

| RESEARCH ARTICLE

Legal Force of the Terms of Reference under the 2026 ICC Arbitration Rules

Eman Abdel-Majid Ali Al-Azzam¹✉ and Mohammed Ibrahim Abu El Hajja²

¹ The World Islamic Sciences and Education University (WISE), Amman, Jordan

² The World Islamic Sciences and Education University (WISE), Amman, Jordan

Corresponding Author: Iman - Al-Azzam, **E-mail:** eman_alazzam223@yahoo.com

| ABSTRACT

This study examines how the removal of the mandatory requirement to prepare Terms of Reference under the 2026 ICC Arbitration Rules affects the legal force of their provisions when Terms of Reference are nevertheless drawn up, in light of the Jordanian Arbitration Law No. 31 of 2001, as amended, and the case law of the Jordanian Court of Cassation. It adopts an analytical doctrinal methodology that compares the institutional regulation of Terms of Reference under the 2021 and 2026 ICC Arbitration Rules and analyses the legal basis governing their effects under Jordanian law and judicial practice. The study finds that removing the requirement to prepare the document did not, in itself, affect the legal force that its provisions may possess. Rather, it separated the requirement to prepare the document from the legal source giving rise to the effect of each provision. Provisions embodying a valid agreement between the parties derive their binding force from the parties' mutual consent, whereas provisions determined by the arbitral tribunal within the scope of its procedural authority derive their effect from the source conferring that authority. By contrast, statements recording claims, defences, issues, and positions retain an organisational or evidentiary function unless they evidence consent capable of giving rise to an independent legal effect. The Jordanian Arbitration Law likewise indicates that the legal force of Terms of Reference does not arise from the document's designation or signature as such, but from the source and legal nature of each element. This approach is supported by the case law of the Jordanian Court of Cassation, which distinguishes between the existence of a procedural agreement, the mere recording of a matter in the Terms of Reference, and the jurisdictional limits defined by the arbitration agreement. The study concludes that the source and legal nature of each provision constitute the most accurate basis for determining the legal force of Terms of Reference following the shift under the 2026 ICC Arbitration Rules from mandatory preparation of the document to its use as an optional procedural instrument.

| KEYWORDS

Terms of Reference; International Chamber of Commerce (ICC); legal force; international commercial arbitration; Jordanian Arbitration Law; Jordanian Court of Cassation.

| ARTICLE INFORMATION

ACCEPTED: 10 August 2026

PUBLISHED: 26 September 2026

DOI: 10.32996/ijlps.2026.8.8.2

Research Problem

The 2026 ICC Arbitration Rules no longer require the Terms of Reference to be drawn up. Where the document is nevertheless drawn up, the removal of that requirement raises the question whether the legal force of its provisions is affected by the change or remains determined by the legal source and nature of each provision. This requires a distinction between provisions based on the parties' agreement, provisions made within the procedural authority of the arbitral tribunal, and statements that serve only organisational or evidentiary purposes.

Research Question

Does the removal of the requirement to draw up the Terms of Reference under the 2026 ICC Arbitration Rules affect the legal force of their provisions when the document is nevertheless drawn up, and how is the legal effect of each provision determined under Jordanian Arbitration Law and the jurisprudence of the Jordanian Court of Cassation?

Research Gap

The 2026 ICC Arbitration Rules removed the requirement to draw up the Terms of Reference without specifying the legal consequences for provisions contained in a document that is nevertheless drawn up. They do not address whether those consequences differ according to whether a provision is based on the parties' agreement, falls within the procedural authority of

the arbitral tribunal, or merely records matters for organisational or evidentiary purposes. The legal force of each provision must therefore be determined by its legal source and nature, rather than by the former requirement to draw up the document.

Scholarly Contribution

By separating the legal force of each provision from the former requirement to draw up the Terms of Reference, the study develops a legal criterion based on the source and legal nature of that provision. It then examines that criterion under Jordanian Arbitration Law and the jurisprudence of the Jordanian Court of Cassation.

1. Introduction

Under the 2026 ICC Arbitration Rules, drawing up Terms of Reference is no longer required. Under earlier editions of the Rules, the Terms of Reference formed a required procedural component of ICC-administered arbitration. The arbitral tribunal may still draw up Terms of Reference when it considers them useful for case management. The removal of the requirement changes the procedural status of the document within ICC institutional arbitration but does not, by itself, determine the legal effect of the provisions it may contain.

