The Moroccan Supreme Court on the Authenticity of an Apostillised Certificate of Conversion to Islam

I. Introduction

As mentioned in a previous post, Morocco is not only the MENA Arab jurisdiction that has ratified the largest number of the HCCH Conventions (7 in total), but also a country where the HCCH conventions have been actively applied (see here on the application of the HCCH 1980 Child Abduction Convention, and here for a case involving the application of the HCCH 1996 Child Protection Convention). The application of the HCCH Conventions in Morocco offers valuable insights into how these HCCH instruments operate within an Islamic context, challenging the widely held assumption of the existence of an Islamic exceptionalism (though such exceptionalism does exist, but to a varying degree across the Muslim-majority countries. See e.g. Béligh Elbalti, "The Recognition and Enforcement of Foreign Filiation Judgments in Arab Countries" *in Nadjma Yassari et al. (ed.), Filiation and the Protection of Parentless Children (T.M.C. Asser Press, 2019), 373-402*).

In the case reported here, the authenticity certificate of conversion to Islam issued in Spain and to which an Apostille was attached was the crucial issue that the Supreme Court had to address. It must be admitted however from the outset that the case did not directly involve the interpretation and the application of the HCCH 1961 Apostille Convention – officially known as Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Nonetheless, the case does raise some interesting issues regarding the admissibility of apostillised documents (i.e. document for which an Apostille has been issued). The case also brings to light a significant concern regarding interfaith successions from a private international law perspective in the MENA Arab region, particularly in Morocco. However, while the latter issue is particularly important, for the sake of brevity, the focus here will be placed d on the implication of the Apostille Convention in this case.

II. Facts

The case involves a dispute over inheritance of A (apparently a Moroccan national). After A's death, his heirs (collectively here referred to as "Y") issued a certificate of inheritance that excluded his wife, a Spanish national (here referred to as "X") from A's inheritance. X contested this in the Family Court, claiming her legal rights as A's widow. She argued that Y had unfairly excluded here on the grounds that she was not Muslim, despite having converted to Islam by declaring her faith in the presence of an imam in a mosque in Spain before A's death, and that she was handed over a certificate confirming her conversion. However, due to the emotional toll of A's sudden death she forgot to bring the certificate with her at the time of A's death, and to rectify this, she obtained an official notary document confirming her conversion. In support of her request to be included in the list of A's heirs, X submitted various legal documents as evidence, including the certificate of her conversion to Islam she obtained in Spain with an Apostille attached to it.

Y, however, requested to dismiss the claim arguing, *inter alia*, that X was still Christian at the time of A's death, that the conversion declaration that she made after A's death had no effect and could not make from a legal heir, therefore, she was not entitled to inheritance since there can be no inheritance between a Muslim and a non-Muslim. Y also argued that her certificate of conversion obtained in Spain was void and had no legal validity even if an Apostille is attached to it.

The Family Court, as the first instance court, ruled in X's favor and recognized her right to inherit. The decision was later appealed on the grounds, among others, X's conversion to Islam was fabricated as she was seen performing Christian rituals at the funeral. Y also filed a separate challenge to the authenticity of her foreign certificate of conversion to Islam on the grounds that the certificate was forged. The Court of Appeal, however, dismissed the appeal and upheld the Family Court's ruling in X's favor.

Dissatisfied, Y filed an appeal to the Supreme Court.

Before the Supreme Court Y argued, *inter alia*, that the Spanish conversion certificate was a mere piece of paper without any official administrative references with a signature attributed to a Mosque in Spain. Nonetheless, the

court accepted this certificate without verifying its authenticity or the context in which it was issued, such as by consulting relevant records or conducting a judicial investigation with Spanish authorities under the judicial cooperation agreement between Morocco and Spain, and also failed to verify whether the widow was even in Spain on the date the certificate was issued.

III. The Ruling

In its ruling *No. 167 of 5 April 2022*, the Moroccan Supreme Court admitted the appeal and overturned the appealed decision with remand stating as following:

"[…] according to the last paragraph of Article 40 of the convention signed between Morocco and Spain on judicial cooperation in civil, commercial, and administrative matters of 30 May 1997, if there is a serious doubt regarding the authenticity of a document issued by the judicial authorities or other authorities of either country, this should be verified through the central authority of both countries.

