration in agency matters as far as international arbitration is concerned. If this is so, the result would be that an arbitration agreement may not operate and, accordingly, any foreign award may not be enforced in Jordan as per article 5.2 of NY Convention. The courts concluded that the purpose of public order in respect of commercial agencies was to protect Jordanian citizens and to affirm national sovereignty (*Civil Cassation 47/91, BAJ, 1993, P. 193; and 411/84, BAJ 1985, P. 152*). In our next issue, we will point out whether these rules apply to distribution and franchising contracts and to what extent, If any.

In any event, judicial precedents have no plain and definite answers to many questions relating to this matter including the following:

- 1- What would the solution be if the plaintiff (*say the Jordanian agent*) was the party who initiated the filing of the arbitration case abroad? If he won the case and wanted to execute the award in Jordan, would the courts enforce the award? Or, in the event his

case was dismissed, would he be able to file another court case in Jordan based on article 20 of the Act?

2- Suppose that there was no arbitration clause but, rather, an arbitration agreement subsequent to the dispute by which the (Jordanian) agent agreed to go to arbitration abroad, and that was actually done. Would the award be executed in Jordan?

3- What would the solution be if the parties had agreed to refer the dispute to arbitration in Jordan according to Jordanian laws? Would the award be subject, in general, to the (local) law No. 18/53? Or such an award would, nonetheless, be null and void in the sense that the dispute should be referred, again, to competent courts in Jordan?

4- Finally, an agent may be authorized, according to the agency contract, to cover not only Jordan but also other countries like Lebanon and Syria (*with the assumption that the laws of these countries allow such agreement, which is not the case, however*). Would a dispute arising from the said contract be subject solely to the jurisdiction of the Jordanian courts though the major part of the agent's activities were performed or to be performed, *e.g.*, in Lebanon? Would an award rendered in Lebanon in these circumstances be enforced in Jordan?

In the light of all these and others, the development and the remarkable increase of the arbitration cases on the international and local levels, we do hope that Jordanian courts will give article 20 of the Act flexible interpretation and in favor of arbitration whenever possible. It may be of particular importance to note here, however, that in a recent judgement, the Court of First Instance applied the arbitration clause in an

agency agreement between a Jordanian agent and a foreign principal. Accordingly, the court dismissed the agent's case by saying that the dispute should be referred, as per the agreement itself, to arbitration abroad under the ICC rules of Arbitration (*No. 1172/ Request /97, not published*). The case is still under review by the Court of Appeal and it is difficult to predict in advance the final outcome of that case.

## **VI- Jordan and Hamburg Rules, Carriage of Goods by Sea**

Upon the UN General Assembly Resolution of 15 December 1976, an international conference was convened in Hamburg, Germany (*6-31 March 1978*) to discuss and take the proper action in respect of the draft convention on the carriage of goods by sea, which was prepared by the UNCITRAL. On 31.3.1978, representatives of 78 States signed the UN Convention, which is also known as the Hamburg Rules (*Annex III to the Convention*). Article 31.1 of the Convention provides that it replaces the 1924 Brussels Convention on the Bills of Lading with relation to any State that becomes a party to the UN Convention when this Convention enters into force in respect of that State. Until 25.5.1998, twenty-five States have become parties to the UN Convention including four Arab States, namely Egypt, Lebanon, Morocco and Tunisia (*A/CN.9/449*). The Convention entered into force as of 1.11.1992 .

As to Jordan, it joined the Brussels Convention in 1931 as a consequence of joining it by the British Government but, in a later step, the Government of Jordan declared in 1948 its denunciation of that Convention (*the Official Gazette, 1931 and 1948, Pp. 313 and 341, respectively; cf., Civil Cassation 12/70, BAJ, 1971, P. 222*). Jordan, on the other hand, did not participate in the Hamburg Conference nor has it

joined the UN Convention yet. As was stated in our previous issue (*No. 1, year 1, August, 1998, P. 5*), it is of particular significance that Jordan shall carefully and seriously study the new Convention to decide, then, whether it is for the benefit of the country to be a party to it or not. On our part, we upheld this joining and would like to remind of our letter No. 418/A/H/93 dated 12.6.1993 addressed to the Prime Minister, the Ministers concerned and the Central Bank of Jordan.