Where Terms of Reference are drawn up, their provisions cannot automatically be given the same legal character. Some may record agreements between the parties, while others may reflect procedural decisions taken by the arbitral tribunal within its authority. Other statements may simply identify claims, issues in dispute, positions, or information relevant to the proceedings. The legal effect of each element must therefore be considered by reference to its legal nature and source, rather than merely to its inclusion in the Terms of Reference.

Jordanian Arbitration Law does not independently require Terms of Reference to be drawn up. Article (24) permits the parties to agree on the arbitral procedure and to refer, for that purpose, to the rules of an arbitration institution. It also requires the arbitral tribunal to determine the procedure and timetable with due regard to any agreement reached by the parties. This allocation of procedural authority is relevant to identifying the legal basis of provisions contained in the Terms of Reference and to distinguishing provisions based on party agreement from those adopted within the procedural authority of the arbitral tribunal and from statements serving only organisational or evidentiary purposes.

The removal of the requirement to draw up Terms of Reference under the 2026 ICC Arbitration Rules raises the question whether that change affects the legal force of provisions contained in Terms of Reference drawn up despite the removal of that requirement, or whether the legal effect of each provision continues to depend on its own legal source and nature. The analysis is conducted under Jordanian Arbitration Law and the jurisprudence of the Jordanian Court of Cassation.

2. Literature Review

Under earlier editions of the ICC Rules, drawing up the Terms of Reference was required, and the principal studies examined how the document operated within ICC-administered arbitration. Goldsmith (1987) addressed its drafting and the practical and legal considerations associated with its contents. Schneider (1997) examined its functions, its connection with the arbitral tribunal's mandate, the formulation of issues, new claims, and the consequences of refusal to sign. Lazareff and Schäfer (1999), followed by Lazareff (2006), considered the operation of the Terms of Reference under successive editions of the ICC Rules. Fry et al. (2012) provided a detailed account of their preparation, content, and procedural use. These works explain the principal functions of the document and its place in ICC-administered proceedings, but they do not separate the requirement to draw it up from the legal source governing the effect of each provision contained in it. (Goldsmith, 1987; Schneider, 1997; Lazareff & Schäfer, 1999; Lazareff, 2006; Fry et al, 2012)

Before the adoption of the 2026 ICC Arbitration Rules, several studies had already examined whether the Terms of Reference should remain compulsory. Sanders (2005) proposed replacing the provision requiring the document with one governing preparatory meetings, with greater emphasis on the early organisation of the proceedings. Smit (2005), in considering the mandatory character of provisions in the ICC Rules, examined whether compulsory Terms of Reference remained justified. Carlevaris (2019) addressed the legal nature and effects of the document and reconsidered the continuing justification for requiring it, particularly in view of the reduced practical importance of some of its earlier functions and the possibility that its preparation could cause delay or procedural disagreement. Paoletti (2019) examined the level of detail appropriate for claims and issues recorded in the Terms of Reference and their relationship with case management. The pre-2026 literature focused mainly on the necessity, functions, and procedural utility of the document, rather than on a distinct legal criterion for determining the force of each provision it contains. (Sanders, 2005; Smit, 2005; Carlevaris, 2019; Paoletti, 2019)

The 2026 ICC Arbitration Rules no longer require Terms of Reference to be drawn up. ICC confirms that the arbitral tribunal may still draw them up when it considers them useful for case management and links the amendment to procedural efficiency and flexibility. Affaki (2026) treats procedural management, rather than reliance on formal procedural documents, as a central feature of the revised framework. Hauser-Morel and Nedden (2026) address the practical consequences of the new Rules for counsel,

particularly the earlier organisation of claims and procedural strategy. None of these sources separately addresses the legal basis governing the effect of individual provisions contained in Terms of Reference drawn up after the requirement was removed. (ICC, 2026; Affaki, 2026; Hauser-Morel & Nedden, 2026)