[Although] the court of the appealed decision ordered an investigation as part of activating the procedure for alleged forgery against the certificate of conversion to Islam [……] issued by the head of the Islamic Center in Spain, and registered under number (…..) in the registry of Islamic associations at the Ministry of Justice there, [it] failed to observe the procedures stipulated in Article 89 of the Code of Civil Procedure, particularly, by hearing the testimony of the person who issued the certificate and examining its authenticity, regularity, the accuracy of the information it contained and its date; and that by way of a rogatory mission to the competent Spanish authorities in accordance with Article 12 of abovementioned Convention [of 1997], in order to base its decision on verified facts.

As a result, the court's decision lacked a legal basis and was deficient in its reasoning [……], and therefore, it must be overturned."

IV. Comments

1. About the HCCH 1961 Apostille Convention

The HCCH 1961 Apostille Convention is undoubtedly one of the most successful HCCH conventions, with its 127 contracting parties (as of the date of the writing). The Convention's status table shows that more than 15 countries are Muslim-majority jurisdictions or have legal systems influenced by or based on Islamic law. Among them are five Arab jurisdictions from the MENA region: Saudi Arabia, Tunisia, Morocco, Bahrain and Oman. Marocco ratified the Convention on 27 September 2015, and it entered into force on 14 August 2016.

As is widely known, the Convention aims at simplifying the process of authenticating public documents for use abroad. The Apostille Convention eliminates the need for a complex and time-consuming legalization process by introducing a standardized certificate called an Apostille. As such, the Apostille, issued by a designated authority in the State of origin, is a simplified certificate that confirms the authenticity of the document's origin by certifying the signature on the document is genuine, thus allowing it to be recognized in another Contracting States, the State of destination. (For details, see the HCCH Permanent Bureau, *Practical Handbook on the Operation of the Apostille Convention* (2nd ed. 2023) pp. 25-34 hereafter the "Apostille Handbook")

Several key principles that underpin the Apostille Convention. These include the following: First, the Convention applies mainly to "public documents" (the Apostille Handbook, p. 51, para. 102). Second, the Convention is based on the premise that the Apostille only verifies the authenticity of a public document's *origin* (and not the *content*) by certifying the signature, the signer's capacity, and, where applicable, the seal or stamp (see the Apostille Handbook, p. 31, para. 22-23).

The case commented here provides valuable insights concerning these two points. The first issue is whether a certificate of conversion to Islam, issued by a mosque or an Islamic center in Spain, qualifies as a "public document" under the Convention. Even if it does qualify, the second issue concerns the probative value of an apostillised document, particularly when the authenticity of the document itself is contested for forgery or fabrication.

As the ruling of the Supreme Court above indicates, the Court did not address the first question, arguably assuming the validity of the Apostille without further examination. However, a closer review of the first principle mentioned above suggests that this issue may not be as straightforward as the Court seemed to

have presumed. This can be supported by the fact that the Court focused more on the allegation of forgery of the apostillised certificate, implying that the validity of the Apostille itself was not in question.

2. Certificate of Conversion to Islam as a "public document"

Can a certificate of conversion to Islam issued in Spain be qualified as a "public document" under the Apostille Convention? Answering this question first requires an understanding of what constitutes a "public document" under the Convention.

a) What is a public document under the Convention?

Although the Convention enumerates in a non-exhaustive list the documents deemed to be "public documents" (art.1(2)), and mainly relies on the national law of the State of origin (i.e. where the document was executed) to determine whether the document qualities as "public document" (the Apostille Handbook, p. 52, para. 105), it provides for a useful criterion to determine whether a document is a "public document". According to the Apostille Handbook, "the term "public document" extends to all documents other than those issued by persons in their private capacity. Therefore, any document executed by an authority or person in an official capacity (*i.e.* acting in the capacity of an officer authorized to execute the document) is a public document" (p. 51-52, para. 103). Documents that do not meet this criterion are generally not considered "public documents" under the Convention (the Apostille Handbook, p. 64, para. 182).