### **VII- Euro-Jordanian Association Agreement, Settlement of Disputes, Arbitration**

Jordan and the European Communities have finally signed an agreement establishing an association between them, which is, generally, based on the Euro-Mediterranean Association Agreement. The aims of the Euro-Jordanian Association are to establish mutual cooperation between the two Parties in political, economical, social, scientific and technological fields. This includes the establishment of conditions for the progressive liberalization of trade in goods, services and capital, and the encouragement of regional cooperation with view to the consolidation of peaceful co-existence in the Middle East. For achieving these goals, the Parties have agreed to encourage operations having a regional impact including trade, environmental issues, development of economic infrastructures, scientific and technological research, cultural issues and customs matters (*Art. 62*). In the Joint Declaration on this article, the Parties reaffirm their commitment to the Middle East peace process and their belief that peace should be consolidated through regional cooperation. Also, the European Community is prepared to support joint development projects submitted by Jordan and other regional parties, subject to relevant Community technical and budgetary procedures.

As to the settlement of disputes, articles 89 and 90 of the Agreement provide for the establishment of an Association Council consisting of the members of the Council of the European Union and members of the Commission of the European Communities, on the one hand, and members of the Government of Jordan, on the other. Each of the Parties may refer to the Council any dispute relating to the application or interpretation of the Agreement and the decisions taken by the Council shall be binding on them. Each Party shall take the necessary measures to implement such decisions (*Arts. 97 and 91*). In the event it is not possible to settle the dispute in accordance with this procedure, it shall be referred to an arbitral tribunal of three members. Each Party shall appoint an arbitrator and the Council shall appoint the third arbitrator. The tribunal's decisions shall be taken by unanimous or majority vote, and each Party must take the steps required to implement the arbitral award (*Art. 97*).

In this respect, one may point out several remarks including the following:

- 1- The Agreement is a bilateral treaty (regardless of its name) and, thus, is subject to international law (*see also the Joint Declaration relating to Art. 101 of the Agreement*).
- 2- Nevertheless, the Agreement is not simply a mere treaty between two parties that was made without taking into regard the surrounding circumstances in the Middle East region. It is broader than that as its scope extends to include the peace process, security and regional cooperation in the Middle East. This is confirmed in many different places in the Agreement including its introduction and, for instance, articles 1, 3, 4, 62 and 75, and the Joint Declaration on article 62.

3- The Agreement does not provide for the procedures to be followed by the arbitrators regarding the disputes referred to them. Therefore, it is suggested that the general principles of international law apply in these circumstances (*see, e.g., the Annex to Vienna Convention of 1969 on the Law of Treaties*). Based on these principles, one may conclude that the arbitral tribunal is empowered to establish its own procedures for conducting the arbitration process. This is not, however, the case in respect of some other bilateral agreements to which Jordan is a party, such as the Jordan American Agreement of 1997 relating to the mutual encouragement and protection of investments which provides for the application of the UNCITRAL Rules of 1976.

4- Last but not least, the Agreement, while it provides for the majority vote for rendering the award, contains no provision regarding the matter where such majority cannot be reached, i.e., the case where each of the three arbitrators has an opinion different from the others. The question that may arise here is: What would the result be then? While national laws vary from each other in answering this question, it is extremely difficult to conclude that the answer can be inferred from the general principles of international law (*cf., Art. 25 of the ICC Rules and Art. 26.3 Of LCIA Rules*).

### **VIII- ICC Arbitration Rules**

In our previous issue (*No. 1, year 1, August 1998*), we mentioned that the ICC had adopted new arbitration rules effective as of 1.1.1998 (the NR) which replace the old rules of 1975 as amended in 1988 (the OR). We also pointed out therein some differences between these two sets of rules. In this issue, we would like to add that the OR had expressly limited the

function of the Court of Arbitration to providing for settlement of business disputes of an international character. The NR clearly add to this jurisdiction disputes of national character if the arbitration agreement so provides (*Art. 1/1 of the OR; cf., Appendix II of those Rules; Art. 1/1 of the NR*).

As to the additional (new) claims intended to be submitted after the establishment of the Terms of Reference (TR), article 16 of the OR allows such claims provided that they remain within the limits fixed by the TR. The NR contain a different provision whereby either party may submit new claims even if they are outside the limits of the TR if that party has been authorized to do so by the arbitral tribunal. The tribunal shall consider, before giving its decision on the matter, the nature of such new claims, the stage of arbitration and other relevant circumstances (*Art. 19*). Furthermore, the NR bind the arbitral tribunal, after it has declared the proceedings closed, to inform the Secretariat about the approximate date by which the draft award will be submitted to the Court for its approval. Any postponement of that date shall be communicated to the Secretariat by the tribunal (*Art. 22.2*). This provision has no counterpart in the OR.