In Jordanian legal scholarship, Almomani (2017) examines the arbitral tribunal's role in determining the law and procedural rules applicable to arbitration and is relevant to the relationship between party autonomy and the tribunal's procedural authority. Because the study predates the 2018 amendment to Article (24) of the Jordanian Arbitration Law, it cannot be relied upon to interpret the amended provision itself. Abu Shuaisha (2022) examines case management in arbitration and litigation and is relevant to the distribution of procedural powers within arbitral proceedings. Al-Tarawneh et al. (2026) provide a recent examination of international institutional arbitration and the procedural rules governing institutionally administered proceedings. These works are relevant to the Jordanian legal framework governing party autonomy and the procedural authority of the arbitral tribunal, but they do not address the specific effect of the 2026 ICC Arbitration Rules on provisions contained in Terms of Reference drawn up after the requirement to prepare the document was removed. (Almomani, 2017; Abu Shuaisha, 2022; Al-Tarawneh et al., 2026)

The literature reviewed does not provide a separate analysis of the legal effect of removing the requirement to draw up the Terms of Reference under the 2026 ICC Arbitration Rules. Earlier studies focused mainly on the document's functions, content, role in managing arbitral proceedings, and whether mandatory preparation should be retained, without establishing a distinct criterion for determining the legal force of each provision after that requirement was removed. The reviewed literature also does not examine this distinction together with Jordanian Arbitration Law and the jurisprudence of the Jordanian Court of Cassation. The remaining issue is whether the legal effect of the contents of the Terms of Reference depends on the procedural character of the document or is determined separately according to the legal source and nature of each provision.

3. Methodology

A doctrinal and analytical examination of the 2021 and 2026 ICC Arbitration Rules and Jordanian Arbitration Law is used to assess the legal consequences of removing the requirement to draw up the Terms of Reference and to identify the legal basis governing the effect of each provision they contain. A limited comparative analysis between the 2021 and 2026 ICC Arbitration Rules identifies the changes made to the regulation of the Terms of Reference. The jurisprudence of the Jordanian Court of Cassation is examined to assess the role of party agreement, the procedural authority of the arbitral tribunal, and the limits of arbitral jurisdiction in determining the legal effect of matters recorded in the Terms of Reference. The analysis relies on official legal texts, judicial decisions, and specialised legal scholarship directly related to the subject.

4. Results and Analysis

4.1 The Removal of the Requirement to Draw Up Terms of Reference under the 2026 ICC Arbitration Rules

Under the 2021 ICC Arbitration Rules, Article 23 required the arbitral tribunal, upon receipt of the file from the Secretariat, to draw up the Terms of Reference. The Terms of Reference were required to be signed by the parties and the arbitral tribunal and transmitted to the ICC International Court of Arbitration. If a party refused to participate in drawing them up or to sign them, the Terms of Reference were submitted to the Court for approval.¹ The obligation to draw up the document was imposed by the ICC Rules. Article 23 governed that procedural requirement but did not prescribe a uniform legal effect for every provision recorded in the Terms of Reference. The requirement to draw up the document is therefore distinct from the legal basis governing the effect of each provision it contains.

Article 23 was expressly excluded from arbitrations conducted under the Expedited Procedure Rules. Article 3(1) of Appendix VI provided that Article 23 did not apply to such proceedings.² An arbitration administered by the ICC could therefore proceed without Terms of Reference where the Expedited Procedure Rules applied. The obligation to draw up the document depended on the procedural regime governing the arbitration and was not a requirement applicable to all ICC-administered proceedings.

The 2026 ICC Arbitration Rules removed the requirement to draw up the Terms of Reference. ICC confirms that the Terms of Reference are no longer a necessary procedural step, while the arbitral tribunal retains discretion to draw them up where

¹ International Chamber of Commerce (ICC), *ICC Arbitration Rules*, in force as from 1 January 2021, Art. 23(1)–(3), “Terms of Reference”. Article 23(1) required the arbitral tribunal, upon receipt of the file from the Secretariat, to draw up the Terms of Reference; Art. 23(2) governed their signature and transmission to the Court; and Art. 23(3) governed refusal by a party to participate in drawing up or signing the Terms of Reference and their approval by the Court.