There are, however, exceptions. A document may still be apostollised if it is notarized or officially certified (art. 1(2)(c) and (d). See the Apostille Handbook, p. 54, paras. 116-122. On the example of educational documents, including diplomas, see p. 59, paras. 150-153). In addition, "[t]he law of the State of origin may consider religious documents, as well as documents executed by official religious courts, to be of public nature and therefore a public document under the Convention" (See the Apostille Handbook, p. 65, para. 185).

b) The Public nature of Certificates of Conversion to Islam

In certain countries, certificates of conversion to Islam are clearly recognized as public documents. For example, in many Muslim-majority jurisdictions such

certificates are issued by public organs or institutions affiliated with the state, such as the Ministry of Religious Affairs, or the Ministry of Justice (e.g., in the UAE) or by authorized persons (such as the Adouls in Morocco). In such cases, the conversion certificate possesses the requisite "public" nature under the Apostille Convention.

However, in many non-Muslim countries, no specific public administrative authority is responsible for overseeing religious conversions or issuing certificates to that effect. Instead, individuals wishing to convert to Islam typically approach a local mosque or Islamic center. There, the person publicly professes their declaration of faith in front of an imam and witnesses. While a certificate is often provided for various purposes (e.g., marriage or pilgrimage), these documents lack the "public" character necessary for apostillasation under the Apostille Convention.

In the case commented here, the summary of facts indicates that the Spanish widow had embraced Islam before an imam at a mosque. The Supreme Court's ruling, however, refers to her conversion in front of the head of an Islamic Center in Spain registered with the Spanish Ministry of Justice (although it is possible that the mosque was part of the Islamic center, and the head of the Islamic center serves also served as the imam). In any event, it doubtful that either the Imam or the head of the Islamic center acted "in the capacity of an officer" to issue the conversion-to-Islam certificate. Indeed, even when registered as non-profit or religious organization or association, mosques and Islamic centers generally do not possess the authority to issue "public documents" within the meaning of the Apostille Convention. This applies to other types of certificates these centers or mosques may issue such as marriage or divorce certificates. Such certificates are generally not recognized by the states unless duly registered with civil authorities. Where registration is not possible, these documents primarily serve religious purposes within the community.

There is also no indication in the Supreme Court's decision that the certificate in question falls under the exceptions outlined above (see IV(2)(a)). Therefore, it remains unclear on which grounds the certificate of conversion was apostillised, as "[t]he Convention does not authorize the issuance of an Apostille for a document that is not a public document under the law of the State of origin [Spain *in casu*], even if the document is a public document in the State of destination [Morocco *in casu*]" (the Apostille Handbook, p. 52, para. 107).

3. Contestation for forgery of an apostillised document

It is worth recalling here that the case reported here concerned the invalidation of a certificate of inheritance that excluded a Spanish widow, who claimed to have converted to Islam, from her deceased husband's estate. To support her claim, the widow submitted, among other documents, an apostillised certificate of conversion to Islam issued in Spain. Before the Supreme Court, the appellants argued that the certificate of conversion had no legal value because it was forged and lacked sufficient elements to establish its authenticity. The Supreme Court admitted the appeal on the grounds that the authenticity of the certificate had to be examine pursuant to the relevant provisions of the 1997 Moroccan-Spanish Convention on Legal Assistance in Civil, Commercial and Administrative Matters.

The position of the court should be approved on this particular point. the Apostille Handbook makes it clear that the Apostille has no effect on the admissibility or probative value of a foreign public document (the Apostille Handbook, p. 32, para. 25). Indeed, since the Apostille does not relate to or certify the content of the underlying public document, issues concerning the authenticity of the foreign public document and the extent to which it may be used to establish the existence of a fact are left to be dealt with under the law of the State of destination. In this case, the applicable provisions are found the Moroccan code of civil procedure and the Hispano-Moroccan bilateral convention on judicial assistance, as indicated in the Court's decision.