² International Chamber of Commerce (ICC), *ICC Arbitration Rules*, in force as from 1 January 2021, Appendix VI, Art. 3(1), “Proceedings”, which provides that Article 23 does not apply to arbitration conducted under the Expedited Procedure Rules.

appropriate for case management.³ Under the revised Rules, the arbitral tribunal must hold the initial Case Management Conference within 30 days after receiving the file from the Secretariat, and must establish the procedural timetable during that conference or as soon as possible thereafter. Article 25 further provides that no party may introduce new claims after the initial Case Management Conference without the authorisation of the arbitral tribunal.⁴ The revised framework places greater emphasis on the initial Case Management Conference and the procedural timetable in organising the proceedings, while preserving the tribunal's ability to draw up Terms of Reference where appropriate. The 2026 Rules apply to arbitrations commenced on or after 1 June 2026 unless the parties have agreed to submit to the Rules in effect on an earlier date.⁵

The removal of the requirement to draw up the Terms of Reference alters the procedural status of the document within ICC-administered arbitration but does not, by itself, determine the legal effect of provisions contained in Terms of Reference drawn up after that requirement was removed. The obligation to draw up the document and the legal basis governing the effect of each provision are separate questions. A provision may reflect an agreement between the parties, fall within the procedural authority of the arbitral tribunal, or merely record a claim, issue, position, or other matter relevant to the proceedings. The 2026 Rules remove the institutional obligation to draw up the document but do not assign the same legal effect to every matter recorded in it. The legal force of each provision must be assessed according to its source and legal nature.

Sources of the Legal Force of Terms of Reference

The Terms of Reference do not carry a uniform legal force merely because their provisions are contained in a single document. Those provisions may perform different functions, including defining the arbitral tribunal's mandate, regulating aspects of the proceedings, and recording claims, positions, or other matters arising during the proceedings. Their legal effect may differ according to the nature of each provision and the legal basis for that effect. The Terms of Reference thus have a composite legal nature, predominantly procedural in character. (Schneider, 1997)

Where a provision reflects an agreement between the parties, its binding force is based on that agreement rather than on its inclusion in the Terms of Reference. Signature of the document does not make every statement it contains an agreement between the parties. A claim, defence, or reservation may remain attributable to one party even though it is recorded in the document. Binding force based on party agreement therefore extends only to matters on which the parties' agreement has been established. (Fry, Greenberg, & Mazza, 2012)

Provisions adopted within the procedural authority of the arbitral tribunal do not depend on a separate agreement between the parties for their legal effect. Their effect is based on the authority conferred on the tribunal by the applicable law or rules to organise the proceedings and determine procedural matters, subject to any binding agreement between the parties. The tribunal's procedural authority must be kept separate from the powers exercised by the arbitral institution and from matters that can be determined only by party agreement. The legal effect of each procedural provision depends on the source and scope of the authority under which it was adopted. (Reiner, 1996)

Statements that merely identify claims, issues, factual matters, or positions taken in the proceedings do not by themselves create new obligations. Their legal effect differs from that of provisions reflecting party agreement or defining the scope of the arbitral tribunal's mandate. Recording these different elements in the same Terms of Reference does not give them the same legal effect or make every statement an agreement between the parties. Organisational or evidentiary statements are therefore distinct from provisions that define claims, issues in dispute, or the tribunal's mandate. (Goldsmith, 1987)

The arbitration agreement remains the primary consensual basis of the arbitral tribunal's jurisdiction and defines the scope of matters submitted to arbitration. The Terms of Reference cannot expand that scope merely by recording a new claim or identifying an additional issue. They may, however, evidence a subsequent express arbitration agreement where the parties

³ International Chamber of Commerce (ICC), "Unveiling the 2026 ICC Arbitration Rules, Part 2: Moving Beyond Mandatory Terms of Reference," 15 May 2026. ICC confirms that Terms of Reference are no longer a necessary procedural step under the 2026 Rules and that arbitral tribunals retain discretion to draw them up where appropriate for case management.

⁴ International Chamber of Commerce (ICC), *ICC Arbitration Rules*, in force as from 1 June 2026, Art. 24(1)–(2), "Case Management Conference; Procedural Timetable"; Art. 25, "New Claims". Article 24(1) requires the arbitral tribunal to hold the initial Case Management Conference within 30 days after receiving the file from the Secretariat; Art. 24(2) requires the procedural timetable to be established during that conference or as soon as possible thereafter; and Art. 25 provides that no party may make new claims after the initial Case Management Conference without the authorisation of the arbitral tribunal.

⁵ International Chamber of Commerce (ICC), *ICC Arbitration Rules*, in force as from 1 June 2026, Art. 1(2), "Scope of Application", providing that the Rules apply to arbitrations commenced on or after 1 June 2026 unless the parties have agreed to submit to the Rules in effect on an earlier date.

clearly agree to broaden the matters submitted to arbitration and that agreement satisfies the requirements for a valid arbitration agreement. Any resulting expansion of the tribunal's jurisdiction is based on the parties' subsequent consent, not on the fact that the agreement appears in the Terms of Reference. The legal effect of each provision must therefore be determined according to its source and legal nature, including where the provision concerns the scope of the tribunal's jurisdiction. (Carlevaris, 2020)

The Basis of the Legal Force of the Terms of Reference under Jordanian Arbitration Law

Jordanian Arbitration Law No. (31) of 2001, as amended, does not require the Terms of Reference to be drawn up as a separate procedural requirement. Article (24/A) recognises the parties' autonomy to agree on the arbitral procedure, including the order in which pleadings, evidence, and arguments are presented and the means by which evidence is submitted. It also permits the parties, for that purpose, to refer to the rules applied by any arbitration institution within or outside the Kingdom. The obligation to draw up the Terms of Reference therefore does not arise merely from the designation of the document. Where the parties have agreed that the document is to be drawn up, or have referred to institutional rules requiring its preparation, that obligation is based on the parties' agreement or the applicable institutional rules.⁶

Article (24/B) reflects a distinction between matters governed by party agreement and matters falling within the procedural authority of the arbitral tribunal. In matters within the scope of party autonomy, the tribunal must have due regard to any agreement reached by the parties when determining the procedure and timetable within the authority conferred on it by law. A procedural determination does not become an agreement between the parties merely because it is recorded in, or connected with, the Terms of Reference. Nor may the tribunal attribute to the parties an agreement that they did not make. The legal effect of each provision must therefore be assessed according to its source and the scope of the authority on which it is based.⁷

The participation of both the parties and the arbitral tribunal in drawing up the Terms of Reference does not give every provision in the document the same legal character. The tribunal may not alter the parties' claims or reservations, or modify a valid procedural agreement within the scope of party autonomy. It may, however, make procedural decisions within its authority and identify the issues to be decided, provided that it does not alter the parties' legal positions. Provisions based on party agreement remain governed by that agreement, whereas procedural provisions operate only within the limits of the tribunal's authority. (Abu Shaisha, 2022)

Jordanian law does not confer a single legal force on the Terms of Reference as a whole. The legal effect of each provision depends on its source and legal nature. A provision may reflect a valid agreement between the parties, set out a procedural decision made within the tribunal's authority, or merely record an existing claim, defence, reservation, or position in the arbitral proceedings. Neither inclusion in the same document nor signature of that document gives these provisions the same legal effect. (Al-Tarawneh, Qoul, & Al-Tarawneh, 2026)

Limits on the Legal Force of the Terms of Reference in the Case Law of the Jordanian Court of Cassation

In Decision No. 8353/2025, the Jordanian Court of Cassation examined the Terms of Reference to determine whether the parties had agreed on a particular law or specific rules of law governing the merits of the dispute and found that no such agreement had been established.⁸ The decision distinguishes between recording a matter in the Terms of Reference and establishing party agreement on that matter. Mere inclusion in the document does not, by itself, make a statement binding. A provision can have binding effect on the basis of party agreement only where that agreement is established.

In Decision No. 6090/2025, the Jordanian Court of Cassation gave effect to a procedural agreement recorded in the Terms of Reference governing the conduct of the proceedings. The Court did not regard the admission of additional evidence as a ground for setting aside the award because the arbitral tribunal had acted in accordance with the agreed procedure without infringing

⁶ Hashemite Kingdom of Jordan, Arbitration Law No. (31) of 2001, as amended, Article (24/A), as substituted by Article (14) of Law No. (16) of 2018 Amending the Arbitration Law, published in the Official Gazette, No. (5513), dated 2 May 2018, p. 2317, which provides: "The parties to the arbitration may agree on the procedures to be followed by the arbitral tribunal, including the order in which the parties shall submit their pleadings, evidence and arguments, as well as the means by which such evidence is to be presented. For this purpose, the parties may also refer to the rules followed for that purpose by any arbitration institution within or outside the Kingdom."

⁷ See: Jordanian Arbitration Law No. (31) of 2001, as amended, Article (24/B), as substituted by Article (14) of Law No. (16) of 2018 Amending the Arbitration Law, which provides: "The arbitral tribunal shall issue a procedural order determining the arbitration procedures to be followed, including the timetable for the arbitration and the matters referred to in the preceding paragraph, while having due regard to any agreement reached by the parties in this respect."

⁸ Jordanian Court of Cassation (Civil), Decision No. 8353/2025.

the principle of equality between the parties or the right of defence.⁹ A provision in the Terms of Reference may have binding effect where it reflects a valid procedural agreement on a matter that the parties are entitled to regulate. That binding effect is based on the agreement itself, not on the provision's inclusion in the document.

In Decision No. 3970/2025, the Jordanian Court of Cassation found that counsel for both parties had authorised the sole arbitrator, without reservation, to draw up the Terms of Reference and the procedural rules, which were subsequently signed.¹⁰ The Court rejected the later challenge to their validity and considered those provisions when assessing whether the procedure followed in relation to expert evidence complied with the parties' agreement. The Court treated the provisions as governing the arbitral procedure because the parties had authorised their preparation without reservation and had subsequently signed them. Their legal effect followed from that authorisation and signature, while their function within the proceedings remained procedural.

In Decision No. 9676/2024, the Jordanian Court of Cassation did not regard a provision permitting the submission of a counterclaim as sufficient to establish jurisdiction over claims falling outside the dispute defined by the Memorandum of Understanding and the submission agreement.¹¹ The decision distinguishes between the procedural question of how a claim may be submitted and the jurisdictional question of whether that claim falls within the parties' agreement to arbitrate. Neither recording a claim in the Terms of Reference nor permitting its submission as a procedural matter can, by itself, extend the arbitral tribunal's jurisdiction beyond the scope of the arbitration agreement. Any jurisdictional effect must arise from the parties' agreement to arbitrate, not from the procedural permission itself.

5. Conclusion

The removal of the requirement to draw up the Terms of Reference under the 2026 ICC Arbitration Rules alters the procedural status of the document within ICC-administered arbitration, but does not by itself determine the legal effect of provisions contained in Terms of Reference that are nevertheless drawn up. The former obligation to draw up the document and the legal force of its contents are separate questions. The 2026 Rules remove the institutional requirement to draw up the document without establishing that provisions recorded in it either lose or acquire legal force merely because of that change.

The legal effect of a provision contained in the Terms of Reference depends on its source and legal nature. A provision recording a valid agreement between the parties has binding effect because of that agreement. A procedural provision adopted by the arbitral tribunal operates only within the powers conferred on it by the applicable law and rules. Statements that merely record claims, defences, reservations, issues, or positions do not become binding agreements simply because they appear in the Terms of Reference or because the document has been signed. The Terms of Reference are therefore of a composite legal nature, predominantly procedural in character.

Jordanian Arbitration Law accords with this distinction. Article (24) recognises the parties' autonomy to agree on the arbitral procedure and permits reference to institutional rules, while also regulating the procedural authority of the arbitral tribunal to determine the procedure and timetable with due regard to the parties' agreement. The jurisprudence of the Jordanian Court of Cassation establishes that recording a matter in the Terms of Reference is not sufficient, by itself, to establish party agreement, while a valid procedural agreement recorded in the document may be given binding effect. Provisions based on party agreement and provisions operating within the tribunal's procedural authority may therefore coexist in the same document without sharing the same legal source.

The arbitration agreement remains the legal basis and limit of the arbitral tribunal's jurisdiction. Terms of Reference cannot extend that jurisdiction merely by recording a claim, identifying an issue, or regulating the manner in which a claim is submitted. Where the Terms of Reference evidence a subsequent valid agreement to broaden the matters submitted to arbitration, any resulting jurisdictional effect is based on the parties' subsequent consent, not on the document itself. The legal force of the Terms of Reference must therefore be determined separately for each provision according to its legal source and nature, rather than by attributing a uniform legal force to the document as a whole.

Funding: This research received no external funding.

Conflicts of Interest: The authors declare no conflict of interest.

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⁹ Jordanian Court of Cassation (Civil), Decision No. 6090/2025.

¹⁰ Jordanian Court of Cassation (Civil), Decision No. 3970/2025.

¹¹ Jordanian Court of Cassation (Civil), Decision No. 9676/2024.

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